

**THE NOVA SCOTIA FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY ACT**

A **REQUEST FOR REVIEW** of a decision of the **DEPARTMENT OF NATURAL RESOURCES** respecting coal exploration in Cape Breton.

REVIEW OFFICER: Darce Fardy

REPORT DATE: August 18, 2005

ISSUE: Whether the information sought is subject to the *FOIPOP* Act.

In a Request for Review dated January 4, 2005, under the **Freedom of Information and Protection of Privacy Act**, the Applicant asked for a Review of “the failure [of the Department of Natural Resources (DNR)]to give access to the proposals.”

The Applicant wanted copies of proposals received by DNR for exclusive rights to explore, develop and reclaim coal from four properties in Cape Breton. He was told that the information he was looking for did not fall under the *FOIPOP* Act. The Department explained that Section 150 of the *Mineral Resources Act (MRA)* places such proposals beyond the reach of the *FOIPOP* Act.

DNR cited **Section 4A(1)** and **4A(2)(k)** of the *FOIPOP* Act and **Section 150(1)** of the *MRA*.

S.4A(1) of *FOIPOP* reads:

Where there is a conflict between a provision of this Act and a provision of any other enactment and the provision of the other enactment restricts and prohibits access by any person to a record, the provision of this Act prevails over the provision of the other enactment unless subsection(2) or the other enactment states that the enactment prevails over the provision of this Act.

Section 4A(2)(k) reads:

The following enactments that restrict or prohibit access by any person to a record prevail over this Act:

(k) subsection (2) of Section 87 and Sections 150 and 175 of the *Mineral Resources Act*.

Section 150 of the MRA reads:

Subject to this Section, information or documentation provided for the purpose of this Act or any regulation made pursuant to this Act, whether or not such information or documentation is required to be provided pursuant to this Act or any regulation made thereunder, is privileged and shall not knowingly be disclosed without the consent in writing of the person who provided it except for the purposes of the administration or enforcement of this Act for the purposes of legal proceedings relating to such administration or enforcement.

In its letter of decision to the Applicant, DNR added that “if the FOIPOP Act does apply to the records, access has been refused under Section 21 of the Act.” Section 21 is a mandatory exemption for information which, if disclosed, would reasonably be expected to harm the commercial interests of third parties.

Section 21 of FOIPOP reads:

(1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

- (ii) commercial, financial, labour relations, scientific or technical information of a third party;
- (b) that is supplied, implicitly or explicitly, in confidence; and
- (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
 - (iii) result in undue financial loss or gain to any person or organization, or
 - (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour-relations dispute.

Background:

On June 15 of this year, DNR announced that the province had completed its review of three applications for surface coal exploration and mining in the Sydney coalfield, and its review of three proposals to develop the Donkin subsea coal resource.

There is considerable opposition in Cape Breton communities to any further development of strip mines on the island. Angry exchanges have dominated some public meetings.

The opposition grew after DNR issued a “call for proposals” in December 2003, inviting proposals from “interested proponents for the exploration, development and reclamation of selected coal resources with the Sydney coalfield that may be extracted by surface mining techniques.” The opposition was evident at a public meeting reported on May 27 of this year.

The DNR’s submission:

DNR said it cited s.21 of *FOIPOP* even though “it firmly believes that the reports in question are protected from disclosure under s.150 of the MRA.” It continued:

Any release of information deemed to be confidential under the MRA will be a precedent setting decision. The result of any such decision will, in our judgement, significantly compromise the future willingness of clients to submit confidential information under the MRA. This *FOIPOP* related decision would also compromise the ability of the Province to continue to provide confidentiality provisions normally found in mineral rights administration legislation throughout Canada.

Recognizing that the consent of the companies is necessary before their proposals can be disclosed, the DNR explained why the applicant and not DNR should seek that consent:

We believe that DNR officials asking consent, could be perceived as asking favours of the companies - it is inappropriate and may create a conflict of interest within the administration of the MRA.

DNR explained that this tendering process is different from other public tenders because it is not asking for a good or service, but is providing “a fair process to administer mineral rights.” It concluded that “(c)onfidentialty is essential to ensure fair business practices for companies.”

Conclusions:

No other conclusion can be drawn but that the proposals in question are protected by Section 150 of the MRA. The reasons given by DNR for insisting that the Applicant should ask for the consent of the third party are unclear and appear to be contrary to the expectations of **Section 22** of FOIPOP. Since DNR cited s.21 (in case the MRA did not apply) it was obliged by s.22 to notify the third party:

22(1) On receiving a request for access to a record that the head of a public body has reason to believe contains information the disclosure of which must be refused pursuant to Section 20 or 21, the head of a public body **shall**, where practicable, promptly give the third party a notice.

Subsection 22(1)(c) obliges a public body to invite the third party to consent to disclosure or explain why the information should not be disclosed.

This Section was subsequently amended by the legislature by adding s.1A, which reads:

(1A) Notwithstanding subsection (1), that subsection does not apply if

- (a) the head of the public body decides, after examining the request, any relevant records and the views or interests of the third party respecting disclosure requested, to refuse to disclose a record;
or
- (b) where the regulations so provide, it is not practical to give notice pursuant to that subsection.

With respect, I don't think the intention of this amendment is clear to the reader. I believe it is meant to apply specifically to s.20 (protection of personal privacy), not to s.21, to provide public bodies with an avenue that would allow them to decide against notifying a third party of an application when the applicant may be seen as a threat to the third party. Such circumstances, involving requests for the personal information of others, have arisen in the past and I have always supported the public body's decision not to notify. To use the phrase in s.22(1)(a), I determined that notification was not "practicable."

The amendment expects a public body to consider "the views or interests of the third party respecting disclosure requested." I find it difficult to understand how those views and interests could be determined without revealing to a third party the existence of an application.

In my view, s.22 (1A) should not apply in this case.

To conclude I would like to comment on the view expressed in the DNR's submission that "confidentiality is essential to good business practice." A view, quite to the contrary, is now prevalent, as legislatures across the country, in their own FOIPOP laws, have recognized that "openness and accountability" are essential to "good business practice" in government.

Recommendations:

- That DNR confirm to the Applicant, in writing, with a copy to the Review Officer, its decision to claim Section 150 of the MRA.

- that DNR reexamine its policy of leaving it to an applicant to notify a third party.

Dated at Halifax, Nova Scotia this 18th of August, 2005.

Darce Fardy, Review Officer