



New Glasgow, Nova Scotia
20 May 2003

Mr. Peter O'Brien, Chair
FOIPOP Review Committee
c/o Department of Justice
5151 Terminal Road
PO Box 7
Halifax, Nova Scotia
B3J 2L6

Dear Mr. O'Brien:

Re: Freedom of Information and Protection of Privacy Act Review

Thank you for the opportunity to comment on the review of this Act.

We are writing to express concern about paragraph 22(1A)(b) of the Act which was included with the amendments to the Act passed in November 1999. Sections 22(1) and (1A) are noted below:

“22 (1) On receiving a request for access to a record that the head of a public body has reason to believe contains information the disclosure of which must be refused pursuant to Section 20 or 21, the head of the public body shall, where practicable, promptly give the third party a notice

(a) stating that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests or invade the personal privacy of the third party;

(b) describing the contents of the record; and

(c) stating that, within fourteen days after the notice is given, the third party may, in writing, consent to the disclosure or may make written representations to the public body explaining why the information should not be disclosed.

(1A) Notwithstanding subsection (1), that subsection does not apply if

(a) the head of the public body decides, after examining the request, any relevant records and the views or interests of the third party respecting the disclosure requested, to refuse to disclose the record; or

(b) where the regulations so provide, it is not practical to give notice pursuant to that subsection.” (emphasis added).

There may be occasions where it may be necessary for a company to consider submitting trade secret information to a Nova Scotia government body. It is important to remember that the trade secret information is property owned or licensed by the company that submits that information. It is not the property of the government. Moreover, that information may be worth many millions of dollars and be critical to that company’s continued success.

We are concerned that proprietary information be protected from unauthorized disclosure. Accordingly, it is of paramount importance that companies be in a position to make the appropriate response relating to any request for access to their information. We cannot imagine that there is any appropriate reason why convenience to the head of the public body should prevail to avoid giving of a notice where the third party can be reasonably located. Even if large numbers of third parties are involved, it must still be recognized that it is their confidential information that is in issue. The fact that notices may have to be given to large numbers does not change the nature of the request.

To date, there are no regulations with respect to Section 22(1A)(b). This is not a satisfactory resolution to the uncertainty created by this legislation over the protection of proprietary information.

The following proposed section suggests a way to ensure that it will always be practical to notify a corporate third party through the address of its recognized agent or its last known address:

For the purposes of paragraph 22(1A)(b) of the Act, it shall be deemed to be practical to give notice to a third party corporation registered to carry on business in the Province, in the manner set out in Section 14 of the regulations.

Following is an alternative suggestion. We understand that Subsections 22(1A)(a) and (b) are intended to apply only when the head of the public body has decided against disclosure. This interpretation is not clear from the wording of Subsection 22(1A). Perhaps the way to deal with difficult issues with respect to the giving of notices to third parties where disclosure is not intended is to revise Subsection 22(1) in a manner similar to the Federal legislation. The opening words of Subsection 22(1) could read:

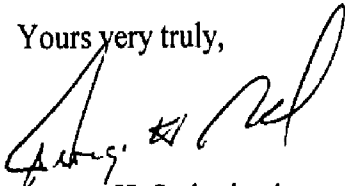
“Where the head of the public body intends to disclose a record, or any part thereof, that contains or the head of the public body has reason to believe might contain information described in Section 20 or 21, the head of the public body shall promptly give the third party a notice...”

With this revision, notice is required only in the case where the head of the public body intends to disclose a record. If, as contemplated by Subsection 22(1A)(a), the head of the public body has decided to refuse to disclose, there is no need for notice and therefore no need for Subsection 22(1A) and the uncertainty it adds to the protection of proprietary information.

I hope our comments will be helpful to the Committee in its review of this Act. Should you have any questions or wish to discuss this matter, please do not hesitate to contact me.

All of which is respectfully submitted,

Yours very truly,

A handwritten signature in black ink, appearing to read "George H. Sutherland". The signature is fluid and cursive, with a large initial "G" and "S".

George H. Sutherland
General Counsel

GHS:gmd