REPORT
Nova Scotia Freedom of Information and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-09-52(M)

Report Release Date: January 9, 2012

Public Body: Halifax Regional Municipality

Issues:

1. Whether the HRM made a request to go in-camera and if so, whether it did so appropriately.
2. Whether the HRM has appropriately applied s. 476 [solicitor-client privilege] of the *MGA* to refuse the Applicant access to the Record.
3. If yes, whether the HRM has properly exercised its discretion to apply s. 476 of the *MGA* to this Record including whether it considered the appropriate factors in exercising its discretion.
4. Whether the HRM considered or ought to have considered the application of s. 486 [public interest] of the *MGA*.
5. Whether the HRM considered or ought to have considered the application of s. 485(5) [archival or historical purposes] of the *MGA*.

Record at Issue:

Pursuant to s. 491 of the Municipal Government Act ["*MGA"*], the Halifax Regional Municipality ["HRM"] has provided the Freedom of Information and Protection of Privacy Review Office with a copy of the complete Record, including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the Review Officer or her delegated staff.

The Record at issue in this Review is an undated anonymous one page document that has been withheld in full under s. 476 of the *MGA* – the solicitor-client privilege exemption.

Summary:

An Applicant requested personal information from the HRM regarding the land and deeds in the name of relatives between 1940 and 1969 and information regarding the

Africville expropriation file. The Record was refused by the HRM based on the solicitor-client exemption under the *MGA*. The Review Officer found that the solicitor-client exemption did not apply, the HRM failed to consider exercising its discretion to release the Record and the HRM failed to consider public interest and the historical/archival sections of the *MGA* in the exercise of that discretion.

Findings: The Review Officer made the following findings:

1. I find that the HRM conducted an appropriate search and met its duty to assist the Applicant by making every reasonable effort to assist him by clarifying the scope of his Form 1 and by responding openly, accurately and completely.
2. I find it reasonable, however, that the HRM FOIPOP Administrator, out of an abundance of caution, wanted to make it perfectly clear s/he did not want the HRM's initial Representations, which had made specific reference to the Record, to be made public in the Review Report.
3. I find that the ultimate decision under the *MGA* rests with the FOIPOP Administrator as the expert in access to information legislation and ought not to be usurped by the legal department.
4. On reviewing the one page Record, I find the first condition – that the communication be oral or written – is met as the Record is a handwritten note.
5. I find that the second condition – that the communication was confidential – has not been met.
6. I find that the third condition – that the Record is a communication between a client and a legal advisor – has not been met.
7. Having reviewed the Record thoroughly, I find the fourth condition – that the Record is about seeking, formulating or giving legal advice – has not been met.
8. I find that the HRM has failed to meet its burden to demonstrate that the Record is subject to solicitor-client privilege and, therefore, s. 476 of the *MGA* does not apply.
9. I find the HRM's position that it never releases a record otherwise subject to the solicitor-client exemption contrary to the *MGA* and the practice of applying blanket decision-making when it relates to the solicitor-client exemption is unreasonable.
10. I find the factors the HRM listed as ones it would consider if it were to ever exercise its discretion, fall short of the relevant criteria to consider in exercising discretion.
11. I find public interest is relevant.
12. Given the attention paid to the Africville residents and their property interests historically and given that the HRM

negotiated a settlement agreement with the Africville Genealogy Society during the material time of this Review, I find even if the solicitor-client exemption were to apply [which I have found it does not], that for the HRM not to exercise its discretion to release an archived record to an Africville descendant, in the public interest, is unreasonable.

13. I find the HRM gave no indication it considered public interest in making its decision.
14. I find that the only *reasonable* conclusion is that disclosure of the Record is clearly in the public interest.
15. Pursuant to s. 485(5)(a) of the *MGA,* I find that the disclosure of a Record regarding property interests to a son, grandson and great grandson for persons deceased well over 20 years not to be an unreasonable invasion of anyone's personal privacy.
16. I find it is reasonable to conclude that the Record is no less than forty years old.
17. Pursuant to s. 485(5)(b) of the *MGA,* I find the HRM knew the Applicant's access to information request was for his familial historic research to learn about his relatives' property interests in Africville.
18. Pursuant to s. 485(5)(c) of the *MGA,* I find the Applicant is seeking information for an historical purpose for relatives who have been dead for twenty or more years.
19. I find the HRM has failed to give any consideration to s. 485(5) of the *MGA.*
20. I find that the only *reasonable* conclusion is the Record should be disclosed pursuant to one or all three of the conditions set out in s. 485(5) of the *MGA.*

Recommendations: The Review Officer made the following recommendations to the HRM:

1. Release the Record in full to the Applicant.
2. Discontinue the current practice of applying the solicitor-client discretionary exemption as if it were mandatory.

Key Words: Africville, anonymous, archives, burden of proof, client, communication, confidential, delegated authority, discretionary, expropriation, in-camera, historical, history, legal advice, legal advisor, mandatory, onus, override, public interest, reasonable, release, solicitor-client privilege, unreasonable, usurp.

Statutes Considered: *Part XX of the Municipal Government Act ss. 462, 462(3)(A), 467, 476, 485(5), 485(5)(a), 485(5)(b), 485(5)(c), 486, 486(1), 490, 491, 495(6).*

Case Authorities Cited:	*NS FI-08-104, FI-09-04, FI-08-47(M), FI-05-08; AB Order 97-007; AB Order 97-003; ON Order M-457; CBC v. Canada (Information Commissioner), 2010 FC 954.*
Other Cited:	*HRM Municipal Archives website Africville [http://halifax.ca/archives/AfricvilleSources.html]; HRM Municipal Archives website Africville Terms and Conditions of Apology and Agreement 2010 [http://www.halifax.ca/africville/Documents/councilreport.pdf]; Remember Africville – Producers Daryl Gray & Shelagh Mackenzie. National Film Board of Canada, 1991; Saunders, Charles R. et al. The Spirit of Africville. Halifax: Formac, 1992. Print; McNairn and Woodbury "Government Information, Access and Privacy"; Government of Ontario, FOIPOP Manual.*

BACKGROUND

On April 15, 2009 the Applicant made an Application for Access to a Record ["Form 1"] to the Halifax Regional Municipality ["HRM"] for personal information pursuant to *Part XX* of the *Municipal Government Act (Freedom of Information and Protection of Privacy) [MGA]* as follows:

> *[Archive Reference #]*
> *Any land and deeds in the name of [names of two individuals] from 1940? to 1969.*

This was the text of the original Form 1. The HRM had been advised by the Provincial Archives staff, with whom the Applicant had previously been working, that the Applicant was also looking for expropriation information for these same lands. The HRM clarified this with the Applicant and made an addition to his/her Form 1 to make it clear that s/he was seeking information in the archive and expropriation Africville file, thus broadening the scope of the request to including the following:

> *[Name of the Applicant] – I'm looking for information regarding 3:20 of the [expropriation] of Africville file. E-01 [names of two individuals]*

The HRM advises that, thereafter, it conducted a proper and complete search and indicates that it met if not exceeded its duty to assist by assisting the Applicant to clarify the access to information request.

On May 20, 2009, the HRM made a decision with respect to the Applicant's Form 1, which read as follows:

> *This application for access under Part XX of the Municipal Government Act (MGA) was received at this office on April 15, 2009. You are entitled to the records requested and your application for access has been partially granted with one exception. One record has been denied in accordance with Subsection 465(2) of the Act and has been withheld in its entirety for the following reasons:*
>
> - ***Section 476*** *– information is subject to solicitor-client privilege.*
>
> *You have the right to ask, within 60 days of being notified of this decision, for a review of the decision by a Review Officer.*
> ***[Emphasis in the original]***

On June 4, 2009 (received June 12, 2009) the Applicant made a Request for Review to the Freedom of Information and Protection of Privacy Review Officer, which read as follows:

> *This Request for Review arises out of an Application for Access to a Record or a Request for Correction of Personal Information submitted to the Halifax Regional*

Municipality on the 15 day of April, 2009, a copy of which Application or Request is attached.

The applicant requests that the Review Officer review … the decision dated or made on the 20th of May, 2009;

The applicant requests that the Review Officer recommend that: the Responsible Officer of the Municipality give access to the record as requested in the Application for Access to a Record;

The HRM confirmed that all responsive records in relation to the Applicant's Application for Access to a Record had been released in full to the Applicant with one exception. The withheld Record had a note attached that read as follows:

Only record denied s. 465(2) Section 476 – information is subject to solicitor-client privilege.

The HRM provided a copy of the one-page Record withheld from the Applicant to the Review Office on June 18, 2009.

Noting the Record was anonymous, the Review Office asked the HRM to provide us with the names of the author and recipient of the Record on June 26, 2010. On the same date, the HRM advised that it did not know who the author or recipient was but that the legal department had reviewed the Record and recommended this page not be released under the solicitor-client privilege.

On June 28, 2010, the HRM FOIPOP Administrator indicated that s/he had been advised by the legal department that a solicitor had created the Record. S/he indicated to the Review Office that the situation had changed regarding Africville and, therefore, the FOIPOP Administrator said s/he would make inquiries of the legal department as to whether the solicitor-client privilege could now be waived.

On June 29, 2010, the HRM FOIPOP Administrator, having made those inquiries, advised that s/he had been informed by the legal department that it continues to hold the opinion that the Record is solicitor-client privileged on the basis it considered it advice from an HRM solicitor and should not be released.

On August 9, 2010, in response to a letter from the Review Office seeking details on its position, the HRM provided detailed Representations addressing the requirements of the solicitor-client exemption.

On September 2, 2011, the Review Office provided a detailed investigation summary to the HRM and requested a response to additional questions. On September 22, 2011, the HRM responded briefly to the questions and also referred the Review Office back to its prior Representations of August 9, 2010, which it considered a full response.

On October 28, 2011, the HRM confirmed that it did not wish to make any further Representations beyond what was provided on August 9, 2010 and September 22, 2011.

The matter was referred to formal Review on December 7, 2011. On December 22, 2011, as part of the formal Review, a full copy of the Record that had been released to the Applicant was requested from the HRM. The FOIPOP Administrator expedited the request and, on December 23, 2011, the HRM provided a complete copy of the disclosed Record to the Review Officer.

MEDIATION

Mediation was not attempted as none of the pre-conditions for it were present in this case.

EXEMPTION CLAIMED

The only exemption at issue in this Review is a discretionary exemption in s. 476 of the *MGA* – solicitor-client privilege.

RECORD AT ISSUE

Pursuant to s. 491 of the *MGA*, the HRM has provided the Freedom of Information and Protection of Privacy Review Office with a copy of the complete Record, including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the Review Officer or her delegated staff.

The Record at issue in this Review is a one page document that has been withheld in full under s. 476 of the *MGA* – the solicitor-client privilege exemption. The Record is an undated anonymous one page document.

APPLICANT'S AND PUBLIC BODY'S REPRESENTATIONS

All of the Representations received from the Applicant and the HRM, both oral and written, have been reviewed by me in detail and given due consideration. The HRM had the burden to demonstrate whether the exemption applied and why the Record should be withheld. The Applicant had no burden under the exemption claimed. The Representations received will be discussed throughout the remainder of this Report.

ISSUES UNDER REVIEW

1. Whether the HRM made a request to go in-camera and if so, whether it did so appropriately.
2. Whether the HRM has appropriately applied s. 476 [solicitor-client privilege] of the *MGA* to refuse the Applicant access to the Record.
3. If yes, whether the HRM has properly exercised its discretion to apply s. 476 of the *MGA* to this Record including whether it considered the appropriate factors in exercising its discretion.

4. Whether the HRM considered or ought to have considered the application of s. 486 [public interest] of the *MGA*.
5. Whether the HRM considered or ought to have considered the application of s. 485(5) [archival or historical purposes] of the *MGA*.

DISCUSSION:

There may be information or evidence discussed in this Review Report which may directly or indirectly identify the Applicant. The usual practice of the Review Office is to keep the identities of the parties, except the public body, confidential. On January 3, 2012, the Applicant provided his consent to be referred to as son, grandson, or great grandson of the individuals named by him in his Form 1.

The Applicant made an Application for Access to a Record with respect to personal information as a son, grandson and great grandson, about the property interests of deceased relatives who lived in Africville. The Applicant is seeking the information to understand the history of his family while they lived in Africville.

Section 462 of the *MGA* states the purpose of the access provisions in the *MGA*, and reads, in part, as follows:

> *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,*
>
> *. . .*
> *(b) provide for the disclosure of all municipal information with necessary exemptions, that are limited and specific, in order to*
>
> *. . .*
> ***(ii) ensure fairness in government decision-making, . . .***
> ***]Emphasis added]***

The *Act* imposes a duty to assist on the Public Body in s. 467 of the *MGA*, which states:

> *(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]***

After receiving the Applicant's Form 1, the HRM worked with the Applicant to clarify his request and, in the result, broadened the scope of the Application for Access to a Record. I find that the HRM conducted an appropriate search and met its duty to assist the Applicant by making every reasonable effort to assist him by clarifying the scope of his Form 1 and by responding openly, accurately and completely.

ISSUE #1 In-Camera

The first issue is whether the HRM made a request to go in-camera and, if so, did the HRM do it appropriately. On September 22, 2011, in its final Representations, the HRM made the following request:

> *When the Review Report is being prepared we respectfully request that the advice contained in the record – the content – and the legal instrument that is being recommended in the record not be referenced or described in such a manner that it could be determined.*

I do ***not*** consider this a request by the HRM to have its Representations considered in-camera or in private *[Refer to s. s. 490 of the MGA]*. At no time did the HRM make a formal request to me, as the Review Officer, to provide its Representations in-camera *[Refer to FI-08-104 and FI-09-04]*. What the HRM ***did request*** is that the Review Report not reference or describe any part of the Record in a manner that would disclose the content of the Record.

With respect to the HRM's request that my Review Report not disclose the contents of the Record, I find this request stunning. All the Review Officer's public reports contain a reference in this regard in both the headnote and in the text of the Report that reads like the following:

> *Pursuant to s. 491 of the MGA, the Municipality has provided the Freedom of Information and Protection of Privacy Review Officer with a copy of the complete Record, including the information withheld from the Applicant.* ***At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the Review Officer or her delegated staff.***
> ***[Emphasis added]***

For the HRM to consider it necessary to include in its Representations that the Review Officer not disclose the contents of the Record is out of the ordinary for the HRM. My experience is that the HRM has always approached its access to information requests in a manner that is professional, cordial and informed. The FOIPOP Administrator is well aware that the Review Officer has never and will never disclose the contents of the Record. Public bodies have the sole authority to release records to the public. The Review Officer's role is to review a public body's decision and confirm it or make findings and recommendations as to how it should be altered in order to comply with the *MGA.* Were a Commissioner or Review Officer to ever disclose the contents of a Record, directly or indirectly, it would seriously compromise its role and credibility as an independent non-partisan oversight body.

I find this precautionary request come with two possible explanations. The first is that the HRM's initial Representations provided to the Review Office on August 9, 2010, referred to the content of the Record. This Representation was provided to the Review Office without any disclaimer of 'Confidential' and was not accompanied by a request to provide its Representations in-camera. I find it reasonable, however, that the HRM FOIPOP Administrator, out of an abundance of caution, wanted to make it perfectly clear s/he did not want the HRM's initial Representations, which had made specific reference to the Record, to be made public in the Review Report.

The second possible explanation, I find problematic. The HRM Administrator indicated that the advice to withhold the Record came from the HRM legal department. For the HRM to consider it necessary to make this statement at all regarding disclosing the contents of the Record appears to imply that the FOIPOP Administrator's decision-making process is being usurped by the HRM legal department that may not know this never happens. I reiterate what I have said in previous Reviews: the delegated authority to make decisions under the *MGA* rests solely and appropriately with the FOIPOP Administrator. Of course the FOIPOP Administrator is free to seek advice from the legal department, superiors and other employees and subject experts. But it is his/her responsibility to make a decision under the *MGA* balancing all relevant factors including the right to access information, the purposes of the legislation, the timing of the access to information request, the historical context of the record, the duty to assist, all mandatory and discretionary exemptions and public interest. I find that the ultimate decision under the *MGA* rests with the FOIPOP Administrator as the expert in access to information legislation and ought not to be usurped by the legal department.

ISSUE #2: Solicitor-client Privilege

The second issue is the focus of this Review: whether the HRM has appropriately applied s. 476 [solicitor-client privilege] of the *MGA* to refuse the Applicant access to a Record.

There are two recognized "branches" to this exemption – communication privilege and litigation privilege. In its Representations, the HRM indicated it relied on the communication privilege branch of the exemption in its decision to withhold the Record.

Communication privilege exists to enable clients to speak frankly, openly and candidly with their lawyers and to receive legal advice on the same basis – basically to protect the sanctity of the solicitor-client relationship. The essence of the privilege has been summarized 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 includes 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.* ***However, the communications must be in the context of the client seeking legal advice from the solicitor.***
> ***[Emphasis added]***
> *[McNairn and Woodbury's Government Information, Access and Privacy]*

In *FI-05-08,* I cited the BC Commissioner's description of the conditions that must be met for the communication branch of the solicitor-client privilege to apply:

> *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.*

With respect to claiming the solicitor-client privilege exemption, the burden of proof rests with HRM. It is incumbent on the HRM to demonstrate that all conditions are met in regards to the Record and the requirements are conjunctive, which means all must apply.

On August 9, 2010, the HRM provided the following Representation, in response to a letter sent by the Review Office, addressing the conditions to be met for the exemption to apply:

> *I acknowledge receipt of your correspondence dated the 20th of July, 2010 whereby you requested that the municipality reconsider the application of the solicitor-client privilege exemption. Please be advised that the municipality maintains its position that this record is subject to solicitor-client privilege. You had also presented three (3) questions which you requested be addressed – please see the comments in* **[bold]** *italics below for the requested response.*
>
> **1.** *Regarding the "confidential nature" of the record, there is nothing in the document that indicates that the author intended confidentiality. What information supports the condition that the record is of a confidential nature?* ***The content of the record – that a solicitor is making a request of a staff member – indicates the confidentiality and supports the condition that the record is of a confidential nature.***
>
> **2.** *If the communication must be between a client (or her/his agent) and a legal adviser for the exemption to apply, there should be an indication on the document who the author and recipient are. Please identify the parties who sent and received the record, and if they qualify as a client and a legal advisor for the purpose of applying the exemption.* ***Although we are not able to confirm who the author and the recipient of the record is, there is no doubt it is a message from a solicitor in the Legal Department and is directed to a City of Halifax employee.***

3. *The document instructs the recipient to* [Review Officer removed as it would disclose the contents of the Record]. *This alone does not seem to qualify as "directly related to the seeking, formulating or giving of legal advice." In Order 97-003, the Alberta Information and Privacy Commissioner analyzed a document in which "the Public Body gives some information regarding pending litigation, and it requests some information." He found that this "does not meet the criteria of being a communication that entails the giving or seeking of legal advice." Considering this standard, please provide what can be considered legal advice in the document.* ***The content of the record – the message itself – is legal advice, it demonstrates that there is an on-going relationship between the solicitor and the staff member and requesting staff*** **[Review Officer removed as it would disclose the contents of the Record]** ***is the culmination of the advice provided. [Bold emphasis added to HRM's italics]***

I will deal with each of the criteria separately. On reviewing the one page Record, I find the first condition – that the communication be oral or written – is met as the Record is a handwritten note.

The second condition is that the communication must be of a confidential nature. There is no indication on the Record that it was intended to be confidential. It is not marked confidential. The HRM did not provide any additional evidence to support its claim that the communication was provided on a confidential basis. With respect, the HRM's argument is circular: it claims the Record is subject to solicitor-client privilege therefore it must have been confidential. The HRM cannot use the solicitor-client exemption it has claimed to prove the Record was provided on a confidential basis. There must be ***some evidence*** to meet the criteria and not a mere claim that it is confidential because the HRM claims it is privileged. I find that the second condition – that the communication was confidential – has not been met.

The third condition is that the communication must be between a client (or her/his agent) and a legal advisor. The HRM confirmed that it cannot identify the author or recipient of the Record. There is ***no evidence*** as to whom the communication is addressed or the identity of the author. It is not addressed to anyone by name and it is not signed by anyone. There is no indication in what capacity the recipient received or the sender sent the Record. It is a third party [unknown author] relaying a message to an employee [unknown recipient]. The HRM Representations state:

> *The information, it appears, was passed through a supervisor or a co-worker. What was originally received as an oral communication was subsequently transferred into written communication by the supervisor or co-worker. The communication is between a client and a legal advisor. The fact the information passed through a third person does not alter the solicitor/client relationship.*

There is ***no evidence*** that this is a communication between a legal advisor and a client. This is not because it went through a third party – a supervisor or a co-worker. It is because there is no evidence that the original message came from a legal advisor. A simple declaratory statement by the current legal department that the Record was the

result of a message from a legal advisor is not evidence. Along the same line as its argument about the Record meeting the test of confidentiality, the HRM's Representation for the third condition is once again circular. The HRM claims the Record is privileged and to support that contention submits that therefore the author must have been a legal advisor or a person conveying a message on behalf of a solicitor. This circular reasoning where a public body uses the basis underlying the exemption to explain the contents of the Record – it is protected by solicitor-client exemption therefore it must be from a solicitor - is not appropriate and does not meet the required conditions. I find that the third condition – that the Record is a communication between a client and a legal advisor – has not been met.

I turn to the fourth and final condition – the Record must directly relate to seeking, formulating or giving advice. The *MGA* does not define "legal advice." For a definition of "advice", I have adopted a definition used in Orders of the Alberta and Ontario Information and Privacy Commissioners, which can be summarized as follows:

- Alberta's Commissioner defined "advice" as "an opinion, view or judgement. . . expressed to assist the recipient whether to act and if so how" *[Refer to Order 97-007]*.
- The Ontario Commissioner accepted "views" and "thoughts" as advice if they lead to a course of action *[Refer to Order M-457]*.

In addition, the Government of Ontario, in its *FOIPOP Manual*, provides a definition of "legal advice", as follows:

> *[I]ncludes a legal opinion about a legal issue and a recommended course of action based on legal considerations. It does not include information which was provided about a matter having legal implications where no legal opinion was expressed or where no course of action based on legal considerations was recommended.*

The HRM submits in its Representations that the contents of the Record support that the document is protected by solicitor-client privilege. I have reviewed the Record and I find that the potential instructions from one unknown employee to another unknown employee to do something does not constitute seeking or giving of legal advice. In Alberta *Order 97-003,* the Commissioner discussed what does not constitute giving or seeking legal advice:

> *[215.] In Order 96-017, I stated that to correctly apply section 26(1)(a) (solicitor-client privilege), the Public Body must meet the common law criteria for that privilege, as set out in Solosky v. The Queen, [1980] 1 S.C.R. 821. In that case, the Supreme Court of Canada stated that solicitor-client privilege must be claimed document by document, and each document must meet the following criteria: (i) it is a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.*
>
> . . .
>
> *[221.] Document Number 5 is written by the Public Body to the Credit Union's lawyer. In that document, the Public Body gives some information regarding pending litigation, and it requests some information. Accordingly, Document*

Number 5 does not meet the criteria of being a communication that entails the giving or seeking of legal advice.

The HRM was unable to provide ***any evidence*** how the contents of the Record met the fourth condition. Having reviewed the Record thoroughly, I find the fourth condition – that the Record is about seeking, formulating or giving legal advice – has not been met.

I find that the HRM has failed to meet its burden to demonstrate that the Record is subject to solicitor-client privilege and, therefore, s. 476 of the *MGA* does not apply.

ISSUE #3: Exercise of Discretion

This is the next step in the process. Ordinarily, the public body's exercise of discretion only needs to be considered once it is determined that solicitor-client privilege exists and the exemption applies. Discretion can be exercised to release information that is rightfully considered to be privileged, because ***the solicitor-client exemption is discretionary***. This means that HRM is not required to apply the exemption, rather it chooses whether or not to apply it. While it is unnecessary to consider whether the HRM has appropriately exercised its discretion to withhold the Record because I find that the HRM has failed to demonstrate that the Record is subject to solicitor-client privilege, I choose to do so for several reasons.

The first reason is because of the importance of the issues raised with respect to how the HRM represented how it did or did not exercise its discretion. Second, if the HRM elects to not follow my recommendations below, the Applicant may choose to appeal to the Nova Scotia Supreme Court. The *MGA* stipulates that while the Review Officer can replace the decision of a public body and exercise her discretion to recommend a different decision under the statute, a Supreme Court Justice cannot *[Refer to s. 495(6) of the MGA]*. As a result, I will consider the issue of the exercise of discretion to make it clear how the findings and recommendation are consistent with the *MGA.*

On September 22, 2011, the HRM provided the following Representations with respect to the exercise of the discretionary solicitor-client exemption:

You note in your correspondence that in order to establish that discretion was exercised properly, HRM must identify what factors were considered when exercising its discretion. ***HRM does not release records or waive privilege on records that are subject to solicitor-client privilege. If HRM did have a practise of releasing records that were subject to solicitor-client privilege or waiving privilege,*** *then the following factors would have been considered before a decision was reached- the release of the record will not increase public confidence in HRM, the applicant is not requesting their own personal information, the entire file – including this record – was held in the Municipal Archives and not open to the public, and upon receiving the access application the entire file was reviewed and the decision made to release the entire file with the exception of this one record thereby meeting the general purpose of the legislation.*

[Emphasis added]

The solicitor-client exemption is ***discretionary***. That means that when a public body decides the solicitor-client exemption applies it must consider whether or not it chooses ***["may"]*** to claim it. This is what distinguishes discretionary exemptions from mandatory ones. In the case of the latter, if a mandatory exemption applies, a public body is obliged ***["shall"]*** to apply it. In this case, however, by its own admission, the HRM has stated unequivocally it ***does not release records or waive privilege on records that are subject to solicitor-client privilege***. I find that this amounts to applying a discretionary exemption as if it were mandatory, thus treating it as a blanket exemption, which is contrary to s. 476 of the *MGA* and thus unreasonable.

In its Representations, the HRM goes not to provide the factors that it would have considered before a decision was reached if it were ever to exercise its discretion to release when it was claiming the solicitor-client exemption. The following lists the direct quotes the HRM's Representations:

1. *The release of this Record will not increase public confidence in HRM.*
2. *The Applicant is not requesting their own personal information.*
3. *This Record was held in the Municipal Archives and not open to the public.*
4. *Upon receiving the access application the entire file was reviewed and the decision made to release the entire file with the exception of this one record thereby meeting the general purpose of the legislation.*

In response to HRM's Representations regarding the exercise of its discretion, I make the following comments for each of the factors listed above, respectively:

1. The factor the HRM should consider is whether the release of the Record will increase public confidence in the HRM, not the reverse. The focus on increasing public confidence in the HRM should have led the HRM to consider the provisions in s. 486 of the *MGA*, which will be discussed below.
2. The Form 1 is clear: the Applicant is requesting personal information about his relatives.
3. The fact the Record was held in the Municipal Archives should have led the HRM to consider the provisions in s. 485(5) of the *MGA*, which will be discussed below.
4. Release of most of the Record does not ever justify withholding part of the Record. The only issue is whether any of the *limited and specific* exemptions apply to any or all parts of the Record.

I find the HRM's position that it never releases a record otherwise subject to the solicitor-client exemption contrary to the *MGA* and the practice of applying blanket decision-making when it relates to the solicitor-client exemption is unreasonable. I find the factors the HRM listed, as ones it would consider if it were to ever exercise its discretion, fall short of the relevant criteria to consider in exercising discretion.

Issue #4: Public Interest

One of the factors for a public body to consider in making its decision under a discretionary exemption is whether public interest is a factor. The purpose section of the *MGA* makes it clear that the legislation is intended to provide a right of access to information *[Refer to s. 462(3)(a)]*. The Courts have held the right of access is quasi-constitutional *[Refer to CBC v. Canada (Information Commissioner)]*. The default in exercising discretion should be the release of a record. In exercising its discretion, the HRM should include as a factor whether or not disclosure is clearly in the public interest.

The *MGA* provides as follows:

> *486(1) Whether or not a request for access is made, the responsible officer may disclose to the public, to an affected group of people or to an applicant information*
> . . .
> *(a) the disclosure of which is, for any other reason, clearly in the public interest.*

In Review Report *FI-08-47(M)*, I discussed the issue of a public body considering public interest in making a decision under the solicitor-client discretionary exemption:

> *In Nova Scotia the provincial and municipal access to information statutes enable public bodies and the Review Officer to consider whether disclosure for any reason whatsoever is clearly in the public interest. The public interest provision in the MGA reads as follows . . .*
> *[cites s. 486]*
> *The wording of s. 486(1) of the MGA is sufficiently plain and the section contains no restrictions as to which statutory exemptions it can be applied to and thus, in exercising discretion under the discretionary exemptions, public bodies need to consider public interest a factor.*
>
> > *. . . 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 . . . 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; FI-00-50; ON Order P-944]*
>
> ***One of the factors a public body should consider in exercising its discretion is whether or not disclosure of the subject information is, for any reason, clearly in the public interest. The public interest override is a question of fact and will be applied where the circumstances suggest it is appropriate and especially in cases where it is raised by an applicant.*** *The following questions have been formulated by the former Review Officer with respect to addressing the issue of public interest:*

Has the matter been a subject of recent public debate?
Would dissemination of the information yield a public benefit by assisting public understanding of an important policy, law or service?
Do the records show how the public body is allocating financial or other resources?
If it is agreed that the matter is one of public interest, other factors to be considered are:

> *Is the Applicant's primary purpose to disseminate information in a way that could reasonably be expected to benefit the public or to serve a private interest?*
> *Is the Applicant able to disseminate the information to the public?*
> *[FI-00-29]*

The section states that it can be applied where there is a risk of significant harm to the environment, or health or safety of the public or ***for any other reason that is clearly in the public interest. This can be applied, therefore, whenever it is clearly within the public interest to do so, notwithstanding the applicability of any other discretionary exemption, including the solicitor-client privilege.*** *It is wholly appropriate, therefore, and indeed, necessary, for the Municipality to consider public interest in deciding whether or not to release the Record to the Applicant notwithstanding that it may contain solicitor-client privileged information.*
[Emphasis added]

The Applicant's Form 1 makes it clear that he is seeking personal information about the property owned by his relatives in Africville and information about the expropriation of those lands. The HRM confirmed with the Review Office that prior to the Applicant filing the Form 1 he had been working with the archives to research the history of property ownership of landowners of which he is a descendant. The HRM assisted the Applicant to broaden the scope of his Form 1 to make specific reference to the Archive file number and to amend the wording to replace and include "expropriation."

During the Review, the Applicant provided documentary evidence including news clippings from 1970 and correspondence and documentation between the HRM [then the City of Halifax] and the Canadian National Railways and the Applicant's relatives. The documents provided to the Review Office by the Applicant are all in addition to what he received when the HRM disclosed the majority of the responsive Record.

The decision to withhold the Record was made in May 2009. Nine months after that access to information decision a settlement agreement dated February 2010 that included an apology was reached between the Africville Genealogy Society and the HRM regarding the removal of residents and property owners from Africville. The statement by the HRM on June 28, 2010 that the situation had changed regarding Africville would

appear to coincide with the period of time shortly after the February 2010 public release of the terms of the settlement agreement.

The legacy of the residents and property owners from Africville has garnered considerable attention over the last fifty years *[Refer to Remember Africville; The Spirit of Africville; Africville Act (Bill 213)2005; HRM Municipal Archives website Africville Apology and Agreement 2010]*. The story made headlines in the sixties and seventies when the relocation of the residents and destruction of their homes occurred. More recently Africville has once again attracted a lot of attention because of the efforts of the Africville Genealogy Society and the HRM to reach a settlement agreement, signed in February 2010. That agreement was reached nine months after the decision to withhold the Record. The reference by the HRM on June 28, 2010, to the fact that the situation has changed regarding Africville and indicating it will ask the legal department if it is prepared to waive the privilege as a result, leads me to conclude that it was referring to the February 2010 Settlement Agreement that had been reached *[Refer to HRM Municipal Archives website Africville Apology and Agreement 2010]*.

Taking into account the following factors:

1. the HRM was well aware the purpose of the Applicant's Form 1 was to research the history of his relatives' property ownership and expropriation in Africville. The HRM assisted the Applicant to broaden the scope of his Form 1 to include the Archive file reference. The HRM also assisted the Applicant to amend the Form 1 to amend the wording to replace and include "expropriation";
2. the Applicant is a direct descendant of the property owners about which he seeks information;
3. in 1969 there was considerable public attention to the expropriation of the residents of Africville. The period of time noted in the Applicant's Form 1 included 1969. There is a wealth of well-documented historical information about Africville in relation to property ownership and expropriation; and
4. in 2009 and 2010, there was considerable public attention given to the settlement agreement between the HRM and the Africville Genealogy Society – the material time for this Review,

I find public interest is relevant.

Given the attention paid to the Africville residents and their property interests historically and given that the HRM was negotiating a settlement agreement with the Africville Genealogy Society during the material time of this Review, I find even if the solicitor-client exemption were to apply [which I have found it does not], that for the HRM not to exercise its discretion to release an archived record to an Africville descendant, in the public interest, is unreasonable. I find the HRM gave no indication it considered public interest in making its decision. I find that the only *reasonable* conclusion is that disclosure of the Record is clearly in the public interest.

Issue #5: Disclosure of Personal Information for Historical Purpose

The final issue is with respect to the disclosure of personal information for historical purposes. The relevant conditions set out in s. 485(5) of the *MGA* read as follows:

(5) *The Public Archives of Nova Scotia, or the archives of a municipality, may disclose personal information for archival or historical purposes where*

(a) the disclosure would not be an unreasonable invasion of personal privacy;
(b) the disclosure is for historical research;
(c) the information is about someone who has been dead for twenty or more years; . . .

Pursuant to s. 485(5)(a) of the *MGA*, the Public Archives or a municipality such as the HRM can release information if to do so would not be an unreasonable invasion of another person's privacy. The Applicant is the son, grandson and great grandson of the persons named in the Form 1. In his Representations to the Review Officer, the Applicant provided the dates of death for his father and grandfather: 1976 and 1953 respectively. Pursuant to s. 485(5)(a) of the *MGA*, I find that the disclosure of a Record regarding property interests to a son, grandson and great grandson for persons deceased well over 20 years not to be an unreasonable invasion of personal privacy.

As was discussed above, the withheld Record at issue is undated. The remainder of the documents, which were released to the Applicant, all bear the date of 1969. It is reasonable to conclude that the Record withheld from the Applicant was created sometime in or around 1969. It is also reasonable to conclude that the Record could be no older than 1969 or it would not have been included as responsive to the Form 1. I find it is reasonable to conclude that the Record is no less than forty years old.

Pursuant to s. 485(5)(b) of the *MGA*, a public body may disclose personal information for historical or archival purposes. The Applicant filed his Form 1 as a son, grandson and great grandson of his relatives for personal information about their property interests in Africville. The HRM assisted the Applicant with his access to information request by adding the archive file reference number and by clarifying he was looking for information from the expropriation of Africville file. In response to the Form 1, the HRM disclosed the majority of the information in the responsive Record to the Applicant made up of documents from the Municipal Archives. The Record had been archived with the Provincial Archives until they were transferred to the HRM as a result of the Provincial Archives relinquishing custody to the HRM to be responsible for its own archival records. There is evidence that the property interests of all those living in Africville are a matter of public record having been well documented and publicized *[Refer to HRM Municipal Archives website Africville; Remember Africville; The Spirit of Africville]*. Pursuant to s. 485(5)(b) of the *MGA*, I find the HRM knew the Applicant's access to information request was for his familial historic research to learn about his relatives' property interests in Africville.

The third possible applicable subsection under s. 485(5)(c) of the *MGA* is if the information about someone who is deceased. The Applicant is seeking information about his relatives who died in 1976 and 1953 [deceased 34 and 57 years respectively from the date of the HRM's decision]. Pursuant to s. 485(5)(c) of the *MGA*, I find the Applicant is seeking information for an historical purpose for relatives who have been dead for twenty or more years.

I find the HRM has failed to give any consideration to s. 485(5) of the *MGA.* I find that the only *reasonable* conclusion is the Record should be disclosed pursuant to one or all three of the conditions set out in s. 485(5) of the *MGA.*

FINDINGS:

1. I find that the HRM conducted an appropriate search and met its duty to assist the Applicant by making every reasonable effort to assist him by clarifying the scope of his Form 1 and by responding openly, accurately and completely.
2. I find it reasonable, however, that the HRM FOIPOP Administrator, out of an abundance of caution, wanted to make it perfectly clear s/he did not want the HRM's initial Representations, which had made specific reference to the Record, to be made public in the Review Report.
3. I find that the ultimate decision under the *MGA* rests with the FOIPOP Administrator as the expert in access to information legislation and ought not to be usurped by the legal department.
4. On reviewing the one page Record, I find the first condition – that the communication be oral or written – is met as the Record is a handwritten note.
5. I find that the second condition – that the communication was confidential – has not been met.
6. I find that the third condition – that the Record is a communication between a client and a legal advisor – has not been met.
7. Having reviewed the Record thoroughly, I find the fourth condition – that the Record is about seeking, formulating or giving legal advice – has not been met.
8. In conclusion, I find that the HRM has failed to meet its burden to demonstrate that the Record is subject to solicitor-client privilege and, therefore, s. 476 of the *MGA* does not apply.
9. I find the HRM's position that it never releases a record otherwise subject to the solicitor-client exemption contrary to the *MGA* and the practice of applying blanket decision-making when it relates to the solicitor-client exemption is unreasonable.
10. I find the factors the HRM listed, as ones it would consider if it were to ever exercise its discretion, fall short of the relevant criteria to consider in exercising discretion.
11. I find public interest is relevant.
12. Given the attention paid to the Africville residents and their property interests historically and given that the HRM negotiated a settlement agreement with the Africville Genealogy Society during the material time of this Review, I find even if the solicitor-client exemption were to apply [which I have found it does not], that for the HRM not to exercise its discretion to release an archived record to an Africville descendant, in the public interest, is unreasonable.
13. I find the HRM gave no indication it considered public interest in making its decision.
14. I find that the only *reasonable* conclusion is that disclosure of the Record is clearly in the public interest.
15. Pursuant to s. 485(5)(a) of the *MGA*, I find that the disclosure of a Record regarding property interests to a son, grandson and great grandson for persons deceased well over 20 years not to be an unreasonable invasion of anyone's personal privacy.

16. I find it is reasonable to conclude that the Record is no less than forty years old.
17. Pursuant to s. 485(5)(b) of the *MGA*, I find the HRM knew the Applicant's access to information request was for his familial historic research to learn about his relatives' property interests in Africville.
18. Pursuant to s. 485(5)(c) of the *MGA*, I find the Applicant is seeking information for an historical purpose for relatives who have been dead for twenty or more years.
19. I find the HRM has failed to give any consideration to s. 485(5) of the *MGA.*
20. I find that the only *reasonable* conclusion is the Record should be disclosed pursuant to one or all three of the conditions set out in s. 485(5) of the *MGA.*

RECOMMENDATIONS:

I make the following recommendations to the HRM:

1. Release the Record in full to the Applicant.
2. Discontinue the current practice of applying the solicitor-client discretionary exemption as if it were mandatory.

Respectfully,

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