REPORT

Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum FI-07-04

Report Release Date: January 14, 2008

Public Body: Department of Education

Issues: When the head of a public body can refuse an Applicant access to information where the disclosure could reasonably be expected to harm inter governmental relations.
When the head of a public body can refuse to disclose information that would reveal advice for or to a public body to an Applicant.

Summary: The Applicant made an Application for Access to a Record to the Department of Education requesting information concerning the Applicant and/or the Applicant's businesses. Education refused the Applicant access to the Record citing two discretionary exemptions; s. 12(1) and s. 14(1) of the *Act.*
The Review Officer found that Education provided sufficient evidence on a confidential basis to demonstrate that the severed portion of the Record could reasonably be expected to harm the conduct of relations between the Province of Nova Scotia and another level of government. The Review Officer also found that the email discussions in the Record regarding a proposed plan falls short of what constitutes "advice" for the purpose of s. 14 of the *Act.*

Recommendations: 1. Education should provide a copy of the Record to the Applicant including any personal information, severing only the portions which would harm intergovernmental affairs;
2. Education should make every effort to inform those within its Department that it is important to avoid making

unnecessary reference to potential applicants or third parties in email exchanges that are principally about negotiations, consultations or other sensitive exchanges between different levels of government and that remotely involve the other parties to whom they refer.

Key Words: Advice, email, intergovernmental relations, information received in confidence, Third Party.

Statutes Considered: *Nova Scotia Freedom of Information and Protection of Privacy Act s. 2, 3(1)(i), 5(1), 12(1)(a) and (b), 14(1), 14(2)*

Case Authorities Cited: *Chesal v. Attorney General of Nova Scotia, 2003 NSCA 124; Do-Ky et al. V. Canada (Ministers of Foreign Affairs and International Trade) (1999), F.C.J. No. 673; Lavigne v. Canada (Officer of the Commissioner of Official Languages) (2002) S.C.J. No. 55; McLaughlin v. Halifax-Dartmouth Bridge Commission (1993), 125 N.S.R. (2d) 288; O'Connor v. Nova Scotia (Minister of Priorities and Planning Secretariat) (2001) 197 N.S.J. No.360; FI-02-49; FI-03-51; FI-05-11; LA-2007-001.*

REVIEW REPORT FI-07-04

BACKGROUND

The Applicant made an Application for Access to a Record by letter to the Department of Education ["Education"] dated October 31, 2006 for the following:

> *A thorough search of the following information for the period from January 1, 2006 to and including October 1, 2006, any and all notes, memos, concerns, documentation, information, etc. concerning or pertaining to [the Applicant] and/or [the Applicant's company A]. Any and all written communications between the Department of Education and the [Third Party] and the Student Assistance Office of the Department of Education pertaining to or concerning [the Applicant], [the Applicant's company A], and/or [the Applicant's company B]. A file search at the Student Assistance Office, Department of Education Private Career Colleges Division and the Department of Education Offices of the Minister and Deputy Minister files, for any information pertaining to [the Applicant's company B].*

The request was received by Education on December 2, 2006. On December 12, 2006, Education made the following decision and refused the Applicant access to all the information contained in the Record on the basis of two discretionary exemptions; s. 12(1) and s. 14(1) of the *Act.*

Records that you sent to the Department, or which the Department sent to you, were not considered for this application, as per your wishes expressed in previous applications for records. Four pages of records were identified in a records search. Access to these four pages of records is refused for the following reasons [cites s. 12(1), 14(1) and 14(2) of the Act]

On December 18, 2006, the Applicant filed a Request for Review asking that the Review Officer recommend that the head of the public body give access to the Record as requested in the Applicant's Application for Access to a Record. By letter dated January 12, 2007, counsel for the Applicant clarified that the Request for Review was intended to be filed by the Applicant on behalf of himself and two corporate entities [herein referred to as Applicant companies A and B], though the original request for access to information was signed only by the Applicant in his personal capacity.

On January 26, 2007, Education provided the Record to the Review Office with a cover letter, which stated:

We decided that severing was not possible with these records, and that it was necessary to refuse disclosure.

On March 6, 2007, the Applicant, through his counsel, made a submission to the Review Office. The letter provided clarification as to what the Applicant was seeking in the Record. The letter stated in part:

What the Applicant is seeking in this case are the nature and contents of complaints that are made to the Nova Scotia Department of Education.

Mediation was partially successful and the Applicant, who remained dissatisfied, requested a formal Review on May 9, 2007.

RECORD AT ISSUE

The Record at issue contains four pages of email correspondence including three emails to set up a meeting and one email that is an exchange between staff members of Education. The dates of the emails are: April 12, 2006, April 13, 2006 (2 emails) and June 15, 2006. The Third Party referred to in the Record was not contacted by Education or the Review Office. The Record is four emails between members of the Education who are arranging a meeting with a Third Party from another level of government who has brought forth an issue, which is under Education's jurisdiction.

APPLICANT'S SUBMISSION

On March 6, 2007, counsel for the Applicant made a submission to the Review Office in favour of providing access to the Record, which are summarized as follows:

1. The Applicant is seeking the nature and contents of complaints made to Education;

2. There are precedents from the Review Officer where at least the substance of complaints (if not the names) have been disclosed;
3. The Record should be severed and released in accordance with a case involving the Department of Community Services *[FI-02-49]* where the Review Officer found that the Public Body had been able to disclose the source of the complaints without releasing personal information such as names;
4. The Record should be severed and released in accordance with a case involving Environment and Labour *[FI-05-11]* where the Review Officer decided that any of the complaints and the information in the complaints should be released including names of public officials, but excluding names of individuals who are not public officials.

PUBLIC BODY'S SUBMISSION

Education made its initial submission to the Review Officer on January 26, 2007 reiterating its reliance on exemptions in s. 12(1)(a), 12(1)(b), 14(1) and 14(2).

After consulting with the Freedom of Information and Protection of Privacy Review Officer and participating in mediation, Education provided a further submission to the Review Officer. The purpose of that submission was to provide clarification regarding its exercise of discretion under the two discretionary exemptions claimed. The November 9, 2007 submission from Education stated:

1. Education takes its duty to assist and to provide a right to access personal information very seriously in every decision made by the Department, in order to honour the purposes of the *Act*;
2. Prior to refusing access in this case, Education considered whether the information could be released, even though it potentially fell under discretionary exemptions;
3. Education continued to emphasize the importance of its work in relation to other governments;
4. Education provided a list of the factors it took into account in exercising their discretion, which read as follows:

    a. The general purpose of the legislation is for public bodies to make information available and Education believes it released as much of the Record as possible;
    b. The historical practice of Education is to release as much information as possible while ensuring at the same time that no harm would result, and in particular, harm in relations with other governments;
    c. The Record in this particular instance that involves the Applicant are very sensitive and disclosure will definitely cause harm to intergovernmental relations;
    d. Disclosure of any additional portion of the Record will not increase public confidence in the operations of Education;

e. Public confidence and the endowment of the mandate to negotiate on behalf of citizens may significantly decrease by releasing the Record;
f. Release of the Record could effectively reduce other governments' ability to freely discuss issues in confidence;
g. Education has not been informed of any sympathetic or compelling reason to release the information;
h. The information was not about the Applicant.

When the formal Review began, a number of questions remained outstanding. Therefore, on November 19, 2007, the Review Officer posed a number of specific questions to Education to which the Public Body was asked to respond by November 23, 2007. Education provided responses to the questions posed in a further submission that was received on December 5, 2007. The focus of this additional request by the Review Officer was to advise Education that it was necessary to provide actual evidence to the Review Officer in order to claim the exemptions under s. 12 when it involved probable harm between two levels of government. Education provided this evidence with its final submission on a confidential basis, arguing that if the evidence was referred to in the Review Report, the purported harm that would result from disclosure through an access request would result in the same harm by virtue of the Review Report being made public.

DISCUSSION:

The purpose of the *Act*, which has been a broad and purposeful interpretation, 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,***
> ***(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,***
> *(iii) specifying limited exceptions to the rights of access,*
> *(iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and*
> *(v) providing for an independent review of decisions made pursuant to this Act; and…*
> *(c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.*
> *[Emphasis added]*

Section 3(1)(i) of the *Act*, provides a definition of *personal information:*

> *personal information means* ***recorded*** *information about* ***an identifiable individual****, including…*
> *(viii) anyone else's opinions about the individual,*
> *[Emphasis added]*

The Applicant has a right of access to any record in the custody or under the control of a public body pursuant to s. 5, once a request has been received. Section 5 of the *Act* states:

> *5(1) A person has a right of access to any record in the custody or under the control of a public body upon complying with Section 6.*

Education has relied on the following two discretionary exemptions:

> *12(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expect to*
> *(a) harm the conduct by the Government of Nova Scotia of relations between the Government and any of the following or their agencies:*
> *i. the Government of Canada or a province of Canada,*
> *ii. a municipal unit or school board,*
> *iii. an aboriginal government,*
> *iv. the government of a foreign state, or*
> *v. an international organization of states;*
> *(b) reveal information received in confidence from a government, body or organization listed in clause (a) or their agencies unless the government, body, organization or its agency consents to the disclosure or makes the information public.*
>
> *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.*

In a federated state such as Canada where the Constitution sets out the mandates of the various levels of government, considerable overlap in jurisdictions is inevitable. This requires governments to consult, negotiate and cooperate at and between all levels – provincial and federal, provincial and territorial, provincial and provincial, provincial and municipal, provincial and aboriginal, provincial and international – all the combinations contemplated by s. 12 of the *Act*.

The whole of s. 12 has been cited by Education in its submission to the Review Officer. The reason given is that Education believes that to cite the specific subsection[s] or paragraph[s] under s. 12 has the potential to disclose the identity of which government or level of government whose discussions are contained in the Record, discussions which they allege, if made public, could reasonably be expected to harm relations between them. In essence, Education argues that even the identity of which levels of government could impact adversely on the relations between them.

The Record, in this case, is comprised of an exchange of emails between Education and other parties attempting to set up a meeting to discuss an issue of mutual interest. The Record contains factual information about a proposal as to how to proceed. The identity of members of other public bodies other than employees of Education, some

of whose identities have already been disclosed could, Education argued, impact negatively on relations between levels of government involved just by virtue of the fact of who the employee was.

In both *McLaughlin v. Halifax-Dartmouth Bridge Commission* and *Chesal v. Attorney General of Nova Scotia* exemptions sought under s.12(1)(a) and s.14(1) were interpreted to mean could reasonably be expected to result in probable harm. In considering whether disclosure of the information could reasonably be expected to "harm the conduct by the Government of Nova Scotia of relations between the Government and the aboriginal government" Justice Coughlan in the *Chesal* case stated:

> *The FOIPOP Act is to be broadly interpreted in favour of disclosure (McLaughlin v. Halifax-Dartmouth Bridge Commission 1993 CanLII 3116 (NS C.A.), (1993), 125 N. S.R. (2d) 288 (C.A.)). Bearing that direction in mind,* ***I find the phrase in the Act "could reasonably be expected to harm" is to be read as "could reasonably be expected to result in probable harm".***
> *[Emphasis added]*

To satisfy the requirements of s. 12(1)(a) and (b) of the *Act*, the onus is on Education to demonstrate that:

- disclosing the emails could ***reasonably be expected to result in probable harm*** the Government of Nova Scotia's relations with other levels of government; or
- that disclosure would reveal information received in confidence from another level of government without their consent.

Again, the *Chesal v. Attorney General of Nova Scotia* decision of the Court of Appeal with respect to s.12 is helpful. The decision stresses the importance of insisting that the public body opposing disclosure present specific evidence of potential harm if the records are disclosed. That case has been relied upon in prior Reviews from this Office. In *FI-03-51*, the then Review Officer Darce Fardy stated:

> *Justice Bateman began her analysis of the case by referring to O'Connor v. Nova Scotia (Minister of Priorities and Planning Secretariat) (2001) 197 N.S.J. No.360 which is recognized as the leading decision on the FOIPOP Act. In para 26, Justice Bateman said that principles found in O'Connor must guide the resolution of requests for disclosure under the Act. In para 57 of O'Connor Justice Saunders wrote:*
>
> > *I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in other provinces and territories in Canada.*
>
> *Justice Bateman agreed with O'Connor that exemptions under the FOIPOP Act, (including s. 12) "are to be construed narrowly."*

*Justice Bateman also wrote that "Section 12(1)(a) of the **FOIPOP Act** does not establish a class exemption from disclosure of all information flowing between governments." She referred to a Federal Court of Appeal interpretation of a somewhat similar exemption (Section 15 of the Federal Information Act). In that case, which dealt with diplomatic notes, the Court said:*

> *"there is no presumption [in s.15(1)] that such notes contain information the disclosure of which could reasonably be expected to be injurious to the conduct of international relations. There must be evidence of this." (Do-Ky et al. V. Canada (Ministers of Foreign Affairs and International Trade) (1999), F.C.J. No. 673.)*

Justice Bateman makes it clear that proof of the harm alleged is required. She explores definitions for "reasonable" and "expect" and concludes, as have other courts, that "the language of the statute requires that there be more than a mere probability of harm."

The Supreme Court of Canada has said the reasonable expectation of harm test requires "a clear and direct connection between the disclosure of specific information and the injury that is alleged." [Lavigne v. Canada (Officer of the Commissioner of Official Languages) (2002) S.C.J. No.55] In Chesal, the Court of Appeal adopts "the same formulation for the evidence required to meet a reasonable expectation of harm" under the FOIPOP Act.
[FI-03-51]
[Emphasis in the original text]

The solicitor for the Applicant queries whether the release of the information being sought will affect a whole government body or agency, or simply one or a few members of same. The exemption, the Applicant submits, is for communications that will affect government bodies, not individual members working within government. I am satisfied based on the evidence provided by Education in confidence to the Review Officer that:

1. the Record contains very little personal information about the Applicant;
2. the release of portions of the Record could result in real harm to the relations between two levels of government and is not simply information about individuals working within various government agencies.

Not all portions of the Record would cause harm if released, therefore, the Record can be provided in severed form. Because s. 12 of the *Act* has been found to apply to some of the Record, it would not be necessary to consider s. 14. However, as the

Applicant relied on the case law under s. 14 of the *Act* and in order to provide further clarity, it will be discussed. The second exemption relied upon by Education was s. 14 of the *Act*, claiming that the email exchange contained information that constituted "advice" developed by or for a public body.

The solicitor for the Applicant stated:

> *[T]he Nova Scotia Court of Appeal in McLaughlin v. Halifax-Dartmouth Bridge Commission, 1993 CanLII 3116 (NSCA), it was determined that it **expects** that "advice" with respect to assessing the Freedom of Information Act, be given its "ordinary meaning." In other words, that background material is not deleted and that it is truly what would normally be associated in the ordinary meaning of "advice", which is exempted.*
> *[Emphasis in the original text]*

The solicitor reiterates the point made in *McLaughlin v. Halifax-Dartmouth Bridge Commission* that the *Act* be broadly interpreted in favour of disclosure.

A case recently reviewed in Saskatchewan provided a comprehensive analysis of the meaning given to "advice" in various jurisdictions. In referring to a case in the BC Court of Appeal, Saskatchewan Commissioner Dickson stated:

> *The Court of Appeal held that it is not necessary in order for it to qualify as "advice" that the information must communicate future action and not just an opinion about an existing set of circumstances. Levine J.A. in delivering the court's judgment stated that:*
>
> > *In my view, it is clear from s. 12 that in referring to advice or recommendations, the Legislature intended that "information…the purpose of which is to present background explanations or analysis…for…consideration in making a decision…" is generally included. There is nothing in s. 13 that suggest that a narrower meaning should be given to the words "advice" and "recommendations" where the deliberative secrecy of a public body, rather than of the cabinet and its committees, is in issue.*
> >
> > *I am similarly of the view that the word "advice" in s. 13 of the Act should not be given the restricted meaning adopted by the Commissioner and the chambers judge in this case. In my view, it should be interpreted to include an opinion that involves exercising judgment and skill to weigh the significance of matters of fact. In my opinion, "advice" includes expert opinion on matters of fact on which a public body must make a decision for future action.*
> > *[LA-2007-001]*

The BC Commissioner was critical of the expansive definition given to "advice" by his Court of Appeal stating it would seriously erode the public's right of access to information including previously available personal information.

In this Review, the Record identifies an issue being considered by those who are party to the emails, refers to individuals who should be involved and proposes a meeting to discuss strategy. Arranging a meeting to determine a course of action that may involve the development of advice, will not itself constitute "advice" for the purpose of s. 14 as defined by the courts. The information contained in the severed portions of the Record and the proposed plan, therefore, fall short of meeting the definition of what the Legislative Assembly intended by the word "advice" in s. 14(1) of the *Act.*

The solicitor also relies on Review Report *FI-02-49* [which was incorrectly cited by the Applicant as *FI-99-59* which resulted in the wrong Report being provided in support of the submission], where the lawyer argues the former Review Officer for Nova Scotia determined that the Department of Community Services had disclosed the sources of the complaints without disclosing the names or other identifying personal information. That case, however, involved the Department claiming s. 20 of the *Act,* which has not been claimed here. As such the case cited is not applicable.

The solicitor also cited Review Report *FI-05-11*, again a case decided under s. 20 of the *Act* involving when personal information should be released, about whether the names of public servants should be released and when releasing non government names would be an unreasonable invasion of privacy. This case is distinguishable because this is not a case of personal information [the personal information about the Applicant having been provided].

Regardless, having found that s. 12 of the *Act* applies to portions of the Record that can be withheld by Education, any argument under s. 20 is unnecessary to decide.

FINDINGS:

1. The Applicant's request for access was in part for his personal information for the period from January 1, 2006 to and including October 1, 2006, any and all notes, memos, concerns, documentation, information, etc. concerning or pertaining to the Applicant;
2. In addition, the solicitor for the Applicant sought information about the Applicant's companies. This kind of information does not fall within the definition of 'personal information';
3. Some of the individual names being withheld are Third Parties while others are public servants from departments other than Education. Ordinarily, under the definition of what constitutes personal information, employees' names can be revealed. In this case, however, to reveal the names of those involved in the email exchange would disclose the particulars of the intergovernmental relations issue;
4. The s. 12 exemption is intended to protect information that will affect relations between governments bodies not protect relationships between individual members who are employees of different levels of government;

5. Education did not co ntact the Third Party[ies] to seek consent to the release of name[s] in the Record. Education did not need t o contact t he Third Party[ies] as that portion of the Recor d is not perso nal information about t he Applicant and, in any event, Education did not intend to release the information;
6. The information contained in the severed portions of the Record fal ls short of what the Legis lative Assembly intended by t he word "advice" in s. 14(1) of the *Act*. Education' s reliance on the s. 14 (1) exemption – advice – is rejected. An exchange of email p lanning when to discuss a course of action does n ot constitute advice in this case;
7. Based on the final submission provided b y Education, I am satisf ied that the evidence provided meets the test contained in s. 12 of the *Act* and that t he release of the whole Record could reasonably be expecte d to harm the c onduct of rel ations between the P rovince and another leve l of government;
8. Section 12 does not a pply to all portions of the Record, as harm wo uld not result from the re lease of the Record in se vered form. On ly portions of the Record which would revea l which le vels of gov ernment are invo lved could cause harm intergovernmental to relations;
9. At the direct ion of the Review Officer, Education was asked to inquire as to whether the perso n providing information to Education in the emai l exchange conse nted to its release, in whole or in part, whi ch they did not, believ ing that to do s o would have a serious and negative effect on intergove rnmental relations. This evidence supp orts the finding that s. 1 2 of the *Act* applies.

RECOMMENDATIONS:

1. Education sh ould provide a copy of the Record t o the Ap plicant inc luding any personal information, sever ing only the portions which would harm intergove rnmental affa irs;
2. Education sh ould make every ef fort to inform those within its Department that it is important to avoid making unnecessary reference to potenti al appl icants or third parties in emai l exchanges that are princ ipally about negotiations, consultations or other sensitive exchanges between different levels of government and that remotely invo lve the other part ies to whom the y refer.

Respectfully,

Dulc ie McCa llum
Freedom of Information an d Protection of Privacy Rev iew Officer for Nova Scotia