REPORT
Nova Scotia Freedom of Information and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-07-14

Report Release Date: September 21, 2007

Public Body: Executive Council

Issue: Whether Executive Council properly exercised its discretion to sever information in applying the exemption in s. 13(1) (Cabinet Confidence) or whether the information constitutes background information under s. 13(2) and should be released.

Summary: An Applicant requested a Review of an Executive Council decision to apply s. 13(1) (Deliberations of Executive Council) of the *Freedom of Information and Protection of Privacy Act* in withholding part of a Record. The Applicant specifically, requested the Review Officer to consider whether s. 13(2)(c) overrides s. 13(1).

The Review Officer found the decision by the Executive Council to provide a response based on a broad interpretation of the request for access is consistent with the duty to assist in s. 7 of the *Act* and that the Executive Council released as much of the information to the Applicant that formed part of its deliberations prior to implementation of the decision as it could without comprising the principle of Cabinet confidentiality.

The Review Officer upheld the decision of the Executive Council to exercise its discretion to withhold a portion of the Record under s. 13(1).

Recommendation: Executive Council re-affirm its decision to sever under s. 13(1) in a letter to the Applicant with a copy to the Review Officer.

Key Words:	Ad Hoc Committee, Background Information, Cabinet Confidences, Clearly in the Public Interest, Executive Council, Factual Material, Matter of Public Record, Oath of Allegiance, Oath of Confidentiality.
Legislation Considered:	*Nova Scotia Freedom of Information and Protection of Privacy Act s. 2(b), 3(1)(a)(xii), 4(1), 5(2), 13(1), 13(2)(c), 31(1), 45(1).* *Freedom of Information and Protection of Privacy Regulations s. 24(1), s. 24(2).*
Case Authorities Cited:	*O'Connor v. Nova Scotia, 2001 NSCA 132 (CanLII), 2001 NSCA 132, O'Connor v. Nova Scotia, 2001 NSSC 6 (CanLII), 2001 NSSC 6, FI-02-58, Nova Scotia (Department of Justice) (Re), 2002 CanLII 12493 (NS F.O.I.P.O.P.), Babcock v. Canada (Attorney General), 2002 SCC 57 (CanLII), [2002] 3 S.C.R. 3, 2002 SCC 57, FI-02-77, Nova Scotia (Department of Justice) (Re), 2002 CanLII 15363 (NS F.O.I.P.O.P.).*
Others Cited:	*Management Guide #100, Chapter 3, for the Government of Nova Scotia, Procedures Manual - FOIPOP (2005), The Access to Information Act and Cabinet Confidences, A discussion of New Approaches, 1996, Treasury Board Secretariat, Access to Information Act: Policies and Guidelines, [Ottawa, 1983], Confidences of the Queen's Privacy Council for Canada, Province of Ontario, Report of the Royal Commission on Freedom of Information and Protection of Privacy, vol.2, Freedom of Information, Freedom of Information and Protection of Privacy Act, R.S.O. 1990 c. F.31, Information Commissioner of Canada, The Access to Information Act and Cabinet Confidences: A Discussion of New Approaches, Government Information: Access and Privacy, McNairn and Woodbury, Thomson Carswell.*

REVIEW REPORT FI-07-14

BACKGROUND

The Applicant made an access to information request on February 5, 2007 for the following:

> *All background information the purpose of which was to present explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision with regard to the establishment of Conserve Nova Scotia, as per s. 13(2)(c) of the Freedom of Information and Protection of Privacy Act.*

In its March 2, 2007 decision, the Executive Council released part of the information and relied on the s. 13(1) exemption of the *Freedom of Information and Protection of Privacy Act* ["*the Act*"] for the severed portion of the Record. The decision stated:

> *We have granted access in full to the records enclosed on p. 18 and p. 34.*
>
> *We have granted access in part to the records enclosed on p. 1-17, p. 19-33 and p. 35-42.*

In its decision, Executive Council also refused access to the whole of one document contained in the Record, information referred to as follows:

> *Minute letter recording decisions by Executive Council with respect to the establishment of Conserve Nova Scotia (see p. 43, enclosed).*

No exemption is cited for this information in the decision letter, but s. 13(1) is referred to on the severed Record provided to the Applicant.

Subection 13(1) of the *Act* was the basis on which the Executive Council severed the information from the Record, which provides a discretionary exemption intended to protect Cabinet Confidences.

> *13(1) The head of a public body may refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.*

On March 6, 2007 the Applicant requested a Review of the decision by Executive Council dated March 2, 2007 and, specifically, requested the Review Officer to consider whether s. 13(2)(c) overrides s. 13(1) that had been relied upon by the Executive Council to withhold a portion of the Record. Subsection 13(2) provides:

Subsection (1) does not apply to
(a) information in a record that has been in existence for ten or more years;
(b) information in a record of a decision made by the Executive Council or any of its committees on an appeal pursuant to an Act; or
(c) background information in a record the purpose of which is to present explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
(i) the decision has been made public,
(ii) the decision has been implemented, or
(iii) five or more years have passed since the decision was made or considered.
[Emphasis added]

On May 18, 2007, the Executive Council provided a letter indicating their position that there was no other material in the documents listed that can be defined as background information as defined by the *Act* and the *Freedom of Information and Protection of Privacy Regulations ["Regulations"]*. The public body submitted that the matter should be referred to the Review Officer by-passing mediation because the Executive Council believes the existing jurisprudence on the question of Cabinet Confidentiality governs this case and the role of Cabinet in a parliamentary tradition is not a subject appropriately subjected to the give and take of the mediation process.

The matter was referred directly to the Review Officer.

RECORD AT ISSUE

The Record consists of Cabinet documents provided to Executive Council in September and October 2006 just prior to its decision with respect to the implementation of Conserve Nova Scotia.

The original request for access to information read literally refers to *all background information . . . in making a decision with regards to the establishment of Conserve Nova Scotia* and makes no reference to deliberations of Executive Council with respect to the implementation of the decision to establish Conserve Nova Scotia. It appears that the Executive Council, in responding to the access request, gave a broad interpretation to the request by identifying all documents considered by Cabinet with respect to the ***decision to establish and to implement the decision to establish*** Conserve Nova Scotia. Executive Council released all the information in the Record other than what it considers to fall under s. 13(1) of the *Act*.

The Executive Council in a submission to the Review Officer provided details of the severed documents that fell into two categories; Submission to an Ad-hoc Committee of Executive Council and a Submission to Cabinet including a report and recommendation, two briefing notes, a communications plan, a cover letter for the aforementioned, a staff memorandum regarding the report and recommendation to Cabinet, a minute letter to Cabinet and a memorandum to Executive Council regarding the establishment of Conserve Nova Scotia.

APPLICANT'S SUBMISSION

The Applicant's March 8, 2007 submission to the Review Office included the following arguments in favour of releasing the entire Record requested including the withheld portion:

1. The Executive Council claims that s. 13(1) applies, which gives a public body the discretion to refuse access to information if it would reveal the substance of its deliberations. Because Conserve Nova Scotia, the subject of the information requested, has been in existence and operational for some months, the Applicant argues the Executive Council decision has, therefore, been implemented. As the decision has been implemented and it is public, s. 13(2)(c) should apply, which deems the Executive Council deliberations exemption inoperable;
2. One of the exceptions to the Cabinet Confidences exemption applies to background information. The Applicant alleges that the information severed from the Record fits squarely within the definition of background information because it is:

    a. a plan or proposal to establish a new program,
    b. factual material, and
    c. an appraisal of resources available.

On July 12, 2007, the Applicant made a submission as part of the formal Review, which made the following points:

1. The Applicant claimed that the Executive Council relies on s. 13(1) on a regular basis to refuse access to government records;
2. Section 13(2)(c) provides an exception to subsection (1) with respect to background information if the decision has been made public, implemented or five years has passed since it was made;
3. The decision to establish Conserve Nova Scotia was made public in June 2006, eight months before the Applicant made the request for access to information;
4. The decision to establish Conserve Nova Scotia was implemented in October 2006, four months before the application to Executive Council was made;
5. Because the decision was made public and has been implemented, s. 13(2) should override s. 13(1);
6. Section 13(2)(c) should be upheld by the Review Officer to prevent the "heavy-handed use of s. 13(1) of the *Act*, which is completely at odds with the spirit or intention" of the legislation;
7. Informally the Applicant was told by the public body that the severed records were not of any interest or value, a contention, according to the Applicant, that misses the point;
8. The Applicant, requests a Review of the decision by the Executive Council "as soon as possible, in order that the [Applicant] may adopt the Review Office's [sic] interpretation of Section 13(2)(c) of the FOIPOP Act for use in its research work."

PUBLIC BODY'S SUBMSSION

On May 18, 2007, Executive Council made its initial submission to the Review Office providing an explanation as to their reasoning behind refusal to disclose the withheld information. That submission is summarized as follows:

1. Executive Council believes that s. 13(1) of the *Act* protects the principle of cabinet confidentiality and this principle is at the heart of their decision to exercise their discretion not to disclose the severed information.
2. The principle of cabinet confidentiality has been upheld by the present and former governments in Nova Scotia.
3. By past practice and convention, waiver of cabinet privilege has only been by consent of the Cabinet/Executive Council.
4. Courts have recognized the primary purpose of the confidentiality provision to be to maintain the "proper functioning of government" by preventing the substance of Cabinet's deliberations from being disclosed before it is in the public interest to do so.
5. Even where a government chooses to be open and make a Cabinet decision public that does not mean dispensing with the confidentiality of the documents upon which that decision was based would be appropriate. In fact, to do so would set a damaging precedent to the principle of Cabinet confidentiality, which the Courts have judged more important to the public interest than any particular circumstances.

On June 15, 2007, Executive Council submitted a formal representation to the Review Officer. The main points of that submission are as follows:

1. The section of the *Act* at issue in this case is s. 13(1) not s. 13(2);
2. The issue is about the fundamental principles underlying the tradition and role of Cabinet and their deliberations and thus falls squarely under s. 13(1);
3. Section 13(2) does not apply because the information severed does not fall within the definition of "background information." The *Act* provides a test, in s. 3(1)(a), for what constitutes background information listing 12 specific items including "factual material." The latter has been further defined by Regulation, in s. 24(1), to mean "a coherent body of facts, separate and distinct from interpretations of, reactions to or advice and recommendations in respect of facts." The severed information does not fall within the definition of "factual material" nor any of the other 11 categories listed in the definition of "background information" and thus does not fall under s. 13(2);
4. The information does fall within s. 13(1), which is discretionary, meaning a public body is not required to disclose the information to an Applicant if it would reveal the substance of deliberations of the Executive Council;
5. The test question as to what is meant by "substance of deliberations" as articulated by Nova Scotia Court of Appeal, in *O'Connor v. Nova Scotia* is

> *Is it likely that the disclosure of the information would permit the reader to draw <u>accurate</u> inferences about Cabinet deliberations? If the question*

is answered in the affirmative, then the information is protected by the Cabinet confidentiality exemption under s. 13(1).
[O'Connor v. Nova Scotia, 2001 NSCA 132 (CanLII), 2001 NSCA 132, at para. 92]

6. Making some of the information public does not by extension render the severed portion of the Cabinet documents that contain the same or similar information appropriately made public.
7. The severed sections delivered advice, recommendations and/or policy considerations at the time of the Executive Council deliberations and remain as such even after a decision is made, regardless of what decision is made;
8. Section 13(1) is one example of where the *Act* recognizes the importance of withholding disclosure in "limited and specific, necessary exemptions" as referred to in s. 2;
9. Even where the information may technically be caught by the exemption, because it is discretionary, the public body may decide to release in the public interest. Similarly, a public body may decide not to release if disclosure would interfere with the public interest;
10. In deciding the question of public interest, there are two competing interests at stake; the presumption under s. 2 of the *Act* of the public interest in the right or need to know and the exemption in s. 13 of the public interest in keeping the business of Cabinet government manageable;
11. In relying on jurisprudence, Executive Council argues:

    a. Primary rationale that maintaining Cabinet confidences is in the public interest is to allow for the proper functioning of government;
    b. The most important reason to refuse access is that disclosure would create or inflame criticism calculated to entrap or confuse that may be ill informed or politically motivated;
    c. The business of government is difficult enough and disclosure could lead to harassment making Cabinet government unmanageable.

12. In exercising its discretion under s. 13(1) of the *Act*, Executive Council considered the following:

    a. Historical practice in Nova Scotia is that in keeping with Cabinet solidarity, Cabinet will only waive Cabinet privilege with the consent of the entire Cabinet.
    b. There is only one example of when Cabinet waived privilege and on that occasion took that extraordinary step because Cabinet unanimously judged the public interest in the right/need to know to be an overriding factor [Westray mining tragedy];
    c. Is it an individual or an organization making the request?
    d. Is the information otherwise available?
    e. Consider whether the argument made by the Applicant for public interest is one of substance or merely to gain access to the documents and whether the facts sought to be established by the documents can or cannot otherwise be proved.

On August 21, 2007, the Review Officer requested more information from the Executive Council; what format the oath each member of Executive Council took with respect to Cabinet confidentiality? The Oath of Office and the Oath of Allegiance were provided.

In addition, the Review Officer sought further clarification with respect to the categories of documents contained in the severed portion of the Record. The Executive Council confirmed that the package of information contained in the Record represents the package that went before an Ad Hoc Committee on September 13, 2006, and to Cabinet on October 11, 2006, prior to the decision to implement Conserve Nova Scotia. Executive Council confirmed that it had no responsive documents concerning the decision to *establish* Conserve Nova Scotia, a decision that was made public in June 2006; information about the decision appeared in documents already publicly available.

In addition to documents related to Cabinet, Executive Council claimed the s. 13(1) exemption applied to information before the Ad Hoc Committee. Management Guide #100, Chapter 3, for the Government of Nova Scotia, provides a useful definition for Ad Hoc Committee[s]:

> *An Ad Hoc Committee(s) may be established as a sub-committee of the Treasury and Policy Board and shall report to the Treasury and Policy Board and/or Executive Council. The responsibility of the Ad Hoc Committee(s) shall be to review all matters dealing with specific topics of importance as they arise, especially when issues are of a corporate or government-wide nature that require approval of Treasury and Policy Board and/or Executive Council.*
>
> *All matters and things coming before the Ad Hoc Committee are subject to Cabinet Privilege to the extent that they would be if they came before the Executive Council.*
>
> *Those members of the Ad Hoc Committee who are not Executive Council members shall sign an Oath of Confidentiality.*

DISCUSSION

Section 13(1) establishes a discretionary exemption intended to protect Cabinet Confidences. It reads:

> *13(1) The head of a public body may refuse to disclose to an applicant information that would reveal the substance of deliberations of Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.*

This exemption has been used as an example of a type of exemption referred to in s. 2(b) of the *Act* which reads:

2(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
[Emphasis added]

In *O'Connor*, Justice Saunders in commenting on the values underlying the access to information legislation and its purposes, stated:

I have already commented upon the Legislature's clearly expressed intention to promote values like responsibility, accountability and transparency for the mutual benefit of government and its citizens under FOIPOP legislation. All of this is reflected in this province's unique purpose section set out in s. 2 of the Act. What s. 13 provides is a carefully worded exemption to preserve and protect the principle of Cabinet secrecy for the important reasons mentioned by Justice La Forest in Carey v. Ontario, supra. Thus in my view s. 13 is an example of the ***limited and specific, necessary exemptions*** *referred to in s. 2(b) of FOIPOP. Section 13(1) leaves a discretion to the head of a public body that will extend broadly to the whole substance of Cabinet and Cabinet committee deliberations but nevertheless is limited and specific in the sense that it is exempted from the rules of disclosure imposed on all other information in government hands. [O'Connor v. Nova Scotia, 2001 NSCA 132 (CanLII), 2001 NSCA 132, at para. 107]*
[Emphasis in original]

In Nova Scotia confidentiality of deliberations by Executive Council is information, which can be protected by an exemption from the right of access and not by an exclusion from the scope of the legislation. In some jurisdictions the section is mandatory and requires a public body to refuse access if it falls within the definition of Cabinet Confidences. In those jurisdictions, a review will decide if the information is a Cabinet Confidence, and if it is, the public body must refuse access to the information. In Nova Scotia a request for such information is subject to the right to Request a Review, which looks at whether the information is a Cabinet Confidence and whether the public body has properly exercised its discretion to refuse or permit access. Pursuant to s. 45(1) of the *Act*, the onus is on the Executive Council to justify the exercise of discretion to sever some or all of the information:

45(1) At a review or appeal into decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right to the record or part.

The Nova Scotia FOIPOP Procedures Manual explains s. 13(1) as follows:

The Act provides that a public body may refuse to disclose records which would reveal the substance of Executive Council deliberations including advice, recommendations, policy considerations, draft legislation or regulations.

Even if the information meets the criteria of the exemptions, the public body must still go through the process of exercising its discretion in its disclosure decision.

[Procedures Manual - FOIPOP (2005), p. 4-5]

What distinguishes background information from advice to Cabinet is what distinguishes the information released by Executive Council under s. 13(2) and what was severed or withheld under s. 13(1); Cabinet confidences are about advice received that identifies Executive Council's deliberations and is qualitatively different from explanations or analysis that constitute background information only. Associate Chief Justice MacDonald in the *O'Connor*, Nova Scotia Supreme Court decision, quotes Commissioner Linden [as he was then] who opined:

> *. . . The general purpose of the section 13 exemption has been discussed in Order 94 (Appeal Number 890137) released on September 22, 1989. At page 5, I stated that:*
>
> > *. . . in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the Act stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the Act. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making…*
>
> *. . . In my view, "advice", for the purposes of subsection 13(1) of the Act, must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.*
> *[O'Connor v. Nova Scotia, 2001 NSSC 6 (CanLII), 2001 NSSC 6, at para. 25]*

The Nova Scotia Review Officer has reported on the issue of substance of deliberations of the Executive Council in previous Reviews. A former Review Officer put it this way:

> *I think it is important to consider what is meant by "the substance of deliberations" of the Executive Council. In Review FI-00-01 I adopted a definition used by the Alberta Information and Privacy Commissioner: "substance" is the essence of what was considered and "deliberations" are "the act of weighing and examining reasons for and against a contemplated action or course of action." In my view, the "substance of deliberations" refers to the body of information and documents which the Cabinet used in reading its decision.*
>
> *A definition of "advice" is helpful. Alberta's Commissioner defined it as "an opinion, view or judgement" based on the knowledge and experience of an individual and "expressed to assist the recipient whether to act and, if so, how" (Order 97-007). The Ontario Commissioner accepted "thoughts" and "views" as well as "advice," if they lead to a suggested course of action.*

[FI-02-58, Nova Scotia (Department of Justice) (Re), 2002 CanLII 12493 (NS F.O.I.P.O.P.), at p. 3]

In *O'Connor*, the Nova Scotia Court of Appeal cited with the analysis approach for s. 13(1) taken by the BC Privacy Commissioner, referred to in *Aquasource*:

It is the approach I favour and is expressed in this way:

…The information is prepared for Cabinet and its committees. It forms the basis for Cabinet deliberation and so its disclosure would reveal the substance of Cabinet deliberations because it would permit the drawing of accurate inferences with respect to the deliberations.

Thus the question to be asked is this: Is it likely that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations? If the question is answered in the affirmative, then the information is protected by the Cabinet confidentiality exemption under s. 13(1).
[Emphasis in the original]
[O'Connor, at para. 92]

In 1996, the Information Commissioner of Canada solicited a paper on Cabinet confidences. In its introduction, the paper succinctly characterizes the impact of access legislation on Canadian parliamentary tradition when it stated:

The Access to Information Act has operated for almost 15 years in Canada to help make government more open, understandable and accountable to the citizenry. It established a "right to know", set standards for what the government could legitimately keep secret and affixed to a Westminster-style government a system of review of refusals of access which is independent of government. The effectiveness of access rights, however, depends upon the classes of records which are not accessible."
[The Access to Information Act and Cabinet Confidences, A discussion of New Approaches, 1996]

In Nova Scotia, the *Act* provides for an exemption in the case of deliberations of the Executive Council. A federal policy provides the rationale for protecting Cabinet confidences by excluding them from coverage:

The Canadian government is based on a Cabinet system. Thus, the responsibility rests not on a single individual, but on a committee of ministers sitting in Cabinet. As a result, the collective decision-making process has traditionally been protected by the rule of confidentiality. This rule protects the principle of collective responsibility of ministers by enabling them to support government decisions, whatever their personal views. The rule also enables ministers to engage in full and frank discussions necessary for effective functioning of a Cabinet system of government.

[Treasury Board Secretariat, Access to Information Act: Policies and Guidelines, [Ottawa, 1983], Confidences of the Queen's Privacy Council for Canada]

The key to evaluating whether or not the cabinet confidentiality exemption has been properly applied to a particular document is to rely on the test of ***whether the disclosure would reveal the substance of deliberations of an Executive Council.*** Merely including or attaching a document, such as a department memorandum or a newspaper article, to a Cabinet brief does not, however, necessarily convert that document to a properly excluded record under the exemption. The Williams Commission defined Cabinet documents as follows:

> *…it is useful to assume, for definitional purposes, that Cabinet documents consist only of those documents that have been either generated by or received by Cabinet members and officials in the course of their participation in the decision-making processes. Thus, described, Cabinet documents would include agendas, informal or formal minutes of the meetings of Cabinet committees or full Cabinet, records of decision, draft legislation, Cabinet submissions and supporting material, memoranda to and from ministers relating to matters before Cabinet, memoranda prepared by Cabinet officials for the purpose of providing advice to Cabinet, and briefing materials prepared for ministers to enable them to participate effectively in Cabinet discussions.*
> *[Province of Ontario, Report of the Royal Commission on Freedom of Information and Protection of Privacy, vol.2, Freedom of Information, p.285]*

Considerations a head of a public body may want to bear in mind in determining whether the exemption of cabinet confidentiality applies include, but are not limited to:

1. Has the policy that is the subject of the Executive Council deliberations has been announced or implemented?
2. What is the subject matter of the information contained in the record?
3. Does the record contained draft legislation or regulations?
4. Has the record actually been considered by the Executive Council?
5. Would release of the information disclose the deliberations of Executive Council, policy discussions between Ministers or the particular position taken by a Minister?

Nova Scotia's independent oversight body, the Freedom of Information and Protection of Privacy Review Officer, has the authority to view the record over which cabinet confidentiality has been claimed in order to determine whether or not the exemption has been properly applied.

While cabinet confidences are defined in the *Act* by what does not fit within the exemption, legislation from other jurisdictions, such as Ontario's, offer assistance in providing lists of what kinds of records may fall within the definition:

1. *an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;*

2. *a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;*
3. *a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;*
4. *a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;*
5. *a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultation among ministers relating to government decisions or the formulation of government policy; and*
6. *draft legislation or regulations.*
   [Freedom of Information and Protection of Privacy Act, R.S.O. 1990 c. F.31, s.12(1)]

Citing the Williams Commission in Ontario and the federal *Open and Shut Report*, the Information Commissioner of Canada's discussion paper lists three justifications for cabinet confidences about which there is consensus:

> ***Convention of collective ministerial responsibility:*** *This convention requires that each Cabinet member be accountable for government policy. Thus, at the Cabinet table, each minister should be free to exchange frank and vigorous views with his or her colleagues and to have those views protected.*
> ***Need for candid advice from officials:*** *A corollary of the first justification is the need for ministers to receive candid advice from their officials. That is more likely to occur, it is believed, if advice to ministers is to be provided in confidence.*
> ***Confidentiality of Cabinet's agenda:*** *Finally, it is felt that Cabinet's agenda should be confidential. This will allow cabinet to set its own agenda and carry on discussion without undue political pressures being brought to bear. This type of confidentiality helps ensure that Cabinet decision-making processes are conducted in as expeditious a manner as possible.*
> ***[Emphasis in original text]***
> *[Information Commissioner of Canada, The Access to Information Act and Cabinet Confidences: A Discussion of New Approaches, at p.5]*

In Nova Scotia, each member of Cabinet takes an oath of confidentiality upon being sworn in as a member of the Executive Council. The Oath taken by each member of Cabinet is considered to be at the heart of Cabinet Confidences:

> *The access legislation of most jurisdictions respects the confidentiality of certain records relating to matters before, or to come before, the executive of government as represented by the Cabinet or Executive Council. Information that has been prepared for or submitted to, or that reflects the deliberations of, members of the executive is commonly regarded as a "Cabinet confidence." Such confidences*

are formally protected from disclosure by the oath of office taken by Cabinet members and by official secrets legislation.
[Government Information: Access and Privacy, McNairn and Woodbury, Thomson Carswell, at p. 3-21]

A copy of the oath was requested by the Review Officer during the course of the formal Review. The Oath of Allegiance reads:

PROVINCE OF NOVA SCOTIA

OATH OF ALLEGIANCE

I, xxxxx

BEING APPOINTED TO BE ONE OF HER MAJESTY'S EXECUTIVE COUNCIL FOR THE PROVINCE OF NOVA SCOTIA, DO SWEAR THAT I WILL IN ALL THINGS BE A TRUE AND FAITHFUL COUNCILLOR AND WILL NOT REVEAL ANY OF THE SECRETS ENTRUSTED TO MY CARE AS SUCH. SO HELP ME GOD.

As the Executive Council noted in its submission, the custom in Nova Scotia is that a cabinet confidence will only be made public with the unanimous consent of all members. This custom has been incorporated into the legislation in some jurisdictions including Ontario, where the statute reads, a head shall not refuse to disclose where:

…the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.
[FIPPA BC s. 12(2)(b)]

Whether by custom or by statute, the requirement for unanimous consent is in keeping with parliamentary tradition of government by Cabinet. No such consent has been given in this case.

Similarly all Members of the Legislative Assembly on Ad Hoc Issue Committees of Cabinet swear an Oath of Confidentiality, which reads:

I, _____, do solemnly swear/affirm that I will faithfully and honestly fulfill my duties as a member of the Executive Council Ad-Hoc Issue Committee(s) of Cabinet. That I acknowledge the applicability of Cabinet Confidentiality to all matters coming before the Executive Council Ad-Hoc Issue Committee(s) and that I will not without due authority disclose or make known any matter or thing that comes to my knowledge by reason of my membership on the Executive Council Ad-Hoc Issue Committee(s) and will treat this information in the same manner as if I were a member of Cabinet.

These Oaths are sworn before a Barrister and Solicitor of the Supreme Court of Nova Scotia.

In the case of both Cabinet and Ad Hoc Committee deliberations, the taking of an oath is based on practical considerations of the functioning of the Cabinet system. In that regard, in the *Babcock* case in the Supreme Court of Canada, Chief Justice McLachlin put it as follows:

> *A Cabinet discussion was not the occasion for the deliverance of considered judgements but an opportunity for the pursuit of practical conclusions. It could only be made completely effective for this purpose if the flow of suggestions which accompanied it attained the freedom and fulness which belong to private conversations – members must feel themselves untrammelled by any consideration of consistency with the past or self-justification in the future…The first rule of Cabinet conduct, he used to declare, was that no member should ever "Hansardize" another – ever compare his present contribution to the common fund of counsel with a previously expressed opinion…*
>
> *The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly. In addition to ensuring candour in Cabinet discussions, this Court in Carey v. Ontario, CanLII 7 (S.C.C.),[1986] 2 S.C.R. 637, at p. 659, recognized another important reason for protecting Cabinet documents, namely to avoid "creat[ing] or fan[ning] ill-informed or captious public or political criticism". Thus, ministers undertake by oath as Privy Councillors to maintain the secrecy of Cabinet deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision-making.*
> *[Babcock v. Canada (Attorney General), 2002 SCC 57 (CanLII), [2002] 3 S.C.R. 3, 2002 SCC 57, at para. 18]*

Section 13(1) of the *Act* is a discretionary exemption and thus it was open to Executive Council to release the Record notwithstanding the applicability of the Cabinet Confidences exemption. In other jurisdictions, Cabinet Confidences is a mandatory exemption. In those cases, once a record is found to fall within the definition of Cabinet Confidence, the public body has no ability to release. In this case, the Applicant made no argument that it was information that was clearly in the public interest to release. Section 31(1) of the *Act* reads:

> *Whether or not a request for access is made, the head of a public body may disclose to the public, to an affected group of people or to applicant information*
> *(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people; or*
> *(b) the disclosure of which is, for any other reason,* ***clearly in the public interest***
> ***[Emphasis added]***

The *Act,* therefore, enables a public body to *provide for disclosure for any reason clearly in the public interest despite any other provision of the Act. [Government Information: Access and Privacy, McNairn and Woodbury, Thomson Carswell, at p. 3-6*]

Factors to consider in determining what is meant by clearly in the public interest, a phrase not defined in the *Act*, have been discussed in prior Review Reports of this Office.

> *These factors include:*
> *(a) Has the matter been the subject of recent public debate?*
> *(b) Does the matter relate directly to the environment, health or safety?*
> *(c) Would dissemination of the information yield a public good by assisting public understanding of an important policy?*
> *(d) Do the records show how the public body is allocating financial or other resources?*
> *[FI-02-77, Nova Scotia (Department of Justice) (Re), 2002 CanLII 15363 (NS F.O.I.P.O.P.), at p. 10]*

Having thoroughly reviewed the information contained in the severed portions of the Record, I find that there was only one aspect of Conserve Nova Scotia that was the subject of some public debate but it has long since passed and could not be characterized as recent. Executive Council's deliberations regarding Conserve Nova Scotia were only parenthetically about the environment. Nothing in the severed portion of the Record would yield a public good if released. The Record does concern itself with how a public body proposed to allocate resources. While the information sought may satisfy one or two the listed factors, this does not in any way tip the balance in favour of disclosure, because they do not amount to meeting the test of *clearly in the public interest.*

The Applicant submitted that the information should be released as it fell within s. 13(2) as background information. In several provinces, including Nova Scotia, background information that is considered by Cabinet in coming to a decision, is subject to disclosure under particular circumstances.

Section 13(2), to be read disjunctively, provides three circumstances, where information before the Executive Council can be released, and reads as follows:

> *Subsection (1) does not apply to*
> *(c) **background information** in a record the purpose of which is to present explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if*
> *(i) the decision has been made public,*
> *(ii) the decision has been implemented, or*
> *(iii) five or more years have passed since the decision was made or considered.*
> ***[Emphasis added]***

Section 3 provides an interpretation of *background information*, the applicable portion reads as follows:

> *3(1)(a) "background information" means*
> *(i) any factual material,*
> *(iv) an appraisal,*

(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***
[Emphasis added]

The *Regulations* provide a definition of some of the words and phrases used to define background information in s. 3(1)(a), at s. 24:

> *. . . "factual material" means a coherent body of facts,* ***separate and distinct from interpretations of, reactions to or advice and recommendations in respect of facts.***
>
> *. . . "appraisal" means a report prepared by a qualified appraiser that estimates the value of property or sets a price on an asset or liability.*
> ***[Emphasis added]***

The Record has been reviewed thoroughly. The public body has indicated that the Record, as presented, is the whole package that went before an Ad Hoc Committee in September 2006 and to Cabinet in October 2006, prior to the decision to implement Conserve Nova Scotia in October 2006. The decision to establish Conserve Nova Scotia was made public in June 2006.

In its representation, the Applicant states that when it submitted its request for access to information to the Executive Council in February 2007, the decision to establish and to implement the decision had been made public. The Applicant states, therefore, that s. 13(2) applies and that all background information contained in the severed materials provided to the Ad Hoc Committee and Cabinet should be released.

The portion of the Record released by the Executive Council falls within the definition of background information and was properly provided to the Applicant in response to the access to information request because the decision to establish and implement had been made public. The portion of the Record that was before Cabinet clearly falls within the s. 13(1) exemption as advice and recommendations to Cabinet which if released would reveal Cabinet deliberations in reaching a decision regarding implementing the decision about Conserve Nova Scotia. In order for the information the Applicant is seeking to be available under s. 13(2), the background information must relate to:

1. a decision that has been made public; or
2. a decision has been implemented.

In this case, the decision has been made public and has been implemented. The contents of the portion of the Record withheld, however, cannot be characterized as information "to present explanations or analysis" in order to meet the test of "background information" in s. 13(2) or "a plan or proposal to establish a new program…if the plan or proposal has been approved by the head of the public body" in the definition of "background information" in s. 3(1)(a)(xii). The portion of the Record released properly meets the s. 13(2) test and falls within the definition of "background information" cited.

FINDINGS:

1. The Applicant indicated that the Request for a Review was made, in addition to a *bona fide* interest in the information, to assist the Applicant in its research by having a precedent ruling on s. 13. Access to information requests for the purpose of research is a purpose consistent with s. 2 of the *Act.* It is important to note, however, that an interpretation of any section of the *Act*, while it may have some precedent value and assist public bodies and the public to understand how the *Act* may apply in any given situation, will be only truly applicable to the particular facts and circumstances in any given Review. Each case must be decided on its own merits and this applies equally to any ruling with respect to Cabinet confidences and when the exemption can be applied. It would be inappropriate for the Review Officer to issue findings and recommendations that purport to apply to or be binding on any case but the present Review.
2. The decision of the Executive Council to exercise its discretion to withhold the a portion of the Record under s. 13(1) is upheld;
3. The original access to information request was limited to the decision to establish Conserve Nova Scotia, a decision made in June 2006. The Executive Council interpreted the request of the Applicant broadly and provided information responsive both to the original request and to the broader issue of when the decision to establish Conserve Nova Scotia was implemented in October 2006. It appears the Executive Council released as much of the information to the Applicant that formed part of its deliberations prior to implementation of the decision as it could without comprising the principle of Cabinet confidentiality. The decision by the Executive Council to provide a response based on a broad interpretation of the access to information request, *information regarding the decision to implement as well as establish Conserve Nova Scotia*, is consistent with the duty to assist in s. 7 of the *Act*;
4. Section 3(1)(a)(iv) "appraisal" has no application to this case as no such information was included in the Record and therefore did not form part of the "background information."

RECOMMENDATION:

1. Executive Council re-affirm its decision to sever under s. 13(1) in a letter to the Applicant with a copy to the Review Officer.

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