

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

A **REQUEST FOR REVIEW** of a decision of **NOVA SCOTIA ENVIRONMENT AND LABOUR** to deny access to some records related to an offshore natural gas gathering and transportation system in Nova Scotia.

REVIEW OFFICER: Darce Fardy

REPORT DATE: August 16, 2005

ISSUE: Whether Sections 14 (advice to a public body) and Section 12 (harm to intergovernmental relations) support a decision to deny records.

In a Request for Review, received May 16, 2005, under the **Freedom of Information and Protection of Privacy Act (FOIPOP)**, the Applicant asked that I recommend to Nova Scotia Environment and Labour (DEL) that it reverse its decision not to disclose three records related to her application.

The Applicant speaks for members of an environmental group. She asked for:

access to all documents, plans, reports, maps etc. related to certain lands in Shelbourne County. The lands in question comprise both Crown-owned and private properties designated by El Paso Canada Pipeline Company as locations for the Blue Atlantic Transmission System Project, and include water, soil and geotechnical sampling sites.

DEL provided her with some 36 records, most of them in their entirety. Parts of some records were severed of what DEL believed to be information exempt under *FOIPOP*. Three records were denied in whole. Those disclosed in part were severed only of the names of the individuals who either sent or received letters related to the matter.

The exemptions cited by the Department were:

- **12**: harm to inter-government relations;
- **14(1)**: advice to a public body;
- **20**: protection of personal privacy.

DEL offered no explanation of how disclosure would do the harm alleged.

DEL's submission:

DEL's representative in discussions on the project said one of the records denied was a draft report to be held in confidence by all participants as long as the project was not yet finalized.

The Applicant's submission:

Much of the Applicant's submission questions the adequacy of the search for records and refers to one record which she knows exists but which has not been identified by DEL in its response to the Applicant. The Record referred to is a draft project description for the Blue Atlantic Transmission System.

Conclusions:

There are three records at issue: The draft Project Description prepared by the El Paso Corporation, an internal DEL e-mail to the Deputy Minister, and the deputy's response. The e-mails

are denied because, in DEL's view, they contain advice and are therefore exempt under s.14. The draft Project Description is denied under s.14 and as well as s.12. The s.12 exemption allows a public body to deny access to a record if disclosing it "could reasonably be expected to harm the conduct of the Government of Nova Scotia of relations between the Government" and any other government or agency of government.

DEL recognized that El Paso Corporation was a "third party" under *FOIPOP* but chose not to inform the Corporation of the application because it had decided not to disclose the draft anyway and was not citing Section 21 as an exemption. (S.21 is a mandatory exemption which obliges a public body to refuse to disclose information that contains commercial, financial, technical information and other information of a third party if the information were provided to the public body by the third party in confidence and if disclosure would cause harm to the third party.)

Section 14:

The "advice" exemption has been addressed by the courts, as well as by provincial information commissioners. The Alberta Commissioner defined "advice" as an "opinion," "view" or "judgement" (Order 97-007). The Ontario Commissioner accepted "thoughts" or "views" if they led to a course of action (Order M-457).

The Nova Scotia Court of Appeal said "advice" should be given its "ordinary meaning" [*McLaughlin v. Halifax-Dartmouth Bridge Commission* (1993) 125 N.S.R. (2d) 288]. The Federal Court wants public bodies "to choose the interpretation that least infringes on the public right of access." [*Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, 1997 F.C.J. No. 1812].

With respect to the two e-mails, I am satisfied they contain advice, but they also contain factual information which can be severed and disclosed under **Section 5(2)** of *FOIPOP*.

I cannot accept the view of DEL that the draft Project Description can be described as “advice.” The draft is what it says it is: a description of a project.

Section 12:

Although DEL states that the disclosure of the draft could harm the conduct of its relations with the federal government, it did not contact the federal government for its views and offered no evidence of the harm it alleged. The Nova Scotia Court of Appeal [in *Chesal v. Attorney General of Nova Scotia* (2003) NSCA 124] expects more than a “mere possibility” of harm, to warrant refusal to disclose a record. There must be “a reasonable expectation of harm.”

Although DEL did not notify El Paso Corporation of the notification, I called the Corporation’s local office to ask what concerns it might have about making the Project Description public. I was told there were none and that the applicant would be sent a copy of it on receipt of a written request.

Consequently, without any evidence of harm to relations between the Province and the Federal Government, and because El Paso has no objection, it is my view the draft should not be refused.

It would have been helpful to the Applicant if DEL, in its response to the application, had identified the records being denied. In an earlier Review - FI-05-28 - I reminded this same Department of the admonition of the Supreme Court of Nova Scotia [in *McCormack v. Nova Scotia*

(1993) N.S.J. 625 para. 4] to “detail for the applicant the reasons why the particular exemption is operative... mere recital of the words of the relevant section is not enough.” Identifying the records being denied helps an applicant in deciding whether to ask for a Review of the decision.

Recommendations:

that DEL disclose to the Applicant:

- a copy of the draft Project Description dated June 2002; (document R54)and
- a severed copy of the two e-mails. (See attached to DEL’s copy of this Review.)

Section 40 of the Act requires DEL 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, DEL is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 16th of August, 2005

Darce Fardy, Review Officer