

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

A **REQUEST FOR REVIEW** of a decision of the **DEPARTMENT OF TOURISM, CULTURE AND HERITAGE** to deny some records related to an application

REVIEW OFFICER: Darce Fardy

REPORT DATE: November 15, 2005

ISSUE: Whether Section 21 supports the decision of the Department to deny access to certain records.

In a Request for Review, under the **Freedom of Information and Protection of Privacy Act (FOIPOP)**, received August 9, 2005, the Applicant asked that I recommend to the **Department of Tourism, Culture and Heritage** (the Department) that it disclose all of the records she asked for.

The Applicant wants copies of records related to a \$15,000.00 grant to the Chedabucto Bay Folk Society, specifically copies of:

- the application for funding made by the Society;
- supporting documents that accompanied the application, including the Memorandum of Association, Certificate of Incorporation and By-Laws;
- a list of board members;
- a list of staff persons;

- signed financial statements for the most recently completed fiscal year, including a statement of actual revenues and expense along with a comparison of financial performance with the budget for the year;
- a budget for the upcoming year;
- the society's current business plan; and
- the completed questions from the application form.

Before making a decision on the application the Department, in accordance with **Section 22** of *FOIPOP*, notified a third party to ask for its reaction to the application.

After hearing objections from the third party the Department informed the Applicant that it would release copies of the application form, the Memorandum of Association, the Certificate of Incorporation, the Society's By-Laws, the names of the Board of Directors and staff, the Society's budget, the Society's organizational structure and any news releases on file.

The Department told the Applicant that it was refusing to disclose both the summary and detailed copies of the Society's Strategic Development Plan, the Society's Operating Budget and the Profit and Loss Statement. The Department said it was withholding those records under the exemption found in **Section 21(1)** of *FOIPOP* which requires a public body to refuse to disclose information about a third party if disclosure met the conditions laid down in that section.

Confidential information

21 (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.
- (2)** The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.
- (3)** The head of a public body shall disclose to an applicant a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an enactment.
- (4)** Subsections (1) and (2) do not apply if the third party consents to the disclosure. 1993, c. 5, s. 21.

The Department used subsections 21(1)(a)(ii), 21(1)(b) and 21(1)(c)(i) and (iii).

The Applicant was told that the Society submits financial statements to the Registry of Joint Stock Companies each year. The Department directed the Applicant to the Registry to obtain a copy of the Society's financial statement for the year ended September 30, 2003. The Department indicated that there will be a \$10 fee for the statement.

The Department's submission:

The Department wrote that disclosing the profit and loss statement and operating budget for the current year “has the potential to cause undue financial loss to the Stan Rogers Folk Festival” and, therefore ss.21(1)(c)(iii) applies. The submission continued that the detailed business strategies of the Society are not intended for public release and that the financial and profit and loss statements are intended to enable the Department staff to make good decisions for funding. The Department said that information was provided by the Society in confidence.

The third party's submission:

The third party said disclosure of the records would provide “to an unknown party,” commercial, financial and labour relations information “as well as proprietary intellectual property.” He added that the “festivals and events industry is a competitive one and disclosure of a detailed business strategy could be detrimental.”

The Applicant's submission:

The Applicant believes all of the requested information should be disclosed because it was used to decide how much taxpayers' money the society should receive. With respect to “competitive harm” the Applicant points out that the Stan Rogers Folk Festival is the only large scale festival in the Guysborough area and the only one dedicated to the memory of Stan Rogers. The Applicant concludes that because one of the purposes of the festival is “to bring economic prosperity to the area” the Society and the Department have a responsibility to the taxpayers to disclose all information requested.

The Applicant feels that, due to costs and distance, she should not be required to obtain the financial statements from the Registry of Joint Stock Companies.

Conclusions:

The third party's concern about the identity of the "unknown person" who asked for the information is not relevant. The names of applicants and third parties are not to be disclosed.

Although the Department directed the Applicant to the Registry of Joint Stock Companies, it made no reference to **Section 7(4)(a)** which reads:

. . . this Act does not apply to published material or material that is available for purchase by the public.

This puts the published material beyond my purview for comment.

Section 7(4)(b) also excludes records to be published or made public within thirty days after the application is received.

However, the information provided to the Registry is not the information sought by the Applicant who wants to see financial figures for "the most recently completed fiscal year". The Registry contains financial information for the fiscal year ending September 30, 2003.

For the exemption cited by the Department to stand all three parts of s.21(1) [(a), (b) and (c)] must apply and the burden of proof is on the Department (s.45).

In my view, there is no question that subsection 21(1)(a) applies because the records contain commercial and financial information.

I can find no evidence that the records were provided in confidence but I am satisfied there was an implicit understanding that the records were not meant to go public. I accept that ss.21(1)(b) applies.

When considering subsection (c) it is important to note the words used by the Nova Scotia Court of Appeal: “the legislators, in requiring a reasonable expectation of harm, must have intended that there be more than a possibility of harm to warrant refusal to disclose a record” (*Unama’ki Board of Police Commissioners, Chapel Island Band Council, Eskasoni Band Council, Membertou Band Council and Waycobah Band Council v. John Chesal* (2003) NSCA 124 Para. 38).

I have not seen convincing evidence of harm to a third party’s interests by the disclosure of the “Profits and Loss” statement and Operating Budget. However, in my view, a company’s strategy would certainly be of interest to a competitor or others and disclosure of it could reasonably be expected to result in undue financial loss to the Society and gain to competitors. I agree with the Department’s decision to deny access to the Strategic Development Plan and the Summary and Work Plan.

Recommendations:

That the Department disclose the “Profit and Loss” statement for “October 2003 through September, 2004” and the “Operating Budget 2005/2006/2007.”

Section 40 of the Act requires the Department of Tourism, Culture and Heritage 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 Tourism, Culture and Heritage is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 15th day of November 2005.

Darce Fardy, Review Officer