



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

REVIEW REPORT 22-08

March 15, 2022

Department of Environment and Climate Change

Summary: The applicant requested an issue paper about the use of off-highway vehicles when harvesting moose in the Polletts Cove-Aspy Fault Wilderness Area from the Department of Environment and Climate Change (public body). The public body withheld the document in full because it said the document would reveal advice, recommendations or draft regulations developed by or for a public body or a minister, as per s. 14 of the *Freedom of Information and Protection of Privacy Act*. The Commissioner finds that some of the information can be withheld because it does contain advice or recommendations however some of the information is factual and cannot be withheld because it constitutes background information to which the exemption cannot apply. The Commissioner recommends that the public body release some information and continue to withhold the remainder.

INTRODUCTION:

[1] In the late 1800's to early 1900's, the original indigenous population of moose in Cape Breton was extirpated.¹ Moose from Alberta were reintroduced in the 1940's.

[2] The applicant had an interest in the use of motorized off-highway vehicles² when harvesting moose in the Polletts Cove-Aspy Fault Wilderness Area (PCAFWA) of Cape Breton. In 2012, the use of off-highway vehicles in the PCAFWA became prohibited by virtue of the *Wilderness Areas Protection Act*.³ The applicant became aware that the Department of Environment and Climate Change⁴ (public body) was working on an issue paper on this topic through records he received in response to a previous application for access to a record (access request). The applicant made an access request for this issue paper. The public body responded to the applicant that it was withholding the issue paper in full based on s. 14 of the *Freedom of Information and Protection of Privacy Act (FOIPOP)*, which gives a public body discretion to withhold advice, recommendations or draft regulations developed by or for a public body or a minister.

¹ Government of Nova Scotia, *Mainland Moose Frequently Asked Questions*, online: <https://novascotia.ca/natr/wildlife/sustainable/mmoosefaq.asp>.

² Off-highway vehicles are also often referred to as all-terrain vehicles or ATVs.

³ SNS 1998, c. 27. See s. 17(2)(c), 23(4B).

⁴ At the time of this access request, the public body was titled Department of Environment.

ISSUE:

[3] 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

[4] The public body bears the burden of proving that the applicant has no right of access to the record or part of the record.⁵

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?

[5] The public body withheld the entire responsive record based on s. 14 of *FOIPOP*. For the reasons set out below, I find that the public body properly applied s. 14 to some but not all of the withheld information.

[6] 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.⁶ My predecessor, former Commissioner Catherine Tully, set out an in-depth analysis of the purpose, application and requirements of s. 14 in *Review Report 18-02*.⁷ I will not repeat that analysis here, but I do adopt it.

[7] Under s. 14(1), a public body may withhold information if the information would reveal advice, recommendations or draft regulations developed by or for a public body or a minister. Section 14(2) states that a public body cannot withhold background information under s. 14. Section 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. Section 14(4) explains that nothing in this section requires the disclosure of information that the public body has discretion to withhold under s. 13 of *FOIPOP*.

[8] The process for determining whether s. 14(1) applies involves three steps:

1. Determine whether disclosing the information “would reveal advice, recommendations or draft regulations 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).
3. Determine whether the public body has exercised its discretion lawfully.

⁵ *FOIPOP*, s. 45.

⁶ *NS Review Report 18-02, Department of Community Services (Re)*, [2018 NSOIPC 2 \(CanLII\)](#), at para. 8; *John Doe v. Ontario (Finance)*, [2014 SCC 36 \(CanLII\)](#), [2014] 2 SCR 3, at para. 43.

⁷ *NS Review Report 18-02, Department of Community Services (Re)*, [2018 NSOIPC 2 \(CanLII\)](#).

Analysis

[9] The record consists of an issue paper totaling 17 pages. I will discuss my findings in relation to the first eight pages (not including the last paragraph on page 8 and also not including the comment on page 7), which I will refer to as Part 1. I will refer to the remainder of the pages (last paragraph on page 8 to the end of the document at page 17), along with the comment on page 7, as Part 2.

Part 1

[10] The public body explained that the issue paper is a shared record between it and the Department of Lands and Forestry⁸ and that it was drafted as one option on how to advance moose management in the PCAFWA. The public body noted that the issue paper was still being actively drafted at the time the access request was made. It had not yet been advanced to the decision-makers. To the best of my knowledge, the issue paper remains in draft form today, some four years after it was originally created. In that light, the public body's argument was that the entire draft issue paper falls within a range of options, opinions, advantages and disadvantages of a course of action, and also reflects the decision-making process of government.

[11] In its representations, the public body spoke of its increasing use of technology, whereby advice is transmitted through the drafting of documents and receiving of comments and markups within one electronic draft as a tool for feedback. The public body's position was that as such, the record at issue identifies one of the "false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighting of the relative importance of the relevant factors..." that the Supreme Court of Canada determined could be protected from disclosure in *John Doe v. Ontario (Finance)*.⁹

[12] Under s. 14(2), a public body cannot withhold information under s. 14(1) if it qualifies as background information. The definition of "background information" can be found in s. 3(1)(a) and includes such things as any factual material, final reports on the performance of a public body or a report of an external task force.

[13] The public body argued that the entire issue paper should not be considered as background information within the meaning of s. 3(1)(a) of *FOIPOP* because the body of facts in the record is not "separate and distinct from interpretations of, reactions to or advice and recommendations in respect of facts," as required by *Freedom of Information and Protection of Privacy Regulation* 24(1).¹⁰ It pointed out that the visible markup from the original Microsoft Word document demonstrated that an employee had drafted the issue paper, while other staff provided interpretations and reactions.

[14] The public body also argued that another type of information considered to be background information (s. 3(1)(a)(xii)) had to be ruled out because it required the issue paper to have been

⁸ Since the time of the creation of the issue paper, the name of the Department of Lands and Forestry has changed to the Department of Natural Resources and Renewables.

⁹ *John Doe v. Ontario (Finance)*, [2014 SCC 36 \(CanLII\)](#), [2014] 2 SCR 3, at para. 44.

¹⁰ NS Reg 105/94.

advanced to the head of the public body to either accept or reject, which had not yet been done in this case.

[15] The public body said that none of the other meanings of the term “background information” had any potential applicability to the current review.

[16] As former Commissioner Tully explained in *Review Report 18-02*,¹¹ there are times when factual material included with advice or recommendations may be withheld. For example, factual material may be withheld where the facts were compiled and selected by an expert using their expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body. In addition, where the facts, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations, s. 14 might also apply.

[17] In my view, Part 1 of the issue paper is quite distinct from Part 2 in that it is introductory in nature. The type of withheld information is factual on its face. There is no analysis of the information in Part 1; it is provided as background. It may reveal the general topic of the options discussed in Part 2 of the issue paper, but it would not disclose the advice or recommendations in Part 2. There are no comments or markups providing feedback on the content of Part 1.

[18] I find that the information withheld in Part 1 of the issue paper is factual information and therefore meets the definition of “background information” in s. 3(1)(a) of *FOIPOP*. I find that s. 14 does not apply to this information because the information withheld is factual and background information and does not amount to advice or recommendations within the meaning of s. 14(1).

Part 2

Step 1: Would disclosing the information reveal advice, recommendations or draft regulations developed by or for a public body or a minister?

[19] The information withheld in Part 2 of the issue paper can accurately be characterized as advice or recommendations developed by a public body. It sets out options and opinions that involved the exercise of judgement and skill on a matter that the public body was intending to make a decision about.

Step 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).

[20] Under s. 14(2), a public body cannot withhold information under s. 14 if it qualifies as background information. The information in Part 2 of the withheld issue paper does not constitute background information. Rather, it is more accurately described as advice and options.

¹¹ *NS Review Report 18-02, Department of Community Services (Re)*, [2018 NSOIPC 2 \(CanLII\)](#) at para. 22.

[21] Section 14(3) provides that information cannot be withheld under s. 14(1) if it has been in existence for five or more years. The information at issue here was only a few months old when it was requested by the applicant and even with the passage of time it is still less than five years old.

[22] Section 14(4) does not apply in this case.

[23] None of the exclusions set out in ss. 14(2)-(4) apply to Part 2 of the issue paper. Therefore, I find that s. 14(1) of *FOIPOP* applies to the withheld information in Part 2 of the issue paper.

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

[24] This office has set out the relevant factors in the exercise of discretion in past review reports.¹² The public body explained that it considered the following when exercising its discretion:

- The wording of s. 14 attempts to balance transparency against the need for civil servants to give free, full and frank advice to decision-makers.
- Its historical practice with respect to the release of similar types of documents is to withhold the information.
- In terms of the nature of the record and its significance, at the time of the access request, the issue paper was still in the process of being drafted and decisions arising from it had not yet been made.
- Its position that the disclosure of the record would provide only a negligible or minimal increase in public confidence in its operations.
- In terms of the age of the record, the matter was still a public issue at the time the access request was made.
- There was no sympathetic or compelling need to release the information.
- Its approach was consistent with previous Supreme Court of Canada cases.

[25] The public body considered relevant factors in its exercise of discretion. I am satisfied that discretion was appropriately applied in this case.

FINDINGS & RECOMMENDATIONS:

[26] I find that:

1. Section 14 does not apply to the withheld information in Part 1 of the issue paper.
2. Section 14 applies to the withheld information in Part 2 of the issue paper.

¹² See for example, *NS Review Report 18-02, Department of Community Services (Re)*, [2018 NSOIPC 2 \(CanLII\)](#), at paras. 46-47.

[27] I recommend that:

1. The public body disclose the withheld information in Part 1 of the issue paper to the applicant within 45 days of the date of this review report.
2. The public body continue to withhold the information in Part 2 of the issue paper.

March 15, 2022

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File: 17-00350