Date: 20011002
Docket: C.A. 169637

NOVA SCOTIA COURT OF APPEAL
[Cite as: *O'Connor v. Nova Scotia*, 2001 NSCA132]

Freeman, Bateman and Saunders, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN IN THE RIGHT OF NOVA SCOTIA
as represented by **DR. PATRICIA RIPLEY**,
Deputy Minister of the Priorities and Planning Secretariat

Appellant
(Respondent by Cross-Appeal)

- and -

DANIEL O'CONNOR

Respondent
(Appellant by Cross-Appeal)

REASONS FOR JUDGMENT

Counsel:	Louise Walsh Poirier for the appellant Graham Steele for the respondent
Appeal Heard:	June 12, 2001
Judgment Delivered:	October 2, 2001
THE COURT:	Appeal and cross-appeal dismissed per reasons for judgment of Saunders, J.A.; Freeman and Bateman, JJ.A. concurring.

SAUNDERS, J.A.:

[1] This case is about striking a balance: a balance between a citizen's right to know what government is doing and government's right to consider what it *might* do behind closed doors. It pits the citizen's right to access information relating to the workings of government against the ability of Cabinet to carry out its deliberations in confidence and in private. It calls for an interpretation of an Act that attempts to balance two public rights of perhaps equal importance, the right of the public to be informed and its right to be governed by elected representatives free to frankly express perhaps unpopular views protected by traditional cabinet confidentiality from captious criticism.

BACKGROUND

[2] The respondent, Daniel O'Connor, is Chief of Staff in the Caucus office of the Nova Scotia New Democratic Party, Her Majesty's Official Opposition. On July 27, 1999, a provincial general election was held. A Progressive Conservative majority government headed by Premier John Hamm was chosen by the electorate. The new government was sworn into office on August 16, 1999.

[3] In a government news release issued September 20, 1999, Finance Minister Neil LeBlanc announced the establishment of "an internal process to look at all government programs, their costs, their relevance today, and possible alternatives". This was the first formal indication to the public of action being taken by the newly elected government to conduct a government-wide review of all of its programs. The press release went on to say that the:

> ... internal process will be completed by an external review of government operations. The details of this process will be announced before the budget.

[4] A short time later, the Priorities and Planning Secretariat set up a "Program Analysis Intranet Site". This web site was available to provincial public servants but not to the public and included a "backgrounder" that described the program review. The backgrounder explained that on September 15, 1999, all departments and agencies had commenced a two week process so as to identify their existing programs as part of what the government called

its “Program Analysis and Options Exercise” (“PAO”). The web site described the four “phases” to the PAO.

[5] Phase One was entitled “Finding the Facts”. Under this phase departments would be given a template with which to examine any given program so as to get at and identify such things as its stated purpose, contractual arrangements, cost, staffing and whether its policy objectives conformed to the government’s own agenda.

[6] Phase Two of the PAO was described on the web site as “Looking at the Results”. An interdepartmental review team chaired by a senior official from the Priorities and Planning Secretariat would analyse the results, the objective being to rank all government programs “in a descending order of priority”. This same committee would then measure the results against “identified fiscal and policy imperatives of the Government”. Its target date for completion was October 20, 1999.

[7] Phase Three described as “Testing the Assumptions” would occur in the last two weeks of October. Deputy ministers and senior officials from all departments would have an opportunity to vet and debate the committee’s analysis leading ultimately to a progress report to be in the hands of the Priorities and Planning Committee at its meeting scheduled for November 2, 1999.

[8] Phase Four was labelled “Drawing the Road Map”. This segment of the PAO was optional in that if the Priorities and Planning Committee saw a benefit in proceeding to this the final phase, then an expanded group might be formed to develop a detailed set of options for reducing or restructuring government programs. As the backgrounder makes clear, the options were to be presented to Cabinet and if approved by Cabinet, the information to be acted upon would be back in the hands of government departments in sufficient time “for inclusion” in the 2000 budget targets.

[9] The exercise, with its investigation, analysis, ranking system and recommendations was obviously intended to measure the efficacy and utility of government programs, presumably to decide their worth and what fate lay in store for those seen to be expendable.

[10] The same themes emphasizing government accountability, fiscal responsibility and the need to scrutinize the cost and relevance of all government programs were repeated in speeches made by the Premier and in various other government releases throughout November.

[11] On December 10, 1999, Mr. O’Connor submitted two Freedom of Information (“FOI”) applications. In his two applications the respondent

sought to obtain the "template" provided to government departments as part of Phase One, together with the results of both Phase One and Phase Two. Among other things the respondent was obviously interested in learning how government had ranked its programs as well as details relating to their staffing costs and relevance.

[12] His two FOI applications were directed to Dr. Patricia Ripley, the Deputy Minister of Priorities and Planning Secretariat ("the Secretariat"). On January 13, 2000, Mr. O'Connor received a written response to his applications from Dr. Ripley. The sought after results of Phases One and Two were denied. The "template" for the Phase One program review was provided, together with certain correspondence, the PC 1999 election platform and a copy of the October 7, 1999 speech from the throne. Dr. Ripley reminded Mr. O'Connor of his right to a review of her decision(s). On January 14, 2000, Mr. O'Connor applied to the FOI Review Officer seeking a review of Dr. Ripley's response.

[13] On April 11, 2000, the provincial government presented its 2000-2001 budget to the Nova Scotia Legislature. After debate in the House, the budget was approved. Although the budget had several components that were approved at different times, the last component, the **Financial Measures 2000 Act**, was given Royal Assent on June 8, 2000.

[14] Throughout May and June 2000, communications ensued between the FOI Review Officer and Mr. O'Connor bearing upon the officer's efforts to review Dr. Ripley's initial position. The reason stated by Dr. Ripley for denying Mr. O'Connor's requests was that the:

> ... information denied would reveal advice, recommendations and policy considerations to the Priorities and Planning Committee, a Committee of the Executive Council, and the Executive Council. The program inventory is part of a multi-year budget process.

[15] In his renewed demands, Mr. O'Connor suggested that he be given access to the records after first insuring that any advice, recommendations or policy considerations prepared for the Executive Council or any of its committees had been severed. In that way, he might still obtain "objective information" including the names of programs and their costs, as well as an analysis of program data showing how the programs were ranked and classified.

[16] On June 16, 2000, the Review Officer informed the respondent that he had met with Secretariat officials and been advised that the PAO as laid out in the government's web site *had not been followed*. Rather a review of each

program over a four or five year period had been undertaken as part of a multi-year budget process such that the PAO database (to which access was restricted and password protected) did provide information, analysis and advice to government for use in its business and its budget planning, and that it would be periodically updated. Consequently it was being withheld because it was said to contain advice, recommendations and policy considerations of the Priorities and Planning Committee and the Executive Council that would reveal the substance of deliberations of the Executive Council or its committees.

[17] The Review Officer agreed that had Phase One been conducted as initially contemplated, it would have been an entirely "factual exercise" and that the information in the three "components" under Phase One in the backgrounder would not contain the "substance of deliberations". Having found, however, that Phase One was not carried out as announced, the Review Officer, after inspecting the database personally, concluded at page four of his report:

> I agree with P & P that the database contains information that would constitute the substance of deliberations of the Cabinet.

[18] Notwithstanding this finding the Review Officer recommended that the Secretariat provide Mr. O'Connor with documents containing the information described in the three components listed in Phase One of the PAO.

[19] In response to Mr. O'Connor's request for a review of his second FOI application, the Review Officer found that the categorization of government programs as "essential", "necessary" or "discretionary" constituted "advice, views and policy considerations" to Cabinet and was therefore exempt from disclosure under s. 13(1) of the **Freedom of Information and Protection of Privacy Act**, Stats. N.S. 1993, c. 5 as amended by Stats. N.S. 1999, c. 11 ("**FOIPOP**"). However he recommended disclosure of "background information" as defined s. 3(a) of the **Act** with respect to those programs on which decisions had been made.

[20] On July 14, 2000, Ms. Ripley advised the respondent that the Secretariat would follow the Officer's recommendations. That is to say background information would be released as defined in s. 3(1)(a) of the **Act** respecting the three components listed in Phase One of the government's PAO. Similarly background information as defined in the **Act** with respect to those programs on which decisions had been made, would be made available to Mr. O'Connor. By e-mail dated August 9, 2000, in response to the

recommendations of the FOI Review Officer, the records were released by the appellant to the respondent electronically in a portable document format.

[21] The respondent was not satisfied with the FOI Officer's review and he appealed Ms. Ripley's decision to the Supreme Court of Nova Scotia. The matter came on for hearing before MacDonald, A.C.J.S.C., in chambers, on November 29, 2000. Broadly stated, the proceedings there concerned whether access to documents prepared for a review of almost 1,200 government programs could be refused on the basis that they were covered by the exemption protecting deliberations of the Executive Council in s. 13 of **FOIPOP**. MacDonald, A.C.J.S.C. ordered the production of information relating to the review of 86 government programs that had been eliminated. He found that the material did constitute advice given and/or recommendations made to the Cabinet's Priorities and Planning Committee by its Secretariat, but that access to it should be granted because the information sought in relation to those 86 discontinued programs constituted background information for the purpose of presenting explanations or analysis to Cabinet for consideration in making a decision that had already been implemented. The chambers judge upheld the Nova Scotia government's refusal of access to material concerning the roughly 1,000 other programs yet to be reviewed.

[22] The chambers judge stayed his order pending any further order of the Supreme Court or the Court of Appeal. He did so in order to preserve the appellant's right of appeal. Following the chambers judge's decision, the appellant released to the respondent material relating to 85 of the 86 programs, but continued to resist disclosure of the material relating to one such program, chosen at random, so as to preserve its right of appeal. In a decision filed March 2, 2001, Cromwell, J.A. of this court sitting in chambers continued the stay until June 12, the day set for the hearing of this appeal.

[23] At the appeal, counsel agreed that the stay ought to be extended pending any further order of this court.

ISSUES

[24] The Province of Nova Scotia as appellant raises three grounds of appeal arguing that the chambers judge erred in law in:

(1) interpreting the relationship between s-s. 13(1) and 13(2) of the **Act**. In particular, interpreting the meaning of "substance of deliberations" in s. 13(1) of the **Act** too narrowly and finding that the "substance of deliberations" including advice and/or recommendations to Cabinet or its committees, fell within s. 13(2)(c) of the **Act**;

(2) broadly interpreting the meaning of "background information" defined in s. 3(a) of the **Act**, including the meaning of "feasibility study" in s. 3(a)(ix) of the **Act**; and

(3) ordering that access be provided in a particular format.

[25] Daniel O'Connor, the respondent and appellant by cross-appeal, advances four grounds of appeal urging that the chambers judge erred in law in:

(1) finding that the Cabinet exemption in s. 13 of **FOIPOP** applied to the records sought by him when there was no or insufficient evidence before the court that the records were ever actually submitted to Cabinet or a Cabinet committee;

(2) finding that the Cabinet exemption was not waived when the documents were shown to certain members of the Legislative Assembly, who were neither members of Cabinet nor civil servants providing advice to Cabinet;

(3) finding that the records "would reveal the substance of deliberations of the Executive Council or any of its committees" as required in s. 13(1) of **FOIPOP**; and

(4) finding that s. 13(2)(c)(i)(ii) of **FOIPOP** applied only to records about programs that had been eliminated completely, and that decisions to continue or modify other programs had not been "made public" or "implemented".

[26] All of these various grounds require an interpretation of the meaning of s. 13 and certain other defined or related terms of the **FOIPOP Act,** as well as a determination of the test to be applied when deciding requests for information under the **Act** or subsequent appeals brought as a consequence. In order to properly address the important issues arising in this appeal, I

prefer to combine to some extent the various grounds of appeal advanced by both the appellant and the respondent and restate them as follows:

ISSUE 1: Is s. 13 of **FOIPOP** engaged in this case? If it is, then,

ISSUE 2: How is s. 13 to be interpreted and applied to the information sought by the respondent?

ISSUE 3: If the circumstances in this case qualify for Cabinet exemption thereby barring access to the information sought by the respondent, has entitlement to the exemption been waived as a result of the government's actions?

ISSUE 4: By what authority can the particular format of *providing* information deemed accessible, be compelled?

ISSUE 5: How should costs between the parties be resolved?

[27] Before addressing these issues, I wish to first consider two preliminary matters: the standard of review and the statutory regime that apply in this case.

STANDARD OF REVIEW

[28] Under **FOIPOP** the power of the Supreme Court of Nova Scotia is very broad. Section 42 provides:

> **42 (1)** On an appeal, the Supreme Court may
>
> (a) determine the matter *de novo*; and
>
> (b) examine any record *in camera* in order to determine on the merits whether the information in the record may be withheld pursuant to this Act.
>
> **(2)** Notwithstanding any other Act or any privilege that is available at law, the Supreme Court may, on an appeal, examine any record in the custody or under the control of a public body, and no information shall be withheld from the Supreme Court on any grounds.

> **(3)** The Supreme Court shall take every reasonable precaution, including, where appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid disclosure by the Supreme Court or any person of
>
> > (a) any information or other material if the nature of the information or material could justify a refusal by a head of the public body to give access to a record or part of a record; or
> >
> > (b) any information as to whether a record exists if the head of the public body, in refusing to give access, does not indicate whether the record exists.
>
> **(4)** The Supreme Court may disclose to the Minister or the Attorney General of Canada information that may relate to the commission of an offence pursuant to another enactment by an officer or employee of a public body.
>
> **(5)** Where the head of the public body has refused to give access to a record or part of it, the Supreme Court, if it determines that the head of the public body is not authorized to refuse to give access to the record or part of it, shall
>
> > (a) order the head of the public body to give the applicant access to the record or part of it, subject to any conditions that the Supreme Court considers appropriate; or
> >
> > (b) make any other order that the Supreme Court considers appropriate.
>
> **(6)** Where the Supreme Court finds that a record falls within an exemption, the Supreme Court shall not order the head of the public body to give the applicant access to the record, regardless of whether the exemption requires or merely authorizes the head of the public body to refuse to give access to the record.

[29] Thus, on an appeal to that court, the Supreme Court may decide the case *de novo* and as well may decide to examine any record in camera to see if the information in the record should be withheld.

[30] There is no appeal provided in the statute to this court. Thus such a right of appeal is found in the **Judicature Act**, R.S., c. 240, s. 1, which states:

> 38(1) Except where it is otherwise provided by any enactment, an appeal lies to the Court of Appeal from any decision, verdict, judgment or order of the Supreme Court or a judge thereof, whether in court or in chambers.

[31] During argument, we invited counsel to comment on the standard of review that ought to be applied in this case. Counsel for the appellant, Province of Nova Scotia, argued that some degree of deference was owed by this court to the decision of the learned chambers judge, whereas counsel for the respondent/appellant by cross-appeal urged that no deference was owed and that we were as free as the judge in first instance to come to our own conclusions upon the evidence. Where as here there was no issue of credibility, we were encouraged to consider the entire record, decide the facts and draw our own inferences and conclusions based on our findings.

[32] No cases were referred to us for the standard of review that ought to be applied by this court to this statute. I am therefore drawn to first principles. In his text, *Standards of Review Employed by Appellate Courts* (Edmonton, Juriliber Limited, 1994), the Honourable Roger Kerans sums it up well:

> ... an appellate court is a court of review and not one of original jurisdiction. Its task is to consider whether the trial court properly decided the matters tendered to it and not whether the case could be decided differently if it were differently conceived or presented. [At p. 21.]

Mr. Kerans examines the reasons why appellate courts should and do limit their review of lower court decisions. He rejects the theory that such reticence depends upon concerns related to credibility or jurisdiction or a floodgates argument. Mr. Kerans points out that in Canada there are few restrictions placed by legislatures on appellate review. He demonstrates that only a few statutes actually set out or limit jurisdiction, for example, the workers compensation legislation in this and other provinces. Mr. Kerans concludes that:

> Appellate courts limit review because they have confidence in the capacity of first judges to do justice, and see no need to repeat that process. This leads to the presumption of fitness ... [At p. 28.]

[33] I endorse Mr. Kerans' observations, which reflect the rationale underlying the standard of review in civil cases consistently applied by this court and

expressed in a long line of cases. For example, in **Davis v. Bathtub King (Halifax) Ltd.** (1991), 104 N.S.R. (2d) 98, Matthews, J.A. stated at p. 100:

> Our function is not to retry the case. Appeal courts in innumerable cases have applied the rule: conclusions of fact cannot be disturbed unless they are perverse,
> or clearly wrong, or unless the trial judge made some "palpable and overriding error" to use the words of Mr. Justice Ritchie in **Stein Estate et al v. Ship "Kathy K" et al.** (1975), 6 N.R. 359 (S.C.C.), at p. 366.

More recently in **MacPhail v. Desrosiers**, [1998] N.S.J. No. 353, Justice Hallett writing for the court stated at §22 :

> 22 The Supreme Court of Canada in a series of recent cases has emphatically stated that conclusions on matters of fact by trial courts are not to be overturned by Courts of Appeal unless there is a gross and overriding error. However, appellate courts can interfere with such findings and should do so if the findings are clearly unfounded or based on a misunderstanding of the evidence. The most often quoted statement of the Supreme Court of Canada on this issue is that of McLachlin, J., in **Toneguzzo-Norvell v. Burnaby Hospital**, 1994] 1 S.C.R. 114 at p. 121:
>
> > It is by now well established that a Court of Appeal must not interfere with a trial judge’s conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see **P.(D.) v. S.(C.)**, [1993] 4 S.C.R. 141, at p. 188-89 (per L’Heureux-Dube J.), and all cases cited therein, as well as **Geffen v. Goodman Estate**, [1991] 2 S.C.R. 353, at pp. 388-89 (per Wilson J.), and **Stein v. The Ship “Kathy K”**, [1976] 2 S.C.R. 802, at pp. 806-8 (per Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.
>
> . . .

> I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of fact does not apply with the same force to interferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge.

[34] Accordingly, in the absence of clear statutory direction to the contrary, the standard of review under the **FOIPOP Act** of a lower court's findings of fact should be the same as in other civil cases, that is obvious, palpable and overriding error. In matters of law, for example conclusions with respect to the interpretation to be given to legislation, the test is one of correctness. These are the standards I have applied in this case.

STATUTORY REGIME

[35] The overall scheme of the **Act** is relatively straightforward. Its purpose is expressed clearly in s. 2, which provides:

> Purpose of Act
>
> **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
>
> (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;

> (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. 1993, c. 5, s. 2.

[36] Thus it can be seen that the Legislature has identified three objectives as constituting the purpose of the **Act**. First, to ensure that public bodies are fully accountable to the public. Second, to provide for the disclosure of all government information, subject to certain exemptions said to be "limited and specific". Third, to protect the privacy of individuals over their own personal information.

[37] The third objective is irrelevant in these proceedings. The first two bear further consideration.

[38] Section 2(a) provides that one of the statute's purposes is:

> to ensure that public bodies are fully accountable to the public ...
>
> [Underlining mine.]

[39] Section 2(b) states that a further purpose of the statute is:

> 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 public formulation,
>
> (ii) ensure fairness in government decision making,
>
> (iii) permit the airing and reconciliation of divergent views;
>
> [Underlining mine.]

[40] Thus, it seems clear to me that the Legislature has imposed a positive obligation upon public bodies to accommodate the public's right of access and, subject to limited exception, to disclose all government information so that public participation in the workings of government will be informed, that government decision making will be fair, and that divergent views will be heard.

[41] The **FOIPOP Act** ought to be interpreted liberally so as to give clear expression to the Legislature's intention that such positive obligations would enure to the benefit of good government and its citizens.

[42] I will come back to the provisions purporting to deal with "exceptions" or "exemptions" later in these reasons.

[43] Section 3 of the **Act** is the interpretation section which provides certain definitions. For our purposes in this case, I need only refer to a few of them. In s. 3(1)(a), “background information” is defined to “mean” (not “include”) the twelve specific things or descriptions listed after it.

[44] Section 3(1)(k) provides that:

> “record” includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;

[45] Section 3(1)(l) provides:

> “Review Officer” means the Review Officer appointed pursuant to Section 33;

[46] Section 4 provides for the application of the statute. It begins:

> 4 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records.
>
> (2) Notwithstanding subsection (1), this Act does not apply to
>
> ...
>
> (b) material that is a matter of public record;

[47] A citizen’s right of access to records is described in s. 5. It provides (citing only the sections material to this case):

> **Right of Access**
>
> 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.
>
> (2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Act, but if that information can reasonably be severed from the record an applicant has the right of access to the remainder of the record.

[48] The duties of the head of the public body are set out in s. 7 of the **Act**. Upon receiving an application that meets the statutory requirements, the head of the public body must - where access to the record or part of the record is refused - state the reasons and the provisions of the **Act** upon which the

refusal is based and alert the applicant to the fact that the applicant may ask for a review by the Review Officer within 60 days of the applicant becoming notified of the refusal.

[49] Section 8(2) describes the ways in which the head of a public body may provide access to a record, depending upon its kind or type of storage.

[50] Beginning with s. 12, under the heading EXEMPTIONS, the **Act** goes on to describe the circumstances in which the head of a public body "may" refuse to disclose information to an applicant. The first such circumstance refers to inter-governmental affairs and is irrelevant to this case.

[51] The second circumstance is headed **Deliberations of Executive Council** and it is upon this section that the Deputy Minister relied in refusing the respondent's application for information. I will repeat it verbatim:

> **Deliberations of Executive Council**
>
> 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.
>
> (2) 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.

[52] In terms of the burden of proof, s. 45(1) provides:

> **Burden of proof on head of public body**
>
> 45(1) At a review or appeal into a 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 of access to the record or part.

[53] Before turning to an analysis of the particular provisions of the **FOIPOP Act** material to this case, I wish to comment briefly on how the legislation in Nova Scotia compares to similar legislation in other provinces in Canada. Such a comparison together with the statute's own legislative history may be useful when considering the meaning to be attached to its provisions.

[54] Having compared all of the freedom of information and privacy acts in the other provinces across Canada, I find that the purpose clause in the Nova Scotia statute is unique. This is the only province whose legislation declares as one of its purposes a commitment to ensure that public bodies are "fully accountable to the public"(underlining mine). By comparison, British Columbia's **Freedom of Information and Protection of Privacy Act**, R.S.B.C. 1996, c. 165 states that the purposes of that statute are "...are to make public bodies more accountable to the public ...". In Alberta their purpose clause is worded differently than that of either Nova Scotia or British Columbia. It does not state whether it is to make public bodies more or fully accountable. The statute in that province seems much more restrictive and is focused mainly upon allowing individuals some access to information held by public bodies (**Freedom of Information and Protection of Privacy Act**, Stats. Alberta 1994, c. F-18.5, as amended). There is no purpose section in the Saskatchewan legislation. There are two statutes in that province. One is more general and the other applies to local authorities. Manitoba's legislation, the **Freedom of Information and Protection of Privacy Act**, Stats. M. 1997, c. 50, as amended, has a purpose clause that is almost identical to that of Alberta. The purpose section of the

Ontario legislation is not as comprehensive as the Nova Scotia **Act** (**Freedom of Information and Protection of Privacy Act**, R.S.O. 1990, c. F-31, as amended). Quebec has two statutes, one giving access to documents held by public bodies and the other protecting personal information in the private sector. The first statute has no purpose section. The second statute has an "object" section, as it relates to the civil code of Quebec. New Brunswick and PEI have no equivalent legislation. Newfoundland's **Freedom of Information Act**, R.S.N. 1990, c. F-25, as amended, is much shorter than most other statutes. Its purpose section says nothing about government accountability. FOI statutes in the Yukon and the Northwest Territories are identical and mirror British Columbia's statute. Their legislation makes clear that the "... purposes of this Act are to make public bodies more accountable ... and to protect personal privacy ...".

[55] In summary, not only is the Nova Scotia legislation unique in Canada as being the only **Act** that defines its purpose as an obligation to ensure that public bodies are *fully* accountable to the public; so too does it stand apart in that in no other province is there anything like s. 2(b). As noted earlier, 2(b) gives further expression to the purpose of the Nova Scotia statute that being:

> 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;

[56] Thus the **FOIPOP Act** in Nova Scotia is the only statute in Canada declaring as its purpose an obligation both to ensure that public bodies are fully accountable and to provide for the disclosure of all government information subject only to "necessary exemptions that are limited and specific".

[57] 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 the other provinces and territories in Canada. Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation; ensure fairness in government decision making; and permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives.

[58] And so before turning to an analysis of s. 13, its meaning and its application to this case, I think it important to bear in mind these features that make our **Act** unique.

REASONS

ISSUE 1: Is s. 13 of **FOIPOP** engaged in this case?

[59] To justify a refusal to disclose information to an applicant, government must bring itself within s. 13 of the **Act**. This section is one of those "necessary exemptions" mentioned in s. 2(b). Other such exemptions, not material to this case, may be found in s. 15 and s. 17 of the **Act**.

[60] As a first position the respondent challenges the government's ability to bring itself within s. 13. For ease of reference I will repeat the text of s. 13(1).

> **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.
>
> [Underlining mine.]

[61] The respondent argues that the government cannot avail itself of the protection of s. 13 because on the facts of this case, there was no evidence presented that the records sought by the respondent were actually ever submitted to the full Cabinet or to a Cabinet committee. In his factum, Mr. Steele, counsel for the respondent, advances the argument this way:

> The evidence before the Court below was that there are three kinds of formal Cabinet documents: a Report and Recommendation to Cabinet, a Memorandum to Cabinet and a Memorandum to the Priorities and Planning Committee ... there was no evidence before the Court that the database had ever been included in, or attached to, or even referred to in, one of these documents. The only witness put forward by the government, Mr. Duff, could name only one standing committee of Cabinet - the Priorities and Planning Committee. He did not give evidence that the database was submitted to that committee. Mr. Duff's evidence was that information from the database was given to three ad hoc committees formed by the government. Each

committee included one person who was not a member of the Cabinet, as well as several Cabinet Ministers. Mr. Duff described these ad hoc committees as Cabinet committees, but the respondent submits that the formal inclusion of a person who was not a Cabinet Minister means that these ad hoc committees cannot be described as committees of the Executive Council for the purposes of the **FOIPOP** Act.

[62] With respect, there is no merit to the respondent's first argument. There was clearly evidence before the chambers judge upon which he could reasonably come to the conclusion that the database sought by the respondent did constitute advice or recommendations prepared for and submitted to Cabinet for its consideration. At §27 of his decision, the judge said:

> ... I have in my Chambers reviewed the subject material. In so doing, I find that all the withheld material constitutes advice given and/or recommendations made to Cabinet's Priorities and Planning Committee by its secretariat. This includes:
>
> (a) The results of the above categorization process (with supporting commentary), and

(b) Each program's alignment with the Government's platform.

[63] Ramsay Duff, Assistant Deputy Minister of Finance, whose primary responsibility was to coordinate and manage the budget process including the 2001 budget process, gave affidavit and *viva voce* evidence that Cabinet initiated the PAO exercise so as to review government services in the context of Cabinet's annual planning and budgeting cycles commencing with the 2001 budgeting exercise. Mr. Duff's evidence confirmed that the PAO database was submitted to three subcommittees of Cabinet - the Economics, Social and Governments Committees. His testimony before the chambers judge was that:

> For the purposes of the budget process, Cabinet chose to break into these three subcommittees, if you will, to manage the workload to make it easier for them to manage the budget process.

[64] Mr. Duff stated that each member of the subcommittees was given, and worked from, a large legal size binder containing a printed copy of the portion of the PAO database relating to those departments for which the particular subcommittee was responsible. He testified that the subcommittees then made recommendations to Cabinet. In addition to Mr.

Duff's evidence, the respondent's own affidavit sworn October 3, 2000 was before the court. It provides further evidence that the sought after information was prepared for submission and was submitted to a Cabinet committee and that it would reveal the substance of budget deliberations of Cabinet or its committees within the meaning of s. 13(1) of the **Act**. For example, Mr. O'Connor's affidavit includes Ms. Ripley's letters of response to his initial applications for access, written in her capacity as Deputy Minister of the Priorities and Planning Secretariat. She states that the undisclosed information constitutes "advice, recommendations and policy considerations to the Priorities and Planning Committee, a Cabinet committee, and the Executive Council".

[65] In my view there was ample evidence on the record before the chambers judge justifying his conclusion that the government had satisfied the threshold requirements of s. 13(1) of the **Act** and had thereby discharged its burden of proof under s. 45(1).

<u>ISSUE 2: How is s. 13 to be interpreted and applied to the information sought by the respondent?</u>

[66] At first reading there might appear to be some duplication between resolution of the first issue and addressing this the second issue on appeal. However, the first position taken by the respondent really raised a question of proof; that is to say whether there was *any or sufficient* evidence before the court even entitling the government to rely upon the sheltering exemption set out in s. 13(1)? Having satisfied myself that the record before the chambers judge clearly met the primary threshold of proof, I turn now to the more difficult question of how s. 13 ought to be interpreted and applied to the information sought by Mr. O'Connor in this case.

[67] This raises further subsidiary questions including the meaning to be attached to the words "substance of deliberations" and "submitted or prepared for submission"; whether the information in the database is of such a nature that it would reveal the substance of Cabinet's deliberations; and the relationship between s. 13(2)(c) and s. 13(1).

[68] The parties have acknowledged that this is the first occasion this court has had the opportunity to consider s. 13 of the **FOIPOP Act**, that is the Cabinet document exemption. Both the government and the respondent recognize the importance of Cabinet confidentiality to the public interest and the

proper functioning of government as a whole, but disagree as to the manner, or extent to which, such confidentiality is protected.

[69] The essence of the appellant's argument is that the chambers judge erred in interpreting the relationship between 13(1) and 13(2) of the **Act**, in particular by defining "substance of deliberations" in s. 13(1) of the **Act** too narrowly and finding that the "substance of deliberations" including advice and/or recommendations to Cabinet or its committees, falls within s. 13(2)(c) of the **Act**.

[70] By contrast the respondent argues that the chambers judge applied the exemption in s. 13(2) too broadly. The respondent says it ought to have been interpreted in the "limited and specific" manner prescribed by s. 2(b) of the **Act** with the result that the exemption available to government in s. 13 is not broad enough to shelter the information he is after.

[71] I have already explained how the Nova Scotia **FOIPOP Act** reflects a deliberate attempt by legislators in this province to articulate and enhance the principle of government accountability and responsibility for its actions.

[72] It is also well established in this province that freedom of information legislation is to be broadly interpreted in favour of disclosure. In

> **McLaughlin v. Halifax-Dartmouth Bridge Commission** (1993), 125 N.S.R. (2d) 288, this court observed at p. 293:
>
> > The Nova Scotia **Freedom of Information Act** should be construed liberally in light of its stated purpose.

Although decided under predecessor legislation, there is no need to depart from the view expressed in **McLaughlin**.

[73] The respondent complains that the chambers judge erred in law by giving special and inappropriate weight to the exemption extended to Cabinet confidentiality, thereby interpreting s. 13 too broadly. I cannot agree. Here is what the chambers judge said after first citing the direction given by this court in **McLaughlin** and similar precedents.

> At the same time, it is equally clear that the purpose of s. 13(1) is to protect Cabinet confidentiality as an important exception to broad disclosure.

The statement by the chambers judge does not, in my view, give any special or greater weight to the exemption extended to Cabinet confidentiality. He merely confirmed that Cabinet confidentiality is a well recognized and important

exception to the notion of broad disclosure. There is nothing in the judge's remarks on this point that would contradict the statute's clear statement of purpose set out in s. 2.

[74] The decision of the Supreme Court of Canada in **Carey v. Ontario**, [1986] 2 S.C.R. 637 assists in understanding the historical evolution, rationale and significance of Cabinet confidentiality. While that case did not concern freedom of information legislation, the observations of Justice La Forest writing for a unanimous court are instructive. His analysis describes Cabinet confidentiality as promoting the public interest, not impeding it. He observes that the public interest in protecting Cabinet documents from disclosure is more properly described as a public interest immunity than a privilege of the Crown. Under the heading "Rationale for Non-disclosure of Cabinet Documents" beginning at §43, Justice La Forest elaborates on the nature of a public interest in Cabinet confidentiality. While recognizing the argument favoring candor as a legitimate basis for preserving Cabinet privilege in order that government policy might be conceived and debated openly and behind closed doors, La Forest, J. identified "the proper functioning of government" as the primary rationale for Cabinet

confidentiality. In this, Justice La Forest preferred the reasons given by Lord Reid in **Conway v. Rimmer**, [1968] A.C. 910:

> ... The best explanation is that of Lord Reid. For him it was not candour but the political repercussions that might result if Cabinet minutes and the like were disclosed before such time as they were of historical interest only. [At §49.]

[75] Later in his judgment, Justice La Forest approved the following statement of Lord Reid in **Conway**:

> ... To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticize without adequate knowledge of the background and perhaps with some axe to grind. [At §49.]
>
> [Underlining mine.]

[76] Justice La Forest concluded his own reasons on this point by stating:

> ... I would agree that the business of government is sufficiently difficult that those charged with the responsibility for running the

> country should not be put in a position where they might be subject to harassment making Cabinet government unmanageable. [At §50.]

[77] The Court's expressions in **Carey** concerning the primary and lesser values that underlie the public interest in Cabinet confidentiality are not misplaced when considering the statutory exceptions to disclosure under **FOIPOP** legislation.

[78] I turn now to the way in which the principle of Cabinet confidentiality finds expression in s. 13 of the Nova Scotia **FOIPOP Act**.

[79] The first clue to the manner in which s. 13 is to be interpreted is found in the purpose clause, s. 2. It is significant that this purpose clause, unique to Nova Scotia in the ways I have already demonstrated, contains not one but two directives as to how exceptions are to be considered. As we have seen, s. 2(a) indicates that one of the purposes of the statute is to ensure that public bodies are fully accountable to the public and one of the ways of ensuring that objective is by:

> 2(a)(iii) <u>specifying limited exceptions</u> to the rights of access
>
> [Underlining mine.]

[80] In s. 2(b), the statute goes on to express a further purpose, namely:

> to provide for the disclosure of all government information with necessary exemptions, that are limited and specific ...
>
> [Underlining mine.]

[81] Thus it can be seen that "exceptions" are to be "limited" (s. 2(a)(iii)) and "exemptions" are to be "limited and specific" (s. 2(b)). While the Legislature chose different words when setting its own parameters to the exceptions or exemptions, I draw no meaningful distinction between the selected characterizations.

[82] Given such a clear expression of intent on the part of the Legislature, I cannot accept the appellant's argument that the Cabinet document exemption contained in s. 13(1) should, to quote from the appellant's factum, "be broadly construed under the **Act** to accomplish the purpose of the exemption". To my mind the approach suggested by the appellant is neither contemplated nor required. I see s. 13(1) as exempting the whole concept of Cabinet confidentiality, a discrete concept, limited and specific, from the general duty of disclosure. The provisions from the purpose section to which I have just referred simply make it clear that in order to achieve the **Act**'s stated objectives, any exemptions or exceptions to the obligation upon a fully accountable government to provide its citizens with government

information, must be limited and specific. Logic would dictate that any limitations upon the stated objective of insuring that public bodies are fully accountable, must be few and tightly drawn. They must be clearly identified and the basis upon which such a request for information might be refused, must be clearly stated.

[83] This then leads to an analysis of the meaning of the words “the substance of deliberations” and “submitted or prepared for submission”. Counsel for the appellant places considerable reliance on the approach taken by the British Columbia Court of Appeal in **Aquasource Ltd. v. British Columbia (Information & Privacy Commissioner)**, [1999] 6 W.W.R. 1. Not surprisingly the respondent takes the position that statements and conclusions of the Court of Appeal in that case have limited application to the matter before us here. It would be helpful to briefly review the facts of that case and then consider how it came to be applied by the chambers judge to the information sought by Mr. O’Connor.

[84] Unlike this case, the issue arising in **Aquasource** came before the British Columbia Court of Appeal as an appeal from a judicial review of a decision made by that province’s Privacy Commissioner. Aquasource was in the business of producing, selling and exporting bottled water. It was anxious to

secure a bid for a contract to supply water to a drought stricken community in California. In March 1991 the provincial government, by an order in council, established a moratorium on the issuance of new water-export licenses effectively nullifying Aquasource's bid. In its various attempts to rectify the situation, Aquasource sought copies of all information that had been considered by the B.C. Cabinet in coming to its decision. In response to its application, **Aquasource** obtained excerpts severed from a single document that had been submitted to Cabinet by the Ministry of International Business and Immigration. Aquasource then applied pursuant to s. 52 of that province's **Act** for a review of the Ministry's refusal. Section 12 of the B.C. statute reads:

> 12(1) The head of a public body must 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.

[85] But for this mandatory requirement obliging the head of a public body in British Columbia to refuse to disclose such information (whereas in Nova

Scotia the provision is discretionary), the operative text of the B.C. statute is the same as s. 13(1) of the **FOIPOP Act** in Nova Scotia.

[86] In 1994 the B.C. Privacy Commissioner ordered the Ministry to reconsider its decision. Aquasource applied for judicial review on the basis that the Commissioner did not have jurisdiction to refer the matter back to the Ministry and was instead required to order the Ministry to release the whole of the document. The court directed the Commissioner to reconsider the case and make such findings of fact as he considered appropriate. In 1995 the Commissioner concluded that the Ministry was obliged by s. 12 to refuse access to the severed portions of the document. Aquasource applied once again for judicial review asking that the Commissioner's order be set aside. In 1996 the province's Supreme Court upheld the Commissioner's order. This led to the matter coming before the British Columbia Court of Appeal in 1998. Justice Donald wrote for the court and dismissed the appeal. He described the document that had been submitted to the court in a sealed packet as consisting of 11 pages of text and numerous other pages of appendices, tables and a financial impact assessment. A senior policy analyst testified that he prepared the document at the request of Cabinet and

that he had been asked questions relating to it by Cabinet ministers during a Cabinet committee meeting.

[87] As we are here dealing with an appeal taken from the decision of a judge of the Nova Scotia Supreme Court as opposed to judicial review of a Commissioner's order, I need not concern myself with the factors addressed by Mr. Justice Bastarache in his majority reasons in **Pushpanathan v. Canada (Minister of Employment and Immigration)** (1998), 160 D.L.R. (4th) 193 or that portion of the judgment of Donald, J.A. in **Aquasource**, referring to them. Instead I will address my remarks to Justice Donald's interpretation of the phrase "substance of deliberations". To lend context to his analysis I must first refer, as did he, to the position taken by counsel representing Aquasource in its demand for production. Its counsel said:

> 41 It is submitted that the phrase "substance of deliberations" on its ordinary and natural interpretation must mean the essence or core content of the deliberations which would be the actual views, opinions, thoughts, ideas and concerns of the members of the cabinet.
>
> ...
>
> 44 The fact that the legislature specifically restricted the obligation not to disclose "information that would reveal the substance of

> deliberations of the executive council" suggests that the legislature intended the restriction under section 12(1) to be a narrow one limited to documents that would actually reveal the views of cabinet. [Underlining mine.]

[88] Donald, J. A. declined to accept the narrow reading of s. 12(1) urged upon him by Aquasource. I agree with his rejection of that interpretation. Having done so, I must respectfully disagree with his stated reasons and, further, with his ultimate conclusion concerning the test to be applied.

[89] Donald, J.A. explained:

> 39 I do not accept such a narrow reading of s. 12(1). Standing alone, "substance of deliberations" is capable of a range of meanings. However, the phrase becomes clearer when read together with "including any advice, recommendations, policy considerations or draft legislation or regulations submitted ....". That list makes it plain that "substance of deliberations" refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision. An exception to this is found in s. 12(2)(c) relating to background explanations or analysis which I will discuss later.

...

> 41 It is my view that the class of things set out after "including" in s. 12(1) extends the meaning of "substance of deliberations" and as a consequence the provision must be read as widely protecting the confidence of Cabinet communications.

[90] With great respect while I agree that the equivalent of their s. 12(1) ought not to be given the narrow interpretation urged by the Aquasource Corporation in that case, my reasons for coming to that conclusion are different than those expressed by the British Columbia Court of Appeal. In my respectful view, it miscasts the inquiry required in a s. 13(1) analysis to say that:

> ... ‘substance of deliberations’ refers to the body of information which Cabinet considered (or would consider ...) in making a decision.

Neither do I read this provision “as widely protecting the confidence of Cabinet communications”, as did the Court of Appeal in **Aquasource**.

[91] To my mind there is no need to give the kind of broad, expansive definition to “substance of deliberations” urged by either the government in the **Aquasource** case, or by the appellant in a matter before us. Rather than

focusing the inquiry on the "kind" or "body" of information, the question that ought to be asked is whether by its disclosure, the substance of Cabinet deliberations would be revealed.

[92] In my opinion, an earlier decision of the B.C. Privacy Commissioner in another case, referred to by the court in **Aquasource**, properly describes the approach to be taken whenever a s. 13(1) analysis is triggered. 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 those deliberations. [Underlining mine.]

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).

[93] In my respectful opinion, this is a much easier test to apply than that expressed by the court in **Aquasource** as:

> Does the information sought to be disclosed <u>form the basis</u> for Cabinet deliberations?
>
> [Underlining mine.]

To put the question that way would, in practical terms, be very difficult to answer, or ever prove.

[94] Whenever an application for information is filed, the head of the public body, or the Review Officer, or a reviewing court, must examine the information to see if the test I have described, is satisfied. Among other questions, the examiner will want to know: how the information is labeled or characterized by government, what it purports to be or do, and what, in fact, it is or does. However, no government can hide behind labels. The description or heading attached to the document will not be determinative. The hyperbole accompanying speeches or press releases will not be decisive. There is no shortcut to inspecting the information for what it really is and then conducting the required analysis under s. 13 to see if its disclosure would enable the reader to infer the essential elements of Cabinet deliberations. The Review Officer must always be wary of such traps before embarking upon the necessary inquiry.

[95] Before leaving the subject of the test to be applied in any s. 13(1) analysis, I wish to comment briefly on the chain or list of words that follow the phrase "substance of deliberations". For ease of reference I will note again the material parts of s. 13(1):

> ... may refuse to disclose ... information that would reveal the substance of deliberations of the Executive Council or any of its committees, <u>including any advice, recommendations, policy considerations or draft legislation or regulations</u> ...
>
> [Underlining mine.]

Counsel for the appellant, Province of Nova Scotia, urged us to adopt the approach taken by the B.C. Court of Appeal in **Aquasource** and find that the additional chain of words I have emphasized should be taken to extend the meaning of "substance of deliberations", thus broadening the protection of confidentiality afforded Cabinet communications. Again, with great respect, I am not inclined to follow the reasoning expressed in **Aquasource**. Rather, the words add context and are subsumed by the accurate inferences test I have just explained. In my opinion, the words "including any advice, recommendations, policy considerations or draft legislation or regulations" following "substance of deliberations" in s. 13(1) are

simply added so as to provide specific examples of “information”, thus removing any ambiguity as to whether such things are in fact included. See for example, **National Bank of Greece (Canada) v. Katsikonouris**, [1990] 2 S.C.R. 1029 at pp. 1040-41.

[96] Having stated the test I will turn now to a consideration of the approach taken by the chambers judge in this case.

[97] As noted earlier, the appellant here complains that the chambers judge took too narrow a view of s. 13 and that he ought to have adopted the broad approach adopted by the British Columbia Court of Appeal in **Aquasource** so as to “widely protect the confidence of Cabinet communications”. I have already determined that such expanded protection is neither justified nor warranted. It is true that at paras. 21-22 of his decision the chambers judge (after first referring to the approach taken by the B.C. Court of Appeal in **Aquasource**) states,

> On the other hand, “*substance*” could refer to Cabinet’s actual deliberation process. In other words, only that information touching on the actual deliberations would be protected. This view would significantly limit the s. 13(1) exception in favour of more Government disclosure.

> With respect, when comparing the two approaches, I prefer the latter interpretation. To interpret the "*substance of deliberations*" as protecting all information "*form [ing] the basis of Cabinet deliberations"*, would paint Cabinet confidentiality with too broad a brush. Cabinet may base its deliberations on a variety of data, some of which deserves no protection at all. In fact in the case at bar, the Respondent released to the Appellant information that arguably could have "*formed the basis for Cabinet's deliberations*". Let me use a refer (sic) to example. The cost of each program is no secret. In fact the Respondent, properly released each program's actual costs and future projected costs. Yet this uncontested information would have clearly "*form[ed] the basis for Cabinet deliberations*".

Yet the chambers judge qualifies that observation when at paras. 23-24 he states:

> However, at the same time s. 13(1) protects more than Cabinet's actual deliberations (in a verbatim sense). It would also protect information that would infer the *"substance of cabinet deliberations"* (in a tangential sense). As the subsection provides, this would include

"...advice [or] recommendations...prepared for submission to Cabinet or any of its committees...".

However, as earlier stated, a distinction must be made between advice (which is protected) and mere factual information (which must be disclosed). This distinction was recognized recently by the Manitoba Court of Queen's Bench in *Jaslowski v. Manitoba (Minister of Justice)* [1999] M.J. No. 348 when considering a similar *advice and recommendation* exemption, Clearwater J. at paragraph 10 noted:

> The subsection 23(1)(a) and (b) exemption (advice to a public body – sections 38, 39 and 41 of the old *Act*) has been considered by this court on more than on occasion [see *Brousseau v. Manitoba (Minister of Industry, Trade and Tourism* (1996), 116 Man.R. (2d) 8 and *Pollock v. Manitoba (Minister of Justice)* (1995), 103 Man.R. (2d) 64]. The purpose of this exemption is [to] promote open and candid discussion and advice internally within the government with respect to the deliberative and decision-making process. *The "advice" referred to in s. 23(1)(a) and (b) must contain more than mere information* [see a

> decision of the Ontario Access and Privacy Commission dealing with a similar provision in Ontario's *Freedom of Information and Protection of Privacy Act*, 1987, in order #118 (appeal 890172)]. [Emphasis added]

[98] At §25 the chambers judge endorsed a statement made by Commissioner Sidney Linden (as he then was) in **Order 118, Institution: Ministry of Transportation**, [1989] O.I.P.C. No. 81 (Appeal 890172), where the then Commissioner said:

> 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.

[99] Finally the chambers judge continued at §26:

> I accept Commissioner Linden's analysis completely. Advice is part of the deliberation process. It deserves s. 13(1) protection. The facts upon which the advice is based need not be protected.

[100] So although in paras. 20 and 21 the chambers judge spoke of the two extremes, it seems to me that he ultimately chose a middle ground, the

essence of which is that any information from which one could likely infer the substance of Cabinet deliberations is sheltered by s. 13(1).

[101] In my opinion the chambers judge's general approach reflects the test as I have explained it, at least insofar as it addresses the proper focus of a s. 13(1) inquiry. I do not intend my reasons to be taken as an endorsement of the judge's reflections on the meaning of "advice" or the distinction he cast between "advice" and "facts". In this case I need not go so far as to say whether the chambers judge was right in his observation that "... mere factual information ... must be disclosed". The distinction between advice given to Cabinet which is sheltered by the s. 13(1) exemption and "mere factual information" does not arise in this case. We need not explore the possible scenarios where, in other circumstances, a legitimate claim might well be advanced to protect factual information submitted to Cabinet from which their deliberations might then be inferred.

[102] In the result the chambers judge did not err in the interpretation he gave to s. 13(1). Furthermore, the approach he took in applying its provisions to the evidence he examined privately in his Chambers led him to conclude that the material did amount to advice given and/or recommendations made to a

Cabinet committee and from which one could likely accurately infer their deliberations, and was thus exempt from disclosure pursuant to s. 13(1).

[103] I turn now to a consideration of the chambers judge's approach to the relationship between s. 13(1) and s. 13(2).

[104] The chambers judge recognized that s-s. 13(2) stands as an exception to the exemption available to government under s. 13(1). He said:

> In keeping with the **Act**'s theme of openness, s. 13(2) recognizes that Cabinet confidentiality is less significant with the passage of time and when advice has been acted upon by Cabinet. [At §29.]

[105] Having found that the Cabinet confidentiality exemption had been established under s. 13(1), the chambers judge then had to decide whether any of the three exceptions set out in s. 13(2) applied to the circumstances before him. Clearly 13(2)(a) and (b) and (2)(c)(iii) were irrelevant. Thus the only remaining relevant portions of s. 13(2)(c) requiring his consideration were:

> 13(2) 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, ...

[106] The two subsidiary questions that then arose were whether or not a decision had been “made public” or “implemented” and if so, was the information “background information”? In order for the information sought by Mr. O’Connor to be revealed - it first having been determined that it was protected from disclosure by virtue of s. 13(1) - the chambers judge would have to be satisfied that the requirements of this *exception* to the *exemption* were met. He found that they had. At this point it would be helpful to consider what I view as the true practical relationship between s. 13(1) and s. 13(2).

[107] 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 is **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.

[108] Subsection 13(2) begins:

> Subsection (1) does not apply to ...

That is to say, s. 13(2) delineates those situations wherein the head of a public body has *no discretion* to refuse to produce the sought after information. The obvious intent of the Legislature in adding s. 13(2) was to provide those few and specific limits to the scope of s. 13(1), rather than purporting to specify "limited exceptions to the right of access" referred to in s. 2(a)(iii).

[109] From the list of excepted circumstances - that is to say, those situations wherein there would be no discretion to refuse disclosure - the only circumstance applicable to this case is s. 13(2)(c). This subsection clearly requires the disclosure of "background information in a record the purpose of which is to present explanations or analysis" to Cabinet or its committees, provided any one of the additional prescribed characteristics in (i), (ii), or

(iii) is attained. In this case, it is acknowledged that the decision by government has been implemented and made public. The judge having found that the information is "advice and/or recommendations", the information sought by Mr. O'Connor could only be released if it were deemed to be "background information" under s. 13(c). The phrase "background information" in s. 13(2)(c) is narrowly defined in s. 3(a) of the **Act** to "mean" only 12 possible things, the things listed in subclauses (3)(a)(i) through (xii). This therefore reflects the Legislature's clear intent to provide an exhaustive list of what is meant by "background information" disclosable under s. 13(2). Having chosen the word "means" rather than "includes" the Legislature must have intended the definition to be a complete list of the things that comprised it, and to which no others would be added.

[110] The chambers judge found as a fact that the PAO was very much an ongoing effort. He wrote:

> In reviewing all the materials both released and unreleased, and all the evidence before me, I find that the program review is very much a work in progress. Except for 86 programs that have been eliminated, it is not something upon which a final decision has been "implemented

> or made public" . ... To release this type of advice while an exercise is "in stream" would risk the orderly process of government which s.13(1) is designed to protect ...

I agree with his conclusion, in this respect, as to the ongoing nature of the PAO in providing advice to government for its consideration in making decisions concerning the continued life of all government programs under review. But for the 86 programs that had already been eliminated, no decision concerning the others had been made public or been implemented by government.

[111] The remaining question, for the purposes of this appeal, is whether the chambers judge erred in deciding that the PAO for the 86 eliminated programs was "essentially a feasibility study" as defined in s. 3(a)(ix) of the **Act** and therefore accessible by the respondent in that it then qualified as "background information" under s. 13(c).

[112] The appellant makes a persuasive argument that the PAO is not a feasibility study. The *Concise Oxford Dictionary*, (1990) 8th Ed., defines "feasible" as:

> practicable, possible; easily or conveniently done.

[113] The phrase "feasibility study" is defined as:

> a study of the practicability of a proposed project.

[114] In *Black's Law Dictionary*, 6th ed., "feasible" is defined as:

> Capable of being done, executed, affected or accomplished.
>
> Reasonable assurance of success. See Possible.

[115] The appellant argues that the PAO database was not directed towards measuring whether programs were capable of being accomplished or had a reasonable assurance of success. It does not contain a proposed plan or method, nor any assessment. Rather in the appellant's submission the PAO is exactly what it says: a policy, analysis and options exercise; a management tool in government's multi-year budget and business planning process designed and employed to assist in aligning delivery of government programs to the new government's policy objectives, fiscal targets and agenda. The Province protests that neither government nor an applicant should be expected to, nor concerned about having to "shoehorn" the sought after information into one of these listed categories, to ensure a fit.

[116] While I admit to some difficulty with the chambers judge's conclusion, I am not prepared to say that he committed reversible error by finding that the PAO database constituted a feasibility study, thus meeting the statutory definition of background information. It is not my function to retry the case.

The test is not what I would have done had the matter come before me in first instance but rather, whether the judge's finding amounts to a "palpable", "gross", and "overriding" error. Based on the evidence before him, I am not prepared to say that it was.

ISSUE 3: If the circumstances in this case qualify for Cabinet exemption thereby barring access to the information sought by the respondent, has entitlement to the exemption been waived as a result of the government's actions?

[117] I find no merit to the respondent's argument that an exemption for Cabinet confidentiality here was waived when the documents were shown to certain members of the Legislative Assembly who were neither members of Cabinet nor civil servants providing advice to Cabinet. In my view these arguments were correctly rejected by the chambers judge. As is made clear by s. 5 of the **Public Service Act**, R.S., c. 376, as amended, the Priorities and Planning Committee is a committee of Cabinet. From time to time persons other than Cabinet ministers may be appointed to the committee. There was no waiver of Cabinet confidentiality when the documents were shown to the three caucus members, who had been included as members of the three Cabinet

subcommittees. The evidence discloses that a single caucus member was assigned to each of the three Cabinet subcommittees into which Cabinet divided itself so as to facilitate its workload in reviewing the PAO database for budget decision making. That did not amount to a general waiver of Cabinet privilege such that any member of the public might then exercise a right under the **FOIPOP Act** to access the PAO database.

ISSUE 4: By what authority can the particular format of *providing* information deemed accessible, be compelled?

[118] Here the appellant argues that the learned chambers judge erred in law in ordering that access be provided in a particular electronic format. Prior to the judge's decision, the information supplied to the respondent had been forwarded electronically in a portable document format (PDF) which was found by the respondent to be much less user-friendly than the "access" format in which the database was originally created.

[119] The appellant complains that by, in effect, ordering the government to provide the information to Mr. O'Connor in the access format, the chambers judge exceeded his jurisdiction and set a dangerous precedent.

[120] Technically the appellant is right. There is no authority in the **FOIPOP Act** enabling the judge to do what he purported to do when he said:

> ... it only makes sense to provide all the relevant information in "access" format and I so order.

[121] However, it is hard to fault the chambers judge's directions. The "access" format had already been prepared by government. In other words it was "on the shelf" and immediately available to the respondent at no additional effort, expense or inconvenience to the government. In those circumstances, it seems to me to be perfectly reasonable for the chambers judge to have given the direction he did. This ought not to be taken as establishing an unwarranted or unnecessary precedent. As the chambers judge himself recognized in the very next line of his judgment:

> By doing so I am not saying that all **FOIPOP Act** applicants shall have their choice of formats. This aspect of my ruling is specific to the facts of this case. [At §50.]

[122] I do not propose saying anything more about this aspect of the appeal.

<u>ISSUE 5: How should costs between the parties be resolved?</u>

[123] The appellant takes the position that in chambers each party agreed to bear their own costs and that the order of the trial judge reflected their agreement. The appellant points out that the respondent did not appeal the order on costs. The respondent argues that because, in his submission, there "were no obstacles to your [this court] deciding the case afresh", any costs arrangements at trial were never intended to be binding on the respondent on appeal.

[124] I agree with the appellant. Success has been divided. I would make no order with respect to costs. Both the appeal and the cross-appeal are dismissed.

Saunders, J. A.

Concurred in:

Freeman, J.A.

Bateman, J.A.