



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

REVIEW REPORT 22-13

November 1, 2022

Department of Public Works

Summary: In 2018, the Government of Nova Scotia announced the construction of a new high school on the Eastern Shore. In 2020, the Department of Public Works (public body) produced a report containing a high-level analysis of the campus site options for the new school for the Minister of Education and Early Childhood Development (Report). The applicant requested a copy of this Report. In response, the public body released the title of the Report, its introductory statement, and the report headings, but redacted everything else under s. 14 and s. 17 of the *Freedom of Information and Protection of Privacy Act*. The Commissioner finds that these sections do not apply and recommends disclosure of the entire Report.

INTRODUCTION:

[1] On April 30, 2018, the Government of Nova Scotia (Government) announced that it would replace the existing Eastern Shore District High School (ESDH) building in Musquodoboit Harbour as part of its multi-year Capital Plan.¹

[2] In 2019, the School Advisory Committee for Gaetz Brook Junior High School (GBJH) in Gaetz Brook expressed interest in having its students included in the proposed new building.

[3] The Department of Public Works² (public body) created a report entitled *Eastern Shore District HS*,³ *Campus Site Options – DTIR High Level Analysis*, dated March 20, 2020 (Report). The Report is six pages and begins with the sentence, “We have performed a high level review of two sites as possible locations of the new Eastern Shore District High School, described below.”⁴

¹ Government of Nova Scotia, *School Capital Plan Released*, (April 2018), online: <<https://novascotia.ca/news/release/?id=20180430002>>.

² At the time of creation of the *Eastern Shore District HS, Campus Site Options – DTIR High Level Analysis* report, this department was named the Department of Transportation and Infrastructure and Renewal (DTIR). It is now named the Department of Public Works as of August 31, 2021.

³ “HS” is short for high school.

⁴ The title of the Report and this information was released to the applicant in response to her access request.

[4] From October 8, 2020, to November 30, 2020, the Halifax Regional Centre for Education (HRCE) sought public feedback to consider the consolidation of ESDH and GBJH.⁵ Following this consultation, on December 15, 2020, HRCE issued a final report recommending to the Minister of Education and Early Childhood Development that ESDH and GBJH be consolidated.⁶ This consultation did not address the issue of site selection for the school.⁷

[5] On February 2, 2021, the Government announced it had decided that a new consolidated school would be built on industrial land in East Chezzetcook to replace both ESDH and GBJH.⁸

[6] This decision created some controversy as some community members wanted the school to remain in Musquodoboit Harbour. In early March 2021, three community members filed a judicial review application of the industrial land decision with the Nova Scotia Supreme Court. In addition to seeking a review of the decision, the application asked for a review of what the applicants characterized as a failure to inform the public about the site selection process and findings. Ultimately, the judicial review application did not proceed or conclude.

[7] Later in March 2021, the Government set aside its February 2, 2021, site decision and opened the issue of site selection by seeking and obtaining feedback from the public on the proposed site options.⁹ To inform public feedback, the public was provided with the Department of Infrastructure & Housing – Building Project Services Division report dated March 23, 2021, entitled *Eastern Shore District 7-12, Site Options Comparison – Technical Overview*.¹⁰ The opportunity for feedback closed April 23, 2021. In May 2021, a document summarizing the feedback was released.¹¹

[8] On June 3, 2021, the Minister of Education and Early Childhood Development announced that a decision had been made that the schools would be consolidated and built in the East Chezzetcook industrial land area.¹² In other words, the same site that was originally selected was chosen for the site location after the public consultation took place.

⁵ Halifax Regional Centre for Education, *Eastern Shore Consultation: Have Your Say!* (date unknown), online: <<https://www.hrce.ca/consult>>; Elwin LeRoux (2020), online: Halifax Regional Centre for Education <https://www.hrce.ca/sites/default/files/hrsb/esdh-gbjh_consultation_final_report-15dec2020.pdf>.

⁶ Elwin LeRoux (2020), online: *Halifax Regional Centre for Education* <https://www.hrce.ca/sites/default/files/hrsb/esdh-gbjh_consultation_final_report-15dec2020.pdf>.

⁷ Halifax Regional Centre for Education, *Eastern Shore Consultation – Frequently Asked Questions* (date unknown), online: <https://www.hrce.ca/sites/default/files/hrsb/eastern_shore_consult_faq.pdf>.

⁸ Education and Early Childhood Development, *School Capital Plan Update* (February 2021), online: Government of Nova Scotia <<https://novascotia.ca/news/release/?id=20210202002>>.

⁹ Government of Nova Scotia, *Future Home of Eastern Shore Consolidated School Selected*, (June 2021), online: <<https://novascotia.ca/news/release/?id=20210603003>>.

¹⁰ Department of Infrastructure & Housing, *Eastern Shore District 7-12, Site Options Comparison – Technical Overview* (March 2021), online: Government of Nova Scotia <https://www.hrce.ca/sites/default/files/hrsb/esd_7-12_site_options_comparison-23mar2021.pdf>.

¹¹ Government of Nova Scotia, *Site Selection: Eastern Shore District High & Gaetz Brook Junior High New Construction Summary of Feedback* (May 2021), online: <https://www.hrce.ca/sites/default/files/hrsb/eastern_shore_school_site_selection_feedback_summary-may2021.pdf>.

¹² Government of Nova Scotia, *Future Home of Eastern Shore Consolidated School Selected*, (June 2021), online: <<https://novascotia.ca/news/release/?id=20210603003>>.

[9] In September 2021, the applicant requested a copy of the Report from the public body. In response, the public body released its title, introductory statement and the document's headings, but redacted everything else under s. 14 and s. 17 of the *Freedom of Information and Protection of Privacy Act (FOIPOP)*.

[10] The applicant objected to the severing the public body applied and filed a request for review with this office.

ISSUES:

[11] There are two issues under review:

1. 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?
2. Was the public body authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia?

DISCUSSION:

Burden of proof

[12] The public body bears the burden of proving that the applicant has no right of access to a record or part of a record.¹³

1. 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?

[13] The public body severed the information from the responsive record based on both s. 14 and s. 17 of *FOIPOP*. Section 14 gives a public body discretion to withhold advice, recommendations or draft regulations developed by or for a public body or a minister. For the reasons set out below, I find that s. 14 does not apply to the withheld information.

[14] 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 minister. Section 14(2) states that a public body cannot withhold background information under s. 14(1) 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.

¹³ *FOIPOP* s. 45.

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

[16] The public body explained that the Report is a review of the possible site locations for the new school. It sets out the strengths and weaknesses of the site options. It contains comparison information about each site such as high-level estimates, terrain, visibility and support for a campus concept for the school. The public body argued that this information was laid out so that it could use those options to decide which site would be best. As a result, the public body said the information constitutes advice.

[17] The applicant pointed me to *O’Connor v. Nova Scotia*, where the Nova Scotia Supreme Court noted the uniqueness of Nova Scotia’s *FOIPOP* in that it is intended to give the public greater access to information than in other Canadian jurisdictions:

[55] In summary, not only is the Nova Scotia legislation unique in Canada as being the only Act that defines its purpose as an obligation to ensure that public bodies are fully accountable to the public; so too does it stand apart in that in no other province is there anything like s. 2(b). As noted earlier, 2(b) gives further expression to the purpose of the Nova Scotia statute that being:

- b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to
 - (i) facilitate informed public participation in policy formulation,
 - (ii) ensure fairness in government decision-making,
 - (iii) permit the airing and reconciliation of divergent views.¹⁵

[56] Thus the *FOIPOP* Act in Nova Scotia is the only statute in Canada declaring as its purpose an obligation both to ensure that public bodies are fully accountable and to provide for the disclosure of all government information subject only to “necessary exemptions that are limited and specific”.

[57] I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada. Nova Scotia’s lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation; ensure fairness in government decision making; and

¹⁴ *NS Review Report 18-02, Department of Community Services (Re)*, [2018 NSOIPC 2 \(CanLII\)](#).

¹⁵ *O’Connor v. Nova Scotia*, [2001 NSCA 132 \(CanLII\)](#), at para. 55.

permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives.¹⁶

Step 1: Would disclosing the information reveal advice, recommendations or draft regulations¹⁷ developed by or for a public body or a minister?

[18] Recommendations include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.¹⁸ Advice must have a distinct meaning from “recommendations”¹⁹ 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 the public servant does not include a specific recommendation on which option to take.²⁰ 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.”²¹

[19] In *BC Order F17-08*,²² an adjudicator found that statistical figures compiled and selected by an expert using her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body in a draft report was information that qualified under the advice or recommendations exemption. The adjudicator accepted evidence that the author was an expert, and that the information was factual and integral to the analysis set out in the report. In contrast, the adjudicator did not find that statistical information in the beginning of the report qualified for the exemption because its purpose was to provide a snapshot of current conditions to set up the discussion of the expert’s investigation, findings and recommendations. The adjudicator found that its disclosure would not enable the drawing of accurate inferences of the expert’s recommendations.²³

[20] In my view, the majority of the information contained in the responsive record is factual as opposed to evaluative. It is objective information. If it were disclosed, a reader could not deduce accurate inferences as to the nature of the actual advice or recommendations. However, there are three exceptions to this.

[21] There are three portions of the Report that I find meet the criteria for Step 1 of the test in that their disclosure could reveal advice or recommendations:

1. The first two sentences of the severed section on page 1.
2. The last sentence of the “General Terrain” section on page 2.
3. The last sentence of the “Hazards, Legal issues, and Environment Concerns” section on page 3.

¹⁶ *O'Connor v. Nova Scotia*, [2001 NSCA 132 \(CanLII\)](#), at paras. 55-57.

¹⁷ Draft regulations were not at issue in this report.

¹⁸ *John Doe v. Ontario (Finance)*, [2014 SCC 36 \(CanLII\)](#), [2014] 2 SCR 3, at para. 23.

¹⁹ *John Doe v. Ontario (Finance)*, [2014 SCC 36 \(CanLII\)](#), [2014] 2 SCR 3, at para. 24.

²⁰ *ON Order PO-3714, Ontario (Municipal Affairs and Housing) (Re)*, [2017 CanLII 21451 \(ON IPC\)](#), at para. 30.

²¹ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, [2002 BCCA 665 \(CanLII\)](#), at para. 113.

²² *BC Order F17-08, British Columbia (Public Safety and Solicitor General)*, [2017 BCIPC 9 \(CanLII\)](#), at paras. 17-19.

²³ *BC Order F17-08, British Columbia (Public Safety and Solicitor General)*, [2017 BCIPC 9 \(CanLII\)](#), at para. 20.

[22] These portions of the Report contain opinions, including opinions on matters of fact.

[23] I find that only the three portions described above in paragraph 21 qualify as advice or recommendations.

[24] My analysis of Step 2 will continue only with respect to these three portions of the Report.

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)?

[25] Section 14(2) of *FOIPOP* explains that even if the information constitutes advice, recommendations or draft regulations developed by or for a public body or minister, it cannot be withheld if it is “background information”.

[26] “Background information” is defined in an enumerated list in s. 3(1)(a) of *FOIPOP* and includes things like factual material. “Factual material” means, “a coherent body of facts, separate and distinct from interpretations of, reactions to or advice and recommendations in respect of facts.”²⁴

[27] Background information also includes “a feasibility or technical study, including a cost estimate, relating to a policy or project of a public body.”²⁵ A “feasibility study” means, “a study, the fundamental purpose of which is to advise a public body on the practicability of a specific proposed project, that includes an evaluation of whether the project, or specific proposals for that project, are capable of being accomplished with a reasonable assurance of success and in accordance with established standards including specified financial limits.”²⁶

[28] In terms of whether the information redacted meets the definition of background information in s. 3(1)(a) of *FOIPOP*, the applicant argued that while there may be advice or recommendations in the Report, they would be based on background information and that background information should be disclosed. She thought that a description of the geology of each site would be background information, even if that description was the basis for accepting or rejecting a site. For example, she speculated that if a site had a hill, knowledge of the hill should be considered as background information.

[29] The public body argued that the severed information is not background information within the meaning of *FOIPOP*, although its representations appear to speak only to the cost information contained in the Report. It said that while costs could usually be considered as background information, these were high-level estimates produced as part of the decision-making process to evaluate the best value for the options considered. The costs were not final itemized costs, but rather a list of potentially extra costs on top of building the school that would have to be considered, such as running power lines, sewer, roads, etc.

²⁴ *FOIPOP Regulations*, NS Reg 105/94, s. 24(1).

²⁵ *FOIPOP*, s. 3(1)(a)(ix).

²⁶ *FOIPOP Regulations*, NS Reg 105/94, s. 24(6).

[30] There is no analysis or advice with respect to the cost estimates in the Report; they are presented as just that – cost estimates. The withheld information is more akin to an evaluation of whether the proposed sites are capable of being accomplished in accordance with the standards established by the Minister.

[31] I find that the withheld information in the portions specified above (paragraph 21) constitutes background information and so cannot be withheld pursuant to s. 14(2) of *FOIPOP*.

[32] Because I have found that the information cannot be withheld under s. 14, there is no need for me to complete the third step of the test.

2. Was the public body authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia?

[33] In addition to s. 14, the public body also relied on s. 17(1) to withhold information on the responsive record. For the reasons set out below, I find that the public body failed to discharge its burden of establishing that s. 17 applies to the withheld information.

[34] Section 17 gives the public body discretion to withhold information that 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. It then lists a number of subsections that identify specific categories of information that can be withheld, without restricting the generality of that list. In this case, the public body did not cite a subsection but rather relied solely on s. 17(1) of *FOIPOP*.

[35] Harms-based exemptions, like s. 17, require a reasoned assessment of the future risk of harm. The leading case in Canada²⁷ 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.²⁸

[36] The public body's argument for relying on s. 17(1) was that releasing the severed information would be harmful to the Government's financial interests because the site for the school had not yet been finalized and therefore if the land was required to be purchased, release of the requested record could affect the purchase price. It also said that releasing the information on the different sites could affect the Government's ability to negotiate the best deal to build the new school.

²⁷ *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.

²⁸ *NS Review Report 18-11, Department of Transportation and Infrastructure Renewal (Re)*, [2018 NSOIPC 11 \(CanLII\)](#), at para. 34.

[37] It is unclear to me how releasing the requested record could affect the purchase price or the Government's ability to negotiate the best deal. Simply stating that release of the information could impact negotiations without saying how does not establish evidence well beyond or considerably above a mere possibility of harm.

[38] As such, I find that the public body has not established that s. 17 applies to the withheld information.

FINDINGS & RECOMMENDATIONS:

[39] I find that:

1. Section 14 does not apply to the withheld portions of the Report.
2. Section 17(1) does not apply to the withheld portions of the Report.

[40] I recommend that the public body disclose the information severed under s. 14 and s. 17(1) within 45 days of the date of this review report.

November 1, 2022

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia