

**THE NOVA SCOTIA FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY ACT**

A **REQUEST FOR REVIEW** of a decision of the **DEPARTMENT OF TRANSPORTATION AND PUBLIC WORKS** deny access to records it deems to contain legal advice.

REVIEW OFFICER: Darce Fardy

REPORT DATE: September 21, 2005

ISSUE: Whether Section 16 (solicitor-client privilege) supports the decision of the Department to withhold a number of e-mails relevant to the application.

In a Request for Review, dated April 26, 2005, under the **Freedom of Information and Protection of Privacy Act (FOIPOP)**, the Applicant asked that I recommend to the Department of Transportation and Public Works (TPW) that it reverse its decision and disclose the records at issue.

The Applicant is looking for records related to construction of the “Highway #118 Interchange.” She asked specifically for records containing legal opinion or references to legal opinion related to “the nature of commitments” made by the Department of Highways in a letter dated December 1, 1975 from its solicitor to the solicitor for a real estate development company.

She also asked for a copy of a consultant’s report on “noise studies” but as a result of mediation by the Review Office, this information is no longer being requested.

TPW denied access to the legal opinion, citing **Section 16** of the *FOIPOP* Act, a discretionary exemption which allows a public body to refuse to disclose records subject to solicitor-client privilege.

Submission of the Applicant:

“I am a disinterested member of the public in the sense that I have no private financial interest in this matter. I believe that this information should be released for several reasons:

- At least \$10,000,000 of public funds will be spent on constructing this interchange. It is not clear that the original legal agreement . . . commits the Department of Transportation to building an interchange; in my opinion this is the reason for which the Department of Transportation sought legal interpretation of this agreement. Surely we the taxpayers have the right to scrutinize public documents to ensure that the government has the obligation that it says it does, especially given the large amount of scarce taxpayer dollars at stake. An open, transparent process vastly increases the probability that public money is being spent appropriately.

- Client-solicitor privilege cited by the Department of Transportation should not be used as a blanket cover to keep secret any and all information. The Information Commissioner of Canada, Honourable John M. Reid, has said that *“[i]n the spirit of openness, the government’s vast storehouse of legal opinions on every conceivable subject should be made available to the interested members of the public. Tax dollars are paid for these opinions and, unless an injury to the conduct of government affairs could reasonably be said to result from disclosure, legal opinions should be disclosed”* (Office of the Information Commissioner of Canada, Annual Report 2000-2001). What possible injury to the conduct of government affairs could accrue through the disclosure of the information?

- It is inconsistent that the Department of Transportation released the original agreement to the public without citing solicitor-client privilege, yet refuses to make public the interpretation of that agreement . . . Refusal to release this information breeds suspicion and distrust of our elected officials and bureaucrats and undermines the democratic process.”

Conclusions:

In response to the Applicant's query, TPW disclosed the December 1, 1975 letter because it was not privileged. It was a communication between two solicitors, not advice from a solicitor to a client.

I have included the entire submission of the Applicant because it urges a "common sense" approach to the use of solicitor client privilege. In many of my Reviews I have urged public bodies not to use s.16 as a blanket denial of all communications it has with solicitors. Public bodies are reluctant to waive privilege, one of the purposes of which is to ensure the advice is freely given. But in the context of the *FOIPOP Act*, which obliges public bodies to be "fully" accountable to the public, it would, in my view, be appropriate for public bodies to weigh the accountability factor with the exemption in matters of particular public interest. The construction of the highway interchange has attracted considerable public interest and debate.

It is unfortunate that the Department was not able, in one fashion or another, to be more forthright with the Applicant and answer the questions she raised. This kind of openness can often dissuade an Applicant from asking for a Review, with its attendant costs.

There is no question, and the Applicant would not argue otherwise, that the records denied enjoy solicitor-client privilege, and TPW can refuse to disclose them if it wishes to. The Review Officer cannot substitute his discretion for that of a public body.

Recommendations:

That TPW write to the Applicant, with a copy to the Review Officer, reconfirming its decision.

DATED at Halifax, Nova Scotia this 21st day of September, 2005

Darce Fardy, Review Officer