Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Catherine Tully

REVIEW REPORT 16-12

October 28, 2016

South Shore Regional School Board

Summary: The applicant sought access to the amount of money paid to a former South Shore Regional School Board (School Board) employee to settle a series of legal disputes. The School Board refused to disclose the information, claiming that disclosure would constitute an unreasonable invasion of privacy and harm the economic interests of the Province. The School Board also claimed that settlement privilege at common law applied and refused disclosure on that basis. The employee's Union became a party, supporting the initial decision of the School Board. The Union further objected to disclosure on the basis that disclosure would reveal confidential labour relations information.

The Commissioner finds that the amount of money paid as part of the settlement agreement was remuneration of a public body employee and so disclosure of the information is not an unreasonable invasion of privacy. The other terms of the agreement had previously been made public by the School Board's actions, and so any privacy interest on behalf of the employee was significantly diminished. Disclosure would therefore not constitute an unreasonable invasion of privacy. The Commissioner finds the evidence of harm to either economic interests or labour relations insufficient in the circumstances to meet the requirements of the exemptions.

The Commissioner determines that the legislature intended the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*) to be an exhaustive code with respect to restrictions on the right of access to government information. She finds that *FOIPOP* does not permit the addition of a free-standing exemption based on the common law regarding settlement privilege.

The Commissioner recommends full disclosure of the records.

Statutes Considered: *Access to Information Act*, RSC 1985, c A-1; *Access to Information and Protection of Privacy Act* S.N.W.T. 1994, c 20, s. 15**;** *Education Act*, SNS 1995-96, c 1, s. 65; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s. 14, s. 22(4); *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 3(1)(i), 17, 20(1), 21(1), 37(2), 45; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 C. F-31, s. 19; *Public Sector Compensation Disclosure Act*, SNS 2010, c 43, s. 2(b); and *Public Interest Disclosure of Wrongdoing Regulations*, NS Reg 323/2011.

Case Law Considered: *Atlantic Highways Corp. v. Nova Scotia* (1997) 162 N.S.R. (2d) 27; *Brown v. Cape Breton (Regional Municipality*), 2011 NSCA 32 *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25; *Canadian Pacific Forest Products Ltd. and I.W.A., Loc. 2693*, [1993] O.L.A.A. No. 19; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII); *Donham v. Attorney General of Nova Scotia* (June 1993) SN. No. 08092; *Gendron v. Supply & Services Union of the Public Service Alliance of Canada , Local 50057* [1990] S.C.J. No. 55; *Halifax Herald v. Nova Scotia (Workers' Compensation Board),* 2008 NSSC 369; *House, Re*, 2000 CanLII 20401 (NS SC) [*House*]; *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner),* 2014 ABCA 231; *International Union of Operating Engineers, Local Union No. 955 v. North American Mining Ltd (Dowhaniuk Grievance),* [2014] A.G.A.A. No. 39; *Liquor Control Board of Ontario v. Magnotta Winery Corp.*, 2009 CanLII 921189 (Ont SC); *Liquor Control Board of Ontario v. Magnotta Winery Corp*., 2010 ONCA 681 at para 48; *Monkman v. Serious Incident Response Team*, 2015 NSSC 325; *McClurg v. R.* [1990] S.C.J. No. 134 (SCC); *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate*, 2015 NSCA 38; *O'Connor v. Nova Scotia*, 2001 NSCA 132; *Rudd v. Trossacs Investments Inc*. (2006) 79 O.R. (3d) 687; *Sable Offshore Energy v. Ameron International*, 2013 SCC 37; *Seneca College v. Bhadauria* [1981] 2 S.C.R. 181; *Sparling v. Southam Inc,* (1988) 66 O.R. (2d) 225.

Authorities Considered: Nova Scotia Review Reports FI-06-13(M); FI-09-100; FI-10-95, FI-11-71, FI-02-25, FI-03-07, FI-13-38, FI-16-03, FI-16-04, and FI-16-08; British Columbia Orders No. 1-1994, 24-1994, 02-56, F06-03, F08-10, 173-1997, F09-15, F10-21, and F11-33; and Nova Scotia Assembly Debates, Monday Nov. 8, 1993 at p. 2197.

Blacks' Law Dictionary (5th Edition) (St. Paul, Minn.: West Publishing Col, 1979), "remuneration"; Angus Stevenson & Maurice Waite, eds., Concise Oxford English Dictionary, 12th ed. (New York: Oxford University Press, 2011) "compensation"; Ruth Sullivan, *Statutory Interpretation*, 2nd ed. (Toronto, Ont.: Irwin Law, 2007); Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed.) Lexis Nexis at p. 440 (Sullivan, Construction).

INTRODUCTION:

[1] The applicant sought a copy of a settlement agreement between the South Shore Regional School Board (School Board) and a former employee represented by a Union. The School Board refused access citing personal privacy (s. 20), harm to the economic interests of the Board and settlement privilege as the basis for denying access. The Union argued that the disclosure would also cause harm to third party business interests under s. 21 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*).

ISSUES:

[2] There are four issues under review:

1. Is the School Board required to refuse access to information under s. 20 of *FOIPOP* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

2. Is the School Board required to refuse access to information under s. 21 of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?
3. Is the School Board authorized to refuse access to information under s. 17(1) of *FOIPOP* because disclosure could reasonably be expected to harm the economic interests of the public body?
4. Does settlement privilege at common law authorize the School Board to refuse access to the record or any part thereof?

DISCUSSION:

Background

[3] The applicant in this matter seeks a copy of an agreement reached between the School Board, a Union, the Minister of Education, and a named employee. In particular, the applicant is interested in the amount paid to the employee by the School Board.

[4] The pertinent facts are as follows: while employed by the School Board, an employee was charged with, and pled guilty to, certain criminal code offences. As a result, the School Board fired the employee citing just cause. The employee grieved the termination and was reinstated by a Board of Appeal. The School Board asked the Nova Scotia Supreme Court to review the Board of Appeal's decision. The Court did so, and upheld the Board of Appeal's decision.

[5] At the same time as these proceedings were ongoing, the Minister of Education canceled the employee's teaching certificate. This left the employee unable to teach anywhere in the province. The Union grieved the cancellation and an arbitrator directed that the cancellation of the teaching certificate be set aside. The Department of Education asked the Nova Scotia Supreme Court to review the arbitrator's decision.

[6] Ultimately, the employee, the Union, the School Board and the Department of Education arrived at an agreement which provided a final resolution to the matter. It is this agreement, and a related email, that the applicant wishes to access.

[7] In responding to the applicant's application, the School Board identified two responsive records. This first is the agreement. The second is an email containing information specific to the amount paid pursuant to the agreement. The School Board denied access to the records citing third party personal privacy (s. 20) and harm to the economic interests of the province (s. 17). The School Board also relied on the common law dealing with settlement privilege.

[8] The applicant sought a review of the School Board's decision.

[9] The Union sought and was granted status as a party to the review.[1] It took the position that the School Board acted properly in denying access to the records. The Union also argued that the School Board ought to have applied s. 21 (third party business information) to the records.

[1] Pursuant to s. 37(2) of *FOIPOP*.

[10] The employee was provided with notice of the review process and the right to participate. The employee declined to do so.

Burden of Proof

[11] Usually it is the public body who bears the burden of proving that the applicant has no right of access to a record. In this case the School Board bears the burden of proving that s. 17 applies to the record and that settlement privilege at common law authorizes the School Board to refuse access to the record or any part thereof. However, where the information being withheld is the personal information of people other than the applicant (s. 20), the applicant bears the burden of proof. Where the information being withheld is other third party information, it is the third party who bears the burden of proof.[2]

1. Is the School Board required to refuse access to information under s. 20 of *FOIPOP* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

[12] The School Board applied s. 20 to a portion of the record, specifically the terms of the agreement, the employee's name wherever it appears, location where the employee signed the agreement, and the amount of the settlement.

[13] The proper approach to the s. 20 analysis in Nova Scotia is well established. I have discussed the four step approach to the s. 20 analysis in four recent review reports and so will not repeat that analysis here.[3] In summary, the four steps are:

a. Is the requested information "personal information" within the meaning of s. 3(1)(i)? If not, that is the end. Otherwise the public body must go on.
b. Are any of the conditions of s. 20(4) satisfied? If so, that is the end.
c. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?
d. In light of any s. 20(3) presumption, and in light of the burden upon the applicant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that the disclosure would constitute an unreasonable invasion of privacy or not?

a. Is the requested information personal information?

[14] Section 3(1)(i) of *FOIPOP* defines personal information and states that it means recorded information about an identifiable individual. Section 3(i) includes a non-exhaustive list of the types of information that qualify as "personal information" within the meaning of *FOIPOP*. Included in that list are the individual's name and information about financial or employment history. Clearly then, the employee's name and the amount paid to the employee qualifies as personal information.

[2] Pursuant to s. 45 of *FOIPOP*.
[3] NS Review Reports FI-10-95, FI-11-71, 16-03, 16-04 and 16-08 which are based on the Nova Scotia Supreme Court decision in *House, Re*, 2000 CanLII 20401 (NS SC) [*House*] at p. 3.

[15] I find that a portion of the information withheld under s. 20 qualifies as personal information, specifically:

- the employee's name,
- location where the employee signed the agreement,
- financial calculation set out in the responsive email, and
- paragraphs numbered 1, 2, 3 and 4 of the settlement agreement.

[16] However, a number of the terms of the settlement agreement relate to actions to be taken by the School Board to settle the matter at issue, the confidentiality agreement, and one term agreed to by the employee. These three terms (paragraphs 5, 6 and 7) do not qualify as information about an identifiable individual. They do not constitute employment history or financial history or allow a reader to learn anything about the individual's financial or employment history directly or by inference. They appear to be fairly standard clauses of a settlement agreement intended to ensure that all outstanding matters have been properly concluded. I find that these details withheld under s. 20 do not qualify as personal information as defined by s. 3(1)(i) of *FOIPOP*.

b. Are any of the conditions of s. 20(4) satisfied?

[17] Section 20(4)(e) provides:

> 20(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff.

[18] The School Board stated simply that in its view the settlement amount did not fall within the meaning of "remuneration" in s. 20(4)(e). The School Board gave no reasons for this assertion.

[19] The Union takes the position that, while the dispute did arise out of the employee's employment with the School Board, the amount is not "about" the employee's position, functions or remuneration as an employee. Rather, the settlement information relates to the figure that the parties agreed would resolve the various disputes among them.

[20] The question then is whether a lump sum payment paid to a departing employee is 'remuneration' as contemplated by s. 20(4)(e) and therefore not an unreasonable invasion of personal privacy if disclosed.

[21] "Remuneration" is not defined in *FOIPOP*. According to Black's Law Dictionary,[4] remuneration means: *reward; recompense; salary; compensation*. "Compensation" then is a synonym for "remuneration".

[4] Black's Law Dictionary (5th Edition) (St. Paul, Minn.: West Publishing Col, 1979) at p. 1165.

[22] While the definition of compensation in other Nova Scotia statutes is of course not determinative of the definition in *FOIPOP*, it is informative. In the absence of a specific definition in *FOIPOP*, it is worthwhile to consider how the term "remuneration" is used in other Nova Scotia statutes.

[23] In Nova Scotia, we have a public reporting requirement with respect to "compensation". Under the *Public Sector Compensation Disclosure Act*,[5] public sector bodies must annually publicly report compensation over $100,000.[6] Further, this same statute defines "compensation" as including, among other things, wages, payments, allowances, bonuses, severance payments and lump sum payments.[7] Severance pay is money paid to an employee on the early termination of a contract.[8]

[24] On at least one previous occasion a former Review Officer determined that the amount paid to a departing employee as severance fell within the meaning of "remuneration" in s. 20(4)(e).[9]

[25] Section s. 22(4)(e) of British Columbia's *Freedom of Information and Protection of Privacy Act*[10] is identical to our own. It reads as follows:

> 22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if,
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> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff.

[26] Since as early as 1994, the British Columbia Information and Privacy Commissioner has held that negotiated severance payments, individual severance payments, severance remuneration set out in settlement agreements, and schedules to severance agreements showing calculations all fit within the meaning of remuneration as contemplated by s. 22(4)(e). As such, the disclosure of these amount would not result in an unreasonable invasion of personal privacy under s. 22 of *FOIPOP* (BC).[11]

[27] The reasoning behind this interpretation was explained by Former Commissioner Flaherty:

> I agree with the submission of the applicant that the key fact is that "the Third Party left the employ of the District with some form of compensation, severance, buy-out, pension, or other such agreement which came as a direct result of his employment

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[5] *Public Sector Compensation Disclosure Act*, SNS 2010, c 43, s. 2(b).
[6] School boards are included in this requirement although N.S. Regulation 229/2015 to the *Act* exempts school boards from the reporting requirement if they provide a report under s. 65 of the *Education Act.* The *Education Act* reporting requirement does not include the same definition of "compensation".
[7] *Public Sector Compensation Disclosure Act*, SNS 2010, c 43, s. 2(b).
[8] Concise Oxford English Dictionary, 12th ed., Angus Stevenson & Maurice Waite, eds., (New York: Oxford University Press, 2011), at p. 1319.
[9] NS Review Report FI-02-25.
[10] *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s. 22(4).
[11] See for example BC Order No. 1-1994, Order No. 24, 1994, Order F09-15, Order F10-21, Order F11-33.

> with the District." In my view, the Final Release accomplishes the purpose of a severance agreement; there is no substantial difference.[12]

[28] This settlement agreement arises from the employment relationship between the employee and the School Board. However, by virtue of the unionized work environment, the Union had a vested interest in ensuring that the School Board abided by the terms of the collective agreement. The Minister, for his part, was seeking to have the Court uphold its decision to cancel the teaching certificate.

[29] In this case, the parties arrived at an agreement that settled all disputes before them. Part of that agreement included a lump sum payment to the departing employee. The wording of the agreement is clear that it was intended as a form of compensation, severance and/or payout.

[30] On this basis, I find that s. 20(4)(e) applies to the compensation calculation withheld in the responsive email and to item #1 on page 2 of the settlement agreement – both of which focus on the quantum of the payment. Accordingly, the disclosure of this personal information is not an unreasonable invasion of a third party's personal privacy because it is information about the employee's remuneration as an employee of the School Board.

c. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?

[31] With respect to the remaining information (name, location information) and paragraphs 2, 3 and 4 of the settlement agreement, do any of the presumptions in s. 20(3) apply? Section 20(3) provides in part:

> 20(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if:
> (d) the personal information relates to employment or educational history;
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities or credit worthiness.

[32] The Union submits that both s. 20(3)(d) and (f) apply.

[33] Without disclosing the content of the remaining terms, I agree that item #2 is information that relates to the employee's finances. Paragraphs 3 and 4 contain information that relate to the employee's employment history. As such, under s. 20(1), this information is presumed to result in an unreasonable invasion of privacy if disclosed to the applicant.

[12] BC Order No. 173-1997. Followed recently in BC Order F09-15 at para. 16.

d. In light of any s. 20(3) presumptions, and in light of the burden upon the applicant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that the disclosure would constitute an unreasonable invasion of privacy or not?

[34] Before conducting this final balancing I must reiterate that I have already found that the amount of compensation agreed to falls within s. 20(4) and so cannot be withheld under s. 20(1). Therefore, there is no need to conduct a balancing of factors with respect to this information.

[35] This balancing exercise is only with respect to the employee's name, location information and paragraphs 2, 3 and 4 the agreement. The Union submits that s. 20(2)(e), (f) and (h) are all relevant considerations. The School Board agrees that s. 20(2)(e) and (f) are relevant considerations and argues further that any s. 20(2)(a) consideration is outweighed in this case.

[36] Section 20(2) provides in part:

> 20(2) In determining pursuant to subsection (2) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;
> (e) the third party will be exposed unfairly to financial or other harm;
> (f) the personal information has been supplied in confidence;
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

[37] The employee's name and location information do not fall within s. 20(3) and so there is no presumption against disclosure of this information. However, the three remaining terms of the agreement do fall within s. 20(3). Therefore, s. 20(2) requires that the other factors taken into consideration outweigh this statutory presumption before determining whether the disclosure constitutes an unreasonable invasion of third party personal privacy.

Public scrutiny – s. 20(2)(a)

[38] Ordinarily, the three terms would represent what the School Board and an identifiable employee exchanged in order to arrive at a settlement. However, in this case, there are four parties to the agreement, only two of which are public bodies. In my view, disclosing the terms of settlement would serve the purpose of subjecting the activities of the two public bodies to public scrutiny. It would, along with the disclosure of the compensation amount, allow taxpayers to decide for themselves whether or not School Board got value for taxpayer money in the settlement agreement. This factor weighs strongly in favour of disclosure of the information.

Exposure to financial or other harm – s. 20(2)(e)

[39] The Union argued that disclosing the personal information of the employee related to the settlement amount could revive some of the anger and ill will towards him and put him at risk of physical harm. However, as noted above, the settlement amount constitutes "remuneration" within the meaning of s. 20(4)(e) and so s. 20(1) cannot be applied to the settlement amount.

[40] No evidence was offered as to how the disclosure of the remaining information would cause harm to the employee. Further, upon reaching the settlement, the School Board made a public announcement which included disclosure of the information contained in paragraphs 3 and 4 of the agreement. This information was quickly reported upon in the media.[13] The resulting articles have been available to the public for several years. There was no evidence offered to prove how a fresh disclosure would result in financial or other harm. This factor does not weigh for or against disclosure.

Supplied in confidence – s. 20(2)(f)

[41] There is evidence that the parties intended to keep the terms of the agreement confidential. One of the terms of the agreement is a confidentiality requirement. As noted above however, the disclosure by the School Board of two of the terms of the agreement at the time of the signing of the agreement undermined this stated intention. However, I am satisfied that there is some evidence of an intention to keep the agreement confidential and this factor weighs somewhat against further disclosure.

Unfairly damage the employee's reputation – s. 20(2)(h)

[42] Section 20(2)(h) makes clear that it is "unfair" damage to reputation that is relevant, not just any damage to reputation. So what is "unfair" in this context? The Concise Oxford English Dictionary defines "unfair" as: *not based on or showing fairness; unjust. Contrary to the rules of a game*.

[43] The information at issue here is the name and location information and three terms of the agreement, two of which have been publicly known for a number of years. I have no evidence or argument before me as to how exactly disclosure of this particular information would "unfairly" damage the employee's reputation.

[44] I accept that a number of years have passed and that the employee has tried to move on with life. A disclosure of the settlement agreement now would certainly revive the issue, if for just a short time. One consequence would likely be that the events that lead to the settlement would once again be in the public sphere. Is this an "unfair" damage to the employee's reputation?

[45] In *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate*, the Nova Scotia Court of Appeal determined that just because a criminal prosecution is the subject matter of a public process does not mean that witnesses provide an unfettered and perpetual waiver of their privacy expectations.[14] Does the same hold true for the accused? Different considerations apply in my opinion. First, the information at issue here is accurate. There is no suggestion that the third party would be harmed by an error in the record. Second, there has not been a significant passage of time here. In *Fitzgerald,* more than 35 years had passed since the original criminal proceeding.

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[13] The parties will be provided with copies of the publicly available information. The applicant in this case is already aware of the identity of the employee and of the public information I am referring to here. In order to limit the possibilities that the individual employee at issue in this matter is identifiable through this public report, I have not included links to this information. I have however, included sufficient background information necessary to support the findings in this matter.

[14] *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate,* 2015 NSCA 38 at para. 91-92.

[46] Here, significantly less time has passed. The facts in this case are still fairly fresh. Therefore, I am not satisfied that the evidence in this case supports a finding that the disclosure would result in "unfair" damage to the employee's reputation. This factor does not weigh for or against disclosure.

Other considerations

[47] As I have noted on a number of previous occasions, s. 20(2) does not contain an exhaustive list of relevant circumstances. Other considerations may apply.

[48] Below I have considered two further factors that are relevant to determining whether or not disclosure of the personal information would be an unreasonable invasion of a third party's personal privacy:

i. Sensitivity of the information v. publicly available information
ii. Settlement privilege

i. Sensitivity of information v. publicly available information

[49] One consideration is the sensitivity of the information. The identity of the employee, the circumstances that led to the employment and certification disputes, and the fact that all were resolved by settlement received considerable press coverage. The essential basis for the agreement was widely reported at the time. It is unclear to me how this information that was once of a very public nature can now be said to be sensitive. In my opinion, the name of the employee in the context of this settlement agreement is not particularly sensitive information. There is no doubt that there is some sensitivity associated with the amount of the settlement. However, this information is "remuneration" and not subject to s. 20.

[50] Further, the remaining outstanding terms (paragraphs 2, 3 and 4) are not particularly sensitive nor is the location where the employee signed the settlement agreement. The terms are straightforward business-like terms intended to bring the matter to a certain conclusion. I find that the information is not, in the context of this case, particularly sensitive and further, that the fact that most of the information subject to s. 20 is already publicly available with no apparent harm to the third party individual weighs in favour of disclosure.

ii. Settlement privilege

[51] In this case, the public policy considerations behind settlement privilege which will be discussed in detail later in this report weigh against the disclosure of the terms of a settlement agreement.

Balancing of the Factors

[52] The factors weighing against disclosure of the employee's name, location information and paragraphs 2, 3 and 4 of the agreement are:

- Settlement privilege
- Information supplied in confidence

[53] The factors weighing in favour of disclosure are:

- Public scrutiny
- Publicly available information

[54] Several factors were neutral:

- Exposure to financial or other harm
- Unfair damage to reputation of the employee
- Sensitivity of the information

[55] In my view, subjecting the terms of the agreement to public scrutiny weighs heavily in favour of disclosure. Two of the three terms are publicly available, as is the fact of the existence of the agreement. On that basis it is difficult to see what harm, if any, could come to the employee from the further disclosure. The settlement amount is not at issue in this s. 20 discussion since s. 20(4) applies to that information. The remaining terms are simply not as sensitive as the settlement amount. However, as noted, settlement privilege weighs in favour of withholding the relevant information. I conclude that on balance, disclosure of the employee's name, location where the agreement was signed and the three outstanding terms (paragraphs 2, 3 and 4) would not be an unreasonable invasion of personal privacy.

2. Is the School Board required to refuse access to information under s. 21 of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

[56] In preparation for this formal review, the Union was added as a party. As part of its submission, the Union submitted that s. 21 also applies to the withheld record. In its submission, the Union argued that the entire record is subject to s. 21. The School Board agreed that s. 21 requires it to refuse access to the record.

[57] Section 21 of *FOIPOP* provides in part:

> 21(1) The head of a public body shall refuse to disclose to an applicant information
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> (a) that would reveal
>
> (ii) commercial, financial, labour relations, scientific or technical information of a third party;
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> (b) that is supplied, implicitly or explicitly, in confidence; and
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> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party;
>
> (iii) result in undue financial loss or gain to any person or organization…

[58] In this case, the third party is the Union. The Union takes the position that the information contained in the settlement agreement is labour relations information. The terms that it agreed to

by way of settlement is its business information, in that it would reveal what it was willing to agree to in order to resolve two labour relations matters: one with the School Board, and the other with the Province. The Union submits that the terms of the agreement were arrived at in confidence and the disclosure of these terms could be reasonably expected to interfere with future negotiations, the consequence being undue financial loss or gain in future negotiations.

[59] It is well established that s. 21 must be read conjunctively. In other words, all three parts of the test must be satisfied in order for s. 21 to apply.[15]

Reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party – s. 21(1)(a)(ii)

[60] There are three components to s. 21(1)(a)(ii) in this review:

1. Does the withheld information constitute labour relations information?
2. Is the withheld information, information of the Union?
3. Or does the withheld information reveal labour relations information of the Union or allow accurate inferences which would reveal this information?

Does the withheld information constitute labour relations information?

[61] The leading case in Nova Scotia on this issue is *Atlantic Highways Corp. v. Nova Scotia*.[16] In *Atlantic Highways*, the public body argued that the commercial information contained in an omnibus agreement (for the construction of a toll highway) was not proprietary to the third party because, in the form it appeared in the omnibus agreement, it was the product of negotiation with the Province. The Province further argued that portions of the agreement simply reflected the Province's requirements as set out in its Request for Proposal. The Court agreed stating:

> I thus conclude that the information AHC seeks to protect has either been already exposed to publication or is so intertwined with the Provincial input by way of the requirements of the 'Request for Proposal' or modified by the negotiation process that it clouds AHC's claim to a proprietary interest in the information. I am therefore not satisfied by the Appellant AHC, after reviewing the evidence, including the specific clauses referred to by them in the Omnibus Agreement, that the information they seek to protect is one of the categories of information listed in 21(1)(a).[17]

[62] Former Review Officer Bishop determined that contracts can contain terms that fit within the definition of commercial and financial information, but may also contain terms that do not fit either because they are matters of a standard nature or because they are so intertwined with input from the public body during the negotiation process that it is difficult to state with a degree of confidence how the information would fall under one of the categories listed in s. 21(1)(a).[18]

[15] *Atlantic Highways Corp. v. Nova Scotia* (1997) 162 N.S.R. (2d) 27 (Atlantic Highways) at pp. 28-29.
[16] *Atlantic Highways Corp. v. Nova Scotia* (1997) 162 N.S.R. (2d) 27 (Atlantic Highways).
[17] *Atlantic Highways* at para. 36.
[18] NS Review Report FI-06-13(M) at p. 6.

[63] As a first step, *FOIPOP* requires that public bodies sever information subject to an exemption and release the remainder of the record. In this case, the Union proposes withholding the entire documentation under s. 21. However, the withheld information includes a cover letter with no substantive content, preliminary matters on the first and second page of the agreement, signatures, and dates etc. that contain no information within the meaning of s. 21(1)(a). Likewise, the responsive email contains a header and content that cannot fit within the meaning of s. 21(1)(a) (email recipients, topic, salutations etc.). I find that s. 21 does not apply to any of this type of information.

[64] "Labour relations" is not defined in Nova Scotia's *FOIPOP*. Review Officer Fardy adopted the early Ontario approach to the meaning of this term: labour relations information is information concerning the collective relationship between an employer and its employees.[19]

[65] In 2008, an adjudicator with the Office of the Information and Privacy Commissioner of British Columbia conducted an extensive review of the approach other offices had taken to the meaning of the phrase "labour relations". Based on that review the adjudicator concluded that the term may not necessarily be strictly limited to the collective bargaining relationship between employer and union in that it may also include negotiations, bargaining and related matters between parties to analogous relationships.[20]

[66] The Nova Scotia Supreme Court took what might be characterized as an even more expansive view of the meaning of "labour relations" in s. 21(1)(a) when it determined information that relates directly to the employer-worker relationship and in particular, workplace safety, qualified as labour relations information.[21]

[67] I agree with this evaluation and conclude that in terms of Nova Scotia's *FOIPOP*, the term "labour relations information" includes information related to particular labour relations issues and disputes, such as grievances, that arise within the collective bargaining relationship between employer and union or analogous relationships.

[68] The information in question here is all part of a resolution of outstanding issues arising from a unionized labour relationship. I am therefore satisfied that with respect to the specific terms of the agreement (numbered paragraphs 1 to 7 and the calculation set out in the email), I agree that this information qualifies as labour relations information.

Is the withheld information, information <u>of</u> the Union?
And if so, does the withheld information <u>reveal</u> labour relations information of the Union or allow accurate inferences which would reveal this information?

[69] The Union, as the third party, bears the burden of proof in this matter. The Union must also establish that the information is "of the third party". The Union argues the *Atlantic Highways* approach, which held that information that is so intertwined with public body input by the negotiation process clouds proprietary interest claims, should not apply in the labour relations context. Instead, the Union makes arguments that the information was confidential and so

[19] NS Review Report FI-03-07
[20] BC Order F08-10.
[21] *Halifax Herald v. Nova Scotia (Workers' Compensation Board),* 2008 NSSC 369 at para. 56.

proprietary. This conflates two parts of the s. 21 test. The fact that information is supplied in confidence is relevant but it falls under the s. 21(1)(b) portion of the test. The requirements of s. 21(1)(a) must still be satisfied and, in my opinion, they are not.

[70] The School Board and the Union gave extensive submissions regarding settlement privilege. In the course of those submissions, they pointed out that the case law had developed such that the privilege is now a class-based privilege and that it now includes settlement amounts. In so doing, they both made references to the Supreme Court of Canada decision in *Sable Island*. But this is what the Supreme Court had to say about the nature of settlement agreements generally:

> A principled approach to settlement privilege did not justify a distinction between settlement negotiations and what was ultimately negotiated…Since the negotiated amount is a key component of the content of successful negotiations reflecting the admissions, offers and compromises made in the course of negotiations, it too is protected by privilege.[22]

[71] The content of the record in this case makes clear that it reflects the admissions, offers and compromises made in the course of negotiations. Clearly there was give and take. The School Board wanted certain concessions. In exchange, the Union and the employee wanted compensation. Whether a certain term was advanced by one party and accepted by the other unchanged does not matter if the term was open to negotiation. This agreement is, in my view, exactly the type of agreement referenced by the Nova Scotia Supreme Court in the *Atlantic Highways* decision. The terms are intertwined by the delicate labour negotiations and so any proprietary interest of the third party is now clouded.

[72] I find that the withheld information is not labour relations information <u>of</u> the third party and so s. 21 does not apply to the withheld information.

Supplied implicitly or explicitly in confidence and reasonable expectation of harm [s. 21(2)(b) and (c)]

[73] Since all three parts of the s. 21 test must be met, and since I have already determined that the first part of the test has not been satisfied, I do not need to evaluate whether the remaining two requirements have been met. However, I note that while there is an indication within the record that the information would be treated in confidence, the evidence is that the School Board publicly disclosed two of the key terms of the agreement and it appears that the Union, who was clearly aware of the disclosure, raised no objection to this disclosure.

[74] The substance of the harms arguments provided by the parties were in relation to the importance of settlement privilege and the harms that could arise generally if the privilege were not observed in every case including this one. I will discuss below whether or not such arguments are sufficient to meet a reasonable expectation of harm test.

[22] *Sable Offshore Energy v. Ameron International*, 2013 SCC 37 at paras. 17 - 18.

3. Is the School Board authorized to refuse access to information under s. 17(1) of *FOIPOP* because disclosure could reasonably be expected to harm the economic interests of the public body?

[75] The School Board relied on s. 17(1) as authority for exempting the terms of settlement from disclosure. The School Board's representations explained that in deciding to withhold information under this exemption, it considered s. 17(1) generally and s. 17(1)(e) in particular:

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia or the ability of the Government to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:
>
> (e) information about negotiations carried on by or for a public body or the Government of Nova Scotia.

[76] Section 17 can apply to any "information", the disclosure of which could reasonably be expected to cause the harm identified. Section 17(1) includes examples of the types of information that may fall within this provision, but the examples do not restrict "the generality of the foregoing". In other words, "information" in s. 17(1) may include other classes or types of information not reflected in the list that follows.

[77] Section 17(1)(e) states that information about negotiations is one type of information to which s. 17 may apply. What is "information about negotiations"? Information that might be collected or compiled for the purpose of negotiations, that might be used in negotiations or that might, if disclosed, affect negotiations is not necessarily *about* negotiations. Information about negotiations includes analysis, methodology, options or strategy in relation to negotiations.[23]

[78] The School Board says that the specific terms within the agreement reveal information about negotiations within the meaning of s. 17(1)(e). In the narrow circumstances of this case, I agree. The terms of this settlement agreement are based on a unique and limited set of facts. Because the facts in play are publicly known, the settlement terms and amount reveal more about negotiation strategies than a more complex and multi-termed agreement might.

[79] Such an approach is consistent with the Supreme Court's determination that negotiated settlement amounts reflect admissions, offers and compromises made during the course of negotiations:

> A principled approach to settlement privilege did not justify a distinction between settlement negotiations and what was ultimately negotiated…Since the negotiated amount is a key component of the content of successful negotiations reflecting the

[23] I am paraphrasing former Commissioner Loukidelis in Order 02-56 at paras. 43-44 as applied more recently in Order F06-03 at para. 66.

> admissions, offers and compromises made in the course of negotiations, it too is protected by privilege.[24]

[80] In order for s. 17 to apply, the School Board has the burden of proving that the disclosure of the identified information satisfies the reasonable expectation of harm test.

[81] The Nova Scotia Supreme Court recently revisited the "reasonable expectation of harm" test in *FOIPOP*. In *Monkman v. Serious Incident Response Team*[25] (*Monkman*), the Court examined the leading Nova Scotia case and the leading Supreme Court of Canada case on the meaning of the reasonable expectation of harm test in the context of the application of s. 15 of *FOIPOP* (harm to law enforcement). The Court concluded that:

> [61] Reading the decisions of the Supreme Court of Canada with that of the Nova Scotia Court of Appeal leads to the following conclusion: that the burden falls on the Director to show that it is more than merely possible, but at a standard less than a balance of probabilities that the disclosure could harm "law enforcement".

[82] As I have said on a number of occasions, as a practical matter, mere assertions of harm will rarely be sufficient. Independent evidence of expectations of harm or at least evidence of harm from the public body is helpful. Ideally, such evidence would come from individuals with expertise and/or experience with the program area under consideration. Evidence of previous harm from similar disclosures, some empirical, financial or statistical evidence of harm is also useful. In all cases, it is evidence of a connection between the disclosure of the type of information at issue and the harm that is necessary.[26]

[83] Both the Union and the School Board emphasized the general public interest in preserving the confidentiality of settlement discussions. The case law is replete with judicial observations on the public policy interest inherent in settlement privilege. They can be summarized as follows:

- Settlement discussions require candour. That will not be forthcoming without the protection from non-disclosure that settlement privilege confers.[27]
- It allows for free and frank discussions between the parties.[28]
- The interests of the public in transparency are trumped by a more compelling public interest in encouraging settlement of litigation.[29]
- No third party would willingly entertain settlement discussions with a government institution, particularly where admissions are made and concessions offered, that would enure to the detriment of the third party if publicly disclosed.[30]
- Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation.[31]

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[24] *Sable, infra* at paras. 17 and 18.
[25] *Monkman v. Serious Incident Response Team*, 2015 NSSC 325 at pp. 22-23.
[26] I expressed a similar list of potential sources of evidence of harm NS Review Report FI-13-38 at para. 41.
[27] *Brown v. Cape Breton (Regional Muncipality)*, 2011 NSCA 32 at para. 27.
[28] *Magnotta Div Ct*. para. 55.
[29] *Brown* at para. 27 and Magnotta Div Ct. at para. 85.
[30] Magnotta Div Ct. at para. 65.
[31] *Sable Offshore infra at* para. 11.

- Overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues and it reduces the strain upon an already overburdened provincial court system.[32]
- The rules of civil procedure require mandatory mediation of many civil disputes in order to assist the parties in arriving at a settlement and thus reduce the costs of litigation. There is clearly a significant public interest in protecting the confidentiality of discussions at mediation in order to make the process as effective as possible.[33]

[84] But a key point here is, as noted by the Alberta Court of Appeal: *The exact purpose of the settlement privilege is to allow the withholding of the settlement terms from an adverse party that has related unsettled claims against the party asserting the privilege.*[34]

[85] The specific harm from disclosure of the settlement terms in this case as submitted by the School Board can be summarized as follows:

- The settlement was intended to conclude the litigation. It was not intended to set any precedent and it is a result of its own peculiar circumstances. However, it is reasonable to expect that if the payment amount were known to any person negotiating with the School Board, it would set that person's expectations and would interfere with such negotiations.
- Disclosure of the information will send a chill among public bodies and will make them much less likely to settle disputes informally and confidentially.

[86] In its submission, the Union pointed out a number of potential harms that could arise from the disclosure of settlement information specific to the grievance context:

- If a party to a grievance has to be concerned about the disclosure of admissions or compromise positions at an arbitration hearing, it will be unwilling to say anything that might later be used against it.[35]
- Grievance discussions need to be treated as privileged in order to allow the employer and union to engage in full, frank and honest efforts to adjust grievances.[36]
- Disclosure of this type of information will result in increasingly adversarial relations between the public sector unions, school boards and the Province because parties will be less likely to engage in settlement discussions or to extend compromise positions. As a result there will be increased costs for all parties because disputes will need to be resolved through litigation rather than through arbitration or settlement.
- Disclosing this type of information in the labour relations context amplifies the financial consequences because the parties interact and dispute issues related to the collective agreement or employment of union members on a regular basis. This will create a chill over labour relations in the Province and will lead to dramatically increased costs for all parties involved.

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[32] *Sparling v. Southam Inc*, (1988) 66 O.R. (2d) 225 at 230 – cited in Magnotta at 56 and Sable at 11
[33] *Rudd v. Trossacs Investments Inc*. (2006) 79 O.R. (3d) 687 at para. 33.
[34] *Imperial Oil* at para. 61.
[35] Citing *Canadian Pacific Forest Products Ltd. and I.W.A., Loc. 2693*, [1993] O.L.A.A. No. 19 at para 37.
[36] Citing *International Union of Operating Engineers, Local Union No. 955 v. North American Mining Ltd (Dowhaniuk Grievance),* [2014] A.G.A.A. No. 39 at para. 7.

[87] There is no doubt that there is strong general public policy support for maintaining the confidentiality of documents subject to settlement privilege. But *FOIPOP* requires evidence of a reasonable expectation of harm in order for s. 17 to apply.

[88] Both the School Board and the Union argued that disclosing the settlement terms will create a chilling effect on labour relation negotiations. I have on previous occasions discussed the "chilling effect" arguments.[37] The evidence offered here in support of the chilling effect argument was simply assertions that the disclosure would create this effect. In the same way that the parties say this disclosure will reduce their willingness to engage in labour relation negotiations, they can likewise choose to say that it will increase their willingness to engage in labour relation negotiations. Perhaps the public will view the agreement as particularly well done by the School Board or perhaps Union members will believe that the former employee was particularly well served in the negotiations by the Union. Both outcomes would presumably result in an increased willingness to negotiate. In either case, the argument does not constitute detailed and convincing evidence.

[89] The facts in this case are that two of the terms of the agreement – two key concessions made by the Union and employee – were disclosed publicly by the School Board on the day it agreed to settle the matter. The School Board chose to disclose the terms that quelled the fears of the public regarding the potential return of the employee. The School Board chose not to disclose the amount it agreed to pay in order to obtain these concessions. Such an approach is reminiscent of an observation made by the Nova Scotia Supreme Court in one of the earliest decisions made under *FOIPOP*. In *Donham v. Attorney General of Nova Scotia*, Edwards J. delivered an oral decision in relation to a request for information about the construction of the Barra Strait Bridge. He noted that the Department had selectively released financial information in one document and stated,

> This selective disclosure leaves the recipient of the information package with a distorted picture. It offends the stated purpose of the Freedom of Information Act [quotes s. 2]. Specifically what I have called selective disclosure, in the circumstances of this case, militates against ensuring fairness in government decision making. Further, when only one view is presented, the airing and reconciliation of divergent views is not possible.[38]

[90] The significant point with respect to reasonable expectation of harm is that while both the Union and the School Board knew or should have known[39] that these terms had been released, neither argued that their disclosure had in fact resulted in any harm to the School Board, the Union or the employee in this case. The only term of substance left still undisclosed is the actual amount paid to resolve the matter.

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[37] See for example NS Review Report FI-09-100 at paras. 70 - 72

[38] *Donham v. Attorney General of Nova Scotia* (June 1993) SN. No. 08092 at p. 12.

[39] The Union is aware that the terms were released because it supplied this office with the newspaper article that contained that information. Further, the information is disclosed in the School Board minutes which are available on the internet.

[91] This is not a case where there is any outstanding litigation in which the settlement amount is specifically relevant. In the leading Nova Scotia case on settlement privilege, it was an opposing party in a related matter who sought the settlement amount in hopes of reducing its own liability.[40] In a recent Alberta Court of Appeal decision, the Court determined that because the applicant in the matter had a claim against the public body arising from the very same set of events, disclosure of the contents of the settlement agreement would accord a significant tactical advantage to the applicant and effectively destroy the privilege.[41] Such a circumstance would certainly increase the chances of harm to the economic interests of the public body from the disclosure at issue, but these are not the facts in this case.

[92] I accept that there is a potential disincentive for the settlement of labour relations matters should information be disclosed. But I am faced with a lack of evidence on how likely it is that this harm would occur on the particular facts of this case. The circumstances were quite unique. The nature of the criminal charges, the fact that two judicial decisions failed to support the School Board's decision to terminate the employee and the significant public outcry against the reinstatement of the employee. What are the chances that this combination of events will ever occur again? Because surely, these unique facts put the School Board in an unprecedented and challenging position with respect to the settlement negotiations. Clearly, it was faced with three hard choices: prolonged and expensive litigation, the reinstatement of an employee that was widely and vocally opposed by parents, or reaching a settlement to conclude the matter. That said, those three hard choices seem extremely unlikely to arise again.

[93] Neither party provided any evidence of harm specific to disclosure of the information in this case. Rather, as noted above, there were general assertions of harm should this type of information be disclosed, particularly if disclosed on a regular basis. Each decision under *FOIPOP* is specific to the facts and circumstances of the individual case. No public body is bound to disclose information simply because it disclosed some similar information on a previous occasion. It may be that the analysis and facts relating to the previous occasion are persuasive and guide the public body's approach going forward or it may be that the new situation has unique considerations that warrant a different approach. In other words, there is no suggestion here that settlement agreements must always be disclosed. Quite the contrary, such agreements may well attract an exemption under s. 17(1)(e), but the public body will always have the burden of establishing that there is a reasonable expectation of harm in that case.

[94] The School Board bears the burden of proof and I have not been provided with any evidence to support a finding that the disclosure of the settlement agreement including the amount in this case would result in a reasonable expectation of harm to the economic or other interests of the public body as set out in s. 17. Therefore I find that s. 17 does not apply to the withheld information.

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[40] *Brown*.
[41] *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner),* 2014 ABCA 231 at para. 37.

4. Does settlement privilege at common law authorize the School Board to refuse access to the record or any part thereof?

[95] The School Board and the Union take the position that settlement privilege applies to the records at issue and that further, settlement privilege at common law authorizes the School Board to refuse access to the record.

[96] In order to answer this question I must address two issues:

i. Is the record at issue subject to settlement privilege?
ii. If it is, is common law settlement privilege a free-standing exemption under *FOIPOP*?

i. Is the record at issue subject to settlement privilege?

[97] The leading case in Nova Scotia on settlement privilege is *Brown v. Cape Breton (Regional Municipality).*[42] In *Brown*, the appellant injured her knee in two separate accidents. She sued the Municipality for the first injury and a third party in the second. She settled the second claim. The Municipality sought disclosure of the settlement documents including the settlement amount. The Court determined that at the early stages of the proceeding the information was protected by the doctrine of settlement privilege.

[98] The Court in *Brown* sets out the three conditions that must be met to attract settlement privilege:[43]

1) A litigious dispute must be in existence or in contemplation.
2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event that negotiations failed.
3) The purpose of communication must be to attempt to effect a settlement.

[99] At least one litigious dispute was in existence at the time of the creation of the records at issue here – the judicial review of the decision to re-instate the employee's teaching certificate, scheduled for hearing in January, 2013. In addition, the time for appealing the Nova Scotia Supreme Court decision that revoked the termination of the employee had not expired as of the date of the agreement.[44] I conclude that the first condition for settlement privilege is satisfied in this case.

[100] With respect to the second requirement, the record itself makes clear that the parties intended to keep the terms of the agreement confidential. I am satisfied that the express intention of the parties at the time of the agreement was that the terms including the amount paid to the employee would not be disclosed and so the second portion of the test in *Brown* is satisfied.

[101] The third requirement is that the purpose of the communication must be to attempt to effect a settlement. On the face of the record at issue it is clear that its purpose was to settle all

[42] *Brown v. Cape Breton (Regional Municipality)* 2011 NSCA 32 (*Brown*).
[43] *Brown* at para. 30.
[44] According to Civil Procedure Rule 90.13 the School Board had 25 days to file a review from the date of the Nova Scotia Supreme Court decision. The agreement was signed before the 25 days expired.

outstanding legal disputes in relation to the employee's employment. Therefore I am satisfied that the third requirement is met.

[102] Further, because the email discloses the contents of the settlement agreement, I am satisfied that it too attracts settlement privilege and meets the three part requirement described above.

ii. Is common law settlement privilege a free-standing exemption under *FOIPOP*?

[103] Both the School Board and the Union submit that documents subject to settlement privilege cannot be disclosed under *FOIPOP*. Both parties made reference to the only case in Canada where a court has determined that a "free-standing" exemption for settlement privilege exists under access to information legislation. That case was the Ontario Divisional Court level decision in *Liquor Control Board of Ontario v. Magnotta Winery Corp.* (*Magnotta Div Ct*).[45] The first important point about this case is that, on appeal, the decision with respect to the "free-standing" exemption was not upheld. Instead, the Ontario Court of Appeal determined that based on the wording of s. 19 of the Ontario law, settlement privilege was an express exemption under Ontario's law. With respect to the potential that a free-standing exemption for settlement privilege might exist, the Court of Appeal had this to say:

> [48] Having concluded that the Disputed Records fall within the second branch of s. 19, it is unnecessary to decide this issue. Whether common law settlement privilege is a free-standing exemption under FIPPA or whether FIPPA is a complete code is a complex, serious question that is better decided in a case that depends on the answer to that question.[46]

[104] Section 19 of the Ontario legislation reads, as follows:

> 19. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.[47]

[105] By contrast, the privilege exemption in Nova Scotia's *FOIPOP* simply reads:

> 16. The head of the public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege.

[106] The Ontario Court of Appeal determined that settlement privilege was included in s. 19 of the Ontario law based on the following reasons. First, it noted that s. 19 has two branches. The first branch is the exemption for records that are subject to solicitor-client privilege. The second branch is for records that were prepared by or for Crown counsel for use in giving legal advice or in contemplation for use in litigation.[48] Next the Court notes that the dispute is over whether

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[45] *Liquor Control Board of Ontario v. Magnotta Winery Corp.*, 2009 CanLII 921189 (Ont SC).
[46] *Liquor Control Board of Ontario v. Magnotta Winery Corp*., 2010 ONCA 681 at para. 48.
[47] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 19.
[48] *Liquor Control Board of Ontario v. Magnotta Winery Corp*., 2010 ONCA 681 at para. 22.

documents prepared for mediation and settlement have been prepared for use in "litigation".[49] The Court concludes that the word "litigation" in the second branch of the s. 19 test encompasses mediation and settlement discussions.

[107] With respect to the significance of the specific wording found in Ontario's access law, the Court specifically notes that:

> The IPC would limit the second branch to documents that fall within the ambit of litigation privilege. With respect, a plain reading of the second branch does not support such an interpretation. When the legislature wished to exempt records based on privilege, it did so using clear language. Witness the first branch of s. 19, which permits a head to refuse to disclose a record that is "subject to solicitor-client privilege". The words of the second branch follow immediately afterwards in the same provision and they do not use the words "litigation privilege". Rather, the second branch governs records "prepared by or for Crown Counsel…for use in litigation". Therefore, the second branch should not be taken to be limited to documents that fall within the common law litigation privilege.[50]

[108] Two important points arise from this. First, the decision that settlement privilege was included in Ontario's s. 19 was very specific to the broad wording of Ontario's Act not found in Nova Scotia's *FOIPOP* s. 16. Second, had the words only included the expression "solicitor-client privilege", that privilege would not have included settlement privilege.

[109] In the case at hand, the School Board did not apply s. 16 to the records at issue and did not attempt to argue that solicitor-client privilege as expressed in s. 16 could be read to include settlement privilege. The Union also did not argue that s. 16 of *FOIPOP* could include settlement privilege.

[110] Instead, the parties have advanced settlement privilege as a free-standing exemption under *FOIPOP*.

[111] Therefore, in essence, what the parties are saying is that common law provides for an exemption not set out in *FOIPOP*. Does the common law apply in this circumstance? Ruth Sullivan, the leading scholar in Canada on statutory interpretation has this to say about the relationship between statutes and common law:

> In a parliamentary democracy, the legislature is the primary and paramount source of law, and judges – like everyone else – must take direction from the legislature. This basic principle has several implications. First, it means that judge-made law is subordinate to valid legislation, whether federal or provincial, Act or regulation. In the event of a conflict between legislation and the common law, the legislation always prevails. Second, by enacting an exhaustive set of rules dealing with a matter, the legislature may occupy the field and preclude further recourse to the common law. Third, the power of judges to create new common law is limited to

[49] *Ibid* at para. 32.
[50] *Ibid* at para.37.

incremental change; in most areas, significant policy initiatives must be left to the legislature.[51]

[112] Can public bodies rely on the common law rule regarding settlement privilege to supplement the exemptions in *FOIPOP*? The courts generally pose this question by asking whether the legislation to be interpreted is an "exhaustive code". Since codes are meant to be the sole source of law governing an area, resort to the common law to supplement a code is impermissible. Professor Sullivan points out that this articulation of the question may be too broad and that the real question for the court, then, is not so much whether a statute is a code but whether resort to the common law in this case for this purpose is permissible.[52]

Modern principle of statutory interpretation and *FOIPOP*

[113] The proper approach to statutory interpretation has been articulated repeatedly and is well entrenched. The goal is to determine the intention of the legislature by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of the *Act* and the objects of the statute.[53]

[114] What do we know about the scheme of *FOIPOP* and its objects? The Nova Scotia Court of Appeal provided extensive guidance on this topic in *O'Connor v. Nova Scotia* (*O'Connor*).[54] The key points made by the Court of Appeal in that decision were:

- The purpose clause in Nova Scotia is unique in its declared commitment to ensure that public bodies are fully accountable to the public.[55]
- Nova Scotia's law is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in other provinces or territories.[56]
- Exceptions are to be limited and exemptions are to be limited and specific. While the legislature chose different words when setting its own parameters to the exceptions and exemptions, the Court drew no meaningful distinction between the selected characterizations.[57]
- Logic dictates 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.[58]

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[51] Ruth Sullivan, Statutory Interpretation, 2nd ed. (Toronto, Ont.: Irwin Law, 2007) at pp. 313-314.
[52] Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed.) Lexis Nexis at p. 440 (*Construction*), referring to a decision of L'Heureux-Dube in *Gendron v. Supply & Services Union of the Public Service Alliance of Canada , Local* 50057 [1990] S.C.J. No. 55 at paras. 42 and 46.
[53] As stated by the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence),* 2011 SCC 25 at para. 27 (*Canada v. Canada*).
[54] *O'Connor v. Nova Scotia*, 2001 NSCA 132.
[55] *Ibid*, at para. 54.
[56] *Ibid*, at para. 57.
[57] *Ibid* at para. 81.
[58] *Ibid* at para. 82.

[115] It is in light of these general observations regarding the purposes of *FOIPOP* that I have conducted the analysis that follows.

Is resort to the common law for the purpose of an exemption based on settlement privilege permissible in this case?

[116] The starting point to answering this question is that there is a presumption against changing the common law. That presumption may be rebutted by evidence that the legislature intended its law, or some aspect of it, to be an exhaustive code.[59] In my opinion, there are six core considerations that lead to the conclusion that *FOIPOP* is intended to be an exhaustive code of exemptions and so resort to the common law for this purpose is not permitted:

i. The legislature expressly indicated this intent;
ii. The legislation implements a specific policy choice;
iii. To permit a common law exemption would defeat the intention of the legislature;
iv. The legislation offers a comprehensive scheme;
v. The legislation offers an adequate solution; and
vi. Specific provisions displace the general common law.[60]

i. Express indication of legislative intent

[117] Section 4A of *FOIPOP* indicates that the provisions of *FOIPOP* prevail over provisions of other enactments that restrict or prohibit access. This is an indication that *FOIPOP* is intended to be an exhaustive code, particularly with respect to restrictions on access.

ii. Legislation implements a specific policy choice

[118] Resort to the common law is considered inappropriate if it would interfere with the policies or balance of interests embodied in legislation.[61]

[119] Access to information law was intended to remedy a problem. The problem was citizens' access to government information was at the discretion of politicians and bureaucrats.[62] In the debate in Nova Scotia's legislature during second reading of Bill 55 that later became our current *FOIPOP*, Minister of Justice, the Honourable William Gillis stated,

> The Act should specify the right thing. That perhaps more than anything else is the advance this bill represents over the current Act. Nova Scotians want to know where they stand with their government. They want their rights to information and their

[59] Sullivan, Construction, p. 441.
[60] Sullivan, Construction pp. 441-448 discusses all of these factors as relevant considerations in determining whether or not the legislature intended a law or some aspect of a law to be an exhaustive code.
[61] Sullivan, Construction at p. 444.
[62] The Honorable William Gillis, Minister of Justice made this point in his introductory comments during second reading of the current *FOIPOP* on Monday November 8, 1993, Assembly Debates, at p. 2197. Donald C. Rowat explained the problem this way: "Public officials are too used to the old system of discretionary secrecy under which they arbitrarily withheld information for their own convenience or for fear of disapproval by their superiors, and will not change their ways unless they are required by law to do so." D.C. Rowat, "The Right to Government Information in Democracies" (1981) 2 Journal of Media Law and Practice 330.

> rights to privacy defined with precision, and they want procedural fairness. What they do not want is an Act that allows the government to keep its secrets.[63]

[120] One of the remedies then was to expressly provide for the limited and specific exemptions. The whole statutory scheme of *FOIPOP* is to grant access to "any record in the custody or control of a public body" and to provide "disclosure of all government information with necessary exemptions that are limited and specific".[64]

[121] There are several indications within *FOIPOP* and in court decisions that make clear that the exemptions specified in *FOIPOP* are the only exemptions intended. First, s. 5(2) of *FOIPOP* provides, "The right of access to a record does not extend to information exempted from disclosure pursuant to this Act…" In response to an access to information request the public body must state, "where access to the record or to part of the record is refused, the reasons for the refusal and the provision of this Act on which the refusal is based." [emphasis added].

[122] If a public body proposes to withhold information based on common law settlement privilege, what provision of the *Act* will it cite in keeping with its s. 7(2) obligations? There is no provision and so s. 7(2) cannot be complied with. Such an interpretation is implausible.

[123] The Supreme Court of Canada has made two significant findings relevant to this matter. First, the Court has clearly found that access to information laws are quasi-constitutional. Therefore, like human rights codes for example, access laws attract broad, goal promoting interpretations.[65] Second, the Supreme Court of Canada has indicated that it is only exemptions specified within the *Access to Information Act*[66] that are permitted. In analyzing arguments by the federal Information Commissioner regarding why ministers' offices should be considered to be "government institutions" under the federal law, the Court notes that this would mean political documents would then become subject to the law because there is no political class exemption provided under the *Act*. Such a result was not acceptable and formed one of the reasons the Court determined that for the purposes of the federal law, ministers' offices were not government institutions.[67]

iii. To permit a common law exemption would defeat the intention of the legislature

[124] To permit a common law exemption in these circumstances would defeat the apparent intention of the legislature and would risk disrupting the statutory enforcement scheme.

[125] The Nova Scotia legislature did specify one type of privilege as an exemption– solicitor-client privilege. If the legislature intended that common law privileges would continue to apply in their common law form despite *FOIPOP*, why would it have included solicitor-client privilege as an exemption? There would have been no need. Therefore, an interpretation allowing for an exemption based on another common law privilege is implausible.

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[63] Assembly Debates, Monday Nov. 8, 1993, p. 2197.
[64] *FOIPOP* at ss. 5 and 2(b).
[65] *Canada v. Canada* at para. 40 and Sullivan at 307.
[66] *Access to Information Act*, RSC 1985, c A-1.
[67] *Canada v. Canada*, at para. 42.

[126] Is it possible that the legislature simply failed to consider settlement privilege? At the time *FOIPOP* was drafted, settlement privilege had been in existence for at least two centuries.[68] Several provisions of the *Act* suggest that drafters had settlement privilege in mind. For example, s. 21(1)(c)(iv) lists as one potential harm a disclosure that would reveal information supplied to, or the report of, an arbitrator, officer or other person or body appointed to resolve or inquire into a labour-relations dispute. Section 17(1)(e) lists information about negotiations carried on by or for a public body or the government of Nova Scotia as a type of information that may be refused if the harms test in s. 17 can be satisfied.

[127] Another important consideration is that different jurisdictions have treated privilege in different ways. At and around the time of the drafting of Nova Scotia's 1993 *FOIPOP*, several other jurisdictions were in the process of drafting or had already drafted access legislation. For example, in 1994 the Northwest Territories adopted one of the broad privilege exemptions also found in PEI and Alberta's legislation. That exemption states that the head of a public body may refuse to disclose to an applicant information that is subject to any type of privilege available at law.[69] Saskatchewan and Ontario had both already adopted a broader privilege exemption including records prepared for use in litigation.[70] It was this provision that the *Magnotta* decisions determined included settlement privilege. Given that provisions in Nova Scotia's law are worded identically to other access and privacy laws in Canada, it is clear that drafters were consulting drafts and laws in other provinces at the time the law was enacted. This suggests that the sole reference to solicitor-client privilege was an intentional specific and limited exemption.

[128] Permitting the reintroduction of a common law privilege such as settlement privilege would therefore defeat the intention of the legislature.

iv. Legislation offers comprehensive scheme

[129] In so far as the legislation is comprehensive, it displaces the common law. Legislation is considered comprehensive when it appears that every aspect of a matter, or every possible response to a matter, has been addressed by the legislature.[71]

[130] The scheme in *FOIPOP* includes a substantive right of access to government information, detailed and mandatory procedural requirements on government when responding to access to information requests, and an enforcement scheme that includes complaint and mediation procedures, administrative review by a Review Officer, and appeal process to the Supreme Court. There is, therefore, a well-established regime for dealing with access to information requests. In my opinion, resort to a common law privilege to exempt information from disclosure is foreclosed by the legislative initiative set out in *FOIPOP* which overtook the existing common law.[72]

v. Legislation offers an adequate solution

[131] Various provisions within *FOIPOP* address the harms raised by parties with respect to settlement privilege. As noted earlier, s. 21(1)(c)(iv) lists as one potential harm a disclosure that would reveal information supplied to, or the report of, an arbitrator, officer or other person or

[68] *Brown* at para. 24.
[69] *Access to Information and Protection of Privacy Act* S.N.W.T. 1994, c 20, s. 15.
[70] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 C. F-31, s. 19.
[71] Sullivan, Construction at p. 442.
[72] Paraphrasing remarks by Laskin C.J. in *Seneca College v. Bhadauria* [1981] 2 S.C.R. 181 at p.194.

body appointed to resolve or inquire into a labour-relations dispute. Section 17(1)(e) lists information about negotiations carried on by or for a public body or the government of Nova Scotia as a type of information that may be refused if the harms test in s. 17 can be satisfied.

vi. Specific provision displaces general common law

[132] Section 16 of *FOIPOP* authorizes an exemption based on one common law privilege – solicitor-client privilege. The legislature chose to only include solicitor-client privilege. By enacting a specific provision addressing privilege, the legislature indicated that it had considered the matter but was not satisfied to leave it to the common law; it wished to deal with the matter as set out in the legislation. This specific provision would be superfluous if the general law applied. By listing some common law restrictions, the legislature created an expectation that these would be expressly set out in the *Act*. Restrictions not mentioned were impliedly excluded.[73]

Ontario Divisional Court in *Magnotta*

[133] I noted earlier that the School Board and the Union pointed to the one case in Canada where a court found a free-standing exemption based on the common law right of settlement privilege. In *Magnotta*, the Division Court states that the proposed interpretation is plausible, efficacious and acceptable and for those reasons permitted. In support of its finding that the interpretation was plausible, it said the interpretation complied with the legislated text which provided for "necessary exemptions" that are "specific and limited". The new exemption, the Court said, was necessary to maintain confidentiality of negotiated settlements. The exemption was specific and limited in that it is "specific to and limited by the circumstances of this case. A case-by-case analysis ensures settlement privilege will always be specific to and limited by particular fact situations".[74] The Court states that the interpretation was efficacious because it promotes the legislative purposes of creating exemptions where necessary, provided the exemptions are limited and specific. And finally, the Court determines that the interpretation is acceptable because it leads to a conclusion that is both reasonable and just.

[134] Does this reasoning work for Nova Scotia's *FOIPOP*? First, the law with respect to settlement privilege has advanced since the findings in the 2009 *Magotta Div Ct*. In particular, it is now accepted that settlement privilege is not a case-by-case privilege but has become a class privilege.[75] One of the core reasons the Divisional Court in *Magnotta* determined that the proposed interpretation allowing for a free-standing exemption was "specific and limited" was that it required a case-by-case analysis. This is no longer true.

[135] With respect to whether or not such an interpretation is efficacious, it does not, in my respectful opinion, promote the purposes of *FOIPOP*. It creates a non-specific exemption: one that is not specified in the legislation. The whole statutory scheme of *FOIPOP* is to grant access to "any record in the custody or control of a public body" and to provide "disclosure of all government information with necessary exemptions that are limited and specific".[76]

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[73] According to Sullivan, Construction at p. 448, the Court in *McClurg v. R.* [1990] S.C.J. No. 134 (SCC) determined that because the *Business Corporation Act* specified some, but not all common law restrictions, the legislature created an expectation that restrictions would be expressly set out in the *Act*. Restrictions not mentioned were impliedly excluded.

[74] *Magnotta Div Ct* at para.74.

[75] *Sable Offshore infra* at para. 12.

[76] *FOIPOP* at ss. 5 and 2(b).

[136] As discussed earlier, there are several indications within *FOIPOP* and in other court decisions that make clear that the exemptions specified in *FOIPOP* are the only exemptions intended. The *Magnotta* decision fails to take this into account and further fails to address the potential loss of procedural protections if a common law exemption is applied.

[137] If a public body proposes to withhold information based on common law settlement privilege, what provision of *FOIPOP* will it cite in keeping with its s. 7(2) obligations? There is no provision and so s. 7(2) cannot be complied with. If the public body is not applying an exemption specified in *FOIPOP*, do the *FOIPOP* procedural requirements in terms of a timely response with reasons apply? Does the right to review apply? This creates uncertainty where none exists now.

[138] Finally, Nova Scotia's law has a unique purpose provision not reflected in Ontario's law. As noted above, the Nova Scotia courts have provided clear guidance in terms of our approach to interpretation that includes ensuring that Nova Scotians have greater access to information than might otherwise be contemplated in other provinces or territories.

[139] For all of these reasons I am of the view that the reasoning in the Division Court decision in *Magnotta* does not apply to Nova Scotia's *FOIPOP*. Instead, based on the six reasons discussed above, I conclude that Nova Scotia's *FOIPOP* provides a comprehensive code of exemptions and does not permit the addition of a free-standing exemption based on the common law regarding settlement privilege. If an exemption in relation to this information exists, it must be found within the terms of *FOIPOP*.

CONCLUSION:

[140] I recognize that finding that the settlement agreement and calculation email must be disclosed under *FOIPOP* puts the School Board in a challenging position. At common law a court might not admit the settlement agreement and certainly the decisions cited by the parties emphasized the public policy interest in fostering informal resolution of litigious matters.[77] But even those cases that most strongly endorse the policy reasons for protecting settlement communications from disclosure recognize that there are several exceptions.[78] Two are relevant here. Statutes may abrogate the privilege[79] and compelling public interests may outweigh the public interest of encouraging settlement.[80] That is what has happened here. The standards set in *FOIPOP* must be met. I have determined that the parties in this case have failed to satisfy the burden of proof on them to establish either that s. 21 or s. 17 applies and further, that the disclosure of information that qualifies under s. 20 as third party personal information would not be an unreasonable invasion of the third party's personal privacy.

[77] As highlighted by the Nova Scotia Court of Appeal in *Brown* at para. 27.
[78] This point was specifically noted by the Court in *Brown* at para. 63.
[79] Alan W. Bryant, Sidney N. Lederman, & Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis Canada Inc., 2009) at p. 1039.
[80] *Brown* at para. 63.

[141] One final note, as I stated above, in a parliamentary democracy, the legislature is the primary and paramount source of law. Given the advances in the common law with respect to settlement privilege and its importance in management of cases before Nova Scotia's courts since *FOIPOP* was drafted more than 20 years ago, the time may have come for the legislature to revisit this issue with a view to deciding whether or not settlement privilege, like solicitor-client privilege, should be made a necessary, specific and limited discretionary exemption under *FOIPOP*. The legislature could then make the test for withholding records under *FOIPOP* on the basis of settlement privilege the same under *FOIPOP* as it is under common law.

FINDINGS & RECOMMENDATIONS:

[142] I find that:

1. Paragraphs 5, 6, and 7 on page 2 of the settlement agreement do not contain any personal information within the meaning of *FOIPOP* and so s. 20 does not apply to this information.
2. Section 20(4)(e) applies to the withheld calculation information in the responsive email and to item #1 listed on page 2 of the settlement agreement and so s. 20 does not apply to this information.
3. The disclosure of the remaining information including name, location, where the agreement was signed by the third party, and paragraphs 2, 3,and 4 would not result in an unreasonable invasion of a third party's personal privacy and so s. 20 does not apply to this information.
4. Section 21 does not apply to the withheld information.
5. Section 17 does not apply to the withheld information.
6. *FOIPOP* provides a comprehensive code of exemptions and does not permit the addition of a free-standing exemption based on the common law regarding settlement privilege.

[143] I recommend full disclosure of the withheld information.

October 28, 2016

Catherine Tully
Information and Privacy Commissioner for Nova Scotia