

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

A **REQUEST FOR REVIEW** for information respecting a complaint against a vehicle body shop said to be operating illegally.

REVIEW OFFICER: Darce Fardy

REPORT DATE: April 21, 2005

ISSUE: Whether disclosing names of individuals attached to records related to the activities of the body shop would constitute an unreasonable invasion of personal privacy and be exempt from disclosure under Section 20 of the FOIPOP Act.

In a Request for Review, pursuant to the Nova Scotia **Freedom of Information and Protection of Privacy Act (FOIPOP)**, received March 3, 2005, the Applicant asked that I recommend to the **Department of the Environment and Labour** (the Department) that it reverse the decision it made to refuse to disclose the names of individuals.

The Applicant acting on behalf of a client, claimed that his client has been injured as a result of chemical exposure released by an illegal body shop in her neighbourhood. He asked the Department for copies of all records as they pertain to these activities.

The Department partially granted the Application. It provided copies of its Field Inspection Report; an exchange of e-mails between the Medical Officer of Health for the Central

Health Region and the Department; a letter from the Department's Environment Inspector to the owner of the property against which the complaint was made; and hand-written inspection notes. Except for the names of the Medical Health Officer and Department's inspector, the Department omitted the names of all other individuals mentioned in these records. The Department cited **Section 20** of the *FOIPOP* Act which requires a public body to refuse to disclose personal information if disclosure would constitute an unreasonable invasion of privacy.

The Department Submission to the Review:

The Department argued that "while the Act is not meant to impede legal processes, the severances made under s.20 are applied to protect individual privacy rights." It stated "[g]iven Court processes and judicial rules of disclosure . . . FOIPOP is not the appropriate process for the applicant (a lawyer) to use for compelling full disclosure of this information."

The Department also pointed out that neither the Department nor the Province is a party to this civil suit and therefore government accountability is not a factor to consider when responding to the application.

The Department continued:

"[W]hile the FOIPOP act allows for consideration of the release of personal information in extenuating circumstances, s.20 is a mandatory exemption and the applicant has other, more appropriate processes available to him to access the information requested."

The Department did not indicate, in either its decision or its submission, how it interpreted the clauses of s.20. It did so later on the invitation of the Review Officer.

The Department noted that it did not notify the third parties whose names appear in the records to give them an opportunity to agree or object to the disclosure of their names. It said

it had a reasonable belief that consent would not have been given and the decision it made in response to this application would have been the same.

The Department said it agreed with the view of the federal Minister of Finance, in an argument before the Supreme Court of Canada, in reference to the personal information of public employees, that waiver of the protection provided to an individual must be balanced against threats to the individual's privacy. [*Dagg v. Minister of finance and Privacy Commissioner of Canada and Public Alliance of Canada* (File # 24786)]

The Applicant's oral submission:

The Applicant said his client's health is deteriorating and the names of witnesses are needed to decide whether to call them in the civil suit. He said the disclosure of witnesses' names is necessary to prosecute a violation of the law, which is covered by Section 20(3)(b).

Conclusions:

In my view, given the small number of individuals named in the records, the Department should have asked them if they had any objections to the disclosure of their names.

The guidelines for public bodies to use when determining whether the disclosure of personal information would constitute an unreasonable invasion of an individual's personal privacy are found in Subsections 20(2), 20(3) and 20(4). The relevant parts to consider are: subsections 20(2)(b), (c), (e) and (f); (3)(b); and (4)(b) and (e).

Subsection (4) describes the circumstances that should apply to allow a public body to conclude that disclosure would not be an unreasonable invasion of an individual's personal privacy. Subsection (3) lists circumstances that, if they applied, would enable a public body to conclude that disclosure would be an unreasonable invasion of an individual's personal privacy; and ss.(2) provides other factors to consider if a public body concludes ss.(3) applies.

The relevant circumstances in ss. (4) are:

- (b) there are compelling circumstances affecting anyone's health or safety;
- (e) the information is about the third party's position, functions or remunerations as an officer or member of a public body or as a member of a minister's staff.

The circumstance to consider in ss(3) is found in part (b):

- (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent the disclosure is necessary to prosecute the violation or to continue the investigation.

And in ss(2), the relevant parts are:

- (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;
- (c) the personal information is relevant to a fair determination of the applicant's rights;
- (e) the third party will be exposed unfairly to financial or other harm;
- (f) the personal information has been supplied in confidence.

The Supreme Court of Nova Scotia has laid down a four-step process for public bodies to follow when considering s.20 as an exemption. [*Cyril House*, S.H. 160555 April 20,

2000 (unreported)]. A public body should first be satisfied that the information in question is “personal information” as defined in **Section 3(i)**. Then if so, it should determine if disclosure of the personal information is deemed not to be an unreasonable invasion of privacy under the conditions set out in ss.20(4). If this subsection applies there is no need to consider the remainder of s.20. If it doesn’t apply then public bodies should consider, pursuant to ss.20(3), if disclosure would be an unreasonable invasion of privacy. If a public body concludes it is an unreasonable invasion of privacy then it must balance all of the relevant circumstances, including those in ss.20(2).

I am satisfied that none of the circumstances found in ss.(4) apply to those individuals who are not public officials. In my view, ss.(3) (b) does apply to them and there is nothing in ss.(2) that leads me to conclude that their names should be disclosed.

However, in line with a conclusion of the Supreme Court of Canada, I believe that ss. (4)(e) applies to the public servants named in the records. In *Dagg v. Minister of finance and Privacy Commissioner of Canada and Public Alliance of Canada* (File # 24786) the Supreme Court accepted the argument that the names of public servants is information relating to their position and functions as public servants and should be disclosed.

The Ontario Information and Privacy Commissioner has also concluded that the names of individuals when used in their professional capacity as public servants do not enjoy privacy protection. [Order 139]

Recommendations:

That the Department disclose the names of public servants found in the records.

Section 40 of the Act requires the Department of Environment and Labour to make a decision on these recommendations within 30 days of receiving them and to notify the Applicant and the Review Officer, in writing, of that decision.

If a written decision is not received within 30 days, the Department of Environment and Labour is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 20th day of April, 2005.

Darce Fardy, Review Officer