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

REVIEW REPORT 23-05

July 26, 2023

Halifax Regional Water Commission

Summary: The applicant requested records relating to a planned subdivision from the Halifax Regional Water Commission (municipal body). The municipal body gave the applicant a responsive package of records but redacted the majority of the information within it pursuant to s. 476 (solicitor-client privilege) of *Part XX* of the *Municipal Government Act* (*MGA*). The Commissioner finds that the municipal body has failed to meet its burden to establish that the information on the records is subject to the solicitor-client privilege exemption (litigation privilege) and so recommends it be disclosed. The applicant also believed that the response package was missing records and asked the Office of the Information and Privacy Commissioner to review the municipal body's search efforts. The Commissioner finds that the applicant has not provided sufficient evidence that additional records exist and so concludes that the municipal body has conducted an adequate search as required by s. 467(1)(a) of the *MGA*. She recommends the municipal body take no further action with respect to searching for records in response to the applicant's access to information request.

INTRODUCTION:

[1] The applicant requested all records from the Halifax Regional Water Commission (municipal body)[1] related to a named subdivision that referenced a specified premises identification number (PID number) and/or the applicant and/or another named individual for a defined period. The municipal body provided the applicant with a package of responsive records (response package) with information redacted pursuant to several exemptions set out in *Part XX* of the *Municipal Government Act* (*MGA*). During the Office of the Information and Privacy Commissioner's (OIPC) review process, the municipal body's use of some of those exemptions was informally resolved such that the only exemption still at issue in this review is the municipal body's application of s. 476 (solicitor-client privilege) of the *MGA* to withhold the majority of 17 pages from the applicant (one email was released to the applicant in the response package she received).

[1] *MGA*, s. 461(d).

[2] In addition, the applicant also believed that the response package was missing a variety of records and so asked the OIPC to review the municipal body's search efforts.

ISSUES:

[3] There are two issues under review:

1. Was the municipal body authorized to refuse access to information under s. 476 of the *MGA* because it is subject to solicitor-client privilege?
2. Did the municipal body meet its duty to assist the applicant by conducting an adequate search, as required by s. 467(1)(a) of the *MGA*?

DISCUSSION:

Burden of proof

[4] The municipal body bears the burden of proving that the applicant has no right of access to a record or part of a record with regard to its application of s. 476.[2]

[5] With respect to the duty to assist set out in s. 467, the *MGA* is silent as to who bears the burden of proof. Therefore, both parties must each submit arguments and evidence in support of their positions.[3]

[6] The OIPC has described the efforts that each party should make when the issue under review is whether a public body conducted an adequate search for the records requested in multiple recent review reports.[4] I adopt this analysis but will not repeat the description here.

1. Was the municipal body authorized to refuse access to information under s. 476 of the *MGA* because it is subject to solicitor-client privilege?

[7] The municipal body relied on s. 476 to redact the majority of 17 pages in the response package provided to the applicant. This section gives the municipal body discretion to withhold information if the information is subject to solicitor-client privilege. For the reasons set out below, I find that the municipal body failed to meet its burden of establishing that the redacted information can be withheld under s. 476 of the *MGA*.

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[2] *MGA*, s. 498.

[3] *NS Review Report FI-11-76, Nova Scotia (Community Services) (Re),* 2014 CanLII 71241 (NS FOIPOP), at para. 10. Note that while the review reports discussed under this heading predominantly refer to interpretation of the duty to assist in s. 7(1)(a) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*), the requirements are the same as those set out in s. 467(1)(a) of the *MGA*. As such, the same analysis applies for both statutes.

[4] For example, *NS Review Report 23-04, Nova Scotia (Community Services) (Re)*, 2023 NSOIPC 5 (CanLII), *NS Review Report 23-03, Chignecto Central Regional Centre for Education (Re),* 2023 NSOIPC 4 (CanLII), and *NS Review Report 23-02, South Shore Regional Centre for Education (Re),* 2023 NSOIPC 3 (CanLII). The expected efforts are the same whether a party is a public body under the *Freedom of Information and Protection of Privacy Act* or a municipal body under the *MGA*.

[8] In a 2006 case called *Blank v. Canada (Minister of Justice)* (*Blank*),[5] the Supreme Court of Canada (SCC) delved into the types of privilege encompassed by the solicitor-client privilege exemption in s. 23 of the federal *Access to Information Act*,[6] which states:

> 23 The head of a government institution may refuse to disclose any record requested under this Part that contains information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege.

[9] In comparison, Nova Scotia's *MGA* similarly gives a municipal body discretion to withhold information that is "subject to solicitor-client privilege":

> 476 The responsible officer may refuse to disclose to an applicant information that is subject to solicitor-client privilege.

[10] In *Blank*, the SCC explained that although the exemption refers only to "solicitor-client privilege", it encompasses both legal advice privilege and litigation privilege.[7] Accordingly, Nova Scotia's exemption for solicitor-client privilege encompasses two types of privilege found at common law: legal advice privilege and litigation privilege.[8] The SCC explained:

> 28 R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:
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> > It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
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> > Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-

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[5] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), [2006] 2 SCR 319.
[6] *Access to Information Act*, RSC 1985, c A-1.
[7] *Blank* at paras. 1, 3-7.
[8] *NS Review Report FI-10-71*, *Nova Scotia (Department of Justice) (Re)*, 2015 CanLII 60916 (NS FOIPOP), at para. 15. The principle that both branches of solicitor-client privilege are encompassed in the solicitor-client privilege exemption also applies in British Columbia: *BC Order F22-49*, *British Columbia Human Rights Tribunal (Re)*, 2022 BCIPC 56 (CanLII), at para. 8.

> client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).
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> ("Claiming Privilege in the Discovery Process", in Special Lectures of the Law Society of Upper Canada (1984), 163, at pp. 164-65).[9]

[11] Given the major differences between legal advice privilege and litigation privilege, each type of privilege has its own test.[10] In *Goodis v. Ontario (Ministry of Correctional Services)*,[11] the SCC explained that the same test for determining whether or not to disclose privileged materials in the normal course also applies in the freedom of information context.

[12] 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.[12]

[13] In contrast, to invoke litigation privilege, the party claiming privilege must establish that:

1. Litigation was ongoing or was reasonably contemplated at the time the document was created; and
2. The dominant purpose of creating the document was to prepare for that litigation.[13]

[14] The purpose of litigation privilege is to create a "'zone of privacy' in relation to pending or apprehended litigation."[14] It protects documents and communications made for the dominant purpose of litigation from disclosure and can extend beyond the solicitor-client relationship to communications with a third party.[15] Once the litigation ends, so does the privilege, unless related litigation is ongoing or reasonably apprehended.[16]

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[9] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), [2006] 2 SCR 319, at para. 28.
[10] *BC Order F08-19, Insurance Corporation of British Columbia (Re)*, 2008 CanLII 66913 (BC IPC), at para. 17.
[11] *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 (CanLII), [2006] 2 SCR 32.
[12] This test has consistently been applied in solicitor-client privilege analyses by this office. The exemption is the same under both *FOIPOP* and the *MGA*. 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.
[13] *BC Order F22-49, British Columbia Human Rights Tribunal (Re)*, 2022 BCIPC 56 (CanLII), at para. 10.
[14] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), [2006] 2 SCR 319, at para. 34.
[15] *BC Order F18-17, Parksville (City) (Re)*, 2018 BCIPC 20 (CanLII), at para. 10.
[16] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), [2006] 2 SCR 319, at paras. 34-39.

[15] In its representations, the municipal body did not specify exactly which type of privilege it was relying on, nor did it set out how it met either test. Instead, the municipal body gave me information on its structure and its relationship to Halifax Regional Municipality (HRM). It explained how it provides water, wastewater and stormwater services to customers. It said that as per the *Halifax Regional Water Commission Act*,[17] it is owned by HRM and that in essence, it is a subsidiary corporation of HRM. The municipal body noted that while it is legally a separate entity from HRM, the two entities necessarily function hand-in-hand in many of their operations. The municipal body said that many of its responsibilities were recently transferred from HRM to it and day-to-day-cooperation between the two entities is necessary to provide water and other municipal services to Halifax residents.

[16] The municipal body explained that with regard to this particular case, both it and HRM were defending a range of claims brought by the applicant. The municipal body said that given the nature of the applicant's claims and the nature of its relationship with HRM, it collaborated on this endeavor with HRM and so shared a common interest with HRM in the records over which privilege was claimed.

[17] The municipal body explained that while a privileged record may have originated with HRM, it remains privileged in the hands of the municipal body where it was shared for a common purpose and that in this case, the common purpose was for the two entities to defend themselves against claims made by the applicant. It said the records redacted in this case represent consultations and negotiations that were taking place among stakeholders regarding the settlement of legal claims brought by the applicant and that all entities had a common interest in defending and settling the claims. It said that as a result, solicitor-client privilege was properly claimed over these records.

[18] These representations led me to believe that the municipal body was relying on litigation privilege, but it had not specified that, nor explained how the information on the records fit within the litigation privilege test. At this point it is important to remember that it is the municipal body's burden to prove that the applicant has no right of access to the requested information on the records.[18] Normally with a discretionary exemption (which s. 476 is), if a municipal body does not supply sufficient evidence to meet its burden, then the burden is not met and I would recommend the records be disclosed. However, in this case, I am mindful that the topic of solicitor-client privilege in the freedom of information realm is quite contentious and has been extensively canvassed in review reports and case law across this country. I am aware that despite being a discretionary exemption, courts and some information commissioners have held that the solicitor-client exemption is all but absolute in recognition of the significant public interest in maintaining the solicitor-client relationship.[19] I am also mindful that in *Sable Offshore Energy Project v. Ameron International Corporation*, the Nova Scotia Court of Appeal said in reviewing the chambers judge's conclusion that there was insufficient evidence to establish when

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[17] *Halifax Regional Water Commission Act*, SNS 2007, c 55.
[18] *MGA*, s. 498(1).
[19] See for example, *PEI Order No. FI-17-0004, Public Schools Branch (Re)*, 2017 CanLII 19225 (PE IPC), at para. 15; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 SCR 815, at para. 53

the litigious dispute arose, that instead of rendering an order to permit disclosure of documentation that has been established as privileged, the chambers judge should have "…considered other options…."[20]

[19] That is why, for this review, when I realized that the representations provided by the municipal body were insufficient to establish privilege, I took the uncommon step of providing the municipal body with a second opportunity to provide representations to me. I also outlined the tests it needed to meet and the information it needed to supply to meet those tests. Even though the municipal body had been informed at numerous stages throughout the OIPC review process that it is the municipal body's burden to supply sufficient evidence, I also again reminded the municipal body that it was its responsibility to present evidence to substantiate its application of s. 476 to withhold portions of the requested records.

[20] In response, the municipal body declined to answer my question about which branch of the solicitor-client test it was relying on (legal advice or litigation privilege), nor would it provide information to satisfy either test. The municipal body said that it had consulted with HRM and HRM asserted that the records were privileged. The municipal body said that HRM did not offer to waive privilege. The municipal body told me that HRM would be in a much better position to provide me with the details of the solicitor-client and/or litigation privilege it asserted. It also noted that the applicant is a "serial litigant"[21] so it thought that litigation may reasonably be contemplated in connection with all interactions with the applicant. The municipal body again explained its position that both it and HRM were defending a range of claims brought by the applicant. It said the records were shared by HRM with it for the common purpose of defending themselves against claims made by the applicant.

[21] In a nutshell then, the municipal body reiterated that its rationale for withholding the requested information was that it had a common interest in the matter with HRM to defend against a range of claims brought by the applicant but would not outright say it was relying on litigation privilege nor provide me with details of the litigation contemplated at the time the records were drafted. Instead, it pointed to me common interest privilege.

[22] Although it has often been described as "common interest privilege", this term is a bit of a misnomer as common interest is not a type of privilege but rather an exception to the general rules regarding waiver of privilege:

> What is sometimes referred to as a Common Interest Privilege is properly understood as an exception to the rules of waiver for solicitor-client privilege and litigation privilege. It applies where separately represented parties share a common interest in the outcome of litigation or possibly in some other matter. In such circumstances, the parties may share privileged information without losing solicitor-client privilege.[22]

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[20] *Sable Offshore Energy Project v. Ameron International Corporation*, 2015 NSCA 8 (CanLII), at para. 79.
[21] This was the term used by the municipal body.
[22] Adam Dodek, *Solicitor-client Privilege*, (Markham: LexisNexis Canada, 2014), at p. 25, *Sable Offshore Energy Inc. v. Ameron International*, 2013 NSSC 131 (CanLII), at para. 115.

[23] Generally, disclosure to outsiders of privileged information constitutes a waiver of the privilege. However, the common interest exception to waiver allows parties with interests in common to share certain privileged information without waiving their privilege.[23]

[24] In the United States, common interest privilege only applies in the litigation context. In Canada, while this exception is largely also discussed only in the litigation context, some courts have recognized its application beyond litigation matters; however, its scope is uncertain.[24] Either way, "The issue of waiver only arises in circumstances where communications are already determined to be privileged."[25] As stated by the Nova Scotia Court of Appeal, "The correct approach is to direct that only where it is clearly established that the documents were exchanged in furtherance of a joint interest against a third party, *and the documents were also otherwise privileged*, does a common interest privilege arise" (emphasis added).[26] Thus, in order to rely on the common interest exception to waiver, the municipal body must also convince me that the redacted information on the records is privileged.

[25] While the municipal body declined to answer my question about whether the records were redacted under legal advice privilege or litigation privilege, its representations all center around its position that it had a common purpose with HRM in defending itself from some kind of claims made by the applicant. Furthermore, I have the benefit of having reviewed the withheld information on the records. It is clear to me that at the time the records were drafted in 2014, some kind of litigation was ongoing or reasonably contemplated in regard to the applicant. What I don't know and what the municipal body will not give me any information on is the municipal body's role in that litigation. What was its common interest with HRM in regard to this particular litigation?

[26] When I wrote to the municipal body to give it a second chance to meet its burden, I explained that I needed more information on how it satisfied the various aspects of the tests for whichever privilege it was relying on. Specifically with regard to the litigation privilege test, I explained that I needed more information from the municipal body about the circumstances surrounding the litigation. I reminded the municipal body that it is its responsibility to present evidence as required by the test, including but not limited to establishing what litigation was ongoing or reasonably contemplated, whether that litigation was concluded at the time the applicant made her access request, and what the dominant purpose of the litigation was. I explained to the municipal body that the applicant herself had told me that she was unsure what claims it was referring to. She said that in 2014 she was a defendant in a case that she says was filed by a third party, but that lawsuit was ultimately settled or abandoned.

[27] A key concern I have with the municipal body's apparent reliance on litigation privilege is that the access request was made in 2018, four years after the date of the records at issue. Remember that once the litigation ends, so does the privilege, unless related litigation is ongoing or reasonably apprehended. As the Supreme Court of Canada explained in *Blank*, litigation

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[23] Adam Dodek, *Solicitor-client Privilege*, (Markham: LexisNexis Canada, 2014), at p. 247.
[24] Adam Dodek, *Solicitor-client Privilege*, (Markham: LexisNexis Canada, 2014), at p. 416. See for example *BC Order F15-61, Victoria Police Department (Re),* 2015 BCIPC 67 (CanLII).
[25] Adam Dodek, *Solicitor-client Privilege*, (Markham: LexisNexis Canada, 2014), at p. 189.
[26] *Sable Offshore Energy Project v. Ameron International Corporation*, 2015 NSCA 8 (CanLII), at para. 69.

cannot be said to be concluded "…where litigants or related parties remain locked in what is essentially the same legal combat."[27] Thus, litigation privilege remains even if the specific litigation that gave rise to the privilege has ended but related litigation may reasonably be apprehended. As set out above, in terms of whether litigation is ongoing or reasonably apprehended, the municipal body argued that the applicant is what it termed a "serial litigant" so it thought that litigation could reasonably be contemplated in connection with all interactions with the applicant. It listed four court cases about an access request the applicant had made to HRM as support for this proposition.

[28] In *Sable Offshore Energy Project v. Ameron International Corporation*, the chambers judge found that counsel's affidavit saying that litigation seemed likely was not sufficient to establish that litigation privilege applied. On appeal, the appellants argued that the chambers judge erred in not accepting unrefuted evidence of counsel that litigation was reasonably contemplated. The Nova Scotia Court of Appeal rejected the appellant's assertion and said, "With respect, the fact that an affiant is not challenged, does not require a trier of fact to accept their evidence or the submitted interpretation of their evidence. The trier of fact is entitled to accept some, all, or none of the evidence offered by a particular witness."[28] I am in a somewhat similar boat here. All I have before me is some limited knowledge from the records and from the applicant that there appeared to be litigation between the applicant and possibly a third party and possibly HRM (I am not entirely sure) and vague assertions from the municipal body that it had a common purpose in defending against those claims with no specificity as to its role in that regard.

[29] It is easy to imagine that the municipal body and HRM would frequently have a common interest in defending legal claims where issues within both of their mandates arise. While HRM and the municipal body are likely to share a common interest when legal claims arise that address both the municipal body's and HRM's mandate issues, there will also likely be times that legal claims are directed solely at HRM and not the municipal body and vice versa. Regardless, privilege must be assessed on a case-by-case basis, particularly when in-house or government lawyer records are at issue (as is the case for this review) because such lawyers may be called upon to give policy advice, which is not legal advice.[29]

[30] For this review, the municipal body would not tell me what the litigation was that was at issue, what its common interest in the litigation was in this particular case, whether the litigation was over when the applicant made her access request, whether the dominant purpose of the particular records at issue was to prepare for litigation, or any information about the relationship between the lawyer and the other parties addressed in the withheld information on the responsive records. Without more context, I cannot deduce from the records why the records were shared with the municipal body in this particular case in a manner that did not serve to waive privilege.

[31] There is simply insufficient evidence to establish that litigation privilege applies to the redacted information on these records due to the municipal body's lack of submitted evidence. It is not enough to defer this matter off to HRM. It is the municipal body who applied s. 476 to

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[27] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), [2006] 2 SCR 319, at paras. 34-39.
[28] *Sable Offshore Energy Project v. Ameron International Corporation*, 2015 NSCA 8 (CanLII), at paras. 72-74.
[29] *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 (CanLII), [2004] 1 SCR 809.

withhold information on these records. It is the municipal body's burden to meet. It has been reminded of that repeatedly and yet it has not provided me with sufficient evidence to meet its burden. Having a common interest in some litigation matter would require the municipal body to be knowledgeable enough about the litigation that it could explain its common interest with regard to it.

[32] As such, I find that the municipal body has not met its burden to establish that solicitor-client privilege (and more specifically litigation privilege) applies to the records redacted pursuant to s. 476 and therefore the records are no longer shielded from disclosure under the *MGA*.

2. Did the municipal body meet its duty to assist the applicant by conducting an adequate search as required by s. 467(1)(a) of the *MGA*?

[33] For the reasons set out below, I find that the applicant has not met her burden to provide a reasonable basis to show that the records she believed were missing from the response package exist. Therefore, I also find that the municipal body's search efforts were reasonable.

[34] The requirement to conduct an adequate search arises out of the duty to assist provision in s. 467(1)(a) of the *MGA*, which states:

> 467 (1) Where a request is made pursuant to this Part for access to a record, the responsible officer shall
>
> (a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely;

[35] The applicant noted several documents she believed were missing from the municipal body's response package. She provided details on why she believed documents were missing and the municipal body provided information to explain why it does not have the requested documents.

[36] Before providing information about why it did not have the requested records, the municipal body first conducted an additional search for the records the applicant believed were missing and found two additional responsive records not originally provided to the applicant. In terms of its search approach, the municipal body provided sufficient details on the names and positions of those who performed the additional search. It clarified that the search terms provided to those searching were spelled correctly as there had been some concern that the search terms used contained grammatical errors. The municipal body's Information Systems Department also conducted a search of all of the municipal body's network servers and Outlook accounts.

[37] The municipal body explained that some of the requested records were for documents generated and managed within the development/permit approval process, which is a process it does not administer. The municipal body explained that while it may be consulted during that process, it is only provided with such information and documents that are needed to conduct its review and provide comments to HRM. It only retains documents related to any comments it provides to HRM, which it did not do in this case.

[38] Other records requested by the applicant were land-related documents. The municipal body explained that land-related documents are managed and maintained by HRM's Land Registration Office. The municipal body does not maintain copies of such records.

[39] The applicant asked for meeting notes from specified people. The municipal body explained that no such notes exist. While note-taking is encouraged, there is no legal duty to document in Nova Scotia.[30] The applicant also asked for notes from a specific councillor who sat on the Halifax Water Board of Commissioners. The Halifax Water Board of Commissioners includes four members of HRM Council appointed by Council, three residents of HRM who were appointed by Council and the chief administrative officer (CAO) of HRM or an HRM employee appointed by the CAO.[31] The notes requested by the applicant were those of an HRM councillor, appointed to the Halifax Water Board by HRM's Council. The municipal body explained that the appointed councillors do not have email accounts through the municipal body, nor do they have access to the municipal body's records systems.

[40] The applicant was also particularly interested in accessing a letter of credit. The municipal body explained that it does not issue letters of credit (they are issued by HRM). It further explained that the only aspect of a letter of credit that would be relevant to it is with regard to deficiencies. As there were no deficiencies related to the subdivision at issue, the municipal body did not need to generate records about deficiencies.

[41] Finally, the municipal body argued that some of the records thought to be missing by the applicant were in fact not responsive to the applicant's access request. I agree. Some of the records thought missing by the applicant were outside the parameters of her access request.

[42] In my view, the municipal body has provided sufficient evidence to demonstrate that it conducted an adequate search for the records the applicant believed were missing.

[43] In my view, the applicant has not met her burden of establishing that the municipal body has the records the applicant believed were missing from the response package in its custody or under its control. The municipal body has provided sufficient evidence to demonstrate that it conducted an adequate search for the records the applicant believed were missing.

FINDINGS & RECOMMENDATIONS:

[44] I find that:

1. The municipal body has not met its burden to establish that solicitor-client privilege (and more specifically litigation privilege) applies to the records redacted pursuant to s. 476 and therefore the records are no longer shielded from disclosure under the *MGA*.

[30] While the OIPC and its counterparts across the country have called for the duty to document to be included in access to information legislation (see *Statement of the Information and Privacy Commissioners of Canada on the Duty to Document* (March 2016), online: <https://oipc.novascotia.ca/sites/default/files/reports/22-07%202022%2002%2015%20Review%20Report_0.pdf>), there is currently no duty to document in *FOIPOP* or the *MGA*. The failure of a public body or municipality to document or to follow policy related to standards for how/what to document is not reviewable by the OIPC.
[31] *Halifax Regional Water Commission Act*, SNS 2007, c 55, c. 4(1).

2. The applicant has not met her burden to provide a reasonable basis to show that the records she believed were missing from the response package exist.
3. The municipal body's search efforts were reasonable.

[45] I recommend that the municipal body:

1. Disclose the information redacted from the records pursuant to s. 476 within 45 days of the date of this review report.
2. Take no further action with respect to searching for records in response to the applicant's access to information request.

July 26, 2023

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia