**Office of the Information and Privacy Commissioner for Nova Scotia**
**Report of the Commissioner (Review Officer)**
**Tricia Ralph**

# REVIEW REPORT 21-08

## July 8, 2021

## Town of Wolfville

**Summary:** The applicant sought access to a settlement agreement and associated schedules reached between the Town of Wolfville (Town) and multiple third parties arising out of a court case. The Town notified the third parties that it intended to release the requested settlement agreement with some information severed pursuant to s. 481 (confidential business information) and s. 480 (personal information). A third party submitted a request for review, claiming that the settlement agreement should be withheld in full pursuant to s. 481, s. 476 (solicitor-client privilege) and settlement privilege. The Commissioner finds that s. 481 does not apply to the settlement agreement. The Commissioner also finds that a third party cannot raise a discretionary exemption that has not been relied upon by the Town. Finally, the Commissioner finds that aside from the signatures, which are not necessary to release in these circumstances, the disclosure of the withheld personal information would not result in an unreasonable invasion of a third party's personal privacy. As such, the Commissioner recommends disclosure of the settlement agreement in full with the exception of signatures.

**Statutes Considered:** *Municipal Government Act*, SNS 1998 c 18, ss. 476, 477, 480, 481, 482, 498.

**Authorities Considered: Newfoundland & Labrador:** Report A-2012-011, 2012 CanLII 74517 (NL IPC); Report A-17-014, 2017 CanLII 37267 (NL IPC); **Nova Scotia:** FI-09-100, 2015 CanLII 70493 (NS FOIPOP); FI-10-59(M), 2015 CanLII 39148 (NS FOIPOP); FI-12-01(M), 2015 CanLII 54096 (NS FOIPOP);16-01, 2016 NSOIPC 1 (CanLII); 16-10, 2016 NSOIPC 10 (CanLII);16-13, 2016 NSOIPC 13 (CanLII); 20-06, 2020 NSOIPC 6 (CanLII); **Ontario:** Order PO-1705, 1999 CanLII 14384 (ON IPC); Order PO-1885, 2001 CanLII 26085 (ON IPC). **Prince Edward Island:** Order No. 17-002, 2017 CanLII 19215 (PE IPC).

**Cases Considered:** *Air Atonabee Ltd. V. Canada (Minister of Transport) (1989), 37 Admin. L.R. 245 (FCTD); Atlantic Highways Corporation v. Nova Scotia*, 1997 CanLII 11497 *(NS SC); Dagg v. Canada (Minister of Finance) [1997] 2 S.C.R. 403 1997*, CanLII 358 (SCC)*; House, Re, 2000* CanLII 20401 (NS SC)*; Merck Frosst Canada Ltd. V. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII).

## INTRODUCTION:

[1] The applicant sought a copy of a settlement agreement[1] between the Town of Wolfville (Town) and multiple third parties arising out of a court case. The Town indicated to the third parties that it intended to release the requested records with some information severed under s. 480 and s. 481 of the *Municipal Government Act* (*MGA*). One of the third parties submitted a request for review to the Office of the Information and Privacy Commissioner (OIPC) of the Town's decision to partially disclose the records.

## ISSUES:

[2] There are five issues under review:

1. Was the Town required by s. 481(1) of the *MGA* to refuse access to the records or any part thereof because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?
2. Was the Town required by s. 480 of the *MGA* to refuse access to the records or any part thereof because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?
3. Can the third party claim the application of a discretionary exemption or a common law exception when it was not relied upon by the Town?
4. If the answer to issue #3 is yes, was the Town authorized to refuse access to the records under s. 476 of the *MGA* because they are subject to solicitor-client privilege?
5. If the answer to issue #3 is yes, did settlement privilege at common law authorize the Town to refuse access to the records?

## DISCUSSION:

### Background

[3] The applicant in this matter sought a copy of any agreement, including drafts, and any records pertaining to a legal case that the Town was a party to. The Town identified a settlement agreement containing multiple schedules between itself and several third parties as the responsive records to this request.

[4] In the Town's opinion, the settlement agreement contained information of or about third parties. As such, the Town provided third party notice to the parties to the settlement agreement, in accordance with s. 482 of the *MGA*. The Town advised the third parties that it intended to release the requested records to the applicant with some information severed under s. 480 (personal information) and s. 481 (confidential third party information) of the *MGA*.

[5] Some of the third parties objected to the Town's proposed decision to release a redacted version of the responsive records and requested that the Town withhold the records in full. The Town rejected these third parties' objections and gave written notice of its decision to the third parties. One of the third parties submitted a request for review to the OIPC as it objected to the

[1] Note that the settlement agreement also contained a number of associated schedules.

Town's decision to release a severed version of the records. The third party believed that the entire record must be withheld.

**Burden of proof**

[6] At a review into a municipality's decision to give an applicant access to part of a record containing information that relates to a third party, and the third party appeals the municipality's decision to the OIPC, the onus is on the third party to prove that the applicant has no right of access to the record.

[7] Where the municipality has established that s. 480(1) applies, s. 498(2) shifts the burden to the applicant to demonstrate that the disclosure of third party personal information would not result in an unreasonable invasion of personal privacy.

**1. Was the Town required by s. 481(1) of the *MGA* to refuse access to the records or any part thereof because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?**

[8] The test for the application of s. 481 of the *MGA* and the equivalent provision (s. 21) in the *Freedom of Information and Protection of Privacy Act* is clearly set out in the provision. Upon receipt of the access to information request, the burden was on the Town and the third parties who were opposed to the disclosure to establish that the disclosure of the requested information:

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

[9] As set out in *Atlantic Highways Corporation v. Nova Scotia*,[2] s. 481 must be read conjunctively. Thus, a party seeking to apply it to restrict information must satisfy all of the lettered subsections of s. 481(1).

***Position of the parties***

*The applicant's position*

[10] The applicant's position was that it was difficult to understand what in the settlement agreement would qualify as information that was protected from public scrutiny under s. 481. The applicant said that the settlement agreement could contain information that implicitly or explicitly revealed mistakes made by the parties but argued that information about mistakes did not qualify as "confidential information" within the meaning of s. 481 of the *MGA.*

*The Town's position*

[11] The Town provided representations to me for this review, along with its decision letters to the parties. Those decision letters set out the Town's proposed redactions as well as some explanations for its decisions. None of these documents set out the Town's explanation as to how the requirements in s. 481(1)(a) were met. There was no explanation as to how the settlement

[2] *Atlantic Highways Corp. v. Nova Scotia* (1997) 1997 CanLII 11497 (NSSC) (*Atlantic Highways*).

agreement would reveal trade secrets of a third party or commercial, financial, labour relations or technical information of a third party.

[12] At the time of its decision, the Town explained to the third parties that it was applying s. 481(1) to the responsive records. It stated it did so because the settlement agreement contained a confidentiality clause and thus the Town thought that clause met the criteria set out in s. 481(1)(b), which requires the information to have been supplied, implicitly or explicitly, in confidence. The Town said that to reach a settlement agreement, the parties needed to be able to put everything on the table without concern of public confusion/unneeded concern.

[13] In terms of the third part of the test, the harms criteria, the Town explained that it thought s. 481(1)(c)(i) and (ii) were met as disclosure of certain terms of the agreement could reasonably be expected to harm the ability of the parties to further negotiate if the terms of the settlement agreement were ultimately not met. There was concern that disclosure could interfere with the parties' ability to work cooperatively. The Town was also concerned that harm could result in the form of future financial loss due to the impact on this, and future negotiations in similar circumstances. It said that the public interest was for an agreement that would avoid the financial and resource costs of a court case. The Town argued that increased costs would impact insurers, builders and the Town's ability to deal with developers in the future. The Town said that, in turn, would affect the taxpayer who would ultimately bear these higher costs (even if only indirectly through higher insurance premiums).

[14] With regard to the schedules to the settlement agreement, the Town further argued that it was required to redact the names and information about other companies because:

> Companies connection to contribution to resolving this dispute puts it in the middle of a dispute that if full resolution of the settlement agreement not achieved….the company could reasonable suffer undue financial loss via professional reputation. (sic)

*The third party's position*

[15] The third party that filed this review did not provide representations to this office. However, I was provided with its representations to the Town at the time the Town was making its disclosure decision. In addition, I reviewed representations to the Town of a different third party, which the third party in this case indicated it adopted.

[16] For the first part of the test that requires that the information would reveal trade secrets of a third party or commercial, financial, labour relations or technical information of a third party, there were several arguments. First, it was argued that because the settlement agreement discussed actions and costs that would be borne by the third parties, the information was commercial and financial information as required by s. 481(1)(a). It was also argued that the third party's participation in the settlement agreement itself spoke to its commercial and financial interests. Finally, the third party made arguments relating to reputation.

[17] In terms of the requirement under s. 481(1)(b) that the information be supplied in confidence, the third party said that all the information supplied leading up to the execution of the settlement agreement was expressly provided on a without prejudice basis. It noted that there

was a clause of the settlement agreement that explicitly required the parties to keep its terms confidential. Its perspective was that this clause was an explicit mutual promise of total confidentiality among all parties to the agreement. To the extent that this clause spoke to the requirement to release the terms of the agreement subject to statutory obligations, the third party's position was that it referred to those statutory obligations associated with building and development permit obligations and not the *MGA* access to information obligations.

[18] With respect to the requirement to establish harm in s. 481(1)(c), the third party highlighted the harm enumerated in subsection (ii), which indicates harm could reasonably result in similar information no longer being supplied to the Town when it is in the public interest that similar information continue to be supplied. The third party noted that normally settlement agreements are covered by settlement privilege. It said that the very rationale of settlement privilege, which is that effective settlement negotiations can only occur if confidentiality is assured, strongly suggests that disclosure of information covered by settlement privilege would dissuade other parties from seeking settlements with municipalities in the future. The third party stated that if municipalities could no longer maintain the confidentiality of settlement agreements, litigants would be far less likely to engage in such negotiations with any municipality in the future. This, the third party said, would result in all litigation against municipalities becoming more prolonged and painful. The third party's position was that this outcome would damage public interest to a much greater extent than denying public access to the specific text of settlement agreements. The third party noted that the settlement agreement contained a provision for arbitration of disputes arising under it. The third party said that if the agreement were disclosed, the floodgates would open to all information supplied during the settlement being disclosed, including information that was required to be supplied to an arbitrator. The third party also argued that the release of the settlement agreement could result in future lost contracts and business opportunities.

***Analysis***

[19] The responsive records contained the settlement agreement along with its associated schedules. In my view, for the reasons set out below, s. 481 does not apply to the responsive records.

*Would the disclosure reveal trade secrets of a third party or commercial, financial, labour relations or technical information of a third party?*

[20] Section 481(1)(a)(ii) of the *MGA* contains two elements: (a) whether the disclosure would reveal commercial, financial, labour relations or technical information and (b) whether the information is "of a third party".

Commercial and financial information

[21] The terms "commercial" and "financial" are not defined in the *MGA*. Previous Review Officers originally adopted definitions set out in early Ontario Information and Privacy Commissioner decisions.[3] However, since that time, it has been generally accepted that dictionary meanings provide the best guide and that it is sufficient for the purposes of the

[3] See for example: NS Review Reports FI-06-13(M) at p. 5, FI-03-37(M) at p. 7 and FI-07-38 at p. 11.

exemption that the information relates or pertains to matters of finance, commerce, science or technical matters as those terms are commonly understood.[4]

[22] The *Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998), provides the following definitions:

> **Commercial**: of, engaged in, or concerned with commerce…of, relating to, or suitable for office buildings etc. (commercial land)
>
> **Financial**: of or pertaining to revenue or money matters

[23] In addition, in order to constitute financial or commercial information, "the information at issue need not have an inherent value, such as a client list might have for example. The value of information ultimately depends upon the use that may be made of it, and its market value will depend upon the market place, who may want it and for what purposes, a value that may fluctuate widely over time."[5]

[24] The settlement agreement sets out the parties' roles and responsibilities in relation to the construction of a building. It discusses what services each party must complete, along with their financial obligations. I find that the responsive records clearly contain commercial and financial information.

Of a third party

[25] Section 481(1)(a)(ii) requires not only that the withheld information be commercial or financial information, but also that the information be "of a third party". In Nova Scotia we have the benefit of the Supreme Court's decision in *Atlantic Highways Corp. v. Nova Scotia*.[6] In that decision, the Court determined that information in an omnibus agreement to construct a toll highway was not commercial or financial information of a third party. The Court came to this determination because the information had either already been exposed to publication or was so intertwined with the Provincial input by way of the requirements of the request for proposal, or modified by the negotiation process, that it clouded the third party's claim to a proprietary interest in the information.[7]

[26] The parties in this case did not supply any specific arguments as to how the information in the settlement agreement was "of a third party" in light of the reasoning in *Atlantic Highways*. The settlement agreement came to be after negotiations and discussions amongst the parties. There were four parties to this agreement. How can it be said that the information belongs to just one of the parties? How could it be parsed out? Neither the Town nor the third party explained this.

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[4] *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD) [*Air Atonabee*] at p. 268 cited with approval in *Merck Frosst Canada Ltd. V. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at para. 139.
[5] *Merck Frosst* at para. 140 (citing *Air Atonabee,* at pp. 267-68).
[6] *Atlantic Highways Corp. v. Nova Scotia* (1997) 1997 CanLII 11497 (NSSC).
[7] *Atlantic Highways Corp. v. Nova Scotia* (1997) 1997 CanLII 11497 (NSSC) at p. 9.

[27] Public expenditures are a key type of government information to which access to information law is intended to provide information necessary for the public to hold the government accountable. Many commissioners have noted that nothing is more central to the goals of accountability and transparency than the right to information about what municipalities are spending public money on, and what they are receiving in turn.[8]

[28] While the settlement agreement may contain commercial and financial information, the information it contains was not "of a third party" once it was incorporated into the settlement agreement with the Town and the three third parties. I find that the information on the responsive records is not "of a third party" as required under s. 481(a) of the *MGA*.

[29] Since the three parts of s. 481(1) must all be satisfied (read conjunctively) and I have found that the first part of the test has not been met, it is not necessary for me to consider the remaining requirements of s. 481. However, I do wish to add some comments about the remaining two parts of the test.

[30] In terms of the requirement to show that information was supplied in confidence (s. 481(1)(b)), there is a provision in the agreement that requires confidentiality. However, that clause also includes language where the parties acknowledge that some information will need to be made accessible to the public because of statutory obligations. The access to information regime under the *MGA* includes statutory obligations to make information available to the public.

[31] It is also noteworthy that one of the four parties to the agreement told the Town it wanted the entire record released. This party noted that all court documents related to the case were publicly available and that since public funds were spent on this case, the public had a right to know what its tax dollars were spent on. This party thought it was in the public interest to make the settlement agreement available to the public.

[32] With regard to the harm element of s. 481, there is no doubt that there is strong public policy support for maintaining the confidentiality of documents subject to settlement privilege. But the *MGA* requires evidence of a reasonable expectation of harm for s. 481 to apply. In my view, the harms asserted were very much of a general nature. There were vague allegations of harm about the risks of releasing settlement agreements in general but neither the Town nor the third party that requested this review provided any evidence or argument of harm specific to the disclosure of the information in this case.

**2. Was the Town required by s. 480 of the *MGA* to refuse access to the records or any part thereof because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?**

[33] The Town withheld the names and signatures of every named individual in the settlement agreement and its associated schedules. To the best of my knowledge, all the names referenced were in the context of their professional capacities. The Town also withheld the names of businesses in the schedules. The names of businesses do not constitute "personal information"

[8] This point was made by PEI Commissioner Rose in Order No. FI-17-002 at para 15 and Newfoundland and Labrador Commissioner Molloy in Report A-17-014 at para 16.

within the meaning of s. 461(f) because they are not recorded information about an identifiable individual. As such, the names of businesses cannot be withheld under s. 480.

[34] In terms of the names and signatures of individuals identified in the settlement agreement, in order for s. 480 to apply to information, the Town must conduct a four-part analysis as follows:[9]

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

***Position of the parties***

*The applicant's position*
[35] The applicant argued that it was hard to understand why the settlement agreement would even contain personal information other than perhaps home addresses, phone numbers or email addresses. He noted that if the settlement agreement did contain such information, he was not interested in it anyway and so redacting those portions of the records would have been appropriate.

*The Town's position*
[36] The Town said that s. 480(2)(e), (f) and (h) all apply. With respect to the names of personal and/or business names in the schedules to the settlement agreement, the Town noted that none of these parties were contacted. These would be third parties that were not part of the agreement. The Town argued that therefore, permission to release names as connected to the settlement agreement had not been granted.

*The third party's position*
[37] The third party provided no submissions on the application of s. 480.

***Analysis***

*i. Is the requested information "personal information" within the meaning of s. 461(f)?*
[38] 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 sections equivalent to s. 480 of Nova Scotia's *MGA*. In some cases, the courts, including the Supreme Court of Canada, have characterized business contact information as not being "about" an identifiable individual and as not satisfying the

[9] This test has been consistently applied in NS Review Reports and is based on the NS Supreme Court decision in *House, Re,* 2000 CanLII 20401 (NS SC) at p. 3.

definition of personal information.[10] 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.[11]

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

*ii. Are any of the conditions of s. 480(4) satisfied*?
[40] Section 480(4) sets out an enumerated list of situations of when a disclosure of personal information would not be an unreasonable invasion of a third party's privacy. No party to this review suggested that any of the conditions in s. 480(4) were satisfied in this case. I agree that s. 480(4) does not apply.

*iii. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 480(3)?*
[41] Section 480(3) sets out an enumerated list of situations where a disclosure of personal information would be presumed to be an unreasonable invasion of a third party's personal privacy. No party to this review suggested that any of the conditions in s. 480(3) were satisfied in this case. I agree that s. 480(3) does not apply.

*iv. In light of any s. 480(3) presumption, and in light of the burden upon the applicant established by s. 498(2), does the balancing of all relevant circumstances, including those listed in s. 480(2), lead to the conclusion that the disclosure would constitute an unreasonable invasion of privacy or not?*
[42] The Town pointed me to the following circumstances of s. 480(2):

> (e) the third party will be exposed unfairly to financial or other harm;
> (f) the personal information has been supplied in confidence;
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

[43] In this case, I have no argument from any party as to how s. 480(2)(e), (f), and (h) were realized. Rather I simply have a statement from the Town that these subsections apply. In the absence of further explanation, it appears to me that the redacted third party names and signatures, as well as various other business names, appeared in the records strictly in a business capacity. The other redacted information includes names of persons and businesses that were providing a service to the parties of the settlement agreement. They were acting in a work-related context to supply a service. The service they were providing arose from the obligations of the parties to the settlement agreement. However, they were simply hired to provide that service. Release of their names would do nothing more than indicate who the parties to the settlement agreement had hired to complete various tasks for them.

[10] See for example Ontario Order PO-1885 at p. 2 and *Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R. 403 1997, CanLII 358 (SCC) at para. 94.
[11] NS Review Report FI-12-01(M) at para. 41.

[44] There is a nuance to the issue of signatures. The case law is somewhat varied in terms of whether a signature should be released. In Newfoundland and Labrador Review Report A-2012-011,[12] it was found that signatures do constitute personal information and as they are commonly used to confirm identity, disclosure could open a door for improper or even malicious use. In Nova Scotia Review Report 16-10,[13] former Commissioner Tully weighed a number of factors and found that in that specific case, disclosure of the signatures would not be an unreasonable invasion of the third parties' personal privacy. What is clear is that each case is specific to the facts and requires a balancing of all relevant circumstances.

[45] Under each signature that was redacted there is a signature block that identifies the name of the third party. Thus, it is clear which party has signed in each location where there is a signature. In this context, there is no value to releasing the signatures to this applicant.

[46] Balancing all of the relevant factors, I find that the disclosure of the names of individuals in this case would not be an unreasonable invasion of the third parties' personal privacy and so s. 480 does not apply to this information. I find that there is no need to release the signatures. The names of the businesses are not considered to be "personal information" and so cannot be withheld under s. 480.

### 3. Can the third party claim the application of a discretionary exemption or a common law exception when it was not relied upon by the Town?

[47] The third issue in this review is whether a third party can raise a discretionary exemption not claimed by the Town. By way of history, the Town proposed to sever some information on the basis of s. 480 and s. 481. In response, the third party argued to the Town that it was not authorized to release any portions of the records. The third party's position was that the settlement agreement should be withheld in its entirety. In addition to relying on s. 480 and s. 481, the third party said that the Town should have also applied s. 476 to the records, which in its view captured the concept of settlement privilege. Alternatively, the third party argued that if s. 476 did not include settlement privilege, the entire document should be withheld on the basis of the common law principle of settlement privilege. The Town heard these arguments but did not apply s. 476 or the common law exception to the requested records.

[48] Despite this, the third party maintained its position that solicitor-client privilege and/or settlement privilege required that the records not be disclosed. The position of the third party raises the question of whether a third party may claim the application of a discretionary exemption or a common law exception that was not relied upon by the Town in its decision.

[12] NL Review Report A-2012-011, *College of the North Atlantic (Re)*, 2012 CanLII 74517 (NL IPC), see para. 25.
[13] NS Review Report 16-10, *Department of Business (Re)*, 2016 NCOIPC 10 (CanLII), see paras. 102-104.

[49] None of the parties to this review provided representations on this issue. This was an unusual approach to take by the third party since it was its onus to establish that it could add a discretionary exemption or common law exception. It would be a rare case where that burden is satisfied with no evidence or argument.

[50] This issue has been the subject of multiple reviews in Ontario. In Order PO-1705,[14] former Assistant Commissioner Tom Mitchinson spoke to a situation where an affected party raised the possible application of additional discretionary exemptions during the mediation stage of the appeals process. In finding that the affected party should not be permitted to claim discretionary exemptions in that appeal, he stated:

> During mediation, the third party raised the application of the sections 13(1) [the provincial equivalent to section 7(1) of the municipal *Act*] and 18(1) [the provincial equivalent to section 11 of the *Act*] discretionary exemption claims for those records or partial records Hydro decided to disclose to the requester. The third party also claim that Hydro had improperly considered, or neglected to consider, these discretionary exemptions in making its access decision.
>
> This raises the issue of whether the third party should be permitted to raise discretionary exemptions not claimed by the institution. This issue has been considered in a number of previous orders of this Office. The leading case is Order P-1137, where former Adjudicator Anita Fineberg made the following comments:
>
> > The *Act* includes a number of discretionary exemptions … which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.
> >
> > The *Act* also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) [the equivalent of section 14(1) of the *Act*] and 17(1) [the equivalent of section 10(1) of the *Act*] of the *Act* respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.

[14] ON Order PO-1705, *Ontario Hydro (Re)*, 1999 CanLII 14384 (ON IPC).

> Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

[51] I am persuaded by this approach to the question of whether a third party can add an additional discretionary exemption. It ought to be only in the most unusual of cases that a third party could raise the application of an exemption which has not been claimed by a municipality. This is not one of the most unusual of cases. It is important to remember that s. 476 (solicitor-client privilege) is a discretionary exemption and not a mandatory one. There is no evidence to suggest that the Town did not consider relevant factors or acted in bad faith when it decided not to claim a discretionary exemption. Rather, the third party made its views known to the Town that it thought s. 476 should apply to the extent that it captured the concept of settlement privilege or in the alternative, that the common law principle of settlement privilege ought to apply to withhold the document in full. The Town was fully aware of these arguments and decided not to apply the exemption or the common law principle of settlement privilege to the records.

[52] In this case, I am not persuaded that this is such an unusual case that the third party should be permitted to claim the discretionary exemption in s. 476 when the Town has elected not to do so. Accordingly, I will not consider the possible application of s. 476 or the common law principle of settlement privilege.

**4. If the answer to issue #3 is yes, was the Town authorized to refuse access to the records under s. 476 of the *MGA* because they are subject to solicitor-client privilege?**

[53] Since the answer to issue #3 is no, it is not necessary for me to consider this issue.

**5. If the answer to issue #3 is yes, did settlement privilege at common law authorize the Town to refuse access to the records?**

[54] Since the answer to issue #3 is no, it is not necessary for me to consider this issue.

**FINDINGS & RECOMMENDATIONS:**

[55] I find that:

1. Section 481 does not apply to the redacted provisions of the settlement agreement and its schedules.
2. The disclosure of the withheld personal information would not result in an unreasonable invasion of a third party's personal privacy.
3. It is not necessary to release the signatures in this case.
4. The third party is not permitted to claim additional discretionary exemptions.

[56] I recommend that the Town:

1. Disclose the settlement agreement and associated schedules in full, with the exception of signatures, within 60 days of receipt of this review report.

July 8, 2021

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File: 16-00320