REPORT
Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum FI-10-49/FI-10-51

Report Release Date: April 6, 2011

Public Body: Department of Labour and Advanced Education

Issues: Whether Department of Labour and Advanced Education ["Labour"] appropriately applied the *Freedom of Information and Protection of Privacy Act* ["*Act*"] and, in particular:

1. Whether the entire Record fit the definition of advice and recommendations in s. 14 of the *Act*.
2. If no, that is the end of the matter. If yes, whether Labour has properly exercised its discretion to withhold the Record.
3. Other issues: Government Reorganization, Delay and Mediation.

Record at Issue Pursuant to s. 38 of the *Act*, Labour 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 Applicants. At no time are the contents of the Record disclosed or the Record itself released to the Applicants by the FOIPOP Review Officer or her delegated staff.
The Record in this Review consists of a copy of a consultant's report on the socio-economic impact of gambling in Nova Scotia.

Summary: An Applicant filed a Request for Review of Labour's decision to withhold the Record in full under s. 14 of the *Act.* The Review Officer found that s. 14(1) had no application to the Record as there was no advice or recommendations to a public body or Minister. As s. 14(1) does not apply and because no other exemptions have been claimed, Labour is required under s. 14(2) to release the information in full to the Applicants as it fell within the definition of background information.

Findings: The Review Officer made the following Findings:

1. I find the Record does not fall within the meaning of advice to a Minister in s. 14(1) because there is no advice, recommendation or draft regulation in the Record to any Minister or public body.
2. I find the intended recipient of the Report may not fall clearly within the definition of a public body as intended by s. 14(1).
3. I find that because the s. 14(1) exemption has no application in this Review, the issue of discretion is moot.
4. I find the Record does contain information that falls within the definition of background information and as such pursuant to s. 14(2) Labour is under a duty to release and cannot refuse access by characterizing it as advice.
5. I find Labour's interpretation that the Review Officer is required by statute to conduct mediation in all cases prior to proceeding to formal Review is not how the statute reads, is contrary to common sense and best practice; therefore, this position is dismissed.
6. I find that in any Review but particularly in an expedited Review all parties and the Review Office should make every effort to avoid unnecessary delay. That was not achieved in this Review.

Recommendation: The Review Officer made the following Recommendation to Labour:

That Labour release the complete Record to the Applicants in full.

Key Words: advice, background information, committee, Court, delay, discretion, duty to assist, expedited, gambling, gaming, Minister, Order, public body, purpose, recommendations, strategy, trial *de novo.*

Statutes Considered: *Freedom of Information and Protection of Privacy Act, s. 2, s. 3(1)(a), 3(1)(i), s. 14, s. 35, s. 36, s. 37, s. 38, s. 42(6).*

Case Authorities Cited: *NS Review Reports FI-04-50, FI-07-32; R. v. Fuller 2003 NSSC 58; Halifax Herald Limited v. Workers' Compensation Board 2008 NSSC 369; BC Orders 02-38, F05-27, 04-22; Ontario Order MO-2183.*

Others cited: *Nova Scotia Information Access and Privacy Office Procedures Manual - FOIPOP (2005), c. 7; Alberta Policy and Procedures Manual FOIP Guidelines and Practices, 2009, p. 179.*

BACKGROUND

This Review Report deals with two Applications for Access to a Record. The Applicants consented to the identities of the groups they represent being made public in this Review Report. The Applicants represent GameOverVLTs.com and the Canadian Press. Both Applicants filed Requests for Review. The two files have been processed and investigated together at the Review Office because the Record is identical and the decision by Labour and Workforce Development (now called Labour and Advanced Education) ["Labour"] was the same in both – to withhold the Record in full.

On February 16, 2010, one of the Applicants made an Application for Access to a Record under the custody and control of the Labour that read as follows:

> *Through the FOI Act we request all records related to the Socio-economic Study including but not limited to the following:*
>
> 1. *A copy of the RFP for the project*
> 2. *The assessment framework agreed upon for the study*
> 3. *Name of the Consultants hired for the project*
> 4. *Copy of the Consultant's contract*
> 5. *Proposed budget detail of the project*
> 6. *Actuals Budget of the project (money spent to date)*
> 7. *Names of the project Steering Committee including Chair*
> 8. *Steering Committee correspondence, memos, e mails and meeting minutes*
> 9. *Name of NS Government project manager*
> 10. *Emails and other correspondence in reference to the project study, criteria, and consultant dialogue*
> 11. *Internal department memos, correspondence and emails regarding criteria, project results, Difficulties and termination of the project*
> 12. *Copy of the consultant's report on the Socio-economic on Impact of Gambling in Nova Scotia [sic.]*

A second Applicant requested access to the consultant's report in an Application for Access to a Record received by Labour on April 15, 2010. That Application was subsequently amended to include all the information requested in the other Applicant's February 16, 2010 Application for Access to a Record.

On May 20 2010, Labour issued the same decision to both Applicants. This decision included full or partial disclosure of items 1 to 11, while item 12 (the "consultant's report") was withheld in full. During the Intake stage at the Review Office, the Applicants agreed that the only Record at issue in this Review was the consultant's report. The portion of Labour's decision relevant to the consultant's report reads as follows:

> *Copy of consultant's report on "the Socio-economic on Impact of Gambling in NS" [sic.]*

- *please be advised that there is no final consultant's report in the custody of or under the control of this department on "the Socio-economic Impact of Gambling in NS."*
- *Copies of all draft records provided to the department by the consultant have been reviewed and processed by myself in keeping with the provisions of the FOIPOP Act . . .*

The text which has been severed from the documents contains information pertaining to . . . information that would reveal advice, or recommendations developed by or for a public body or a minister (S.14) . . .

S.14 – Advice to Public Body or Minister

> *S.14(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice, recommendations [. . .] developed by or for a public body or Minister.*
>
> *. . . The draft records prepared by [consultant's name] have been withheld in full under this section as material which was being prepared as advice to the public body.*
>
> *S.14(2) The head of the public body shall not refuse pursuant to subsection (1) to disclose background information used by the public body.*

Any background information, including factual information, in the records has been disclosed in keeping with this section of the Act. In other words, any background information or records in support of advice or recommendations which were acted upon, or upon which a decision was made, have been disclosed.

To be clear, the consultant's report, the only Record at issue here, was withheld in full, and it appears that any "background information" referenced in the decision was, in Labour's view, contained in the disclosure package that is not a part of the responsive Record subject to this Review.

On June 16, 2010 (received June 18, 2010) one Applicant filed a Request for Review which read as follows:

The applicant requests that the review officer review the following decision, act or failure to act of the head of the public body;

(a) decision dated or made on the 20 day of May, 2010, a copy of which is attached to this Request for Review;
(b) failure to release the report on socio-economic impact of gambling in Nova Scotia

The applicant requests that the review officer recommend that

(a) the head of the public body give access to the record as requested in the Application for Access to a Record; . . .
(c) reasons why refusal would cause harm why we are not entitled to public info in report.

On June 15, 2010 (received June 24, 2010) the other Applicant filed a Request for Review:

> *This letter is to request a review of the refusal to release the draft study of the impact of problem gambling by consultant [consultant's name] [Department file number]. The public body is relying primarily on a s. 14 exemption, arguing this is advice to a public body.*
>
> *I will seek the review officer's view on whether this is a valid exemption, relying on my argument that public benefit overrides this, and also that this material is essentially background material upon which advice to the minister would be based.*

Shortly after the Requests for Review were received, one of the Applicants requested that the Review be expedited. I made a decision to expedite both Reviews. This decision to expedite was based on evidence provided by the Applicant that there was considerable public interest in the issue of gambling and there was a need for timeliness in the Review. Labour was advised promptly that the Review would be processed on an expedited basis.

While in the mediation stage, once the investigation was done and the Review was nearing completion, an issue arose as to whether or not the Record at issue continued to be in the custody or under the control of Labour. This issue arose as a result of a reorganization of responsibilities of different departments of government. Mediation was placed on hold, pending the outcome of the process to identify which public body should be involved in the process. Later, the Mediator determined that the mediation would not proceed.

There was over a month delay [48 days] before Labour confirmed that it in fact was the Department that retained custody and control of the Record. It has come to light that during this same period of time that the final strategy with respect to gaming in the province was being prepared for public release.

RECORD AT ISSUE

Pursuant to s. 38 of the *Freedom of Information and Protection of Privacy Act* ["*Act*"] Labour has provided the Freedom of Information and Protection of Privacy ["FOIPOP"] Review Office with a copy of the complete Record, namely the information withheld from the 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.

The Record in this Review consists of a copy of a consultant's report on the socio-economic impact of gambling in Nova Scotia.

REPRESENTATIONS

All of the Representations received from the Applicants and Labour have been reviewed in detail and given due consideration. They will be referred to in the Discussion but will not be reproduced in this section of the Report.

ISSUES UNDER REVIEW

During the processing and investigation of these Requests for Review the following issues were identified, including whether Labour appropriately applied the *Act*, and, in particular:

1. Whether the entire Record fit the definition of advice and recommendations in s. 14 of the *Act*.
2. If no, that is the end of the matter. If yes, whether Labour has properly exercised its discretion to withhold the Record.
3. Other issues: Government Reorganization, Delay and Mediation.

DISCUSSION

The purpose of the *Act* is clearly laid out in s. 2 of the *Act* and in part, reads as follows:

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 . . .

(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.***
[Emphasis added]

The Applicants sought access to the Record, a report prepared by a consultant on gambling in Nova Scotia. As an advocacy organization and a media outlet, both Applicants sought access to the information in the Record with a view to participating in policy development in a manner consistent with the exact three purposes highlighted above.

Labour relied on one exemption and represented that s. 14 of the *Act* permitted the withholding of the Record in full. Section 14 provides as follows:

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.***
(2) The head of a public body ***shall not refuse*** *pursuant to subsection (1) to disclose* ***background information*** *used by the public body.*

(3) Subsection (1) does not apply to information in a record that has been in existence for five or more years.
(4) Nothing in this Section requires the disclosure of information that the head of the public body may refuse to disclose pursuant to Section 13.
[Emphasis added]

In the Nova Scotia Supreme Court case *R. v. Fuller (2003 NSSC 58)*, Justice Pickup discussed the elements that are necessary for a record to be exempt as "advice":

> *[25]The intent of s. 14 is to protect from disclosure advice and recommendations developed within government.*
>
> *[26] There does not appear to be any judicial interpretation of s. 14 of the FOIPOP Act in Nova Scotia. In John Weidlich v. Saskatchewan Power Corporation (1997) Q.D.G. No. 834, the Saskatchewan Court of Queen's Bench adopted a practical definition of "advice" as follows:*
>
> > *[10] I suggest that the meaning of 'advice' in ordinary parlance is to be adopted here, meaning 'primarily the expression of counsel or opinion, favourable or unfavourable, as to action, but it may, chiefly in commercial usage, signify information or intelligence', per Rand, J., in Moodie (J.R.) Co. v. Minister of National Revenue. [1950] 2 D.L.R. 145(S.C.C.), at p. 148.*
>
> *[27] In O'Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat), supra, MacDonald, A.C.J. of the Nova Scotia Supreme Court, sitting as a Chambers Judge considered the meaning of "advice" in interpreting s. 13(1).*
>
> *[28] The Chambers Judge concluded that "advice is part of the deliberative process", and accepted the views of Commissioner Linden, the Ontario Commissioner in Order 118 that "advice" generally pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by the recipient during the deliberative process.*
>
> *[29] The question in this case is whether the severed record for which a s. 14 exemption is claimed is "advice, recommendations or draft regulations" and whether this information was directed to assisting the Executive Council to decide on a course of action respecting FOIPOP fees. If the answer to this is in the affirmative, then the document is exempt from disclosure under s. 14.*

The Record has been reviewed in detail. I find the Record does not fall within the meaning of advice to a Minister in s. 14. There is no advice, recommendation or draft regulation in the Record. Reading the Record makes it clear that it could not fit the definition of advice - *must lead to a suggested course of action where another responsible party will make a decision.* The Record does not contain anything that would suggest a course of action.

Labour wanted to refer to the Record as a failed work-in-progress that contains inaccurate information that may mislead the public. With respect, as I stated in a previous Review, applicants are perfectly capable of discerning inaccurate information. If a public body believes information may be misleading, rather than withhold the record, under the duty to assist in the *Act*, a public body should provide the record along with a further explanation *[See FI-07-32]*.

Were inaccuracies in government records a reason to allow government to withhold information, the public's right of access to information would be rendered meaningless. It could be argued that gaining access to inaccurate information in a government Record [I make no Finding as to whether or not that applies in this Review], may strengthen the need for public access so that public debate and consultation could proceed based on all information held and work towards accurate facts upon which government could make policy decisions.

Labour has essentially confirmed the fact that the Record does not contain advice to a Minister or public body in its December 3, 2010 and final Representations. Labour stated:

> *[T]he records in question are in draft format, not completed, and not yet presented to the Department as a completed or final study. Once completed, such a record indeed may have been considered background information providing options and/or information in support of future advice and direction to the Department or Government on the matter of gaming. However if it were to be considered background information, no decision has been made on this information.*

In addition, without revealing parts of the Record, the Request for Proposal ["RFP"] that preceded the preparation of the Record indicates the report was being prepared for a Committee made up of representatives from four public bodies and an outside academic advisor. The *Act* is clear that the advice must be developed "by or for a public body or minister." A public body is defined in the *Act* as follows:

> *3(1)(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,***
>
> ***[Emphasis added]***

On the information contained in the RFP, it appears that the committee established by Labour to receive the report ***may not*** meet this definition of a public body as it is unclear how the academic adviser was appointed, and thus information submitted to it could not be considered "advice" within the meaning of s. 14(1) of the *Act*.

In addition, unsolicited advice will not attract the protections of the s. 14 exemption: the advice must be "sought" and "received" *[See Service Alberta Policy and Procedures Manual FOIP Guidelines and Practices, 2009, p. 179]*. The RFP does appear to ask for "advice" or "recommendations," but rather to "assess and understand the social and economic impacts of gambling to Nova Scotia" *[Refer to RFP, p. 3]*.

Labour has provided no guidance as to how the Record fits the required components of the s. 14(1) exemption. It failed to show how the contents of the Record met the definition of advice and recommendations despite being given a list of questions on two occasions that would have assisted it to do so. The issues of what is the public body for which the alleged advice was being sought and how this advice had been solicited were also not addressed by Labour.

In essence the only Representations by Labour related to the exercise of discretion: the Record is a draft; Labour had already released lots of other information to the Applicants, elected representatives and the public; some of the content of the Record is available publicly elsewhere; and that some of the information in the Record is considered inaccurate. These may be appropriate factors in considering how Labour exercised its discretion to withhold the Record. However, unless the public body clearly establishes at the outset that s. 14 of the *Act* applies to the Record, the question of discretion does not arise. These are not considerations in determining if the content is advice and recommendations.

As the exemption in s. 14 of the *Act* does not apply to any part of the Record, I find the issue of how Labour exercised its discretion is moot. It is therefore unnecessary for me to discuss it further in this Review, other than to note the following cases, which will provide guidance in future situations in which public bodies must exercise discretion to apply the advice exemption:

- Inaccurate information will not impact on the decision to release or not [see *NS Review Report FI-04-50* and *Halifax Herald Limited v. Workers' Compensation Board (2008 NSSC 369)*];
- Views or beliefs of the author, unless they set out or imply options or recommended courses of action are not normally considered advice [see *BC Order 02-38*, para 129];
- The amount of information already disclosed is irrelevant [see *BC Orders F05-27* and *04-22*];
- Analytical information, evaluative information, notifications or cautions, views, draft documents, and background information have been found not to qualify as advice [see *ON Order MO-2183*].

This finding that discretion is not relevant because s. 14(1) does not apply is important. If this matter were to go to Nova Scotia Supreme Court pursuant to s. 42 of the *Act* by way of a trial *de novo* and the Court were to determine that the exemption applies, unlike a recommendation from me, its Order cannot replace the public body's exercise of discretion *[See s. 42(6)]*.

In addition to my finding that the Record does not contain advice, I find that the information in the Record does fall within the definition of background information and as such Labour was obliged to release to the Applicants pursuant to s. 14(2).

Section 14(2) imposes a duty on public bodies ***not to refuse*** to disclose information if it falls within the definition of background information, which is defined in s. 3(1)(a) of the *Act* as follows:

3 (1) In this Act,

(a) "background information" means

(i) any factual material,
(ii) a public opinion poll,
(iii) a statistical survey,
(iv) an appraisal,

(v) an economic forecast,
(vi) an environmental-impact statement or similar information,
(vii) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,
(viii) a consumer test report or a report of a test carried out on a product to test equipment of a public body,
(ix) a feasibility or technical study, including a cost estimate, relating to a policy or project of a public body,
(x) a report on the results of field research undertaken before a policy proposal is formulated,
(xi) a report of an external task force, advisory board or similar body that has been established to consider any matter and make reports or recommendations to a public body, or
(xii) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body;

The Record is a compilation of data from which decisions could be made in the future but no advice was provided. This is consistent with the RFP which, in addition, never required an opinion or advice as a deliverable. While the word "recommendation" appears once in the Record it is with respect to further research not about gambling. Section 14(2) imposes a duty ["shall"] that public bodies cannot refuse to release background information, for which there is no discretion, by characterizing it as advice and recommendations.

Other Issues: Government Reorganization, Delay and Mediation

From the perspective of the oversight body responsible for access to information, it is important for government, when it chooses to reorganize responsibilities between departments, to turn its attention to the issue of records management. In this case, the Review Office sought confirmation that when reorganization occurred, the Record in issue remained with Labour. That was to ensure that any Findings and Recommendations would be directed to the correct public body that would be in a position to make a decision in response to the Review Officer. In this case, the issue caused considerable delay [48 days] to the Review, which Labour knew was being processed on an expedited basis as of July 21, 2010.

After that delay, Labour argued that the Review Officer is required by statute to undertake mediation in all Reviews. The *Act* allows for mediation at the Review Officer's sole discretion in s. 35:

*The Review Officer **may try** to settle a matter under review through mediation.*
[Emphasis Added]

Section 36 of the *Act* imposes a 30 day time limit when and ***if*** mediation is attempted:

*Where the Review Officer is unable to settle a matter **within thirty days** through mediation, the Review Officer **shall conduct a review** in accordance with Section 37.*
[Emphasis added]

To maintain impartiality, the Review Officer's statutory authority to mediate is delegated to the Mediator at the Review Office. As the Review Officer, I am not privy to what occurs in

mediation. This ensures that if mediation is attempted and unsuccessful, I conduct my formal Reviews with fresh eyes to ensure an independent, unbiased, formal Review of the matter. The need for separate mediation and Review processes is recognized by the Chief Information and Privacy (IAP) Office's FOIPOP Procedures Manual where it states:

> *All conversations with the mediator are in confidence and considered to be on a "without prejudice" basis. If the mediation is unsuccessful, any notes taken by the mediator and all possible remedies discussed during the mediation process are set aside from the file in a sealed envelope before the file is forwarded to the Review Officer.*
>
> *Suggested options or solutions that were not agreed upon during the mediation cannot be forwarded to the Review Officer. [Procedures Manual - FOIPOP (2005), c. 77]*

As is best practice in any mediation, in order for mediation to be attempted, two criteria must be met:

1. The Mediator must deem the issue(s) under Review suitable for mediation; and
2. All parties must agree to enter into mediation.

As what goes on in mediation is protected, I can only confirm that one or more of these criteria were not met in this Review and, therefore, mediation was not pursued.

During this Review, Labour advanced the position that in order to conduct a formal Review the *Act* requires that mediation must be attempted. I find that this position is without merit. On a reading of the relevant sections of the *Act* regarding mediation, [s. 35 and 36] and on a reading of s. 37 regarding my duty to conduct a Review, it is clear that mediation is discretionary ["may try"] and is only constrained by the 30 day time limit in s. 35. The formal Review process in s. 37 does not in any way supersede the provision allowing for mediation. Had the Legislature intended mediation to be mandatory, the legislation at s. 35 would have used the word "shall" to replace "may try". I note that the public body has reserved the right to argue this position at some point in the future by providing its Representations on a "without prejudice" basis. It is worth noting that common sense would dictate that by the very definition of mediation, no two parties can be forced to participate. In keeping with best practices, it is the Mediator who makes the final determination as to whether or not mediation will be undertaken.

I find Labour's interpretation is not how the statute reads and this position is dismissed.

However, again, in this case trying to force the Review Office to go into mediation is viewed as another attempt to delay. Within two weeks of this issue being left on an agree-to-disagree basis, the file was moved to formal Review just prior to the provincial gaming strategy being made public.

The relevant dates are as follows:

1. The Investigation Summary was shared with all parties on December 14, 2010.
2. The Reviews were moved to mediation by the Mediator with the consent of the parties on January 13, 2011 for one day.
3. On January 14, 2011, the Reviews were placed on hold while Labour determined if the Record remained with that department.

4. On March 2, 2011, the Review Office received Labour's confirmation by letter dated February 16, 2011 that it continued to have custody and control of Record; mediation was ended; and the parties were notified that the file was moving to formal Review.
5. The Representations for formal Review were due March 23, 2011.
6. Labour submitted its position on mediation on March 22, 2011.
7. Labour provided its final Representation on March 23, 2011.
8. The Responsible Gaming Strategy was released to the public March 28, 2011
9. Formal Review started on April 1, 2011.

The timing may be circumstantial but my observation is that as a result of the delay the Applicants' right to access information and to fully participate in policy formulation, government decision-making and being allowed to air divergent views, was interfered with and at odds with the purposes of the *Act.*

Finally, I find that in any Review but particularly in an expedited Review all parties and the Review Office should make every effort to avoid unnecessary delay. That was not achieved in this Review.

FINDINGS

1. I find the Record does not fall within the meaning of advice to a Minister in s. 14(1) because there is no advice, recommendation or draft regulation in the Record to any Minister or public body.
2. I find the intended recipient of the Report may not fall clearly within the definition of a public body as intended by s. 14(1).
3. I find that because the s. 14(1) exemption has no application in this Review, the issue of discretion is moot.
4. I find the Record does contain information that falls within the definition of background information and as such pursuant to s. 14(2) Labour is under a duty to release and cannot refuse access by characterizing it as advice.
5. I find Labour's interpretation that the Review Officer is required by statute to conduct mediation in all cases prior to proceeding to formal Review is not how the statute reads, is contrary to common sense and best practice; therefore, this position is dismissed.
6. I find that in any Review but particularly in an expedited Review all parties and the Review Office should make every effort to avoid unnecessary delay. That was not achieved in this Review.

RECOMMENDATION

I recommend that Labour release the complete Record to the Applicants.

Respectfully,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer for Nova Scotia