



**Nova Scotia Freedom of Information and Protection of Privacy
Review Office**

Guide to Formal Reviews

under the

Freedom of Information and Protection of Privacy Act

and

Part XX of the Municipal Government Act

This Guide does not apply to files that are deemed to be “Straightforward Reviews”

April 2014

TABLE OF CONTENTS

1. Why are Formal Reviews held?	1
2. Who participates in a Formal Review?	1
a) Changes of address and change of representative	1
3. What happens during a Formal Review?	2
a) The Review Office distributes the Notice of Formal Review.....	2
b) Notice of Formal Review	2
i) Background and Facts	2
ii) Initial Representations and reply Representations	3
4. Deviating from the process	3
5. Decision	4
6. Preparing for a Formal Review	4
a) Burden of Proof.....	5
b) Representations	5
i) Mediation Material.....	6
ii) Reference Material.....	7
c) Format of Representations	7
d) In-camera Representations.....	7
i) How to submit in-camera Representations to the Review Office for approval	8
e) Standards for preparation of responsive records.....	8
7. Frequently Asked Questions	9
a) Will my name be disclosed?	9
b) Are Representations public documents?	9
c) Are Review Reports final and binding?	10
d) Will the Review Office provide me with the Records	10

You are entitled to participate in a formal Review conducted by the Freedom of Information and Protection of Privacy Review Officer [“Review Officer”]. To help you get ready, we have prepared answers to questions you might have about formal Reviews.

If you have further questions regarding the formal Review process after reading this Guide, please ask for assistance from the Portfolio Officer assigned to your file; his/her contact information is found in the Notice of Formal Review that was sent to you.

Where this Guide refers to specific sections of the *Act*, the first number refers to the *Freedom of Information and Protection of Privacy Act* and the second to *Part XX* of the *Municipal Government Act* [“*Act*”].

1. Why are Formal Reviews held?

In most cases, early in the Review process, the Review Office staff attempt to informally resolve the matter. If the attempt is successful, the file closes. If it is unsuccessful, the Review Officer must decide the matter. Sometimes the issue(s) under Review do not lend themselves to informal resolution. In those cases, the Review Officer must decide the matter.

If the matter is decided by the Review Officer, this is considered formal Review. After completing the formal Review, the Review Officer makes a decision and issues a Review Report that contains findings and recommendations.

2. Who participates in a Formal Review?

The applicant and the public body to which the request was made will be required to make representations. If the Review relates to information about another individual or a business (third party), the third party will also be entitled to participate in the formal Review.¹

If a Review flows from a Request for Review by a third party, the original applicant who made the access request will be entitled to provide representations.² The Review Officer also has the power to deem any other person appropriate to make representations;³ this could be other organizations, agencies or individuals who may have a broader interest in, or knowledge of, the implications of an issue or who may be able to provide a different perspective.

2. a) Changes of address and change of representative

Requests for Review require that the applicant/applicant representative provide a mailing address, where that individual is to be contacted by the Review Officer, Review Office staff, the public body and any party for all purposes related to his/her Review. Similarly, the mailing address of the public body and every other party are required. Every address will be shared with all other parties to the Review. Any change to any party's address must be communicated to both the Review Office and all other parties immediately. Failure to do so on the part of the applicant will result in the Review not proceeding. Failure of other parties to provide updated contact information will result in the forfeiture of their opportunity to participate in the formal Review. These requirements may be modified in appropriate circumstances, such as the involvement of undisclosed (unnamed) parties.

The Review Office's mailing address is:

Freedom of Information and Protection of Privacy Review Office
PO Box 181
Halifax NS, B3J 2M4

Where there is a change in representative, a new Form 3⁴ is required. The Review Office will only deal with the representative. An applicant's failure to provide current representative contact information will result in the file being considered abandoned and closed.

¹ s. 37(2)(b)/492(b)

² s. 37(2)(b)/492(b)

³ s. 37(2)(d)/492(d)

⁴ *Consent to Disclosure of Information*

3. What happens during a formal Review?

The procedures followed during a formal Review are formal. You are not required to appear in person in front of the Review Officer. Formal Reviews are conducted in writing.

A formal Review involves sending your written submissions, called representations to the Review Officer and exchanging copies of your representations with the other parties to Review [“parties”].

You may, at your own expense, have a lawyer or another person represent you in the formal Review, however it is not necessary. If you are going to be represented, a Form 3 is required. Where parties do have legal counsel or another form of representation, the representative is expected to provide the party with copies of Review documents. The Review Office will only communicate with the representative.

3. a) The Review Office distributes the Notice of Formal Review

The Portfolio Officer, who is assigned to the file, sends the Notice of Formal Review to all parties. The Notice of Formal Review is described below.

If a third party or other appropriate person is identified as an appropriate party to participate in the formal Review, the Portfolio Officer, if this has not already been done, will provide that party with Notice of Formal Review. The Notice will include a copy of the Request for Review.⁵

3. b) Notice of Formal Review

The Notice of Formal Review generally contains the following information, as appropriate to the specific formal Review:

- relevant background and facts⁶
- names and addresses of the Review parties in the formal Review⁷
- the sections of the *Act* under consideration
- the issues to be decided in the formal Review
- who has the burden of proof, where applicable
- the deadlines for the delivery and exchange of initial and reply representations
- the date the file will be forwarded to the Review Officer

3. b) i) Background and Facts

The Portfolio Officer assigned to the file will prepare a brief description of the background of the file and other facts that are deemed relevant to the Review, such as:

- the chronology and details of the access request
- the issues and applicable sections of the *Act*
- a description of the record and types of personal information (if applicable)
- any factual outcomes of mediation, such as changes in the issues, the exemptions applied or the scope of the records
- a timeline

⁵ s. 34(3)(b)/489(1)(c)

⁶ see 3. b) i) of this Guide

⁷ see 2. and 2.a) of this Guide

3. b) ii) Initial and Reply Representations

The parties must provide their initial representations and reply representations to the Review Office on or before the dates set out in the Notice of Formal Review, under *Schedule for Representations*.

Parties must also, at the same time, provide copies of their initial representations and reply representations to each other, on or before the dates set out in the Notice of Formal Review, under *Schedule for Representations*. Parties may contact the Portfolio Officer for guidance on this process.

Where the Review Officer determines a party's identity is in issue or otherwise to be kept private from other parties, the Review Officer will — in these cases only — accept and exchange representations for all parties. In these cases, parties will receive replacement instructions in the Notice of Formal Review.

Initial representations must deal only with those issues set out in the Notice of Formal Review and should include evidence and arguments. Initial representations must not raise any new issues or exemptions.

Where the applicant does not provide initial representations and s/he has the burden of proof, the Review Office will assume that s/he no longer wishes to proceed with the Review and the file will be closed.

Parties may reply to each other's initial representations. Reply representations must not raise any new issues or contain any new facts (except in response to facts in the other parties' initial representations).

A party who does not deliver initial representations will not be allowed to deliver reply representations. The Review will proceed onward in the formal Review and the Review Report will be issued in the absence of representations from that party.

Once the exchange of representations has taken place, the file will be forwarded to the Review Officer on the date identified in the Notice of Formal Review.

4. Deviating from the process

If a party wishes to deviate from the process, they must first obtain the agreement of all the other parties.

This is most likely to happen in cases where one party requires an extension to the due date for providing representations set out in the Notice of Formal Review. Evidence of those agreements must be provided to the Review Officer before the due date. If the party is unable to get the other parties' agreement, the person who is seeking the deviation may then ask the Review Officer for permission, but it should be noted that the Review Officer will consult with the other parties before making a decision.

The Review Officer will not accept late representations, except under extenuating circumstances. In these cases, the party must have the agreement of the other parties. A Review party that wishes to request more time to make representations must do so no later than 10 days before the due date for the representations. See below for further details on the content of representations.

5. Decision

In order to consider the case and make a decision, the Review Officer is provided with the following material:

- the applicant's original access request, the public body's decision, the applicant's Request for Review and any other relevant correspondence
- the Notice of Formal Review
- the parties' initial representations and reply representations
- copies of any records
- other material relevant to the Review, including documents received and notes taken during the earlier stages of the Review (excluding mediation materials)

The Review Officer may request further representations where it is deemed more information is necessary or desirable.

The Review Officer will decide what evidence to rely on and how much weight to give that evidence. To be successful, the party will be required to prove certain facts and issues according to a particular standard of proof. The standard of proof is "on a balance of probabilities" or "on a preponderance of evidence." A party will have proven its case "on a balance of probabilities" if the Review Officer is able to say: "I think it more likely, or more probable, than not." This means that the Review Officer has considered and weighed the evidence presented by all parties and the Review Officer is convinced by the persuasiveness and/or accuracy of one party's evidence over the others'.

After considering the material, the Review Officer issues a written decision,⁸ or Review Report, to the parties.⁹ The *Act* authorizes the Review Officer to make any recommendation that the Review Officer considers appropriate.¹⁰ The recommendations may recommend that the public body disclose records or reconsider its decision. The Review Officer may also confirm the public body's decision.

In most cases, the Review Office will first provide each party with a copy of the Review Report and then make it available to the public by publishing it on the Review Office website. Some Review Reports are not made public.

The public body has 30 days after receiving the Review Report to make a decision in regard to the Review Officer's recommendations and give notice to all parties of the decision.¹¹

6. Preparing for a Formal Review

How you prepare depends largely on your role, the issues under Review and who has the burden of proof for the issues. The burden of proof will, where applicable, be described in the Notice of Formal Review.

Parties are encouraged to consult previous Review Reports to determine how similar Reviews have been decided in the past and on what basis. Review Reports are published on our website, arranged by the year in which they were issued. The Review Office website also has a sectional index – Review Reports by Section. For each sections of the *Act* it lists the Review Reports that have considered that section.

⁸ s. 39(1)(a)/492(1)(a)

⁹ s. 39(1)(b)/492(1)(b) and s. 37(2A)(a)/490(2A)(a)

¹⁰ s. 39(2)/492(2)

¹¹ s. 40(1)/493(1)

There are also other online resources which provide additional guidance. In most cases, the Portfolio Officer will attach other tools to the Notice of Formal Review.

6. a) Burden of Proof

When the *Act* imposes a burden of proof on a party in a Review, it means that party must provide evidence and arguments to support the party's position.

What is meant by "burden of proof" is that one party has the duty in law to bring forward evidence that a particular fact or situation exists, and then to persuade the Review Officer that the evidence meets the necessary tests and standards.

In Reviews involving a decision to give or refuse access to information, the public body has, with two exceptions,¹² the burden to prove that it made the correct and appropriate decision regarding the access request.

For other issues, the *Act* does not set out a burden of proof. In these cases, each party has an obligation to bring forward evidence and arguments that justify its position on the issue. Because the Review Officer is essentially reviewing whether the public body's decision or action was made in accordance with the *Act*, the public body is in the best position to support its decisions even when it does not formally have the burden of proof.

Information that would be helpful in meeting your burden of proof could include:

- Excerpts from relevant legislation or regulations that apply to the operations of the public body and that relate to the issues under Review.
- Excerpts from policy manuals that set out practices or policies followed by the public body that relate to the issues under Review.
- Relevant court decisions or past Review Reports of the Review Officer.
- Decisions made by Information and Privacy Commissioners in other jurisdictions that may be of assistance to the Review Officer in consideration of the issues.

6. b) Representations

Each party makes initial representations. All parties exchange their initial representations at the same time.

A party's initial representations should contain arguments and evidence that support its case. "Evidence" is the material that parties must submit to establish the facts on which they are relying. "Arguments" are the reasons why the party thinks the evidence shows certain facts to be true, or why the Review Officer should interpret the law in a particular way.

Arguments should include the party's interpretation of how the relevant sections of the *Act* apply in the circumstances and explain how the evidence presented supports the party's position.

Evidence is comprised of assertions of fact on which a party relies and can be submitted in the form of affidavits or other documents containing factual information that supports a party's argument. If a party wishes to rely on evidence from another person, as opposed to a document, the evidence from that

¹² s. 45/498

person must be collected by the party who wishes it to be included. The Review Office will not seek out the evidence from anyone on behalf of the parties.

Hearsay evidence is evidence given by one person about what another person said. Because the formal Review results in the Review Officer issuing a Review Report that disposes of the issues, it is not generally appropriate for parties to submit arguments based solely on belief or that include hearsay evidence. Wherever possible, the person with direct knowledge of the facts, or who made the statements, should be the one to attest to those facts or statements.

Parties may not succeed in a formal Review if they do not provide evidence to support their arguments. If the success of an argument depends on underlying facts, providing the argument alone is not sufficient. The underlying facts must be established by evidence.

It is also not sufficient to provide the Review Officer with the records and leave it up to the Review Officer to try to draw from the records the facts on which the public body's decision was based.

Parties that do not provide the evidence necessary to support their arguments risk having decisions go against them.

6. b) i) Mediation Material

The *Act* gives the Review Officer the power to try to settle a matter through mediation.¹³ This is distinct from “informal resolution” that may be attempted by the Portfolio Officer prior to the matter being forwarded to formal Review. Mediation is a confidential and formalized process that is only attempted in rare circumstances. If it is attempted and unsuccessful, the entire mediation process, and the materials produced, will remain confidential.

“Mediation material” refers generally to information or communications that relate to offers or attempts to settle the matter during mediation, including any opinions on the merits of the matter by the Mediator conducting the mediation.

To preserve the confidentiality of the mediation process, a party may not, without the written consent of all other parties, include or refer to, in any representations:

- records or information generated during, and related to, the mediation process
- records or information provided by any party related to the mediation process
- records or information referring or relating to attempts to settle the issue(s) through mediation

If the party has not obtained written consent, the Mediator will remove this mediation material from the representations and will place it in a sealed envelope before the file is forwarded to the Review Officer. The Review Officer will not consider it in reaching a decision and issuing a Review Report.

“Mediation material” does not include information related to the factual outcomes of mediation, such as changes in the issues; or the exemptions applied; or changes to the scope of the records.

¹³ s. 36/489(2)

6. b) ii) Reference Material

Parties must provide a list of Review Reports, orders, court cases, statutes and other legal authorities mentioned in the party's representations and must cite the sources relied on. In addition to this list, the party must provide the following:

- For all published Canadian authorities referred to, the full name of the order, decision or legislation referred to and a proper citation for either QuickLaw or CanLII (Canadian Legal Information Institute, a public website at www.canlii.org) or the neutral citation assigned to the order or decision by the issuing body.
- For all unpublished or foreign authorities referred to, a full copy of the order, decision or legislation.
- For all other material referred to, including books, articles and academic journals, a copy of the relevant section, chapter or article and complete bibliographic information indicating the title, author, publisher and date of publication.

The party is responsible for ensuring that the materials and citations referred to or provided are accurate and complete.

6. c) Format of Representations

Parties must label representations with the public body's file number, the Review Office file number and the party's name. Any in-camera representations must be clearly marked in accordance with our instructions below.

Initial representations and reply representations must be:

- no longer than 10 pages each (excluding attached items such as affidavits or evidence)
- in 12-point type or clear and legible handwriting
- on numbered pages
- on one side of the page

Representations, affidavits and any copies of relevant authorities should not be bound in any fashion or placed in plastic covers.

6. d) In-camera Representations

Representations made in-camera means that the material is submitted privately and kept from the other parties in the formal Review and from the public. In-camera material will also not be disclosed in a Review Report. A party may request that part or all of its representations be received on an in-camera basis. The Review Officer may accept in-camera material if it discloses the contents of records in the Review or discloses information that might be subject to an exemption under the *Act*.

A party who wishes to submit in-camera material must explain in writing why the material submitted in-camera should be accepted as such by the Review Officer and should limit the in-camera material to the absolute minimum necessary to protect the information in question.

The Review Officer will review the in-camera representations, consider the party's written explanation and may request further information from the party, before making a final decision about whether the in-camera representations will be accepted.

6. d) i) How to submit in-camera Representations to the Review Officer for approval

If a party intends to request to provide in-camera representations in the formal Review, the party must, no later than 10 business days before the due date for initial representations, provide to the Review Officer the following:

- one full copy of its initial representations containing any material that is submitted in-camera
- separate written representations and any supporting authority explaining why the material is properly submitted in-camera

The material proposed for in-camera treatment must be clearly marked, for example, by bolding, underlining or boxing the in-camera text or by highlighting the in-camera text with a colored highlighter.

It is not acceptable to provide one complete (unsevered) copy and one severed copy of the material being submitted in-camera. If the material is submitted in-camera with respect to only one or some of the other parties, then this must also be clearly indicated.

Given the other parties to the Review are copied on the representations to the Review Officer, the Review Officer will not be checking the content of the representations for any information that could or should have been considered in-camera. It is the responsibility of the Review parties to ensure that they follow the proper in-camera request procedure if they do not wish the other parties to receive part of their representations.

Please note that it is not necessary for the public body to request that the responsive records be submitted to the Review Officer in-camera, the Review Officer and Review Office staff never disclose the content of the records to anyone.

If necessary, the Portfolio Officer can answer any questions on how to provide in-camera representations.

6. e) Standards for preparation of responsive records

Public bodies must submit two copies of any records responsive to the access request early in the Review process – a complete unsevered copy and a copy of what was provided to the applicant. The pages of both copies are to be numbered and the numbers must match. If this was not done previously as requested, along with the initial representations, the public body must do so now, as follows:

- the records must be numbered clearly, beginning with the number 1, in the top right or lower right corner of each page.
- information and pages that have been severed and withheld must be clearly marked by highlighting the withheld text or pages – if more than one colour is being used, a legend must be provided; it is not acceptable to provide one complete (unsevered or unmarked) copy and one severed copy of the records.
- the sections and subsections of the *Act* the public body applied to the withheld information must be clearly indicated on the withheld page or next to the severed information, as the case may be.

Public bodies must also, wherever practicable, provide a table listing the records by record or page number and listing the sections of the *Act* applied, by record or page number.

Failure to provide the records in this fashion will render the representations ineffective as the public body will not be in a position to reference a specific document in its representations.

If the Review Officer is unable to identify the information to which the representations refer, it will not be possible to make a finding that the exemption applies. A public body's ability to point to specific pages in their representations will greatly enhance its ability to meet the burden of proof. Without the pages being numbered, the representations are incomplete. Page numbering also ensures that the records are kept in the same order as they were processed by the public body and provided to the applicant.

7. Frequently Asked Questions

7. a) Will my name be disclosed?

The Notice of Formal Review and the Review Report name the public body. The Review Report does not name the applicant or any third party unless consent is received. The Notice of Formal Review names all Review parties to each other.

While the *Act* prohibits public bodies from disclosing the identity of the applicant and the third parties to each other while providing notice during the access process,¹⁴ this is not applicable to the Review process.

The Review Officer also has the discretion to decide who will get a copy of the Request for Review; this includes original applicants and third parties, who did not know each other's identity previously.

The *Act* gives the applicant¹⁵, the public body¹⁶ and the third parties who were entitled to notice of the access request¹⁷ the right to make representations to the Review Officer.

When the Review Report is issued, a copy must be provided to the applicant, the public body and any third party that was entitled to notice of the access request.¹⁸

After a Review Report has been issued, public bodies must give notice of their decision in regard to the Review Officer's recommendations to the parties who were sent a copy of the Report.¹⁹ If a party appeals the public body's decision to the Supreme Court of Nova Scotia, the public body must give notice of the appeal to any other Review party.²⁰

As such, your name will be disclosed to the other parties as necessary.

7. b) Are Representations public documents?

We do not make representations available to the public in full. However the Review Report will often contain direct quotes and summaries of the content of the representations. If any party believes information should not be made public, please follow the instructions above for providing in-camera representations.

¹⁴ s. 22(4)/482(3B)

¹⁵ s. 37(2)(a)/490(2)(a)

¹⁶ s. 37(2)(c)/490(2)(c)

¹⁷ s. 37(2)(b)/490(2)(b)

¹⁸ s. 39(1)(b)/492(1)(b)

¹⁹ s. 40(1)(b)/493(1)(b)

²⁰ s. 41/494

7. c) Are Review Reports final and binding?

Review Reports are final. The Review Officer makes findings and issues recommendations to the public body. It is up to the public body to accept or reject the Review Officer's recommendations. If a party is not satisfied with the public body's decision in regard to the recommendations, s/he can appeal to the Supreme Court of Nova Scotia.²¹ Such an appeal is not an appeal of the Review Report, but an appeal of the public body's decision. The Review Officer is not a party to any appeal. Once the Review Report is issued, the Review is completed and the file is closed.

7. d) Will the Review Officer provide me with the Records?

No. The Review Office does not distribute records or disclose the contents of records. Even when the Review Office gets a copy of the records during the Review process, records are not released to you by the Review Office. If the Review Officer recommends the release of records, and the public body accepts their recommendations, records will always come from the public body.

²¹ s. 41/494