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

REVIEW REPORT 24-11

April 24, 2024

Office of L'nu Affairs

Summary: An applicant made a request for records from the Office of L'nu Affairs (public body) for 13 separate gaming agreements between the Nova Scotia Government and 13 First Nations. The public body applied s. 12(1)(a) (intergovernmental affairs) and s. 17(1) (financial or economic interests) of the *Freedom of Information and Protection of Privacy Act* to withhold the records in full. The Commissioner finds that the public body did not meet its burden of establishing it was authorized to withhold the information and so recommends the withheld information in the responsive records be released in full to the applicant.

INTRODUCTION:

[1] The Nova Scotia *Gaming Control Act*[1] allows the Nova Scotia Gaming Corporation, which is an agent of the Nova Scotia Government, to enter into agreements with a person(s) to operate a casino or other lottery scheme on its behalf. Pursuant to this, there are gaming contracts with every First Nation in the province, with the first such agreement having been made in 1995.[2]

[2] An applicant made a request to the Office of L'nu Affairs (public body)[3] for 13 separate gaming agreements, including their associated schedules (gaming agreements) between the Nova Scotia Government and 13 First Nations. Each gaming agreement ranges between 39 and 87 pages.

[3] In response to the applicant's request, the public body issued 13 decisions to withhold the 13 gaming agreements in full under s. 12(1)(a)(iii) (intergovernmental affairs) and s. 17(1) (financial or economic interests) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). During the Office of the Information and Privacy Commissioner's (OIPC) informal resolution process, the public body agreed to release in full an identical schedule that was attached to all but one of the gaming agreements. The schedule is a copy of the publicly available

[1] *Gaming Control Act*, SNS 1994-95, c 4, s. 25(1).
[2] *Nova Scotia Tribal Gaming* (undated), online: <https://www.casinocity.com/canada/nova-scotia/tribal-gaming/>.
[3] At the time the access to information request was made, the public body was titled the Office of Aboriginal Affairs. Subsequent to the applicant filing their access request, this public body was renamed Office of L'nu Affairs.

Video Lottery Regulations (*Regulations*)[4] made under s. 127 of the *Gaming Control Act*.[5] The public body continued to withhold in full the content of the 13 gaming agreements.

[4] The applicant objected to the public body's decision to continue to withhold the remaining information. As a result, this matter proceeded to this public review report.

ISSUES:

[5] There are two issues under review:

1. Was the public body authorized to refuse access to information under s. 12(1)(a) of *FOIPOP* because disclosure of the information could reasonably be expected to harm intergovernmental affairs?
2. Was the public body authorized to refuse access to information under s. 17(1) of *FOIPOP* because disclosure could reasonably be expected to harm the financial or economic interests of a public body?

DISCUSSION:

Burden of proof

[6] The public body bears the burden of proving that the applicant has no right of access to a record or part of a record.[6]

1. Was the public body authorized to refuse access to information under s. 12(1)(a) of *FOIPOP* because disclosure of the information could reasonably be expected to harm intergovernmental affairs?

[7] Section 12(1)(a) gives the public body discretion to redact information that could reasonably be expected to harm intergovernmental affairs. Specifically, the public body relied on s. 12(1)(a)(iii), which speaks to harming relations with an aboriginal government. For the reasons set out below, I find that the representations provided by the public body were not sufficient to discharge its evidentiary burden of proof and so it cannot withhold the 13 gaming agreements from the applicant.

[8] Section 12 provides:

> 12 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> (a) harm the conduct by the Government of Nova Scotia of relations between the Government and any of the following or their agencies:
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> (i) the Government of Canada or a province of Canada,
>
> (ii) a municipal unit or the Conseil scolaire acadien provincial,
>
> (iii) an aboriginal government,
>
> (iv) the government of a foreign state, or

[4] *Video Lottery Regulations*, NS Reg 42/95.
[5] *Gaming Control Act*, SNS 1994-95, c 4.
[6] *FOIPOP*, s. 45.

(v) an international organization of states;

(b) reveal information received in confidence from a government, body or organization listed in clause (a) or their agencies unless the government, body, organization or its agency consents to the disclosure or makes the information public.

(2) The head of a public body shall not disclose information referred to in subsection (1) without the consent of the Governor in Council.

(3) Subsections (1) and (2) do not apply to information in a record that has been in existence for fifteen or more years.

[9] As s. 12 is a harms-based exemption, the public body has the burden to establish that the disclosure of the withheld information could reasonably be expected to harm the relations between the Nova Scotia Government and the aboriginal governments.

[10] While *FOIPOP* does not define "harm", the Supreme Court of Canada has outlined the test for meeting a harms-based exemption. In *Merck Frosst Canada Ltd. v. Canada (Health)*, the Court stated the harm that could reasonably be expected to result "…suggests a middle ground between that which is probable and that which is merely possible. The intended threshold appears to be considerably higher than a mere possibility of harm, but somewhat lower than harm that is more likely than not to occur."[7]

[11] In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* the Supreme Court of Canada expanded upon this test by adding a provision that an "institution must provide evidence 'well beyond' or 'considerably above' a mere possibility of harm in order to reach that middle ground".[8]

[12] More recently, in *Houston v. Nova Scotia (Minister of Transportation and Infrastructure Renewal)*, the Supreme Court of Nova Scotia stated:

> The evidence required to establish the harm would have to convince the court that there is a direct link between the disclosure and the apprehended harm, and the harm could reasonably be expected to ensue from disclosure (*Merck Frosst* at para. 219). The words "harm significantly" in s.21(1)(c)(i) of the Act mean harm which is important enough to have an effect, not minor or trivial.[9]

[13] The OIPC has consistently applied this approach to analyzing harms-based exemptions.[10]

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[7] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 201.

[8] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), [2014] 1 SCR 674, at para. 54.

[9] *Houston v. Nova Scotia (Minister of Transportation and Infrastructure Renewal)*, 2021 NSSC 23, at para. 67. Note that while this case referred to s. 21 of *FOIPOP*, the same analysis applies to any exemption in *FOIPOP* that has a requirement that disclosure "could reasonably be expected" to cause harm.

[10] See for example, *NS Review Report 18-03*; *Nova Scotia (Department of Justice) (Re)*, 2018 NSOIPC 3 (CanLII); and *NS Review Report 19-01*, *Department of Intergovernmental Affairs (Re)*, 2019 NSOIPC 19 (CanLII).

[14] The public body's position was that disclosure of the information withheld in the gaming agreements would harm the relationship between the Nova Scotia Government and the 13 First Nations.

[15] The public body relied on *NS Review Report FI-05-20*[11] to support its position that there is well beyond or considerably above a possibility of harm if the gaming agreements were to be disclosed to the applicant. In that review report, former Commissioner Darce Fardy agreed with the public body that release of video lottery terminal and gaming agreements with First Nation bands at the point in time when such agreements were still being negotiated could reasonably be expected to harm relations with an aboriginal government and so could be withheld under s. 12(1)(a)(iii) of *FOIPOP*.

[16] There are key differences between *NS Review Report FI-05-20* and this case. In *NS Review Report FI-05-20*, the negotiations for some gaming agreements were still ongoing. That is not the case in the present matter. In this case, the gaming agreements were finalized at the time the applicant made their access request. Another key reason on which former Commissioner Fardy came to the conclusion he did was because the agreements at issue in that case had not made clear that such agreements are subject to disclosure under *FOIPOP*. Since that time, it is standard practice that the Nova Scotia Government includes such a provision in its agreements.

[17] A more similar case to the present matter is the Nova Scotia Court of Appeal decision of *Chesal v. Nova Scotia (Attorney General) et al*. (*Chesal*).[12] In *Chesal*, the applicant asked for and was denied access to an audit report. The audit report analyzed the state of the establishment of a police force with an independent police governing authority, whose membership was made up of representatives from a First Nation band, the federal Government and the Nova Scotia Government. In making its decision on the arguments provided by the First Nation band and the Attorney General of Nova Scotia, the Court said:

> The evidence of Messrs Paul and Christmas says nothing of the harm which could be expected from disclosure of the "information" in the Audit Report. The thrust of their evidence is that harm would come from the "act" of the government disclosing the Audit Report. In effect they assert that harm will arise, not from the content of the information disclosed, but from the fact that the government willingly surrenders the information to the public."[13]

[18] The Nova Scotia Court of Appeal concluded:

> To satisfy the requirements of s. 12(1)(a), there must be evidence that the public knowledge of the "information" could be reasonably expected to harm relations between the governments. Unaddressed in the evidence is how the release to the public of the "information" contained in the Audit Report will harm relations between the appellants and the Nova Scotia Government. The appellants say that the harm is self-evident on a reading of the report. I disagree. The Nova Scotia Government prepared the Audit Report

[11] *NS Review Report FI-05-20, Nova Scotia (Office of Aboriginal Affairs*), *Re*, 2005 CanLII 23674.
[12] *Chesal v. Nova Scotia (Attorney General) et al*., 2003 NSCA 124 (CanLII).
[13] *Chesal v. Nova Scotia (Attorney General) et al*., 2003 NSCA 124 (CanLII), at para. 54.

> and is already aware of its contents. In my view there is no evidence from which to conclude that the public release of the report could reasonably be expected to harm relations between the governments.
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> To give effect to the appellants' submissions would be to create a blanket privilege for all information pertaining to an aboriginal government. It would matter not whether the information contained in the Audit Report is critical or supportive of the aboriginal policing initiative. It is the position of the appellants that it may not be disclosed without consent. Section 12(1)(a) of the **FOIPOP Act** clearly does not establish a class exemption from disclosure for all information flowing between governments.[14] [emphasis included in original]

[19] The same is true in this matter.

[20] In terms of establishing that release of the information could reasonably be expected to harm intergovernmental relations, the public body argued that "A quick Google search reveals a relationship that has room to improve, and a disclosure recommendation poses a reasonable risk of damaging this." This statement shows a fundamental misunderstanding of the burden that *FOIPOP* places on a public body to establish a reasonable expectation of harm. As an oversight office, it is not the OIPC's role or burden to do an online search using Google on behalf of a public body that is asserting harm from disclosure. That is the public body's role and burden.

[21] I agree and acknowledge that there is an importance and sensitivity to accommodating the interests of First Nations, as reconciliation remains an ongoing process of establishing and maintaining respectful relationships in this province and in Canada. However, the public body's argument was essentially that release of the gaming agreements could reasonably be expected to harm intergovernmental relations from the simple act of disclosure, with no detail on what harm disclosure of the information in the responsive records could be reasonably be expected to cause.

[22] The public body said that it had consulted with the 13 First Nations and that none consented to the disclosure in full. It said that one considered a partial disclosure but others strongly indicated that disclosure of the gaming agreements would damage the relationship with First Nations. The public body said that most of the First Nations did not respond at all. As the Nova Scotia Court of Appeal explained in *Chesal*, acceptance of such a vague harm, without reference to the contents of the settlement agreement, would create a blanket privilege for withholding all information pertaining to a First Nation. As such, I cannot accept this argument for withholding the gaming agreements, just as the Nova Scotia Court of Appeal declined to do in *Chesal*.

[23] Another important factor is that prior to the current request, the applicant made the same access request regarding earlier versions of the same agreements to a different public body between 2010 and 2015. At that time, the records were released in full. The applicant noted that they have had similar records in their possession for several years, yet no reported harm has been demonstrated from the disclosure of these earlier agreements. The applicant stated they conducted a search of publicly available news and current affairs databases and did not find:

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[14] *Chesal v. Nova Scotia (Attorney General) et al*., 2003 NSCA 124 (CanLII), at paras. 56-57.

> … any articles documenting harm that occurred either to intergovernmental relations or the economic interests of Nova Scotia as a result of the previous release. In fact, it appears to have been a non-event. The operation of the First Nations VLTs continued without interruption, no First Nations leaders spoke out about the harms they suffered or even publicly criticized the government, revenues continued to increase, and in subsequent years, additional video lottery gaming locations have been opened on reserve lands in proximity to urban areas such as the Halifax region. There has been no public discussion or coverage of any impacts on the economic interests of any public bodies caused by the previous released. Indeed, it appears the release of the previous versions had no impact at all on any of these things. Extrapolating from that, I would contend that no such impacts will occur with the release of the versions requested in 2020. It would, again, be a non-event other than that it would serve to allow the public to hold the government to account for this policy that has facilitated the transfer of hundreds of millions of dollars to First Nations.

[24] I agree with the applicant. The applicant's arguments are compelling, as they provide information and evidence that there has been no harm from the previous disclosure of the earlier negotiated gaming agreements.

[25] Aside from asserting that the arguments set out in *NS Review Report FI-05-20* to establish harm are the same for this matter, the public body provided no evidence of a reasonable expectation of the harm that could arise from disclosing these specific gaming agreements. It did not set out and execute the harm test noted above. It is not enough to assert harm; the evidentiary burden requires more. Therefore, I find that the representations provided by the public body were not sufficient to discharge its evidentiary burden of establishing that releasing the withheld information could reasonably be expected to harm relations between the public body and an aboriginal government pursuant to s. 12(1)(a)(iii).

2. Was the public body authorized to refuse access to information under s. 17(1) of *FOIPOP* because disclosure could reasonably be expected to harm the financial or economic interests of a public body?

[26] In addition to s. 12, the public body also relied on s. 17(1) to withhold the gaming agreements in full. Like s. 12, s. 17(1) is a harms-based, discretionary exemption. My analysis above for harms-based exemptions applies here as well. For the reasons set out below, I find that the public body failed to discharge its burden of establishing that s. 17(1) applies to the withheld information.

[27] 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).

[28] Numerous cases from the OIPC[15] and other jurisdictions discussing the equivalent statutory provisions[16] have explained that ss. 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.

[29] In this case, the public body did not cite the specific subsection it relied upon. This is problematic because this approach does not comply with s. 7(2)(a)(ii) of *FOIPOP*, which requires the public body to explain which provision of *FOIPOP* it relied upon to withhold the gaming agreements from the applicant. Nevertheless, in its representations, the public body did state that "The Department has asserted that disclosure will harm the relationship with Mi'kmaw First Nations and future agreement negotiations will be damaged." This points to a reliance on s. 17(1)(e) - information about negotiations.

[30] Section 17(1)(e) states:

> 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:
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> …
>
> (e) information about negotiations carried on by or for a public body or the Government of Nova Scotia.

[31] In *NS Review Report 19-01*, former Commissioner Catherine Tully discussed the two elements that must be established for s. 17(1)(e) to apply:

- First, the information must be about negotiations carried on by or for a public body; and
- Second, the public body must establish that disclosure of that information could reasonably be expected to harm the financial or economic interests of a public body of the Government of Nova Scotia.[17]

[32] In that case, former Commissioner Tully went on to explain:

> Information that might be collected or compiled for the purpose of negotiations, that might be used in negotiations or that might, if disclosed, affect negotiations, is not

[15] See for example, *NS Review Report 18-11, Department of Transportation and Infrastructure Renewal (Re)*, 2018 NSOIPC 11 (CanLII), at paras. 33 and 50.
[16] See for example, *Burnaby (City) (Re)*, 2022 BCIPC 50 (CanLII), at para. 10.
[17] *NS Review Report 19-01, Department of Intergovernmental Affairs (Re)*, 2019 NSOIPC 19 (CanLII), at para. 60.

> necessarily about negotiations. Information about negotiations includes analysis, methodology, options or strategies in relation to negotiations.[18]

[33] The applicant argued that if the public body was in fact relying on 17(1)(e), their response to that is:

> …that an agreement or contract is not itself information "about negotiations." It may be the product of the negotiations, a record of what was agreed by the parties, but it says nothing of the negotiations themselves. Such an interpretation of the section would mean that any contract or agreement could be withheld, which would fatally undermine the purpose of the Act to hold public bodies fully accountable, as well as the established expectation of the province's highest court that the Act be interpreted liberally.

[34] I agree with the applicant and with former Commissioner Tully. The public body did not provide any evidence that the information withheld contains analysis, methodology, options or strategies.

[35] Since the information in the records does not contain information about negotiations, the first element in determining the applicability of s. 17(1)(e) has not been met; therefore, the public body failed to meet its required burden and s. 17(1)(e) cannot apply.

FINDINGS & RECOMMENDATION:

[36] I find that:

1. The representations provided by the public body were not sufficient to discharge its burden of proof to establish that s. 12(1) applies to the withheld information. Therefore s. 12(1) does not apply.
2. The representations provided by the public body were not sufficient to discharge its burden of proof to establish that s. 17(1) applies to the withheld information. Therefore s. 17(1) does not apply.

[37] I recommend that the public body release the 13 gaming agreements in full to the applicant within 45 days of the date of this review report.

April 24, 2024

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC Files: 20-00339; 20-00340; 20-00341; 20-00342; 20-00343; 20-00344; 20-00345; 20-00346; 20-00347; 20-00348; 20-00349; 20-00350; 20-00351

[18] *NS Review Report 19-01, Department of Intergovernmental Affairs (Re)*, 2019 NSOIPC 19 (CanLII), at para. 61.