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

REVIEW REPORT 17-05

June 12, 2017

Halifax Regional Municipality

Summary: The applicant had significant concerns with the impact a development in her neighbourhood would have on her own property rights. The applicant sought further information in relation to the development. In its response, the Halifax Regional Municipality (HRM) withheld portions of the information citing third party personal privacy among other exemptions. The Commissioner determines that the disclosure of the identity of neighbouring landowners who raised concerns with HRM would result in an unreasonable invasion of their personal privacy.

However, the Commissioner determines that much of the remaining withheld information should be disclosed since disclosure would not result in an unreasonable invasion of a third party's personal privacy. The Commissioner recommends disclosure of initials of municipal employees confirming receipt of documents, the identity of individuals in a business context including the name of the Lord Bishop of Halifax from 1884, the historical name of the estate, opinions of individuals given in a business context, vague leave-related information, and all emails sent to or from the applicant. The Commissioner agrees that, for the most part, information withheld as solicitor-client privilege was properly withheld. The third party failed to provide any evidence in support of its claim that disclosure of a small amount of information would result in harm to its business interests. As a result, the Commissioner recommends disclosure of information withheld under the third party business exemption.

Statutes Considered: *Municipal Government Act*, SNS 1998, c 18, ss. 466, 467, 475, 476, 477, 481, 482, 496, 498.

Authorities Considered: **Alberta:** Order F2014-38, 2014 CanLII 72623 (AB OIPC); **British Columbia**: Orders 00-38, 2000 CanLII 14403 (BC IPC); F08-03, 2008 CanLII 13321 (BC IPC), F15-25, 2015 BCIPC 27 (CanLII); **Newfoundland and Labrador**: Report A-2016-004, 2016 CanLII 37499 (NL IPC); **Nova Scotia**: Review Reports FI-10-71, 2015 CanLII 60916 (NS FOIPOP); FI-11-76, 2014 CanLII 71241 (NS FOIPOP); FI-12-01(M), 2015 CanLII 54096 (NS FOIPOP); 16-02, 2016 NSOIPC 2 (CanLII); 16-04, 2016 NSOIPC 4 (CanLII); 16-07, 2016 NSOIPC 7 (CanLII); 16-10, 2016 NSOIPC 10 (CanLII); **Ontario**: Order PO-3446, 2015 CanLII 1539 (ON IPC).

Cases Considered: *A.B. v. Griffiths*, 2009 NSCA 48 (CanLII); *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104 (CanLII); *Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R. 403 1997 CanLII 358 (SCC); *Dickie v Nova Scotia (Department of Health)*, 1999 CanLII 7239 (NSCA); *French v. Dalhousie University*, 2003 NSCA 16 (CanLII).

INTRODUCTION:

[1] The applicant sought records relating to a development in her neighbourhood. Initially, the Halifax Regional Municipality (HRM) withheld a substantial amount of information under a variety of exemptions, particularly the third party personal information exemption. Following active participation in the informal resolution process by both parties, much of the withheld information was disclosed. What remains is small portions of information withheld under six exemptions and some outstanding concerns with the adequacy of HRM's search.

ISSUES:

[2] There are seven issues under review:

(a) Did HRM meet its duty to assist the applicant by conducting an adequate search for records as required by s. 467(1)(a) of the *Municipal Government Act* (*MGA*)?
(b) Is HRM authorized to refuse access to information under s. 476 of the *MGA* because it is subject to solicitor-client privilege?
(c) Was HRM required by s. 481 of the *MGA* to refuse access to the records or any part thereof because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?
(d) Is HRM required by s. 480 of the *MGA* to refuse access to the record or any part thereof because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?
(e) Is HRM authorized to refuse access to information under s. 477 of the *MGA* because disclosure could reasonably be expected to harm the economic interests of HRM?
(f) Is HRM authorized to refuse access to information under s. 474 of the *MGA* because disclosure of the information would reveal advice or recommendations?
(g) Is HRM authorized to refuse access to information under s. 475 of the *MGA* because disclosure of the information could reasonably be expected to harm law enforcement?

Issues further narrowed

[3] HRM withheld portions of information on pages 116, 205 and 206 citing s. 477 (harm to economic interests). In its submissions in response to the Notice of Formal Review, HRM indicated that due to the passage of time and the fact that a decision has already been implemented, it has decided to release information withheld under s. 477 on page 116. Further, with respect to pages 205 and 206, it no longer relies on s. 477 preferring instead to rely on s. 480(1). This resolves issue (e) above.

[4] I note that the Notice of Formal Review did not list the issue related to s. 474 (policy advice). This was an oversight as HRM had raised this issue and it was noted in the table of

records provided to both parties on December 20, 2016. However, in its submissions, HRM indicated that it is now prepared to disclose page 507 and page 524. Page 507 is the only page where s. 474 (advice and recommendations) was applied. Page 524 is the only page where s. 475 (harm to law enforcement) was applied. As a result, issues (f) and (g) above are now resolved.

[5] HRM indicated that it was no longer relying on "non-responsive" as a basis for withholding information and made no submissions in relation to the potential use of this as a non-specified exemption under the *MGA*. I thoroughly canvassed the application of "non-responsive" in NS Review Report 16-10 where I concluded:

> [71] In summary, it is far more consistent with the purpose provisions of *FOIPOP* to determine that the legislature intended irrelevant information to be disclosed than it is to determine the opposite. The legislation is intended to subject government to public scrutiny. Allowing government officials a non-specific unlimited right to selectively sever information it views as irrelevant, out of scope or not responsive from responsive records would be entirely inconsistent with the essential purpose of *FOIPOP*, with the actual design of *FOIPOP* and with the well-established approach that freedom of information legislation be broadly interpreted in favour of disclosure.[1]

[6] The same reasoning applies to the access provisions in the *MGA*. There are two pages (pages 134 and 139) where HRM failed to identify an exemption under the *MGA* for the withheld information. Instead, the documents still reference "non-responsive" as the basis for the severing. HRM presented no argument or evidence in support of the use of "non-responsive". On that basis, I recommend that the information on pages 134 and 139 be disclosed.

[7] The applicant indicated that pages 1 through 35 are not at issue from her perspective and so these 35 pages do not form part of this review.[2]

DISCUSSION:

Background

[8] The applicant sought copies of records relating to the construction of a new subdivision adjacent to her property. The applicant was concerned that the construction affected a pre-existing right of way.

[9] In response, HRM initially issued a fee based on an estimate of 1050 responsive records. Eventually, HRM concluded that there were 554 pages of responsive records, 536 pages were partially disclosed to the applicant, and 18 pages were fully withheld. HRM cited a number of exemptions in support of its position that the applicant was only entitled to a portion of the record. During the course of the informal resolution process HRM disclosed more information to the applicant. In the end, the majority of the remaining withheld information is withheld under s. 480 (third party personal information).

[1] NS Review Report 16-10.
[2] Email from applicant dated February 3, 2017.

(a) Did HRM meet its duty to assist the applicant by conducting an adequate search for records as required by s. 467(1)(a) of the *Municipal Government Act* (*MGA*)?

[10] The applicant raised three adequate search issues during the course of the informal review process. First, she raised concerns about the concept plan she received in the initial response package. This issue was informally resolved between the parties. Second, she raised concerns about missing attachments. And third, she raised concerns about the scope of responsive records produced.

[11] On April 1, 2015 the applicant received a letter from HRM indicating that the initial fee estimate had been reduced because the initial volume of records had been estimated at 1050 pages, but once the records were reviewed and duplicate and non-responsive records were removed, the volume processed was 554 pages.

[12] Section 467(1) sets out HRM's duty to assist:

> 467(1) Where a request is made pursuant to this Part for access to a record, the responsible officer shall
>
> (a) Make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely;

[13] Section 498 of the *MGA*, which sets out the burden of proof, is silent respecting s. 467(1). Therefore, the parties must each submit argument and evidence in support of their positions.

[14] In NS Review Report FI-11-76,[3] I discussed the approaches taken in various jurisdictions to the duty to assist and in particular, to the obligation to conduct an adequate search. I will not repeat that discussion here. My conclusions in NS Review Report FI-11-76 apply here:

> [13] What is clear from decisions across these Canadian jurisdictions is that where an applicant alleges a failure to conduct an adequate search the applicant must provide something more than mere assertion that a document should exist.
>
> [14] In response, the public body must make "every reasonable effort" to locate the requested record. The public body's evidence should include a description of the business areas and record types searched (for example emails, physical files, databases), should identify the individuals who conducted the search (by position type), and should usually include the time taken to conduct the search. If there is an explanation for why a record may not exist, it should be provided.

Missing attachments

[15] During the course of the informal resolution process, the applicant pointed to a number of emails contained in the response package that made references to attachments that did not appear to be in the responsive records.

[3] NS Review Report FI-11-76.

[16] In response, HRM looked at each instance and provided a written explanation. Included with the explanation was a description of the further search undertaken and who was asked to conduct a further search. Also included was a copy of the program area staff member's response to the search questions. HRM provided four explanations:

- The attachments existed within the responsive record and HRM provided the page number or specific reference.
- The missing attachment was found as a result of the further search and was provided with an explanation.
- No attachment existed. Instead, HRM provided an explanation for what appeared to be incomplete or missing documents. The explanations included information directly from program staff responsible for the original document. Generally, program staff reproduced the document in question so that access staff could confirm the full original had been produced.
- Two pages were released in error as the entire documents and attachments were non-responsive to the applicant's request.

[17] The applicant provided a reasonable and detailed explanation for why she believed attachments were missing. It was therefore appropriate for HRM to conduct a second search, which it did. In each case, HRM provided an equally reasonable explanation for the adequacy of the search. Included in the explanations were details such as the identity of staff persons tasked with searching, confirmation that the original document was retrieved and reviewed to confirm that the full document was produced, and specific answers to questions raised.

[18] With respect to pages 212 and 213, HRM stated that these two pages were entirely non-responsive and in effect were released in error. Pages 212 and 213 are two emails. Page 213 is the attachment referred to at page 212. Page 213 in turn refers to an attachment that was withheld as non-responsive. As part of the informal resolution process HRM provided a detailed explanation for the content of pages 212 and 213 and the missing attachments. Based on that explanation I am satisfied that the entire documents at pages 212, 213 and the withheld attachment were non-responsive to the applicant's request and need not have been included in the disclosure decision.

[19] **Finding #1:** I find that, with respect to potential missing attachments, after conducting the second search and providing a thorough explanation for that search, HRM met its duty to make every reasonable effort to locate the missing records as required by s. 467(1) of the *MGA*.

Responsive records

[20] The applicant received a fee estimate in response to this access request indicating that there were 1050 responsive records. However, when her request was finally processed, HRM indicated that 536 pages would be released to her (with some severing) and 18 pages were entirely withheld.

[21] The applicant alleges that "HRM's development office and/or its legal department have been obstructionist, and on numerous occasions have apparently failed to respond candidly to the

requests of the access officer." The applicant did not provide any evidence in support of this allegation.

[22] Upon receipt of the applicant's request, HRM's access & privacy officer made a call for records. HRM's evidence is that seven municipal staff had responsive records and a great many of the records provided were exactly the same record. In total, 1050 pages were initially identified as responsive. On that basis, the access & privacy officer produced a fee estimate. Once the fee issue was resolved, the access & privacy officer proceeded to process the request. Upon doing so she discovered that the business areas had provided exact duplicates of a number of records and had included records which, in her opinion, were not responsive to the applicant's request.

[23] There is nothing unusual in this process. The *MGA* requires that applicants specify the subject matter of the record requested with sufficient particulars to enable an individual familiar with the subject matter to identify the record.[4] HRM must then make every reasonable effort to respond openly, accurately and completely. But practically, the identification of responsive records often takes coordination between the business areas and the access and privacy experts. The *MGA* contemplates that some estimation will be initially required. Municipalities are required to provide applicants with an estimate of the total fees before providing the services.[5]

[24] The applicant makes reference to my decision in NS Review Report 16-10 where I determined that public bodies (and municipalities) are not entitled to sever information within responsive records as "non-responsive". However, as I note in that decision, the first step in processing any access request is the gathering of relevant records or documents. Every public body or municipality first goes through the process of deciding what records are or are not responsive to the particular access request. Once that process is complete, the responsive records must be disclosed unless an exemption permitted under the *MGA* applies. As I stated in NS Review Report 16-10, "non-responsive" is not a permitted exemption and so pieces of information within a responsive record cannot be withheld on that basis.[6]

[25] That is not what has happened here. Instead, HRM was simply conducting the first stage in processing any access request – it was identifying records responsive to the applicant's request.

[26] The concerning element of this access request is that because the business area so badly overestimated the number of responsive records, the initial fee estimate was much higher than it should have been. The problem appears to have arisen because seven individuals produced similar collections of records. Fees can create barriers to access and so municipalities should take particular care to ensure that fee estimates are as accurate as possible.

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[4] *MGA* s. 466(1)(b).
[5] *MGA* s. 471(5).
[6] At para 72 of NS Review Report 16-10 I stated, "Therefore, I conclude that *FOIPOP* does not authorize a public body to withhold information within a responsive record on the basis that it is somehow "out of scope", "not relevant" or "non-responsive".

[27] Where multiple individuals respond to a call for records, municipalities and public bodies should take the time to make a quick scan through the records to remove large exact duplicates before producing a fee estimate. In addition, business areas benefit from regular refresher courses in gathering records responsive to an access request. Certainly, it is better to err on the side of taking a liberal approach to what may be a potentially responsive record and allowing the access experts to make the final decision, but at the same time, simple rules like "do not include exact duplicates" and "call the access & privacy officer if you have questions about the scope of the request" may reduce the scope errors made by the business area staff.

[28] **Finding #2:** I find that there is no evidence to suggest that HRM failed to satisfy its duty to assist in identifying responsive records.

(b) Is HRM authorized to refuse access to information under s. 476 of the *MGA* because it is subject to solicitor-client privilege?

[29] Section 476 of the *MGA* states that a municipality may refuse to disclose information that is subject to solicitor-client privilege. HRM withheld 18 pages in their entirety and a portion of pages 47, 51-52 and 496 under s. 476. HRM stated that the information was withheld as legal advice.

[30] There is a well-established four-part test used to determine if legal advice privilege applies:

1. There must be a communication, whether oral or written.
2. The communication must be of a confidential nature.
3. The communication must be between a client (or his agent) and a legal advisor.
4. The communication must be directly related to the seeking, formulating or giving of legal advice.[7]

[31] HRM states that it makes no submissions with respect to pages 47, 51 and 52. During the informal resolution process HRM explained that pages 51-52 are correspondence from a third party's lawyer. Page 47 is a comment by another third party.

[32] The records at pages 47, 51 and 52 were partially disclosed to the applicant. The disclosed portion reveals that the documents are emails. Applying the four-part test above to these emails:

1. They are written communications.
2. One of the emails has a standard confidentiality notice that appears to be part of the sender's signature block. The other email has no confidentiality notice. HRM offered no evidence or argument that the communications between the parties would necessarily be confidential.

[7] As I stated in NS Review Report FI-10-71 at para 16. I cited two earlier review reports that applied the same four-part test: NS Review Reports FI-05-08 (Darce Fardy) and FI-08-104 (Dulcie McCallum). Other jurisdictions also apply this test. See for example: BC Orders F15-25 and 00-38, AB Order 2014-38, ON Order PO-3446, and NFLD Order A- 2014-05.

3. The communication is not between a client (or his agent) and a legal advisor. Rather, the communication is between a city employee and an outside party. There is no evidence that there is any common legal interest in play here.
4. The communication is initiated by an outside party. There is no evidence before me that the purpose of the communication is directly related to giving legal advice.

[33] I conclude that the withheld information on pages 47, 51 and 52 fails to satisfy parts 2, 3 and 4 of the solicitor-client privilege test. To be clear, just because a lawyer authors a document, is included in the distribution of a document, or is mentioned in the text of a document, that does not mean the document is subject to solicitor-client privilege in the hands of HRM. There must be a solicitor-client relationship between the municipality and the lawyer.

[34] **Finding #3:** I find that s. 476 does not apply to pages 47, 51 and 52.

[35] With respect to page 496 and the 18 withheld pages, I have carefully examined the content of these documents. They consist of written communications specifically related to the seeking and giving of legal advice. Included with the documents is some background information relevant to the advice sought. In NS Review Report FI-10-71 I explained why this type of information also falls within legal advice privilege:

> [18] Another aspect of the legal advice privilege that is relevant to the discussion of the records at issue here is that the privilege applies to communications in the continuum in which the solicitor tenders advice. The Court in The Minister of Public Safety and Emergency Preparedness and the Minister of Justice v. the Information Commissioner of Canada 2013 FCA 104 ("Minister of Public Safety") explains the continuum as follows:
>
> > [27] Part of the continuum protected by privilege includes "matters great and small at various stages… includ[ing] advice as to what should prudently and sensibly be done in the relevant legal context" and other matters "directly related to the performance by the solicitor of his professional duty as legal advisor to the client…
> >
> > [28] In determining where the protected continuum ends, one good question is whether a communication forms "part of that necessary exchange of information of which the object is the giving of legal advice"…If so, it is within the protected continuum. Put another way, does the disclosure of the communication have the potential to undercut the purpose behind the privilege – namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them?[8]

[36] I am satisfied that any background information contained within the 18 withheld pages forms part of the necessary exchange of information of which the object is the giving or receiving of legal advice.

[8] NS Review Report FI-10-71 at para 18.

[37] **Finding #4**: I find that s. 476 (solicitor-client privilege) applies to all of the information withheld on page 496 and the 18 fully withheld pages.

Exercise of discretion

[38] Section 476 is a discretionary provision. As such, the last step in any decision made by a municipality is to answer the question – should the information be withheld? HRM provided no information regarding the exercise of discretion.

[39] As a matter of regular practice, whenever a municipality determines that it has the authority to apply a discretionary exemption, before actually severing the information, the responsible officer must consider whether or not to exercise discretion in favour of disclosure despite the fact that the exemption applies. During the sign off process, I encourage access administrators to provide the individuals who have the delegated authority to apply exemptions with a list of considerations relevant to the exercise of discretion. That way, if the exemption is questioned, the administrator is in a position to clearly identify the factors considered in the exercise of discretion.[9]

[40] In a recent decision, *Minister of Public Safety*,[10] the Federal Court of Appeal considered the application of solicitor-client privilege in the context of the federal *Access to Information Act*. After determining that the first three paragraphs of an agreement were subject to solicitor-client privilege and the remaining fourteen were not, the Court then went on to consider the exercise of discretion. Factors the Court highlighted for the consideration of the public body in the exercise of discretion were:

- Might disclosure bolster in the eyes of the public the credibility and soundness of the documentary procedures the RCMP and Department of Justice are following?
- Might there now be a greater public interest in disclosing the paragraphs?
- Are there still important considerations that warrant keeping the information confidential?
- Discretion should be exercised mindful of all of the relevant circumstances of the case and the purposes of the Act.

[41] In her submissions, the applicant raised a number of considerations as to why HRM should not be permitted to rely on solicitor-client privilege. These arguments, for the most part, are relevant to the exercise of discretion. The applicant's position is that if the withheld information relates to her or her property, then in order to ensure that municipalities are fully accountable and that individuals have a right of access to personal information about themselves, the information should be disclosed. In other words, HRM should take into account the content of the records and the purposes of the *MGA* when exercising its discretion. Without any detailed explanation, the applicant also alleges that HRM placed a document in the Land Registry which it knew to be materially false in regard to her property and property rights. On that basis, she says HRM should not be permitted to claim solicitor-client privilege.

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[9] This discussion is taken from NS Review Report FI-10-71 at paras 31-32.

[10] *Minister of Public Safety and Emergency Preparedness and the Minister of Justice v. the Information Commissioner of Canada*, 2013 FCA 104 at paras 47-49.

[42] In this case HRM provided no information in relation to its exercise of discretion. In the absence of this information, I recommend that HRM review the withheld information and consider whether, as a matter of discretion, the record, or a portion thereof, could be disclosed even though it is exempt from disclosure under s. 476 of the *MGA*.

(c) Was HRM required by s. 481 of the *MGA* to refuse access to the record or any part thereof because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

[43] HRM withheld a small portion of information on pages 367, 370 and 371 citing s. 481 as authority for the decision. In accordance with s. 498(3)(b), when a matter is under review, it is the third party who bears the burden of proving that withheld information satisfies the test in s. 481.

[44] With respect to page 371, during the informal resolution process the affected third party consented to the disclosure of this information. Section 481 provides that unless a third party consents, the responsible officer shall refuse to disclose information that meets the test in s. 481. Here, since the third party consents, s. 481 cannot be applied to this record.

[45] The information withheld on pages 367 and 370 relate to a different third party. While that third party declined to consent to the disclosure of this information, it also declined to provide any submissions in support of its position that s. 481 applies to the withheld information. HRM also provided no submissions or evidence in support of the application of s. 481 to the withheld information. Its submission simply notes that it is the third party business that bears the burden of proof with respect to the application of s. 481.

[46] In order to satisfy the burden of proof the third party must establish that the disclosure of the requested information:

1. Would reveal trade secrets of a third party or commercial, financial, labour relations or technical information of a third party;
2. That was supplied implicitly or explicitly in confidence; and
3. The disclosure of which could reasonably be expected to cause one or more of the harms enumerated in s. 481(1)(c).

[47] In 2015, when HRM was initially processing this access request, it provided the third party with written notice pursuant to s. 482 of the *MGA*. In response, the third party provided a brief explanation for its objection to the disclosure of certain information. HRM provided this office with the original submission it received from the third party. This is the only information before me supporting the application of s. 481 to the records.

[48] Aside from reciting s. 481 verbatim, the third party's response in 2015 stated that that the redacted material remains "contentious" and the third party remained concerned about potential future litigation.

[49] Since I have no evidence to support the application of s. 481, I find that the third party has failed to satisfy its burden of proof as set out in s. 498(3)(b) of the *MGA.*[11]

[50] As noted earlier, I also received no submissions from HRM in support of the application of s. 481 to the requested record.

[51] **Finding #5:** I find that s. 481 does not apply information withheld on pages 367 and 370.

(d) Is HRM required by s. 480 of the *MGA* to refuse access to the record or any part thereof because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

[52] In order for s. 480 of the *MGA* to apply, the disclosure of the withheld information would have to result in an "unreasonable invasion of a third party's personal privacy." As I have previously stated, this means that the disclosure of the information can result in an invasion of personal privacy, but it cannot result in an "unreasonable" invasion of personal privacy. The fact that personal information appears in a record is not enough to satisfy the s. 480 test. Instead, it is well established that municipalities must apply a four-part test to determine whether or not s. 480 applies to third party personal information:

1. Is the requested information "personal information" within the meaning of s. 461(f)? If not, that is the end. Otherwise, the municipality must go on.
2. Are any of the conditions of s. 480(4) satisfied? Is so, that is the end.
3. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 480(3)?
4. In light of any s. 480(3) presumption, and in light of the burden upon the applicant established by s. 498(2), does the balancing of all relevant circumstances, including listed in s. 480(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?

[53] Usually it is the municipality who bears the burden of proving that the applicant has no right of access to a record. However, where the information being withheld is the personal information of people other than the applicant (s. 480), the applicant bears the burden of proof.[12] The fact that the applicant bears the burden of proving that the disclosure of information would not be an unreasonable invasion of a third party's personal privacy does not relieve the municipality from its responsibility to properly apply the *MGA* and to provide reasons for the exemptions it has chosen.[13]

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[11] I made a similar finding in similar circumstances in NS Review Report 16-07 at paras 16-18. In a recent decision by the Information and Privacy Commissioner for Newfoundland, the Commissioner also determined that where the third party did not provide any evidence it had therefore failed to meet its burden of proof and so he recommended full disclosure of the requested record. The report also details a related Court of Appeal decision in relation to the same records. OIPC Newfoundland Report A-2016-004.

[12] *MGA* s.198(2).

[13] I have made this point on a number of previous occasions including NS Review Reports 16-04 at para 9 and 16-02 at para 42.

[54] In its submission HRM pointed out that through the course of the informal resolution process it disclosed a significant amount of information that had originally been withheld under s. 480. It took the position that all of the remaining information "is the personal information of an individual" and that at review, the applicant must provide that disclosure of the information would not be an unreasonable invasion of a third party's personal privacy. Further it stated that "by redacting the personal information the Municipality is meeting its legislative obligations by preventing the unauthorized disclosure of personal information."

[55] There is no further explanation for how disclosure of the information that remains severed under s. 480 would result in an unreasonable invasion of a third party's personal privacy. The withheld information falls into a number of categories of information types. I will deal with each type in turn.

Email addresses, cell phone numbers, signatures, identifying information of neighbours

[56] The applicant indicates that she does not take issue with the severing of signatures or cell phone numbers. With respect to personal email addresses the applicant also did not object to the withholding of this information "unless it is the only way of identifying a participant in a decision-making process." Finally, she indicated in her submission that she has no desire to know the personal details of individuals "who appear to be advocating for changes to our (sic) own property rights, and are part of the development process."

[57] Although the applicant does not take issue with this type of information, her written submission specifically addressed one of the pages that fell within this category- page 167. That page includes the name and details relating to a neighbouring property owner who communicated concerns with the development to the city.

[58] I will therefore apply the four-part test to the information found on page 167. First, the name, email address, street address, and any information that could potentially identify neighbouring landowners qualifies as the personal information of these individuals within the meaning of the *MGA*. Second, none of the conditions of s. 480(4) apply to this information.

[59] With respect to part three of the test, the information at issue is the identity of neighbours who raised concerns about a development project in their neighbourhood. In raising these concerns, individuals often provided a few personal details such as the length of time they lived in the neighbourhood, unique features of their property, individual concerns they had specific to their personal circumstances, and sometimes other family members' names. There is nothing in the individual communications to indicate that the citizens intended their individual concerns to form part of a public discussion. This is not true for some other communications which were copied to the applicant among others and which I will deal with below. I find that none of the presumptions in s. 480(3) apply to this information.

[60] The final and most important step in determining if s. 480 applies is the need to assess in light of any s. 480(3) presumption, and in light of the burden upon the applicant established by s. 498(2), does the balancing of all relevant circumstances, including those listed in s. 480(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not? The applicant believes that some neighbours may have been privy to the decision-making

process and/or were granted access to review plans or have input in the development. If this was the case, her argument is that this information should be disclosed. In essence this is an argument that the disclosure would be desirable for the purpose of subjecting the activities of HRM to public scrutiny (s. 480(2)(a)).

[61] The content of the withheld information is not particularly sensitive, but the context suggests that the information was provided on the assumption that it would be kept confidential. In my opinion, there is a public interest in permitting citizens to communicate their concerns to a municipality in a confidential manner. Weighing each of these factors, I am satisfied that the disclosure of information identifying neighbours such as that found on page 167 would result in an unreasonable invasion of their personal privacy.

[62] **Finding #6:** I find that s. 480 applies to the identity and identifying information in relation to neighbours concerned with the proposed development. This finding does not apply to emails sent to or from the applicant which are discussed below.

Emails to or from the applicant

[63] On 18 pages HRM severed names and contact information including email address of third parties from emails that the applicant either sent herself or was copied on. Keeping in mind that the test is whether or not the disclosure of personal information would be an "unreasonable invasion" of personal privacy, it would be a rare situation indeed when information supplied by an applicant could not be returned to the same applicant. It is difficult, if not impossible, to claim that returning information to an applicant that was supplied by the applicant would be an unreasonable invasion of a third party's personal privacy. The applicant clearly already knows the information, he or she may be the author of the information, and likely still has a copy of the information. Likewise, emails that were copied by the third party to the applicant contain information the applicant clearly already knows and further, the fact that the third party at issue copied the applicant indicates a consent to the disclosure by the third party.

[64] In this case, names of third parties and some details of the third party concerns are explained by the applicant in an email or are copied to the applicant by the third party. The record itself is evidence of this. Then, in response to this access to information request, the same record is returned to the applicant by HRM with this very information severed. Applying the four-part test to this type of information is straightforward:

1. The names and identifying details are personal information.
2. No provisions in s. 480(4) apply to the information in this case.
3. No presumptions in s. 480(3) apply in this case.
4. Under s. 480(2)(f) where the third party is the author of the email copied to the applicant, clearly the third party did not mean the information to be kept confidential. Where the applicant is the author of the email with the third party information, clearly that information was not supplied by the third party in confidence because it was supplied by the applicant. Another non-enumerated factor that weighs heavily in support of disclosure is the knowledge of the applicant. She already knows the information as evidenced by the record itself.

[65] The test under s. 480 is whether the disclosure would be an unreasonable invasion of a third party's personal privacy. Evidence from the record that the third parties chose to communicate their identities to the applicant supports a finding that disclosure of these identities is entirely reasonable; it simply reflects the third parties' own privacy preferences.

[66] **Finding #7:** I find that s. 480 does not apply to any email either sent by or copied to the applicant. (Located on pages 58, 59, 60, 61, 67, 70, 84, 85, 86 107, 108, 110, 111, 279, 280, 281, 338, 350,468, 469, 470, and 471.)

Out of office references

[67] As public servants, we all have an allotment of holiday time and other types of authorized leave. On at least twelve occasions HRM withheld references to periods of leave. None of the references include specific dates or the exact nature of the leave. On several occasions the reference to time off was contained in an email sent to the applicant, members of the public or via an automatic out of office email notice. On one record the withheld information is simply the identity of two staff persons who were not in the office. No specific reason was given. They could have been on a work assignment, they may not have been scheduled to work that day, they may have been on holiday. HRM provided no explanation for why this information was withheld and made no argument as to whether or not any provision in s. 480(4) or 480(3) could apply to the withheld information.

[68] There are two provisions in s. 480 that are relevant to work-related information. The two provisions are at the opposite ends of the spectrum from each other. Section 480(4)(e) provides that it is not an unreasonable invasion of a third party's personal privacy to disclose information about the third party's position, functions or remuneration as an officer, employee or member of a municipality. Section 480(3)(d) provides that it is a presumed unreasonable invasion of personal privacy to disclose a third party's work history.

[69] The Supreme Court of Canada has determined that information about hours worked, including overtime hours revealed by a sign in log, is information about a third party's position and so cannot be withheld as an invasion of privacy.[14] If the information in question were simply how many hours vacation an individual was entitled to by virtue of their position, this would likely fall within information about the third party's position and could not be withheld under s. 480.

[70] But in this case, the information in question is vague general information that a particular municipal employee is away from work. I do not believe this information falls within s. 480(4)(e). It is not vacation entitlement information that could be seen as information about a third party's position. It is information specific to the individual employee.

[71] Does the withheld information then qualify as "employment history" within the meaning of s. 480(3)(d)?

[72] In order to make this evaluation it is important to first consider the purpose of the *MGA* access provisions and how s. 480(3) fits within that purpose. The purpose of the *MGA, Part XX*

[14] *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, 1997 CanLII 358 (SCC) at para 8.

provisions is set out in s. 462 and includes ensuring that municipalities are fully accountable to the public and providing for the disclosure of all municipal information with necessary exemptions that are limited and specific. In addition, s. 462 provides that the *MGA* is also intended to protect the privacy of individuals with respect to personal information about themselves held by municipalities.

[73] Section 480(3) creates a presumed unreasonable invasion of personal privacy for certain categories of records. When the presumption applies, this adds an additional burden on the applicant to establish that the disclosure of the withheld information would not be an unreasonable invasion of a third party's personal privacy. Given that the purpose of the *MGA* is to ensure full accountability, making a finding that the presumption applies should be done with care. A review of that subsection reveals that the information listed in that subsection has a common theme. The information listed is sensitive. The list includes medical information, tax return information, bank balances, sexual orientation and political beliefs along with employment history. The term "employment history" should be interpreted in light of the purposes of the law and consistent with the sensitivity of the other information listed in s. 480(3).

[74] The Nova Scotia Court of Appeal had this to say about the proper interpretation of the term "employment history":

> [36] In order to be found to be employment or educational history, the information must do more than simply have some sort of link to employment or education. The words "employment and educational" are not nouns, but adjectives which describe the word "history". The presumption against disclosure will only arise if the information relates to "employment or educational history" in the fuller sense set out in the jurisprudence.[15]

[75] The types of information that fall within the employment history presumption include details of work related conduct that led to disciplinary actions taken against a third party[16] and work performance evaluation information.[17]

[76] In this case, the withheld information consists of references to leave. There is no "history" in the sense of any enumeration of the leave or purposes. The vague references to leave in this case is non-sensitive and not specific. It is certainly not of the same nature or sensitivity as work conduct or performance evaluation type information. It does not qualify as work history within the meaning of s. 480(3).

[77] Applying the four-part test to the information:

1. The leave information associated with identifiable individuals qualifies as personal information.
2. No provisions in s. 480(4) apply to the information in this case.
3. No presumptions in s. 480(3) apply to the information.

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[15] *A.B. v. Griffiths*, 2009 NSCA 48 (CanLII).
[16] *Dickie v Nova Scotia (Department of Health)*, 1999 CanLII 7239 (NSCA) at para 31.
[17] *French v. Dalhousie University*, 2003 NSCA 16 (CanLII) at para 18.

4. None of the factors listed in s. 480(2) apply to either support disclosure or mitigate against disclosure. The only relevant factors are that the information is not particularly sensitive given its vague nature and the employees in question disclosed the fact that they were on leave on at least two occasions through an out of office message and in emails to outside third parties. The information relates to leave taken more than four years ago.

[78] **Finding #8:** On balance, I conclude that the disclosure of the leave-related information would not constitute an unreasonable invasion of any third party's personal privacy. (Located on pages 44, 55, 70, 82, 304, 332, 338, 350, 380, 385, 508, and 511.)

Historical name of the estate

[79] Throughout the responsive records the historical name of the estate is sometimes disclosed and sometimes withheld under s. 480. The estate was named after a former owner. A simple historical fact. I assume the failure to disclose the name in all instances was simply an oversight. But, to be clear, there is certainly no unreasonable invasion of a third party's personal privacy disclosing the name. The individual's name is in common usage and appears in emails of local residents, including correspondence from the applicant and, as noted above, was disclosed to the applicant by HRM on a number of occasions.

[80] **Finding #9:** I find that the disclosure of the historical name of the estate would not constitute an unreasonable invasion of personal privacy. (Located on pages 72, 85, 110, 111, 113, 157, 169, and 181.)

Information that does not qualify as "personal information"

[81] Throughout the document HRM periodically withheld both names and pronouns, sometimes withheld pronouns with no name present, or failed to sever only the personal information contained in the record. As a result, information was withheld under s. 480 that does not qualify as "personal information" within the meaning of s. 461(f) of the *MGA*.

[82] In order to qualify as "personal information" the information withheld must be "recorded information about an identifiable individual." For the most part, in the records at issue here, once the name of the individual was withheld, his or her gender revealed through a pronoun could not be used to identify him or her. This is because there were a number of neighbours, both men and women, who registered concerns with the proposed development. Severing pronouns in this context resulted in the severing of information that was not about an identifiable individual.

[83] Further, HRM originally withheld information on one email string that it said was "non-responsive". However, during the informal resolution process it agreed instead to identify a limited and specific exemption under the *MGA*. In one email string that appears twice in the record HRM severed entire emails or entire paragraphs. Section 465(2) of the *MGA* requires that if information can reasonably be severed from the records, an applicant has the right of access to the remainder of the record. Once the personally identifiable information is removed, the remainder of the email string does not qualify as "personal information". I will include a copy of

recommended severing for this email string located at pages 248-251 and 437-441 with HRM's copy of this decision.

[84] One final type of record in this category is the address of a community group. The group name is disclosed but its address is withheld. The address of community group would not qualify as personal information within the meaning of s. 461(f) of the *MGA*.

[85] **Finding #10**: I find that where names are properly withheld, pronouns and other non-identifiable details do not qualify as "personally identifiable" information. (Located on pages 59, 86, 110, 111, 122, 125, 138, 232, 248, 249, 251, 266, 267, 274, 281,305, 306, 382, 425, 437, 438, 439, 440, 441, 455, 502, 503, 504, 505, and 514.)

Opinions given in a work-related context

[86] On a number of occasions HRM withheld opinions of municipal employees in a work-related context, or opinions of third parties, also in their work-related roles. What is interesting about this approach is that there is a lack of consistency to the severing. Most of this severing occurs in the minutes of a meeting held between HRM and employees of the developer. The disclosed portion of the minutes make clear that the meeting was intended to address outstanding issues. The opinions of both the third party employees and municipal employees are found throughout the document as they discuss the various issues and the participants' opinions about the potential effects of various options. Most of this information is disclosed. However, on occasion, some statements are withheld. The nature of the withheld statements are, in my opinion, indistinguishable from the nature of the disclosed statements. Since I do not have any submission from HRM explaining why the statements were selected or not for severing under s. 480, I have no evidence before me as to why HRM decided that the withheld information would result in an unreasonable invasion of personal privacy when similar information in other parts of the minutes was disclosed as not being an unreasonable invasion of personal privacy.

[87] Applying the four-step analysis required under s. 480:

1. The withheld information is, generally, opinions of various individuals. An individual's opinions do qualify as personal information within the meaning of s. 461(f) of the *MGA*.
2. Section 480(4) does not apply to this information.
3. There is no presumption in s. 480(3) that applies to the withheld information.
4. With respect to the considerations under s. 480(2) and any other relevant circumstances, there are three considerations. All weigh in favour of disclosure:
    i. The disclosure of the information is desirable for the purpose of subjecting the activities of HRM to public scrutiny. The proposed development discussed in the withheld information was a matter of intense public debate. Information relating to HRM's involvement and any information related to decisions or activities of HRM would aid in this purpose.
    ii. There is no indication that the meeting was intended to be confidential. In fact, the majority of the minutes have already been disclosed to the applicant.
    iii. The comments are made by individuals in their business capacity, not their personal capacity. They are either using their professional judgement or are

advocating a position on behalf of their employer. In either case, this is not the type of information that is sensitive.

[88] **Finding #11:** I find that disclosure of opinions of municipal employees and other third party employees given in a work-related context would not result in an unreasonable invasion of a third party's personal privacy. (Located on pages 140, 201, 202, 203, 205, 206, 207, 208, 515, 525.)

Initials of municipal employees

[89] HRM has withheld the initials or sometimes handwritten first names of municipal employees under s. 480. The initials and names appear in two contexts, either as confirmation that a document has been received, or to identify the author of the document. In all cases, the initials or first names are handwritten. Also apparent is that the initials or first names are used strictly in a work context. So, would the disclosure of employee initials or first names in this context constitute an unreasonable invasion of the personal privacy of these employees within the meaning of s. 480?

1. Are the initials and first names personal information? In the context of the records at issue here, the full identity of the individual is easily ascertained from the disclosed information. Therefore, the initials and first names do qualify as personally identifiable information.
2. Section 480(4) does not apply.
3. There is no presumption in s. 480(3) that applies.
4. With respect to the considerations described in s. 480(2), there are two relevant considerations. First, the information is simply a handwritten initial or first name. It is not a signature. For the most part, the initials or first name are printed and clearly legible. I consider this to be non-sensitive information. Second, the initials or first name are used to confirm a work-related task – receipt of a document or authorship of a work-related document. Again, this means the information is non-sensitive.

[90] **Finding #12**: I find that the disclosure of the initials and printed first names of municipal employees used to confirm receipt of or authorship of a document would not result in an unreasonable invasion of a third party's personal privacy. (Located at pages 93, 166, 171, 190, 336, 378, 393, 413, 435, 448, and 461.)

Third party names in a business context

[91] The disclosed information reveals that officials from a local church were involved in discussions about the proposed development. The land in question was adjacent to church-owned property including an old cemetery. HRM disclosed the content of the discussions but not the names of the church officials involved in the discussions. In another series of documents HRM disclosed a study about the cemetery. Within the study, the authors describe historical information gathered from local witnesses. One of the witnesses is described as a local "historian". The name of this individual is severed in many places and disclosed in others. The third name withheld in this category is the name of an employee of the developer who received the historical report.

[92] Once again, the question is whether or not disclosure of the withheld information, in this case third party names in a business context, would result in an unreasonable invasion of a third party's personal privacy?

[93] This is a question I have previously examined. In NS Review Report FI-12-01(M) I examined cases from other jurisdictions in Canada and noted that other Commissioners have determined that the identity of individuals as employees or representatives of businesses lacks a distinctly personal dimension. The correspondence consists entirely of straightforward business communications.[18] I also note that in some jurisdictions business contact information (name and contact information) does not even qualify as personal information because the courts have determined that it is not "about" the individual (as required in the definition of "personal information"). The common thread is that, regardless of whether the information is characterized as not being "about" an identifiable individual or as personal information that lacks a distinctly personal dimension, release of this information would not constitute an unreasonable invasion of personal privacy.[19]

[94] I apply the four-part test as follows:

1. The names of individuals, even in the business context, qualify as personally identifiable information.
2. Section 480(4) does not apply.
3. There is no presumption in s. 480(3) that applies.
4. With respect to the considerations described in s. 480(2), there are two relevant considerations. First, the information is not sensitive. It is the identity of an individual in a business context. Second, there is nothing in the record to suggest the information associated with the names was intended to be confidential. The church officials, for example, were simply asserting the interests of their employer and congregation when discussing their concerns. These were entirely work-related discussions.

[95] I have included in this category the name of the Lord Bishop of Nova Scotia from 1884 which was withheld under s. 480. I can only assume this historical name was withheld in error given that it is publicly available and relates to a public position held more than 130 years ago. Also included in this category is the name of an individual who is quoted in the disclosed record, with the website link to the quote disclosed yet the name is withheld. Clicking on the link brings up the individual's name. The individual represents herself as an expert in public forums.

[96] **Finding #13:** I find that the disclosure of the identity of individuals strictly in a business-related context would not result in an unreasonable invasion of their personal privacy. (Located on pages 41, 51, 72, 83, 157, 184, 195, 196, 197, 323, 324, 325, 332, 333, 382, 394, 397, 398, 399, 400, 401, 403, 404, 405, 406, 415, 475, 477, and 513.)

[18] NS Review Report FI-12-01(M) at para 39.
[19] BC Order F08-03 at para 87.

FINDINGS & RECOMMENDATIONS:

[97] I find that:

1. With respect to potential missing attachments, after conducting the second search and providing a thorough explanation for that search, HRM met its duty to make every reasonable effort to locate the missing record as required by s. 467(1) of the *MGA*.
2. There is no evidence to suggest that HRM failed to satisfy its duty to assist in identifying responsive records.
3. Section 476 (solicitor-client privilege) does not apply to pages 47, 51 and 52.
4. Section 476 (solicitor-client privilege) applies to all of the information withheld on page 496 and the 18 fully withheld pages.
5. Section 481 does not apply to information withheld on pages 367 and 370.
6. Section 480 applies to the identity and identifying information in relation to neighbours concerned with the proposed development. This finding does not apply to emails sent to or from the applicant.
7. Section 480 does not apply to information in emails sent by or copied to the applicant.
8. Section 480 does not apply to leave-related information.
9. The disclosure of the historical name of the estate would not constitute an unreasonable invasion of personal privacy.
10. Where names are properly withheld, pronouns and other non-identifiable details do not qualify as "personally identifiable" information.
11. Disclosure of opinions of municipal employees and other third party employees given in a work-related context would not result in an unreasonable invasion of a third party's personal privacy.
12. Disclosure of the initials and printed first names of municipal employees used to confirm receipt of or authorship of a document would not result in an unreasonable invasion of a third party's personal privacy.
13. Disclosure of the identity of individuals strictly in a business-related context would not result in an unreasonable invasion of their personal privacy.

[98] I recommend that HRM:

1. Disclose all information withheld under s. 476 on pages 47, 51 and 52.
2. Consider whether, as a matter of discretion, page 496 and the 18 wholly withheld pages or some portion thereof could be disclosed even though they are exempt from disclosure under the *MGA* s. 476. Such further decision should be communicated in writing to the applicant and to the Commissioner within 60 days of receipt of this report.
3. Disclose all information withheld under s. 477 on page 116, under s. 474 on page 507, and under s. 475 on page 524 consistent with the position stated in HRM's written submission.
4. Disclose all information withheld under s. 481 on page 371 consistent with the written consent received from the third party.
5. Disclose all information withheld under s. 481 on pages 367 and 370.

6. Continue to withhold names and identifying information of neighbours who raised concerns relating to the proposed development except where that information appears on emails sent to or from the applicant.
7. Disclose all information withheld under s. 480 in emails sent to or from the applicant. (Located on pages 58, 59, 60, 61, 67, 70, 84, 85, 86 107, 108, 110, 111, 279, 280, 281, 338, 350,468, 469, 470, and 471.)
8. Disclose all leave related information withheld under s. 480. (Located on pages 44, 55, 70, 82, 304, 332, 338, 350, 380, 385, 508, and 511.)
9. Disclose the historical name of the estate. (Located on pages 72, 85, 110, 111, 113, 157, 169, and 181.)
10. Disclose all information that does not qualify as "personally identifiable". (Located on pages 59, 86, 110, 111,122, 125, 138, 232, 248, 249, 251, 266, 267, 274, 281, 305, 306, 382, 425, 437, 438, 439, 440, 441, 455, 502, 503, 504, 505, 514, and 525.) I will include a copy of recommended severing for pages 248, 249, 251, 437, 438, 439, 440, and 441 with HRM's copy of this decision.
11. Disclose opinions of municipal employees and other third party employees given in a work-related context. (Located on pages 140, 201, 202, 203, 205, 206, 207, 208, 515, and 525.)
12. Disclose initials and printed first names of municipal employees used in a work-related context. (Located at pages 93, 166, 171, 190, 336, 378, 393, 413, 435, 448, and 461.)
13. Disclose the names of individuals identified only in a business context. (Located on pages 41, 51, 72, 83, 157 184, 195, 196, 197, 323, 324, 325, 332, 333, 382, 394, 397, 398, 399, 400, 401, 403, 404, 405, 406, 415, 475, 477, and 513.)
14. Disclose the information withheld on pages 134 and 139 as "non-responsive".

June 12, 2017

Catherine Tully
Information and Privacy Commissioner for Nova Scotia