



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

REVIEW REPORT 24-04

February 29, 2024

Halifax Regional Municipality

Summary: The applicant requested records relating to a complaint filed against a councillor of the Halifax Regional Municipality's (municipality) Regional Council. In response, the municipality severed a portion of the responsive records under s. 473 (minutes or substance of private deliberations), s. 476 (solicitor-client privilege) and s. 480 (personal information) of *Part XX* of the *Municipal Government Act*. The Commissioner finds that the municipality was authorized to withhold some, but not all the severed information under s. 473, and recommends all but names, dates and times continue to be withheld. The Commissioner finds that the municipality was not authorized to withhold some of the information it withheld under s. 476 and so recommends its disclosure. She finds some information must continue to be withheld under s. 480 but the remainder should not.

INTRODUCTION:

[1] The applicant asked for records from Halifax Regional Municipality (municipality). Specifically, the applicant asked for records relating to a complaint that was filed against a councillor of the municipality's Regional Council (Regional Council).

[2] In response, the municipality provided the applicant with 28 pages of responsive records. Nineteen of those pages were emails (emails).¹ The other nine pages made up the Regional Council's report regarding the complaint, including meeting minutes (report).² The municipality severed information on the responsive records pursuant to s. 473 (minutes or substance of private deliberations), s. 476 (solicitor-client privilege) and s. 480 (personal information) of *Part XX* of the *Municipal Government Act (MGA)*.³

[3] The applicant objected to the severing applied by the municipality and filed a request for review with the Office of the Information and Privacy Commissioner (OIPC). As the matter was not able to resolve informally, it proceeded to this review report.

¹ The emails are numbered as pages 1-19.

² The report is numbered as pages 1-9.

³ *Municipal Government Act*, [SNS 1998](#), c 18.

ISSUES:

[4] There are three issues under review:

1. Was the municipality authorized to refuse access to information under s. 473 of the *MGA* because disclosure of the information would disclose the minutes or substance of deliberations held in private?
2. Was the municipality authorized to refuse access to information under s. 476 of the *MGA* because it is subject to solicitor-client privilege?
3. Was the municipality required to refuse access to information under s. 480 of the *MGA* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

DISCUSSION:

Burden of proof

[5] Under s. 498(1) of the *MGA*, the municipality bears the burden of proving that the applicant has no right of access to a record or part of a record regarding its application of s. 476 and s. 473 of the *MGA*.

[6] Where the municipality has established that s. 480 applies, s. 498(2) of the *MGA* shifts the burden to the applicant to demonstrate that the disclosure of third party personal information would not result in an unreasonable invasion of personal privacy.

1. Was the municipality authorized to refuse access to information under s. 473 of the *MGA* because disclosure of the information would disclose the minutes or substance of deliberations held in private?

[7] The municipality applied s. 473 of the *MGA* to sever information on pages 2, 3, 4, 5 and 6 of the report. Section 473 allows the municipality to withhold information that would disclose the minutes or substance of deliberations held in private. For the reasons set out below, I find that s. 473 applies to some of the withheld information but not to the remainder of it.

[8] Section 473(1) of the *MGA* states:

Refusal to disclose information

473(1) The responsible officer may refuse to disclose to an applicant information that would disclose the minutes or substance of the deliberations of a meeting of the council, village commission or service commissioners or of the members of the municipal body held in private, as authorized by law.

- (2) Subsection (1) does not apply to
 - (a) information in a record that has been in existence for ten or more years; or
 - (b) background information in a record, the purpose of which is to present explanations or analysis to the council, committee, agency, authority, board or commission for its consideration in making a decision, if
 - (i) the decision has been made public,
 - (ii) the decision has been implemented, or
 - (iii) five or more years have passed since the decision was made or considered.

[9] To decide whether s. 473 applies, the municipality must establish that:

1. The meeting took place in the absence of the public;
2. The municipality had the statutory authority to meet in the absence of the public; and
3. Disclosure of the record would reveal the minutes or substance of deliberations of the meeting.⁴

[10] If the municipality fails to prove all three of the above, it cannot use s. 473 to refuse to disclose information.⁵

Step 1: Did the meeting of the Regional Council take place in the absence of the public?

[11] Neither party denies that the Regional Council meeting held to address the complaint against the councillor was in the absence of the public. The records themselves also indicate this.

[12] I am satisfied that the meeting was held in-camera, meaning it took place in the absence of the public.

Step 2: Did the municipality have the statutory authority to meet in the absence of the public?

[13] The municipality argued that its authority to meet in the absence of the public is found in s. 19(2)(c) of the *Halifax Regional Municipality Charter (HRM Charter)*.⁶

[14] Section 19(2)(c) of the *HRM Charter* states that the Regional Council or any committee appointed by the Council may meet in closed session to discuss personnel matters.

[15] In my view, the municipality had the statutory authority to hold the meeting in the absence of the public under s.19(2)(c) of the *HRM Charter*.

Step 3: Would disclosure of the record reveal the minutes or substance of deliberations of the meeting?

[16] Former British Columbia Commissioner Loukidelis set out the following guidance on the meaning of the phrase “substance of deliberations”:

As *Black’s Law Dictionary*, 8th ed., puts it, ‘substance’ is the essential or material part of something, in this case, of the deliberations themselves. [...]

Without necessarily being exhaustive of the meaning of the word ‘deliberations’, I consider that term to cover discussions conducted with a view to making a decision or following a course of action.⁷

⁴ *BC Order F23-57, Port Coquitlam (City) (Re)*, [2023 BCIPC 67 \(CanLII\)](#), at para. 17. See also *ON Order MO-3171, Oshawa (City) (Re)*, [2015 CanLII 15991 \(ON IPC\)](#), at para. 9.

⁵ *BC Order F15-20, Courtenay (City) (Re)*, [2015 BCIPC 22 \(CanLII\)](#), at para. 14.

⁶ *Halifax Regional Municipality Charter*, [SNS 2008, c 39](#), s. 19(2).

⁷ *BC Order 00-11, The College of Physicians and Surgeons' Decision Not to Disclose Complaint Records, Re*, [2000 CanLII 10554 \(BC IPC\)](#).

[17] Information that would reveal only the topic of deliberations is not captured by s. 473 because the topic on its own does not reveal what was discussed or concluded.⁸ So, information can only be withheld under s. 473 of the *MGA* if it can reveal or allow someone to accurately infer what council members discussed or decided based on the material being considered.⁹

[18] Ancillary information such as the identity of attendees and whether they left the meeting is not captured by s. 473 because such information could not reveal the substance of deliberations.¹⁰

[19] In this matter, some of the withheld information consists of minutes, motions, recommendations, possible actions and considerations made by the Regional Council. If disclosed, this information could reveal or allow someone to accurately infer what the Regional Council members discussed or decided based on the material being considered.¹¹ In contrast, information such as headings, attendees who participated or left the meeting and the date of the meeting is ancillary information that would not reveal the substance of deliberations.¹²

[20] I find that the municipality was not authorized to withhold headings, names of attendees, dates and times found on pages 4, 5 and 6 of the report under s. 473 of the *MGA*. This information should be released to the applicant. I find that the municipality was authorized to withhold the remainder of the information it severed on pages 2, 3, 4, 5 and 6 of the report, as disclosure of this information would reveal the substance of the Regional Council's deliberations.

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

[21] The municipality applied s. 476 of the *MGA* to withhold the same information it withheld under s. 473 as well as information on pages 7, 8 and 9 of the report. For the reasons set out below, I find that s. 476 does not apply to the information withheld on pages 7-9 of the report and so that information should be released to the applicant.

[22] Section 476 of the *MGA* states:

Solicitor-client privilege

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

[23] Nova Scotia's exemption for solicitor-client privilege encompasses two types of privilege found at common law: legal advice privilege and litigation privilege.¹³

⁸ *BC Order F23-57, Port Coquitlam (City) (Re)*, [2023 BCIPC 67 \(CanLII\)](#), at para. 28.

⁹ *BC Order F15-56, New Westminster (City) (Re)*, [2015 BCIPC 59 \(CanLII\)](#), at para. 34.

¹⁰ *BC Order F23-57, Port Coquitlam (City) (Re)*, [2023 BCIPC 67 \(CanLII\)](#), at para. 35.

¹¹ *BC Order F23-57, Port Coquitlam (City) (Re)*, [2023 BCIPC 67 \(CanLII\)](#), at para. 43.

¹² *BC Order F23-57, Port Coquitlam (City) (Re)*, [2023 BCIPC 67 \(CanLII\)](#), at para. 35.

¹³ *NS Review Report 21-10, Department of Justice (Re)*, [2021 NSOIPC 10 \(CanLII\)](#), at para. 6.

[24] Because of the nature of the records in this case, I need only examine the application of legal advice privilege. The test for whether the municipality can withhold information pursuant to s. 476 has been widely adopted and consistently applied in numerous review reports issued by the OIPC. 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.¹⁴

[25] The municipality applied s. 476 to the same information withheld under s. 473 on pages 2-6 of the report. As I have found that the municipality was authorized to withhold that information (excluding headings, names of attendees, dates and times), it is not necessary for me to consider the application of s. 476 on these pages.

[26] In terms of the remainder of the information severed on pages 7-9 of the report, I will address whether the information meets all four elements of the test for legal advice privilege.

[27] The withheld information consists of written communications between a municipal clerk and a director of Legal Services, Municipal Clerk & External Affairs. Step 1 is satisfied.

[28] The content of the records makes it clear that the communications were intended to be confidential. Step 2 is satisfied.

[29] In terms of steps 3 and 4, the municipality argued that the correspondence was between legal counsel and a client and therefore, the records are clearly subject to solicitor-client privilege.

[30] The Supreme Court of Canada has established that not everything done by a government (or other) lawyer attracts solicitor-client privilege.¹⁵ Additionally:

While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise but draws on departmental know-how.¹⁶

¹⁴ 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.

¹⁵ *R. v. Campbell*, [\[1999\] 1 SCR 565](#), at para. 50.

¹⁶ *R. v. Campbell*, 1999 *CanLII 676 (SCC)*, [\[1999\] 1 SCR 565](#), at para. 50.

[31] Whether solicitor-client privilege attaches to the responsive records depends on the nature of the relationship, the subject matter of the advice and the circumstances in which the advice was sought and rendered.

[32] The withheld information consists of the contents of emails sent between a municipal clerk and a director of Legal Services, Municipal Clerk & External Affairs. Presumably a director of legal services would be in a position to provide legal advice, but as described in the Supreme Court of Canada's decision noted above, legal advisors can also be called upon to give policy or other non-legal advice.

[33] The content of the withheld information does not make clear that the director was wearing their legal services "hat" as opposed to their municipal clerk and external affairs "hat". Based on the content of the withheld information, I am not convinced that it was directly related to the seeking, formulating or giving of legal advice.

[34] Therefore, I find that the municipality was not authorized to withhold the information it severed on pages 7-9 of the report under s. 476 of the *MGA*.

3. Was the municipality required to refuse access to information under s. 480 of the *MGA* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

[35] The municipality severed information on pages 1-3 of the report and on pages 9, 12 and 16 of the emails pursuant to s. 480 of the *MGA*. For the reasons provided below, I find that release of the information withheld pursuant to s. 480 on pages 1-3 of the report would be an unreasonable invasion of privacy. In contrast, I find that release of the information withheld pursuant to s. 480 on pages 9, 12 and 16 of the emails would not be an unreasonable invasion of privacy.

[36] Section 480 of the *MGA* is a mandatory exemption which requires the refusal to disclose personal information if disclosure would be an unreasonable invasion of a third party's personal privacy.

[37] It is well established in Nova Scotia that a four-step approach is required when evaluating whether s. 480 requires that a municipality refuse access to personal information. This test is often referred to as the *House* test.¹⁷ The four steps are:

1. Is the requested information "personal information" within the meaning of s. 461(f)? If not, that is the end. Otherwise, the municipality must go on.
2. Are any of the conditions of s. 480(4) satisfied? If so, that is the end. Otherwise, the municipality must go on.
3. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 480(3)?

¹⁷ As set out in *House, Re*, [2000 CanLII 20401 \(NS SC\)](#) and *Sutherland v. Nova Scotia (Community Services)*, [2013 NSSC 1 \(CanLII\)](#). The OIPC has consistently followed this approach. Note that these cases reference s. 20 of the *Freedom of Information and Protection of Privacy Act*, however the same approach applies to s. 461 of the *MGA*.

4. In light of any s. 480(3) presumption, and in light of the burden upon the applicant established by s. 498(2), does the balancing of all relevant circumstances, including those listed in s. 480(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?

Step 1: Is the requested information personal information?

[38] Personal information is defined in s. 461(f) of the *MGA* as recorded information about an identifiable individual and includes things like names, addresses, information about an individual's health care history, education, finances, employment history and anyone else's opinions about the individual.

[39] The information on the withheld pages is clearly personal information as the information severed consists of initials and one name.

Step 2: Are any of the conditions of s. 480(4) satisfied?

[40] Section 480(4) of the *MGA* sets out the circumstances in which a disclosure of personal information would not be an unreasonable invasion of a third party's privacy.

[41] Pursuant to 480(4)(e) of the *MGA*, a disclosure of personal information is not an unreasonable invasion of privacy if "the information is about the third party's position, functions or remuneration as an officer, employee or member of a municipality".

[42] At this point, my analysis will differ for the information withheld on pages 1-3 of the report versus the information withheld on pages 9, 12 and 16 of the emails.

Pages 9, 12 and 16 of the emails

[43] The information withheld on these pages of the emails consists of initials of municipality staff acting in their professional capacity. The withheld initials relate to their functions as contemplated in s. 480(4)(e). As such, release of the withheld initials would not be an unreasonable invasion of these third parties' privacy.

Pages 1-3 of the report

[44] In contrast, the information withheld on pages 1-3 of the report is not information that could be considered as information about a third party's position, functions or remuneration as an officer, employee or member of a municipality because it is information about employment *history*, and not employment *position or functions*.¹⁸ As such, its release is presumed to be an unreasonable invasion of a third party's personal privacy.

[45] The applicant did not provide any representations explaining why this information should be released. In this context and after balancing the relevant considerations above, I find the information withheld pursuant to s. 480 on pages 1-3 of the report should continue to be withheld.

¹⁸ *NS Review Report 17-01, Nova Scotia (Justice) (Re)*, [2017 NSOIPC 1 \(CanLII\)](#), at paras. 53-54; *NS Review Report FI-10-19, Nova Scotia (Justice) (Re)*, [2015 CanLII 54095 \(NS FOIPOP\)](#); *Dickie v. Nova Scotia (Department of Health)*, [1999 NSCA 62 \(CanLII\)](#), at para. 38-51.

[46] In conclusion, I find that the personal information withheld under s. 480 on pages 1-3 of the report should not be released, while the withheld information under s. 480 on pages 9, 12 and 16 of the emails should be released.

FINDINGS & RECOMMENDATIONS:

[47] I find that:

1. The municipality was not authorized by s. 473 of the *MGA* to withhold names of attendees, dates and times found on pages 4, 5 and 6 of the report.
2. The municipality was authorized to withhold the remaining information it severed under s. 473 of the *MGA* found on pages 2, 3, 4, 5 and 6 of the report, as disclosure of this information would reveal the substance of the Regional Council's deliberations.
3. Section 476 does not apply to the withheld information on pages 7-9 of the report.
4. Disclosure of the withheld information on pages 1-3 of the report would result in an unreasonable invasion of third parties' personal privacy under s. 480 of the *MGA*.
5. Disclosure of the withheld information on pages 9, 12 and 16 of the emails would not result in an unreasonable invasion of a third party's personal privacy under s. 480 of the *MGA*.

[48] I recommend that the municipality:

1. Disclose the names of attendees, dates and times found on pages 4, 5 and 6 of the report within 45 days of the date of this review report.
2. Disclose the information severed under s. 476 of the *MGA* on pages 7-9 of the report within 45 days of the date of this review report.
3. Continue to withhold the personal information severed under s. 480 on pages 1-3 of the report.
4. Disclose the signature initials on pages 9, 12 and 16 of the emails within 45 days of the date of this review report.

February 29, 2024

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File: 18-00207