



Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner
Catherine Tully

REVIEW REPORT 18-08

October 17, 2018

Department of Health and Wellness

Summary: Canadian courts have made clear that the purpose of the policy advice exemption is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice. In order for the exemption to apply, there must be a deliberative or evaluative process and the withheld advice must involve an evaluative analysis of information. In this case, the public body withheld cost estimates for sterilization equipment replacement. The Commissioner determines that the nature of the withheld information is factual on its face. The nature of the records in which the information is found is likewise factual and not accompanied by options or analysis demonstrating skill or judgement. She recommends that the withheld information be disclosed in full.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [SNS 1993, c 5](#), ss. 3, 14, 17, 45.

Authorities Considered: **British Columbia:** Orders F11-19 [2011 BCIPC No. 25 \(CanLII\)](#); F13-17, [2013 BCIPC 22 \(CanLII\)](#); F15-44 [2015 BCIPC 47 \(CanLII\)](#); **Newfoundland:** Report A-2010-008 [2010 CanLII 34734 \(NL IPC\)](#); **Nova Scotia:** Review Report 18-02 [2018 NSOIPC 2 \(CanLII\)](#); **Ontario:** Orders PO-219, Appeal PA 09-337, [2010 CanLII 61014 \(ON IPC\)](#); PO-3578, Appeal PA13-494, [2016 CanLII 10086 \(ON IPC\)](#).

Cases Considered: *John Doe v. Ontario (Finance)*, [\[2014\] 2 SCR 3](#), [2014 SCC 36 \(CanLII\)](#).

Other sources considered: *Black's Law Dictionary*, 7th ed, (St Paul, MN: Thomson West, 2004) "monetary"; *Concise Oxford English Dictionary*, (New York: Oxford University Press, 2011) "monetary".

INTRODUCTION:

[1] The applicant sought records relating to proposed equipment sterilization systems between December 2009 and January 2012. In response, the Department of Health and Wellness (Department) disclosed a total of 16 pages of records. The records set out cost estimates and rationales for the replacement of sterilization equipment for five health authorities and the

Department during the time period in question. The only information withheld from the records were the cost estimates.

ISSUES:

[2] There are two issues under review:

1. Is the Department authorized to refuse access to information under s. 14 of the *Freedom of Information and Protection of Privacy Act (FOIPOP)* because disclosure of the information would reveal advice or recommendations?
2. Is the Department authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure could reasonably be expected to harm the economic interests of the public body?

DISCUSSION:

Background

[3] The records are forms used by staff to request replacement equipment. The disclosed information sets out the rationale for the requested purchase of sterilization equipment. The rationales provided generally relate to the age of the equipment and the risks associated with ongoing use of the equipment. Only estimated costs of the proposed replacement equipment were withheld from the records. According to the Department, the information redacted did not represent actual costs or even quoted costs but rather consisted of costs estimated by staff.

[4] The Department withheld the estimated costs citing the policy advice exemption (s. 14) and the harm to the economic interests of the public body exemption (s. 17).

Burden of Proof

[5] The Department bears the burden of proving that the applicant has no right of access to a record.¹

Is the Department authorized to refuse access to information under s. 14 of *FOIPOP* because disclosure of the information would reveal advice or recommendations?

[6] Section 14 of *FOIPOP* provides in part:

14(1) The head of the public body may refuse to disclose to an applicant information that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister.

(2) The head of a public body shall not refuse pursuant to subsection (1) to disclose background information used by the public body.

(3) Subsection (1) does not apply to information in a record that has been in existence for five or more years.

¹ *FOIPOP* s. 45.

[7] The purpose of this exemption is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice.²

[8] In Canada, the leading case on the meaning of the policy and recommendations exemption is *John Doe v. Ontario (Finance)*.³ In Review Report 18-02 I conducted a review of *John Doe* and numerous recent decisions evaluating and applying the advice or recommendations exemption and summarized the general guidance about the advice or recommendations exemption as follows:⁴

- The exemption is intended to protect the deliberative or evaluative process.
- The exemption is intended to protect a public body’s internal decision-making and policy-making processes, in particular while the public body is considering a given issue.
- Evidence of an intention to communicate is not required for the exemption to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.
- The exemption covers earlier drafts of material containing advice or recommendations even if the content of a draft is not included in the final version. Advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by the exemption.
- Recommendations include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.
- Advice must have a distinct meaning from “recommendations” and includes the views or opinions of a public servant as to the range of policy options to be considered by the decision-maker even if he or she does not include a specific recommendation on which option to take.
- Advice includes an opinion that involves exercising judgement and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.
- Advice or recommendations may be revealed in two ways:
 1. The information itself consists of advice or recommendations.
 2. The information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.
- Advice involves an evaluative analysis of information.

[9] The process for determining whether s. 14(1) applies involves three steps:

1. It is first necessary to establish whether disclosing the information “would reveal advice or recommendations developed by or for a public body or a minister.”
2. If so, it is then necessary to consider whether the information at issue is excluded from s. 14(1) because it falls within any of the categories of information listed in ss. 14(2)-(4).

² As I stated in NS Review Report 18-02. This summary of purpose is also frequently stated in decisions of adjudicators at the Office of the Information and Privacy Commissioner for British Columbia. For example, Order F13-17 at para 26.

³ *John Doe v. Ontario (Finance)*, [\[2014\] 2 SCR 3, 2014 SCC 36 \(CanLII\)](#).

⁴ NS Review Report 18-02 at para 14.

3. If s. 14(1) is found to apply, the final step is to determine whether the head of the public body has exercised his or her discretion lawfully.

Would disclosing the withheld information reveal advice or recommendations developed by or for a public body or minister?

[10] The withheld information in this case consists only of cost estimates provided on forms that appear to be part of a budget planning process. The forms, through subheadings, ask for a variety of information including equipment type, estimated life of the equipment, expiry date, current status of the equipment, malfunctions and cost. Not all of the forms include these subheadings, but the documents that do not reflect the cost estimate listed on these planning forms.

[11] All of the information was disclosed to the applicant except the cost estimates.

[12] Cost estimates and expenditure rationales have been the subject of a number of access to information appeals. One line of cases finds that estimated costs contained in evaluations of potential policing models and construction qualified as advice.⁵ The rationale for new expenditures in areas of operation for a university campus was also determined to satisfy the test of revealing advice or recommendations.⁶ In all three cases, it appears that the expenditures were accompanied by evaluative discussions leading to the cost estimates.

[13] There are cases which take a contrary view. For example, in Ontario the estimates for the impact on financial revenues of the HST were determined not to fall within the policy advice exemption.⁷ In another Ontario decision it was determined that financial numbers both current and historical did not qualify under the policy advice exemption because the adjudicator viewed them as factual information.⁸

[14] Since the cases are equivocal on this point, I will apply the factors articulated in the *John Doe* decision to the facts in this case.

The exemption is intended to protect the deliberative or evaluative process

[15] It is only speculation on my part that the records were compiled as part of a budget planning process. The Department's submission on this point is as follows: "The information was redacted as it did not represent actual costs or even quoted costs, but rather it consisted of costs provided as recommendations to the public body presumably to inform a budgetary process." While a budgetary process could certainly include deliberations and evaluations, asserting that the records "presumably" informed a budgetary process does not meet the evidentiary burden on the public body. This factor is neutral at best in terms of finding whether the exemption applies.

⁵ BC Order F15-44 at para 19 and BC Order F11-19 at paras 12-13.

⁶ Newfoundland Report A-2010-008 at para 40.

⁷ Ontario Order PO-219, Appeal PA 09-337 at p. 14.

⁸ Ontario Order PO-3578, Appeal PA13-494 at paras 109-111.

Advice involves an evaluative analysis of information

[16] There is no evaluative analysis of information contained on the document or in the withheld records. The disclosed and withheld information are made up of a factual description of the (then) current status of the equipment listed on the forms. The author of the information contained on the forms is tasked simply with filling out a form. The elements selected for consideration are dictated by the form. There is no discussion about relative merits and the significance of any particular factor. The information is presented as factual. This factor favours a finding that the exemption does not apply.

The exemption is intended to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue

[17] It appears, as noted above, that these documents may have been part of an internal budgeting process. This is an internal decision-making process that can be informed by a policy-making process. At the time of this request though, the records were already four years old. Based on the date of the records, any budgeting decisions that relied on the information had long ago concluded. This factor favours a finding that the exemption does not apply.

The exemption covers earlier drafts of material containing advice or recommendations even if the content of a draft is not included in the final version. Advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by the exemption

[18] It is unclear at what point these records were created. Were they first drafts or last? There is no evidence on this point. This factor does not assist in the decision-making in this case.

Advice must have a distinct meaning from "recommendations" and includes the views or opinions of a public servant as to the range of policy options to be considered by the decision-maker even if he or she does not include a specific recommendation on which option to take

[19] The withheld information does not include the views or opinions of any individual as to the range of policy options to be considered. No range of policy or decision options are presented. There is no analysis of the information included. The record contains only the description of aging equipment and estimated replacement costs. The information is presented as factual within the record. This factor favours a finding that the exemption does not apply.

Advice includes an opinion that involves exercising judgement and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action

[20] Does estimating the replacement cost of a piece of medical equipment involve exercising judgement and skill to weigh the significance of matters of fact? Is it expert opinion on matters of fact? The Department's evidence was an assertion in its submissions that, "These numerical figures indicate staff's expert judgement regarding estimated expenses to purchase equipment." The submissions do not identify who the authors of the documents were (i.e. positions or responsibilities) nor what their expertise was. It is possible that individuals just made a best guess. It is also possible that individuals used experience and knowledge to estimate the cost. It may also be possible that they used the internet and looked for a potential range of cost of replacement equipment and inserted that into the budgeting documents. The Department bears the burden of proof in this matter and provided no evidence to support a finding that the cost

estimates involved the exercise of expert judgement or skill. This factor favours a finding that the exemption does not apply.

The information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations

[21] The final factor to consider is whether the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations. The disclosed and withheld information consist of a list of facts relevant to deciding whether or not to replace sterilization equipment. There is no discussion as to whether or not the sterilization equipment should be replaced or whether the replacement of the sterilization equipment is of a higher priority than any other proposed capital purchase. Someone may well have relied on the information provided but the authors of the cost estimates were not asked to provide advice in the records at issue here. If advice was provided, it is not inferable from the withheld cost estimates.

[22] The nature of the withheld information is factual on its face. The nature of the records in which the information is found is likewise factual, not accompanied by options or analysis demonstrating expert skill or judgement. I find that the information does not qualify as advice or recommendations within the meaning of s. 14.

[23] Alternatively, even if the information might be said to somehow allow an accurate inference regarding advice or recommendations, I am also of the view that it qualifies as background information within the meaning of s. 3(1)(a)(i) of *FOIPOP*. Like the age of the equipment and lifespan, potential cost was another factor that the decision-maker may have considered in determining the Department's course of action. It is the factual material which the decision-maker and/or policy advice provider may have considered.

[24] I find that s. 14 does not apply to the withheld information because the statement of a cost estimate in the context of this record is factual and background information and does not amount to advice or recommendations within the meaning of s. 14.

Is the Department authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure could reasonably be expected to harm the economic interests of the public body?

[25] In its submissions, the Department states that it was 17(1)(b) that it applied to the records. Section 17(1)(b) provides that a public body may refuse to disclose information the disclosure of which could reasonably be expected to harm the financial or economic interests of the public body, including:

17(1)(b) financial, commercial, scientific or technical information that belongs to a public body or the Government of Nova Scotia and that has, or is reasonably likely to have, monetary value;

[26] In order for s. 17(1)(b) to apply, four things must be true. The information:

- must be financial, commercial, scientific or technical information;

- belongs to the public body or the Government of Nova Scotia;
- has, or is reasonably likely to have, monetary value; and
- the disclosure of which could reasonably be expected to harm the financial or economic interests of the public body or the Government of Nova Scotia.

[27] The withheld information is a number of dollar figures – estimates of the cost to replace sterilization equipment. On its face, this would qualify as financial information. It appears in documents of the public body and is about potential capital purchases of the public body, so it belongs to the public body.

[28] Next, the withheld information must have monetary value. Does a dollar figure have monetary value? The Department provided no submission on how estimated costs of capital purchases could have monetary value. “Monetary” is not defined in *FOIPOP*. The Concise Oxford English Dictionary defines it as follows:

Monetary – adj. relating to money or currency⁹

[29] Black’s Law Dictionary provides:

Monetary. The usual meaning is “pertaining to coinage or currency or having to do with money”, but it has been held to include personal property.¹⁰

[30] Two things are clear. First, it is not any value that will do. *FOIPOP* clearly requires that the value be monetary. Second, based on the usual definitions for the word “monetary”, the value is in relation to money. For information to have monetary value in the context of s. 17(1)(b) there must be a reasonable likelihood of independent monetary value in the information concerned. To be clear, the requirement isn’t that the withheld information be monetary but rather that the withheld information have monetary value.

[31] What value does a four-year-old estimated cost of replacement equipment have? Even at the time of the request, the information was dated. As noted above, given that the forms in question related to financial years 2011/2012 and 2012/2013, the decisions relating to the purchases would have been made either in late 2010 or late 2011. The disclosure decision was made five to six years later in January 2016. How then could a disclosure in 2016 have affected any budget or purchasing decisions and so had any type of monetary value? The Department provided no explanation of how the withheld information could have monetary value three or four years after decisions had been made and so I find that this part of the s. 17 test has not been met.

[32] While I do not need to move on to the final consideration (harm), I note that the harm identified by the Department was that, “Should potential bidders be aware of the approved budget levels for the proposed equipment they might be motivated to adjust costs in accordance with the estimated costs. This could harm the effectiveness and true nature of the bidding process to ensure that Government funds are allocated fairly.” The withheld information does

⁹ *Oxford*, “monetary” at p. 923.

¹⁰ *Black’s*, “monetary” at p. 906.

not reflect approved budget levels. The documents appear to be preliminary budget documents although the evidence does not establish what exactly they are or how they fit in the process. They are clearly not approved budget levels. The assertions provided by the Department fall well short of evidence of harm.

[33] I find that s. 17 does not apply to the withheld information because the Department has failed to provide evidence that the information had or was reasonably likely to have any monetary value at the time of the disclosure decision.

FINDINGS & RECOMMENDATIONS:

[34] I find that:

1. Section 14 does not apply to the withheld information because the statement of cost estimate in the context of this record is factual and background information and does not amount to advice or recommendations within the meaning of s. 14.
2. Section 17 does not apply to the withheld information because the Department has failed to provide evidence that the information had or was reasonably likely to have any monetary value at the time of the disclosure decision.

[35] I recommend that that Department disclose the withheld information in full.

October 17, 2018

Catherine Tully
Information and Privacy Commissioner for Nova Scotia