Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Catherine Tully

REVIEW REPORT 18-02

May 1, 2018

Department of Community Services

Summary: In response to a request for records relating to the decision to cancel an expansion of an adult residential centre, the Department of Community Services (Department) provided a confusing collection of documents. Many of the documents were emails without attachments with no explanation for their removal. Versions of the same documents were severed differently and sometimes had different exemptions applied to the same information. Public bodies have a duty to respond openly, accurately and completely. The Department's inconsistent approach and its failure to clearly identify exemptions under the law resulted in the applicant believing the Department was "blatantly hiding information". The Commissioner recommends that the Department release significantly more information where the Department has failed to meet its burden of proving that exemptions apply. The Commissioner further recommends that the Department revisit its exercise of discretion and consider releasing more information. Finally, the Commissioner recommends that the Department provide the applicant with a clearly paginated, consistently severed and labelled response package.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 2, 3, 5, 7, 14, 17, 20, 21, 45.

Authorities Considered: British Columbia: Orders F01-15, 2001 CanLII 21569 (BC IPC); F13-17, 2013 BCIPC 22 (CanLII); F15-59, 2015 BCIPC 62 (CanLII); F15-23, 2015 BCIPC 25 (CanLII); F17-08, 2017 BCIPC 9 (CanLII); F17-13, 2017 BCIPC 14 (CanLII); F17-19, 2017 BCIPC 20 (CanLII); F17-22, 2017 BCIPC 23 (CanLII); F17-33, 2017 BCIPC 35 (CanLII); F17-51, 2017 BCIPC 56 (CanLII). **Nova Scotia:** Review Reports FI-10-71, 2017 NSOIPC 5 (CanLII);16-10, 2016 NSOIPC 10 (CanLII); 16-12, 2016 NSOIPC 12 (CanLII); 17-01, 2017 NSOIPC 1 (CanLII); 17-05, 2017 NSOIPC 5 (CanLII); 17-08, 2017 NSOIPC 8 (CanLII). **Ontario:** Orders PO-3799, 2017 CanLII 89962 (ON IPC); PO-3778, 2017 CanLII 78779 (ON IPC); PO-2901-F, 2015 CanLII 15989 (ON IPC); PO-3270, 2013 CanLII 70444 (ON IPC); PO-3714, 2017 CanLII 21451 (ON IPC). **PEI:** Order FI-16-003, 2016 CanLII 48834 (PE IPC).

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *Donham v. Nova Scotia (Attorney General)*, 1993 CanLII 4541 (NS SC); *Fuller v. R. et al. v. Sobeys*, 2004 NSSC 86 (CanLII); *Gaetz v. Nova Scotia (Attorney General)*, 2005 NSSC 215 (CanLII); *John Doe v. Ontario (Finance)*, [2014] 2

SCR 3, 2014 SCC 36 (CanLII); *O'Connor v. Nova Scotia,* 2001 NSCA 132; *O'Connor v. Nova Scotia,* 2001 NSSC 6 (CanLII); *Ontario (CSCS) v Ontario (IPC)*, 2014 SCC 31, [2014] 1 SCR 674; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23 (CanLII); *R. v. Fuller*, 2003 NSSC 58 (CanLII).

INTRODUCTION:

[1] In 2014 the Department of Community Services announced its decision to cancel Phase 3 of the Riverview Adult Residential Centre in Pictou County. In July 2014, the applicant made a request for records relating to that decision. In response, the Department provided a confusing collection of severed documents and emails without attachments. The applicant's view was that the response was a "blatant hiding of information on the cancellation of the proposed expansion." The Department provided a number of reasons for withholding the information. In December 2014, the applicant requested a review of the Department's decision.

ISSUES:

[2] There are five issues under review:

(a) Is the Department authorized to refuse access to information under s. 14 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*) because disclosure of the information would reveal advice or recommendations?
(b) Is the Department authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure could reasonably be expected to harm the economic interests of the public body?
(c) Is the Department required to refuse access to information under s. 21 of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?
(d) Is the Department authorized to withhold portions of the record as "not related to this request"?
(e) Is the Department authorized to withhold information it considers to be "duplicate information"?

DISCUSSION:

Background

[3] The applicant sought records relating to the decision to cancel Phase 3 of the Riverview Adult Residential Centre in Pictou County in 2014. The Department's response was to provide partial access to the records. Information was severed under four exemptions: advice to the public body or minister (s. 14), harm to the economic interests of the public body (s. 17), unreasonable invasion of a third party's personal privacy (s. 20) and harm to third party business interests (s. 21). In addition, the Department removed numerous email attachments as duplicates and severed portions of a responsive record as "not related to this request".

[4] During the course of the informal resolution process, the applicant indicated that she was not interested in information severed under s. 20 (third party privacy).

[5] In preparation for this formal review, this office provided the third party with a notice of the formal review and sought its submission on whether or not it agreed that its business interests would be harmed by disclosure as set out in s. 21.

Burden of Proof

[6] The Department bears the burden of proving that the applicant has no right of access to a record. However, where the information being withheld relates to a third party business (s. 21), it is the third party who bears the burden of proof.[1]

(a) Is the Department authorized to refuse access to information under s. 14 of *FOIPOP* because disclosure of the information would reveal advice or recommendations?

[7] Section 14 of *FOIPOP* provides in part:

> 14(1) The head of the public body may refuse to disclose to an applicant information that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister.
> (2) The head of a public body shall not refuse pursuant to subsection (1) to disclose background information used by the public body.
> (3) Subsection (1) does not apply to information in a record that has been in existence for five or more years.

Purpose of the exemption

[8] The purpose of this exemption is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice.[2]

[9] In Canada, the leading case on the meaning of the policy and recommendations exemption is *John Doe v. Ontario (Finance),* 2014 SCC 36 *(John Doe*).[3] The Court discusses the purpose of the exemption and states:

> [45] Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada (*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 86; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at pp. 44-45). The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.

[1] See s. 45 of *FOIPOP*
[2] This summary of purpose is frequently stated in decisions of adjudicators at the Office of the Information and Privacy Commissioner of British Columbia. For example, Order F13-17, 2013 BCIPC 22 (CanLII), at para 26.
[3] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII).

Nova Scotia courts

[10] The advice or recommendations exemption is present in all public sector access to information laws across Canada. The articulation of the exemption varies with British Columbia's version being the closest to Nova Scotia's but other jurisdictions share terminology such as the words "advice and recommendations".

[11] Nova Scotia's courts have considered the meaning of the exemption in five cases.[4] All of the Nova Scotia decisions were issued before the Supreme Court of Canada decision in in *John Doe*. In summary, what the Nova Scotia courts have said about the exemption is:

- There must be a "communication" of information for the exemption to apply.[5]
- Advice must suggest a course of action.[6]
- Advice is part of a deliberative process.[7]
- It is not enough for the record to be part of a "continuum of communications", the test must be applied to the information itself.[8]
- Advice is not an opinion that a person is made aware of to keep him informed.[9]
- Advice implies a decision-making process in progress.[10]
- Exemption does not apply to neutral compilations of facts or scientific calculations of certain costs or requests for such information.[11]

[12] The first two findings listed above (requirement for communication and suggested course of action) are not consistent with the *John Doe* decision.

[13] Another important distinction with respect to Nova Scotia's exemption is that it must be read in light of the purposes of *FOIPOP* which includes the unique purpose of facilitating "informed public participation in policy formulation".[12] What this means, in my view, is that s. 14 must be narrowly construed to be focused on a deliberative, decision-making processes. As the Court stated in *O'Connor*, advice is not an opinion that a person is made aware of to keep him informed. Further, just because something has the word "draft" on it or has been subjected to some editorial comment does not necessarily mean that it is of the nature of information intended to be protected by the policy and recommendations exemption. Section 14 must be

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[4] *Donham v. Nova Scotia (Attorney General)*, 1993 CanLII 4541 (NS SC) [*Donham*], *O'Connor* v. *Nova Scotia (Minister of the Priorities and Planning Secretariat)* (2001), 2001 NSCA 132 (CanLII); *R. v. Fuller*, 2003 NSSC 58 (CanLII), *Fuller v. R. et al. v. Sobeys*, 2004 NSSC 86; *Gaetz v. Nova Scotia (Attorney General)*, 2005 NSSC 215 (CanLII) [*Gaetz*].

[5] *R. v. Fuller*, 2003 NSSC 58 at para 76-77. Note this finding is not consistent with the *John Doe* case.

[6] *Gaetz* at para 23. This decision was pre-*John Doe* and is not consistent with the findings of the Supreme Court of Canada on this point.

[7] *R. v. Fuller*, 2003 NSSC 58 at para 28.

[8] *R. v. Fuller*, 2003 NSSC 58 at para 69.

[9] *O'Connor v. Nova Scotia, ("O'Connor")* 2001 NSSC 6 (CanLII), aff'd, 2001 NSCA 132 (CanLII), leave to appeal denied, [2001] S.C.C.A. No. 582) at para 25. Note that the NSCA did not specifically adopt this analysis stating instead that it was unnecessary to do so for the purposes of its decision (at para 101).

[10] See footnote 9.

[11] *Donham* at p. 8, referring to s. 5(2)(d) of the *Freedom of Information Act*, R.S.N.S. 1990, c. 11.

[12] *FOIPOP* s. 2(b)(i).

applied judiciously keeping in mind the duty to sever only that information which qualifies under s. 14.[13]

General requirements

[14] A review of *John Doe* and numerous recent decisions evaluating and applying the advice or recommendations exemption reveals the following general guidance about advice or recommendations exemptions:

- The exemption is intended to protect the deliberative or evaluative process.[14]
- The exemption is intended to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue.[15]
- Evidence of an intention to communicate is not required for the exemption to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[16]
- The exemption covers earlier drafts of material containing advice or recommendations even if the content of a draft is not included in the final version. Advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by the exemption.[17]
- Recommendations include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.[18]
- Advice must have a distinct meaning from "recommendations"[19] and includes the views or opinions of a public servant as to the range of policy options to be considered by the decision-maker even if he or she does not include a specific recommendation on which option to take.[20]
- Advice includes an opinion that involves exercising judgement and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.[21]
- Advice or recommendations may be revealed in two ways:
    1. The information itself consists of advice or recommendations.
    2. The information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[22]
- Advice involves an evaluative analysis of information.[23]

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[13] *FOIPOP* s. 5(2).
[14] *John Doe* at para 51, Order PO-3778, 2017 CanLII 78779 (ON IPC), at para 43.
[15] Order 01-15, 2001 CanLII 21569 (BC IPC) at para 22, cited most recently in in Order F17-19, 2017 BCIPC 20 (CanLII), at para 17.
[16] *John Doe* at para 51 applied, for example in Order PO-3799, 2017 CanLII 89962 (ON IPC), at para 32.
[17] *John Doe* at para 51 applied, for example in Order PO-3799, 2017 CanLII 89962 (ON IPC), at para 33.
[18] *John Doe* at para 23.
[19] *John Doe* at para 24.
[20] Order PO-3714, 2017 CanLII 21451 (ON IPC), at para 30.
[21] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) at para 113.
[22] *John Doe* at para 24. This approach if followed in both Ontario and British Columbia: PO-2901-F, 2015 CanLII 15989 (ON IPC), at para 28 and Order F17-19, 2017 BCIPC 20 (CanLII), at para 19.
[23] Ontario Order PO 2901F, 2015 CanLII 15989 (ON IPC), at para 27.

Examples of information that did not qualify as advice or recommendations:
[15] Examples of the types of information that have been found *not to qualify* as advice or recommendations in decisions of the Office of the Information and Privacy Commissioner for Ontario include factual or background information, analytical information, evaluative information, notifications or cautions, views, and a supervisor's direction to staff on how to conduct an investigation.[24]

[16] Some specific examples of the types of information found *not to qualify* under these exemptions in jurisdictions across Canada include:

- estimates of how many people were employed as a result of an awards program,[25]
- payroll information provided by a third party,[26]
- conversation summaries,[27]
- facts about what an employee said or did,[28]
- direction to staff from management or decision maker,[29]
- letter seeking information,[30]
- projected impacts of delay.[31]

Examples of information that did qualify under the advice* or *recommendations exemption:
[17] Examples of the types of information to which the advice or recommendations exemption *has been applied* include:

- policy options prepared in the course of a decision-making process constitute advice,[32]
- draft meeting notes that revealed discussion of strengths and weaknesses of various nominees as part of a recommendation process,[33]
- expert report in a professional conduct investigation,[34]
- a director's assessment and opinion on the merits of a citizen's complaint,[35]
- advice and recommendations on how to manage an applicant's job classification and workplace complaints as part of a deliberative process,[36]

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[24] This list can be found in numerous Ontario cases including: Order PO-3270, 2013 CanLII 70444 (ON IPC), at para 24 and Order PO-3778, 2017 CanLII 78779 (ON IPC), at para 31.
[25] Order F15-59, 2015 BCIPC 62 (CanLII), at para 33.
[26] *Fuller v. R. et al. v. Sobeys* 2004 NSSC 86, at para 23.
[27] Order F17-13, 2017 BCIPC 14 (CanLII).
[28] Order F17-22, 2017 BCIPC 23 (CanLII).
[29] Order PO-3778, 2017 CanLII 78779 (ON IPC), at paras 54 and 58.
[30] Order PO-3778, 2017 CanLII 78779 (ON IPC), at para 59.
[31] Order PO-3778, 2017 CanLII 78779 (ON IPC), at para 57.
[32] *John Doe* at para 35, Order F17-19, 2017 BCIPC 20 (CanLII), at para 19.
[33] Order F17-33, 2017 BCIPC 35 (CanLII).
[34] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner,*2002 BCCA 665 (CanLII) at para. 113.
[35] Order F15-23, 2015 BCIPC 25 (CanLII).
[36] Order F17-19, 2017 BCIPC 14 (CanLII).

- communication strategies, key message documents, media plans (that contain advice), opinions, implications and considerations of various communication issues,[37]
- statistical information found within a draft report compiled and selected by an expert using her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.[38]

[18] In its submission, the Department agreed that advice and recommendations have two distinct meanings. It says simply that s. 14 was applied to such things as advice given to the Department about negotiations being carried out for the Department, management of personnel and residents in the residential centre, the draft communications plan that would be used to communicate the upcoming changes and overall advice or recommendations regarding the Services for Persons with Disability program transformation plan.

[19] The process for determining whether s. 14(1) applies involves three steps:

1. It is first necessary to establish whether disclosing the information "would reveal advice or recommendations developed by or for a public body or a minister".
2. If so, it is then necessary to consider whether the information at issue is excluded from s. 14(1) because it falls within any of the categories of information listed in sections 14(2)-(4).
3. If s. 14(1) is found to apply, the final step is to determine whether the head of the public body has exercised his or her discretion lawfully.

[20] I have applied the principles discussed above to the records at issue here.

Information that does not qualify as advice or recommendations

[21] Withheld information that contains no recommendations and that does not qualify as advice within the meaning of s. 14 includes:

- **Process notes:** Brief descriptions of next steps that resulted from a decision, or directions regarding who should attend meetings or review documents contain no advice or recommendations. The processes are established and simply being followed. This type of information does not qualify as advice or recommendations:
  - Pages 9 (first three emails), 16, 18 (a portion), 19, 28 (bottom), 30, 32 and 94.[39]

- **Conversation summaries:** In several emails, members summarize the outcome of meetings and conversations and state their impressions. No advice or recommendations are provided. It is simply a historical accounting of the outcome.
  - Pages 14, 15 (bottom) and 16.

- **Introductory or concluding remarks**: On other occasions, the Department withheld introductory or concluding remarks that do not qualify as advice or recommendations.

[37] Order F17-51, 2017 BCIPC 56 (CanLII).
[38] Order F17-08, 2017 BCIPC 9 (CanLII) at para 19.
[39] All references to page numbers relate to the Department's copy of the records as the applicant's copy had no page numbers.

These comments may reveal the topic of the discussion but they do not disclose the advice or recommendations made with respect to the topic.

- Pages 9, 10 (top of page), 18 (a portion), 19 and 81.

- **Opinions not advice**: On several occasions, the Department withheld opinions of staff regarding various matters. Where the withheld information is in the nature of an opinion that a person is made aware of to keep him informed, the Nova Scotia Supreme Court stated that these opinions do not qualify as advice within the meaning of *FOIPOP*.[40] In addition, on each occasion the opinion is not given as part of the deliberative process. They are more in the nature of colour commentary.
  - Pages 92, 94, 101 and 114.

- **Email seeking information**: One withheld document is an email also withheld under s. 21. It contains no advice or recommendations but is instead a request. This document is of the same nature as a letter seeking information that other jurisdictions have determined does not qualify as advice or recommendations.[41]
  - Page 117.

[22] Section 14(2) of *FOIPOP* provides that s. 14 cannot be applied to "background information". Background information is defined in s. 3(1) of *FOIPOP* and includes a list of 12 types of information including "any factual material". As noted above, it is possible that factual material included with advice or recommendations may be withheld where, for example, the facts are compiled and selected by an expert using her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body. In addition, where the facts, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations, s. 14 might also apply.

- **Organizational data – FTE counts and capacity numbers:** On occasion, the Department withheld factual information regarding capacity of Riverview and/or other similar institutions. The same or very similar information regarding Riverview's actual and estimated capacity were disclosed to the applicant on other documents.[42] In addition, the Department withheld information relating to the number of staff employed at various institutions. There is no advice associated with the information; it is presented to give context. I find that s. 14 does not apply to this information.
  - Pages 23 (middle paragraph), 24 (top paragraph), 89 and 90.

- **Cost estimates:** The applicant's request was for records related to the decision to cancel Phase 3 of the Riverview project. The Department withheld cost estimates in four copies of an Information Note. A second Information Note also included the cost estimates but the information was partially disclosed. There is no analysis or advice with respect to the estimates; they are presented as just that – cost estimates. Some of the information is also associated with historical facts relating to the scheduling and completion dates of the project. What is particularly puzzling about this severing is that the cost information

[40] See note 9.
[41] Order PO-3778, 2017 CanLII 78779 (ON IPC), at para 59.
[42] See for example, p. 40.

withheld on these pages was fully disclosed to the applicant in other documents. The Information Notes themselves contain no further analysis of the information; they simply present the disclosed information in a more narrative form. In addition, the four copies of the first Information Note are not consistently severed so that information withheld on one version is disclosed on another found later in the responsive records. These discrepancies were drawn to the attention of the Department but they provided no response nor explanation. I find that this information qualifies as "factual" within the meaning of s. 3(1)(a) and cannot be withheld under s. 14. Similar information was also withheld on a variety of other documents. Section 14 does not apply to this information.

- Pages 2, 3, 5, 6, 34 (bottom), 35, 36, 37.
- Pages 23 (bottom), 78, 79 (part), 85-86 (part) and 125.

- **Historical context:** On several documents the Department withheld a description of the historical context regarding residential facilities. All of the information was publicly available at the time of the request. There is no analysis of the information; it is provided as background. Two copies of a PowerPoint presentation contain a series of slides describing a publicly available document. While the presentations have very slight differences in slide selection, the content of the slides themselves are entirely a factual summary of a public report. I find that this information qualifies as "factual" within the meaning of s. 3(1)(a) and cannot be withheld under s. 14.
  - Pages 42-55 and 57-72.
  - Pages 75 (middle section) and 77 (second section).

Information that does qualify as advice or recommendations

[23] I find that the following information withheld under s. 14 qualifies as advice or recommendations:

- **Options, recommendations and suggested courses of action**: On a number of occasions leading up to the decision, staff identified key issues, provided discussion, analysis and recommendations regarding the choices under consideration. This information clearly qualifies as advice and/or recommendations under s. 14.
  - Pages 10 (last paragraph), 23 (one phrase), 24 (last two bullets), 35 (last paragraph), 37 (last paragraph), 78 (second paragraph), 79 (bottom 2/3), 80 (in full), 85 (second paragraph), 86 (bottom 2/3), 87, 88 (top), 122 (last full paragraph) and 127 (part).

- **Advice:** On a number of occasions, Department staff and/or contractors offer an assessment of the options or exercise judgement and skill to weigh the significance of facts as part of the deliberative process. This type of information qualifies for exemption under s. 14.
  - Pages 18 (one phrase), 90 (bottom) and 91 (top and bottom paragraphs).

- **Draft versions of documents:** The responsive records include drafts of a number of documents. In *John Doe*, the Court made clear that the exemption covers earlier drafts of material containing advice or recommendations even if the content of a draft is not

included in the final version.[43] Again, this is not a blanket exemption. The Department wholly withheld drafts but a careful review of the content of the drafts reveals that only a portion of the information qualifies as advice or recommendations. In this case, several of the earlier drafts include information and context that did not make it into the final version. The earlier characterization of issues, current situation and background information, in my opinion, qualifies as advice within the meaning of s. 14. On several early drafts, analysis and recommendations were included that did not appear in later versions. This information also qualifies for exemption under s. 14.

- Pages 34 (top two sections), 35 (top), 37 (bottom), 97 (one sentence, bottom section) and 98 (top section).

- **Substantive editorial comments on draft documents:** Editorial comments may qualify as advice where the comments are substantive and so can be seen as part of a deliberative process. So, for example, grammatical or punctuation changes would not, in my opinion, qualify as "advice" within the meaning of s. 14. But changes in tone, structure, emphasis and addition of information and/or deletion of information could all qualify as advice.
    - Pages 26 (middle), 28 (middle), 32 (middle), 73 (three bullets), 75 (end of first paragraph), 83 (middle), 84 (first line) and 110 (middle).

- **Communications strategies, key messages and communications plans**: Consistent with cases cited above, this type of information qualifies as advice or recommendations within the meaning of s. 14.
    - Pages 14 (bottom sentence), 15 (top portions), 75 (bottom), 76 (all except headings) and 77 (portions under 4 headings).

[24] I will not make any final recommendation here with respect to the disclosure of the above-noted records because, in many instances, the Department also applied s. 17(1)(e) and/or s. 21 to the information. I will evaluate the application of these exemptions first before making a final recommendation with respect to the disclosure of the records.

[25] The final stage on the application of s. 14 is to consider the exercise of discretion. The Supreme Court of Canada had this to say about the advice exemption and exercise of discretion:

> [52] It is important to emphasize that s. 13(1) is a discretionary decision and that heads of institutions must be careful to exercise their discretion lawfully (*Telezone*, at paras. 45, 100, 102, 107-9 and 112-16; *Ontario v. CLA*, at paras. 66, 69 and 71). The Court noted in *Ontario v. CLA*:
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> > The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations.[44]

[43] I note that all copies of the Information Note have a *draft* water mark on them. However, the last two copies both indicate that they were approved by all three individuals identified. Also, given the date of the last two versions it appears that they were the versions used by the Department. The Department provided no evidence on this issue.
[44] *John Doe* at para 71.

[26] Section 17 is also a discretionary exemption with similar considerations. As a result, I will comment on the Department's exercise of discretion generally following the analysis of the application of s. 17 to the records.

(b) Is the Department authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure could reasonably be expected to harm the economic interests of the public body?

[27] Section 17 is a harms-based exemption. As noted above, by virtue of s. 45, it is the Department that bears the burden of proof.

[28] In 2014, the Supreme Court of Canada reviewed decisions on the "reasonable expectation of harm test" contained in access to information legislation and summarized the appropriate test as follows:

> [54] This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground.[45]

[29] As I have stated in a number of previous reports, what is clear from the recent cases is that evidence of speculative harm will not meet the test, certainty of harm need not be established, rather the test is a middle ground requiring evidence well beyond a mere possibility of harm but somewhat lower than harm that is more likely than not to occur.[46]

[30] The Department relied on s. 17(1)(e) according to the notation on the records. This discretionary exemption relates specifically to "information about negotiations carried on by or for a public body". The type of information that appears to have attracted the s. 17(1)(e) severing were paragraphs with the word "negotiation" in them, cost estimates and background information.

[31] There are two elements that must be established for s. 17(1)(e) to apply. First, the withheld information must be "information about negotiations carried on by or for a public body". Secondly, the disclosure of the information could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia.

[32] What is "information about negotiations"? Information that might be collected or compiled for the purpose of negotiations, that might be used in negotiations or that might, if disclosed, affect negotiations, is not necessarily about negotiations. Information about negotiations includes analysis, methodology, options or strategies in relation to negotiations.[47]

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[45] *Ontario (CSCS) v. Ontario (IPC)*, 2014 SCC 31, [2014] 1 SCR 674.
[46] For a full discussion of the test and examination of the case law see NS Review Report FI-10-71, 2017 NSOIPC 5 (CanLII) at paras 40-47.
[47] As stated in NS Review Report 16-12, 2016 NSOIPC 12 (CanLII) at para 77.

[33] The Department's submission requests that the topic of the negotiation remain confidential and so I have described it in only general terms. One part of its argument is that it was significant that at the time of the disclosure decision in November 2014, no final decision regarding Phase 3 had been made. The Department argued that the plan had not been implemented or made public and so the disclosure of the information withheld under s. 17 in the fall of 2014 would have resulted in the premature disclosure of the proposal/project. However, the disclosed records contradict that statement indicating that during the week of June 27, 2014, the decision to not proceed with Phase 3 had been made.[48] In addition, the applicant clearly knew a decision had been made since the request, dated July 25, 2014, was for records relating to the decision to cancel Phase 3 of the Riverview Adult Residential Centre project. The negotiation at issue is discussed in two records. Curiously, neither record was severed under s. 17.[49]

[34] On page 1 of the records the Department withheld one paragraph under s. 17(1)(e). I find that the information qualifies as "information about negotiations" within the meaning of s. 17(1)(e). On the balance of probabilities, I accept that there was a reasonable expectation of harm from the disclosure of this information in the fall of 2014.

[35] Much of the information withheld under s. 17(1)(e) relates to cost estimates. Every cost estimate severed under s. 17(1)(e) (and s. 14) was disclosed on some other page in the package. As noted earlier, this inconsistency was raised directly with the Department prior to proceeding to formal review. The Department never responded to this issue.

[36] If disclosing the cost estimates withheld under s. 17(1)(e) would result in harm, that harm would likely have materialized since the information was disclosed to the applicant three and a half years ago. The Department provided no argument or evidence regarding the effects, if any, of this disclosure.[50] Further, it is unclear to me how the cost estimates qualify as "information about negotiations". I find that the Department has failed to satisfy the burden of establishing a reasonable expectation of harm from the disclosure of cost estimate information withheld under s. 17 on:

- Pages 2, 3, 5, 6, 30, 34, 35, 78, 79, 85 and 86.

[37] The records under consideration here include four versions of an Information Note. The Department severed or wholly withheld all four versions of the Information Note. On three of the four versions, the Department applied both s. 14 and s. 17. On one version, it applied only s. 14. There is no clear reason for this. To the extent that this was an oversight, the discussion above regarding the application of s. 17 also applies to the fourth version of the note at pages 36-37.

[48] Page 40 of the records – fully disclosed to the applicant.
[49] To avoid disclosing the nature of the information at issue, I will advise only the Department of the page number I am referring to.
[50] To be clear, a reasonable expectation of harm can exist without the harm actually ever materializing.

[38] A small portion of the withheld information on the Information Notes relates to costs not otherwise disclosed.[51] The Department's submission speaks to negotiations occurring at the time of the access request response. The withheld cost estimate information on these pages does not appear to relate to the matter discussed in the Department's submission. Further, it is exactly the same type of information as was already disclosed to the applicant. Therefore, I find that the Department has failed to satisfy its burden of establishing a reasonable expectation of harm from the disclosure of this additional cost estimate information.

[39] With respect to information withheld on pages 75-77, I agreed above that most of the information qualifies under s. 14. A portion that was factual and formed background information does not. I find that with respect to this background information, the Department has not met its burden of proving that disclosing this type of publicly-known contextual information at the time of the request would result in the harm contemplated under s. 17(1)(e). With respect to the remainder of the information on pages 75-77, since I have already agreed that s. 14 applies, I will not evaluate whether or not s. 17 also applies.

[40] The Department also withheld background factual information other than financial estimates on pages 89, 90 and 91. The Department's argument regarding the application of s. 17(1)(e) does not appear to relate in any way to the type of information withheld on these three pages. There is no obvious connection between the harm argument raised and the factual information withheld. I therefore find that s. 17 does not apply to the information withheld on pages 89, 90 and 91. Earlier I determined that s. 14 applies to some of the withheld information on pages 90 and 91 and so with respect to that information, I make no finding as to the application of s. 17.

[41] Finally, pages 97-98 were wholly withheld under ss. 14 and 17. I earlier determined that a portion of this information on page 97 was background information and could not be withheld under s. 14. Again, there is no obvious connection between the harm argument raised and the factual information withheld on page 97. I cannot see any logical connection between the matters described by the Department and the precise information withheld on page 97. I find that it is not "information about negotiations" within the meaning of s. 17(1)(e). Earlier I did agree that s .14 applies to a portion of the information withheld on page 97 and so with respect to that information, I make no finding as to the application of s. 17.

[42] In summary, I find that:

- Section 17 (1)(e) applies to the information withheld on p. 1.
- Section 17(1)(e) does not apply to the following information:
  - Cost estimate information on pages 2, 3, 5, 6, 30, 34, 35, 78, 79, 85 and 86.
  - Contextual information on p. 75, titles on p. 76 and one paragraph on p. 77.
  - Pages 89, 90 and 91.
  - Top of p. 97.

[51] Last bullet on pages 3, 6 and 35 (7th bullet on page).

[43] The remainder of the information withheld under s. 17(1)(e) was also withheld under s. 14 and since I have already determined that s. 14 applies to this remaining information, I make no decision with respect to the application of s. 17(1)(e).

[44] I will provide the public body with a copy of the recommended severing on each of these pages.

Exercise of discretion

[45] As noted above, both s. 14 and s. 17 are discretionary exemptions. This means that even where the requirements of these provisions are met, the public body's decision-maker must turn his or her mind to whether, despite this, the information should nevertheless be released.

[46] I have on previous occasions summarized relevant factors in the exercise of discretion as follows:[52]

- the wording of the discretionary exemption and the interests which the section attempts to balance;
- 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 have recommended that similar types of records or information should or should not be subject to disclosure; and
- when the policy advice exemption is claimed, whether the decision to which the advice or recommendations relates has already been made.

[47] In Nova Scotia, it is particularly important to emphasize that one of the core purposes of *FOIPOP* is to facilitate informed public participation in policy formulation. Therefore, any decision to apply s. 14 should be considered in light of this purpose.

[48] In this case, some relevant considerations with respect to exercise of discretion are:

- The decision had been made public at the time of the access to information request. Providing further explanation for the rationale would not have interfered with the decision-making process, would have satisfied the purposes of *FOIPOP* and would have increased public confidence in the operation of the public body.

[52] NS Review Report 17-01, 2017 NSOIPC 1 (CanLII) at para 34 citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23 (CanLII).

- While the original disclosure decision was made in the fall of 2014, more than three years have now passed. Passage of time is a relevant consideration and one that would suggest exercising discretion in favour of disclosure.
- The Department has already disclosed all of the core financial information to the applicant, disclosing slightly more context contained in the various communications and Information Notes would also increase confidence in the operations of the public body.

[49] In its submission, the Department provided no explanation for any factors it used in the exercise of discretion.

[50] Therefore, I recommend that the Department reconsider the application of s. 14 and s. 17 to these records in light of the requirement to apply discretion and in light in particular of the factors highlighted above.

(c) Is the Department required to refuse access to information under s. 21 of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

[51] Section 21 of *FOIPOP* provides in part:

> 21(1) The head of a public body shall refuse to disclose to an applicant information
> (a) that would reveal
> (i) trade secrets of a third party, or
> (ii) commercial, financial, labour relations, scientific or technical information of a third party;
> (b) that is supplied, implicitly or explicitly, in confidence; and
> (c) the disclosure of which could reasonably be expected to
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party;
> (iii) result in undue financial loss or gain to any person or organization…

[52] The burden is on the third party to establish that:

1. the disclosure of the requested information would reveal trade secrets or commercial, financial, labour relations or technical information of a third party;
2. the information in question was supplied implicitly or explicitly in confidence; and
3. the disclosure of the requested information could reasonably be expected to cause one or more of the harms enumerated in s. 21(1)(c).

[53] Further, *FOIPOP* is clear that where the third party consents to the disclosure, s. 21(1) does not apply.[53]

[54] When the Department originally issued its disclosure decision in 2014, it applied s. 21 to portions of the record without consulting the third party. As part of this review process, I determined that the third party was an appropriate party to this review. As a result, it received

[53] Section 21(4) of *FOIPOP*.

notice of the review process and a copy of the records at issue. In response, the third party indicated that it had no concerns with the release of information contained on four pages at issue. As a result, I find that s. 21 does not apply to the withheld information under s. 21 on pages 21, 22, 103 and 127.

[55] The Department provided no evidence in support of the application of s. 21. Instead it states, "The Department maintains that the records that have been severed pursuant to Section 21 contains confidential business information that belongs to the third party and confirms that the Department at the time of it's (sic) November 2014 decision, appropriately applied Section 21 to the records."[54] It is unclear how the Department reached the conclusion that s. 21 applied in 2014 given that it did not consult the third party and offered no evidence in support of its decision. Even though it is the third party that bears the burden of proof, it is the Department that ultimately makes the decision to release or withhold information. Each decision must satisfy all of the requirements of the chosen specific and limited exemption under *FOIPOP*.

[56] The remaining information at issue is contained on page 96 which was wholly withheld and pages 117-120 which was a series of emails with all meaningful information withheld. It is clear from the records themselves that the information on these pages is financial information of the third party or reveals financial information of the third party thus, satisfying the test in s. 21(1)(a)(ii) of *FOIPOP*.

[57] There is no overt indication that the information was supplied in confidence as required by s. 21(1)(b). Certainly, from the third party's submission, it is clear that it viewed this information as having been supplied in confidence. While this factor alone is not enough to satisfy the test in s. 21(1)(b), I am satisfied that given the nature of the information, a reasonable person would regard it as confidential.[55]

[58] But this is, of course, not the end of the matter. In order for s. 21 to apply, there must be evidence to support a finding that disclosure of the information would result in the types of harms listed in s. 21. The third party's position is that the disclosure of the withheld information would result in reputational harm, even though, as the third party points out, the issues have been resolved in the intervening years.

[59] Is it possible for reputational harm to satisfy the harms test in s. 21(1)(c) of *FOIPOP*? The third party did not make a connection between potential reputational harm and the harms listed in s. 21. Interestingly, *FOIPOP* does mention reputational harm, in relation to individuals. In s. 20(2)(h), *FOIPOP* provides that a relevant consideration in determining whether disclosure of personal information would result in an unreasonable invasion of personal privacy is whether "the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant."

[54] Department's submission dated March 16, 2018.
[55] In NS Review Report 17-08, 2017 NSOIPC 8 (CanLII), I listed a number of factors relevant to determining whether information has been "supplied in confidence" for the purposes of s. 21. The third party's subjective opinion and the nature of the information were two of those factors.

[60] Obviously, the drafters turned their minds to the idea of reputational harm but chose not to include it as a relevant harm in s. 21. Instead, the harms listed in s. 21 relate to significant harm to a competitive position, significant harm to a negotiating position, undue financial loss or gain, or harm that would result in similar information no longer being supplied to the public body. So, for example, had the third party given evidence that a significant portion of its funding came from fundraising and that the reputational harm would affect its ability to fundraise in the community, which in turn could have resulted in undue financial loss, this might have satisfied the s. 21(1)(c) test. But no such argument or evidence was offered. The third party bears the burden of proof and has not, in this case, satisfied that burden.

[61] I find that s. 21 does not apply to information withheld under s. 21 on pages 96[56] and 117-120.

[62] The Department also applied s. 21 to pages 107 and 122. These pages include discussion between the Department and its own contractors regarding certain arrangements. I have no evidence before me that the information satisfies any part of the s. 21 test. It appears to be financial information of the Department, supplied by employees of the Department[57] as they managed affairs on behalf of the Department. Even if a third party's information is tangentially related to the discussion, there is no evidence of what harm, if any, could arise from the disclosure. I find that s. 21 does not apply to the information withheld under s. 21 on pages 107 and 122.

[63] In summary, I find that s. 21 does not apply to any of the withheld information.

(d) Is the Department authorized to withhold portions of the record as "not related to this request"?

[64] The Department withheld portions of two sentences (21 words) in an email as "not related to the request". In support of this severing, the Department states, "Public bodies in Nova Scotia and across Canada also follow the practice of removing from a record any non-relevant material as non-responsive to the access request." This is not accurate. Since September 2014, my office has received 592 requests for review. In nine cases, public bodies identified "non-responsive" as the basis for withholding portions of responsive records in their decision letters.[58] In all nine cases the public bodies were government departments. No other public body or municipality in Nova Scotia follows this practice.

[56] Page 96 includes a small portion of information the Department characterized as personal information within the meaning of s. 20 on other documents. As this information is not at issue, my recommendation with respect to this page includes a s. 20 notation.

[57] I note that s. 3(1)(b) of *FOIPOP* defines "employee", in relation to a public body, includes a person retained under an employment contract to perform services for the public body.

[58] During our informal resolution process, investigators thoroughly review the records. On occasion, we have discovered that a non-departmental public body has used some version of "non-responsive" to sever records, although they failed to note this in their decision letters. On the rare occasion that this has occurred in the past four years, the public body (non-departmental) has agreed to either disclose the record or apply an exemption found in *FOIPOP*.

[65] Further, the case law supporting the use of "non-responsive" comes from only two jurisdictions: Ontario and Alberta. In the case of the Alberta decisions, I have noted in previous Nova Scotia decisions that the Alberta Commissioner at the time modified his approach in subsequent cases and further, that no other jurisdiction has followed the Alberta line of cases and several have recently specifically declined to follow the Alberta reasoning.[59]

[66] With respect to the Ontario cases I point out that there is a significant difference in wording.[60] The legislation in question has a significant difference to Nova Scotia's legislation.

[67] The cases the Department cites as "leading" are 20 years old. Current caselaw from British Columbia and Prince Edward Island illustrate the modern, current approach that prohibits the use of "non-responsive" to sever portions of otherwise responsive records.[61]

[68] All of the arguments raised by the Department were considered and rejected in NS Review Report 16-10. The Department made no attempt to address the decision in NS Review Report 16-10. Further, the only cases cited by the Department are those that support its position. It fails to deal with all of the significantly more recent case law that does not support its position. Therefore, I do not need to revisit this issue. For all of the reasons set out in NS Review Report 16-10, I find that the Department is not authorized to rely on "non-responsive" as a basis for withholding snippets of information within a responsive record. Allowing government department officials a non-specific, unlimited right to selectively sever information they view as not responsive from responsive records would be entirely inconsistent with the essential purpose of *FOIPOP*, actual design of *FOIPOP* and the well-established approach that freedom of information legislation be broadly interpreted in favour of disclosure.

(e) Is the Department authorized to withhold information it considers to be "duplicate information"?

[69] The Department withheld portions of documents it said were duplicates. All of the duplicates were attachments to emails or other documents. The disclosed portion of the records indicate clearly that there is one or more attachment to the document but the applicant's package contained no attachments nor any explanation for the missing documents. Further, on six pages (all email strings), the Department removed portions of the text of emails it said were duplicates.

[70] When public bodies respond to access to information requests, they have a duty to make every reasonable effort to assist the applicant and to respond without delay "openly, accurately and completely".[62] The law requires that public bodies provide applicants with all government information subject only to limited and specific exemptions.[63]

[71] In this case, the applicant was provided with a package of documents without any page numbers. Where duplicates were removed, the package does not have any indication that a

[59] NS Review Report 16-10, 2016 NSOIPC 10 (CanLII) at para 34.
[60] NS Review Report 16-10 at para 26.
[61] BC Order 15-23 2015 BCIPC 25 (CanLII), PEI Order FI-16-003, 2016 CanLII 48834 (PE IPC).
[62] S. 7(1)(a) *FOIPOP*.
[63] Section 2(b) *FOIPOP*.

document had been removed, nor was the applicant advised in the response letter that duplicates had been removed, which pages were removed or where the original of the removed pages could be found. In total, 27 attachments appear to have been removed as duplicates. I say, "appear to have been removed" because even in the unsevered package of documents sent to this office, the attachments do not follow the records. Instead, we received a package of documents labelled duplicates, with no page numbers and in no discernable order relative to the response package. I can confirm they were duplicates, but I cannot determine where they belong in the release package.

[72] The applicant was in an even worse position than us since she received a package with no page numbering and no indication that duplicates had been removed.

[73] Duplicates can be a no-win situation for public bodies. Some applicants are upset if they get packages of materials with repeated copies of the same document. Other applicants are upset if duplicates are removed because they suspect public bodies of hiding something – they want to see the duplicates and confirm for themselves that they are indeed exact duplicates.

[74] The duty to assist requires that public bodies respond "openly, accurately and completely". The goal is to ensure that public bodies are fully accountable to the public. This ensures fairness in government decision-making, permits the airing and reconciliation of divergent views and facilitates informed public participation in policy formulation. The best way to manage duplicates is in whatever way that best accomplishes the purposes of *FOIPOP*.

[75] In its submission, the Department noted that I have, on a previous occasion, approved of the removal of exact duplicates prior to the processing of an access to information request.[64] Certainly a first step in the processing of an access to information request is to remove whole documents that are exact duplicates. That is not what happened here. Instead, portions of records – all attachments to other documents, were removed from the response package. There is no problem with doing so, so long as the fact of the removal and the reason is clearly communicated to the applicant. This did not happen. Instead, the applicant received a confusing collection of documents referring to numerous attachments but with no attachments provided and no explanation. This left the applicant with the impression that "it appears as if something is being hidden."[65]

[76] I want to emphasize here that this discussion is about duplicates that form portions of responsive records. Duplicates of entire records can be removed in the initial vetting of records collected from business areas. This makes common sense and does serve the duty to assist applicants since it means that they will not get multiple copies of the exact same records.

[64] Making reference to NS Review Report 17-05, 2017 NSOIPC 5 (CanLII) at paras 26 – 27.
[65] Applicant's request for review dated December 10, 2014.

[77] Where portions of responsive records include attachments that are duplicates public bodies have, in my view, three options:

1. Provide all duplicates, with any exemptions consistently applied.
2. Remove duplicates and include an explanation for the removal.
3. Contact the applicant and ask them how they would like duplicate attachments treated.

[78] The fact is, an applicant could make a follow up access request for copies of all duplicates removed from the previous access request. The best way to avoid such a request, is to process the first request openly, accurately and completely.

[79] In this case, the Department also used "duplicate" as an exemption to disclosure. Within the text of four emails, the Department severed portions of text as "duplicate". There are three problems with this practice. First, if the information is disclosed elsewhere, the removal of "duplicate" information miscommunicates the Department's position. It makes it appear that the information is being withheld when, in fact, it is being disclosed. Second, if the information has actually been withheld elsewhere under an exemption permitted under *FOIPOP*, placing "duplicate" on that same information is a failure to provide the "reasons for the refusal and the provision of this Act on which the refusal is based" as required by s. 7(2)(ii) of *FOIPOP*. Third, purporting to sever information as "duplicate" is not consistent with the duty to assist. It renders the emails difficult, if impossible to read and can make it appear that the Department is hiding something. For example, on one email the Department removed a portion of the text as duplicate. The same text is fully disclosed on the previous page.

[80] I find that the Department failed to satisfy its duty to assist the applicant when it removed portions of records as "duplicates" without providing any indication that records had been removed nor any indication of where the original of the duplicate could be found in the response package. Such a practice is neither open, nor accurate, nor complete as required under s. 7(1)(a) of *FOIPOP*.

[81] I recommend that the Department redo the response package to the applicant as follows:

a) Number all of the pages.
b) On the 27 occasions where it has removed duplicates, insert a page indicating that a document has been removed as a duplicate, the number of pages removed and the page numbers of the original matching the removed pages.[66]
c) On pages where portions of text have been removed as "duplicate", re-release these pages so that the full text is either released or severed in a manner consistent with the various other versions of the email disclosed on other pages.

[66] I will provide the Department with a list of all missing attachments that appear to have been removed as duplicates.

FINDINGS & RECOMMENDATIONS:

[82] I find that:

1. Section 14 applies to options, recommendations, suggested courses of action, advice, draft advice and recommendations, substantive editorial comments on draft document, communications strategies, key messages and communications plans withheld on:
    - Pages 10, 14, 15, 16-17 (originally withheld as duplicate), 18, 23, 24, 26, 28, 32, 34, 35, 37, 78, 73, 75, 76, 77, 79, 80, 81, 83, 84, 85, 86, 87, 88, 90, 91, 97, 98, 110, 112-113 (originally withheld as duplicate), 122 and 127.
2. Section 14 does not apply to any other withheld information.
3. Section 17 (1)(e) applies to the information withheld on page 1.
4. Section 17(1)(e) does not apply to the following information:
    - Cost estimate information on pages 2, 3, 5, 6, 30, 34, 35, 78, 79, 85 and 86.
    - Contextual information on p. 75, titles on p. 76 and one paragraph on p. 77.
    - Pages 89, 90, 91.
5. Section 21 does not apply to any information withheld under s. 21.
    - Pages 21, 22, 96, 103, 107, 117-120, 122 and 127.
6. The Department cannot rely on "non-responsive" as a basis for removing portions of a responsive record.
    - Page 108.
7. The Department failed to satisfy its duty to assist the applicant when it removed portions of records as "duplicates" without providing any indication that records had been removed nor any indication of where the original of the duplicate could be found in the response package. Such a practice is neither open, nor accurate, nor complete as required under s. 7(1)(a) of *FOIPOP*.
    - Pages 16, 17, 93, 94, 108, 112 and 113.

[83] I will provide the Department with recommended severing of the documents as described below. These recommendations are, of course, subject to the further exercise of discretion recommended below.

[84] I recommend that the Department:

1. Disclose all information that does not qualify as advice or recommendations within the meaning of s. 14(1).
2. Disclose all information that constitutes background information within the meaning of s. 14(2).
3. Disclose all information to which s. 17(1)(e) does not apply.
4. Disclose all information to which only s. 21 was applied.
5. Reconsider the application of s. 14 and s. 17 to the records in light of the requirement to apply discretion and in light in particular of the factors highlighted in paragraph 48.
6. Disclose all information withheld as "non-responsive".
7. Redo the response package to the applicant as follows:
    a) Number all of the pages.

b) On the 27 occasions where it has removed duplicates, insert a page indicating that a document had been removed as a duplicate, the number of pages removed and the page numbers of the original matching the removed pages.[67]
c) On pages where portions of text have been removed as "duplicate", re-release these pages so that the full text is either released or severed in a manner consistent with the various other versions disclosed elsewhere in the package.

May 1, 2018

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

OIPC File FI-14-119

[67] I will provide the Department with a list of all missing attachments that appear to have been removed as duplicates along with our best guess as to what they are duplicates of.