



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

**REVIEW REPORT 23-11**

**October 19, 2023**

**Dalhousie University**

**Summary:** The applicant requested records from Dalhousie University (public body) relating to various complaints. The public body redacted a small portion of the responsive records it said reveals advice or recommendations, as contemplated in s. 14 of the *Freedom of Information and Protection of Privacy Act*. The Commissioner finds that the public body appropriately applied s. 14 to the redacted information and lawfully exercised its discretion to redact it. The Commissioner recommends that the public body continue to withhold the information redacted under s. 14.

**INTRODUCTION:**

[1] In this case, the applicant sought records relating to complaints she made to a student organization. The applicant requested records from Dalhousie University (public body). She requested emails or written correspondence sent to or from a named public body employee that included her own name, the word “complaint”, the name of a student organization, or the name of a third party for a specified period of time. In response to her request, the public body disclosed almost all the content of 38 pages of responsive records but redacted roughly five sentences of an email contained within them. The public body argued that it lawfully exercised its discretion to redact information it said reflects advice or recommendations within the meaning of s. 14 of the *Freedom of Information and Protection of Privacy Act (FOIPOP)*. The applicant requested a review of the public body’s redactions, claiming that the redacted information should be released to her.

**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?

## DISCUSSION:

### Burden of proof

[3] The public body bears the burden of proving that the applicant has no right of access to a record or part of a record.<sup>1</sup>

### 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?

[4] The public body redacted roughly five sentences from the 38 pages of responsive records based on s. 14 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 applies to the withheld information.

[5] Under s. 14(1) of *FOIPOP*, 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.

[6] Former Commissioner Tully set out an in-depth analysis of the purpose, application and requirements of s. 14 in *NS Review Report 18-02*.<sup>2</sup> 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.

### ***Step 1: Would disclosing the information reveal advice, recommendations or draft regulations developed by or for a public body or a minister?***<sup>3</sup>

[7] The redacted information is contained within an otherwise disclosed email from the public body’s ombudsperson to a human resources and equity services employee of the public body.

[8] Recommendations include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.<sup>4</sup> Advice must have a distinct meaning from “recommendations”<sup>5</sup> 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.<sup>6</sup> Advice includes an

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<sup>1</sup> *FOIPOP*, s. 45.

<sup>2</sup> *NS Review Report 18-02, Department of Community Services (Re)*, [2018 NSOIPC 2 \(CanLII\)](#), at paras. 8-20.

<sup>3</sup> Draft regulations were not at issue in this review.

<sup>4</sup> *John Doe v. Ontario (Finance)*, [2014 SCC 36 \(CanLII\)](#), [2014] 2 SCR 3, at para. 23.

<sup>5</sup> *John Doe v. Ontario (Finance)*, [2014 SCC 36 \(CanLII\)](#), [2014] 2 SCR 3, at para. 24.

<sup>6</sup> *ON Order PO-3714, Ontario (Municipal Affairs and Housing) (Re)*, [2017 CanLII 21451 \(ON IPC\)](#), at para. 30.

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.”<sup>7</sup>

[9] In my view, the redacted information qualifies as advice and recommendations within the meaning of s. 14(1) of *FOIPOP*. It consists of opinions and suggested courses of action that involved exercising judgement and skill. As such, I find that the redacted information qualifies as advice and recommendations.

***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)?***

[10] 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”.

[11] “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.”<sup>8</sup>

[12] In my view, the redacted information is not background information. The public body disclosed all the information within the email at issue that is factual and thus would constitute as background information. Only information that squarely fits within the advice or recommendations criteria was redacted.

[13] Section 14(3) 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 the record has been in existence for five or more years. At the time the access request was made, the records had not been in existence for five or more years.<sup>9</sup>

[14] Section 14(4) of *FOIPOP* explains that nothing in s. 14 requires the disclosure of information that the public body may refuse to disclose pursuant to s. 13. Section 13 gives a public body discretion to withhold information that would reveal the substance of deliberations of the Executive Council. In this case, the public body was not withholding any information pursuant to s. 13. Section 14(4) is not at issue.

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

[15] The final stage on the application of s. 14 is to consider the public body’s exercise of discretion. Because s. 14 is a discretionary exemption, the public body must exercise its discretion to withhold information lawfully. The Commissioner may return the matter to the

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<sup>7</sup> *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, [2002 BCCA 665 \(CanLII\)](#), at para. 113.

<sup>8</sup> *FOIPOP Regulations*, NS Reg 105/94, s. 24(1).

<sup>9</sup> The records have now been in existence for more than five years but they were not yet in existence for five or more years at the time the Office of the Information and Privacy Commissioner initiated its investigation into this matter. Given that five years have now elapsed, the applicant may wish to file a new access request.

public body for reconsideration if she finds that the public body's discretion was exercised in bad faith, for an improper purpose or if the public body took into account irrelevant considerations or failed to take into account relevant considerations.<sup>10</sup> For the reasons set out below, I find that the public body lawfully exercised its discretion in this case.

[16] In its representations, the public body advanced four points in defence of its claim that it lawfully exercised its discretion in deciding to redact the information on the responsive records. First, the public body noted that the purpose of this exemption is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice, which it argued the ombudsperson did in this case.<sup>11</sup> Second, the public body argued that severing the information did not circumvent public participation in policy formations. Third, the public body said it was cognizant of s. 5(2) of *FOIPOP*. Section 5(2) explains that when information is exempted from disclosure, it should, when reasonable, be severed from the record with the remaining information released to the applicant. It said that it severed only the parts of the email that contain specific advice and applicable recommendations. Fourth, the public body said it also relied on historical applications of s. 14 in cases involving its records, with reference to *Denike v. Dalhousie University*.<sup>12</sup>

[17] In my view, the public body demonstrated that it lawfully exercised its discretion to redact the small portion of information it did from the responsive records. I see no reason to interfere with the public body's exercise of discretion.

## **FINDINGS & RECOMMENDATION:**

[18] I find that:

1. Section 14 applies to the redacted information and therefore the public body is not required to disclose it.
2. The public body lawfully exercised its discretion by contemplating relevant considerations.

[19] I recommend that the public body continue to withhold the redacted information under s. 14 of *FOIPOP*.

October 19, 2023

Tricia Ralph  
Information and Privacy Commissioner for Nova Scotia

OIPC File: 18-00323

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<sup>10</sup> *NS Review Report 18-09, Nova Scotia (Department of Justice) (Re)*, [2018 NSOIPC 9 \(CanLII\)](#), at paras. 20-25.

<sup>11</sup> This summary of purpose is frequently stated in decisions of adjudicators at the Office of the Information and Privacy Commissioner for British Columbia. For example, *BC Order F13-17, Victoria (City) (Re)*, [2013 BCIPC 22 \(CanLII\)](#), at para. 26. This office also relies on this summary of purpose.

<sup>12</sup> *Denike v. Dalhousie University*, [2018 NSSC 111 \(CanLII\)](#).