



REPORT
**Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-07-60(M)**

Report Release Date: August 14, 2009

Public Body: The Municipality of the District of Lunenburg

Issues: Whether the Municipality of the District of Lunenburg [“the Municipality”] appropriately applied *Part XX* of the *Municipal Government Act* [“*MGA*”] and, in particular:

1. Whether a Conflict of Interest affected the handling and processing of the Applicant’s Application for Access to a Record.
2. Whether s. 474 of the *MGA* allows the Municipality to withhold the severed information.
3. Whether s. 476 of the *MGA* allows the Municipality to withhold the severed information.
4. Whether the Municipality has conducted an adequate search for the responsive Record in accordance with the duty to assist.

Summary: An Applicant requested a Review of the Municipality’s decision to refuse access to a Record pursuant to s. 474 [advice] and s. 476 [solicitor-client privilege] of the *MGA*. The Applicant alleged that the Freedom of Information and Protection of Privacy [“FOIPOP”] Administrator who is also the Chief Administrative Officer for the Municipality/Responsible Officer and was formerly the Director of Planning and Development was in a conflict of interest. At all times throughout the Review process, the Applicant took issue with the adequacy of the search conducted and remains dissatisfied. The Record was partially released along with three decisions over a period of nearly two years.

Recommendations: The Review Officer recommended the following to the Municipality:

1. Conduct a new search for the entire responsive Record to be

provided to the Applicant at no cost. In conducting the new search, the Municipality should take the following into account:

- a. The start date for the search be February 18, 2004 and be up to and including August 9, 2007, in accordance with the Applicant's Form 1;
 - b. Do not restrict the search for records only to those in the custody of the Chief Administrative Officer/Responsible Officer/FOIPOP Administrator;
 - c. Search all records in the custody or under the control of the Municipality;
 - d. Rely on a proper keyword search including the names of all staff and involved third parties, and the acronyms for all involved companies and agencies and, in particular, the local resident groups and advisory committees;
 - e. Include archived files and emails in the search, but not backup tapes;
 - f. Prepare a comprehensive Index of Records for the new Record;
 - g. Even if it means the Applicant will have some duplicates, the FOIPOP Administrator is to disregard all previous packages given to the Applicant in preparing the Record that is responsive to the original Form 1.
2. In addition to conducting a new search, the following pages should be released to the Applicant, in full, immediately:
 - Pages 950 – 952
 - Page 1094
 - Pages 1132 – 1136
 - Page 1164
 - Pages 1183 – 1185
 3. With respect to the document from the in-camera meetings, the Municipality should consider exercising its discretion to release it in full. Alternatively, the small portion of the Record to which solicitor-client privilege applies could be severed and the remainder of the Record released.
 4. With respect to the three documents to which s. 474 [advice] has been applied, the Municipality should re-confirm its decision to withhold that information because the exemption was applied appropriately under the *MGA*.

Key Words:

advice, Attorney General of Nova Scotia, background information, conflict of interest, Crown Prosecutors, discretion, FOIPOP Administrator, in-camera meetings, Information Access and Privacy

Office [IAP], minutes, offence, reasonable, RCMP, Responsible Officer, search, severed, solicitor-client privilege.

Statutes Considered: *Part XX, Municipal Government Act, ss. 461(a)(i), 461(h), 465(1), 465(2), 474, 476, 482, 498(1), 497, 500; Part I, Municipal Government Act, s. 22.*

Case Authorities Cited: *FI-07-50(M); FI-08-66; ON Order MO-2227; FI-08-26(M); ON Order MO-1283; O'Connor v. Nova Scotia, 2001 NSSC 6; R. v. Fuller (2003), 213 N.S.R. (2d) 316 (SC); FI-05-27; FI-05-84; FI-05-08; FI-04-25; ON Order MO-2334; BC Order 02-03; FI-07-58; NL Report 2007-014.*

Other Cited: *Freedom of Information and Protection of Privacy Act Regulations; FOIPOP Policy and Procedure Manual; McNairn, Colin and Woodbury, Christopher, Government Information: Access and Privacy.*

REVIEW REPORT FI-07-60(M)

BACKGROUND

On August 9, 2007 the Applicant made an Application for Access to a Record to the Municipality of the District of Lunenburg [“the Municipality”] by submitting a Form 1, which requested:

Any and all information and/or documentation relating to the [Development Company Name] Development Proposal for property between civic numbers [address], including but not limited to, any and all amendments to the original proposal and any and all correspondence, e-mails, notes of meetings or telephone conversations concerning the said proposal or amended proposal from February 18th, 2004 to date. The Municipal personnel who are believed to have had such contacts and have such information include, but are not limited to [Names of four Municipal employees].

At the time of submitting the Application for Access to a Record, the Applicant completed the “Request to Waive Fees” section, which was the subject of an earlier Review Report [see *FI-07-50(M)*].

On August 24, 2007, the Municipality corresponded with the Applicant advising that the Record included information about a number of Third Parties that may affect their interests or invade their personal privacy. The Municipality advised that the Third Parties who had been identified would be given the opportunity to make representations regarding disclosure of the requested information.

On October 1, 2007, the Municipality made a Decision [Decision #1] with respect to the Application for Access to a Record, which stated:

Although the review of the entire file is not yet complete, I am prepared to grant access to the records as enclosed. Please note that information falling under the following exemption provisions has been severed from the records(s) [sic] enclosed in accordance with Subsection 465(2) of the MGA and access to the severed parts of the record(s) is refused for the following reasons:

- (1) Section 480 of the Municipal Government Act enables the FOIPOP Officer to refuse to disclose personal information, if the disclosure would be an unreasonable invasion of a third party’s personal privacy. Information has been severed from the enclosed documents that would otherwise reveal: mailing addresses, e-mail address, phone numbers and fax numbers.*
- (2) In the attached records, you will note information severed on three sheets that have been marked with a blue tab. The information severed has been done pursuant to Section 474, 476 and Subsection 481(1)(b) of the Municipal Government (explanation of section is noted below).*

I have made a determination that other records have been severed and, therefore, are not enclosed for the following reasons:

- (3) Section 474 – Information that that [sic] would reveal advice and recommendations developed by or for the municipal body.*
- (4) Section 476 – Information that is subject to client-solicitor privilege, as determined by the Municipal Solicitor;*
- (5) Subsection 481(1)(b) – Information provided implicitly or explicitly in confidence.*

However, as discussed with you on September 27, 2007 via phone, the FIOPOP [sic] Office has advised that you have expressed concern that there may be a conflict of interest in the processing of this request. Given this concern, we have corresponded with the Provincial FIOPOP [sic] Officer [now called the Information Access and Privacy Office (“IAP”) housed in the Department of Justice] concerning the possibility of an independent review of the records not enclosed, as noted in the preceding paragraph. You will be advised accordingly.

On October 9, 2007, the Municipality made another Decision [Decision #2] with respect to the Application for Access to a Record, which stated:

Of the records remaining after the October 1, 2007 records disclosure, you are entitled to part of the records requested and your application for access has been partially granted. Access to the enclosed records has been granted.

Information falling under the following exemption provisions has been severed from the record(s) in accordance with subsection 465(2) of the Act and access to the severed parts of the records are refused for the following reasons:

<i>Record -</i>	<i>Reason – MGA Reference</i>
<i>Record 1</i>	<i>Section 474</i>
<i>19 Records (entire record)</i>	<i>Section 476</i>
<i>3 Records (entire record)</i>	<i>Section 474</i>
<i>Record 37, 38, 55</i>	<i>Section 476</i>
<i>Record 27 (last page disclosed, remainder denied)</i>	<i>Section 474</i>
<i>Record 28, 35</i>	<i>Section 474</i>
<i>Records 17, 18, 20, 25, 46, 47, 48, 49, 61, 61(b), 62, 64, 69, 79, 82, 84, 86</i>	<i>Section 480</i>
<i>Record 69</i>	<i>Section 474</i>

On October 17, 2007 the Applicant requested a Review of the Decision[s] made by the Municipality, which stated:

The applicant requests that the review officer review the following decision, act or failure to act of the head of the public body; decision dated or made on or before the 9th day of October, 2007; and

The applicant requests that the review officer recommend that:

- (i) Improper redactions in the material provided*
- (ii) Withholding of relevant documentation*
- (iii) Improper interpretation of Sections 474, 476 and 480 of the Municipal Government Act.*

Due to the complexity and volume of the various packages of documents submitted and because the Municipality had not been requested to provide an Index of Records, the Review Office compiled one. On May 8, 2008 the Review Office provided a copy of the Index of Records to the Applicant for response. On July 22, 2008 the Review Office provided a copy of an amendment to the Index of Records to the Applicant when it was discovered that the Review Office had not recorded some of the Records in the original Index. This points to the preferred best practice now urged by the Review Officer where appropriate it is recommended that a public body produce an Index of Records to accompany its decision letter to the Applicant.

On July 21, 2008, the Review Office advised the Municipality that the Applicant had raised the issue of possible additional and/or missing records in relation to his/her original Application for Access to a Record. Specifically, the Municipality was asked to conduct a search of its records with respect to any documents between February 18, 2004 and May 1, 2006. The Review Office requested that if no additional information was located that the Municipality was to provide answers to a set of questions regarding the parameters and details of its search for the responsive Record.

On August 22, 2008, the Municipality provided a response to the Review Office with details of the search it conducted and the identification of four additional responsive records. There was full disclosure of this part of the Record to the Applicant. The earliest of these was dated June 24, 2005 and the other three March 2006. The cover letter indicates, however, that there is no information available prior to August 1, 2006 as the development process at issue had not begun.

On September 5, 2008, the Applicant noted an interest in a specific employee's phone log for July to September 2007, which may have been overlooked in the original search. That period extends beyond the original Form 1 which was for information up to and including August 9, 2007. This was requested notwithstanding that it had already been explained to the Applicant that, generally, the clock stops as of the date of the Application for Access to a Record. In other words, any information that is dated beyond the time period specified in the Form 1 does not form part of the responsive Record and applicants can not expect to receive such records in response to their request, unless a new Form 1 is submitted for access to those Records with the appropriate dates.

On October 1, 2008, the Municipality agreed with the Review Office's decision to share the Municipality's search Representation dated August 22, 2008 with the Applicant. The Review Office informed the Applicant that after reading the Representation if search remained

an issue, details needed to be provided by him/her about those ongoing concerns and was asked if s/he would like to focus the Review to particular exemptions and/or severances.

On October 8, 2008, the Applicant responded to the search letter, details of which will be included in the Applicant's Representations section below. The Applicant's outstanding issues in the Review were confirmed in that letter.

On October 22, 2008, the Applicant located a document in the Record that had been supplied to him/her by the Municipality with Decision #1 but was not in the copy of the Record provided to the Review Office and thus was not included in the Index of Records. The Applicant indicates that s/he had misfiled the document and only came to his/her attention in October 2008. The date on the document is June 1, 2006 and consists of handwritten notes of a meeting between the Municipality's Director of Planning [now the Chief Administrative Officer and Responsible Officer] and the developer's engineer.

On January 30, 2009, the Review Office issued an Investigation Summary to the parties that set out the issues, facts, statutory references, definitions and precedents.

On February 26, 2009, the matter was referred for Mediation. The Mediation was not successful.

On May 22, 2009, the Municipality made a supplemental Decision [Decision #3] with respect to the Application for Access to a Record, which stated:

During a review of the above noted file . . . the following records have been discovered as being mistakenly omitted from the original disclosure. The majority of the records were omitted as they were not officially transcribed at the date of disclosure and were in shorthand. These records were just recently brought to my attention. It should be noted that Open Session minutes of Council and Committee are located on the Municipality's website and are accessible to the public. Regardless, these records should have been provided in the original disclosure, and I apologize for this error.

Attached is the index of records and my decision with respects to the same. I have discussed this matter with the FIOPOP [sic] Review Office and have been advised that these records are to be considered part of the original application.

[Attached was an Index of Records, listing 6 documents – 5 released in full and 1 withheld in full under s. 476]

On June 18, 2009, the Review Office issued a revised Investigation Summary reflecting new issues that were raised during the Review process and as a result of Decision #3 and the identification of discrepancies in the Records.

RECORD AT ISSUE

The Record at issue includes a Development Proposal and consists of various types of documents such as: Applications for a Development Agreement, emails and letters regarding the Applications for a Development and the Development Project, memoranda, survey plans, phone conversations, meeting notices, planning reports, construction standards, and correspondence to/from the Municipality.

There has been a notable lack of clarity with respect to what constitutes the responsive Record in this case. There is a significant discrepancy between the documents that were actually given to the Applicant, what was given to the Review Office representing the redacted Record given to the Applicant ["Applicant's copy"] and the copy of the unsevered Record given to the Review Office ["Review Office's copy"]. The Applicant states that the copy s/he received was 1,452 pages while the Review Office copy was 1,337 pages. That is a difference of 115 pages and results in a situation where the Municipality has sent the Applicant more of the responsive Record than what was sent to the Review Office as the "complete copy". The Municipality indicates it withheld 71 pages from the copy given to the Applicant, which would mean the total differential is actually 186 pages. Further, a representation of the Applicant's copy as sent to the Review Office contained only 460 pages. In addition, in the final Representation from the Municipality there was still a miscalculation of the number of maps, for example.

In addition to the responsive Record, the Review Office was also provided with information stemming from consultations between the Municipality and Third Parties as part of the Municipality's decision making process. The Municipality requested representations on disclosure from the Third Parties in accordance with s. 482 of the *MGA*. These packages contain some documents that were shared for consultation that are not found in either copy of the Record provided for the Review.

The size of the Record is significant and these discrepancies have caused delay during the Review process.

During the course of the Review the Applicant indicated that there are only nine documents in the Record that have been severed or withheld in full that s/he is taking issue with regarding the applicability of the exemptions claimed. In addition, search for the full and complete responsive Record and conflict of interest by the Freedom of Information and Protection of Privacy ["FOIPOP"] Administrator continue to be issues for the Applicant.

APPLICANT'S REPRESENTATIONS

On May 22, 2008, the Applicant provided a Representation in response to receiving a copy of the Index of Records. The Applicant raised the following concerns:

1. The large volume of pages withheld by the Municipality in the Record provided to him/her.

2. Reviewing the Record an observer would believe that the information process started May 1, 2006 which the Applicant doubted was the case.
3. Because of this, there was a possibility that the “complete” Record given to the Review Office was missing documents.
4. The manner in which the Municipality applied the exemptions was inconsistent and indeed there was a Record to which the public body had applied solicitor-client privilege that was between two parties neither of whom were solicitors.
5. The Applicant seeks an immediate release of a complete Record from the Municipality.
6. Referring to withheld and severed documents, the Applicant argues that:
 - a. s. 474 of the *MGA* does not apply because the discussion therein did not involve advice given with respect to a by-law change; and
 - b. s. 476 of the *MGA* does not apply because there was a third party present at the meeting who was referred to in the email exchange and therefore solicitor-client privilege does not apply.
7. The Applicant was concerned about delay and requested that this particular appeal be moved directly to the “Report” stage for Review by the Review Officer.

On October 8, 2008, and October 15, 2008, the Applicant responded to the copy of the letter from the Municipality detailing its search efforts. The Applicant took exception to a statement made by the FOIPOP Administrator, which read as follows:

I am unable to advise whether there are records that may exist for this period that are not in my possession.

On October 16, 2008, the Applicant confirmed that his/her letter of May 22, 2008, accurately narrowed the portion of the Record and the exemptions that were still at issue [see paragraph 6 above], and confirmed that severances under section 480 and 481 initially relied on by the Municipality were no longer at issue.

On June 25, 2009, the Applicant provided a final Representation that was to augment previous correspondence given to the Review Office. This Representation focussed on the following issues:

1. The Applicant made a distinction between the use of redaction as compared to severance used by the public body under s. 480 and s. 481 of the *MGA*. The use of severance by the Municipality is, according to the Applicant, indicative of its focus of withholding information versus the protection of privacy of Third Parties.
2. The Applicant submits that s. 474 of the *MGA* permitting a public body to withhold advice only applies when advice is given concerning by-law changes. Also s/he argues that s. 476 of the *MGA* does not apply because the information exchanged does not fall within the definition of solicitor-client privilege. One of the Third Party authors of part of the Record happens to be a lawyer but is not acting in that capacity in the Record at issue.

3. The Applicant contends that the FOIPOP Administrator, in response to the allegation of him/her being in a conflict of interest and being responsible for deciding whether to release a Record of which they were the author, was to have the Record reviewed by an outside party. The problem the Applicant identifies is that only a portion, 11% of the Record, was reviewed by the outside FOIPOP Administrator and thus the process was flawed and still controlled by the person in the conflict of interest.
4. The Applicant argues that the second search had to be conducted when it was clear to him/her that the parameters chosen by the FOIPOP Administrator were flawed and designed, in his/her opinion, to intentionally restrict the information in the responsive Record.
5. A missing document – a handwritten note of a meeting between the FOIPOP Administrator [when s/he was still the Director of Planning and Development] and the developer's engineering firm dated June 2006 – was not in the responsive Record given to the Review Office but was in the bundle given to the Applicant who did not discover it as s/he had misfiled it. The Applicant contends that this discovery supports his/her allegation that information continues to be withheld and that the FOIPOP Administrator is doing so intentionally.
6. The Applicant listed a number of documents which s/he requested be released immediately and that another search be conducted based on the original request by a trusted impartial party.

PUBLIC BODY'S REPRESENTATIONS

On June 26, 2009, the Municipality provided a Representation to the Review Officer in response to the revised Investigation Summary and for the formal Review. The following summarizes that Representation:

1. The first Investigation Summary dated January 30, 2009, did not indicate there was any discrepancy with respect to the contents and size of the responsive Record. The Municipality was not made aware of the discrepancies until May 21, 2009.
2. The Municipality responds to the Review Office's concerns with respect to the number of pages total given to the Applicant that no one has argued that the Applicant paid for more pages than s/he received.
3. With respect to the Third Party consultation packages, the Municipality's records indicate the approved documents were released to the Applicant.
4. Throughout the Review process the Municipality has been accommodating to the Applicant and the Review Office. An indication of the latter is that the Municipality agreed to conduct a second search for the period of February 18, 2004 and May 1, 2006, as requested by the Applicant and the Review Office. The Municipality is concerned that there is an inference that the Municipality has purposefully withheld documents which is not, it submits, the case.
5. With respect to the issue of conflict of interest, the Municipality submits that "[u]pon notification by the Review Office that the Applicant has expressed concerns with regards to Conflict of Interest, immediate steps were taken to address the concern. I was appointed as the Acting Chief Administrative Officer ["CAO"] in July 2006 and at the time of the Application (September 2007) I was, and still remain, the Chief

- Administrative Officer. The delegation of powers under Section 497 was not in place as there was no staff to delegate this power to. As such, in accordance with the *Municipal Government Act* and the corresponding FOIPOP Regulations, I, as the Chief Administrative Officer, was the Responsible Officer. MODL does not have a large staff pool to draw from and, at the time, there was no Municipal Clerk or other resource available to delegate the responsibility of the review of this matter.” It is also noted in a July 21, 2008 email from the Municipality that the Applicant would likewise argue a conflict of interest against the new Administrator as having also been involved in the case in another capacity for the Municipality.
6. Regarding the allegations of a conflict of interest by the Applicant, the Municipality, upon notification of these allegations, immediately took steps to address the concern. At the time the Application for Access to a Record was received in September 2007, the FOIPOP Administrator was the CAO having been appointed the Acting CAO as of July 2006. The *MGA* authorizes the CAO to be the Responsible Officer for the purposes of access to information requests [“FOIPOP Administrator”]. Once the FOIPOP Administrator became aware of the allegation, s/he contacted the Provincial Coordinator’s Office [“IAP”] for advice as to how to proceed with respect to the allegations of a conflict of interest. Arrangements were made to have the FOIPOP Administrator for another municipality review the documents that were either identified as documents with information to be severed or documents to be refused for disclosure in whole. The Applicant was advised that the documents to be withheld or severed would also be reviewed by the external person prior to a final decision being made.
 7. The Municipality reiterates the basis on which it refused to disclose the portion of the Record that has not been released to the Applicant and remains at issue. The Municipality argues that the information in three of them are not background information but advice to an employee of the Municipality, in one case it is exempted on the basis of solicitor-client privilege and on the other also based on solicitor-client privilege of information recorded in the minutes of an in-camera meeting.

ISSUES UNDER REVIEW

The Applicant is not pursuing the severances under s. 480 and s. 481 of *Part XX* of the *Municipal Government Act* [“*MGA*”]. The Review, therefore, is limited to the issue of whether the Municipality appropriately applied the *MGA* and, in particular:

1. Whether a Conflict of Interest affected the handling and processing of the Applicant’s Application for Access to a Record.
2. Whether s. 474 of the *MGA* allows the Municipality to withhold the severed information.
3. Whether s. 476 of the *MGA* allows the Municipality to withhold the severed information.
4. Whether the Municipality has conducted an adequate search for the responsive Record in accordance with the duty to assist.

DISCUSSION

Conflict of Interest

Because the Applicant raised a conflict of interest on the part of the Municipality's FOIPOP Administrator as an issue which could taint the entire Review, I will dispose of this issue prior to addressing the other issues of adequacy of the search and whether the discretionary exemptions claimed apply.

Near the beginning of the process when s/he submitted the Application for Access to a Record, the Applicant alleged that the FOIPOP Administrator was in a conflict of interest. The Applicant based this allegation on the fact that the FOIPOP Administrator was, at the material time, working on the issues discussed in the Record in another capacity as the Director of Planning and Development. The FOIPOP Administrator took that allegation seriously and sought advice as to how to deal with the alleged conflict of interest. The FOIPOP Administrator arranged for an external FOIPOP Administrator from another municipality to review the documents that were to be withheld in full or had severing. The documents that were released in full were released to the Applicant – Decision #1. Once the external FOIPOP Administrator provided an opinion/advice regarding the documents, the FOIPOP Administrator considered that opinion/advice and made a decision regarding disclosure – Decision #2. The Municipality's FOIPOP Administrator made it clear that notwithstanding this outside review of a portion of the Record, s/he had the ultimate decision regarding disclosure.

Case law in all Canadian jurisdictions has consistently held that an applicant has the burden to demonstrate that there is a conflict of interest or that the decision-maker is biased. The person alleging bias must demonstrate that a personal interest in disclosure or non-disclosure affected the outcome of the decision.

The reality is that those delegated authority to make decisions under the *MGA* often have multiple other responsibilities. This is by necessity particularly in smaller jurisdictions.

In an ideal world, FOIPOP Administrators would be assigned access and privacy work solely, in which case there would be limited chance of being seen as in a potential conflict situation. But the reality is that most administrators, particularly in smaller public bodies, do a myriad of other tasks. Public bodies, large or small, are entitled to organize their administration in whatever manner they see fit. They should, however, recognize that, as in this case, where there is a blending of tasks, they run the risk of an allegation of bias being raised.

[FI-08-66]

The critical element in these cases is whether there is any evidence that the person responsible to make a decision with respect to an Application for Access to a Record has a vested interest in refusing access to the Applicant or the circumstances give rise to “an apprehension of bias.” The only evidence provided by the Applicant, who has the burden to

demonstrate bias, is that the FOIPOP Administrator under the *MGA* was involved with the file in three capacities:

1. First as the Director of Planning and Development when the development issues contained in the Record were being considered by the Municipality and, in particular, Planning and Development;
2. Second as the Acting CAO and then the CAO for the Municipality at the time the Application for Access to a Record was first received having been appointed Acting in June 2007 [Application for Access to a Record made August 9, 2007]; and
3. Third as the FOIPOP Administrator designated to make a decision regarding the Applicant's Application for Access to a Record under the *MGA*.

The Applicant did not provide any further details regarding the allegations of bias such as any pecuniary or personal interest in withholding portions of the Record. It appears to be the Applicant's position that the multiple involvement of the FOIPOP Administrator in the matters involved in the Record speaks for itself.

Conflict of interest arises when a decision-maker's private or personal interests take precedence over or compete with the decision-maker's adjudicative responsibilities. Conflict of interest may be real, perceived or potential.

Bias is a lack of neutrality or impartiality on the part of a decision-maker regarding an issue to be decided. A decision-maker must not be biased as "no one shall be a judge in his own cause." In other words, an individual with a personal interest in the disclosure or non-disclosure of a record must not be the decision-maker who makes the determination with respect to disclosure. A breach of this fundamental rule of fairness will cause a statutory delegate to lose jurisdiction. [Order M-1091]. Accordingly, there is a right to an unbiased adjudication in administrative decision-making.

It is not necessary to prove an "actual bias". The test most commonly applied by the courts is whether there exists a "reasonable apprehension of bias". The test for a reasonable apprehension of bias enunciated by the Supreme Court of Canada is "What would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude? Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?" [Order MO-1519]

[Emphasis added]

[ON Order MO-2227]

I have relied on the above citation in two recently released Reports where bias was an issue.

In other words, the decision-maker in an Application for Access to a Record must be free from any personal interest in whether or not a record is released.

[FI-08-26(M)]

*In other words, the decision-maker in a fee waiver request must be free from any personal interest in whether or not the fee waiver is granted.
[FI-08-66]*

In making a determination regarding bias, I am assisted by an Ontario Order that lays out a non-exhaustive but helpful set of questions to guide an oversight body. Those questions are as follows:

1. *Would a well informed bystander reasonably perceive bias on the part of the decision-maker?*
2. *Would the decision-maker have a closed mind, in that no representations could have been made, which could have resulted in the decision-maker making a different decision?*
3. *Would the decision-maker have a pecuniary interest in or relation to the records?*
4. *Would the decision-maker have any other kind of personal or special interest in the records?*

If any of the above questions are answered in the affirmative, please respond to the following:

5. *Would it have been possible for someone other than the decision-maker to have made the decision?*
6. *Would the answer to any of questions 1-4, posed in regard to the alternate decision-maker(s), have been "yes"?*
7. *Would the requester and any third parties/affected persons, with the full knowledge of the relevant facts and having had the opportunity to object, waived their rights to object to the decision-maker's participation?*

[ON Order MO-1283]

The FOIPOP Administrator under the *MGA* processing the Application for Access to a Record was, at all material times, an employee of the Municipality first as the Director of Planning and Development and second as the Acting CAO and ultimately the CAO. As the Director s/he was intimately involved in the issues surrounding the compilation of this Record. The clearest indication of this is the document of handwritten notes of a meeting between her/himself and the Engineer of the Development Company that was not given to the Review Office, in either copy of the responsive Record and therefore was not included in the Index of Records, but was released to the Applicant who supplied it to the Review Office during the course of the Review. I find that this is not evidence that this document was intentionally withheld because of actual bias but rather it relates to the adequacy of the search discussed below. The Applicant has not provided any evidence to demonstrate actual bias and it would be difficult to do when in fact that particular document in its handwritten form had indeed been given to him/her with the initial release of part of the Record. It may be an indication of a problem with respect to records management that goes beyond the purview of this Review.

That being said, however, the confusion surrounding how this Application for Access to a Record was processed and the disorganization around the contents of the Record, which will be discussed below, certainly did not help to dissuade the Applicant from his/her opinion that bias existed nor calm his/her concerns regarding the conflict of interest. I am satisfied that notwithstanding the efforts to involve an outside FOIPOP Administrator to manage the allegations of a conflict of interest, this step did not go far enough to deal with the allegations of a conflict of interest.

However, the Applicant did not provide details of personal interest to support a finding of bias. It is probable that the multiple roles performed by the FOIPOP Administrator as the former Director of Planning and Development Services and the Acting and present CAO could potentially meet the objective test of creating a reasonable perception or apprehension of bias in the mind of a bystander.

The question at this stage is whether by referring a review of part of the Record, to an outside FOIPOP Administrator in another municipality, the decision made has been “objectified”? In other words, was any influence his/her former role may have played in deciding which portion of the Record to sever cured by an outside “second pair of eyes”?

Notwithstanding that the governing statute names the CAO of a municipality the Responsible Officer, the *MGA* also makes provision for those responsibilities to be delegated to another person or persons who are officers of the Municipality. It is worth noting, therefore, that it is open to the Responsible Officer to delegate his or her authority to someone else when such allegations of conflict are levied. In the future, this may be one way in which to manage such allegations. The statute makes provision to enable a responsible officer as follows:

497 (1) The responsible officer may delegate to one or more officers of the municipality a power granted to, or a duty vested in, the responsible officer.

(2) A delegation

(a) shall be in writing; and

(b) may contain any limitations, restrictions, conditions or requirements that the responsible officer considers necessary or advisable.

In smaller public bodies, this may be difficult to do given the limited number of officers on staff to whom the processing of the Application for Access to a Record could be delegated; particularly someone who would also not be vulnerable to an allegation of a conflict of interest simply by virtue of the close quarters of small public bodies or by the fact that they were also involved in the creation of the actual records and involved in the subject of the records. The IAP office gave advice to this FOIPOP Administrator to use an outside FOIPOP Administrator from another municipality, advice upon which s/he relied. In this case, therefore, that course of action should not be used against the Municipality.

In summary with respect to the conflict of interest allegations, I find as follows:

1. The Applicant has failed to meet the burden on him/her as there was no evidence provided that the FOIPOP Administrator was in an actual conflict of interest where s/he had any personal or pecuniary interest in withholding portions of the Record.
2. Though it is conceivable that a bystander could reasonably perceive bias on the part of the FOIPOP Administrator given his/her previous and ongoing role with respect to this Record, this is not the case if that bystander is well informed and thinking the matter through “realistically and practically” as the Supreme Court of Canada intended. That means in this case a bystander who is well informed in the workings of small local governments and appreciates that mere involvement in a matter does not constitute bias. In order to make out bias in this case there would have to be some evidence produced by the Applicant, which there was not.
3. The *MGA* does not make provision for a referral of a file to an outside FOIPOP Administrator from another public body, specifically another municipality, but in a circumstance such as this, such referral is a reasonable solution to manage an allegation of conflict of interest, particularly since the FOIPOP Administrator acted on the recommendation of the IAP Office. There is also no guidance provided to public bodies in the *FOIPOP Policy and Procedure Manual*.
4. The extent to which that decision was implemented, however, did not go far enough. The piecemeal involvement of the outside FOIPOP Administrator at only one stage and then only to review whether the exemptions applied to the portion of the Record the FOIPOP Administrator proposed to sever was insufficient. Had the outside FOIPOP Administrator been engaged at the outset to review the entire process both with respect to its completeness and accuracy of the search that was conducted and the exemptions that may be applicable to justify severing portions of the Record by making a written recommendation to the FOIPOP Administrator, this would have been the appropriate way to manage the request. Even if the contents of the Record were made known over a period of time, as in this case, the engagement of the outside FOIPOP Administrator ought to have continued throughout.

I wish to make one final comment with respect to allegations made by the Applicant as to the propriety of the FOIPOP Administrator in this case. The Applicant alleges intentional wrongdoing to the point of making reference to a prosecution under the offence section of the *MGA*. The Review Officer has no role under the offence and penalty section, s. 500 of the *MGA*. My role is to do an independent review of the decision made by the Municipality and to make findings and recommendations as to whether or not the *MGA* has been properly applied. With respect to prosecutions under the offence section, when Applicants raise this potential problem, they are referred by the Review Office to their local RCMP who is the designated police force in Nova Scotia to enforce provincial statutory offences. The RCMP on behalf of the Attorney General of Nova Scotia decides whether or not to investigate and if so, that investigation information is shared with the Office of the Crown Prosecutors who make a determination as to whether or not charges will be laid. The tests under s. 500 of the *MGA* are stringent – “**maliciously** collects or discloses” and “**knowingly** alters” – and all applicants ought to bear this in mind when making such allegations.

Right to Access

The purpose of the *MGA*, which is to be given a broad and purposeful interpretation, provides as follows:

462 The purpose of this Part is to

(a) ensure that municipalities are fully accountable to the public by

- (i) giving the public a right of access to records,***
- (ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,***
- (iii) specifying limited exceptions to the rights of access,***
- (iv) preventing the unauthorized collection, use or disclosure of personal information by municipalities, and***
- (v) providing for an independent review of decisions made pursuant to this Part;***

(b) provide for the disclosure of all municipal information with necessary exemptions, that are limited and specific, in order to

- (i) facilitate informed public participation in policy formulation,***
- (ii) ensure fairness in government decision-making, and***
- (iii) permit the airing and reconciliation of divergent views; and***

(c) protect the privacy of individuals with respect to personal information about themselves held by municipalities and to provide individuals with a right of access to that information.

[Emphasis added]

The Applicant has a right of access to any record in the custody or under the control of the Municipality pursuant to s. 465 of the *MGA* once the Application for Access to a Record has been received.

465(1) A person has a right of access to any record in the custody, or under the control, of a municipality upon making a request as provided in this Part.

(2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Part but, if that information can reasonably be severed from the record, an applicant has the right of access to the remainder of the record.

[Emphasis added]

The right to access, which is subject to the appropriate exemptions, applies to *all* records in the custody of the Municipality.

463(1) This Part applies to all records in the custody or under the control of a municipality
[Emphasis added]

The responsibility to respond to an Application for Access to a Record rests with the person delegated the authority to do so under the *MGA*: the Responsible Officer. Responsible Officer is defined under the *MGA* as follows:

461(i) "responsible officer" means, in the case of a

(i) regional municipality, town or county or district municipality, the chief administration officer, if one has been appointed or, if one has not been appointed, the clerk

The *MGA* provides that the Responsible Officer is under a duty to do the following when s/he receives an Application for Access to a Record:

467(1) Where a request is made pursuant to this Part for access to a record, the responsible officer shall

- (a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely; and*
- (b) consider the request and give written notice to the applicant of the decision with respect to the request.*

[Emphasis added]

The Responsible Officer, like the delegated authority from the head of a public body under the *FOIPOP Act*, will be referred to herein as the FOIPOP Administrator.

The complete copy of the severed Record accompanying Decisions #1 & #2 given to the Applicant by the Municipality was different than the copy it gave to the Review Office. The copy of what was referred to as the complete Record given to the Review Office does not appear to be complete. A copy of handwritten Minutes of a meeting were included in the package given to the Applicant but was not provided to the Review Office at all by the Municipality. On review of the portions of the Record that accompanied Decisions #2 and #3 it appears that these documents were in the custody and control of the Municipality at the time of the original search. In fact in Decision #3, the FOIPOP Administrator acknowledges that they should have been included in the first release and apologizes for the oversight. I am left wondering if there are other documents that have been missed because the search parameters were insufficiently precise or the request to provide responsive documents was not circulated widely enough at the Municipality by the FOIPOP Administrator. On August 22, 2008, in a letter outlining how the search was conducted, the FOIPOP Administrator states the following:

I am unable to advise as to whether there are records that may exist for this period that are not in my possession.

The test is not what is in the possession of the FOIPOP Administrator or CAO. It is what is in the custody or control of the Municipality as a whole, which is not publicly available, that constitutes the responsive Record.

Subsection 461(h) of the *MGA* defines record as follows:

“record” includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;

In this case, the FOIPOP Administrator at the material time of the events recorded in the Record was the Director of Planning and was professionally involved in the subject matter. Subsequently the FOIPOP Administrator was named Acting CAO and then the CAO at the time of responding to the Applicant’s Application for Access to a Record. It would seem that in these particular circumstances the FOIPOP Administrator would have first-hand knowledge of what could constitute the responsive Record. It is curious, therefore, that there was so much confusion in pulling together this Record in the manner contemplated by the *MGA*: openly, accurately and completely.

Applicability of the Exemptions Claimed

The *MGA* provides that the onus rests with the Municipality to demonstrate that the exemptions claimed apply to the severed or withheld Record. The *MGA* provides:

498(1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the responsible officer to prove that the applicant has no right of access to the record or part.

Section 474 – Advice

There are two exemptions being relied on by the Municipality. The first refers to when a public body can refuse to disclose information that would reveal advice. Section 474 of the *MGA* provides as follows:

474(1) The responsible officer may refuse to disclose information that would reveal advice, recommendations or draft resolutions, policies, by-laws or special legislation developed by or for the

- (a) council, village commission or service commissioners; or*
- (b) members of the municipal body.*

(2) The responsible officer shall not refuse to disclose background information used by the municipality.

(3) This Section does not apply to information in a record that has been in existence for five or more years.
[Emphasis added]

The Applicant argues that s. 474 only applies to advice that is provided in relation to a draft by-law or legislation. The Applicant made this argument despite being informed repeatedly by the Review Office that s. 474 is not restricted to advice in relation to a by-law. On a literal and liberal interpretation of s. 474 of the *MGA*, it is clear that the Legislative Assembly did not intend for this exemption to have such a restrictive interpretation.

Section 474 also specifically prohibits a FOIPOP Administrator from refusing to disclose information that falls within the definition of “background information”, which is defined in the *MGA* as follows:

461 (a) "background information" means

(i) any factual material. . .

We are assisted in understanding the language used in s. 461 of the *MGA* by the definitions provided for in the *Freedom of Information and Protection of Privacy Regulations*. The relevant definition reads as follows:

24(1) For the purpose of subclause 3(1)(a)(i) of the Act, “factual material” means a coherent body of facts, separate and distinct from interpretations of, reactions to or advice and recommendations in respect of facts.

First, the Municipality must establish that the information withheld fits the definition of the exemption. Once it has been determined that a discretionary exemption is applicable to the information that it wishes to withhold, it must then go through the exercise of discretion to apply the exemption. In other words, just because the exemption is applicable, the Municipality has the option to choose whether or not to apply it to the information that is the subject of the request. When exercising its discretion to apply the exemption or not, the Municipality must consider all relevant factors *and* provide reasons to the Applicant. The exercise of discretion and the factors that should be considered have been discussed in many Review Reports [see *FI-06-79*].

In both cases the decision is a discretionary one. As the relevant section of the Act reads “may”, it is up to a public body to exercise its discretion and to provide its rationale for doing so to the Applicant. In Review Report FI-06-79, I emphasized the importance of a public body explaining to an applicant in its decision how it exercised its discretion and not simply that it did. [FI-08-66]

An important element in reviewing the exercise of discretion is that of whether or not the manner in which it was exercised meets the test of fairness. This concept was discussed in a recent Review from this Review Officer [see *FI-08-66*].

The Municipality has relied on s. 474 of the *MGA* with respect to three separate documents within the Record that are still at issue. They involve an exchange between the Municipality and another level of government.

The Nova Scotia Supreme Court has stated that advice is information that leads to a course of action:

[25] . . . Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

[O'Connor v. Nova Scotia, 2001 NSSC 6]

Local governments need to be able to receive candid and comprehensive advice suggesting a course of action knowing that it will be up to their FOIPOP Administrator to make a decision as to whether or not to exercise his or her discretion to release information to an applicant. Section 474 is the exemption that recognizes the necessity for the Municipality to have this discretion for its day to day operations in planning the business of the Municipality.

[25] The intent of s. 14 [which is the equivalent to s. 474 in the MGA] is to protect from disclosure advice and recommendations developed within government.

[26] There does not appear to be any judicial interpretation of s. 14 of the FOIPOP Act in Nova Scotia. In John Weidlich v. Saskatchewan Power Corporation (1997) Q.D.G. No. 834, the Saskatchewan Court of Queens Bench adopted a practical definition of “advice” as follows:

[10] I suggest that the meaning of ‘advice’ in ordinary parlance is to be adopted here, meaning ‘primarily the expression of counsel or opinion, favourable or unfavourable, as to action, but it may, chiefly in commercial usage, signify information or intelligence’, per Rand, J., in Moodie (J.R.) Co. v. Minister of National Revenue. [1950] 2 D.L.R. 145 (S.C.C.), at p. 148

[27] In O'Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat), supra, MacDonald, A.C.J. of the Nova Scotia Supreme Court, sitting as a Chambers Judge considered the meaning of “advice” in interpreting s.13(1).

[28] The Chambers Judge concluded that “advice is part of the deliberative process”, and accepted the views of Commissioner Linden, the Ontario Commissioner in Order 118 that “advice” generally pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by the recipient during the deliberative process. [R. v. Fuller (2003), 213 N.S.R. (2d) 316 (SC)]

There is considerable consensus amongst Canadian Commissioners and Courts as to the meaning to attach to “advice”:

The “advice” exemption has been addressed by the courts, as well as by provincial information commissioners. The Alberta Commissioner defined “advice” as an “opinion,” “view” or “judgment” (Order 97-007). The Ontario Commissioner accepted “thoughts” or “views” if they led to a course of action (Order M-457). The Nova Scotia Court of Appeal said “advice” should be given its “ordinary meaning” [McLaughlin v. Halifax-Dartmouth Bridge Commission (1993) 125 N.S.R. (2d) 288]. The Federal Court wants public bodies “to choose the interpretation that least infringes on the public right of access.” [Canada (Information Commissioner) v. Canada (Immigration and Refugee Board), 1997 F.C.J. No. 1812]. [Report FI-05-27]

When the information contained in the Record is factual material, as defined, it will fit within background information and will not constitute “advice”:

The submission of the SSRSB states “[t]he Report is considered to be a reliable version of events.” This statement, coupled with a plain reading of the document leads me to conclude the nature of the complaint and the findings of Report HR-061-05 are factual in nature, therefore do not meet the definition of advice pursuant to s.14 of the FOIPOP Act as set out by the Nova Scotia Supreme Court in O’Connor v. Nova Scotia, NSSC 6 (2001). [FI-05-84]

Upon reading the three documents in the Record to which the Municipality applied this exemption, I am satisfied that the exemption has been appropriately applied as the information fits within the definition of “advice.” The Municipality chose to exercise its discretion to withhold based on s. 474 of the *MGA* and while I do not have the benefit of its reasons for doing so, I have not been persuaded that it would be appropriate to come to a different conclusion and thus the Municipality’s decision should stand.

Section 476 – Solicitor-Client Privilege

The second and only other exemption that remains at issue in this Review is one based on the solicitor-client privilege exemption of the *MGA*, which reads as follows:

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

This discretionary exemption permits a public body to withhold a document that falls under solicitor-client privilege. The first step is to ascertain whether or not the document contains information that is privileged.

With respect to s.16, in earlier reviews I have cited an opinion of the British Columbia Information and Privacy Commissioner. The Commissioner wrote that “a public body may withhold information that consists of, or would reveal, a confidential communication between a lawyer and his or her client directly related to the giving or receiving of legal advice.” He added that a further four conditions must be established:

1. *There must be a communication, whether oral or written;*
 2. *The communications must be of a confidential nature;*
 3. *The communication must be between a client (or her/his agent) and a legal adviser;*
 4. *The communication must be directly related to the seeking, formulating or giving of legal advice.*
- [FI-05-08]

The solicitor-client privilege is a cornerstone to our legal system having been described as “a substantive rule for the exclusion of evidence in legal proceedings.”

Information protected by the privilege extends to confidential communications, passing both ways, between a lawyer and his or her client that took place in the course of a professional relationship, whether or not in contemplation of litigation. The communications must be in the context of the client seeking legal advice from the solicitor . . .

[McNairn, Colin and Woodbury, Christopher, Government Information: Access and Privacy]

The Nova Scotia Supreme Court has made it clear that not everything done by a lawyer will be protected as privileged but that the privilege is equally available for lawyers within government:

[35] However, only to the extent that a document reveals that legal advice was sought or given, from the named legal counsel, will that document be found to be privileged under s. 16 of the FOIPOP Act [which is equivalent to s. 476 of the MGA]. Solicitor client privilege at common law as defined in Mitsui, supra, and for the purposes of s. 16 of the FOIPOP Act, includes the privilege that attaches to confidential communications between solicitor and client for the purpose of obtaining and giving legal advice.

[36] As noted above, because legal advice privilege protects the relationship between solicitor and client, the key question to consider is whether the communications is made for the purpose of seeking or providing legal advice, opinion or analysis. Legal advice type privilege arises only where a solicitor is acting as a lawyer, and giving legal advice to a client. Therefore, in each instance where such privilege is claimed herein, the question should be “was the named government lawyer acting as a lawyer and providing legal advice when he/she received, commented on or initiated a document or correspondence?”

[37]In R. v. Campbell, [1999] 1 S.C.R. 565 the Supreme Court of Canada at para 50 commented:

“it is, of course, not everything done by a government (or other) lawyer that attracts solicitor client privilege.”

[38] The Court went on to state:

Whether or not solicitor client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

[R. v. Fuller (2003), 213 N.S.R. (2d) 316]

It is wholly appropriate for a public body to consider whether or not to release a record notwithstanding that it may contain privileged information pursuant to an Application for Access to a Record. Alternatively it is appropriate for a record to be severed and in doing so the privilege is not jeopardized in the severed portion of the Record:

It is this Office's considered view, supported by case law, that, in the context of access legislation, severing records which may be protected under s.16 does not amount to a waiver of that privilege.

Not only does the Act give individuals the right of access to records, it also gives individuals the right of access to the remainder of a record when exempted information "can reasonably be severed." Section 5(2) makes no exception for records denied under solicitor-client privilege.

[FI-04-25]

There are six documents within the Record at issue that the Municipality has withheld under s. 476 of the *MGA*. Below, I will deal with the sixth document for which the same exemption is claimed since it also gives rise to a discussion about in-camera meetings below. With respect to the remaining five documents, I find that they involve emails between a solicitor and a Third Party. The information contained in the Record, however, does not fall within the definition of solicitor-client privilege. There is no advice sought or given between the Municipality and its solicitor. The Third Party is involved in all the discussions. When the Third Party was consulted with respect to release of personal information under s. 480 of the *MGA* [no longer at issue], s/he consented to its release. It appears the Municipality takes the position that if a solicitor is involved in any meeting or exchange of information that the document becomes privileged. That is not the case as the information must be between a solicitor and his or her client and be legal advice exchanged between the two. That is not the case in these five documents. This entire portion of the Record should have been provided to the Applicant, with any necessary personal privacy severances applied.

In-Camera Meetings

On May 22, 2009, the Municipality issued Decision #3 accompanied by a third release of a portion of the Record. There were six documents in total, five released in full and a sixth withheld in full pursuant to s. 476 of the *MGA* [solicitor-client privilege]. The Record withheld is minutes of an in-camera meeting of Council which the Municipality claims discussed matters protected by solicitor-client privilege. It is the sixth document of the Record referred to above that remains at issue in this Review.

The *Part I of the Municipal Government Act* permits meetings to be held in-camera when the subject matter meets specific criteria.

22(1) *Except as otherwise provided in this Section, council meetings and meetings of committees appointed by council are open to the public.*

(2) *The council or any committee appointed by the council may meet in closed session to discuss matters relating to*

- (a) acquisition, sale, lease and security of municipal property;*
- (b) setting a minimum price to be accepted by the municipality at a tax sale;*
- (c) personnel matters;*
- (d) labour relations;*
- (e) contract negotiations;*
- (f) litigation or potential litigation;***
- (g) legal advice eligible for solicitor-client privilege;***
- (h) public security.*

(3) No decision shall be made at a private council meeting except a decision concerning procedural matters or to give direction to staff of, or solicitors for, the municipality.

(4) A record which is open to the public shall be made, noting the fact that council met in private, the type of matter that was discussed, as set out in subsection (2) and the date, but no other information.

[Emphasis added]

In-camera meetings are an important part of any local public body's ongoing work but only when considering those issues listed in s. 22 of the *MGA*.

Along with Decision #3 dated May 22, 2009, the Municipality included an Index of Records reference to two pages being withheld from the Applicant. On this portion of the Record, the heading in the column of the minutes is titled "potential litigation." While the Municipal solicitor was present and there is reference to the fact that s/he gave his/her legal opinion, there is no discussion of what that legal opinion was or any recording of potential litigation in the contents of the minutes. The Applicant had registered a concern that the Municipality abuses or overuses in-camera meetings. The Municipality is empowered to deal with matters in-camera that involve litigation and legal opinions. Simply dealing with a matter in-camera and labelling it to be with respect to litigation is not sufficient. In relying on s. 476 of the *MGA* [solicitor-client privilege] the contents of the Record must reveal that the in-camera minutes *de facto* contained information that is protected by the privilege. They do not.

In this sixth document, there is a small reference in the minutes that can be characterized as falling under solicitor-client privilege. The remainder of the Record does not reveal a legal opinion or discussion of potential litigation that could be protected by s. 476 of the *MGA*. One or two sentences that fall under the solicitor-client privilege protection cannot cast a shadow over the whole of the document. Indeed, under access to information legislation, the exact opposite holds true. The Municipality is to make every effort, as is required by the *MGA*, to provide access to as much information as possible relying only on limited and specific exceptions to that

right to justify withholding any of the Record. The Municipality should have provided this portion of the Record to the Applicant, at the very least in severed form. By severing out the small reference of privileged information and providing the remainder to the Applicant, the Municipality would not be jeopardizing the privileged portion.

Adequacy of the Search for the Record

The Applicant has identified search as an ongoing issue. S/he raised it during the Review process and indicated during the formal Review that it continued to be a concern to him/her. When search was raised by the Applicant, the Review Office posed questions to the Municipality to try and determine whether or not an adequate search had been conducted.

The adequacy of a search conducted by a public body is part and parcel of the statutory duty to assist. In reviewing this issue, the Review Officer must be satisfied that the Municipality made every reasonable effort to locate the complete Record, thereby fulfilling its duty to assist.

The Act does not require the City to prove with absolute certainty that further records do not exist. However, the City must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request [other Orders listed]. Furthermore, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

[ON Order MO-2334]

The Municipality responded to the Review Office with respect to the search it conducted. Some of the explanation provided points to a number of facts: The Municipality had to make three decisions in this case providing additional portions of the Record along with those decisions; there were discrepancies in the copies of the Record given to the Applicant and to the Review Office; there were parts of the Record not included in the Index of Records prepared by the Review Office [based on the Records that were provided by the Municipality], which Index had been approved by the Municipality; the search words may have limited the response the FOIPOP Administrator received from others within the Municipality; and the FOIPOP Administrator may have confined the search to too restrictive a zone within the Municipality.

. . . in searching for records, a public body must do that which a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. The evidence should describe all potential sources of records, identify those searched and identify any sources that are not searched, with the reasons for not doing so...

[BC Order 02-03]

I applied these factors in a recent Review Report from this office, [see *FI-07-58*]. In that report, I found that delays in response time, confusion about what was considered the responsive Record, and a failure to provide a comprehensive Index of Records to the Applicant explaining

the nature and scope of the Records considered all contributed to a finding that the Public Body did not meet the standard of an adequate search.

In applying the factors reviewed in *FI-07-58* to this case, I have considered the following information:

1. Access to information is a professional discipline that is often not given the study and attention it ought to. This can be a challenge for smaller public bodies. This FOIPOP Administrator may not have had the opportunity to become familiar with the rigours of processing an Application for Access to a Record as the newly appointed CAO and designated Responsible Officer.
2. Prior to becoming the CAO, the FOIPOP Administrator was, however, the Director of Planning and Development involved in the development issues, which was the subject matter of the Application for Access to a Record. In that capacity, it is reasonable to assume s/he had considerable familiarity with the responsive Record.
3. There were three decisions and separate sets of the Record released to the Applicant over nearly a two year period [October 1, 2007 – May 22, 2009].
4. There are significant discrepancies between the Record given to the Applicant both copies given to the Review Office by the Municipality, which included the copy of the Record representing what was given to the Applicant and the “complete” copy of the unsevered Record.
5. When these discrepancies were brought to the attention of the Municipality, the FOIPOP Administrator tried to be cooperative with the Review Office and offered to redo the search. As the file was moving to the formal Review stage, the offer was declined.

I am left with doubts as to the adequacy of the search even at the conclusion of this Review process. The discrepancies are so many and so complex it is difficult to understand if the problem is adequate search, poor records management or poor handling of the access to information process.

I believe that the Municipality has learned a great deal about the requirements of doing a search for a record throughout the course of this Review. Were it able to turn the clock back and start over, I am certain the Municipality would respond differently in the first instance to the Applicant. A case in Newfoundland was similar with respect to the level of frustration felt by the Applicant as to how the request was being managed.

It is readily apparent that the Applicant has faced considerable frustration resulting from CNA's handling of his request for information. The College's errors were significant and repeated, ranging from an initial response indicating that there were far more responsive records than was actually the case, and later indicating that there were no responsive records when there were. One can hardly blame the Applicant for not wishing to rely on the CNA's response to his request, given such wide ranging errors . . .

In each instance where the duty to assist is under consideration, the Commissioner in each jurisdiction must make a determination as to what seems reasonable, after considering all of the relevant factors involved in each case . . .

My assessment is that CNA has failed to respond within a reasonable standard of accuracy to the Applicant's request and amended request, given the College's experience with such requests and the expertise at its disposal, and the fact that both the original and amended request were not particularly out of the ordinary in terms of other requests which CNA has deal with.

[NL Report 2007-014]

I am therefore recommending that the Municipality be given the opportunity to begin again and conduct a new search in response to the Applicant's original Form 1.

FINDINGS

1. There is no evidence the FOIPOP Administrator was in an actual conflict of interest where s/he had any personal or pecuniary interest in withholding portions of the Record.
2. Though it is conceivable that a bystander could reasonably perceive bias on the part of the FOIPOP Administrator given his/her previous and ongoing role with respect to this Record, not so the case if that bystander is well informed. That means in this case a bystander who is well informed in the workings of small local governments and appreciates that mere involvement in a matter does not constitute a conflict of interest. In order to make out bias in this case there would have to be some evidence produced by the Applicant, which there was not.
3. The *MGA* does not make provision for a referral of a file to an outside FOIPOP Administrator from another public body, specifically another municipality, but in a circumstance such as this, such referral is a reasonable solution to manage an allegation of conflict of interest, particularly since the FOIPOP Administrator acted on the recommendation of the IAP Office. The *FOIPOP Policy and Procedure Manual* is silent with respect to how to manage a conflict of interest.
4. The extent to which that decision was implemented, however, did not go far enough. The piecemeal involvement at only one stage and then only to review whether the exemptions applied to the portion of the Record the FOIPOP Administrator proposed to sever was insufficient. Had the outside FOIPOP Administrator been engaged at the outset to review the entire Record both with respect to its completeness and accuracy and the exemptions that may be applicable to justify severing portions of the Record and make a written recommendation to the FOIPOP Administrator, this would have been the appropriate way to manage the request. Even if the contents of the Record were made known over a period of time, as in this case, the engagement of the outside FOIPOP Administrator ought to have continued throughout.
5. There may not have been other Officers of the Municipality to whom the FOIPOP Administrator could have delegated this Application for Access to a Record who would not also have been vulnerable to an allegation of conflict of interest from the Applicant.

6. The Municipality failed in its duty to assist: to conduct an open, adequate and complete search for the complete responsive Record.
7. There is a significant discrepancy in make-up of the Record given to the Applicant and to the Review Office. The resulting figures are as follows:
 - The total number of pages in the responsive Record: 1337 [Review Office's copy]
 - The copy provided to the Review Office, intended to represent the records sent to the Applicant: 460
 - The total number of pages withheld in full: 71
 - The discrepancy: 806 – This is discrepancy between what the Municipality told the Review Office was the “complete” copy of the Record, and what it said it sent to the Applicant.
 - The total number of pages the Applicant claims to have received: 1452.
8. The keywords selected by the Municipality for the search significantly reduced the information identified as relevant.
9. The Municipality made three decisions and subsequent releases of information in response to the Form 1, the last one made nearly two years after the original Form 1 was submitted by the Applicant.
10. The Municipality included information in its release that is publicly available on its homepage. There is some information contained in the Record that is publicly available such as pages 893 and 894, which should not have formed part of the responsive Record. This information does not fall under the *MGA* and does not form part of the Record. It is not necessary or appropriate to supply this to the Applicant under the *MGA*; rather, it is sufficient to direct the Applicant to where that information can be located.
11. With respect to the nine parts of the Record that were severed and remain at issue, I have identified the portion of the Record by the page numbers in the Index of Records prepared by the Review Office followed by the exemption claimed by the Municipality and a brief discussion as to whether or not the exemption applies in the opinion of this Review Officer. I find as follows:

Pages 880-881

Page 882

Exemption claimed s. 474 [advice]

This involves a string of emails which clearly involves the Municipality asking for and receiving advice from Service Nova Scotia and Municipal Relations. The weighing factor given by the Municipality was that it was supplied in confidence although it is not marked confidential. After reading this portion of the Record, I find the exemption is applicable and thus it can be withheld.

Page 887

Exemption claimed s. 474 [advice]

Although there is some information that should not have been severed, such as the subject line and the signature block as they are left in elsewhere and do not make

up part of the advice or recommendations, the author is providing courses of action, which traditionally have fallen within the definition of advice. I find the exemption is applicable to the majority of the severances, though when the new Record is produced page 887 should be included with the subject line and the signature block not severed.

Pages 950 – 952

Page 1094

Pages 1132 – 1136

Page 1164

Pages 1183 – 1185

Exemption claimed s.476 [solicitor-client privilege]

This is the recording of a meeting held with a Third Party. Although the Municipal solicitor was present, so was a Third Party. This Third Party was consulted by the Municipality and s/he gave permission to release his/her personal information, though it does not appear that the Third Party was given a copy of this document for consideration. It is not appropriate to claim s. 476 of the *MGA* simply because a solicitor is present at a meeting. The Third Party also happens to be a lawyer, but was involved as a resident, not as a lawyer. I find the exemption is not applicable to any of these pages and therefore these pages should be released to the Applicant. In addition, severing the personal information of the Third Party is not necessary as his/her consent was given to disclose.

In-Camera Minutes

No page numbers [2 pages]

Exemption claimed s.476 [solicitor-client privilege]

These are minutes from an in-camera Municipal Council meeting. The *MGA* permits meetings to be held in-camera when the subject matter meets specific criteria. In this case, the heading for the applicable section is “potential litigation” which is one of the reasons for withholding, but in the minutes, there is no discussion of litigation. There is a small portion of the minutes of the meeting that contains a reference that could be characterized as a legal opinion. Most of the information, however, does not. I find that the exemption is not applicable, with one minor exception. It is possible and appropriate for this part of the minutes to be severed and the redacted Record released to the Applicant.

RECOMMENDATIONS

The Review Officer is not restricted by the *MGA* as to what recommendations can be made. The *MGA* provides as follows:

492(2) In the report, the review officer may make any recommendations with respect to the matter under review that the review officer considers appropriate.

I find in this case that the Municipality's ongoing and repeated failure to provide an accurate and complete responsive Record to the Applicant has never been rectified. I am left at the end of this formal Review not knowing exactly what constitutes the complete responsive Record. The amount of time and work to sort out the multiple discrepancies is effort best expended by the Municipality who has the duty to respond to an Application for Access to a Record. Sorting this out is not the role of the Review Office. I make the following Recommendations to the Municipality:

1. Conduct a new search for the entire responsive Record to be provided to the Applicant at no cost. In conducting the new search, the Municipality should take the following into account:
 - a. The start date for the search be February 18, 2004 and be up to and including August 9, 2007, in accordance with the Applicant's Form 1;
 - b. Do not restrict the search for records only to those in the custody of the Chief Administrative Officer/Responsible Officer/FOIPOP Administrator;
 - c. Search all records in the custody or under the control of the Municipality;
 - d. Rely on a proper keyword search including the names of all staff and involved third parties, and the acronyms for all involved companies and agencies and, in particular, the local resident groups and advisory committees;
 - e. Include archived files and emails in the search, but not backup tapes;
 - f. Prepare a comprehensive Index of Records for the new Record;
 - g. Even if it means the Applicant will have some duplicates, the FOIPOP Administrator is to disregard all previous packages given to the Applicant in preparing the Record that is responsive to the original Form 1.
2. In addition to conducting a new search, the following pages should be released to the Applicant, in full, immediately:
 - Pages 950 – 952
 - Page 1094
 - Pages 1132 – 1136
 - Page 1164
 - Pages 1183 – 1185
3. With respect to the document from the in-camera meetings, the Municipality should consider exercising its discretion to release it in full. Alternatively, the small portion of

the Record to which solicitor-client privilege applies could be severed and the remainder of the Record released.

4. With respect to the three documents to which s. 474 [advice] has been applied, the Municipality should re-confirm its decision to withhold that information because the exemption was applied appropriately under the *MGA*.

Respectfully,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer for Nova Scotia