



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

REVIEW REPORT 26-07

June 24, 2026

Department of Opportunities and Social Development

Summary:

The four-part test for assessing whether a record is subject to solicitor-client privilege is established law. I discussed the test in *Nova Scotia Review Report 25-07* and in *Nova Scotia Review Report 26-03*. As the law in this area is settled, and this case is not factually complex, I have prepared an abbreviated review report.

I find that the public body was authorized to refuse access to the record under s. 16 of the *Freedom of Information and Protection of Privacy Act (FOIPOP)* because it is subject to solicitor-client privilege. However, I am recommending that the public body reconsider its decision not to waive solicitor-client privilege.

INTRODUCTION:

[1] The applicant submitted a request for information under s. 6 of the *Freedom of Information and Protection of Privacy Act (FOIPOP)* for all child welfare records relating to them. The public body responded to the applicant with a decision to disclose the records in part, and the applicant applied to the Information and Privacy Commissioner (Commissioner) for a review of the public body's decision.

[2] After the parties and the Office of the Information and Privacy Commissioner for Nova Scotia (OIPC) Investigator worked to informally resolve this matter, the only outstanding issue was whether a four-page document was appropriately withheld because it was the subject of solicitor-client privilege.

[3] The record is a four-page report prepared by an external service provider. The record was sent to the public body by fax in November of 1999. The record was subsequently shared, under an undated fax cover sheet, with external legal counsel for the public body. The record includes personal information of the applicant. I cannot reveal significant information about the record, beyond the above-noted facts, given the obvious need to maintain both the applicant's anonymity and the public body's claim of solicitor-client privilege.

ISSUE:

[4] There is one issue 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?

DISCUSSION:

[5] Section 16 of *FOIPOP* states: “the head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege.” For a public body to be authorized to refuse access to information that it deems subject to solicitor-client privilege, it must satisfy a well-established four-part test. I discussed this four-part test in *Nova Scotia Review Report 25-07*, at paragraph 10:

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.

[6] I find that the first three elements of the test have been met. First, there was a communication – a fax – sent by an employee of the public body to an external law firm that was acting on behalf of the public body in an ongoing child protection matter. The fax included a cover sheet and a copy of the four-page report. Second, while there is no specific statement that the communication was confidential, the sensitive and personal nature of the information supports the conclusion that it was intended to be confidential. Third, there is no dispute – and ample evidence before me – that the public body was the client, and the communication was with a legal advisor.

[7] The only uncertainty in this case surrounds the fourth element of the test: whether the communication was directly related to seeking legal advice. When considering this issue, I must look at the pattern of communications, and not at one document in isolation. As my predecessor Catherine Tully noted in *Nova Scotia Review Report FI-10-71* at paragraph 18: “it is critical to remember that privilege applies to records in a protected continuum of communications between lawyers and clients.”

[8] This continuum of communications was also discussed in *Balabel v. Air India* [1988] 2 W.L.R. 1036 (Eng.C.A.), at 1046:

In most solicitor and client relationships, **especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages.** There will be a continuum of communication and meetings between the solicitor and client . . . **Where information is passed by the solicitor or**

client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. (emphasis added.)

Part of continuum of communications between lawyer and client

[9] I am satisfied that the communication in question was part of the “protected continuum,” and that the fourth element of the test has been met. The records before me demonstrate that public body staff were in regular contact with legal counsel, and shared various third-party reports and assessments with counsel over many months. The matter was protracted, and the sharing of relevant records with counsel via fax was standard procedure. The public body is not obligated to demonstrate that legal advice was sought on the specific document; as noted in *Balabel*, the regular sharing of records appears to be aimed at keeping both parties “informed so that advice may be sought and given as required.”

[10] It is important to note that not all documents shared with counsel are automatically privileged. A case-by-case analysis of the circumstances is required. In the present case, I am satisfied that the record is subject to solicitor-client privilege.

Recommend public body reconsider waiver of privilege

[11] I recommend that the Department consider whether, as a matter of discretion, a portion of the record could be disclosed even though it is exempt from disclosure under s. 16 of *FOIPOP*. As Commissioner Tulley noted in *Nova Scotia Review Report 18-09* at paragraph 22, Ontario’s OIPC has provided the following guidance regarding the exercise of discretion:

[22] The Office of the Information and Privacy Commissioner of Ontario lists a number of considerations that may be relevant to the exercise of discretion in relation to a claim of solicitor client privilege noting that not all of those considerations listed will necessarily be relevant and that additional unlisted considerations may be relevant:

- the purposes of the Act, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[12] In the present case, I encourage the public body to consider the following:

1. The age of the record (more than 26 years),
2. The absence of any ongoing litigation, and the low potential for future litigation,
3. The nature of the record: a third-party report that contains the applicant's personal information,
4. The purpose of child welfare legislation: to protect children and act in their best interests,
5. The relationship between the applicant and the public body, and
6. The requester's sympathetic need for the information.

FINDING & RECOMMENDATION:

[13] I find that the public body was authorized to refuse access to the record under s. 16 of *FOIPOP* because it is subject to solicitor-client privilege. Nevertheless, I am recommending that the public body reconsider its decision not to waive solicitor-client privilege in the unique circumstances of this case.

June 24, 2026

David Nurse
Information and Privacy Commissioner for Nova Scotia