



Office of the Information and Privacy Commissioner for Nova Scotia

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## Know Your Rights Withheld (or Severed) Information

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### **Notice to Users**

This document is intended to provide general information and it is not intended nor can it be relied upon as legal advice. The contents of this document do not fetter or bind this office with respect to any matter. The Information and Privacy Commissioner for Nova Scotia will keep an open mind if this office receives a review request (appeal) on the subject matter of this document. As an independent agency mandated to oversee compliance with *FOIPOP* and *Part XX* of the *MGA* the Office of the Information and Privacy Commissioner for Nova Scotia cannot investigate in advance any concerns from an applicant related to an access to information request, so if there are concerns with a public body's or municipality's decision, the applicant must file a review request for this office to investigate the issue and to provide recommendations in response to those appeals. It remains the responsibility of each public body or municipality to ensure that it complies with its responsibilities under the relevant legislation.

## INTRODUCTION

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Under Nova Scotia's access to information laws, anyone can make an application for access to a record ("access to information request"). This guide is part of our series entitled *Know Your Rights* and is intended to help the public understand how to interpret the information they get back from public bodies and municipalities in response to their access to information request.

When you make an access to information request, public bodies and municipalities must make every reasonable effort to respond without delay openly, accurately and completely.<sup>1</sup> In order to respond openly and completely the law requires public bodies and municipalities to disclose all requested information subject only to limited and specific exemptions.<sup>2</sup> There are two types of authorized exemptions: mandatory and discretionary.

### **(i) Mandatory Exemptions**

Public bodies and municipalities are required to withhold any information that could unreasonably invade someone's else's personal privacy or harm a third party's confidential business information.

### **(ii) Discretionary Exemptions**

If the information meets the requirements in a discretionary exemption, public bodies and municipalities have the choice to disclose or withhold the information. Some subjects covered by discretionary exemptions include intergovernmental affairs, law enforcement, advice and recommendations to government, solicitor-client privilege, financial economic interests and health and safety.

The Information and Privacy Commissioner has determined that withholding information or severing information as "non-responsive" or "out of scope" is not an authorized exemption in Nova Scotia.<sup>3</sup>

Please see our [Glossary: Review Request Terms](#) for help understanding terms in this document and terms that appear frequently during the review process.

## LEGISLATION

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There are several privacy laws in Nova Scotia. This document addresses the *Freedom of Information and Protection of Privacy Act (FOIPOP)* which applies to government departments, agencies, universities and regional centres for education (formerly called

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<sup>1</sup> Section 7(1)(a) of the *Freedom of Information and Protection of Privacy Act*, s. 467(1)(a) of the *Municipal Government Act*.

<sup>2</sup> Section 2(b) and section 5(1) and (2) of the *Freedom of information and Protection of Privacy Act*, section 462(b) and section 465(1) and (2) of the *Municipal Government Act*.

<sup>3</sup> NS Review Report 16-10, [2016 NSOIPC 10 \(CanLII\)](#).

school boards) and *Part XX of the Municipal Government Act (MGA)* which applies to organizations such as municipalities, municipal police forces and public libraries.<sup>4</sup>

Applicants' rights are set out in section 5(2) of *FOIPOP* and section 465 of the *MGA*, and make three things clear:<sup>5</sup>

- The right given is the right of access to a **record**, not a part of a record, the whole record.
- The right of access to a record does not extend to **information** exempted from disclosure **pursuant to *FOIPOP* or the *MGA***.
- If information can reasonably be severed from the record pursuant to the Act that applies (*FOIPOP* or *MGA*), then the applicant has a right of access to the **remainder of the record**.

*FOIPOP* and the *MGA* authorize public bodies and municipalities to remove limited and specific information from the record you requested. These exemptions are set out in sections 12-21 of *FOIPOP*, and sections 472-481 of the *MGA*:

<b>FOIPOP</b>	<b>MGA</b>	<b>Exemption</b>
12	472	Harm the conduct of intergovernmental affairs
13	473	Reveal deliberations of executive council/deliberations of council
14	474	Reveal advice to public body/minister/council/municipality
15	475	Harm to law enforcement
16	476	Reveal solicitor-client privilege
17	477	Harm the financial or economic interest of the public body or municipality
18	478	Threats to health or safety
19	479	Damage to conservation
19A	n/a	Local public body – closed meetings
19B	n/a	Local public body – academic research
19C	n/a	Local public body – appointments and evaluations
19E	n/a	Labour conciliation records
20	480	Personal information
21	481	Confidential third-party business information

**Tip #1: There are only two types of exemptions authorized in Nova Scotia: mandatory and discretionary. Both are found in the legislation.**

<sup>4</sup> The other access to information law is the *Personal Health Information Act (PHIA)*. Guidance documents with respect to *PHIA* are posted on our website: <https://oipc.novascotia.ca/publictools>.

<sup>5</sup> NS Review Report 16-10, [2016 NSOIPC 10 \(CanLII\)](#).

## **DISCRETIONARY VS. MANDATORY EXEMPTIONS**

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Response letters from public bodies and municipalities should provide details about what exemptions they have applied, if any, to the requested records. Often this includes providing the full text of the statutory provision. When reading exemptions, you can determine whether it was discretionary or mandatory based on the wording.

When the words “shall refuse to disclose” are used, it means “must” and this makes it a mandatory exemption. When the exemption says, “may refuse to disclose”, this indicates it is a discretionary exemption and the public body or municipality can choose whether to disclose the information.

When public bodies and municipalities process access to information requests, they must conduct a line-by-line review of the information contained in the record to determine what information can be released or what information either must be withheld under a mandatory exemption or may be withheld under a discretionary exemption.

In order to apply an exemption public bodies and municipalities must do two things:

1. Identify information that might be subject to an exemption.
2. If exemption(s) apply, determine if the exemption is mandatory or discretionary. If the exemption is discretionary, the public body or municipality must exercise discretion and choose whether to release the information or withhold it. If the exemption is mandatory, the public body or municipality must apply the appropriate legal test to determine if it must withhold the information or disclose it.

**Tip #2: Mandatory exemptions use words like “shall” and “must”.  
Discretionary exemptions will use “may”.**

## **EXERCISING DISCRETION**

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If an exemption is discretionary, that means even if the law permits the public body or municipality to withhold information, it can choose to release the information anyway. Public bodies and municipalities must first decide if the exemption applies and then they must exercise their discretion to decide if they will disclose the information.

In exercising discretion, the public body or municipality must consider all relevant factors affecting the particular case, including:<sup>6</sup>

- The general purposes of the legislation: public bodies and municipalities should make information available to the public and individuals should have access to personal information about themselves.

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<sup>6</sup> NS Review Report FI-06-79

- The wording of the discretionary exemption and the interests that exemption attempts to balance.
- Whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable.
- The historical practice of the public body or municipality with respect to the release of similar types of documents.
- The nature of the record and the extent to which the document is significant and/or sensitive to the public body or municipality.
- Whether the disclosure of the information in the record will increase public confidence in the operation of the public body or municipality.
- The age of the record.
- Whether there is a sympathetic or compelling need to release the information in the record.
- Whether the Commissioner has recommended the release of similar types of records or information.
- When the policy advice exemption is claimed, whether the decision to which the advice or recommendations relates has already been made.

**Tip #3: The general purpose of *FOIPOP* and the *MGA* is that information should be available to the public. This is the basis upon which discretion should be exercised.**

## MANDATORY EXEMPTIONS

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In order to determine if information must be withheld, there are legal tests incorporated in the legislation. These tests have been discussed and elaborated on in review reports issued by the OIPC and in cases heard in court. Public bodies and municipalities must apply these tests to any information they think must be withheld. If all the criteria are met, the information cannot be released.

### **Information that could unreasonably invade someone's personal privacy**

When assessing personal information, there is a four-part test used to determine whether releasing it would cause an unreasonable invasion of someone's privacy. If the test confirms that releasing the information would be an unreasonable invasion of someone's privacy, the information cannot be released. The test is:

1. Is the information personal information as defined in *FOIPOP* or the *MGA*? If not, that is the end. Otherwise, the public body or municipality must go on to the next step in the test.
2. Are any of the conditions deemed 'not to be an unreasonable invasion' in *FOIPOP* or the *MGA* met? If so, that is the end.
3. Is the personal information presumed to be an unreasonable invasion of privacy as set out in *FOIPOP* or the *MGA*?

4. Does a balancing of all relevant information and circumstances lead to the conclusion that disclosing the information would result in an unreasonable invasion of privacy?<sup>7</sup>

### **Information that could harm a third party's confidential business information**

When assessing third party confidential business information, there is a three-part test used to determine whether releasing it would cause harm. If all criteria in the test are met, the information cannot be disclosed. The test is:

1. The information reveals trade secrets, or commercial, financial, labour relations, scientific or technical information of a third party; and
2. This information was supplied implicitly or explicitly in confidence to the public body; and
3. Disclosing this information could reasonably be expected to cause one of the harms set out in *FOIPOP* or the *MGA*.

The criteria set out in all three parts of this test must be met for this exemption to apply.

**Tip #4: Legal tests are used to evaluate personal information and business information to safeguard privacy and commercial confidentiality.**

### **NOT RESPONSIVE or OUT OF SCOPE**

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The Information and Privacy Commissioner has determined the practice of withholding information as “not responsive”, “out of scope” or any other variation, is not authorized under Nova Scotia’s access to information laws.<sup>8</sup> However, some public bodies and municipalities continue to remove information for this reason, despite the Commissioner’s ruling and no legal authority to support this practice. This occurs when a public body or municipality identifies a record that contains information that they deem is both responsive and not responsive to the applicant’s request. The public body or municipality then processes only the responsive portion and severs the remainder as “non-responsive” rather than including all releasable information in the disclosure to the applicant.

Applicants may choose to file a new access to information request for the information withheld as “not responsive” or “out of scope”. Alternatively, applicants may choose to file a request for review with this office, seeking access to the withheld information.

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<sup>7</sup> This four-step approach was laid out by the Nova Scotia Supreme Court in *House (Re)*, [2000 CanLII 20401 \(NS SC\)](#).

<sup>8</sup> Nova Scotia Review Report 16-10 provides a thorough discussion on this issue, available at <https://oipc.novascotia.ca/publicly-issued-reports>.

**Tip #5: Severed information should always include a reference to the section of FOIPOP or the MGA authorizing the exemption.**

## AUTHORIZED EXEMPTIONS TABLE<sup>9</sup>

The table below provides a brief explanation for each of the authorized exemptions.

<u>FOIPOP</u>	<u>MGA</u>	<b>Exemption description</b> What type of information does the exemption apply to and when does the exemption <u>not</u> apply?
<b>Discretionary exemptions</b>		
12	472	<b>Harm the conduct of intergovernmental affairs</b> <ul style="list-style-type: none"> <li>• Harm the conduct of relations between Nova Scotia and identified governments; or</li> <li>• Reveal information received in confidence from identified governments.</li> <li>• Does not apply to records in existence for 15 or more years.</li> </ul>
13	473	<b>Reveal deliberations of executive council or deliberations of council</b> <ul style="list-style-type: none"> <li>• Reveal substance of deliberations of the Executive Council or any of its committees including advice, policy considerations or draft legislation; or</li> <li>• Reveal substance of deliberations of municipal council, or members of a municipality held in private, authorized by law.</li> <li>• Does not apply to records in existence for 10 or more years.</li> <li>• Does not apply to background information if the decision has been made public, has been implemented or 5 years have passed since the decision was made.</li> </ul>
14	474	<b>Reveal advice to public body or minister or advice to council or municipality</b> <ul style="list-style-type: none"> <li>• Advice or recommendations or draft regulations developed by or for a public or municipality.</li> <li>• Does not apply to background information or information that has been in existence for 5 or more years.</li> </ul>
15	475	<b>Harm to law enforcement</b> This includes information that could reasonably be expected to: <ul style="list-style-type: none"> <li>• Harm law enforcement.</li> <li>• Prejudice the defence of Canada or its allies or harm the detection, prevention or suppression of espionage, sabotage or terrorism.</li> <li>• Harm the security of any property or system or the effectiveness of investigative techniques.</li> <li>• Reveal the identity of a confidential source of law enforcement information.</li> <li>• Endanger the life of a law enforcement officer or any other person.</li> <li>• Reveal information relating to the exercise of prosecutorial discretion.</li> <li>• Deprive a person of the right to a fair trial or impartial adjudication.</li> </ul>

<sup>9</sup> It is very important to read the full statutory provision. This table is intended as a quick summary, not as an accurate reflection of the entire statutory provision.

		<ul style="list-style-type: none"> <li>• Reveal a record that has been lawfully confiscated by a peace officer.</li> <li>• Be detrimental to the proper custody, control or supervision of a person under lawful detention.</li> <li>• Facilitate the commission of an offence.</li> <li>• Does not apply to the reasons for a decision not to prosecute.</li> </ul>
16	476	<p><b>Reveal solicitor-client privilege</b></p> <ul style="list-style-type: none"> <li>• Applies to records subject to legal advice privilege and litigation privilege.</li> </ul>
17	477	<p><b>Harm the financial or economic interest of the public or municipality</b></p> <ul style="list-style-type: none"> <li>• Applies to any information that, if disclosed, could reasonably be expected to harm the financial or economic interest of the public or municipality including: <ul style="list-style-type: none"> <li>○ Trade secrets of a public body or municipality, or</li> <li>○ Financial, technical, commercial, scientific information of a public body or municipality that has monetary value.</li> <li>○ Plans that relate to the management of personnel that have not yet been implemented or made public.</li> <li>○ Information about negotiations carried on by or for a public body or municipality.</li> <li>○ Information that could reasonably cause undue financial loss/gain or prematurely disclose a proposal or project.</li> </ul> </li> </ul>
18	478	<p><b>Threats to health or safety</b></p> <ul style="list-style-type: none"> <li>• Threaten anyone else’s safety or mental or physical health, or</li> <li>• Interfere with public safety, or</li> <li>• Result in immediate or grave harm to the applicant’s safety or mental or physical health.</li> </ul>
19	479	<p><b>Damage to Conservation</b></p> <ul style="list-style-type: none"> <li>• Disclosure of the information could reasonably be expected to result in damage to or interfere with the conservation of fossil sites, natural sites, sites with anthropological or heritage value or endangered species.</li> </ul>
19A	n/a	<p><b>Local public body<sup>10</sup> – closed meetings</b></p> <ul style="list-style-type: none"> <li>• Where a law authorizes a closed meeting of elected officials the local public body may refuse to disclose draft resolutions, bylaws, draft local bills or the substance of deliberations at the meeting.</li> <li>• The exemption does not apply to a record that has been in existence for more than 15 years.</li> </ul>
19B	n/a	<p><b>Local public body<sup>11</sup> – academic research</b></p> <ul style="list-style-type: none"> <li>• Details of the academic research being conducted by an employee of the local public body.</li> <li>• Where possible, the title and amount of funding being received for the academic research must be released.</li> </ul>
19C	n/a	<p><b>University – appointments and evaluations</b></p> <ul style="list-style-type: none"> <li>• Applies only to universities where the personal information is compiled for the purpose of</li> </ul>

<sup>10</sup> A “local public body” is defined in *FOIPOP* to include a hospital, health authority, university, Nova Scotia Community College, Collège de l’Acadie or a regional centre for education.

<sup>11</sup> See footnote above for definition of a local public body.

		<ul style="list-style-type: none"> <li>○ determining the applicant’s suitability for appointment, promotion, tenure, admission to an academic program or receipt of an honour or award; or</li> <li>○ evaluating the applicant’s research projects and materials, if the information is provided in confidence.</li> </ul>
19E	479A	<p><b>Labour conciliation records</b></p> <p>Applies to information obtained by a conciliation board, report of a conciliation board and any testimony or proceedings before a conciliation board.</p>
<b>Mandatory exemptions</b>		
20	480	<p><b>Personal information</b></p> <ul style="list-style-type: none"> <li>• Public body or municipality must refuse to disclose third party personal information if the disclosure of the information would result in an unreasonable invasion of the third party’s personal privacy.</li> </ul>
21	481	<p><b>Confidential third party business information</b></p> <ul style="list-style-type: none"> <li>• Public body or municipality must refuse to disclose third party business information if three things are true: <ol style="list-style-type: none"> <li>1. The information would reveal trade secrets, commercial, financial or labour relations information of a third party; and</li> <li>2. The information was supplied implicitly or explicitly in confidence; and</li> <li>3. The disclosure of the information would result in harm specified including harm significantly the competitive position of the third party or cause undue loss or gain to any person or organization.</li> </ol> </li> </ul>

## WHAT NEXT?

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When you receive the public body’s or municipality’s response to your access to information request, review it carefully.

If you want to understand the exemption better, there are three helpful sources of information:

- **The statutes:** Copies of *FOIPOP* and the *MGA* are available on the OIPC [website](#).
- **OIPC Decisions:** Search our website for recent decisions (review reports) that explain how the exemption you are concerned with has been interpreted by the Information and Privacy Commissioner.
- **CanLii:** This is a free legal research [website](#) that allows you to search decisions from the court or Information and Privacy Commissioners across Canada, including Nova Scotia.

If you have questions, call the public body or municipality. If you do not agree with the public body’s or municipality’s decision to withhold information, you have a right to request a review (appeal) of their decision to our office. An appeal of any response to your access to information request needs to be filed with the OIPC within 60 days. For more information on how to file an appeal to our office, please see our document [How to Appeal a Decision](#).

## QUESTIONS?

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This guidance was prepared by the Office of the Information and Privacy Commissioner for Nova Scotia. Whether you are an applicant, a public body or a municipality, we encourage you to contact us if you have any questions about the access to information or review process in Nova Scotia.

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