

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

A **REQUEST FOR REVIEW** of a decision of **NOVA SCOTIA TRANSPORTATION AND PUBLIC WORKS** to disclose documents related to the lease of buildings in Yarmouth.

REVIEW OFFICER: Darce Fardy

REPORT DATE: January 12, 2006

ISSUE: Whether Section 21 of the *FOIPOP Act*, supports a third party's objections to the disclosure of government leasing contracts.

In a Request for Review dated, December 12, 2005, under the **Freedom of Information and Protection of Privacy Act** (*FOIPOP*), a third party asked that I recommend to Nova Scotia Transportation and Public Works (TPW) that it reverse its decision to provide the Applicant with the records requested.

An Applicant had asked TPW for the terms of the lease of two buildings in Yarmouth. Under **Section 22** the TPW notified the third party of the application and asked if it wanted to raise any objections to the disclosure of the documents. The third party objected to disclosure. In a letter dated November 18, 2005, TPW advised the third party that it decided to provide copies of the leases requested to the Applicant. This request for review from the third party followed TPW's decision.

In accordance with **Section 37** of *FOIPOP*, the Review Office invited the third party, the Applicant and TPW to make a submission with respect to the review.

The third party's submission to the Review Office:

The third party rested its case for denying the information in the records on Section 21(1):

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,

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

The third party recognizing that all three subsections of this exemption must apply believes that all three do: the leasing agreement contains financial information; it assumed that this agreement would be kept in confidence; and finally that disclosing the lease would “harm significantly” its competitive position. The third party says the leasing industry is a competitive one, and disclosure of a detailed lease and its incentives can be detrimental to its interests. The third party believed that this was especially true if the information were released to a competitor because the leaser could lose tenants.

TPW's submission to the Review Office:

TPW defended its position by comparing this request to two previous reviews, on leases made, by the Review Officer. In Review Report FI-01-154 and Review Report FI-98-70, the Review Officer recommended to TPW that the requested leases be disclosed.

The Applicant's submission to the Review Office:

The Applicant believes that refusing access to the lease would not be in keeping with the spirit of *FOIPOP* which requires public bodies to be “fully accountable.” (see Section 2).

Conclusions:

I agree that subsection 21(a) applies because leases normally contain financial information. However, with respect to the information in the lease being “supplied in confidence” the Nova Scotia Supreme Court has determined that contracts and leases result from a give and take between the parties, making it difficult to determine which party “supplied” what information. It concluded it is difficult to isolate from a negotiated contract commercial and financial information of one of the parties to the agreement. [*Atlantic Highways Corp. v. Nova Scotia*(1997), 162 N.S.R.(2d) 27 (SC)]

I am not satisfied that part (b) applies and consequently it is my view that s.21(1) does not support the position of the third party that the lease and other documents should not be disclosed.

Recommendations:

That TPW reconfirm in writing to the third party its decision to disclose the records.

Dated at Halifax, Nova Scotia this 12th day of January 2006.

Darce Fardy, Review Officer