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

REVIEW REPORT 19-01

February 22, 2019

Department of Intergovernmental Affairs

Summary: An applicant sought information related to the sale of the paper mill in Port Hawkesbury. The Department of Intergovernmental Affairs withheld most of the information, claiming several exemptions under the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*) including solicitor-client privilege. The Commissioner finds that solicitor-client privilege applies to communications between legal counsel and the Government of Nova Scotia. She further finds that communications between the Department and several outside entities were also properly withheld because these parties shared a common interest with the Government of Nova Scotia. The Department also applied three other exemptions to various portions of the records. The Commissioner finds that none of these remaining exemptions apply. The Commissioner recommends that a small portion of the withheld records be disclosed to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 5, 9, 12, 14, 16, 17, 20, 45; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s. 2; *Personal Information Protection Act*, SBC 2003, c 63, s. 1.

Authorities Considered: Alberta: Orders F2015-31, 2015 CanLII 77919 (AB OIPC); F2017-62, 2017 CanLII 49767 (AB OIPC); **British Columbia:** Orders 02-56, 2002 CanLII 42493 (BC IPC); F06-03, 2006 CanLII 13532 (BC IPC); F08-03, 2008 CanLII 13321 (BC IPC); F-08-22, 2008 CanLII 70316 (BC IPC); F15-61, 2015 BCIPC 67 (CanLII); F18-38, 2018 BCIPC 41 (CanLII); **Nova Scotia:** Review Reports FI-10-71, 2015 CanLII 60916 (NS FOIPOP); 16-10, 2016 NSOIPC 10 (CanLII); 18-02, 2018 NSOIPC 2 (CanLII); 18-09, 2018 NSOIPC 9 (CanLII); 18-11, 2018 NSOIPC 11 (CanLII); **Ontario:** Orders PO-1885, 2001 CanLII 26085 (ON IPC); MO-3437, 2017 CanLII 33698 (ON IPC); MO-3533, 2017 CanLII 87947 (ON IPC); **PEI:** Order FI-17-004, 2017 CanLII 19225 (PE IPC).

Cases Considered: *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 (CanLII); *Buttes Gas and Oil Co. v. Hammer* (no. 3) [1980] 3 All E.R. 475 (Eng. C.A.); *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 (CanLII); *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 1997 CanLII 358 (SCC); *Donham v. Nova Scotia (Environment)*, 2017 NSSC; *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue)*, 2002 BCSC 1344 (CanLII); *Hospitality Corp. of Manitoba Inc.*

v. American Home Assurance Co, 2004 MBCA 47 (CanLII); *House (Re)*, 2000 CanLII 20401 (NS SC); *Iggillis Holdings Inc. v. Canada (National Revenue)*, 2018 FCA 51 (CanLII); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII); *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.); *Pritchard v. Ontario* (Human Rights Commission), [2004] 1 SCR 809, 2004 SCC 31 (CanLII); *R. v. Clarke*, 2015 NSSC 26 (CanLII); *R. v. McClure*, [2001] 1 SCR 445, 2001 SCC 14 (CanLII); *Sauvé v. Insurance Corp. Of British Columbia*, [2010] B.C.J. No. 1020 (B.C.S.C.); *Zeigler Estate v. Green Acres* (Pine Lake) Ltd., 2008 ABQB 552 (CanLII).

Other Sources Considered: Belz, Adam. "Paper industry subsidies strike home in Nova Scotia and Minnesota," Star Tribune, (September 19, 2012): http://www.startribune.com/paper-industry-subsidies-strike-home-in-nova-scotia-and-minnesota/170367846/; Dodek, Adam M. *Solicitor-client Privilege* (Markham: LexisNexis Canada, 2014); Government of Nova Scotia. "Province Invests in Jobs, Training and Renewing he Forestry Sector," News Releases from Premier's Office, August 20, 2012, (online: https://novascotia.ca/news/release/?id=20120820001); Martin, Wendy. "U.S. tariffs removed from Port Hawkesbury Paper's products", CBC News, (July 9, 2018): https://www.cbc.ca/news/canada/nova-scotia/tariffs-port-hawkesbury-paper-us-1.4739553; Richardson, Whit. "Nova Scotia mill startup could harm Maine's paper industry, trigger pursuit of tariffs", Bangor Daily News, (August 27, 2012): http://bangordailynews.com/2012/08/27/business/nova-scotia-mill-startup-could-harm-maines-paper-industry-trigger-pursuit-of-tariffs/; U.S. International Trade Commission, *Supercalendared paper from Canada*, Investigation No. 701-TA-530 (Preliminary), April 2015, (online: https://www.usitc.gov/publications/701_731/pub4529.pdf.); U.S. International Trade Commission, *Supercalendared paper from Canada*, Investigation No. 701-TA-530 (Final), December 2015, (online: https://www.usitc.gov/publications/701_731/pub4583.pdf).

INTRODUCTION:

[1] In September 2012, the Province of Nova Scotia announced the sale of the NewPage pulp and paper mill in Port Hawkesbury. Almost immediately, media stories reported that Maine congressmen and Maine paper mill owners were expressing concern about the financial support they believed the Port Hawkesbury paper mill was receiving. The United States Trade Representative Ambassador Ron Kirk sent Canada a series of questions regarding the financial support. An applicant made two access to information requests in 2015 and 2016 seeking details relating to the response to those questions. The Department withheld almost all of the responsive information. The applicant filed requests for review of those decisions with this office.

ISSUES:

[2] There are six issues under review:

a) Is the Department of Intergovernmental Affairs (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?

b) Is the Department authorized to determine that portions of the responsive records are out of scope of the request and to withhold the portions that it deems non-responsive?
c) Is the Department authorized to refuse access to information under s. 16 of *FOIPOP* because it is subject to solicitor-client privilege?
d) 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?
e) Is the Department authorized to refuse access to information under s. 12 of *FOIPOP* because disclosure of the information could reasonably be expected to harm intergovernmental affairs?
f) Is the Department required to refuse access to information under s. 20 of *FOIPOP* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

DISCUSSION:

Background

[3] In September 2011, the NewPage pulp and paper mill in Port Hawkesbury applied for creditor protection and closed. The Port Hawkesbury mill was a major employer in a small town. It was a major North American producer of glossy paper used in magazines and advertisements. The provincial government of the day decided to act in support of the sale of the mill. On September 20, 2011, the government announced its intention to keep the mill in "hot idle" status – a necessary condition of having the mill re-sale ready.

[4] In August 2012, the Province of Nova Scotia issued a press release announcing its intention to support the sale of the mill from NewPage to Pacific West. The press release listed the proposed financial support as follows:

> The province, through its Jobs Fund, is providing a financial package that includes:
>
> 1. a $24-million loan to support improved productivity and efficiency to make this the most efficient paper producer in the world
> 2. a $40-million repayable loan for working capital to help the mill become the lowest cost and most competitive producer of super calendar paper
> 3. $1.5 million to train workers to operate the most efficient paper producing machine in the industry
> 4. $1 million to implement a marketing plan to sell the Nova Scotia forestry sector to the world and create customer opportunities
>
> The province, through the Department of Natural Resources, has also agreed to invest:
>
> - $20 million to buy 51,500 acres of land to help meet the province's commitment to increase Crown land share and ensure the resource is protected for future generations

- $3.8 million annually, for 10 years, from the forestry restructuring fund to support sustainable harvesting, forest land management, and fund programs that will allow more woodlot owners and pulpwood suppliers to become more active in the management of their woodlands
- funding for the development of a Mi'kmaq Forestry Strategy and a Mi'kmaq Forestry Co-ordinator[1]

[5] On September 22, 2012, the Province of Nova Scotia announced that the sale of the mill to Pacific West had been finalized and that the mill would re-open as Port Hawkesbury Paper (PHP). A number of media stories at the time reported that Maine congressmen and Maine paper mill owners and unions immediately expressed concern about the financial support the PHP was receiving.[2] They enlisted the assistance of the United States Trade Representative Ambassador Ron Kirk. Ambassador Kirk sought information from the Canadian government on the nature of the financial package provided by the Nova Scotian government. Ambassador Kirk requested answers to a number of questions in relation to the financial package in November 2012 and again in January 2013.[3] The potential for a more formal process was very clear. In the January 2013 letter, Ambassador Kirk states, "Should the U.S. industry decide to initiate a trade remedy action, the broader Canadian paper industry likely would be affected."

[6] In February 2015, a coalition of American paper mills filed a formal complaint with the U.S. International Trade Commission. In due course, that led to a determination that the United States had been materially injured by reasons of imports of supercalendered paper from Canada that were found by the Department of Commerce to be subsidized by the Government of Canada.[4] Following the final determination in November 2018, a countervailing duty of 20.18 percent was imposed on the PHP. The Canadian government immediately appealed on behalf of Nova Scotia and, in the summer of 2018, a settlement was announced.[5]

[7] The applicant made two access to information requests in relation to this matter. In response to the first request made in October 2015, the Department partially disclosed 3 of 20 pages. In response to the second request made in July 2016, the Department fully withheld all 413 responsive pages including all 20 pages found to be responsive to the first request. During

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[1] Government of Nova Scotia. "Province Invests in Jobs, Training and Renewing the Forestry Sector", News Releases from Premier's Office, August 20, 2012 (online: https://novascotia.ca/news/release/?id=20120820001).
[2] Richardson, Whit. "Nova Scotia mill startup could harm Maine's paper industry, trigger pursuit of tariffs", Bangor Daily News, (August 27, 2012): http://bangordailynews.com/2012/08/27/business/nova-scotia-mill-startup-could-harm-maines-paper-industry-trigger-pursuit-of-tariffs/.; Belz, Adam. "Paper industry subsidies strike home in Nova Scotia and Minnesota", Star Tribune, (September 19, 2012): http://www.startribune.com/paper-industry-subsidies-strike-home-in-nova-scotia-and-minnesota/170367846/.
[3] The applicant in this matter provided a copy of Ambassador Kirk's letter to The Honourable Ed Fast dated January 17, 2013. Attached to the letter was a list of questions dated October 10, 2012.
[4] The preliminary determination can be found at: U.S. International Trade Commission, *Supercalendared paper from Canada*, Investigation No. 701-TA-530 (Preliminary), April 2015, (online: https://www.usitc.gov/publications/701_731/pub4529.pdf.). The final decision can be found here: U.S. International Trade Commission, *Supercalendared paper from Canada*, Investigation No. 701-TA-530 (Final), December 2015, (online: https://www.usitc.gov/publications/701_731/pub4583.pdf).
[5] Martin, Wendy. "U.S. tariffs removed from Port Hawkesbury Paper's products", CBC News, (July 9, 2018): https://www.cbc.ca/news/canada/nova-scotia/tariffs-port-hawkesbury-paper-us-1.4739553. [Martin, 2018].

the review process, the Department produced three additional responsive pages for a total of 416 responsive pages.

[8] Because so many of the records consist of email strings, there are numerous duplicates – a total of 144 pages of the records consist of exact duplicates. To be clear, I do not fault the Department for including these duplicates. Email strings can be tricky to deal with, they may go off in different directions with the first few pages being identical and then one new string sent to perhaps a subset of individuals. In order to get the full story and to ensure that the records are comprehensible and complete, it is sometimes necessary to produce numerous versions of the same email string with only slight variations usually to the top most, or most recent email. That is what happened in this case.

Burden of Proof

[9] Usually, it is the Department 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. 20), the applicant bears the burden of proof.[6]

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

[10] In its submissions, the Department notes that because the records are more than five years old now, s. 14(2) would apply to the records if a request were made today. On that basis, rather than requiring the applicant to make a new request, the Department states that it has chosen to exercise its discretion and withdraw its reliance on s. 14. This did not result in any additional information being disclosed by the Department because the Department applied multiple other exemptions to the same information.

b) Is the Department authorized to determine that portions of the responsive records are out of scope of the request and to withhold the portions that it deems non-responsive?

[11] In its original response to the applicant on July 29, 2016, the Department withheld all of the responsive records. In the cover letter, the Department noted that in addition to relying on exemptions in *FOIPOP*, it redacted "information outside the scope" of the applicant's request. In its submissions, the Department identifies 11 pages to which "non-responsive" had been applied. In this case, the Department withdrew its reliance on non-responsive for 10 of the 11 pages. Once again, this did not result in any additional information being disclosed because the Department applied multiple other exemptions to the same information.

[12] For the eleventh page, the Department submits that the entire record is non-responsive and was added to the package in error.

[13] I have reviewed this one page and agree with the Department's submission that this entire record is non-responsive as it deals with a tangentially related staffing matter. As I have previously noted, the first step in the processing of any access to information request is the gathering of relevant records or documents.[7] In fact, public bodies are not required to process requests until the applicant has supplied sufficient particulars to enable the public body to

[6] *FOIPOP*, s. 45.
[7] NS Review Report 16-10, 2016 NSOIPC 10 (CanLII), at para 51.

identify the requested and so relevant record. In this case, due to an oversight, a non-relevant record was included in the responsive package.

[14] I find that page 393 is a non-responsive record and need not be produced in response to these access to information requests. This leaves 415 responsive pages.

c) Is the Department authorized to refuse access to information under s. 16 of *FOIPOP* because it is subject to solicitor-client privilege?

[15] In order to decide if legal advice privilege applies, the record at issue must satisfy the following test:[8]

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; and
4. The communication must be directly related to the seeking, formulating or giving of legal advice.

[16] The applicant argues that the requests sought objective facts and not any legal advice given in relation to the facts. The applicant notes that he was surprised that there was no information that the Department could disclose given the highly factual nature of the questions for which the United States sought answers from the Department through the auspices of the Canadian government. He states that the information sought relates to the closure of the Port Hawkesbury mill and the subsequent financial aid, in whatever form, given by the Province of Nova Scotia to the new owners of the mill. In other words, the applicant's view is that the information sought related to the terms and conditions of loans or assistance.

[17] The applicant's two requests in relation to the PHP can be summarized as follows:

1. All exchanges between the Government of Nova Scotia and the Government of Canada relating to the preparation and communication of responses to two sets of questions (November 2012 and February 2013) from the Government of the United States relating to the mill in Port Hawkesbury.
2. All records within the Government of Nova Scotia and between the Government of Nova Scotia and any other parties regarding the questions posed by Ambassador Kirk in a letter dated October 10, 2012.

[18] Clearly then, the applicant did not simply seek the terms and conditions of any loans or assistance to the Port Hawkesbury mill. Rather, the applicant sought records regarding the response to questions posed by Ambassador Ron Kirk to the Canadian government.

[19] The Department withheld all 415 pages citing a variety of exemptions including solicitor-client privilege (s. 16) which it originally applied to all of the withheld pages. In its submissions, the Department withdrew reliance on s. 16 on one page (page 328) which it now proposes to

[8] I recently examined the application of legal advice privilege under *FOIPOP*. For a more thorough discussion of the test and its use in other jurisdictions, see for example, NS Review Reports 18-09, 2018 NSOIPC 9 (CanLII), at paras 13-26 and FI-10-71, 2015 CanLII 60916 (NS FOIPOP).

partially disclose. I will discuss page 328 later under harm to the economic interests of the Department.

[20] The responsive records withheld under the solicitor-client exemption can be classified into three groups:

a) Communications between Government of Nova Scotia employees and their legal counsel (329 pages).
b) Communications between the Government of Nova Scotia and non-government entities (65 pages).
c) Communications between the Government of Nova Scotia and the Government of Canada (20 pages).

Communications between Government of Nova Scotia employees and their legal counsel

[21] The majority of the responsive records consist of communications between government employees and internal and external legal counsel. Without disclosing the content of the records, suffice it to say that it is clear that from the outset, the Department recognized the potential for legal action in relation to the Port Hawkesbury mill. Indeed, Ambassador Kirk's January 2013 letter made clear that, if necessary, the U.S. industry would "initiate a trade remedy action…."

[22] As noted earlier, a coalition of American paper mills filed a formal complaint with the U.S. International Trade Commission in February 2015. Eventually, this led to a significant duty being imposed, although the ultimate outcome announced in the summer of 2018 was that a settlement had been reached.[9]

[23] In this context, the answers to Ambassador Kirk's questions were not strictly factual. Instead, the questions were posed in the context of a potential international trade complaint. In order for the Department to properly respond to the questions and to protect the interests of Nova Scotia, it relied on legal advice. I agree with the Department's submission that the rules and procedures of international trade agreements are such that no reasonable or prudent government would engage in discussions without first seeking legal advice. It is in this context that the records responsive to these two access to information requests were created.

[24] I have carefully reviewed all of the communications between Government of Nova Scotia employees and their legal counsel. Applying the four requirements of solicitor-client privilege, I find that:

- *There must be a communication, whether oral or written*: The records are entirely made up of written communications.
- *The communication must be of a confidential nature*: From the very beginning of the communications, legal counsel expressly indicates that the communications are confidential. Many of the emails include an express confidentiality notice. In addition, the content of many of the emails is of such a nature that suggests that the communications are confidential.

[9] Martin, 2018.

- *The communication must be between a client (or his agent) and a legal advisor*: The records in this group involve only employees of the Government of Nova Scotia and legal counsel. No others are included in the communication.
- *The communication must be directly related to the seeking, formulating or giving of legal advice:* The majority of the communications involve legal advice, information communicated to support the formulating of legal advice or a communication directly related to this endeavor, such as meeting planning related to the seeking, formulating or giving of legal advice.

[25] I find that all of the communications between Department employees and legal counsel satisfy the four requirements of solicitor-client privilege.

Communications between the Government of Nova Scotia and non-government entities
Communications between the Government of Nova Scotia and the Government of Canada
[26] A smaller group of the responsive records consists of communications between government employees, government legal counsel and third parties. The Department submits that solicitor-client privilege applies to these records despite the involvement of non-Nova Scotia government entities and their legal counsel because of the "common interest" shared among the participants.

[27] Common interest privilege has been described as follows:

> What is sometimes referred to as a Common Interest Privilege is properly understood as an exception to the rules of waiver for solicitor-client privilege and litigation privilege. It applies where separately represented parties share a common interest in the outcome of litigation or possibly in some other matter. In such circumstances, the parties may share privileged information without losing solicitor-client privilege.[10]

[28] Generally, the disclosure to outsiders of privileged information constitutes waiver of the privilege. Common interest privilege allows parties with interests in common to share certain privileged information without waiving their privilege.[11] While common interest privilege has been applied in a variety of contexts, the most relevant for our purposes here is that it will apply to parties who share a common interest in anticipated litigation, even where subsequently only one of them is made a party to litigation. They must anticipate litigation against a common adversary on the same issue or issues; they need not have the same position, just sufficient common interest.[12]

[10] Dodek, Adam M. *Solicitor-client Privilege* (Markham: LexisNexis Canada, 2014) at p. 25. [Dodek].
[11] Dodek at p. 247.
[12] Dodek at p. 248 citing *Sauvé v. Insurance Corp. Of British Columbia*, [2010] B.C.J. No. 1020 (B.C.S.C.). These same concepts are contained in the foundational case on common interest privilege *Buttes Gas and Oil Co. v. Hammer* (no. 3) [1980] 3 All E.R. 475 (Eng. C.A.) varied for other reasons [1982] A.C. 888 (H.L.).

[29] Some of the elements of common interest relevant to this matter are:

- The common interest between the parties must exist at the time of the sharing of the privileged communication between the parties.[13]
- Common interest privilege can arise if there is a common interest in litigation or its prospect against a common adversary.[14]
- Common interest privilege can arise in the absence of specifically-contemplated litigation but may instead be a common interest in the successful completion of a commercial transaction or negotiation.[15]
- Common interest privilege has also been expanded to cover those situations in which a fiduciary or similar duty has been found to exist between the parties to create a common interest.[16]
- For the privilege to arise, there must be a common or self-same interest with regard to the very matter at hand, with regard to which the shared information is relevant.[17]
- The common interest can exist even if there is some issue outstanding between the parties.[18]
- The legal advice sought to be protected by common interest must be relevant to the claim of the parties claiming the common interest, not just one party.[19]
- Communications that discuss legal advice could conceivably contribute to that advice and fall within common interest.[20]

[30] The withheld information at issue is made up of communications between the government, its lawyers and outside parties. The question that remains is whether or not these records have been properly withheld under solicitor-client privilege.

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[13] *Zeigler Estate v. Green Acres* (Pine Lake) Ltd., 2008 ABQB 552 (CanLII), at para 30. There must be both a common interest and the records must be subject to solicitor-client privilege. This principle was applied in Alberta Order F2015-31 where an adjudicator with the Office of the Information and Privacy Commissioner for Alberta determined that because there was no evidence to establish that the original communication between the solicitor and client was confidential (requirement 2 of solicitor-client privilege), there was no underlying privileged communication. The same record then communicated to a third party could not therefore attract common interest privilege. Order F2015-31, 2015 CanLII 77919 (AB OIPC), at para 30. In BC Order F15-61, 2015 BCIPC 67 (CanLII), at paras 56-59, the adjudicator found that the record at issue clearly revealed legal advice, communicated in confidence and so was subject to solicitor-client privilege. The adjudicator then went on to assess whether, by communicating this information to a third party, the privilege was waived or the common interest exception to privilege applied.

[14] BC Order F15-61, 2015 BCIPC 67 (CanLII), at para 61.

[15] Alberta Order F2015-31, 2015 CanLII 77919 (AB OIPC), at para 40, BC Order F15-61, 2015 BCIPC 67 (CanLII), at para 62.

[16] BC Order F15-61, 2015 BCIPC 67 (CanLII), at para 63 citing *Pritchard v. Ontario* (Human Rights Commission), [2004] 1 SCR 809, 2004 SCC 31 (CanLII), at para 24.

[17] Alberta Order F2015-31, 2015 CanLII 77919 (AB OIPC), at para 42. Here the adjudicator determined that the common interest was one that operated at a very high level of generality – maintaining and promoting an effective criminal justice system. The records at issue were in relation to a much narrow matter which could have led the public body to a decision in direct opposition to the interests of the third party.

[18] Dodek at pp. 248-249 citing *Hospitality Corp. of Manitoba Inc. v. American Home Assurance Co*, 2004 MBCA 47 (CanLII).

[19] Dodek at pp. 248-249 citing *Hospitality Corp. of Manitoba Inc. v. American Home Assurance Co*, 2004 MBCA 47 (CanLII).

[20] Alberta Order F2015-31, 2015 CanLII 77919 (AB OIPC), at para 31.

[31] First, I must determine if the withheld information contains privileged information. There's no need for an exception to waiver if there is no privilege. There are four groups of records/communications between the Department, including its legal counsel and outside entities, that fit into this category.

[32] **Group 1** – Pages 151-153 are communications between the Department and the Government of Canada. These three pages were partially disclosed to the applicant in response to his first access to information request. The disclosed information made clear that the record was a communication that included the Government of Canada. When the Department replied to the second access to information request, it purported to apply solicitor-client privilege to the previously disclosed information and so withheld the same three pages in full.

[33] Legal advice privilege exists to protect confidential communications between a client and solicitor. Therefore, any voluntary disclosure by the holder of the privilege is inconsistent with the confidential relationship and waives the privilege.[21] When the Department responded to the first access to information request by providing partial disclosure of three pages of records, if solicitor-client privilege originally attached to the information in those records, the disclosure constituted a voluntary waiver of that privilege. In a follow up to its submissions, the Department agreed to partially disclose pages 151-153 consistent with the disclosure it made in response to the applicant's first access to information request (pages 1-3 in that request). A portion of the record on these three pages continues to be withheld under a number of provisions including the exemption for solicitor-client privilege.

[34] Before this information was partially disclosed in response to the first access to information request, the Department consulted the Government of Canada for its view on whether or not the information could be disclosed.[22] In response, the Government of Canada indicated that the records were, from its perspective, subject to solicitor-client privilege. Although the Department did not apply solicitor-client privilege to the withheld information in the first release, it did apply it in the second.

[35] As noted above, in order for privilege to apply, the four-part test must be satisfied. The withheld information is a communication between the Department and employees of the Government of Canada. Although the withheld information is not strictly a communication between a client and its legal advisor, I am satisfied that it reflects the solicitor-client relationship and what transpired within it.[23] There is a distinct portion of the communication that is clearly based on legal advice and is presented in a manner that supports this interpretation. On the balance of probabilities, I find that the information withheld under s. 16 of *FOIPOP* on pages 151-153 is privileged information or reflects privileged information provided by the Government of Canada to the Department. The next step in the analysis is whether or not the disclosure of the information to the Department constituted a waiver of the privilege or if there was a common interest shared between the Government of Canada and the Department such that the privilege was not waived.

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[21] As noted by Adjudicator Barker in BC Order F15-61, 2015 BCIPC 67 (CanLII), at para 57.
[22] As permitted by s. 9(1) of *FOIPOP*.
[23] BC Order F15-61, 2015 BCIPC 67 (CanLII), at para 68.

[36] **Group 2**[24] – This is a group of email strings that all begin with an email from a Government of Nova Scotia employee. The content of the record discloses the information withheld on pages 151-153. As noted above, I have already determined that this information is subject to solicitor-client privilege. The remainder of the emails discuss the legal advice. Given the participants in the discussion, it appears that the further discussions contribute to the legal advice. I find that the information withheld in this group of records discloses information subject to solicitor-client privilege.

[37] The next step in the analysis is whether or not the disclosure of the information by the Department to third parties constituted a waiver of the privilege or if there was a common interest shared between the Department and the third parties such that the privilege was not waived.

[38] **Group 3**[25] – This is a series of communications that discuss a document that I have already determined is subject to solicitor-client privilege. However, in this series of communications, the document is shared outside of the Department and so the privilege is waived unless there was a common interest between the parties. Most of the email strings that attach the legal advice disclose portions of the content of the privileged information and so to that extent, are themselves privileged. Some of the discussion also contributes to the legal advice.

[39] One email string in this group includes two pages that contain effectively email chatter (pages 197 and 200). The emails are part of the communications that include the legal advice and discussions of the advice. The subject lines of these emails reveal some information about the content of the legal advice.

[40] *FOIPOP* requires that if information can reasonably be severed from the record, an applicant has the right of access to the remainder of the record.[26] There is some debate across Canadian jurisdictions as to whether or not the duty to sever applies to privileged records. Two jurisdictions have determined that once a record is determined to be subject to solicitor-client privilege, severing is not required. This approach is clearest in Prince Edward Island. In 2017, PEI's Information and Privacy Commissioner determined that, "ordinarily if information a public body may properly refuse to disclose can reasonably be severed from a record, the Applicant has a right of access to the remainder of the record. This is not the case for records containing information subject to solicitor-client privilege."[27]

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[24] There are 59 pages in this category: pp. 87-94 (and the copies of this string at pages 98-104, 106-111, 113-132, 134-149), p. 112 and p. 150.
[25] There are 17 pages in this category: pp. 181-194, pp. 200-202. These are the 17 pages also fully withheld in response to the applicant's first access to information request (pp. 4 to 20 in that request).
[26] *FOIPOP*, s. 5(2).
[27] PEI Order FI-17-004, 2017 CanLII 19225 (PE IPC), at para 14. Alberta is the second jurisdiction. Its position is less clear but can be inferred from decisions such as F2017-62, 2017 CanLII 49767 (AB OIPC), at para 22, where the adjudicator ordered the public body to sever the non-substantive portions of emails because there was no claim of privilege being made by the public body. This suggests that perhaps, had a privilege claim been made out, the public body would not have been required to sever the email string.

[41] Some decisions in Ontario support the proposition that a record deemed subject to solicitor-client privilege is exempt from disclosure in its entirety.[28] However, more recent Ontario decisions appear to have taken a more nuanced, if cautious approach to severing records containing privileged information.[29]

[42] The majority of the other jurisdictions in Canada require that severing be considered even when the record has been found to be subject to solicitor-client privilege. All jurisdictions appear to exercise some caution when approaching the severing of records subject, at least in part, to solicitor-client privilege. The rationale for caution was aptly stated by the British Columbia Supreme Court: "Disclosing one part of a string of communications gives rise to the real risk that privilege might be eroded by enabling the applicant for the communication to infer the contents of legal advice."[30]

[43] The cases provide some useful guidelines around when severing might occur:

- Advice given by lawyers on matters outside the solicitor-client privilege is not protected;
- Third party documents, disclosure of which could not reveal any of the legal advice given to the client, is not protected;
- Where the severing could be accomplished without any risk that the privileged legal advice will be revealed or be capable of any ascertainment;[31]
- Where disclosure of the information would reveal only "disconnected snippets" or "worthless" or "meaningless" information, severing portions of a record deemed exempt from disclosure pursuant to solicitor-client privilege was not required.[32]

[44] Generally speaking, the severing of non-privileged parts of a document subject to solicitor-client privilege must be done with great care so that privilege may be preserved where appropriate in order to permit frank exchanges between solicitor and client in relation to legal advice.[33]

[45] Applying these considerations to the email exchanges found on pages 197 and 200, I conclude that this would not be an appropriate case to sever what would otherwise be considered a document (the email string) subject to solicitor-client privilege. The main considerations that apply here are that the subject of the emails reveal something about the advice and that the communications are an integral part of the document. If the document was severed, the withheld information would reveal "worthless" information in terms of the subject matter of this review.

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[28] These decisions cited a 1997 decision of the Ontario Supreme Court in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, [1997] OJ NO 1465 at para 17-18. See for example Ontario Order MO-3437, 2017 CanLII 33698 (ON IPC), at paras 94-95.
[29] Ontario Order MO-3533, 2017 CanLII 87947 (ON IPC), at para 45.
[30] *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 (CanLII), at para 46.
[31] First three points all made by the British Columbia Court of Appeal in *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 (CanLII), at paras 36-40.
[32] Ontario Order MO-3533, 2017 CanLII 87947 (ON IPC), at para 45.
[33] *Ontario (Solicitor General and Correctional Services) (Re)*, 1997 CanLII 22619 (ON IPC).

[46] Therefore, I conclude that the 17 pages that fall within this group of records all contain information subject to solicitor-client privilege. As with the Groups 1 and 2 records, the next step in the analysis is whether or not the disclosure of the information by the Department to third parties constituted a waiver of the privilege or if there was a common interest shared between the Department and the third parties such that the privilege was not waived.

[47] **Group 4**[34] – This is a single email string and a copy of the same string. The purpose and content are logistical. There is no legal advice contained or revealed in the email string. As noted by the Department in its submissions, "If there is no underlying privilege, there can be no common-interest privilege."[35] Therefore, there is no need to consider whether or not a common interest existed with respect to this information as there is no underlying privilege to be considered or protected. I find that s. 16 does not apply to pages 160-165. The Department also applied ss. 12, 14, 17 to these pages as well as s. 20 to some names that appear on these pages. I will discuss the application of these exemptions below.

Common interest

[48] I have found that all of the records described in Groups 1, 2 and 3 above contain or reveal privileged information. As noted, the privileged information has been disclosed to individuals who are neither the solicitor nor the client. Typically, this would constitute a waiver of the privilege, but in this case, the Department says that the information was only shared with entities that had a common interest and so, an exception to waiver applies.

[49] The Department argues that the evidence of a common interest includes that all parties shared a common interest in the outcome of litigation and in receiving legal advice on the matter at issue. Even where litigation was not underway, the Department submits that Canadian law now supports the application of common interest privilege in other circumstances such as:

- documents prepared by professional advisers for the purpose of giving legal advice, exchanged in the course of negotiations;[36]
- sharing of draft legal advice, for the purpose of jointly developing a position.[37]

[50] Applying the law to the facts of this case, I am satisfied that that there are sufficient indications of a common interest including:

- From the outset, the issues raised by Ambassador Kirk's communications involved the interests of all of the parties included in the withheld records.
- The content of the records themselves makes clear that the purpose of the communications related to jointly developing a position related to the common interest.
- Although no legal action had yet been commenced by the United States at the time of the discussions at issue here, the records themselves disclose that all parties were aware of the imminent possibility of a complaint being filed that could and eventually did result in

[34] This category of records includes pp. 160-162 and a copy at p. 163-165.
[35] Quoting the Nova Scotia Supreme Court in *R. v. Clarke*, 2015 NSSC 26 (CanLII), at para 25.
[36] Citing *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue)*, 2002 BCSC 1344 (CanLII).
[37] Citing *Iggillis Holdings Inc. v. Canada (National Revenue)*, 2018 FCA 51 (CanLII), at paras 19 and 33.

the imposition of significant countervailing duties. It was reasonable to assume at the time that the Ambassador's inquiries likely represented a first step in trade litigation.
- The legal advice sought to be protected by common interest is directly relevant to the claim of the parties claiming the common interest, not just one party.
- The communications that discuss legal advice contribute to that advice and fall within common interest.

[51] I find that information withheld in records listed in Groups 1,[38] 2 and 3[39] above were all properly withheld under s. 16 as being subject to solicitor-client privilege.

Exercise of discretion

[52] The last step in evaluating whether or not a public body has properly applied a discretionary exemption is to consider whether the public body properly exercised its discretion when applying the exemption. In Review Report 18-09, I described the types of considerations the courts and other information commissioners have considered in relation to the exercise of discretion in the application of solicitor-client privilege.[40]

[53] The Department in this case asserts that based on two Supreme Court of Canada decisions, solicitor-client privilege must be as close to absolute as possible to ensure public confidence. As a result, the Department concludes that the exercise of discretion in relation to solicitor-client privilege does not involve a balancing of interests on a case-by-case basis.

[54] The decision cited by the Department leaves room for a consideration of the proper exercise of discretion. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[41] the court determined that discretion had been properly applied, "based on the facts and interests at stake" before the court.[42] In the second case cited by the Department, the court said that solicitor-client privilege "will only yield in certain defined circumstances…."[43]

[55] A recent decision by Adjudicator Cameron in British Columbia reflects the current trend with respect to reviewing exercise of discretion under access and privacy laws:

> The Ministry acknowledges that s. 14 is a discretionary exception. However, it specifies that it intended to keep the communications in question confidential. As such, I am satisfied that the Ministry exercised its discretion and that it did so having considered only relevant considerations. Furthermore, as emphasized in Order F16-35, given "the importance

[38] Group 1 consists of pp. 151-153. My finding is with respect to the partial disclosure of these three pages in response to the first access to information request. As noted earlier, the Department has agreed to apply the same severing to pp. 151-153.
[39] Group 2: pp. 87-94 (and the copies of this string at pp. 98-104, 106-111, 113-132, 134-149), p. 112 and p. 150, Group 3: pp. 181-194, pp. 200-202. These are the 17 pages also fully withheld in response to the first access to information request (pp. 4 to 20 in that request).
[40] NS Review Report 18-09, 2018 NSOIPC 9 (CanLII), at paras 20-25.
[41] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23 (CanLII), at para 75.
[42] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23 (CanLII) at para 75.
[43] *R. v. McClure*, [2001] 1 SCR 445, 2001 SCC 14 (CanLII), at para 35.

> of solicitor client privilege to the legal system, it is difficult to conceive of a situation where a public body – having established that records are protected by solicitor client privilege – could then be found to have improperly exercised its discretion to withhold information under s.14." I see nothing that would warrant interfering with the Ministry's decision to continue to assert privilege over the information it withheld pursuant to s. 14.[44]

[56] The same is true in this case. I see nothing that would warrant interfering with the Department's decision to continue to assert privilege over the information it withheld pursuant to s. 16.

d) 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?

[57] Although I have determined that s. 16 does not apply to pages 160 – 165, as noted above, the Department also applied s. 17 to the withheld information. In addition, the Department has proposed a partial release of page 328 with a portion of the information withheld under s. 17.

[58] 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 of Nova Scotia. 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)(e) as being a relevant consideration.

[59] 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.[45] A public body must provide evidence well beyond or considerably above a mere possibility of harm in order to reach that middle ground.[46]

17(1)(e) Information about negotiations carried on by or for a public body or the Government of Nova Scotia

[60] The Department points in particular to s. 17(1)(e) to support withholding information on pages 16-165 and page 328. There are two elements that must be established for s. 17(1)(e) to apply. First, the withheld information must be "information about negotiations carried on by or for a public body." Secondly, the disclosure of the information could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia.

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[44] BC Order F18-38, 2018 BCIPC 41 (CanLII), at para 54.

[45] *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, 2018 NSOIPC 2 (CanLII), 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, 2008 CanLII 70316 (BC IPC), at para 44.

[46] This summary of the application of s. 17 also appears in NS Review Report 18-11, 2018 NSOIPC 11 (CanLII), at paras 33-34.

[61] What is "information about negotiations"? Information that might be collected or compiled for the purpose of negotiations, that might be used in negotiations or that might, if disclosed, affect negotiations, is not necessarily about negotiations. Information about negotiations includes analysis, methodology, options or strategies in relation to negotiations.[47]

[62] The Department asserts that the information withheld under s. 17(1)(e) consists of analysis, methodology, options or strategies in relation to negotiations. I have carefully examined the exact information withheld under this provision. I find that the information withheld on pages 160-165 does not fit into any of those categories. However, the information on page 328 can be accurately described as information regarding strategy in relation to negotiation.

[63] The second thing that must be established by the Department is that the disclosure of the information could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia. As I have previously noted, the Department can establish a reasonable expectation of harm to its economic interests even if s. 17(1)(e) does not apply to the information.[48]

[64] In support of this assertion, the Department states that American paper mills and local political representatives were keen to cite any available information, call it a subsidy, and demand their government take action. Therefore, it argues, it is reasonable for it to expect that aggrieved parties may take a similar approach with any additional information it makes public and the cycle will repeat.

[65] It is unclear how or why the "cycle will repeat" when the matter has been settled as between the parties. Further, as noted above, most of the information at issue (pages 160-165) does not contain any information "about negotiations" and I fail to see how anyone could use it in any meaningful way. It is essentially administrative detail. The information withheld on page 328 does disclose some information about the negotiating strategy. But once again, absent some evidence or even argument about how that particular information could have been of any use to anyone three years after it was written, let alone now, seven years later, is in no way obvious. The public body has failed to meet the standard of proof required.

[66] I find that s. 17 does not apply to the withheld information on pages 160-165 and page 328.

e) Is the Department authorized to refuse access to information under s. 12 of *FOIPOP* because disclosure could reasonably be expected to harm intergovernmental affairs?

[67] The Department also applied s. 12 to the information withheld on pages 160-165. Section 12 permits a public body to withhold information where disclosure of the information could reasonably be expected to harm the conduct of relations between the Government of Nova Scotia

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[47] I am paraphrasing former Commissioner Loukidelis in BC Order 02-56, 2002 CanLII 42493 (BC IPC), at paras 43-44 as applied more recently in Order F06-03, 2006 CanLII 13532 (BC IPC), at para 66.

[48] 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 of Nova Scotia even without establishing that any of the enumerated circumstances in ss. 17(1)(a) through (e) apply.

and any of the number of the entities listed or their agencies. Included in the list are the Government of Canada and the government of a foreign state.

[68] As with other harms-based exemptions, the Department must establish that there is a reasonable expectation of a s. 12 type of harm arising from the disclosure.

[69] Pages 160-165 are not communications that involve any of the entities listed in s. 12. The content of the record does not disclose any information regarding entities listed in s. 12. As noted above, these six pages do not contain any information that would be subject to solicitor-client privilege and do not contain any information about negotiations carried on by or for the public body.

[70] The Department argues that without the protection afforded by s. 12(1)(a) of *FOIPOP*, intergovernmental cooperation would be hampered. This is because the risk that information sensitive to a particular jurisdiction could be released under another jurisdiction's access to information legislation would lead to the censoring of full and frank discussion and thereby lead to a more restricted information flow between intergovernmental contacts.

[71] I don't disagree. But there is no evidence that the information withheld on pages 160-165 could in any way affect, let alone harm, intergovernmental relations. Quite simply, it has nothing to do with intergovernmental relations.

[72] I find that s. 12 does not apply to the withheld information on pages 160-165.

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

[73] Although s. 20 is applied throughout the document, I will only examine its application on nine pages that have already been partially disclosed (pages 151-153) and those pages I have determined cannot be wholly withheld under ss. 12, 16 or 17 (pages 160-165).

[74] On all nine pages, s. 20 has been applied to the names of individuals acting in their business capacity as legal counsel for Nova Scotia, as legal counsel for other entities or as representatives of outside organizations.

[75] In order for s. 20 to apply, the public body must determine that the disclosure of third party personal information would be an unreasonable invasion of third party personal privacy. The law makes clear that this is a four-step process:

1. Is the requested information "personal information" within the meaning of s. 3(1)(i)? If not, that is the end. Otherwise, the public body must go on.
2. Are any of the conditions of s. 20(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. 20(3)?
4. In light of any s. 20(3) presumption, and in light of the burden upon the applicant established by s. 45(2), does the balancing of all relevant circumstances, including those

listed in s. 20(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?[49]

[76] In this case, the Department argues that in the absence of any evidence from an applicant to meet his or her burden of proof, the correct standard for government is to maintain reliance on s. 20. However, s. 45(2) makes clear that the Department must first have refused access to personal information before the burden shifts to the applicant. In order for the Department to "refuse access" it must make an assessment that disclosure of the personal information would result in an unreasonable invasion of personal privacy as set out in s. 20. A proper application of s. 20 requires that the Department complete all four steps noted above.

[77] An improper application of s. 20 would be an approach known as, "see a name, take a name". That is, just because the Department identifies that third party personal information is contained in a record, this does not mean that s. 20 applies. Section 20 only applies if disclosure of that personal information would result in an unreasonable invasion of a third party's personal privacy.

[78] If the law required public bodies to simply remove all personal information and then await the applicant's evidence to counter that approach, no third party personal information would ever be disclosed. Further, there would be no need for the third party notification process. Under that process, public bodies are required to give third parties notice if they receive a request for records they have reason to believe contains third party personal information. Why bother giving notice if you are never going to disclose it?

Step 1: Is the withheld information "personal information"?

[79] One of the purposes of Nova Scotia's access to information law is to protect the privacy of individuals with respect to personal information about themselves. With respect to business contact information, cases across a number of jurisdictions in Canada have consistently found that the disclosure of an individual's identity in a business capacity is not an unreasonable invasion of personal privacy within the meaning of ss. equivalent to s. 20(1) of Nova Scotia's *FOIPOP*. In some cases, the courts, including the Supreme Court of Canada, have characterized business contact information as not being "about" an identifiable individual and so not satisfying the definition of personal information.[50] In other cases, courts and commissioners have determined that business contact information lacks a distinctly personal dimension and so release of the information would not constitute an unreasonable invasion of personal privacy.[51]

[80] In Nova Scotia, personal information includes an individual's name, address or telephone number. There is no specific exemption for business contact information in our definition and so I conclude that business contact information does qualify as personal information for the purposes of *FOIPOP*.

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[49] This is the standard test for applying s. 20 as set out by the Nova Scotia Supreme Court in *House (Re)*, 2000 CanLII 20401 (NS SC).

[50] See for example Ontario Order PO-1885, 2001 CanLII 26085 (ON IPC), at p. 2 and *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 1997 CanLII 358 (SCC), at para 94.

[51] BC Order F08-03, 2008 CanLII 13321 (BC IPC), at para 87.

Step 2: Are any of the conditions of s. 20(4) satisfied? Is so, that is the end.
Step 3: Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?

[81] I agree with the Department that neither s. 20(4) nor s. 20(3) are applicable. This means that the decision as to whether or not the disclosure of the names would be an unreasonable invasion of personal privacy must be based on any other relevant factors including those listed in s. 20(2).

Step 4: Does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?

[82] The Department points to a recent unreported decision of the Nova Scotia Supreme Court in which the Court determined that the public body need not disclose the identities of employees of corporate owners of orphaned dams.[52] That decision takes a curious and unique approach to the application of s. 20 that is inconsistent with the well-established requirements set out in *Re House.*

[83] In particular, the Court initially determined that by virtue of s. 20(4)(b) and 20(4)(h), disclosure of the identities of individual owners of orphan dams would not be an unreasonable invasion of personal privacy. The Court made a point of distinguishing the identities of individuals who were employees of corporate owners of orphan dams from simply individual owners of orphan dams. Since employees of corporate owners did not receive any benefit (a requirement of s. 20(4)(h)), the Court determined that s. 20(4) does not apply to the employee information. The Court did not explain why s. 20(4)(b) applies only to the identity of individual owners.

[84] Based on the four-step test (the *Re House* test) noted above, if s. 20(4) applies "that is the end". In other words, the analysis should have stopped there with respect to individual owners because s. 20 could not apply. The analysis should have proceeded with respect to the employee information only since the Court appears to have determined that s. 20(4) did not apply to this information. However, the Court proceeds with the s. 20 analysis with respect to individual information only. All of the factors listed by the Court further support its conclusion that the individual information should be disclosed. But no further analysis is offered with respect to the business contact information of employees of corporate orphan dam owners. Such an approach is contrary to the *Re House* and fails to provide any guidance as to why the disclosure of business contact information warrants protection while the disclosure of individual identity and contact information does not.

[85] The finding in *Donham* regarding disclosure of business contact information is also inconsistent with decisions in other jurisdictions in Canada. The common thread in these cases is that business contact information lacks a distinctly personal dimension. In fact, in many jurisdictions, legislatures have added a clear exception to the definition of personal information to ensure that business contact information (name, title, employer, phone number, etc.) is not

[52] *Donham v. Nova Scotia (Environment)*, 2017 NSSC.

withheld under the "unreasonable invasion of personal privacy" test.[53] Most persuasively, the finding in *Donham* is not consistent with an earlier finding by the Supreme Court of Canada in *Dagg* noted above.[54]

[86] What are the relevant considerations in this case, either under s. 20(2) or generally keeping in mind that the applicant bears the burden of proof?

- Under *FOIPOP*, s. 20 cannot be applied to names and positions of public service employees because s. 20(4)(e) states that a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions or remuneration as an employee of a public body. In this case, many of the named individuals were employees of a service provider to the Nova Scotia Government. While they were not employees of the Government, they were performing similar functions. The Department relied on their expertise and was guided by them in the course of managing the issues associated with the Port Hawkesbury mill.
- Other individuals are identified in strictly a business capacity – either as lawyers for other entities or as management personnel.
- There is a public interest in knowing who influenced and/or advised the Department on how to respond to the inquiries from the American Ambassador. This would support a core purpose of *FOIPOP* – ensuring fairness in government decision-making.
- The personal information is not sensitive. It is the type of information found on business websites and social media pages such as LinkedIn.

[87] On balance, there is essentially no indication that disclosure of the information would be an unreasonable invasion of personal privacy while at the same time, disclosure of the information would subject the Department's decision-making to some scrutiny. I find that disclosure of the withheld business contact information (names and titles) would not be an unreasonable invasion of personal privacy. Section 20 does not apply to the information withheld on pages 160-165 and 151-153.

FINDINGS & RECOMMENDATIONS:

[88] I find that:

1. Page 393 is a non-responsive record.
2. Section 16 applies to all communications between Department employees and legal counsel.[55]
3. Section 16 applies to the information withheld on pages 151-153.

[53] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s.2., *Personal Information Protection Act*, SBC 2003, c 63, s. 1
[54] Discussed in paragraph 79 above.
[55] In total 329 pages of records fell within this category.

4. Section 16 applies to withheld information where the parties involved share a common interest with the Government of Nova Scotia.[56]
5. Sections 12, 16 and 17 do not apply to the withheld information on pages 160-165.
6. Section 17 does not apply to page 328.
7. Section 20 does not apply to any of the information withheld on pages 160-165 and 151-153.

[89] I recommend that:

1. Page 393 need not be produced in response to these access to information requests.
2. Pages 328 and pages 160-165 be disclosed in full.
3. Pages 151-153 be partially disclosed (release the s. 20 information and withhold the s. 16 information).
4. Take no further action with respect to the 329 pages of communications between Department employees and legal counsel and the 76 withheld pages where the parties involved share a common interest with the Government of Nova Scotia.

February 22, 2019

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

OIPC Files: 16-00036 and 16-00171

[56] A total of 76 pages described as Groups 2 and 3 in the discussion. Group 2: pp. 87-94 (and the copies of this string at pp. 98-104, 106-111, 113-132, 134-149), p. 112 and p. 150, Group 3: pp. 181-194, pp. 200-202. These are the 17 pages also fully withheld in response to the first applicant request (pp. 4 to 20 in that request).