Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
David Nurse

REVIEW REPORT 25-07

July 04, 2025

Department of Justice

Summary:

The applicant asked the Department of Justice (the public body) for copies of correspondence between the governments of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador, regarding legislation that would provide government with immunity from class action lawsuits. The public body applied s. 16 (solicitor-client privilege), s. 12(1)(a) (intergovernmental affairs) and s. 12(1)(b) (information supplied in confidence) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*) to the withheld records.

The Information and Privacy Commissioner for Nova Scotia (the Commissioner) finds that the public body appropriately applied s. 16 to most of the responsive records (pages 1-217) and lawfully exercised its discretion to withhold them. The Commissioner makes no recommendation regarding the withheld records on pages 1-217.

The Commissioner finds that the public body did not appropriately apply s. 12(1)(b) to the withheld information on pages 219-232.

The Commissioner finds that the public body appropriately applied s. 12(1)(a) to some information found on pages 219-232 of the responsive records. However, the Commissioner recommends the public body reconsider its decision to withhold pages 219-232 under s. 12(1)(a) in full within 45 days of this review report.

INTRODUCTION:

[1] The applicant requested access to all correspondence between the government of Nova Scotia and any of the other provincial governments in Atlantic Canada, regarding legislation or possible legislation that would provide immunity to any of the governments or any of their related gaming entities from class action lawsuits and/or to limit the types of damages that can be assessed in lawsuits.

[2] The public body withheld the responsive records almost in full (page 218 was the only page released to the applicant) on the basis that the requested information was subject to solicitor-client privilege pursuant to s. 16 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP)*.

[3] The public body also withheld responsive records on the basis that the requested information would harm intergovernmental affairs pursuant to s. 12(1)(a) of *FOIPOP*, as well as reveal information received in confidence pursuant to s. 12(1)(b) of *FOIPOP*.

[4] The applicant objected to the severing the public body applied and filed a request for review with this office. The matter was not able to be resolved informally and so proceeded to this public review report.

ISSUE:

[5] There are three issues under review:

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

2. 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?

3. Was the public body authorized to refuse access to information under s. 12(1)(b) of *FOIPOP* because disclosure of the information could reasonably be expected to reveal information received in confidence?

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.[1]

Was the public body authorized to refuse access to information under s. 16 of *FOIPOP* because it is subject to solicitor-client privilege?
[7] The public body relied on s. 16 of *FOIPOP* to withhold the records on pages 1-217 in full. For the reasons set out below, I find that s. 16 does apply to pages 1-217 of the withheld records and that the public body appropriately exercised its discretion in deciding to withhold them however, I also find that s. 16 does not apply to pages 219-232 of the withheld records.

[8] This exemption gives the public body discretion to withhold information if it is subject to solicitor-client privilege. Nova Scotia's exemption for solicitor-client privilege encompasses two types of privilege found in common law: legal advice privilege and litigation privilege. In this

[1] *FOIPOP*, s. 45.

case, the public body has claimed that legal advice privilege applies to pages 1-217 (bundle 1) and pages 219-232 (bundle 2). 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.

[9] In *Goodis v. Ontario (Ministry of Correctional Services)*, the Supreme Court of Canada explained that the same test for determining whether or not to disclose privileged materials in the normal course of legal proceedings also applies in the freedom of information context.[2] Given the differences between legal advice privilege and litigation privilege, each type of privilege has its own test.[3]

[10] The public body only raised legal advice privilege. To invoke legal advice privilege, 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.[4]

[11] For the purposes of this review, I will address each bundle of records separately.

Pages 1-217 (bundle 1)

[12] In this matter, bundle 1 consists of communications between legal counsel and clients.

[13] Upon review, I am satisfied that the information found in the withheld records meets all four elements of the test for legal advice privilege.

[14] The withheld records consist of written communications between public body 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 communication[5] between legal counsel and client. Therefore, I agree that the information withheld in bundle 1 was part of the seeking, formulating, or giving of legal advice and I find the exemption applies to bundle 1.

Page 219-232 (bundle 2)

[15] With regards to bundle 2, the records consist of routine communications. Bundle 2 is not communications between a client and legal advisor and does not provide or formulate any legal advice. For this reason, I am not satisfied that the information found in the withheld records

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[2] *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 (CanLII), [2006] 2 SCR 32, at para. 23.
[3] *NS Review Report 23-05*, *Halifax Regional Water Commission (Re)*, 2023 NSOIPC 6 (CanLII), at para. 11, See also *BC Order F08-19, Insurance Corporation of British Columbia (Re),* 2008 CanLII 66913 (BC IPC), at para. 17.
[4] *NS Review Report 21-10, Department of Justice (Re),* 2021 NSOIPC 10 (CanLII), para. 7; and *NS Review Report 18-09, Nova Scotia (Department of Justice) (Re),* 2018 NSOIPC 9 (CanLII), para. 13-26.
[5] *NS Review Report FI-10-71, Nova Scotia (Justice) (Re)*, 2015 CanLII 60916 (NS FOIPOP), at para. 18.

meets all four elements of the test for legal advice privilege. Accordingly, I find that s. 16 of *FOIPOP* does not apply to bundle 2.

Exercise of discretion

[16] Although I find that s. 16 applies to the withheld information in bundle 1, because it is a discretionary exemption, I must address the issue of exercising discretion. For the reasons set out below, I find that the public body lawfully exercised its discretion in this case.

[17] The public body must exercise its discretion lawfully and the Information and Privacy Commissioner for Nova Scotia (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.[6] 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*.[7]

[18] 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. 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.

[19] In *BC Order F18-38*,[8] 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.

[20] I see nothing that would warrant interfering with the public body's decision to continue to assert privilege over the information it withheld in bundle 1 pursuant to s. 16.

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?

[21] Because I find that s. 16 does not apply to bundle 2, I must continue and analyze whether or not the other exemptions applied to bundle 2 are in compliance with the law. While sections 12(1)(a) and 12(1)(b) were also applied to parts of bundle 1, a similar analysis is not required for bundle 1 because of my finding above in paragraphs 12-14 in relation to s. 16.

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[6] *NS Review Report 18-09, Nova Scotia (Department of Justice) (Re),* 2018 NSOIPC 9 (CanLII), at para. 20-25.
[7] *NS Review Report 18-09, Nova Scotia (Department of Justice) (Re),* 2018 NSOIPC 9 (CanLII), at para. 20-25.
[8] *BC Order F18-38, British Columbia (Children and Family Development) (Re)*, 2018 BCIPC 41 (CanLII), at para. 54.

[22] Section 12(1)(a) gives the public body discretion to redact information that could reasonably be expected to harm intergovernmental affairs.

[23] Section 12(1)(a) 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
> (v) an international organization of states;

[24] As s. 12 is a harm-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 Government of Nova Scotia and another level of government. In this case, the public body identified the other provincial governments in Atlantic Canada as the other parties.

[25] While *FOIPOP* does not define "harm", the Supreme Court of Canada has outlined the test for meeting a harm-based exemption. In *Merck Frosst Canada Ltd. v. Canada (Health)*, the Court stated that the phrase "…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."[9]

[26] 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.[10]

[27] The Office of the Information and Privacy Commissioner (OIPC) has consistently applied this approach to analyzing harm-based exemptions.[11]

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[9] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 201.
[10] *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.
[11] 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).

[28] In this matter, the public body properly relied on the harms test to argue that without the protection afforded by s. 12(1)(a) of *FOIPOP*, intergovernmental cooperation would be hampered:

> The test indicates that harm must in fact come to pass if the records are disclosed. The relationship between the Provinces of Nova Scotia, and Prince Edward Island, Newfoundland and Labrador and New Brunswick will be damaged if the information in these sensitive legal records is disclosed. Future collaborative efforts will be impeded because these and other Provinces will be cautious of sharing information with Nova Scotia out of concern that confidentiality will not be maintained, and the information will be disclosed publicly.
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> The Department must maintain productive working relationships with other Provinces. Disclosure of records shared in the common interest and in confidence would give rise to a reasonable expectation of probable harm to those relationships and is antithetical to maintaining trusting relationships between Nova Scotia and other Provinces.

[29] However, this is only a generalized assertion. When relying on the harms test, a public body should be as specific as possible when describing the harm that is likely to occur. In this case, the public body could have provided more direct evidence to demonstrate how there would be a risk of harm to the working relationship with other provinces.

[30] Parties should not assume that the harm under s. 12(1)(a) is self-evident or can be proven simply by repeating the description of the harms test.[12] Otherwise, there is a risk of a broad, categorical exemption of virtually all records relating to intergovernmental affairs.[13] In future, I encourage the public body to be more specific in their arguments and describe the direct link between the proposed disclosure and the potential harms.

[31] Nevertheless, this does not end the matter. Given the circumstances, I did my own review of the records to see if s. 12(1)(a) of *FOIPOP* would in fact apply to some of the information in the records.

[32] Based on my own review of the records, while I believe that some information could have been released, I believe it is clear on its face that some of the pages in question contain sensitive information that, if released, could have a genuine effect on future collaboration between the provinces.

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[12] See *ON Order PO-2332, Ontario (Public Safety and Security) (Re)*, 2004 CanLII 56449 (ON IPC); *ON Order PO-2040, Ontario (Community, Family and Children's Services) (Re),* 2002 CanLII 46442 (ON IPC); *ON Order P-534, Ontario (Attorney General) (Re),* 1993 CanLII 4858 (ON IPC) which was appealed in *Ontario (Attorney General) v. Fineberg*, 1994 CanLII 10563 (ON SC).
[13] *NS Review Report 22-06, Department of Justice (Re)*, 2022 NSOIPC 6 (CanLII), para 18.

[33] On the face of the records, several pages in bundle 2 appear to contain only publicly available information or other innocuous text (e-mail signatures, etc.) and could be released in full. However, other pages in bundle 2 do contain information which may be withheld, but the exempt information could be severed. Specifically, pages 221, 222, 223, 228, 229 and 230 appear to contain information that is properly withheld. In light of my findings, I recommend that the public body reconsider its decision to withhold pages 219-232 in full under s. 12(1)(a).

Was the public body authorized to refuse access to information under s. 12(1)(b) of *FOIPOP* because disclosure of the information could reasonably be expected to reveal information received in confidence?

[34] The public body also withheld the information in bundle 2 under s. 12(1)(b) of *FOIPOP*. For the reasons provided below, I find that s. 12(1)(b) does not apply to information withheld.

[35] Section 12(1)(b) 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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> …
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> (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.

[36] To determine whether particular information is received in confidence, there must be consideration to the circumstances as a whole including the content of the information, its purposes, and conditions under which it was prepared and communicated. It is not enough that the supplier of the information states, without further evidence, that it is confidential.[14]

[37] The public body relied on the principles set out in *Chesal v. Nova Scotia (Attorney General) et. al.* In this matter, the Nova Scotia Court of Appeal provided relevant factors for public bodies to consider when deciding whether information is received in confidence.[15]

[38] Accordingly, the public body did address each consideration. The public body focused on the confidentiality of legal advice and opinions within the records.

[39] Though this might have been a relevant consideration for bundle 1, the information found in bundle 2 does not consist of legal advice.

[40] Therefore, the public body does not have sufficient evidence to prove the applicant has no right to access the information in dispute. Without any evidence from the public body to

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[14] *NS Review Report 20-06, Cape Breton Regional Municipality (Re)*, 2020 NSOIPC 6 (CanLII), para 61.
[15] NS Review Report FI-07-12, *Acadia University (Re)*, 2007 CanLII 30653 (NS FOIPOP). See also *BC Order 331-1999*, *Inquiry regarding Vancouver Police Board's Refusal to disclose complaint-related records,* para. 37. See also *Chesal v. Nova Scotia (Attorney General) et. al.,* 2003 NSCA 124, para 71-72.

demonstrate why this information should be withheld, I find the information in bundle 2 is not information received in confidence and that s. 12(1)(b) does not apply. I would also comment that the authors of the records in bundle 2 appeared to be cognizant of the need to limit the disclosure of solicitor-client information via the e-mail exchange; to me this is suggestive that they understood the discussion thread may not be confidential.

FINDINGS & RECOMMENDATION:

[41] I find that:

1. The public body met its burden of proof to establish that s. 16 applies to the withheld information on pages 1-217, and that it properly exercised its discretion to apply the exemption.

2. The public body did not meet its burden of proof to establish that s. 16 applies to the withheld information on pages 219-232. Therefore s. 16 does not apply to these pages.

3. Section 12(1)(a) applies to certain withheld information on pages 219-232. However, I am not convinced that s. 12(1)(a) applies to all pages/information. As noted above, several pages within bundle 2 appear to contain only publicly available information or other innocuous text (e-mail signatures, etc.) and could be released in full. Pages 221-223 and pages 228-230 appear to contain information which may be withheld.

4. The public body did not discharge its burden of proof to establish that s. 12(1)(b) applies to the withheld information on pages 219-232. Therefore s. 12(1)(b) does not apply.

[42] I recommend that:

1. Within 45 days of this review report, the public body reconsider its decision to withhold bundle 2 (pages 219-232) in full under s. 12(1)(a).

July 04, 2025

David Nurse
Information and Privacy Commissioner for Nova Scotia