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

# REVIEW REPORT 21-10

# August 20, 2021

# Department of Justice

**Summary:** The applicant requested all records "related to An Act Respecting a Teachers' Professional Agreement." The Department of Justice (public body) refused to disclose the responsive records, citing advice to a public body pursuant to s. 14 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*) and solicitor-client privilege (s. 16 of *FOIPOP*). The Commissioner finds that the public body appropriately applied s. 16 to the responsive records. The Commissioner recommends that the public body take no further action with respect to this matter.

## INTRODUCTION:

[1] The applicant requested the following information from the Department of Justice (public body):

> All communication (including emails, letters and other electronic messages), briefing notes and other documents related to An Act Respecting a Teachers' Professional Agreement.

[2] The public body withheld the 275 pages of responsive records in full on the basis that the information could be withheld because it was advice to a public body pursuant to s. 14 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*) and because it was subject to solicitor-client privilege (s. 16 of *FOIPOP*). The applicant appealed the decision to the Office of the Information and Privacy Commissioner (OIPC).

## ISSUES:

[3] There are two issues under review:

1. Was the public body authorized to withhold the requested information under s. 16 of *FOIPOP*?
2. Was the public body authorized to withhold the requested information under s. 14(1) of *FOIPOP*?

## DISCUSSION:

### Burden of proof

[4] 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 record.

### 1. Was the public body authorized to withhold the requested information under s. 16 of *FOIPOP*?

[5] The public body relied on s. 16 to withhold the responsive records. Section 16 gives the public body discretion to withhold information if the information is subject to solicitor-client privilege. For the reasons set out below, I find that s. 16 applies to the responsive records in their entirety.

[6] Nova Scotia's exemption for solicitor-client privilege encompasses two types of privilege found at common law: legal advice privilege and litigation privilege. Because of the nature of the records in this case, I need only examine the application of legal advice privilege.

[7] In order to decide if legal advice privilege applies, the records at issue must satisfy the following test:[1]

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.

[8] The public body noted that the communications withheld were between itself and clients. It said that its role was specific to providing legal advice. It noted that while the responsive records contained some background information, including some that was publicly available, that information was necessary for it to inform the development of its opinion. The public body argued that such information was part of the continuum of communication between a solicitor and her client.[2]

[9] I have reviewed the entirety of the withheld records. One of the challenges with these types of files is that while I would like to give sufficient information so that the basis of my decision is clear, I am limited to how much information I can disclose. What I can say is that I am satisfied that the information in the withheld records meets all of the four elements of the test for legal advice privilege. The records consist of written communications that are of a confidential nature, are between clients and their legal advisor and relate directly to the seeking, formulating or giving of legal advice. While the records do contain some information that could be considered background information, I agree that it was information that was part of the seeking, formulating or giving of legal advice.

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[1] For a more thorough discussion of the test and its use in other jurisdictions, see for example, *NS Review Report 18-09, Nova Scotia (Department of Justice) (Re)*, 2018 NSOIPC 9 (CanLII), at paras 13-26 and *NS Review Report FI-10-71, Nova Scotia (Justice) (Re)*, 2015 CanLII 60916 (NS FOIPOP).
[2] *NS Review Report FI-10-71, Nova Scotia (Justice) (Re)*, 2015 CanLII 60916 (NS FOIPOP), at para 18.

***Exercise of discretion***

[10] Although I have found that s. 16 applies to the withheld information, I must still go on to address the issue of exercising discretion. That is because s. 16 is a discretionary exemption. This means that the public body must exercise its discretion lawfully and the Commissioner may return the matter to the public body for reconsideration if the discretion was exercised in bad faith, for an improper purpose or if the public body took into account irrelevant considerations or failed to take into account relevant considerations.[3] For the reasons set out below, I find that the public body appropriately exercised its discretion.

[11] The applicant's perspective was that s. 16 is a discretionary exemption and that no rationale had been provided to explain how the public body exercised its discretion. The applicant noted that s. 2(a) of *FOIPOP* sets out its purpose, which includes ensuring that public bodies are fully accountable to the public by giving the public a right of access to records (s. 2(a)(i)) and specifying limited exceptions to the rights of access (s. 2(a)(iii)). The applicant said that it is implicit in the stated purpose of *FOIPOP* that public bodies start with a presumption of full disclosure and apply exemptions judiciously, as necessary, and that the decision to withhold did not appear to live up to the spirit of *FOIPOP*. The applicant said that a press release issued by the Provincial Government on December 3, 2016 stated that the proposed legislation, The Teachers' Professional Agreement (2016) Act, would adopt the tentative agreement reached by the union and the Provincial Government on September 2, 2016. The applicant said that the tentative agreement had to have been made available to more than 10,000 members of the Nova Scotia Teachers Union for a ratification to take place. Given its wide distribution, the tentative agreement would have been in the public domain already.

[12] The applicant also pointed me to s. 2(b) of *FOIPOP* which states that its purpose is also to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to facilitate informed public participation in government decision-making and permit the airing and reconciliation of divergent views. The applicant noted that had the legislation referenced in the Provincial Government's December 3, 2016 press release been introduced on December 5, 2016, it would have been subject to debate in the legislature and the bill itself would have been a public document. What ended up happening was government introduced the *Teachers' Professional Agreement and Classroom Improvements (2017) Act* on February 14, 2017. The applicant stated that the Legislature sat through the night over that week and the bill passed into law on February 21, 2017, imposing a contract on Nova Scotia teachers. The applicant hoped that disclosure of the records could provide insight into the fairness of government decision-making in this process. The applicant thought that even a partial release of the responsive records would also serve to facilitate public discussion and enable informed debate about divergent views.

[3] *NS Review Report 18-09, Nova Scotia (Department of Justice) (Re)*, 2018 NSOIPC 9 (CanLII), at paras 20-25.

[13] In terms of exercising its discretion, the public body pointed me to *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.[4] In that case, the Supreme Court of Canada explained that the exercise of discretion analysis for the solicitor-client privilege is unique:

> [75] We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in McClure, stressed the categorical nature of the privilege:
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> > . . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis added; para 35.]
> > (See also Goodis, at paras 15-17, and Blood Tribe, at paras 9-11.)

[14] The public body said that none of the circumstances surrounding this matter approached any of the "clearly defined circumstances" the Supreme Court of Canada intended in its ruling in *Criminal Lawyers' Association*. It said the file was a routine operation of a government lawyer advising her clients on the introduction of new legislation and that waiving privilege over these communications risked a broader undermining of the confidentiality that the courts have guarded against. The public body also said it consulted with clients prior to issuing its decision. It said that those clients did not wish to waive privilege and agreed the records should be withheld.[5]

[15] Previous Nova Scotia Commissioner Tully noted that the *Criminal Lawyers' Association* case leaves room for consideration of the proper exercise of discretion, as the Court said that discretion had been properly applied "based on the facts and interests at stake" before the Court.[6] She also said that where information is withheld under a discretionary provision, public bodies should, as a matter of course, always consider the public interest when evaluating how they exercise discretion.[7]

[16] Newfoundland and Labrador's former Commissioner noted that while the Supreme Court of Canada has held that solicitor-client privilege is all but absolute, it is important to remember that the solicitor-client exception is a discretionary one. Because of that, the public body can choose to disclose information that is solicitor-client privileged. This judgment must be exercised in every case involving a discretionary exception.[8]

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[4] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 SCR 815.
[5] For the benefit of the public body, in my view, its described actions did not constitute consultation.
[6] *NS Review Report 19-01, Department of Intergovernmental Affairs (Re)*, 2019 NSOIPC 19 (CanLII), at para 54.
[7] *NS Review Report 18-03, Nova Scotia (Department of Justice) (Re)*, 2018 NSOIPC 3 (CanLII), at para 52.
[8] *NL Report A-2017-001, Newfoundland and Labrador (Justice and Public Safety) (Re)*, 2017 CanLII 2261 (NL IPC), at para 10. Please note that in Nova Scotia, "exceptions" are referred to "exemptions".

[17] In *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*,[9] the Federal Court of Appeal said that discretion is to be exercised mindful of the relevant circumstances of the case, the purpose of the legislation and the principles set out in paragraph 66 of *Criminal Lawyers' Association*:

> [66] As discussed above, the "head" making a decision under ss. 14 and 19 of the Act has a discretion whether to order disclosure or not. **This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case.** The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made. [my emphasis added]

[18] Other jurisdictions have taken a narrow approach to assessing discretion when applying a solicitor-client privilege exemption. For example, in British Columbia adjudicators have noted:

> [23] On a general note, given the importance 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. Solicitor client privilege is a class privilege that does not involve a balancing of interests on a case-by-case basis or a weighing of the harm that might result from disclosure.[10]

[19] In Prince Edward Island, former Commissioner Rose has noted:[11]

> [55] I agree with the Public Body that proof of a balancing of interests is not necessary to determine whether discretion was exercised properly to withhold information on the basis of solicitor-client privilege. The finding of solicitor-client privilege is enough. The decision of the Supreme Court of Canada, in *R. v. McClure*, [2001] 1 SCR 445, 2001 SCC 14 (CanLII) at page 459, sets this out succinctly:
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> > However, solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case- by-case basis.

[9] *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104 (CanLII) at para 49.
[10] *BC Order F16-35, Burnaby (City) (Re)*, 2016 BCIPC 39 (CanLII), at para 23.
[11] *PEI Order No. FI-17-004, Public Schools Branch (Re)*, 2017 CanLII 19225 (PE IPC), at para 55.

[20] In Alberta, adjudicators have held that once it has been established that solicitor-client privilege applies, it is not necessary to further assess the exercise of discretion by the public body. That being said, they have noted the possibility that public interest could override privilege:

> [para 95] It might be argued that the Court's statement in EPS, that "[n]o further reasons for refusing disclosure need be provided by a public body, at least in the absence of compelling public interest" (at para. 115, my emphasis), and the Supreme Court of Canada's statement in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (cited in the excerpt of the EPS decision, above), that "the use of the word 'may' would permit and, if relevant, require the head to consider the overwhelming public interest in disclosure" (at para. 54 of *Ontario Public Safety and Security*, my emphasis) indicate a possibility that a compelling or overwhelming public interest in disclosure could override the near-absolute nature of solicitor-client privilege. If so, that would be a very high standard to meet. The public interest argument set out in the Applicant's initial submission – that the information would contribute to the public understanding of government actions and activities with respect to wild horses – does not meet such a standard.[12]

[21] In this case, the applicant supplied a public interest override argument. She said there was a strong argument to be made that a disclosure that increases the transparency and accountability of government deliberations regarding the conditions of public education in the province is in the public interest. She noted that public debate and discussion regarding classroom conditions, class sizes, inclusion and decision-making in public education have continued in the years since the access to information request was made. She thought that documents included in the responsive records may have something to add to these debates.

[22] I am of the view that based on *Criminal Lawyers' Association* and the former Nova Scotia Commissioner's comments in existing review reports, that in Nova Scotia, there is some room for consideration of the proper exercise of discretion in a s. 16 analysis. This consideration is not nearly as extensive as that undertaken with other exemptions, as solicitor-client privilege is all but absolute. In this case, we have the benefit of the applicant's public interest arguments. I agree that any public interest argument to override the near absolute nature of solicitor-client privilege would be a high standard to meet. In this case, the applicant's representations do not meet such a standard. As such, I am satisfied that the public body appropriately exercised its discretion in withholding the records.

**2. Was the public body authorized to withhold the requested information under s. 14(1) of *FOIPOP*?**

[23] Because I have found that the records can be withheld pursuant to s. 16, it is not necessary for me to consider this provision.

[12] *Alberta Order F2021-24, Justice and Solicitor General (Re),* 2021 CanLII 62588 (AB OIPC), at paras 94-95.

## FINDINGS & RECOMMENDATIONS:

[24] I find that:

1. Section 16 applies to the withheld information and therefore the public body was not required to disclose it.

[25] I recommend that the public body:

1. Take no further action with respect to this matter.

August 20, 2021

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

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