**REPORT** **FI-05-56**

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

A **REQUEST FOR REVIEW** of a decision of the **OFFICE OF ECONOMIC DEVELOPMENT** to sever records related to a contract with a consulting company.

**REVIEW OFFICER:** Darce Fardy

**REPORT DATE:** December 1, 2005

**ISSUE:** Whether **Sections 14, 17, 20** and **21** of the Act support the decision of the Office of Economic Development to sever records requested by an applicant.

In a Request for Review under the **Freedom of Information and Protection of and Protection of Privacy Act** (*FOIPOP*), dated August 8, 2005, an Applicant asked for a copy of the contract the Office of Economic Development (OED) has signed with a consulting firm to pursue its "Brand Nova Scotia" initiative.

On receiving the application, the OED, in accordance with Section 22 of *FOIPOP*, notified a third party of the application to get its reaction. The third party had no objections to the disclosure of the "main contract" and of Schedule A but objected to the disclosure of Schedules B and C.

The OED subsequently, in its letter of decision to the Applicant, said it was granting partial access to the records. The Applicant was provided with a "Decision Report" which itemed each record, the OED's decision with regards to disclosure, and the exemption claimed for each part denied:

**Sections 14**, **17**, **20** and **21**.

> **Advice to public body or minister**
>
> **14 (1)** The head of a public body may refuse to disclose to an applicant information that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister.
>
> **Financial or economic interests**
>
> **17 (1)** The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia or the ability of the Government to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party.
>
> **Personal information**
>
> **20 (1)** The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> **(2)** In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether
>
> (f) the personal information has been supplied in confidence;
>
> **(3)** A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(d) the personal information relates to employment or educational history;

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations.

**Confidential information**

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

(a) that would reveal

(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, [or]

(iii) result in undue financial loss or gain to any person or organization.

In accordance with **Section 37** of *FOIPOP,* the Review Office invited the third party, the Applicant and the OED to make a submission with respect to the review. The OED and third party made a submission. The Applicant chose not to.

*Background:*

The OED is leading a government initiative with the aim of "building on the existing perceptions of Nova Scotia and increasing the awareness of Nova Scotia as a great place in which to invest, live, do business as well as vacation." It's known as branding. The OED is arguing that branding differentiates this kind of contract from contracts for "goods and services." Many of the OED's arguments to sever are based on this concept.

*Submission of the OED:*

The OED says a brand is of strategic competitive importance. "If properly managed it creates value and influence by helping customers differentiate a specific product, service or company within cluttered markets . . . Each brand is attempting to carve out and maintain a competitive market niche . . . As an instrument of competition, a brand has considerable financial value to its owner. Not only do companies invest heavily in their development they also jealously guard them through trademark protection and challenges of any infringement."

The OED says governments are beginning to recognize that their provinces, regions or municipalities also have a brand and are beginning to realize significant economic benefits can be derived from managing their brand.

The OED sees a difference between an "Invitation to Tender" for goods and service where price is determinative, and a "Request for Proposals" where governments are looking for a solution to "a complex business problem, requirement or objective, and selection of the contractor will be based on the effectiveness of the proposed solution and its overall value, rather than on price alone."

The OED continues that in order to persuade government it has the capacity to do the job, a proponent is required to reveal sensitive and competitive information about its knowledge, insights, financial health, staff, clients and suppliers. For that reason, according to the OED, Requests for Proposals "are consistently treated as confidential materials."

With respect specifically to the s.17 exemption, the OED said that revealing adopted strategy could be harmful to the conduct of the project and therefore be costly for the government and put at risk the investment of public funds.

The submission argues that s.21 applies because

> "[t]he marketing industry is a highly competitive, knowledge-based industry. Companies make considerable competitive investments in acquiring information about key markets, understanding the dynamics of those markets and developing proprietary methodologies and techniques to advantageously address those markets. Such knowledge is the competitive currency of a marketing/communications company."

Recognizing that all three parts of s.21(1) must apply for this exemption to hold, the OED, says it is satisfied the first condition is met because information related to the buying or selling of service is commercial information. It is convinced that although the denied parts of the proposal were not explicitly provided in confidence,

> "there is a long standing implicit understanding between proponents and the government that RFP proposals are confidential materials."

The submission continues that ss.21(c) applies because of the competitiveness of the marketing business.

For further support to this argument the OED referred me to the Alberta Government's Freedom of Information Guidelines and Practices, 2005.

With respect to s.20, the OED believes that disclosing the names of some employees would be an unreasonable invasion of their personal privacy because they did not give consent.

The OED's concluding arguments sought to support its opinion that the parts denied the Applicant can be described as advice to a public body and therefore can be exempted under s.14. It cited two rulings of the Nova Scotia Supreme Court.

It claims that in *Fuller v. R. et al. v. Sobey's (2004) NSSC 86,* the Judge found an Auditor's Report to be advice to a public body; and in *Fuller v. the Queen in the Right of the Province* (2003) NSSC 058, the same Judge found communications plans to be advice because they contained a suggested course of action to the public body.

The OED suggested there were "strong parallels between a Communication Director's advice to a Minister or Cabinet on strategies, approaches and considerations for effective ministerial communication to the public on a particular issue and (the company's) advice to the OED on strategies, approaches and considerations . . . "

*The third party's submission*:

As mentioned earlier, the Company raised no objections to the disclosure of the main Contract and Schedule A.

Arguing in favour of the s.21 exemption on Schedules B and C, the third party noted the company has invested thirty years of money, research and other general know-how into crafting specific methodologies and approaches that have proved to be very successful.

> "To have (the company's) pricing strategy made public would place us at a disadvantage when competing for future work. In addition to this, other (the company's) clients would compare the rates offered to the Office of

> Economic Development and those offered to them. This can also cause frustration and concern, as no two assignments are alike."

The third party maintains that all information provided by the company to clients, and received from clients, is assumed to be confidential information.

**Conclusions**:

While it may be helpful at times to cite the Freedom of Information Policy Guidelines of other jurisdictions and the decisions of other Information and Privacy Commissioners, it's important to remember there is considerable *FOIPOP* case law from Nova Scotia's Courts; and the Nova Scotia Government has its own *FOIPOP* policy guidelines.

First of all the Alberta and Nova Scotia access and privacy acts are not the same, particularly in their stated purposes. As noted in *O'Connor*, the Nova Scotia *FOIPOP* legislation is deliberately more generous to its citizens and is intended to give the public greater access to information than is available in any other province or territory or at the federal level. Justice Saunders said that no other provincial, federal or territorial legislation expects its governments and all pubic bodies to be "fully accountable." [*O'Connor v. Nova Scotia*, (2001), NSCA 132]

When s.20 is applied, the burden of proof is on the Applicant. [See Section **45 (2)** of *FOIPOP]* Although, I believe that the citing of s.20(3) may be arguable, without arguments from the Applicant I am prepared to accept the decision of the Office of Economic Development.

With respect to s.21, each record or part of the record withheld under this exemption must contain commercial, financial or technical information, that was supplied implicitly or explicitly in confidence. As well, it must be shown that disclosure would "harm significantly"

the competitive position of or "interfere significantly" with the negotiating position of the third party. This harm must be proven and the burden of proof is on the OED. A high standard is required as evidenced in several court cases:

> ". . . 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. Our Act favours disclosure and contemplates limited and specific exemptions and exceptions . . . Evidence that relates to consequences that could ensue from disclosure that describe the consequences in a general way falls short of meeting the burden of entitlement to an exemption from disclosure" [*Chesal.v. Attorney General of Nova Scotia* (2003) NSCA 124]
>
> There must be "a clear and direct connection between the disclosure of specific information and the injury that is alleged." [*Lavigne v. Canada (Office of the commission of Official Languages*) (2002) S.C.C. 53 at para 58]
>
> ". . . there must be detailed and convincing evidence." [*Ontario (Workers' Compensation Board) v. Ontario (Attorney General)* (1998) ON C.A]
>
> ". . . there will always be some possibility of an adverse impact when negotiating positions are released, but here the drafters have include the word "reasonable" expectation, thus adding the objective and qualitative elements" [*Kattenburg v. Manitoba (Department of Industry, Trade and Tourism Minister)* (1999) M.J. No. 498]
>
> The Federal Court believes evidence of harm
>
> "must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever." [*Canada (Information Commissioner of Canada)* v. Canada (Prime Minister) (1992) F.C.J. No. 1054]

Also with respect to s.21(1) the Nova Scotia Supreme Court, in *Shannex,* addressed the matter of disclosing what it described as "business information" which could apply to this application:

> "It is accepted that a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information relating to business concerns can be disclosed without harmful consequences to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served." [*Shannex v. Attorney General of Nova Scotia representing the Department of Health*, (2004) NSSC 54 para 18]

I recognize the difficulty that a public body or third party experiences while trying to develop convincing evidence of significant harm. In my experience I find that evidence that includes a past experience or an example is helpful in a review. The Alberta Information and Privacy Commissioner expects evidence that disclosure would cause "damage or detriment" not simply "hindrance" or "minimal interference." (*Practice Note 1, Office of Information and Privacy Commissioner*).

The *Access and Policy Guidelines of the Federal Treasury Board* advise that exemptions based on an injury test provide for the denial of access to requested information if disclosure

> "could reasonably be expected to be injurious to the interest specified in the exemption."

The Treasury Board guidelines go on to say the "injury" in this context means having a detrimental effect. But the guidelines as an example, make it clear that the fact that disclosure could result in an administrative change in a government institution is not sufficient to satisfy an injury test. It must be possible to identify an actual detrimental effect.

It's my view that it is unreasonable to expect "proof positive" evidence.

It is obvious that the company in this case is in a very competitive business where "ideas" have considerable value. To paraphrase the Ontario Information and Privacy Commissioner, in Order PO-1818, each proponent responding to this kind of a "Request for Proposals" develops its own unique style for responding to RFPs, after spending a substantial amount of time and money to do so. The winning proponent runs the real risk of having its "style" and "ideas" expropriated by a competitor if its entire proposal is disclosed.

I am satisfied that there is enough evidence to conclude that s.21(1) applies. Having reached this conclusion there is no need for me to consider the exemptions claimed under s.17 or s.14, because nether of them appear in isolation of s.21.

**Recommendations**:

That the OED reaffirm its decision in writing to the Applicant with a copy to the Review Officer.

**Dated** at Halifax, Nova Scotia this 1st day of December, 2005.

_____

Darce Fardy, Review Officer