



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

REVIEW REPORT 23-12

October 19, 2023

Dalhousie University

Summary: The applicant requested records about herself from Dalhousie University (public body). The public body withheld the requested records in full, on the basis that the records were subject to solicitor-client privilege and so could be withheld under s. 16 of the *Freedom of Information and Protection of Privacy Act*. The Commissioner finds that the public body appropriately applied s. 16 to the responsive records and lawfully exercised its discretion to withhold them. The Commissioner recommends that the public body continue to withhold the records withheld under s. 16.

INTRODUCTION:

[1] The applicant requested records from Dalhousie University (public body). She requested emails or written materials received by a named public body employee from another public body employee or from others that included her own name, the word “complaints”, or the name of a student organization for a specified period of time.

[2] The public body withheld the responsive records in full on the basis that the requested information was subject to solicitor-client privilege. Section 16 of the *Freedom of Information and Protection of Privacy Act (FOIPOP)* gives public bodies discretion to withhold information that is subject to solicitor-client privilege.

ISSUE:

[3] Was the public body authorized to refuse access to information under s. 16 of *FOIPOP* because it is subject to solicitor-client privilege?

DISCUSSION:

Burden of proof

[4] The public body bears the burden of proving that the applicant has no right of access to a record or part of a record.¹

Was the public body authorized to refuse access to information under s. 16 of *FOIPOP* because it is subject to solicitor-client privilege?

[5] The public body relied on s. 16 of *FOIPOP* to withhold the records requested by the applicant in full. This section gives the public body discretion to withhold information if it is subject to solicitor-client privilege. For the reasons set out below, I find that s. 16 does apply to the withheld records and that the public body appropriately exercised its discretion in deciding to withhold them. As a result, I find the records can continue to be withheld under s. 16 of *FOIPOP*.

[6] Nova Scotia's exemption for solicitor-client privilege encompasses two types of privilege found at common law: legal advice privilege and litigation privilege. Because of the nature of the records in this case, I need only examine the application of legal advice privilege. The test for whether a public body can withhold information pursuant to s. 16 has been widely adopted and consistently applied in numerous review reports issued by this office. 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 their agent) and a legal advisor; and
4. The communication must be directly related to the seeking, formulating or giving of legal advice.²

[7] I have reviewed the entirety of the withheld records. One of the challenges with these types of reviews is that while I would like to give sufficient information so that the basis of my decision is clear, I am limited to how much information I can disclose. What I can say is that I am satisfied that the information on the withheld records meets all four elements of the test for legal advice privilege.

[8] The withheld records consist of written communications between public body senior officials and their legal counsel. The content of the records makes it clear that the communications were intended to be confidential. The content of the records demonstrates that the records were either directly related to the seeking, formulating and giving of legal advice, or formed part of the continuum of communication³ between legal counsel and client.

¹ *FOIPOP*, s. 45.

² This test has consistently been applied in solicitor-client privilege analyses by this office. 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.

³ For a discussion on the continuum of communication, see *NS Review Report FI-10-71, Nova Scotia (Justice) (Re)*, [2015 CanLII 60916 \(NS FOIPOP\)](#), at para. 18.

Exercise of discretion

[9] Although I have found that s. 16 applies to the withheld information, I must still go on to address the issue of exercising discretion. That is because s. 16 is a discretionary exemption. This means that the public body must exercise its discretion lawfully and the Commissioner may return the matter to the public body for reconsideration if the 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.⁴ For the reasons set out below, I find that the public body lawfully exercised its discretion in this case.

[10] The types of considerations that other information and privacy commissioners, as well as courts, have contemplated in relation to the exercise of discretion where solicitor-client privilege has been claimed are included in *NS Review Report 18-09*.⁵

[11] The public body said that it carefully assessed the considerations provided in *NS Review Report 18-09* when exercising its discretion to not release the withheld records to the applicant in this case. Specifically, it considered the purposes of *FOIPOP*, the purposes of the s. 16 exemption, and the historical practices of the public body with respect to the treatment of similar information.

[12] In *BC Order F18-38*,⁶ Adjudicator Cameron noted:

... as emphasized in Order F16-35, given “the importance of solicitor client privilege to the legal system, it is difficult to conceive of a situation where a public body – having established that records are protected by solicitor client privilege – could then be found to have improperly exercised its discretion to withhold information under s.14.” I see nothing that would warrant interfering with the Ministry’s decision to continue to assert privilege over the information it withheld pursuant to s. 14.

[13] The same is true in this case. I see nothing that would warrant interfering with the public body’s decision to continue to assert privilege over the information it withheld pursuant to s. 16.

FINDINGS & RECOMMENDATION:

[14] I find that:

1. Section 16 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.

⁴ *NS Review Report 18-09, Nova Scotia (Department of Justice) (Re)*, [2018 NSOIPC 9 \(CanLII\)](#), at paras. 20-25.

⁵ *NS Review Report 18-09, Nova Scotia (Department of Justice) (Re)*, [2018 NSOIPC 9 \(CanLII\)](#), at paras. 20-25.

⁶ *BC Order F18-38, British Columbia (Children and Family Development) (Re)*, [2018 BCIPC 41 \(CanLII\)](#), at para. 54.

[15] I recommend that the public body continue to withhold the redacted information withheld under s. 16 of *FOIPOP*.

October 19, 2023

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

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