



REPORT
Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-08-14

Report Release Date: October 22, 2009

Public Body: Department of Agriculture

Issues: Whether the Department of Agriculture [“Agriculture”] appropriately applied the *Freedom of Information and Protection of Privacy Act* [“*Act*”] and, in particular:

1. Whether the Record is a record responsive to the Original Applicant’s Application for Access to a Record.
2. Whether the disclosure of the subject information would be an unreasonable invasion of the Third Party’s privacy, under s. 20 of the *Act*.
3. Whether s. 21 applies to the subject information.

Record at Issue: The Record at issue in this Review is one email, written from the Third Party Applicant, an employee of a public body, to an Agriculture employee. Agriculture has made a decision to release the email, including the contact information of the Third Party Applicant, with some minor severances. The only part of the Record under Review is the contact information of the Third Party Applicant. Pursuant to s. 38 of the *Act*, Agriculture has provided the Freedom of Information and Protection of Privacy [“FOIPOP”] Review Office with a copy of the complete Record including the information withheld from the Original Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or her delegated staff. Agriculture deemed the email a responsive Record and I agree that the Record fell within the scope of the Form 1 Application for Access to a Record.

Findings:

1. The Third Party Applicant is an employee of a public body that is listed in the Schedule of the *Act*.
2. The email is a responsive Record to the Form 1 Application for Access to a Record filed by the Original Applicant.
3. The Record does contain some personal information of the Third Party Applicant.
4. The Third Party Applicant sent the email on the letterhead of the public body of which s/he is employed and it contained his/her signature block.
5. The email Record was sent by the Third Party Applicant in the course of his/her employment for a public body listed in the Schedule of the *Act*.
6. Section 20 of the *Act* is applied in reverse order in accordance with the Nova Scotia Supreme Court, where s. 20(4)(e) is decided first. The Third Party Applicant is an employee of a public body, sent the email as part of his/her work duties and thus disclosure of personal information is not considered to be an unreasonable invasion of privacy.
7. Under s. 20 of the *Act*, the Third Party Applicant contends that the harm that will result from the release of the Record is that s/he and the public body will open themselves to liability. The governing legislation protects the public body and its agents for all matters done in good faith under the statute.
8. The Third Party Applicant relies on a section of the relevant legislation on the basis that s/he was reporting a violation. The section cited neither creates an offence nor a duty to report but rather stipulates when particular powers can be delegated from a Board to the public body. While the Third Party Applicant was not under any statutory duty to report the information contained in the Record to Agriculture, s/he considered that s/he had a moral duty to report. Agriculture is not the public body responsible for enforcement under the relevant legislation and takes the position that the Third Party Applicant should be aware of this, and therefore should have known it was not going to result in an investigation [triggering s. 20(3)(b)].
9. I find that the personal information contained in the Record was not compiled as part of an investigation and, therefore, the presumption has no application in this case.
10. Agriculture applied the *Act* appropriately when it made a decision to release the Record to the Original Applicant. As part of its decision, Agriculture appropriately severed other third party information from the Record.

Recommendation: The Review Officer recommended the following:

That Agriculture confirm its original decision to the Original Applicant to release the Record including all information related to the Third Party Applicant with minor proposed severances

Key Words: email, employee, investigation, personal information, presumption, public body, Schedule, Third Party, unreasonable invasion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act, ss. 2, 3(1)(b), 3(1)(i), 3(1)(j), 15(1)(d), 20(2)(f), 20(3), 20(3)(b), 20(4)(e), 21(1)(a)(ii), 21(1)(b), 21(1)(c), 22, 38.*

Case Authorities Cited: *NS Review Reports FI-05-08, FI-05-70, FI-07-38, FI-08-44, FI-07-12; ON Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225, PO-2579, MO-2424; House, [2000] N.S.J. No 473 (S.C.); Atlantic Highways Corporation v. Nova Scotia (1997), 162 N.S.R. (2d) 27.*

REVIEW REPORT FI-08-14

BACKGROUND

On November 27, 2007, the Original Applicant made an Application for Access to a Record to the Department of Agriculture [“Agriculture”] for the following:

. . . all information regarding the SPCA of NS, [Name of a third party], [Name of a third party], and other persons active for or with them regarding cattle on properties registered to [Name of Company], [Name of Second Company], [Name of Third Company], [Name of Fourth Company], any of them at [Location] and/or [Name of Fifth Company], NS during the period January 1, 2004 to the present, with particular records of discussions(s) with [Name] now operating from an office at [Address] Street, Halifax, NS and Funding provided to the SPCA to provide feed stuffs for those cattle or some of them and date of each record and name of each person involved in each transaction, discussion or record. Also include all records of funds provided, amounts and dates. Also include all records related to other government personnel by name, informed of all discussions and transactions related to the cattle, their care, their feed supplies, their seizure, the disposal of, their injury of, their destruction of, their attempted transfer of ownership to [Name of Original Applicant], their demands of care made to [Name of Original Applicant], their funding provided to [Name of Original Applicant] for their care after March 23, 2006 to this date.

On December 12, 2007, Agriculture notified the Third Party pursuant to s. 22 of *Freedom of Information and Protection of Privacy Act* [“Act”] that an Application for Access to a Record under the *Act* had been received and that disclosure of records relevant to the application may affect his/her interests as a third party.

On December 24, 2007, the Third Party corresponded with Agriculture and indicated his/her reasons for objecting to the disclosure of the information to the Original Applicant.

On January 24, 2008, Agriculture made a decision to provide an initial release of the requested Record to the Original Applicant.

On January 25, 2008, Agriculture corresponded with the Third Party indicating an intention to release the portion of the Record to which s/he had objected with severances and advising the Third Party how to make a Request for Review if s/he remained dissatisfied with this decision. The decision letter to the Third Party stated:

This is a follow up to my letter in which I explained to you the process relating to your rights as a third party under the Freedom of Information and Protection of Privacy Act. We received your correspondence regarding an application received at this office on December 31, 2007, in which you indicate that you do

not wish information contained in your March 9, 2006 e-mail to the Department of Agriculture to be disclosed. We have taken your representations into account, however we have decided to grant the applicant access to the information which was requested. Please note that we will be removing information pertaining to the address of [Name of a third party] and the activity in which [he or she] is engaging [activity named].

On January 30, 2008, the Third Party Applicant filed a Form 8 Request for Review. The Third Party Applicant made reference to his/her original letter to Agriculture in which s/he had outlined the arguments to withhold the Record. An abridged version of those arguments will be outlined in the Third Party Applicant's Representations below. It is not included verbatim because to do so could possibly reveal the contents of the Record and the identities of third parties.

On February 4, 2008, Agriculture corresponded with the Original Applicant and informed him/her that there could be a further release of information subject to third party notification and any Request for Review by a third party. On February 8, 2008, Agriculture advised the Original Applicant that a Request for Review had been requested from a third party.

On February 18, 2008, Agriculture provided the Original Applicant with a partial release of information that was not the subject of the Third Party's Request for Review. The released information is not under Review.

Mediation was not attempted in this Review.

RECORD AT ISSUE

The Record at issue in this Review is one email, written from the Third Party Applicant, an employee of a public body, to an Agriculture employee. Agriculture has made a decision to release the email, including the contact information of the Third Party Applicant but with some minor severances. The only part of the Record under Review is the contact information of the Third Party Applicant.

Pursuant to s. 38 of the *Act*, Agriculture has provided the Freedom of Information and Protection of Privacy ["FOIPOP"] Review Office with a copy of the complete Record, including the information withheld from the Original Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or her delegated staff.

Agriculture deemed the email a responsive Record and I agree that the Record falls within the scope of the Form 1 Application for Access to a Record.

THIRD PARTY APPLICANT'S REPRESENTATIONS

All of the Representations made by the Third Party Applicant during the Review process have been reviewed by the Review Officer. The Third Party Applicant's Representations are summarized in the following points:

1. The Third Party Applicant originally wanted the entire email withheld but later clarified the focus to be his/her name, along with business contact information.
2. The email making up the Record has nothing to do with the subject matter that forms the Application for Access to a Record: the email is not a responsive record as it is not within the scope of the Form 1 Application for Access to a Record.
3. The email was provided in relation to a [possible] investigation under the [applicable legislation] and was exempt pursuant to s. 20(3)(b).
4. S/he submits that the information was provided in confidence as described in s. 20(2)(f).
5. S/he has a role to notify particular individuals if there is a possible contravention of the applicable legislation.
6. Release of the information would reveal commercial information of a third party and was supplied in confidence as described in s. 21(1)(a)(ii) and 21(1)(b) respectively. S/he argues s. 21 is applicable and claims all three parts fit [but does not expand on that argument].
7. The disclosure of the email would be an unreasonable invasion of another third party's privacy [though by making this argument s/he is arguing someone else's interests].
8. There is a risk of civil action by the Original Applicant if the information is disclosed.

PUBLIC BODY'S REPRESENTATIONS

Agriculture made the following Representations to the Review Officer:

1. The information that the Third Party Applicant provided to Agriculture was as part of his/her position with another public body and that s/he passed it on as part of his/her job.
2. The authority of the other public body, of which the Third Party Applicant is an employee, includes overseeing and pursuing the interests and protecting the industry, which would include bringing this information forward. The Third Party Applicant would be intimately aware of the reporting procedures under the governing legislation.
3. Agriculture wants to be fair and treat this Third Party Applicant no different just because a Request for Review has been filed.
4. Agriculture cites the "Delegation of Powers to [other public body]" under the governing legislation's Regulations which gives the [other public body] the

power to “investigate . . . any dispute arising under this Act” [cite section of the governing legislation].

ISSUES

Whether the Department of Agriculture appropriately applied the *Freedom of Information and Protection of Privacy Act* and, in particular:

1. Whether the Record is a record responsive to the Original Applicant’s Application for Access to a Record.
2. Whether the disclosure of the subject information would be an unreasonable invasion of the Third Party’s privacy under s. 20 of the *Act*.
3. Whether s. 21 apply to the subject information.

DISCUSSION:

The Applicant’s right to access information under the *Act* is stated in the Purpose section, which provides:

2 The purpose of this Act is

(a) to ensure that public bodies are fully accountable to the public by

- (i) giving the public a right of access to records . . .*
- (iii) specifying limited exceptions to the rights of access. . .*
- (v) providing for an independent review of decisions made pursuant to this Act; and*

(b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to

- (i) facilitate informed public participation in policy formulation,*
- (ii) ensure fairness in government decision-making,*
- (iii) permit the airing and reconciliation of divergent views. . .*

WHETHER THE RECORD IS RESPONSIVE

Agriculture deemed the email a responsive Record. The Third Party Applicant argued that the email was not responsive to the Original Applicant’s Application for Access to a Record. Part of the access request read: *Also include all records related to other government personnel by name, informed of all discussions and transactions related to the cattle . . .* I agree with the public body that the Record falls within the scope of the Form 1 Application for Access to a Record.

SECTION 20 EXEMPTION

At a formal Review, the burden is on a third party applicant to demonstrate that the release of the personal information would be an unreasonable invasion of his/her privacy. In a Supreme Court of Nova Scotia case, Moir J. discussed the process to be followed in assessing whether personal information should be released. He stated, at para. 6:

I propose to consider this appeal in the following way:

- 1. Is the requested information "personal information" within s. 3(1)(i)? If not, that is the end. Otherwise, I must go on.*
- 2. Are any of the conditions of s. 20(4) satisfied? If so, that is the end.*

Otherwise . . .

- 3. Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s. 20(3)?*
- 4. In light of any s. 20(3) presumption, and in light of the burden upon the appellant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?
[House, [2000] N.S.J. No 473 (S.C.)]*

Applying the analysis in *House*, the first question is whether the information to which the Third Party objects falls within the definition of personal information. "Personal information" is defined in the *Act* as follows:

3(1)(i) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, address or telephone number, . . .

As the information under Review is the Third Party Applicant's name, email address, affiliated group and contact information, it falls within the definition of personal information and therefore it is necessary to go to the second question in the analysis: are any of the conditions of s. 20(4) satisfied?

Subsection 20(4)(e) of the *Act* states:

*(4) A disclosure of personal information is **not an unreasonable invasion** of a third party's personal privacy if*

(e) the information is about the third party's position, functions or

remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

[Emphasis added]

In the case at hand, the Third Party Applicant is an employee of a public body. “Public body” is defined in the *Act* as follows:

3(1)(j) "public body" means

(i) a Government department or a board, commission, foundation, agency, tribunal, association or other body of persons, whether incorporated or unincorporated, all the members of which or all the members of the board of management or board of directors of which

(A) are appointed by order of the Governor in Council, or

(B) if not so appointed, in the discharge of their duties are public officers or servants of the Crown,

and includes, for greater certainty, each body referred to in the Schedule to this Act but does not include the Office of the Legislative Counsel,. . .

[Emphasis added]

The public body that employs the Third Party Applicant is listed in the Schedule to the *Act*. The Third Party Applicant fits the definition of an employee under the *Act*.

3(1) In this Act,

(b) "employee", in relation to a public body, includes a person retained under an employment contract to perform services for the public body;

The email was sent by the Third Party Applicant from his/her work email address and contains his/her business signature block. The information relayed in the email was obtained from another person but was received in the course of the Third Party performing his/her position and functions with the public body. The email was not marked confidential and was not sent from a personal email address. All correspondence with the Third Party Applicant has been from his/her place of employment, including the Form 8 Request for Review.

While the list of what constitutes “personal information” in s. 3 of the *Act* is not exhaustive [See *NS Review Report FI-05-70*], it is necessary to make the distinction that the information is more personal than professional. The Nova Scotia Review Officer in *FI-08-44* looked to Ontario Orders in this regard:

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an

individual in a professional, official or business capacity will not be considered to be “about” the individual.

[ON Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]

The Third Party Applicant has not provided any Representation to suggest that s/he was sending a personal email from a work address and has not provided any evidence to show that it was not sent in the course of normal business as an employee of a public body.. I therefore find that it is not an unreasonable invasion of the Third Party Applicant’s privacy for the personal information to be disclosed.

If I am not correct and the subsection is not applicable, I must then move on to subsection 3. The Applicant argues that subsection 20(3)(b) of the *Act* is applicable because the information was part of investigation against the Original Applicant and that the factors favouring non-disclosure are subsections 20(2)(e) & (f) of the *Act*.

Other jurisdictions have held that it is not relevant if the investigation is on-going as to whether or not the exemption applies.

Whether or not the investigation is currently on-going has no relevance to the application of this presumption. The presumption at section 14(3)(b) applies to personal information that, at some point of time, was assembled or gathered together as part of an investigation into a possible violation of law [Order P-892]. However, section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law [Orders M-734, M-841, M-1086].

[ON Order MO-2424]

In the present Review, however, no investigation was ever initiated. In fact, the Third Party Applicant indicates that s/he sent the email to provide Agriculture with information it may use in investigating. Agriculture has made it clear and the applicable legislation supports its position that it is not its role to undertake investigations in the industry. In fact, Agriculture argues that it is clear that another public body is responsible for policing the industry. I find that the personal information contained in the Record was not compiled as part of an investigation and, therefore, the presumption has no application in this case.

The final argument advanced by the Third Party Applicant was that if the information was released, his/her public body employer or s/he could be open to civil action by the Original Applicant.

I am not convinced that the harm argued by the Third Party Applicant is anything more than speculation of harm on his/her part. In any event, the legislation governing the activities of the Third Party Applicant’s public body employer protects the public body from liability for actions done in good faith.

Based on all these factors, I find that the release of any personal information about the Third Party Applicant would not constitute an unreasonable invasion of his/her privacy.

SECTION 21 EXEMPTION

The Third Party Applicant also believes that Agriculture should have applied s. 21 [confidential business information] to the same information that s/he believed was personal information – essentially the signature block and the “from” line of the email. As the Third Party Applicant is the person who believes that the exemption should be applied and the information withheld, the burden of proof rests with him/her to prove that it applies.

Section 21 of the *Act*, states in part:

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 . . .

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.

The test laid out in s. 21 has been judicially considered and found to be a conjunctive test; all three parts of the test must be applicable for a public body to rely on the mandatory exemption. The Nova Scotia Supreme Court has established the manner in which the s. 21 exemption should be applied. The Judge determined that the s. 21 exemption is to be read conjunctively, concluding therefore:

. . . that a party seeking to apply [section 21] to restrict information must satisfy the relevant authority or the court that the information satisfies each of the lettered sub-sections of s. 21(1).

For purposes of considering the application of s. 21(1), I suggest the burden the Appellant AHC must satisfy under that section to qualify the Omnibus Agreement as exempted information must be to satisfy the court of the following:

(a) that disclosure of the information would reveal trade secrets or commercial financial, labour relations, scientific or technical information of a third party;

(b) that the information was supplied to the government authority in confidence, either implicitly or explicitly; and
(c) that there is a reasonable expectation that the disclosure of the information would cause one of the injuries listed in 21(1)(c).

[Emphasis added]

[Atlantic Highways Corporation v. Nova Scotia (1997), 162 N.S.R. (2d) 27]

The Nova Scotia Review Officer has established the conditions that must be met to satisfy each of these tests.

Part 1 of Section 21 Test

In Review Report *FI-07-38*, the Review Officer quoted *Ontario Order PO-2579* in defining commercial and financial information:

Commercial information has been interpreted to mean:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

[ON Order PO-2579]

Although the definition of technical information was not relevant to *FI-07-38*, the quoted Ontario Order does go on to define technical information as:

. . . information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

[ON Order PO-2579]

The Third Party Applicant did not indicate which part of the subsection applied to the Record and has not provided any explanation as to how it applies. I have been provided with no reason to believe that his/her contact information fits this subsection.

Although I am not required to carry on once it is determined that one of the subsections of s. 21 does not apply because the three-part test is conjunctive, I will briefly discuss the other two parts of the test.

Part 2 of Section 21 Test

Subsection 21(1)(b) of the *Act* requires that the information in question be “supplied, implicitly or explicitly, in confidence.” Review Report *FI-07-12* established the precedent for meeting this test.

Decisions of the Nova Scotia Supreme Court have established that simply labelling a document as “confidential” is not sufficient to meet the test in s. 21(1)(b); rather, evidence must be provided in line with the tests above to show how expectations of confidentiality were established. There is no evidence in this case to support that the information was provided on a confidential basis and in fact it was not marked as such.

Part 3 of Section 21 Test

The final part of the test under s. 21 of the *Act* is that release of the information must be reasonably expected to cause one of the harms foreseen under s. 21(1)(c). The harms test has been well established in access to information jurisprudence, both through commissioner’s offices and the courts [for example *NS Review Report FI-07-12*].

The Third Party Applicant has not provided any evidence or argument on how harm would result, other than claiming that s/he would no longer report such information to Agriculture if it is to be disclosed.

Therefore, in applying the three-part s. 21 test to this case, this exemption does not apply as the Third Party Applicant has failed to demonstrate that all three parts of the test apply.

FINDINGS

1. The Third Party Applicant is an employee of a public body that is listed in the Schedule of the *Act*.
2. The email is a responsive Record to the Form 1 Application for Access to a Record filed by the Original Applicant.
3. The Record does contain some personal information of the Third Party Applicant.
4. The Third Party Applicant sent the email on the letterhead of the public body of which s/he is employed and it contained his/her signature block.
5. The email Record was sent by the Third Party Applicant in the course of his/her employment for a public body listed in the Schedule of the *Act*.
6. Section 20 of the *Act* is applied in reverse order in accordance with the Nova Scotia Supreme Court, where s. 20(4)(e) is decided first. The Third Party Applicant is an employee of a public body, sent the email as part of his/her work duties and thus disclosure of personal information is not considered to be an unreasonable invasion of privacy.

7. Under s. 20 of the *Act*, the Third Party Applicant contends that the harm that will result from the release of the Record is that s/he and the public body will open themselves to liability. The governing legislation protects the public body and its agents for all matters done in good faith under the statute.
8. The Third Party Applicant relies on a section of the relevant legislation on the basis that s/he was reporting a violation. The section cited neither creates an offence nor a duty to report but rather stipulates when particular powers can be delegated from a Board to the public body. While the Third Party Applicant was not under any statutory duty to report the information contained in the Record to Agriculture, s/he considered that s/he had a moral duty to report. Agriculture is not the public body responsible for enforcement under the relevant legislation and takes the position that the Third Party Applicant should be aware of this, and therefore should have known it was not going to result in an investigation [triggering s. 20(3)(b)].
9. I find that the personal information contained in the Record was not compiled as part of an investigation and, therefore, the presumption has no application in this case.
10. Agriculture applied the *Act* appropriately when it made a decision to release the Record to the Original Applicant. As part of its decision, Agriculture appropriately severed other third party information from the Record.

RECOMMENDATION

I make the following recommendation:

That Agriculture confirm its original decision to the Original Applicant to release the Record including all information related to the Third Party Applicant with the minor proposed severances.

Respectfully,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer