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

REVIEW REPORT 21-14

November 17, 2021

(Amended December 7, 2021)[1]

Department of Natural Resources and Renewables

Summary: The applicant requested access to a lease agreement between the Department of Natural Resources and Renewables[2] (public body) and WestFor Management Inc., along with correspondence surrounding the drafting of this agreement. The public body provided the lease agreement with only a small portion of it redacted under s. 17 (financial or economic interests) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). It also provided the requested correspondence but with some information redacted pursuant to s. 14 (advice or recommendations), s. 16 (solicitor-client privilege), s. 17 (economic harm) and s. 20 (personal information) of *FOIPOP*. The Commissioner finds that the public body appropriately applied s. 16 and recommends that the public body take no further action with respect to its s. 16 redactions. The Commissioner finds that s. 14 applied to some, but not all, of the redacted information at the time the public body made its access to information decision. The Commissioner recommends that the public body release the information where she finds s. 14 did not apply and revisit its exercise of discretion where she finds that s. 14(1) did apply. The Commissioner finds that neither s. 17 nor s. 20 applies to the redacted information and recommends it be disclosed.

INTRODUCTION:

[1] The applicant made a request for access to documents about the Department of Natural Resources and Renewables' (public body) dealings with a company in relation to stumpage and lease rates. Specifically, she asked for:

> "…the stumpage rates on crown land given to WestFor Management Incorporated by the Nova Scotia government. I am also requesting the lease agreement between the province and WestFor Management Inc. In addition to that, I would like all records, including

[1] This report has been amended to correct a typographical error. The 11:09 a.m. email on page 564 referenced in the table under paragraph 20 has been corrected to indicate that s. 14(1) did apply to the information.
[2] The name of the public body at the time the access to information request was made was Department of Natural Resources but has since been changed to the Department of Natural Resources and Renewables.

correspondences, relating to the negotiation of the agreement between WestFor and the province for their lease on crown land."

[2] The public body provided the applicant with responsive records that were severed based on four exemptions set out in the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*): advice or recommendations (s. 14), solicitor-client privilege (s. 16), economic harm (s. 17), and personal information (s. 20).

[3] The applicant objected to the severing applied and filed a request for review with this office. Originally, the responsive records totaled over 600 pages. Through the informal resolution process with this office, the applicant agreed to narrow the scope of her request. She excluded drafts of the requested agreement from her request and focused on only the correspondence surrounding the agreements. As a result, the responsive records at issue now total 82 pages.[3]

ISSUES:

[4] There are four issues under review:

1. Was the public body authorized to refuse access to information under s. 16 of *FOIPOP* because it is subject to solicitor-client privilege?
2. Was the public body authorized to refuse access to information under s. 14 of *FOIPOP* because disclosure of the information would reveal advice or recommendations?
3. Was the public body authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure of the information could reasonably be expected to harm the economic interests of the public body?
4. Was the public body 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:

Burden of proof

[5] The public body bears the burden of proving that the applicant has no right of access to the record or part of the record, pursuant to s. 45(1) of *FOIPOP*.

[6] Where the public body has established that s. 20(1) applies, s. 45(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 public body authorized to refuse access to information under s. 16 of *FOIPOP* because it is subject to solicitor-client privilege?

[7] The public body relied on s. 16 to sever or withhold some information on the responsive records. Section 16 gives the public body discretion to withhold information if the information is

[3] Note that the original page numbers were kept on the responsive records. Accordingly, this review report will reference page numbers into the 600s, however only 82 of the original 600+ pages are under review.

subject to solicitor-client privilege. For the reasons set out below, I find that the redactions made pursuant to s. 16 were appropriately applied by the public body.

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

> 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.[4]

[9] The public body noted that the information severed under s. 16 is emails between public body staff and their solicitor or emails that were forwarded to the solicitor for the solicitor's opinion. It said the emails contain requests from public body staff for the solicitor to provide an opinion on the drafting of the agreement and a letter to the third party company's shareholders, as well as the solicitor's responses to these requests.

[10] The public body acknowledged that some of the information in the emails withheld under s. 16 is background information but pointed me to several review reports that discuss the idea of the necessity of protecting the continuum of privileged communication.[5]

[11] Section 16 is a discretionary provision, meaning that the public body had a choice whether to release the information, even if it thought s. 16 applied to it. The public body said it exercised its discretion in making this determination by considering the circumstances in which the records were created, the relationship of the persons in the emails, the subject of the emails, the harm from disclosure and the purpose of *FOIPOP*.

[12] I have reviewed the information redacted pursuant to s. 16 in the responsive records (at pages 201-202, 523-524 and 609-613) and am satisfied that it is subject to solicitor-client 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 is information that was part of the seeking, formulating or giving of legal advice. I find that s. 16 applies to the withheld information.

[13] I am also satisfied that the public body appropriately exercised its discretion in withholding the redacted information. The consideration of the proper exercise of discretion in a s. 16

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[4] This test has consistently been applied in s. 16 analyses by this office. See for example: *NS Review Report 21-10, Department of Justice (Re)*, 2021 NSOIPC 10 (CanLII), at para. 7; and *NS Review Report 18-09, Nova Scotia (Department of Justice) (Re)*, 2018 NSOIPC 9 (CanLII), at paras. 13-26

[5] The public body pointed me to *NS Review Report FI-97-75 & 76, Nova Scotia (Justice) (Re)*, 1998 CanLII 3725 (NS FOIPOP) and to *NS Review Report FI-93-37, Nova Scotia (Community Services) (Re)*, 1998 CanLII 1580 (NS FOIPOP). This principle was more recently outlined in *NS Review Report FI-10-71, Nova Scotia (Justice) (Re*), 2015 CanLII 60916 (NS FOIPOP) at para. 18, citing *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104 (CanLII) at paras. 27-31.

analysis is somewhat limited.[6] The public body considered a number of factors and has demonstrated to me that it exercised its discretion to withhold the information.

2. Was the public body authorized to refuse access to information under s. 14 of *FOIPOP* because disclosure of the information would reveal advice or recommendations?

[14] The public body severed some of the information on the responsive records based on s. 14 of *FOIPOP*. Under s. 14(1), a public body may withhold information if the information would reveal advice or recommendations developed by or for a public body or minister. Section 14(2) states that a public body cannot withhold background information under s. 14 and s. 14(3) makes clear that a public body cannot withhold information under s. 14(1) if the record has been in existence for five or more years. For the reasons set out below, I find that some of the redactions made pursuant to s. 14 were appropriately applied by the public body and others were not.

[15] In this case, the records had not been in existence for five or more years at the time the access request was made. However, as of today's date, more than five years have passed since their creation.

[16] Public bodies often argue that the law should be applied as of the time the original decision was made, as opposed to when the review is conducted, which was what the public body did in this case. The reality though, is that the records are now more than five years old. If the applicant made a new access to information request today, s. 14(1) would not apply and she would be entitled to any information severed pursuant to s. 14(1). Instead of making the applicant file a new request, it would be more practical if the public body would now simply release all the information withheld or severed under s. 14(1). Past review reports have encouraged the expiration of the exemption to be considered as part of the exercise of discretion.[7] In any event, I wish to make it clear to the applicant that if she files a new access request for the same information, the public body will have to go through the work of re-processing the exact same documents but could no longer withhold the information it withheld under s. 14(1).

[17] Although the applicant has the option to make a new access to information request, which would eliminate the ability for the public body to apply s. 14(1), I will proceed with the s. 14 analysis based on the date the public body made the original access to information decision. The public body said that the information severed pursuant to s. 14(1) of *FOIPOP* is about advice and recommendations prepared by staff about stumpage rates and the agreement with the named company. It said the advice it was protecting is about things like who should be responsible for submitting payments, discussions about information the public body received from a consultant, as well as next steps, and advice that was received by the public body when its solicitors advised on drafting the agreement. The public body noted that the information severed under s. 14 is about changes that were being made to the draft agreement with the named company. It said staff were providing advice on the drafting of a binding agreement between it and the named company. Staff were discussing what should be included in the final version of the agreement,

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[6] See *NS Review Report 21-10, Department of Justice (Re),* 2021 NSOIPC 10 (CanLII) at paras. 10-22 for a discussion of exercising discretion in a s. 16 analysis.

[7] See for example, *NS Review Report 17-01, Nova Scotia (Justice) (Re),* 2017 NSOIPC 1 (CanLII), at paras. 32-36; *NS Review Report 18-09, Nova Scotia (Department of Justice) (Re),* 2018 NSOIPC 9 (CanLII) at para. 11; and *NS Review Report 18-02, Department of Community Services (Re),* 2018 NSOIPC 2 (CanLII) at para. 48.

including things like what to include in the schedules (page 292) and drafting particular sections (pages 523, 524 and 564).

[18] The rationale for the policy advice exemption was explained by the Supreme Court of Canada as:

> To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies.
>
> It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness.[8]

[19] In past review reports, former Commissioner Tully set out the following general guidance about this exemption:

- The exemption is intended to protect the deliberative or evaluative process.
- The exemption is intended to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue.
- Evidence of an intention to communicate is not required for the exemption to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.
- The exemption covers earlier drafts of material containing advice or recommendations even if the content of a draft is not included in the final version. Advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by the exemption.
- Recommendations include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.
- Advice must have a distinct meaning from "recommendations" and includes the views or opinions of a public servant as to the range of policy options to be considered by the decision-maker even if they do not include a specific recommendation on which option to take.
- Advice includes an opinion that involves exercising judgement and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.

[8] *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36 (CanLII), at para. 44 quoting with approval stated by Evans J in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 FC 245, 1999 CanLII 8293 (FC), at para. 31.

- Advice or recommendations may be revealed in two ways:
  1. The information itself consists of advice or recommendations.
  2. The information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.
- Advice involves an evaluative analysis of information.[9]

[20] For ease of reference, below is a table setting out my conclusions as to whether s. 14(1) applied to the withheld information at the time the access decision was made.

Page	Analysis	Did s. 14(1) apply to the withheld information?
44	This information discusses a proposed course of action and discusses the strengths of proceeding in the suggested fashion.	Yes
201-202	This information was also redacted pursuant to s. 16. As set out above, I agree that s. 16 applies. Therefore, it is not necessary to conduct a s. 14 analysis.	N/A
291	This information discusses a proposed course of action.	Yes
292	The first two redacted sentences discuss a proposed course of action. The third redacted sentence is an observation. The fourth redacted sentence is a suggestion for clarity in the agreement.	First two redacted sentences: Yes Third redacted sentence: No Fourth redacted sentence: Yes
335	This information sets out material that relates to a suggested course of action.	Yes
336	This information would not permit the drawing of accurate inferences as to the nature of the actual advice.	No
359-360	Duplicates of the information on page 336.	No
430	This information sets out someone's position. It is not advice or recommendations.	No

[9] This guidance was set out in *NS Review Report 18-02, Department of Community Services (Re)*, 2018 NSOIPC 2 (CanLII) at para. 14 and was gleaned from a review of *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36 (CanLII), as well as numerous other decisions.

Page	Analysis	Did s. 14(1) apply to the withheld information?
431-432	4:33 p.m. email: This information summarizes someone's position. 4:25 p.m. email: This information summarizes a moving forward approach and the seeking of information. 10:53 a.m. email: This appears to be an earlier draft provision of the agreement.	4:33 and 4:25: No 10:53: Yes
477	This information is a question and some responses to it relating to a factual issue.	No
479-480	2:00 p.m. email: This information sets out someone's concerns, along with their rationale for them. 1:45 p.m. and 1:31 p.m. emails: This information sets out staff's proposals to amend the agreement.	2:00: No 1:45 and 1:31: Yes
523-524	3:45 p.m. email: This information is draft wording from an earlier version of the draft provision of the agreement. 10:21 a.m. email: This information was also redacted pursuant to s. 16. As set out above, I agree that s. 16 applies. Therefore, it is not necessary to conduct a s. 14 analysis.	3:45: Yes 10:21: N/A
564	12:39 p.m. email: This information is draft wording from an earlier version of the draft provision of the agreement. 11:09 a.m. email: This information is a suggestion for clarity in the agreement.	12:39: Yes 11:09: Yes
609-613	This information was also redacted pursuant to s. 16. As set out above, I agree that s. 16 applies. Therefore, it is not necessary to conduct a s. 14 analysis.	N/A

Exercise of discretion

[21] For those portions of the withheld information to which I agree s. 14(1) applied at the time the access decision was made, that is not the end of the analysis. I must also review the public body's exercise of discretion. In terms of exercising discretion, the Supreme Court of Canada had this to say about the advice exemption and exercising discretion:

> [52] It is important to emphasize that s. 13(1) is a discretionary decision and that heads of institutions must be careful to exercise their discretion lawfully (*Telezone*, at paras. 45,

100, 102, 107-9 and 112-16; *Ontario v. CLA*, at paras. 66, 69 and 71). The Court noted in *Ontario v. CLA*:

> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations. [para. 71][10]

[22] This office has summarized the relevant factors in the exercise of discretion. Those factors include:

- the wording of the discretionary exemption and the interests which the section attempts to balance;
- the historical practice of the public body with respect to the release of similar types of documents;
- the nature of the record and the extent to which the document is significant and/or sensitive to the public body;
- whether the disclosure of the information will increase public confidence in the operation of the public body;
- the age of the record;
- whether there is a sympathetic or compelling need to release materials;
- whether previous orders of the Commissioner have recommended that similar types of records or information should or should not be subject to disclosure; and
- when the policy advice exemption is claimed, whether the decision to which the advice or recommendations relates has already been made.[11]

[23] The public body's representations on its s. 14 discretion analysis were scant. It noted that the majority of the final agreement with the named company was released to the applicant. The only information severed from the final agreement was the stumpage rates (which were redacted pursuant to s. 17). The public body also stated:

> The Department exercised its discretion, in the emails that detailed how the agreement should be drafted, to sever from the records, information that was used to determine the content that would be in the final agreement.

[24] I found this sentence a little difficult to follow but I believe the public body meant it exercised its discretion by only severing information that it was entitled to sever through the application of s. 14(1). In other words, it only severed any advice or recommendations that were used to determine the content that would be in the final agreement. With respect, this is the first step in applying severing but it does not speak to the exercise of discretion. I do not have any information before me to satisfy me that the public body exercised its discretion.

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[10] *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36 (CanLII), at para. 52.
[11] *NS Review Report 17-01, Nova Scotia (Justice) (Re)*, 2017 NSOIPC 1 (CanLII) at para. 34 citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23 (CanLII).

[25] The factors that the public body considered do not align with the relevant factors in the exercise of discretion. Therefore, where I have agreed in the table above that s. 14(1) applied at the time the access decision was made, I recommend that the public body reconsider, by exercising its discretion, its application of s. 14. In doing so, the public body should consider the factors outlined above, specifically the passage of time.

3. Was the public body authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure of the information could reasonably be expected to harm the economic interests of the public body?

[26] The public body relied on s. 17(1)(d) and (e) to withhold some information on the responsive records, most notably the stumpage rates in the agreement. It also applied s. 17(1)(e) to the 11:09 a.m. email on page 564. For the reasons set out below, I find that s. 17 does not apply to the withheld information.

[27] Section 17(1)(d) gives the public body discretion to withhold information that 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. Section 17(1)(e) gives the public body discretion to withhold information about negotiations carried on by or for a public body or the Government of Nova Scotia.

[28] Harms-based exemptions require a reasoned assessment of the future risk of harm. The leading case in Canada[12] 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.

[29] The public body submitted in camera representations on this point, meaning that I must be careful in how I characterize its arguments in this public review report. What I will say is that the potential harm it outlined for me was significant. However, the problem with the public body's argument is that the potential harm it described would only arise from a misuse or mischaracterization of the released information. In my view, this possibility is too remote to meet the threshold of harm required for a s. 17 exemption. It could also be prevented by the public body by supplying something like a cover letter that explains the information so as to head off any misunderstanding of it. I find s. 17 does not apply to the withheld information.

[12] *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.

4. Was the public body 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?

[30] The public body relied on s. 20(1) to sever the names and contact information of various external parties involved in the communications in the responsive records. Section 20(1) requires the public body to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. For the reasons set out below, I find that s. 20 does not apply to any of the information withheld pursuant to it.

[31] In addition to names and contact information, the public body also severed cell phone numbers of public body staff. In its representations, it acknowledged that this should not have happened and that the numbers should have been released.

[32] The public body explained that when it makes decisions as to whether to sever information that could be considered business contact information, its practice is to search online to see if the company's website or other online sources list the individual and their contact information. The public body's practice is to not redact the information if it is publicly available online and to redact it if it is not publicly available. In this case, the consultant's contact information was not available online. As such, the public body redacted it. The public body's arguments focused on a consultant it used, however the analysis is applicable to all of the external parties whose names and contact information are referenced in the responsive records.

[33] In *Alberta Review Report F2009-009*,[13] the Office of the Information and Privacy Commissioner (OIPC) of Alberta addressed the issue of signatures of individuals employed by private businesses. That report concluded that when individuals are acting in their professional capacity, as opposed to personal capacity, that is a relevant factor weighing in favour of disclosure. The Alberta Commissioner found that in the employment context, information about the performance of work responsibilities is not really about the person, but rather about their work. The Commissioner noted that many orders of the Alberta OIPC have found that disclosure of the names, titles and signatures of individuals acting in their professional capacity is generally not an unreasonable invasion of personal privacy.

[34] In the present case, the information redacted pursuant to s. 20 is all contact information of persons acting in their professional capacity. While I appreciate that the public body was attempting to ensure it did not release information that was not publicly available online, this is not one of the factors that the legislation or the case law proposes. It would not be an unreasonable invasion of the third parties' personal privacy to release the redacted information.

[13] *AB Order F2009-009, Alberta Seniors and Community Supports (Re),* 2009 CanLII 90941 (AB OIPC), starting at para. 63. This reasoning was followed more recently in *NL Report A-2017-014, Memorial University of Newfoundland (Re),* 2017 CanLII 37267 (NL IPC), at para. 21.

FINDINGS & RECOMMENDATIONS:

[35] I find that:

1. Section 16 applies to the withheld information at pages 201-202, 523-524 and 609-613.
2. Section 14(1) applied to some of the information as set out in the table at paragraph 20 of this review report at the time the access decision was made.
3. Section 14(1) did not apply to any other withheld information at the time the access decision was made.
4. Section 17 does not apply to the withheld information.
5. Section 20 does not apply to the withheld information.

[36] I recommend that:

1. The public body take no further action with respect to the s. 16 redactions.
2. The public body reconsider the application of s. 14 to the records in light of the requirement to apply discretion and in particular, using the factors highlighted in paragraph 22 and disclose any additional information within 45 days of receipt of this review report.
3. The public body disclose all information that did not qualify as advice or recommendations within the meaning of s. 14 at the time the access decision was made, within 45 days of receipt of this review report.
4. The public body disclose all information to which s. 17 was applied within 45 days of receipt of this review report.
5. The public body disclose all information to which s. 20 was applied within 45 days of receipt of this review report.

December 7, 2021

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

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