



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

REVIEW REPORT 23-01

January 17, 2023

Department of Fisheries and Aquaculture

Summary: The applicant requested internal records related to a license/lease application that was submitted by a third party to the Department of Fisheries and Aquaculture (public body). The public body relied on s. 17(1)(d) of the *Freedom of Information and Protection of Privacy Act* (financial or economic interests) to withhold the requested records in full. The Commissioner finds that the public body did not meet its burden of establishing that s. 17(1)(d) applies and recommends that the public body release the records after removing the information that the applicant is not interested in and the personal information of third parties.

INTRODUCTION:

[1] In early 2020, a private organization (third party) submitted an aquaculture licence/lease application for commercial operations in Nova Scotia (third party's licence/lease application), to the Department of Fisheries and Aquaculture (public body).

Background on the adjudicative process for aquaculture licence and lease applications

[2] The Government of Nova Scotia has an established three-phase process for responding to aquaculture licence and lease applications.¹

[3] In phase one (proponent scoping phase), there are two steps. First, the organization requesting the license or lease submits a request to the public body to lease a particular area it would like to develop. If the public body approves this request, the organization proceeds to step 2 wherein it has up to six months to explore the proposed location and submit an application to the public body. During this step, the organization must share information with local stakeholders, by holding at least one public meeting, and gather information about the area it proposes to develop.

[4] In phase two (review phase), step one requires the organization to submit an application to the public body. The application must contain an application form, a development plan and a scoping report that includes the results of the information collected in phase one. In the second

¹ Department of Fisheries and Aquaculture, *Adjudicative Process for Aquaculture Licence and Lease Applications* (undated), online: Province of Nova Scotia <<https://novascotia.ca/fish/aquaculture/licensing-leasing/Aqua-Licensing-and-Leasing-Overview.pdf>>.

step of phase two, the public body reviews all this information, shares it with necessary federal and provincial departments for their input, and engages in consultations with First Nations depending on the circumstances. The public body then submits the completed application to the Nova Scotia Aquaculture Review Board (ARB).

[5] In phase three (decision phase), the ARB holds a public hearing on the application and then makes a decision to approve (with or without conditions) or reject the application. The public body then implements the decision of the ARB.

[6] In accordance with its policy to promote public involvement in the aquaculture license and lease process, the public body routinely posts information about license and lease applications on its website.²

The access request

[7] In this case, following the publication of the third party's application,³ the applicant made a request for information (access request) to the public body for internal communications and other documents regarding the third party's license/lease application.

[8] In response, the public body located 1840 pages of responsive records consisting of email messages, letters, reports, agendas and meeting minutes but withheld them in full based on s. 17(1)(d) of the *Freedom of Information and Protection of Privacy Act (FOIPOP)*. The public body explained that it was withholding the records because the ARB had yet to render its decision on the third party's license/lease application.

[9] The applicant objected to the severing the public body applied and filed a request for review with this office, the Office of the Information and Privacy Commissioner (OIPC). Attempts at informal resolution were not successful and so this file proceeded to this public review report.

ISSUE:

[10] 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

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

² Department of Fisheries and Aquaculture, *Proponent's Guide to Scoping* (November 2020), online: https://novascotia.ca/fish/aquaculture/licensing-leasing/Scoping_Guide.pdf.

³ Department of Fisheries and Aquaculture, *Information for the Public* (undated), online: <https://novascotia.ca/fish/aquaculture/public-information/>.

⁴ *Freedom of Information and Protection of Privacy Act (FOIPOP)*, [SNS 1993, c 5](#), s. 45.

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?

[12] The public body relied on s. 17(1)(d) to withhold information on the responsive records. For the reasons set out below, I find that the public body did not meet its burden of establishing that s. 17(1)(d) applied to the withheld information.

[13] Section 17(1)(d) is set out as:

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which 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 and, without restricting the generality of the foregoing, may refuse to disclose the following information:

...
(d) information the disclosure of which 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.

[14] In order to rely on s. 17(1), the public body must establish that the disclosure of the withheld information could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia. Section 17 provides that such harm may arise from the non-exhaustive list of enumerated circumstances set out in ss. 17(1)(a) to (e).

[15] Numerous cases from the OIPC⁵ and from other jurisdictions discussing the equivalent statutory provisions⁶ have explained that subsections 17(1)(a) to (e) are not to be interpreted as stand-alone provisions. What this means is that even if the requested information fits within one or more of those subsections, that alone is not enough to justify withholding the requested information. The public body must also demonstrate the harm described in the opening words of s. 17(1), which is that release of the information 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.

[16] In its representations, the public body provided some background. It explained that at the time of the access request, the third party's licence/lease application had not yet been submitted to or assessed by the ARB. The public body said that it is the ARB's role to issue a decision regarding the licence/lease application. It said that the ARB process allows for transparency and public engagement and that release of the full details of the project in advance of the ARB's review and decision would amount to a premature disclosure of a proposal or project and create a risk of undue financial loss or gain to third parties. The public body also said that the ARB's decision would impact third parties and would impact the public body's ability to exercise its mandate to ensure the sustainable growth of the aquaculture industry.

⁵ See for example, *NS Review Report 18-11, Department of Transportation and Infrastructure Renewal (Re)*, [2018 NSOIPC 11 \(CanLII\)](#), at paras. 33 and 50.

⁶ See for example, *Burnaby (City) (Re)*, [2022 BCIPC 50 \(CanLII\)](#), at para. 10.

[17] Because the third party's licence/lease application was in the adjudicative phase of the process for aquaculture licence and lease applications at the time of the applicant's access to information request, the public body's concern was that release of the requested information could result in the premature disclosure of a proposal or project.

[18] My concern with the public body's arguments is that it has not met its burden of demonstrating that release of the information 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. This is the central element of the test that must be met. The list of enumerated circumstances set out in the subsections act as examples of scenarios for when the test criteria may be present. The only thing the public body said regarding harm was that disclosure would impact its ability to exercise its mandate to ensure the sustainable growth of the aquaculture industry. But it never explained to me how this is so.

[19] It is important to remember that harms-based exemptions such as s. 17 require a reasoned assessment of the future risk of harm. The leading case in Canada⁷ 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.⁸

[20] In this case, the public body has only vaguely asserted harm. The public body has not met the threshold of providing evidence that is well beyond or considerably above a mere possibility of harm. A statement that release of the records would impact the public body's ability to exercise its mandate to ensure the sustainable growth of the aquaculture industry is not enough to establish that releasing the requested information 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. Much more is needed. How and why would the release impact the public body's ability to exercise its mandate to ensure the sustainable growth of the aquaculture industry? The public body simply has not met its burden.

[21] As such, I find that the public body has not met the threshold for exemption under s. 17(1)(d).

Information of other third parties/personal information

[22] The applicant confirmed that they are not asking for, nor interested in, any information regarding other third parties, including other licence/lease applicants or applications. Additionally, albeit infrequently, there is personal information on the records that falls under s.

⁷ *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. 28-29. 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.

⁸ *Nova Scotia Review Report 18-11, Department of Transportation and Infrastructure Renewal (Re)*, 2018 NSOIPC 11 (CanLII), at para. 34.

20 of *FOIPOP*, which is a mandatory exemption. Again, the applicant confirmed they are not interested in this information. My recommendation is drafted to reflect this.

FINDING & RECOMMENDATION:

[23] I find that section 17(1)(d) does not apply to the withheld records.

[24] I recommend that the public body sever from the records the personal and business information of third parties that are not the subject of the applicant's access request and then disclose the remaining information severed under s. 17(1)(d) to the applicant within 45 days of the date of this review report.

January 17, 2023

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

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