



Office of the Information and Privacy Commissioner for Nova Scotia

REVIEW REPORT 21-15

December 20, 2021

Department of Health and Wellness

Summary: In response to a request for records relating to the QEII redevelopment project in Bayers Lake in 2017, the Department of Health and Wellness withheld portions of the records it said revealed policy advice or deliberations of the Executive Council. The reviewing officer recommends that the portion of the records under review be disclosed because it does not qualify as advice. The reviewing officer further recommends that a portion of the records withheld as deliberations of the Executive Council should also be disclosed because it qualifies as background information and so cannot be withheld.

INTRODUCTION:

[1] The applicant filed a request for records created and/or shared from April 10, 2017 to April 25, 2017, relating to the QEII redevelopment project and/or the outpatient clinic in Bayers Lake in Halifax Regional Municipality. In response, the Department of Health and Wellness (public body) provided 115 pages of records with approximately one third of the information withheld for a variety of reasons. For the most part, the public body relied upon the *Freedom of Information and Protection of Privacy Act (FOIPOP)* exemption that permits public bodies to withhold information where disclosure of the information would reveal advice or recommendations developed by or for the public body (s. 14). The public body also withheld a small portion of the records because it said disclosure would reveal the substance of Executive Council deliberations (s. 13). During the informal resolution process leading up to this review report, some issues were resolved. As a result, only two issues relating to 13 pages of records remain.¹

¹ The original package of records provided to the applicant contained 115 pages, however this review report discusses only 13 of those pages as the remainder of the issues on the other pages were addressed during the informal resolution process. The public body withheld page 4 of the records under both s. 13 and s. 14. It also withheld information on pages 42, 43, 44, 47, 49, 56, 93, 94, 96, 97, 109 and 110 under s. 14. Only those 13 pages contain severing that is subject to this review report.

ISSUES:

[2] There are two issues under review:

1. Was the public body authorized to refuse access to information under s. 13 of *FOIPOP* because disclosure of the information would reveal the substance of deliberations of the Executive Council or any of its committees?
2. Was the public body authorized to refuse access to information under s. 14 of *FOIPOP* because disclosure of the information would reveal advice, recommendations or draft regulations?

DISCUSSION:

Burden of proof

[3] The public body bears the burden of proving that the applicant has no right of access to the record or part of the record.²

1. Was the public body authorized to refuse access to information under s. 13 of *FOIPOP* because disclosure of the information would reveal the substance of deliberations of the Executive Council or any of its committees?

[4] The public body applied s. 13 of *FOIPOP* to a three-page document only part of which is under review. For the reasons set out below, I find that s. 13(2)(c) applies to page 4 of the records from the top of the page down to, but not including, the subtitle above the table at the bottom of the page, and therefore that portion of the page cannot be withheld under s. 13(1).

[5] Section 13 of *FOIPOP* provides in part:

Deliberations of Executive Council

13 (1) The head of a public body may refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

(2) Subsection (1) does not apply to...

(c) background information in a record the purpose of which is to present explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if

- (i) the decision has been made public,
- (ii) the decision has been implemented, or
- (iii) five or more years have passed since the decision was made or considered.

² *FOIPOP*, s. 45.

[6] As a result of the Office of the Information and Privacy Commissioner's (OIPC) informal resolution process, the applicant agreed that s. 13 applies to all but a portion of page 4 of the records. The OIPC investigator identified that portion of page 4 as background information falling within the meaning of s. 13(2)(c).

[7] Therefore, the specific outstanding issue in this matter is whether or not s. 13(2)(c) applies to any part of page 4 of the records.

[8] The first step in a s. 13(2)(c) analysis is to determine whether or not the record contains background information. The term "background information" is defined in s. 3 of *FOIPOP* and means "any factual material" among other things. The public body did not provide any representations on the information being background information. The sole focus of the public body's representations was that the information was drafted to be submitted to the Executive Council for consideration.

[9] On a straightforward reading of the document, I find that the information contained on page 4 of the records, from the top down to the analysis section, is entirely factual and historical.

[10] The second step in the analysis is to determine if s. 13(2)(c)(i), (ii) or (iii) applies. In this case, other pages disclosed to the applicant make clear that the decision involved had been made public and had been implemented at the time of this access to information request.³

[11] Therefore, I find that s. 13(2)(c) applies to page 4 of the records from the top of the page down to, but not including the subtitle above the table at the bottom of the page.

[12] Because I have found that the exemption does not apply to the information, it is unnecessary for me to consider the public body's exercise of discretion.

[13] The public body also applied s. 14 to this same information and so I will next evaluate the application of s. 14 to this and other records at issue.

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

[14] The public body also applied s. 14 to the responsive records. For the reasons set out below, I find s. 14 does not apply to the information which is under review.

[15] Section 14 provides:

Advice to public body or minister

14 (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister.

(2) The head of a public body shall not refuse pursuant to subsection (1) to disclose background information used by the public body.

³ This is evident from information disclosed on pages 27-29 and 30-35.

(3) Subsection (1) does not apply to information in a record that has been in existence for five or more years.

(4) Nothing in this Section requires the disclosure of information that the head of the public body may refuse to disclose pursuant to Section 13

[16] The purpose of s. 14 is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice.⁴

[17] In Canada, the leading case on the meaning of the policy and recommendations exemption is *John Doe v. Ontario (Finance)*, 2014 SCC 36 (*John Doe*).⁵ The Supreme Court of Canada discussed the purpose of the exemption and emphasized the importance of permitting full, free and frank discussions regarding advice and recommendations. Nova Scotia *Review Report 18-02*⁶ includes an extensive discussion of the purpose for and general requirements of s. 14. In a recent review report,⁷ Commissioner Ralph set a list of general guidance about this exemption. I have applied both sets of principles to my analysis here.

[18] There is a three-step process required for evaluating whether s. 14 applies:

1. Determine whether disclosing the information “would reveal advice or recommendations developed by or for a public body or a minister.”
2. If so, it is then necessary to consider whether the information at issue is excluded from s. 14(1) because it falls within any of the categories of information listed in ss. 14(2)-(4) if s. 14(1) is found to apply.
3. Determine whether the public body has exercised its discretion lawfully.

Step 1: Does the withheld information reveal advice or recommendations made by or for the public body or a minister?

[19] In its representations, the public body set out the applicable law and cases that are relevant to the exemption applied. It goes on to make its own finding that s. 14(1) was correctly applied based on those cases. What is missing however, is evidence that the cases applied to the actual information under review. In its place is a broad assertion that “the information severed in the individual line severing from the body of emails falls within the range of options, opinions, advantages and disadvantages of courses of action.”

[20] I have reviewed the 13 pages that remain at issue.⁸ I find that 12 of the 13 withheld pages do not reveal advice or recommendations within the meaning of s. 14, for the following reasons:

- The disclosed portion of pages 109-110 indicates that the attached press release (the withheld portion) was going out although no date was specified. There was no request for advice, no advice provided, no opinions given and no evidence that any advice or

⁴ *BC Order F13-17, Victoria (City) (Re)*, [2013 BCIPC 22 \(CanLII\)](#), at para. 26.

⁵ *John Doe v. Ontario (Finance)*, [\[2014\] 2 SCR 3, 2014 SCC 36 \(CanLII\)](#).

⁶ *NS Review Report 18-02, Department of Community Services (Re)*, [2018 NSOIPC 2 \(CanLII\)](#).

⁷ *NS Review Report 21-14, Department of Natural Resources and Renewables (Re)*, [2021 NSOIPC 14 \(CanLII\)](#), at para. 14.

⁸ Those pages were identified in the OIPC investigator’s opinion letter dated February 8, 2021, and include pages 4, 42, 43, 44, 47, 49, 56, 93, 94, 96, 97, 109 and 110.

opinions were received with respect to the withheld document. There is no indication that the document was a draft. It appears to have only been awaiting the specific release date.

- Page 93 is very similar. The public body disclosed the first line of a list of upcoming activities. There is no distinction between the disclosed first item, which was a future event, and the withheld items which were also future events but that were scheduled within a week or two of the first event. The remainder is simply a statement of upcoming events. No advice or recommendations were attached to the list.
- Nine of the withheld pages involve email exchanges on a related topic.⁹ Most of the withheld information is a recounting of historical facts. There was no advice given, just a communication of information generally in the nature of status reports. Other information at issue on page 44 is an observation¹⁰ and includes what can be described as direction by an employer to an employee. Direction from management or a decision-maker to staff does not qualify as advice or recommendations within the meaning of s. 14.¹¹

[21] The public body provided no evidence to support the application of s. 14.

[22] I find that s. 14 does not apply to the information withheld on pages 42, 43, 44, 47, 49, 56, 93, 94, 96, 97, 109 and 110.

Step 2: Does s. 14(2) apply to page 4 of the records?

[23] Finally, the public body applied s. 14 to page 4 of the records. For the same reasons I found s. 13(2)(c) applies from the top of page 4 of the records down to the analysis section, I find s. 14(2) applies. The severed information is exactly the type of information intended to be captured by s. 14(2).

[24] I find that s. 14(2) applies to page 4 of the records from the top of the page down to, but not including the subtitle above the table at the bottom of the page, and therefore that portion of the page cannot be withheld under s. 14(1).

Step 3: Did the public body exercise its discretion lawfully?

[25] Because I have found that the exemption does not apply to the information, it is unnecessary for me to consider this step.

FINDINGS & RECOMMENDATIONS:

[26] I find that:

1. Section 13(2)(c) and s. 14(2) apply to page 4 of the records from the top of the page down to, but not including the subtitle above the table at the bottom of the page.
2. Section 14 does not apply to information withheld on pages 42, 43, 44, 47, 49, 56, 93, 94, 96, 97, 109 and 110.

⁹ Pages 42, 43, 44, 47, 49, 56, 94, 96 and 97.

¹⁰ *NS Review Report 21-14*, at para. 20 found observations do not qualify under the advice and recommendations exemption.

¹¹ *NS Review Report 18-02* at paras. 14-17 provides an extensive list of what has and has not qualified under the advice and recommendations exemptions in access to information legislation in Canada.

[27] I recommend that the public body:

1. Disclose page 4 of the records from the top of the page down to, but not including the subtitle above the table at the bottom of the page, within 45 days of receipt of this review report.
2. Disclose the information withheld under s. 14 on pages 42, 43, 44, 47, 49, 56, 93, 94, 96, 97, 109 and 110 within 45 days of receipt of this review report.

December 20, 2021

Carmen Stuart¹²
Executive Director
Office of the Information and Privacy Commissioner

OIPC File: 17-00180

¹² Out of an abundance of caution, the Information and Privacy Commissioner delegated the authority to complete this review to the Executive Director on November 3, 2021, after identifying the potential for a reasonable apprehension of bias.