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

REVIEW REPORT 21-09

August 18, 2021

Department of Health and Wellness

Summary: The applicant requested records related to the costs of a court case involving a named individual. The Department of Health and Wellness (public body) refused to disclose the requested information, citing financial or economic interests (s. 17 of the *Freedom of Information and Protection of Privacy Act*) and on the basis that some of the information was "not responsive". The applicant appealed to this office. The Commissioner finds that the public body did not meet its burden to prove the information was exempt from disclosure. The Commissioner also finds that other information was removed without authority. She recommends the public body disclose the record in full to the applicant.

INTRODUCTION:

[1] The Department of Health and Wellness (public body) refused to provide access to the costs related to a court case involving another public body and a named individual, claiming release of the information would have a detrimental financial or economic impact on Nova Scotia or would result in financial loss or gain to a third party as set out under s. 17 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). Other information was withheld as not being responsive to the applicant's request. The applicant appealed the decision to the Office of the Information and Privacy Commissioner (OIPC) on the basis that the response was vague and not consistent with the wording of *FOIPOP*.

ISSUES:

[2] There are two issues under review:

1. Was the public body authorized to withhold information under s. 17(1)(d)[1] of *FOIPOP* because the disclosure could reasonably be expected to harm the financial or economic interests of the Government of Nova Scotia or the ability of the Government to manage the economy and result in undue financial loss or gain to a third party?
2. Was the public body authorized to withhold information as "not responsive"?

[1] This subsection comes from the section noted on the withheld record, not the decision letter.

DISCUSSION:

Burden of proof

[3] Section 45(1) of *FOIPOP* states that the burden is on the head of the public body to prove that the applicant has no right of access to the severed portions of the record.

1. Was the public body authorized to withhold information under s. 17(1)(d) of *FOIPOP* because the disclosure could reasonably be expected to harm the financial or economic interests of the Government of Nova Scotia or the ability of the Government to manage the economy and result in undue financial loss or gain to a third party?

[4] For the reasons set out below, I find that the public body was not authorized to withhold the requested information under s. 17(1)(d) because the public body did not meet its burden to prove that the test in s. 17 was satisfied.

[5] The public body withheld a one-page record in full, pursuant to s. 17(1)(d). The record consists of a table that sets out the total yearly legal fees over a five-year period regarding the subject matter, broken down slightly within each year. All years, headings, recipients of fees paid, and total amounts were severed. The record also contained a second page with information severed as "not responsive".

[6] The applicant pointed out that the public body's decision letter paraphrased the wording of *FOIPOP* and in doing so changed the intent of the wording.[2] The decision letter from the public body stated:

> Section 17: information the release of which would have a detrimental financial or economic impact on NS, or result in loss or gain to a third party.

[7] The applicant noted that *FOIPOP* does not use the terms "detrimental" or "impact" and argued that divergence from the specific wording of *FOIPOP* questioned the application of discretion or reasonableness by the person making the disclosure decision.

[8] For ease of reference, the exact wording of s. 17(1)(d) is as follows:

> 17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia or the ability of the Government to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:
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> > (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

[2] In his December 7, 2016 representations.

[9] I agree with the applicant that the wording of the public body's decision letter was incorrect. The wording of s. 17 is much more substantial than simply requiring the public body to show that there would be a detrimental financial or economic impact or result in loss or gain to a third party. Rather, s. 17 requires the public body to show that disclosure could reasonably be expected to harm financial or economic interests, or reasonably be expected to cause undue financial loss or gain. This is a much different and higher threshold than that set out in the public body's decision letter. While it was unfortunate that the decision letter included this language, the public body's representations at review did not attempt to argue that the wording of s. 17 should be read as it was set out in its decision letter.

[10] Instead, the public body argued that disclosure of the requested information would cause the harm required by s. 17. In this case, the public body made two primary arguments[3] about harm:

1. The public body consulted with the primary owner of the records (another public body). That public body identified concerns that release of the information could cause it financial harm and that public knowledge of these fees could negatively impact negotiations to settle in other disputes. Disclosure of the legal fees could be used by other parties to settlement negotiations to secure a more favourable decision, thus resulting in undue gain to third parties.

2. In the other public body's hands, the legal fees are presumptively privileged.[4] The presumption will be rebutted "if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege."[5] The other public body would have the authority to withhold the information so as not to reveal elements of legal strategy to the opposed party at the height of a significant legal dispute. At the time the disclosure decision was made, in the fall of 2016, the jury trial had not yet been completed and any appeals or cross-appeals regarding the costs were still to be heard. Furthermore, in *British Columbia (Attorney General) v. Canadian Constitution Foundation*,[6] the Court of Appeal for British Columbia noted that, in a situation where an applicant has significant knowledge of litigation, that would allow the applicant to make inferences into details of privilege and litigation strategy.

[11] For his part, the applicant made two primary arguments[7] with regard to the exemption applied:

1. Any costs pertaining to the court case would have been paid by now, so any financial hit would have already taken place.

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[3] In its November 24, 2020 representations.
[4] This means that there is a presumption that this information is privileged. This presumption can be rebutted.
[5] *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 (CanLII), at para 8.
[6] *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 (CanLII), at para 77.
[7] In his December 7, 2016 representations.

2. Nova Scotians should be allowed to know what the costs are since their tax money was involved and government is accountable for its spending. This should be no different than the annual publishing of Public Accounts which spells out how tax money is spent.

[12] Harms-based exemptions require a reasoned assessment of the future risk of harm. The leading case in Canada[8] on the appropriate interpretation of the reasonable expectation of harms test found in access to information laws determined that access statutes mark out a middle ground between that which is probable and that which is merely possible. A public body must provide evidence well beyond or considerably above a mere possibility of harm in order to reach that middle ground.[9] In this case, the public body used the words "could" and "may" to describe the likelihood of harm and provided no evidence to support these claims. This falls well below the threshold needed for the exemption to apply.

[13] With regard to the public body's first argument that disclosure would result in undue financial gain to a third party, there are three problems. First, the public body did not address the defining word "undue". Decisions in other jurisdictions have determined that the word "undue" in access to information law is used for the very purpose of distinguishing between mere financial losses or lower returns and financial losses that are unfair, improper, inappropriate or excessive. In other words, "undue".[10] The same principle can be applied to the concept of "undue" gain. Second, the public body stated the legal fees could further be used by other parties to settlement negotiations to secure a more favourable decision, thus resulting in undue gain to the third parties. The public body did not identify any other negotiations underway, who these other parties were, or how the information could be used to their benefit. Simply setting out prejudice to one's competitive position does not necessarily establish that undue gain is probable. Rather, there is a burden to establish that the release of the information could reasonably be expected to result in undue financial loss or gain to a third party.[11] And third, the figures were from the years 2002 to 2007. The public body provided no explanation of how figures that were 8.5 years old at the time the access to information request was made could be relevant to other ongoing settlement negotiations. This falls well below the threshold needed for the exemption to apply.

[14] With regard to the privilege claim, the public body did not apply s. 16, which allows a public body discretion to refuse to disclose to an applicant information that is subject to solicitor-client privilege. However, the arguments it supplied are typically those used in a s. 16 analysis. Furthermore, the public body did not explain how releasing information it thought was subject to

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[8] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at para 54. This office has relied on this test in a number of previous decisions including *NS Review Report 18-02, Department of Community Services (Re)*, 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 F08-22, Fraser Health Authority (Re)*, 2008 CanLII 70316 (BC IPC) at para 44.

[9] *Nova Scotia Review Report 18-11, Department of Transportation and Infrastructure Renewal (Re)*, 2018 NSOIPC 11 (CanLII) at para 34.

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

[11] *Canadian Broadcasting Corp. v. Northwest Territories (Commissioner)*, 1999 CanLII 6806 (NWT SC), at para 62.

solicitor-client privilege could reasonably be expected to harm the financial or economic interests of a public body or result in undue financial loss or gain to a third party within the meaning of s. 17. Rather, it argued that the record should not be released because it is protected by solicitor-client privilege. That requires a s. 16 analysis. The public body cannot effectively raise a new discretionary exemption at this late stage of the process when the applicant has no knowledge of that, and particularly when it provided no argument as to why unusual circumstances existed that would warrant the addition of a new exemption at review.[12] As such, its representations with respect to privilege do not assist its s. 17 argument.

[15] Nevertheless, I will add a few comments here on the public body's privilege argument. First, the case the public body relied upon to support its position does not line up with the type of information in the record at hand. That case was about the total legal costs, including fees and disbursements. In this case, we are discussing only total legal costs, with a slight breakdown of fees and no outline of disbursements. Second, while there is a presumption that privilege does apply to information about lawyer's fees and disbursements, that presumption can be rebutted.[13] The question of whether this presumption has been rebutted depends on the circumstances of the particular case. Critical commonalities in cases addressing the disclosure of legal fees include the tendency to find that aggregate amounts of legal fees that are separated from invoice details, specific date ranges, descriptions, pricing breakdowns, cover letters and other communications tend to be viewed as 'neutral' in that on their own, they do not enable one to deduce privileged information.[14]

[16] For the reasons set out above, I find that s. 17(1)(d) does not apply to the withheld information.

2. Was the public body authorized to withhold information as "not responsive"?

[17] For the reasons set out below, I find that the public body was not authorized to withhold information on the basis that it was "not responsive".

[18] The record at issue is a one-page email that had another document attached to it.

[19] The public body put forth the following arguments:[15]

1. It is common for staff to discuss multiple topics in the same record. In order to focus on the information that is responsive to the applicant's request, the public body removed the

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[12] *NS Review Report 18-11, Department of Transportation and Infrastructure Renewal (Re*), 2018 NSOIPC 11 (CanLII).

[13] *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 (CanLII), at para 61; *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA), at para 11; *Department of Justice Canada (Re)*, 2021 OIC 9 (CanLII), at para 9.

[14] As canvassed in *F15-16, Private Career Training Institutions Agency (Re)*, 2015 BCIPC 17 (CanLII); *PO-2548 2007, Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2007 CanLII 5679 (ON IPC); *PO-2484, Ontario (Attorney General) (Re)*, 2006 CanLII 50827 (ON IPC); *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2007 CanLII 65615 (ON SCDC); *MO-2601, Waterloo (City) (Re)*, 2011 CanLII 9754 (ON IPC); *MO-2294, Waterloo (City) (Re)*, 2008 CanLII 24744 (ON IPC); *Corporation of the City of Waterloo v. Cropley and Higgins*, 2010 ONSC 6522 (CanLII); *F2007-014, Edmonton (Police Service) (Re)*, 2008 CanLII 88778 (AB OIPC).

[15] In its November 24, 2020 representations.

information that was not responsive to the request. This practice has been reinforced by numerous court decisions and rulings throughout the country.[16]

2. Drawing on these precedents, public bodies in Nova Scotia continue the practice of providing only relevant and responsive information to applicants and removing non-responsive materials. This is a common-sense method of providing access to the information the applicant requested.

[20] On multiple occasions,[17] this office has examined the issue of whether or not public bodies are authorized under *FOIPOP* to determine that portions of responsive records are out of scope of the request and on that basis withhold those portions it deems to be non-responsive. In those cases, the former Commissioner carefully examined all of the current case law on this issue both for and against such a finding and concluded that Nova Scotia's *FOIPOP* does not permit public bodies to withhold information it deems to be "not responsive".

[21] The purpose of the legislation set out in s. 2 of *FOIPOP* is to provide the public with a right of access to "all government information" subject only to "necessary exemptions, that are limited and specific". Withholding information on the basis of "not responsive" or "out of scope" is not an exemption to the public's right of access set out in the legislation, like the exemptions set out in ss. 12-21 of *FOIPOP*.[18]

[22] Using "not responsive" to sever snippets of information out of responsive records creates an unlimited, non-specific, entirely arbitrary exemption that frees the public body from any constraints created by the law. It fundamentally undermines the purpose and objectives of Nova Scotia's access to information legislation.[19]

[23] The public body's representations cited old cases that have long been distinguished[20] or rejected by this office.[21] While using "not responsive" may arguably be permissible in other jurisdictions, without amendments to the legislation, it is not permitted here. No one disagrees that non-relevant documents need not be produced. However, once relevant documents have been identified, information within them can only be redacted subject to the exemptions set out in *FOIPOP*. I suggest that this practice end once and for all.

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[16] Precedents provided: *Stevens v. Nova Scotia (Labour*), 2012 NSSC 367 (CanLII), at para 13; *Alberta Order 97-020, Alberta Human Rights and Citizenship Commission (Re),* 1998 CanLII 18626 (AB OIPC); *Ontario OIPC Order P-880, Ontario (Attorney General) (Re),* 1995 CanLII 6411 (ON IPC); *Ontario OIPC Order MO-1770, Toronto District School Board (Re),* 2004 CanLII 56211 (ON IPC) at pg. 12.

[17] *NS Review Report* 16-10, *Department of Business (Re),* 2016 NSOIPC 10 (CanLII) at paras 15-74; *NS Review Report 17-03 Nova Scotia (Fisheries and Aquaculture) (Re),* 2017 NSOIPC 3 (CanLII); and *NS Review Report 19-05, Nova Scotia (Justice) (Re),* 2019 NSOIPC 6 (CanLII).

[18] *NS Review Report 16-10, Department of Business (Re),* 2016 NSOIPC 10 (CanLII).

[19] *NS Review Report 19-05, Nova Scotia (Justice) (Re),* 2019 NSOIPC 6 (CanLII) at para 27.

[20] *Black's Law Dictionary*, (8ed), defines "distinguish" as: "To note a significant factual, procedural, or legal difference in (an earlier case), usually to show that it is inapplicable <the lawyer distinguished the cited case from the case at bar>."

[21] See *NS Review Report 16-10, Department of Business (Re)*, 2016 NSOIPC 10 (CanLII), at paras 15-74 for a detailed review of the law in other jurisdictions and why this practice is not authorized in Nova Scotia.

[24] For the reasons set out above, I find that "not responsive" cannot be used to remove information from the record.

FINDINGS & RECOMMENDATIONS:

[25] I find that:

1. Section 17(1)(d) does not apply to the withheld information.
2. "Not responsive" cannot be used to remove information from the record.

[26] I recommend that the public body:

1. Disclose the record in full within 30 days of receipt of this review report.

August 18, 2021

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia