REPORT
Nova Scotia Freedom of Information and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-08-06

Report Release Date: July 16, 2009

Public Body: Department of Transportation and Public Works [now the Department of Transportation and Infrastructure Renewal]

Issues: Whether the Department of Transportation and Public Works ["Transportation"] appropriately applied the *Freedom of Information and Protection of Privacy Act* ["*Act*"] and, in particular:

1. Whether the letter requested by the Applicant qualifies as solicitor-client privileged.
2. If the Record qualifies as falling within the definition of solicitor-client privilege, whether Transportation has properly applied the s. 16 solicitor-client privilege exemption to the Record.

Record at Issue: Pursuant to s. 38 of the *Act*, Transportation has provided the FOIPOP Review Office with a copy of the information withheld from the Applicant. The Record at issue in this Review is one letter, written from a Department of Justice Solicitor to an employee with Transportation. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or her delegated staff.

Findings: The Review Officer found that:

1. Transportation's FOIPOP Administrator's decision letter did not provide any explanation or rationale to the Applicant regarding the exercise of discretion under s. 16 of the *Act,* contrary to the duty to assist, or give any reasons for its decision contrary to s. 7(2)(a) of the *Act*. It is somewhat perplexing that decades after access

legislation came into force in Nova Scotia and after countless Review Reports on proper procedure regarding discretionary exemptions that a public body would be responding to an Applicant in this manner in 2008.

2. The actual decision provided to the Applicant from Transportation to not release the Record appears to have been made by an employee other than the FOIPOP Administrator not designated under the *Act* and who, therefore, had no authority to make a decision not to provide access.
3. The Applicant's Representations support the fact that there may be sufficient local public interest in understanding government's decision to require Transportation to exercise its discretion to waive the solicitor-client privilege exemption and release the Record.
4. Solicitor-client privilege involves a confidential communication in the context of a longstanding legally sanctioned and protected relationship that deserves respect. However, in the context of access to information legislation, solicitor-client privilege has been included in the statute in the form of a discretionary exemption leaving it open to public bodies to release the information where the circumstances call for openness. It is not sufficient under the scheme of the *Act* for a public body to simply cite the exemption in s. 16 solicitor-client privilege without giving reasons as to how it has exercised its discretion. Included in those reasons must be an indication of what harm would result from its release.
5. Solicitor-client privilege belongs to the client, which in this case is Transportation, and it is an option for the FOIPOP Administrator or the head of Transportation to make a determination under s. 16 of the *Act* as to whether or not to waive the privilege and grant the Applicant access to the requested information.
6. Transportation did not provide any evidence or argument to support the fact that harm would result from disclosure of the Record.
7. Though raised by the Applicant in the Application for Access to a Record and included in the Review Office Investigative Summary given to the parties, Transportation did not address the issue of public interest.
8. I find that it is possible to sever the privileged portion of the Record.

Recommendations:	The Review Officer recommended that: 1. The FOIPOP Administrator reconsider its decision and exercise its discretion by deciding whether to waive privileged information by recognizing that no demonstrable harm would result, being cognizant of the local public interest and recognizing that such full disclosure would be consistent with the *Act's* purpose to ensure fairness in government's decision-making; or 2. Transportation, at a minimum, provide the Applicant with a copy of the Record severing the few sentences near the conclusion of the letter that include legal advice and are subject to solicitor-client privilege.
Key Words:	balance, burden, construed liberally, construed narrowly, delegated authority, discretion, employee, fair process, *fait accompli,* FOIPOP Administrator, front line staff, harm, legal advice, new decision, public interest, reasoned and seasoned, reasons, solicitor-client privilege.
Statutes Considered:	*Freedom of Information and Protection of Privacy Act, s. 2, 7(2), 16, 31(1)(b), 31(4), 38(1), 39(2), 42(6), 45(1).*
Case Authorities Cited:	*NS Review Reports FI-05-08, FI-00-116, FI-04-25, FI-08-66, FI-05-25; Blood Tribe (Department of Health) v. Canada (Privacy Commissioner) (F.C.A.) (2006), [2007] 2 F.C. 561; R. v. Fuller (2003), 213 N.S.R.(2d) 316; O'Connor v. Nova Scotia, 2001, 10 C.P.R (4th) 129; Stevens v. Canada (Prime Minister), [1997] 2 F.C. 759 (Fed. T.D.); McCormack v. Nova Scotia (1993), 123 N.S.R.(2d) 271; McLaughlin v. Halifax-Dartmouth Bridge Commission (1993) 125 N.S.R.(2d) 288.*
Other Cited:	McNairn, Colin and Woodbury, Christopher*, Government Information, Access and Privacy*; Rankin, Professor Murray T., *The New Access to Information and Privacy Act: A Critical Annotation (1983), 15 Ottawa Law Review.*

REVIEW REPORT FI-08-06

BACKGROUND

On December 11, 2007, the Applicant made an Application for Access to a Record to the Department of Justice ["Justice"] for the following:

> *Letter written by [Name of Department of Justice Solicitor] concerning Lower Cross Road, at St. Mary's Bay, located within the Municipality of the District of Digby's Boundary. The letter is believed to be addressed to [Name of Transportation Area Manager, Location] some time in 2007.*

The Application for Access to a Record also requested the fees be waived for the following reason:

> *I hereby request to be excused from paying fees related to the above application because:*
> *The contents of this letter are of interest to the greater community since it affects the status of a public right-of-way.*

By letter dated December 19, 2007, Justice advised the Applicant that the Application for Access to a Record had been forwarded to the Department of Transportation and Public Works [now Transportation and Infrastructure Renewal] as the public body that would have custody and control of the Record sought. On December 21, 2007, the Applicant paid the mandatory twenty-five dollar fee to Transportation and Public Works ["Transportation"].

On January 8, 2008, Transportation issued the following decision to the Applicant:

> *We have located one record which may be responsive to your request. We are refusing access to the record under Section 16 of the Act, Solicitor-client privilege.*

The Applicant filed a Request for a Review dated January 11, 2008. The Applicant requested that the Review Officer review the decision, act or failure to act of the head of the public body; decision dated or made on the 8th day of January, 2008, a copy of which is attached to this Request for Review; the Applicant requests that the Review Officer recommend that the head of the public body give access to the record as requested in the Application for Access to a Record.

On January 21, 2008, Transportation provided the Review Office with the information requested including the Record at issue and a copy of a cover fax from the employee at Transportation who provided the Record to the Freedom of Information and Protection of Privacy ["FOIPOP"] Administrator. The fax contained instructions on the release of the Record.

Mediation was not successful.

RECORD AT ISSUE

Pursuant to s. 38 of the *Act*, Transportation has provided the FOIPOP Review Office with a copy of the information withheld from the Applicant. The Record at issue in this Review is one letter, written from a Department of Justice Solicitor to an employee with Transportation. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or her delegated staff.

APPLICANT'S REPRESENTATION

All of the Representations made by the Applicant during the Review process have been reviewed by the Review Officer. On January 19, 2009, in response to inquiries from the Review Office, the Applicant submitted the following:

> *I am disappointed with the decision not to release the letter. I believe it should be made public. There is considerable concern here locally about the status of the Marsh Road which has been, until relatively recently, a public road along its whole length.*

On January 21, 2009 the Review Office forwarded research regarding the solicitor-client exemption to the Applicant. On February 2, 2009, the Applicant responded with the following Representation:

> *I do not believe the Public Body has correctly applied the solicitor-client privilege exemption and I wish to proceed with the Investigation stage of the review.*
>
> *Of the four conditions referenced in Review FI-05-08, I do not believe the communication that I have requested fulfills "2. The communications must be of a confidential nature"*
>
> *The communication has been referenced by [Name of Transportation Area Manager] of the Department of Transportation and Infrastructure Renewal as the reason that the department no longer believes the road in question (Marsh Road) is a public right-of-way. The public has a right to know the justification for the department's decision.*
>
> *Therefore I do not believe it is "of a confidential nature" in the conventional sense.*

On June 7, 2009, the Applicant provided a Representation to the Review Officer when the matter was in formal Review. The following is a summary of that Representation:

1. The Applicant wanted an explanation why an employee of Transportation was allowed to decide a section of the road was no longer a public road and, according to that employee, it never was a public road.
2. The Applicant has a letter from the Transportation Minister in the 1970s stating the road is a public road. Under the *Highways Act*, it was considered a public road and as such was regularly maintained by the Department of Transportation until sometime in 2000.
3. The letter should be released because the decision is important to local residents and the background for this decision should be made public so people understand the reasons behind it.
4. The Applicant submits that a government bureaucrat should not have the right to reverse decisions made by previous Transportation Ministers without producing legal evidence to the public to justify this reversal.
5. The Applicant does not believe the Record should be withheld from the public because of solicitor-client privilege, as s/he submits this is an avoidance technique on the part of the Department of Transportation.

PUBLIC BODY'S REPRESENTATION

By the time this matter was referred to formal Review, no Representations had been received from Transportation. Where there is an absence of information or explanation given to the Applicant in a public body's decision letter, the need for Representations to the Review Officer during the formal Review becomes even more critical.

On June 22, 2009, with a view to ensuring a fair process, the Review Office inquired whether or not Transportation would be making a Representation. Specifically, the Review Office indicated it had not received any explanation regarding the applicability of the exemption or Transportation's exercise of discretion and that the only information received was a copy of the decision letter, which simply recited the section number of the exemption claimed and its description. The Review Office provided research supporting this position and Transportation responded in the affirmative after the importance of the need for Representations was made clear. Transportation requested an additional extension in which to provide that Representation, which the Review Office granted.

On July 3, 2009, Transportation provided a Representation to the FOIPOP Review Officer, which provided as follows:

> *In response to your request for representation in regard to the above FOIPOP request this request was denied based on Solicitor-client privilege, Section 16 of the Freedom of Information and Protection of Privacy Act (FOIPOP).*
>
> *The information contained within the requested record represents a communication of legal advice between Department of Justice lawyer and Department of Transportation and Infrastructure Renewal client, providing more*

information than this would result in disclosing information that is otherwise privileged.

Therefore the information requested is denied as solicitor-client privilege as per Section 16 of the FOIPOP Act.

The above caption is the entire contents of the Representation submitted by Transportation to the Review Officer. As in the original decision to the Applicant, the Representation from Transportation offered no explanation or rationale as to how it exercised its discretion, once again simply citing s. 16 of the *Act*.

ISSUES

Whether Transportation appropriately applied the *Freedom of Information and Protection of Privacy Act* ["*Act*"] and in particular:

1. Whether the Record requested by the Applicant qualifies as solicitor-client privileged.
2. If the Record qualifies as falling within the definition of solicitor-client privilege, whether Transportation has properly applied the s. 16 solicitor-client privilege exemption to the Record.

DISCUSSION:

The Applicant's right to access information under the *Act* is stated in the Purpose section, which provides:

2 The purpose of this Act is

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

(i) giving the public a right of access to records . . .
(iii) specifying limited exceptions to the rights of access. . .
(v) providing for an independent review of decisions made pursuant to this Act; and

(b) to provide for the disclosure of all government 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,
(iii) permit the airing and reconciliation of divergent views. . .

[Emphasis added]

At a formal Review, the onus is on the public body to demonstrate that an applicant should not be granted access to the responsive Record. Section 45 provides as follows:

45(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 head of a public body*** *to prove that the applicant has no right of access to the record or part.*
[Emphasis added]

Transportation did not provide reasons to the Applicant in its decision letter as to why or how it exercised its discretion to refuse access. Transportation's decision letter simply declared the exemption it was relying on by citing s. 16 of the *Act*. Transportation's failure to put its mind to these factors means it has not met this burden and has rendered the decision one that does not sufficiently comply with the *Act.*

7(2) The head of the public body shall respond in writing to the applicant . . . stating

(a) whether the applicant is entitled to the record or part of the record and . . .

(ii) where access to the record or to part of the record is refused, ***the reasons for the refusal and the provision of this Act on which the refusal is based;***
[Emphasis added]

The burden rests with Transportation to prove the Applicant has no right to access the Record and give reasons *and* recite the section of the legislation when access is denied.

ISSUE #1: WHETHER THE LETTER REQUESTED BY THE APPLICANT QUALIFIES AS SOLICITOR-CLIENT PRIVILEGE.

In order for s. 16 of the *Act* to apply *prima facie*, the Record must meet certain criteria to fall within the definition of a solicitor-client communication. This is important because it is not the exemption in the *Act* that protects the document as being privileged; the exemption in the *Act* simply recognizes the privilege. [*See Blood Tribe (Department of Health) v. Canada (Privacy Commissioner) (F.C.A.) (2006), [2007] 2 F.C. 561*]. Solicitor-client has been defined by McNairn and Woodbury as follows:

[A] substantive rule for the exclusion of evidence in legal proceedings. A person who is privy to matters that originated in privileged circumstances is entitled to resist disclosure of those matters.

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 and Woodbury, Government Information, Access and Privacy, at 3-42]

The Nova Scotia Review Officer has articulated four conditions which must be met in order for the information to fall within the definition of solicitor-client.

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]

Our Nova Scotia Supreme Court has agreed with this approach and made it clear that an essential element is that the document reveals the legal advice sought or given.

[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. 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]
[Emphasis added]

How does one define advice? In essence, it must lead to a course of action. Associate Chief Justice MacDonald of the Nova Scotia Supreme Court stated the following:

> *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, 10 C.P.R (4th) 129, at para. 25]*

Turning to the final condition, the question of seeking, formulating or giving legal advice, the bulk of the letter sets out the background and confirms discussion of the issues at a meeting. Only a small portion at the end of the Record contains what could be characterized as giving advice, sufficient to fall within the definition of the privilege.

> *Thus, the jurisprudence in this area is not really in conflict. It merely reflects the existence of a broad exception to the scope of the privilege, namely, that it is only communications which are protected. The acts of counsel or mere statements of fact are not protected. This is an important balancing mechanism which, along with the prohibition against protecting communications which are themselves criminal, takes into account the public interest inherent in the proper administration of justice.*
> *[Stevens v. Canada (Prime Minister), [1997] 2 F.C. 759 (Fed. T.D.)]*

Therefore, relying on the acceptable definition of solicitor-client privilege, s. 16 of the *Act* does not apply to the entire Record. A portion of the letter recites facts only and no legal advice is sought or given. This means that Transportation could have severed the portion to which it determined the privilege applied and released the remainder of the Record. Equally there is a portion of the Record that contains language that clearly suggests a course of action and, therefore, falls within this definition of advice which could easily be severed from the copy provided to the Applicant.

In this case, have the remaining conditions to meet the solicitor-client definition been established? The Record is a communication in writing between a solicitor for the Justice Department and its client, Transportation. The fact that the solicitor-client relationship is one arising out of work within the public service does not alter its nature.

> *With respect to a government's right to claim solicitor-client privilege when consulting one of its own solicitors, case law has supported this right. This is confirmed in McNairn and Woodbury's Government Information: Access and Privacy: "... when an institution (a public body) consults its own professional legal officers, who are usually members of the Justice or Solicitor General's Department, the privilege is available in the same way as if an outside lawyer had been retained".*
> *[FI-00-116]*

Though not marked confidential it is reasonable to assume that the intention of the author, a Justice solicitor, was that the Record would remain confidential as it was

considered privileged when created by the lawyer: it was a communication considered to be passed in confidence between a lawyer and a client copied to the others present at the meeting. The dominant purpose from the perspective of Justice would be to provide legal advice in confidence. Based on that, I find the Record meets the criteria of confidentiality.

There may be a concern on the part of some that severing a Record that contains information that does fit the definition of the solicitor-client exemption may result in the privilege being waived. It does not.

> *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]*
> ***[Emphasis in the original]***

Courts have supported the residual privilege attaching to information that is not disclosed, even where a portion of the record is disclosed, and particularly where the disclosure is by government.

> *But it is the Government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. **By disclosing portions of the accounts the Government** was merely exercising its discretion in that regard. As I mentioned earlier, **a government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable;** but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients.*
> *[Stevens v. Canada (Prime Minister), [1997] 2 F.C. 759 (Fed. T.D.)]*
> ***[Emphasis added]***

The Record at issue was copied to three individuals from different government departments who had been part of a meeting to discuss the subject matter of the letter. Some may try to argue that sharing the information with third parties outside of Transportation is an action that itself would waive the privilege. I find this not to be the case as they were all representatives of government departments.

ISSUE #2: IF THE RECORD QUALIFIES AS FALLING WITHIN THE DEFINITION OF SOLICITOR-CLIENT PRIVILEGE, WHETHER TRANSPORTATION HAS PROPERLY APPLIED THE S. 16 SOLICITOR-CLIENT PRIVILEGE EXEMPTION TO THE RECORD.

What is at heart of this Review is the basis on which Transportation exercised its discretion to not release the Record or any portion thereof. No reasons were given by Transportation in its decision letter. No Representations were received from Transportation with respect to the exercise of its discretion. Transportation should have provided an explanation as to the factors it considered in exercising its discretion firstly in its decision letter to the Applicant and equally important, in its Representation to the Review Officer.

It is well established in Nova Scotia and Canadian law that citing the section of the *Act* is simply not enough and that public bodies must provide applicants with their rationale for the exercise of their discretion. In a recent Review Report [*FI-08-66*] I stated:

> *. . . 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 doings so to the Applicants. 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. I repeat what was said in that case:*
>
> > *In determining how to exercise its discretion, reference to a recent Review issued by this Review Officer, FI-06-77, with respect to the exercise of discretion bears repeating:*
> >
> > > *Any public body in exercising its discretion under one of the statutory exemptions listed in the statute beginning at s. 12 should be mindful of the following factors:*
> > >
> > > *1. The purposes of the Act including that* ***individuals have a right to access their own personal information;***
> > > *2. Exemptions from the right to access* ***should be limited and specific*** *in order to honour the broad purposes of the Act; and*
> > > *3. Privacy of individuals should be protected.*
> > > ***[Emphasis added]***
> >
> > *BC Information and Privacy Commissioner's Order No. 325-1999 outlined a non-exhaustive list of factors for a public body to consider:*
> >
> > > *In inquiries that involve discretionary exceptions, public bodies must be prepared to demonstrate that they have exercised their*

discretion. That is, they must establish that they have considered, in all the circumstances, whether information should be released even though it is technically covered by the discretionary exception. . .

In exercising discretion, the head considers all relevant factors affecting the particular case, including

> *• the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;*
> *• the wording of the discretionary exception and the interests which the section attempts to balance;*
> *• whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;*
> *• the historical practice of the public body with respect to the release of similar types of documents;*
> *• the nature of the record and the extent to which the document is significant and/or sensitive to the public body;*
> *• whether the disclosure of the information will increase public confidence in the operation of the public body;*
> *• the age of the record;*
> *• whether there is a sympathetic or compelling need to release materials;*
> *• whether previous orders of the Commissioner [or Review Officer] have ruled that similar types of records or information should or should not be subject to disclosure; and*
> *• when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.*
> *[FI-06-79]*

[FI-08-66]
[Emphasis in the original]

This lack of reasons for Transportation's decision is particularly problematic in this case for another reason. The exercise of discretion under any discretionary exemption is to be exercised solely by the designated statutory decision-maker: the FOIPOP Administrator. S/he is either the head of the public body or has the delegated authority from the head of the public body to make a decision under the *Act.* While s/he may consult or seek advice from others within the public body, the final decision rests solely with the FOIPOP Administrator. S/he is the trained and experienced professional who can best combine knowledge about access to information legislation and

jurisprudence together with the particular Record at issue and make a reasoned and seasoned decision in accordance with the *Act.*

In this case, the January 21, 2008 fax forwarding the Record to the FOIPOP Administrator sent by the Area Manager contained a communication not to release the Record. There is no indication on file that the FOIPOP Administrator made an independent decision and s/he appears to have completely relied on that front line staff's direction. The wording used in the faxed note from the Area Manager to the FOIPOP Administrator leads to me to the conclusion that the decision made by the latter was based solely on the direction from the former. The faxed note gives no indication why the Record was not to be released and no disclosure as to the factors considered in exercising discretion or the harm that may result. The FOIPOP Administrator does not appear to have made an independent analysis of the information that was received as no evidence has been provided to that effect.

This is not an appropriate way to make a decision regarding discretionary exemptions under the *Act.* The FOIPOP Administrator is responsible to exercise his or her discretion independently and professionally regarding all discretionary exemptions under the *Act.* In this case, the FOIPOP Administrator's hands appear to have been tied resulting in the decision being one that is based on direction received from the front line staff, who do not have the delegated authority from the head of the public body under the *Act.* The statutory role of the designated decision-maker was displaced by the front line staff. If I had been provided details of what the FOIPOP Administrator had investigated based on one or more legal opinions, it may have affected the outcome of this Review; however, I have no Representations in front of me to conclude otherwise, as the FOIPOP Administrator did not provide any details on the exercise of discretion despite being given extra time to provide them and being given specific instruction on their importance.

I turn now to the question how the public body should exercise its discretion under s. 16 of the *Act.* Generally speaking, Courts have given a broad and liberal interpretation to the solicitor-client privilege and, therefore, public bodies too often rely on s. 16 exemption without any further explanation.

> *In FI-00-50 I quoted from Order P-944 in which the Ontario Access and Privacy Commissioner said he expected a public body to exercise its discretion "in full appreciation of the facts of the case and after having considered the legal principles established for the exercise of discretion and the purposes of the Act". He continued:*
>
> > *"In deciding whether to apply a discretionary exemption to a particular record, the (public body) will typically consider the contents of the document, the significance of the record to the institution and the circumstances in which the document was created."*
>
> *[FI-00-116]*

One of the four long-standing principles of privilege is that the public body must be able to demonstrate that injury or harm will result from disclosure. Transportation has

provided neither the Applicant nor the Review Office any proof that harm to the relationship between solicitor and client would result from the disclosure of the Record.

In fact, the Record was copied to three other individuals from different public bodies who were also in attendance at a meeting where the issues were discussed. The Record is not marked "confidential" or "privileged." While the sharing of the Record beyond the protected relationship does not waive the privilege [*Stevens v. Canada (Prime Minister), [1997] 2 F.C. 759 (Fed. T.D.)*], the fact that it was shared and not marked confidential is instructive as to the extent to which the parties had an expectation that harm may result if there was a broader dissemination of the letter particularly where the Record was not marked confidential. If harm was anticipated from release, the number who received a copy may have been more curtailed and the letter would have been marked confidential. I find that Transportation has not met the burden of demonstrating harm would result from the release of the requested information.

I turn now to the question of public interest. The Applicant argued in favour of release of the Record based on public interest. S/he submitted that the Record was information regarding the closure of a long-standing right-of-way in his/her community and that the public had a right to know the basis for government's decision to suddenly and without explanation, deny public access. The Applicant did not indicate if s/he had the ability to disseminate the information if s/he was successful in obtaining the Record or if s/he had any intention of doing so.

> *31(1) Whether or not a request for access is made, the head of a public body may disclose to the public, to an affected group of people or to an applicant information. . .*
>
> > *(b) the disclosure of which is, for any other reason, clearly in the public interest. . .*
>
> ***(4)This Section applies notwithstanding any other provision of this Act. [Emphasis added]***

The majority of cases within the Nova Scotia jurisdiction discussing public interest have been about whether or not an applicant is entitled to have the fees waived for his/her Application for Access to a Record. In this case, the Applicant sought a waiver of fees but also relied on the public interest aspect as the rationale to release the Record regardless of whether or not it enjoys the 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. . .*

> *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.*
> *[FI-05-25]*

This last citation refers to the fact that the s. 16 solicitor-client exemption is a *discretionary* exemption that Transportation *can choose to apply or not*. The comments in FI-05-25 about the public interest of the documents indicate that public interest is a factor to be weighed by Transportation in its consideration of using the discretionary exemption. This is consistent with reading s. 31 of the *Act.*

There is no indication that Transportation gave any consideration to the public interest element notwithstanding receiving notice of it being raised by the Applicant *vis a vis* the Application for Access to a Record by requesting a fee waiver and the Investigative Summary provided by the Review Office. There is not a scintilla of evidence that Transportation considered whether there was a public interest element for it to consider in rendering its decision, as reflected in the Purpose section of the *Act.*

ADDITIONAL ISSUE: WHO MAKES THE DECISION WITH RESPECT TO ACCESS?

What is expected under the *Act* is that the FOIPOP Administrator, as the designate for the head of the public body, will make a decision based on the legal principles regarding the right to access information, the purposes of the *Act* including, in particular, ensuring fairness in government decision-making, and all of the relevant circumstances surrounding the creation of the Record. There is no indication that this was done in this case.

> *. . . when the Minister determines that an exemption applies, she should tell the Applicant that she has read (or been briefed upon) the requested information and, insofar as possible, should detail for the Applicant the reasons why the particular exemption is operative.* ***Mere recital of the words of the relevant section is not enough.***
> *[McCormack v. Nova Scotia (1993), 123 N.S.R.(2d) 271]*
> ***[Emphasis added]***

This case points to why it is so important for the FOIPOP Administrator as the designated decision-maker to be the one to make the actual reasoned and seasoned decision. Front line staff may have a valuable opinion to contribute to the process, which the FOIPOP Administrator can consider. But front line staff may also view a Record quite differently and may not appreciate the obligations that must be considered regarding a discretionary exemption under the *Act*.

Several questions come to mind. Did the FOIPOP Administrator consult with the author and the recipients of the Record to ascertain what their understanding of the dominant purpose of the Record was at the operative time, which is when it was created? Did any of the four recipients consider the Record confidential? On a review of the

Record the bulk of its contents appear to be background information. There are only a limited number of sentences near the end of the letter that could be characterized as giving legal advice thus falling within the definition of solicitor-client privilege. Did the FOIPOP Administrator consider how the exemption could be applied to a portion of the Record and the redacted Record given to the Applicant? Did the FOIPOP Administrator discuss or consider the issue of public interest and the Purpose section of the *Act?*

Once s/he gathers answers to these kinds of questions, the FOIPOP Administrator considers the information in light of the pertinent principles underlying access legislation.

> *In the first case dealing with the federal* ***Access to Information Act, Re Maislin Industries Ltd. and Minister for Industry, Trade and Commerce****, (1984), 10 D.LR. (4th) 417 (F.C.T.D.) Jerome A.C.J. said at p. 420:*
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> > *"There was no disagreement that the burden of proof rests upon the applicant Maislin. It should be emphasized, however, that since the basic principle of these statutes is to codify the right of public access to government information, two things follow: first, that such public access ought not be frustrated by the courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure; second, the burden of persuasion must rest upon the party resisting disclosure whether, as in this case, it is the private corporation or citizen, or in other circumstances, the government. It is appropriate to quotes. 2(1):*
> >
> > > *2(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government."*
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> *I agree with that statement. A similar view is expressed in the following passage from* ***"The New Access to Information and Privacy Act: A Critical Annotation"*** *by Professor T. Murray Rankin (1983), 15 Ottawa Law Review, 1 at p. 3:*
>
> > *"Both the Access to Information Act and the Privacy Act contain purpose clauses. Rather than taking the form of a mere hortatory preamble, it is significant that the purpose clause is contained in the main body of each statute. In the Access to Information Act, for example, section 2 enunciates a clear statement of the three main components of any worthwhile freedom of information statute:*

> *1. a clear statement of the public's right of access to information in government files;*
> *2. that necessary exception to the right of access should be limited and specific; and*
> *3. that decisions on disclosure . . . should be reviewed independently of government.*
>
> *A purpose clause of this sort is not a common feature in Canadian legislation; even preambles are increasingly infrequent. It is suggested that the entire statute should be read in light of this clear statement of legislative intent. If any ambiguity exists, this provision, reinforced by the mandate contained in the Interpretation Act for liberal construction of statutes, should mitigate in favour of disclosure."*
>
> *The Nova Scotia **Freedom of Information Act** should be construed liberally in light of its stated purpose.*
>
> *[McLaughlin v. Halifax-Dartmouth Bridge Commission (1993) 125 N.S.R.(2d) 288]*
> ***[Emphasis in original]***

Unlike other jurisdictions such as Ontario and British Columbia, the Nova Scotia Review Officer can, where the exemption is discretionary, make a finding and recommendation that comes to a different conclusion than that of the public body as to how the discretion ought to have been exercised. In addition, under our *Act* the Nova Scotia Supreme Court is similarly restricted as the afore-mentioned jurisdictions.

> ***Section 42(6)** prevents the Supreme Court of Nova Scotia, when it finds the record falls within an exemption, from ordering disclosure of a record, "regardless of whether the exemption requires or merely authorizes the head of the public body to refuse to give access to the record". If the document meets the criteria of a discretionary exemption, the court has no power to order disclosure, even if the court might have exercised such discretion differently.*
>
> *It is my view that the same limits are not imposed by the **Act** on the Review Officer. **Section 39(2)** allows the Review Officer to "make any recommendations with respect to the matter under review that the Review Officer considers appropriate". It is therefore clear there is no express prohibition in relation to recommendations concerning the exercise of discretion.*
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> *McNairn and Woodbury, (see above) on pages 6 to 9 came to this conclusion:*
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> *"In those jurisdictions where the investigative approach is followed, the reviewing officer can properly address the question of whether discretion should have been exercised in favour of the requester. It would be perfectly appropriate*

for the report of the reviewing officer to recommend just such an exercise in discretion by a government or institution."
[FI-00-116]
[Emphasis in the original]

Some may argue that where the right to disclosure of information intersects or is in competition with a competing confidentiality right such as the right of a client to claim solicitor-client privilege that the preference should be to maintain confidentiality. I have concluded, however, that had the Legislative Assembly intended for the solicitor-client privilege exemption to always be paramount, the exemption would not have been made discretionary but rather mandatory. But s. 16 of the *Act* is discretionary so clearly the Legislative Assembly anticipated that public bodies would have to find a balance between the need for confidentiality inherent in the privilege and the right to access. On the one hand, one could argue that where the statute contemplates that a public body may allow access to otherwise privileged material that the legislation should be construed narrowly. On the other hand some would argue that under the *Act*, designed to promote transparency through disclosure, that the solicitor-client exemption should be construed liberally. As cited above, the Nova Scotia Supreme Court has quite decisively stated that, given the purpose of the legislation, the *Act* is to be construed liberally [*McLaughlin v. Halifax-Dartmouth Bridge Commission (1993) 125 N.S.R.(2d) 288]*.

In the result in this case, I find that it is possible to sever the privileged portion of the Record and release the severed Record to the Applicant.

FINDINGS

1. Transportation's FOIPOP Administrator's decision letter did not provide any explanation or rationale to the Applicant regarding the exercise of discretion under s. 16 of the *Act,* contrary to the duty to assist, or give any reasons for its decision contrary to s. 7(2)(a) of the *Act*. It is somewhat perplexing that decades after access legislation came into force in Nova Scotia and after countless Review Reports on proper procedure regarding discretionary exemptions that a public body would be responding to an Applicant in this manner in 2008.
2. The actual decision provided to the Applicant from Transportation to not release the Record appears to have been made by an employee other than the FOIPOP Administrator not designated under the *Act* and who, therefore, had no authority to make a decision not to provide access.
3. The Applicant's Representations support the fact that there may be sufficient local public interest in understanding government's decision to require Transportation to exercise its discretion to waive the solicitor-client privilege exemption and release the Record.
4. Solicitor-client privilege involves a confidential communication in the context of a longstanding legally sanctioned and protected relationship that deserves respect. However, in the context of access to information legislation, solicitor-client privilege has been included in the statute in the form of a discretionary exemption leaving it open to public bodies to release the information where the circumstances call for openness. It is not sufficient under the scheme of the *Act*

for a public body to simply cite the exemption in s. 16 solicitor-client privilege without giving reasons as to how it has exercised its discretion. Included in those reasons must be an indication of what harm would result from its release.

5. Solicitor-client privilege belongs to the client, which in this case is Transportation, and it is an option for the FOIPOP Administrator or the head of Transportation to make a determination under s. 16 of the *Act* as to whether or not to waive the privilege and grant the Applicant access to the requested information.
6. Transportation did not provide any evidence or argument to support the fact that harm would result from disclosure of the Record.
7. Though raised by the Applicant in the Application for Access to a Record and included in the Review Office Investigative Summary given to the parties, Transportation did not address the issue of public interest.
8. I find that it is possible to sever the privileged portion of the Record.

RECOMMENDATIONS

The Review Officer recommends that:

1. The FOIPOP Administrator reconsider its decision and exercise its discretion by deciding whether to waive privileged information by recognizing that no demonstrable harm would result, being cognizant of the local public interest and recognizing that such full disclosure would be consistent with the *Act's* purpose to ensure fairness in government's decision-making; or

2. Transportation, at a minimum, provide the Applicant with a copy of the Record severing the few sentences near the conclusion of the letter that include legal advice and are subject to solicitor-client privilege.

Respectfully,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer
July 16, 2009