



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

REVIEW REPORT 18-11

December 17, 2018

Department of Transportation and Infrastructure Renewal

Summary: Three separate applicants sought disclosure of a management fee paid by the Nova Scotia Government to Bay Ferries Limited for the operation of the ferry service between Yarmouth and Portland, Maine. In withholding the information, the Department argued that disclosure of the information would harm both the economic interests of the Department and the competitive position of Bay Ferries Limited. There is a justifiably high democratic expectation of transparency around the expenditure of public money. Expenditure of public funds goes to the heart of the *Freedom of Information and Protection of Privacy Act*'s purposes and is an important reason behind the need for detailed and convincing evidence. The burden of proof rests with the public body. The Commissioner finds that the evidence offered falls well short of the legal standard. Instead, the evidence offered consisted of conclusionary statements of general assertions of risk. The Commissioner recommends full disclosure of the ferry service funding agreement.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [SNS 1993, c 5](#), ss. 17, 21, 45.

Authorities Considered: **British Columbia:** Orders 00-10 [2000 CanLII 11042 \(BC IPC\)](#); 03-03 [2003 CanLII 49167 \(BC IPC\)](#); F08-22 [2008 CanLII 70316 \(BC IPC\)](#); **Nova Scotia:** Review Reports 17-02 [2017 NSOIPC 2 \(CanLII\)](#); 18-02 [2018 NSOIPC 2 \(CanLII\)](#); **Ontario:** Orders PO-1894 [2001 CanLII 26094 \(ON IPC\)](#); MO 2179-F [2007 CanLII 11132 \(ON IPC\)](#).

Cases Considered: *Atlantic Highways Corporation v. Nova Scotia*, [1997 CanLII 11497 \(NS SC\)](#); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [\[2014\] 1 SCR 674](#), [2014 SCC 31 \(CanLII\)](#); *Canadian Broadcasting Corp. v. Northwest Territories (Commissioner)*, [1999 CanLII 6806 \(NWT SC\)](#); *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, [2014 ABCA 231 \(CanLII\)](#).

Other Sources Considered: Adams, Thomas. "Fast-ferry expenses in 2006 top \$5M through November", Rochester Business Journal, (January 12, 2007): <https://rbj.net/2007/01/12/fast-ferry-expenses-in-2006-top-5m-through-november/>; Arrowsmith, Susan L, John Linarelli & Don Wallace Jr. *Regulating Public Procurement: National and International Perspectives*:

<https://books.google.ca/books?id=z4ZiG7rS2FMC&pg=PA382&dq=cost+plus+fixed+fee&hl=en&sa=X&ved=0ahUKEwiYkey74PfeAhWkIMAKHQ9PAW4Q6AEIMDAB#v=onepage&q=cost%20plus%20fixed%20fee&f=false>, (Cambridge: Kluwer Law International, 2000); Bousquet, Tim. “When do we cut bait on the Yarmouth Ferry?”, *Halifax Examiner*, (September 13, 2017): <https://www.halifaxexaminer.ca/featured/when-do-we-cut-bait-on-the-yarmouth-ferry-morning-file-wednesday-september-13-2017/#3.%20Self-driving%20cars>; Burke, David. “Yarmouth to Maine ferry prices reposted after removal from website”, *CBC News*, (April 11, 2016): <https://www.cbc.ca/news/canada/nova-scotia/yarmouth-maine-ferry-prices-cost-cat-1.3529704>; Comeau, Tina. “Financial details released on Nova Star’s start-up and operational costs”, *Digby County Courier*, (January 18, 2015): <https://www.digbycourier.ca/news/regional/financial-details-released-on-nova-stars-start-up-and-operational-costs-37034/>; Ferries.ca, Maine—Nova Scotia: “Special Offers: Nova Scotia Resident Discount” (November 29, 2018): <https://www.ferries.ca/thecat/offers/nova-scotia-resident-discount/>; Government of Nova Scotia: *Funding Agreement between The Province of Nova Scotia and Bay Ferries Limited*, March 24, 2016; Government of Nova Scotia: Public Accounts Volume 3: Supplementary Information for the fiscal year ended March 31, 2018, (<https://notices.novascotia.ca/files/public-accounts/2018/pa-vol3-2018.pdf>); Government of Nova Scotia: Public Accounts Volume 3: Supplementary Information for the fiscal year ended March 31, 2017 (<https://notices.novascotia.ca/files/public-accounts/2017/2017vol3.pdf>); Government of Nova Scotia: Public Accounts Volume 3: Supplementary Information for the fiscal year ended March 31, 2016 (<https://notices.novascotia.ca/files/public-accounts/2018/2016-vol3.pdf>); *Halifax Examiner*. “You Can Read It Here”, (March 24, 2016): <https://www.halifaxexaminer.ca/wp-content/uploads/2016/03/images-2.compressed.pdf>; *Halifax Examiner*. “Bay Ferries Breakdown”, July 2018: <https://www.halifaxexaminer.ca/wp-content/uploads/2018/08/Portland-Monthly-Fee-Breakdown-July-1-July-31-2018.pdf>; *Halifax Examiner*. “Bay Ferries Breakdown”, August 2018: <https://www.halifaxexaminer.ca/wp-content/uploads/2018/09/Portland-Monthly-Fee-Breakdown-August-1-August-31-2018-copy.pdf>; *Halifax Examiner*. “Bay Ferries Breakdown”, October 2018: <https://www.halifaxexaminer.ca/wp-content/uploads/2018/10/Portland-Monthly-Fee-Breakdown-September-1-October-8-2018.pdf>; Karanicolas, Michael. *The Costs of Secrecy: Economic Arguments for Transparency in Public Procurement*: https://www.opengovpartnership.org/sites/default/files/OGP_Costs-of-Secrecy_20180515.pdf, Open Government Partnership. (May 2018); Nova Scotia House of Assembly: Hansard, Committee on Economic Development, <https://nslegislature.ca/legislative-business/committees/standing/economic-development/archive/economic-development/ed2017jan10>, (January 10, 2017); Pearson, Heidi. “Bay Ferries Limited Take Over Operation of Yarmouth Ferry”, *Global News*, (October 29, 2015): <https://globalnews.ca/news/2306889/bay-ferries-limited-to-take-over-operation-of-yarmouth-ferry/>; Province of Ontario: 2016/2017 Owen Sound Transportation Company Annual Report, <https://www.ontarioferries.com/wp-content/uploads/2017/10/2016-Annual-Report-Final-1.pdf>, (July 2017); Sant, Rosemarie. “Bay Ferries defends itself in ferry fiasco”, *Trinidad & Tobago Guardian*, (May 30, 2017): <http://www4.guardian.co.tt/news/2017-05-29/bay-ferries-defends-itself-ferry-fiasco>; *Expert Review Panel on a Yarmouth-US Ferry: Re-establishing a Yarmouth-US Ferry? An Analysis of the Issues: Report of the Expert Panel on a Yarmouth-US Ferry*, https://novascotia.ca/tran/yarmouthferry/Yarmouth-US%20Ferry_Panel_Report-FINAL.pdf, (August 2012).

INTRODUCTION:

[1] The sea link between Yarmouth and the United States has a long history, beginning in the 1880s. A ferry service was in continuous operation since the *Bluenose* service was initiated in 1956. At its peak, two ferries operated and carried 165,000 passengers each. In 2009, the ferry service operated by Bay Ferries Limited ceased operation after the Province decided to cease subsidizing the mounting losses of the service.¹ The service was revived again for the 2014 and 2015 seasons and operated by Nova Star Cruises. In the fall of 2015, the Government of Nova Scotia announced that it had chosen a new ferry operator, Bay Ferries Limited, and that contract negotiations were underway.²

[2] On March 24, 2016, the Province, through the Department of Transportation and Infrastructure Renewal (Department), signed a funding agreement with Bay Ferries Limited (Bay Ferries) for the provision of ferry services from Yarmouth, Nova Scotia to Portland Maine. On March 24, 2016, the Province announced the completion of the agreement. According to the Department, during a media briefing, media outlets were provided with a media package which included a severed version of the agreement.³ The information withheld from the agreement was financial information relating to the management fees, including the incentive payment and operating subsidy payments for the first two years.

[3] This review arises from three access to information requests that were made to the Department for information withheld from the Yarmouth ferry agreement. In response to the three access to information requests, the Department advised the applicants that it was withholding the details under the harm to economic interest exemption, s. 17 of the *Freedom of Information and Protection of Privacy Act (FOIPOP)*.

[4] The information at issue here is:

1. The amount of the base management fee set out in the agreement at article 9.01.
2. The payment in lieu of an incentive payment for 2016-17 in article 9.03.
3. The advances on the operating subsidies for fiscal year 2015-16 and fiscal year 2016-17 and the management fee payments for fiscal year 2016-17 in schedule B to the agreement.

[5] Although the Department proactively disclosed a severed version of the agreement with the three pieces of information listed above withheld, in response to one of the three applicants, the Department disclosed the payment in lieu of an incentive payment for 2016-17 in article 9.03.

¹ Expert Review Panel on a Yarmouth-US Ferry, *Re-establishing a Yarmouth-US Ferry? An Analysis of the Issues: Report of the Expert Panel on a Yarmouth-US Ferry*, (August 2012), at p.v. (online: https://novascotia.ca/tran/yarmouthferry/Yarmouth-US%20Ferry_Panel_Report-FINAL.pdf).

² Pearson, Heidi. "Bay Ferries Limited Take Over Operation of Yarmouth Ferry", Global News, (October 29, 2015): <https://globalnews.ca/news/2306889/bay-ferries-limited-to-take-over-operation-of-yarmouth-ferry/>.

³ The Halifax Examiner published a copy of the contract at: Halifax Examiner. "You Can Read It Here", (March 24, 2016): <https://www.halifaxexaminer.ca/wp-content/uploads/2016/03/images-2.compressed.pdf>.

ISSUES:

[6] The Department's original decision letters identified only one exemption – s. 17. The Notice of Formal Review in this matter also identified only one exemption at issue:

1. 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?

[7] When the Department provided its written submissions, it attempted to add a second issue. I discuss the late application of exemptions below.

[8] The second issue the Department attempted to add is:

2. Is the Department 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?

DISCUSSION:

Background

[9] On March 24, 2016, the Province of Nova Scotia entered into an agreement with Bay Ferries Limited. Bay Ferries agreed to operate a ferry service between Yarmouth, Nova Scotia and Portland, Maine.⁴ The Province agreed to make quarterly payments in advance based on projections contained in an approved budget. According to the 2016 agreement, the payments from the Province to Bay Ferries consist of the total of cash deficiency for the year⁵ plus the management fee⁶ plus any performance incentive payment earned (considered part of the management fee but with a separate calculation).⁷

Preliminary Matter: Last minute application of an exemption

[10] The original access to information requests were filed in the spring of 2016. From that point, through the informal resolution process (a 2 ½ year period) the Department relied solely on s. 17 of *FOIPOP* to support its position that the information at issue ought not to be disclosed. The Notice of Formal Review was issued identifying this sole issue. No objection was raised by the Department to the identification of the issue. Yet when the Department provided its submissions, it attempted to add an issue at the last minute: Was the Department required to refuse access to information under s. 21 of *FOIPOP*?

⁴ Government of Nova Scotia: *Funding Agreement between The Province of Nova Scotia and Bay Ferries Limited*, March 24, 2016, article 2.01. [Agreement].

⁵ Agreement, articles 6.01, 7.01 and 7.10. The Province agrees to pay Bay Ferries an operating subsidy for each year in an amount equal to the cash deficiency for the year. According to the agreement, the cash deficiencies are initially based on projections. The projections are prepared by Bay Ferries and provided by January 15 of each year to the Province. In accordance with article 7.10, following receipt of the annual financial statements there must be an adjustment of payments between the parties so that the amount of the operating subsidy paid to Bay Ferries by the Province equals the actual cash deficiency incurred by Bay Ferries for the year.

⁶ Agreement, articles 6.01 and 9.01.

⁷ Agreement, articles 9.03 and 9.04.

[11] In its submissions, the Department noted its late application of the exemption, but relied on Office of the Information and Privacy Commissioner for Nova Scotia (OIPC) Review Report 17-02 for the proposition that mandatory exemptions will always apply even when not specifically claimed by the public body.⁸ One of the very significant distinctions between the facts at issue in Review Report 17-02 and this case is that the public body in Review Report 17-02 had claimed the s. 20 exemption on the original records. The public body simply failed to make any submissions on the application of the exemption.

[12] In this case, the Department never advised three separate applicants of its intention to rely on s. 21. Each of the three applicants were only aware of the s. 17 issue.

[13] In Review Report 17-03, a public body attempted to add a late discretionary exemption. I highlighted the significant fairness concerns with such an approach:

[132] In accordance with s. 7(1) of *FOIPOP*, public bodies have an obligation to respond without delay openly, accurately and completely. Attempting to apply a discretionary exemption three years after the original response was provided is certainly not “without delay” and it means that the original response was neither open, nor accurate.

[133] Further, s. 7(2) requires that in responding to the applicant a public body must respond in writing and, where access to the record or to part of the record is refused, the public body must state the reasons for refusal and the provision of the Act on which the refusal is based. The Department wrote the applicants and failed to provide adequate notification of the application of s. 14 to a portion of the record.

[134] Finally, *FOIPOP* provides for a process by which applicants are entitled to a review of the public body’s decision. A late application of an exemption such as occurred here clearly prejudices the applicants’ right to review. The exemption was added after the informal resolution process had concluded and after the Notice of Formal Review had been issued.

[14] Because s. 21 is a mandatory exemption and because there are reasonable grounds to believe that the record may contain information to which s. 21 could apply, I have considered the issue of whether or not s. 21 applies to the record below. Because of the outcome of that consideration, I did not request that the applicants provide any submissions on this issue.

Burden of Proof

[15] The Department bears the burden of proving that the applicant has no right of access to a record.⁹

⁸ Citing NS Review Report 17-02 at para.8.

⁹ *FOIPOP*, s. 45.

Is the Department 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?

[16] In order for s. 21 to apply to the withheld information the following three things must be true:

1. the disclosure of the requested information would reveal trade secrets or commercial, financial, labour relations or technical information of a third party;
2. the information in question was supplied implicitly or explicitly in confidence; and
3. the disclosure of the requested information could reasonably be expected to cause one or more of the harms enumerated in s. 21(1)(c).

[17] The Department focused its s. 21 argument on one of the three pieces of withheld information – the base management fee. Because of the nature of the information at issue here, I will only consider the requirement that the information be supplied implicitly or explicitly in confidence (s. 21(1)(b)).

[18] The Department concedes that the management fee on its own was not supplied in confidence, as required by s. 21(1)(b) of *FOIPOP*. However, it argues that in combination with other publicly available information, it would be possible to derive the total costs for operating the service and that it is this number that was supplied in confidence to the Department.

[19] According to the Department, operational costs are the total dollar amount Bay Ferries sets out to pay for operating the ferry. It is these operational costs, the Department says, that were supplied in confidence within the meaning of s. 21. Since disclosure of the requested management fee would result in the disclosure of the operational costs, the Department submits that the “supplied” test in s. 21 is satisfied.

Total operational costs

[20] The Department submits that the public accounts are publicly available and contain the total yearly payment to Bay Ferries. The revenue from ticket sales could be calculated from publicly available sources and so the addition of the release of the management fee would result in the disclosure of the total operational costs associated with the running of the Yarmouth ferry.

[21] The math proposed by the Department is this:

$$\text{Public accounts total} = \text{management fee} + \text{operating subsidy}$$

[22] Since the operating subsidy is equal to the operational costs less revenue, the Department’s submission can be written as:

$$\text{Public accounts total} = \text{management fee} + (\text{operational costs} - \text{revenue from ticket sales})$$

[23] The Department states that since ridership numbers and ticket prices are publicly available, operational costs could be calculated using the following formula:

$$\text{Operational costs} = \text{public accounts total} - \text{management fee} + \text{revenue from ticket sales}$$

[24] The public accounts for the Department of Transportation and Infrastructure Renewal published online¹⁰ provide the following information regarding payments to Bay Ferries:

Fiscal year ending March 31, 2016	\$13,100,000
Fiscal year ending March 31, 2017	\$10,248,421
Fiscal year ending March 31, 2018	\$13,964,393

[25] The evidence does not support the Department's position that the total operational costs would be revealed by the disclosure of the management fee information for three reasons:

- 1. Missing total revenue information:** First, the operating subsidy is equal to the cash deficiency as defined in the agreement. Cash deficiency is the amount by which eligible expenses exceed total revenue, not just ticket sale revenue. Information provided by the Department indicates that ticket sale revenue is one of a number of streams of revenue. Therefore, even if the revenue of ticket sales could be calculated, it would not allow for an accurate calculation of total operational costs since the other revenue streams are not publicly available.
- 2. Lack of ticket revenue information:** Second, revenue from ticket sales is not publicly available. The Department argues that since ticket sale numbers and prices are publicly available, it is possible to calculate a yearly total of ticket sale revenue. There are a total of 13 fares for individuals and 24 fares for vehicles advertised on the Bay Ferries website. Fares range from free to \$550. In order to accurately calculate ticket sale revenue, there would need to be a source of data broken down into the 37 fare categories. The information would also have to include fare dates because the fare rates differ depending on whether the ticket was purchased for the peak or off season. Bay Ferries also offers discounts for Nova Scotians travelling with a vehicle¹¹ so this number would also need to be available to accurately calculate ticket sale revenue.

This type of detailed ridership information is not publicly available. The Department's evidence on this issue consisted of providing references to media articles that indicated that Bay Ferries had provided total ridership numbers for one month. The Department

¹⁰ Government of Nova Scotia: Public Accounts Volume 3: Supplementary Information for the fiscal year ended March 31, 2018 (online: <https://notices.novascotia.ca/files/public-accounts/2018/pa-vol3-2018.pdf>); Government of Nova Scotia: Public Accounts Volume 3: Supplementary Information for the fiscal year ended March 31, 2017 (online: <https://notices.novascotia.ca/files/public-accounts/2018/2016-vol3.pdf>); Government of Nova Scotia: Public Accounts Volume 3: Supplementary Information for the fiscal year ended March 31, 2016 (online: <https://notices.novascotia.ca/files/public-accounts/2017/2017vol3.pdf>).

¹¹ Burke, David. "Yarmouth to Maine ferry prices reposted after removal from website", CBC News, (April 11, 2016): <https://www.cbc.ca/news/canada/nova-scotia/yarmouth-maine-ferry-prices-cost-cat-1.3529704>; Ferries.ca, Maine—Nova Scotia: "Special Offers: Nova Scotia Resident Discount" (November 29, 2018): <https://www.ferries.ca/thecat/offers/nova-scotia-resident-discount/>.

also noted that the City of Portland also releases ridership data. The source of these numbers is unknown.¹² The City of Portland data does not match the Bay Ferries individual fare categories and does not include vehicle fares.¹³

Having total ridership numbers would not permit the calculation of fare revenue because there are 13 possible fare rates for riders and a further 24 fare rates for vehicles. While it appears that the City of Portland has published some vehicle numbers, it is not possible to determine the rates each vehicle was charged from the City of Portland information. The Department provided no evidence that vehicle rates are publicly available and investigators in this office were unable to locate any such numbers despite a thorough search. Therefore, the evidence does not support the Department's submission that it is possible, using publicly available sources, to calculate the yearly ticket sale revenue.

- 3. Additional payments not available:** Finally, the amount published in the public accounts represents the total amount the Department paid to Bay Ferries in a given fiscal year. That total amount does not consist only of the management fee plus the operating subsidy. There are two other amounts included in the public accounts total not accounted for in the Department's submissions: annual operating subsidy adjustment and incentive payment.

The management fee paid each year consists of two payments – the base management fee (article 9.01) plus the incentive payment (articles 9.03 and 9.04). For all years except 2016-17, the incentive payment is calculated using the formula set out in article 9.04. The formula requires knowing the difference between the actual cash deficiency and the estimated cash deficiency. Neither of these amounts are publicly available.

The agreement also provides that following receipt of the annual financial statements for each year, there shall be an adjustment of payments between the parties so that the amount of the operating subsidy paid to Bay Ferries by the Province equals the actual cash deficiency incurred by Bay Ferries for the year. The adjustment payment could potentially be a repayment to the Province from Bay Ferries or it could be an additional payment to Bay Ferries from the Province. The adjustment payment is also not publicly available.

¹² One media article indicates that the reporter "called up...the director of communications for the City of Portland" and that she provided him with the numbers: Bousquet, Tim. "When do we cut bait on the Yarmouth Ferry?", Halifax Examiner, (September 13, 2017): <https://www.halifaxexaminer.ca/featured/when-do-we-cut-bait-on-the-yarmouth-ferry-morning-file-wednesday-september-13-2017/#3.%20Self-driving%20cars>.

¹³ City of Portland monthly passenger breakdowns for June-September 2016 and June-August 2017, available through the Halifax Examiner: Bousquet, Tim. "When do we cut bait on the Yarmouth Ferry?", Halifax Examiner, (September 13, 2017): <https://www.halifaxexaminer.ca/featured/when-do-we-cut-bait-on-the-yarmouth-ferry-morning-file-wednesday-september-13-2017/#3.%20Self-driving%20cars>; July 2018 monthly passenger breakdown: <https://www.halifaxexaminer.ca/wp-content/uploads/2018/08/Portland-Monthly-Fee-Breakdown-July-1-July-31-2018.pdf>; August 2018 monthly passenger breakdown: <https://www.halifaxexaminer.ca/wp-content/uploads/2018/09/Portland-Monthly-Fee-Breakdown-August-1-August-31-2018-copy.pdf>; September 2018 monthly passenger breakdown: <https://www.halifaxexaminer.ca/wp-content/uploads/2018/10/Portland-Monthly-Fee-Breakdown-September-1-October-8-2018.pdf>.

[26] Therefore, operational costs actually equal:

Operational costs = public accounts total – base management fee – incentive payment + revenue from ticket sales + other revenue +/- annual operating subsidy adjustment.

[27] For 2016-17 and 2015-16, if Schedule B to the agreement were released, applicants would know the base management fee, the incentive payment and the operating subsidy for those two years. However, the actual operational costs would still not be calculable because revenue from ticket sales, other revenue and annual operating subsidy adjustments are all unknown.

[28] For any other year, there is even less chance of calculating the operational costs because while the base management fee remains the same, the incentive payment is based on a calculation and so is added to the list of unknowns.

[29] I find that the evidence establishes that the only information that would be disclosed if the base management fee were released to the applicants is the base management fee. The Department concedes that the management fee was a negotiated term and therefore does not meet the test under s. 21(1)(a) that the information be “supplied”. It is well established that the three subsections of s. 21(1) must be read conjunctively.¹⁴ Therefore, if any one of the tests has not been satisfied, s. 21 does not apply.

[30] I find that the Department has failed to prove that the information in question was supplied in confidence and therefore I find that s. 21 does not apply.

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?

[31] The Department and its service provider, Bay Ferries Limited, take the position that the disclosure of certain terms in the agreement should be withheld based on harms to both the economic interest of the Department and harms to the competitive position of Bay Ferries. There is a justifiably high democratic expectation of transparency around the expenditure of public money, which is appropriately incorporated into the interpretation and application of s. 17(1) when a public body’s and service provider’s commercial or financial interests are invoked to resist disclosure of pricing components in a contract between them for the delivery of essential services to the public.¹⁵ The agreement at issue is a matter of public spending in which there is a high public interest in transparency and openness. Indeed, the more significant the contract, the greater the interest.¹⁶

[32] In its submissions, the Department relied in particular on s. 17(1)(d) which provides:

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

¹⁴ *Atlantic Highways Corporation v. Nova Scotia*, [1997 CanLII 11497 \(NS SC\)](#).

¹⁵ British Columbia Order F08-22 at para 48. British Columbia Order 00-10 makes the additional point that public scrutiny of public-private business arrangements accords with the Act’s legislative goals, at p.9.

¹⁶ British Columbia Order F08-22 at para 67.

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:

...

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party.

[33] In order to rely on s. 17(1), the Department must establish that the disclosure of the withheld information could reasonably be expected to harm the financial or economic interests of the Department or the Province. Section 17 provides that such harm may arise from the non-exhaustive list of enumerated circumstances set out in ss. 17(1)(a) to (f). In this case, the Department points to s. 17(1)(d) as being a relevant consideration.¹⁷

[34] The Department bears the burden of proving that the test in s. 17 has been satisfied. Harms-based exemptions require a reasoned assessment of the future risk of harm. The leading case in Canada on the appropriate interpretation of the reasonable expectation of harms test found in access to information laws determined that access statutes mark out a middle ground between that which is probable and that which is merely possible. A public body must provide evidence well beyond or considerably above a mere possibility of harm in order to reach that middle ground.¹⁸

17(1)(d): Undue financial loss or gain to a third party

[35] As noted earlier, the Department asserts that disclosing the management fee would permit anyone to use the total amount paid to Bay Ferries as disclosed in the public accounts plus revenue from ticket sales, less the management fee, to determine the total operational costs to Bay Ferries to operate the service for a given year. The Department says that in doing so, it would reveal a level of detail about Bay Ferries to which its competitors are not typically privy.

[36] The Department identifies the following potential undue financial losses or gains to a third party:

1. Disclosing this type of detail (management fee and operational costs) would result in a competitive disadvantage to Bay Ferries. Bay Ferries currently operates two other ferry services on the east coast and is currently engaged in a competitive bidding process.

If the withheld information were disclosed, competitors would know Bay Ferry's accepted profit margin which would place Bay Ferries at a disadvantage during negotiations, service renewals and bid evaluations. Other bidders would not be subject to

¹⁷ For a discussion of the appropriate interpretation of a provision that consists of a list of specifics linked to a more general term see British Columbia Order F08-22 at paras 40-43.

¹⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at para 54. I have relied on this test in a number of previous decisions including NS Review Report 18-02 at para 38. The former British Columbia Commissioner referred to this as a "reasoned assessment of the future risk of harm" in Order F-08-22 at para 44.

this same disadvantage, resulting in a potential undue loss to Bay Ferries and an undue gain for the procuring entities.

Competitors could also consider Bay Ferries' operating costs when preparing their competing bids. They could adjust their margins to craft a lower bid even while maintaining a higher profit margin.

2. Bay Ferries is currently negotiating to move the service from Portland to Bar Harbour. If Bar Harbour were to learn what the cost for Bay Ferries is to operate the service to Portland this would impact the negotiations and affect any fees proposed by the port of Bar Harbour.
3. There is another company interested in operating a ferry between Bar Harbour/Portland and Yarmouth. The disclosure of Bay Ferries' costs for operating the service, including its profit margin, could provide insights that the other company would not otherwise be privy to without investing into market research. This, says the Department, would represent an undue gain to that company. Further, it argues that as this is an active negotiation, the risk of undue loss to Bay Ferries is present.
4. The funding agreement expires on March 31, 2026. When that term expires, if the management fee has been released, competing vendors would, when factoring information related to Nova Scotia's payments to Bay Ferries, determine Bay Ferries' operating costs for the ferry line for ten years. As a result, the Department asserts that, "competing proponents having access to Bay Ferries' costs for operating the line for that period will result in significant prejudice to the competitive position of the third party prospective bidders in 2026." The Department argues that the 2026 agreement renewal process is a "pending commercial transaction" within the meaning of a number of Ontario decisions.

[37] All of the undue financial loss or gain harm arguments are predicated on the assertion that disclosing the management fee would, with a little math, disclose the actual operational costs. According to the Department, operational costs are the total dollar amount Bay Ferries sets out to pay for operating the ferry. If the operational costs are disclosed, the Department argues, competitors could then evaluate Bay Ferries' profit margins and use this information to their competitive advantage in the circumstances described above.

[38] The evidence establishes that the only information that would be disclosed if the base management fee were released to the applicants is the base management fee. The base management fee was a negotiated term in the agreement and, according to the Department, it represents a stable profit margin for the operator. For 2015-16 and 2016-17, Schedule B includes a set incentive amount and the total operating subsidies paid. As noted above, the evidence does not support that disclosure of this additional information would allow for an accurate calculation of operational costs.

[39] Although the evidence supplied by the Department does not support its argument that the operational costs would be disclosed, the Department did provide an email from the third party.

In it, the third party does not make any reference at all to operational costs. The third party takes issue only with the disclosure of the management fee.

[40] With respect to the s. 17(1)(d) harm arguments submitted by the Department, as noted above, the Department bears the burden of providing detailed and convincing evidence sufficient to establish that there is a reasonable expectation of harm of the type described in s. 17(1)(d) of *FOIPOP*.

[41] What is “undue financial loss or gain”? Decisions in other jurisdictions have determined that the word “undue” in access to information law is used for the very purpose of distinguishing between mere financial losses or lower returns and financial losses that are unfair, improper, inappropriate or excessive; in other words, “undue”. I agree. Section 17(1)(d) must have some meaning beyond that of mere loss of income in the sense of less profit.¹⁹

[42] I accept that it is fair to assume competing businesses will attempt to use commercial information to their advantage. But, even if I work from that assumption, that does not mean that I can assume that undue loss or gain is the probable result. That depends on the specific market, the number and type of competitors, the manner in which the government organizes and issues its requests for proposal (RFP) and whether one can reasonably conclude that knowing, in this case, what the management fee or operational costs are now, could realistically assist in devising a proposal in the future that would be the most competitive.²⁰

[43] The Department provided no evidence regarding the specific market or the number and type of competitors. The Department submits that there are other ferry RFP processes underway. But no information was provided with respect to the number or type of competitors or whether these competitions used the funding model employed in the Yarmouth ferry agreement. The Department asserted that the agreement was unique but no evidence was provided in support of this assertion aside from noting that the agreement was different than the agreement reached with Nova Star Cruises. At least one academic suggests that the most widely used cost reimbursement contract is the cost plus fixed fee contract.²¹ If the agreement is indeed unique,

¹⁹ In *Canadian Broadcasting Corp. v. Northwest Territories (Commissioner)*, [1999 CanLII 6806 \(NWT SC\)](#), Vertes J. at para 63, as cited in British Columbia Order 03-03 at para 42, were discussing the identical wording in the harm to third party business interest exemptions in its respective legislation. The equivalent to Nova Scotia’s s. 21.

²⁰ This analysis can be found in the two cases cited below. Both cases were in relation to the third party business exemption which includes “significantly harm the competitive position” of the third party. This harm is not one listed in Nova Scotia’s s. 17(1)(d). But in referring to these cases, the Department appeared to be suggesting that the undue loss or gain under s. 17(1)(d) was the significant harm to the competitive position of Bay Ferries and so I have addressed the issue. *Canadian Broadcasting Corp. v. Northwest Territories (Commissioner)*, [1999 CanLII 6806 \(NWT SC\)](#), Vertes J. at para 65, as cited in British Columbia Order 03-03 at para 42. The Department incorrectly cited British Columbia Order 08-22 as the source of the quote.

²¹ While it is acknowledged that the model is different than the Nova Star agreement, the Bay Ferries agreement appears to be a standard cost plus fixed fee agreement, which is commonly used in public procurement. In *Regulating Public Procurement: National and International Perspectives* (online: <https://books.google.ca/books?id=z4ZiG7rS2FMC&pg=PA382&dq=cost+plus+fixed+fee&hl=en&sa=X&ved=0ahUKewiYkey74PfeAhWkIMAKHQ9PAW4Q6AEIMDAB#v=onepage&q=cost%20plus%20fixed%20fee&f=false>), Arrowsmith, et al., explain, “perhaps the most widely used cost reimbursement contract is the cost plus fixed fee contract. In this type of contract, the procuring entity agrees to pay the contractor its actual incurred costs, typically up to a cost ceiling, and a fee that is fixed and invariable” (Cambridge: Kluwer Law International, 2000), at p. 382.

that suggests that the information would be less useful in other differently structured negotiations. There is no evidence to reasonably conclude that by knowing what the operational costs and management fee the Province is paying now could realistically assist a competitor in devising a bid in the future that will be the most competitive. The number and variability of costs associated with the operation of a ferry are significant.

[44] No evidence was offered as to how the management fee could be used to craft a bid on a differently structured project that could in turn result in an undue loss or gain to a third party. This outcome was simply asserted in the submissions. I note in cases where undue loss or gain has been proven, the public bodies provided a series of affidavits from knowledgeable individuals listing in detail the manner in which information could be used and estimating the likely quantum of the undue loss or gain.²²

[45] The Department also argued that the future potential RFP for the Yarmouth ferry was a “pending commercial transaction”. The agreement runs until 2026. I disagree with the Department that this can be viewed as a “pending commercial transaction” within the meaning of the cases cited. In fact, those cases both dealt with disclosure of information relating to contracts that had not yet been finalized and both had the potential to fall through. “Pending” in both circumstances meant a renegotiation of the contract that was subject to the access request.²³

[46] It is relevant that the management fee paid to Bay Ferries on two other ferry contracts is publicly available. Media reported in January 2007 that Bay Ferries received a management fee of \$275,000 for operating a ferry from Rochester to Toronto.²⁴ In 2017, media from Trinidad and Tobago reported both operational expenses (US \$7,236,218.77) and the management fee (US \$954,475.00) associated with the inter-island passenger ferries run by Bay Ferries.²⁵

[47] Publication of management fees does not appear to be that uncommon. For example, the management fee paid to Nova Star Cruises was also publicly reported as being \$285,466 for the period from inception to April 30, 2014.²⁶ In 2017, the Owen Sound Transportation Company (a public body in Ontario) reported in its annual report that it received a management fee of \$460,161 for operating a seasonal ferry between Tobermory and South Baymouth on Manitoulin Island.²⁷

²² See for example British Columbia Order 00-10 at p. 12-13.

²³ Ontario Order PO-1894 at p. 8 makes clear that the information at issue was part of a conditional agreement of purchase and sale that had not yet closed. In Ontario Order MO 2179-F, a county was in the process of negotiating a contract with a supplier and the request related to those very records.

²⁴ Rochester Business Journal reported the \$275,000 figure for an 11-month period available at: Adams, Thomas. “Fast-ferry expenses in 2006 top \$5M through November”, Rochester Business Journal, (January 12, 2007): <https://rbj.net/2007/01/12/fast-ferry-expenses-in-2006-top-5m-through-november/> <https://rbj.net/2007/01/12/fast-ferry-expenses-in-2006-top-5m-through-november/>.

²⁵ Sant, Rosemarie. “Bay Ferries defends itself in ferry fiasco”, Trinidad & Tobago Guardian, (May 30, 2017): <http://www4.guardian.co.tt/news/2017-05-29/bay-ferries-defends-itself-ferry-fiasco>.

²⁶ Comeau, Tina. “Financial details released on Nova Star’s start-up and operational costs”, Digby County Courier, (January 18, 2015): <https://www.digbycourier.ca/news/regional/financial-details-released-on-nova-stars-start-up-and-operational-costs-37034/>.

²⁷ 2016/2017 Owen Sound Transportation Company Annual Report: <https://www.ontarioferries.com/wp-content/uploads/2017/10/2016-Annual-Report-Final-1.pdf>; (July 2017), at p. 15.

[48] I acknowledge that each project is different and that some management fee payments may represent only a portion of the profit earned by the ferry operator. Nevertheless, it seems that Bay Ferries is able to successfully compete on ferry projects despite the fact that its management fees for two other projects are publicly available.

[49] Of greatest significance with respect to the analysis of the harms under s. 17(1)(d) is that the Department bears the burden of proof. Its evidence consists of an email from Bay Ferries that contains general assertions of risk of harm that are conclusionary. I have no hesitation in concluding that the harm requirement in s. 17(1)(d) has not been made out.

17(1): Reasonable expectation of harm to the economic interests of the Department

[50] Even if the Department successfully established that the harm of the type listed in s. 17(1)(d) were to occur, the Department must still also establish that, based on the s. 17(1)(d) harm, there is a reasonable expectation of harm to the economic interests of the Department or the Province. In addition, the Department can still establish a reasonable expectation of harm to the economic interests of the Department even if s. 17(1)(d) does not apply. This is because s. 17 states that the list following the general statement of harm in s. 17(1) is “without restricting the generality of the foregoing”. In effect, this means the Department can provide evidence that there is a reasonable expectation of harm to the economic interests of the Department or the Province even without establishing that any of the enumerated circumstances in ss. 17(1)(a) through (e) apply.

[51] The Department begins its submissions by pointing out that the agreement with Bay Ferries is innovative. In the past, the Department says, the Province provided funding support using a standard arrangement whereby the Province issued an RFP and bidders articulated what their annual cost for operating the service would be. Within each of the components of the operational costs a markup would exist. The Department could not know what portion of the costs accounted for costs of service and what represented a markup. The agreement with Nova Star Cruises is offered as an example of such an arrangement.

[52] In the case of the agreement with Bay Ferries, the Department states that the management fee represents the actual profit margin for Bay Ferries. The operating subsidy provided by the Province is the difference between ticket sale revenues and at cost operation with no markup applied. Therefore, the management fee provides the operator with stable profit margin.

[53] According to the Department, another advantage of the new approach is that advances are based on operating budgets and cash flow projections which are agreed to as between the parties. This approval process offers the Province the necessary oversight to ensure Nova Scotians get the best value for the expense and it allows the Province to more accurately budget the costs of subsidizing the ferry service as there is less variability between the budgets presented at the beginning of a fiscal year to the end.

[54] The agreement itself at article 17.01 makes clear that Bay Ferries viewed the management fee as “confidential, commercially sensitive information which should not be publicly disclosed.” That same provision also notes that the agreement is subject to the *Freedom of Information and Protection of Privacy Act*.

Harm #1: No one else will agree to similar terms

[55] The Department submits that Bay Ferries was only willing to enter into this arrangement with the understanding that the management fee would be kept confidential. Further, the Department says that if Bay Ferries would not agree to enter into a contract if the management fee were disclosed, it is reasonable to infer that another operator would be similarly unwilling to enter into such an arrangement. If this occurs, the Department argues that Nova Scotians will lose the benefits associated with the innovative model.

[56] In support of this assertion, the Department provided an email from an official with Bay Ferries. In that email, the official reasserts the position stated in article 17.01 and states that “the disclosure of any such information would be both offensive and extremely prejudicial to our company and would greatly harm our competitive position.” Further, the official states that disclosure of the management fee would be “highly prejudicial to our company in its other business endeavours.” The third party points to its current participation in a competitive bidding process in relation to another ferry project as an example of circumstances in which harm could potentially arise.

[57] The third party’s email falls short of establishing that it was only willing to enter into this arrangement on the understanding that the management fee would be withheld. Further, the Bay Ferries email does not state that it only entered into the agreement because the Department agreed to keep the management fee confidential. In fact, the Department did not agree to keep the management fee confidential.

[58] The law is clear that public bodies cannot contract out of their obligations under *FOIPOP*.²⁸ The Department was not entitled to contract out of its obligations to be accountable and transparent under *FOIPOP*. It could not guarantee that any information would be kept confidential, it could only guarantee that *FOIPOP* applied to any disclosure decisions. The agreement makes clear that the Department was well aware that *FOIPOP* prevails. The assertion that the management fee was confidential is worded as, “it is understood that BFL takes the position that the amount of the Management Fee payment pursuant of this Agreement is confidential” (emphasis added). If Bay Ferries relied on this as confirmation that the management fee would be treated confidentially then the provision did a disservice to Bay Ferries. There is no undertaking by the Department to hold the management fee confidential.

[59] The Department argues that the harm to the economic interests of the Province is that it is reasonable to infer that if Bay Ferries would not have entered into the agreement without assurances of confidentiality, no other company would either. However, as noted above, there was no assurance of confidentiality. The Department could not contract out of its *FOIPOP* obligations and the evidence falls short of establishing that Bay Ferries would not have entered into the agreement on the understanding that the management fee would be kept confidential.

²⁸ See for example *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, [2014 ABCA 231 \(CanLII\)](#), at para 75 where the court says, “The Commissioner made the obvious point that no public body can “contract out” of the FOIPOP Act. No party disputes that...”

[60] The standard of proof required of the Department is that the evidence must show that the harm asserted is well beyond a mere possibility that disclosure will harm the economic interests of the Province. An assertion that it is reasonable to infer other businesses would not enter into a similar contract because Bay Ferries would not do so does not meet this standard of proof.

Harm #2: Prevent future use of the cost plus management fee model

[61] The Department states that releasing the management fee under this model could be reasonably expected to prevent the Department from using this new model in the future. This is essentially the same argument as saying no one else will agree to the model if the management fee is disclosed. However, the Department connects this assertion with the argument that the proposed disclosure would result in the disclosure of the operational costs and from there, cause undue loss or gain to a third party within the meaning of s. 17(1)(d). As noted above, the evidence fails to establish that operational costs would be calculable based on the disclosure of the withheld information.

[62] The Department states that the model is unique and one that it developed for this project. The evidence from the third party supplied by the Department indicates that in fact, it regularly negotiates these types of management fees. In an appearance before Committee on Economic Development, Bay Ferries Limited CEO gave evidence that it was Bay Ferries who decided to structure its bid to the Province on the basis of cost plus management fee.²⁹

[63] I find that the evidence falls well short of being detailed and convincing and so is insufficient to establish a reasonable expectation harm. In fact, as noted earlier, one piece of information (the payment in lieu of performance incentive) has already been disclosed to one of the three applicants. No evidence was provided to establish that any harm came from the potentially inadvertent disclosure of this information.

[64] The assertion that disclosure of procurement-related information might somehow harm the economic or financial interests of a public body has been recently challenged. In a 2018 international study of open procurement practices, the author found that disclosure of procurement-related information can result in significant benefits to the public body.³⁰ The study highlights a number of benefits of open procurement practices, including that it enhances the ability of businesses to understand and engage with the public procurement system which increases competition, levels the playing field among contractors and helps to enhance the ability of the public, including watchdog groups, to track public procurement expenditure, promoting efficiency and accountability by making it easier to uncover waste and mismanagement.³¹

[65] I find that the Department has not met its burden of proving that s. 17 applies to the withheld information.

²⁹ Nova Scotia House of Assembly; Hansard, Committee on Economic Development: <https://nslegislature.ca/legislative-business/committees/standing/economic-development/archive/economic-development/ed2017jan10>; (January 10, 2017). at p. 14/25.

³⁰ Karanicolas, Michael. *The Costs of Secrecy: Economic Arguments for Transparency in Public Procurement*, (online: https://www.opengovpartnership.org/sites/default/files/OGP_Costs-of-Secrecy_20180515.pdf); Open Government Partnership. (May 2018). [Karanicolas].

³¹ Karanicolas at pp. 3-4.

FINDINGS & RECOMMENDATIONS:

[66] I find that:

1. Section 17 does not apply to the withheld information.
2. Section 21 does not apply to the withheld information.

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

December 17, 2018

Catherine Tully
Information and Privacy Commissioner for Nova Scotia