



**Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Tricia Ralph**

REVIEW REPORT 24-08

March 26, 2024
(Amended April 2, 2024)¹

Build Nova Scotia

Summary: One of the most fundamental aspects of accountability and transparency is the right for the public to know what public bodies are spending public money on, and what they are receiving in return for that money. In this case, an applicant asked Build Nova Scotia (public body) for a land lease agreement between it and a private organization. The public body relied on s. 17(1)(d) (financial or economic interests) of the *Freedom of Information and Protection of Privacy Act (FOIPOP)* to withhold portions of the requested records. The Commissioner finds that the public body did not meet its burden of establishing that s. 17(1)(d) applies.

In addition, a third party objected to the release of the land lease agreement, claiming it should be withheld in full under s. 21(1) (confidential business information) of *FOIPOP*. The Commissioner finds that most of the information in the land lease agreement does not contain information that qualifies as commercial or financial information (s. 21(1)(a)(ii)). For those few portions that do qualify as financial or commercial information, once they were incorporated into the land lease agreement, those portions became information that is no longer information “of a third party” and so cannot be withheld as confidential. The Commissioner recommends that the public body release the land lease agreement in full to the applicant.

INTRODUCTION:

[1] The applicant asked for a land lease agreement made between the Waterfront Development Corporation Limited (public body)² and a private organization (third party). The public body intended to release the land lease agreement with some severing of it under s. 17 (financial or economic interests) of the *Freedom of Information and Protection of Privacy Act (FOIPOP)*. It sent a notice pursuant to s. 22 to a third party, indicating it planned to release the land lease agreement with some redactions under s. 17, but giving the third party the opportunity to provide

¹ This report has been amended to correct a timing error in the Commissioner’s recommendation under para. 37. The recommendation has been corrected to recommend that the public body disclose the records in full within 65 days.

² At the time the access to information request was made, the public body was named Waterfront Development Corporation Limited. In July 2018, it was renamed Develop Nova Scotia. In 2021, it was again renamed Build Nova Scotia.

submissions on whether it had any concerns that the land lease agreement should be severed under s. 20 (personal information) or s. 21 (confidential business information). In response, the third party's position was that the entire land lease agreement must be withheld under s. 21(1) of *FOIPOP*. Section 21(1) requires a public body to withhold confidential business information of a third party.

[2] The public body did not agree that the land lease agreement met the criteria required to withhold it under s. 21(1) so advised the third party that it intended to release the land lease agreement with some information withheld under s. 17. The third party then filed a request for review with the Office of the Information and Privacy Commissioner (OIPC), arguing that the land lease agreement should be withheld pursuant to s. 21(1).

[3] This matter was not resolved by informal resolution attempts and so proceeded to this public review report.

ISSUES:

[4] There are two issues under review:

1. Was the public body authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure could reasonably be expected to harm the financial or economic interests of a public body?
2. Was the public body required to refuse access to information under s. 21(1) of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

DISCUSSION:

Burden of proof

[5] The public body bears the burden of proving that the applicant has no right of access to a record or part of a record with respect to s. 17.³

[6] With respect to s. 21, as the third party filed the request for review, it is the third party who bears the burden of proving that the applicant has no right of access to the record or part of the record.⁴

1. Was the public body authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure could reasonably be expected to harm the financial or economic interests of a public body?

[7] The public body relied on s. 17(1)(d) to withhold information on the responsive records. For the reasons set out below, I find that the public body did not meet its burden of establishing that s. 17(1)(d) applies to the withheld information.

³ *FOIPOP*, s. 45(1).

⁴ *FOIPOP*, s. 45(3)(b).

[8] Section 17(1)(d) states:

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia or the ability of the Government to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:

...

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

[9] In order to rely on s. 17(1), the public body must establish that the disclosure of the withheld information could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia. Section 17 provides that such harm may arise from the non-exhaustive list of enumerated circumstances set out in ss. 17(1)(a) to (e).

[10] Numerous cases from the OIPC⁵ and from other jurisdictions discussing the equivalent statutory provisions⁶ have explained that subsections 17(1)(a) to (e) are not to be interpreted as stand-alone provisions. What this means is that even if the requested information fits within one or more of those subsections, that alone is not enough to justify withholding the requested information. The public body must also demonstrate the harm described in the opening words of s. 17(1), which is that release of the information could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia or the ability of the Government to manage the economy.

[11] The public body's representations state:

The information that was severed pursuant to Section 17(1)(d) is directly related to the negotiated financial terms, which if released would result in harm (losses) to a third party (...) for negotiating future land leases for other properties and as such the Department believes it was severed correctly at the time the decision was made.

[12] The public body's only submission was that release of the land lease agreement would harm a third party. The public body did not assert that release of the land lease agreement could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia or the ability of the Government to manage the economy. It also provided no arguments or evidence in this regard. This is a central element of the test that must be met.

⁵ See for example, *NS Review Report 18-11, Department of Transportation and Infrastructure Renewal (Re)*, [2018 NSOIPC 11 \(CanLII\)](#), at paras. 33 and 50.

⁶ See for example, *Burnaby (City) (Re)*, [2022 BCIPC 50 \(CanLII\)](#), at para. 10.

[13] As such, I find that the public body has not met the threshold for exemption under s. 17(1)(d).

2. Was the public body required to refuse access to information under s. 21(1) of FOIPOP because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

[14] The third party sought to have the land lease agreement withheld in full under s. 21(1) of FOIPOP. For the reasons provided below, I find that much of the responsive records do not contain any information that would qualify as the type of information that can be withheld under s. 21(1). I find that some information on the responsive records would qualify as commercial or financial information. However, that information is not “of a third party” once it was incorporated into the final land lease agreement with the public body, and as such s. 21(1) does not apply.

[15] Once it received the applicant’s request for access to the land lease agreement it had made with the private organization, the public body proposed withholding some information from the land lease agreement under s. 17. It reached out to the third party and sought its position on whether the land lease agreement should also be severed or withheld under s. 20 or s. 21 of FOIPOP. The third party’s position was that the entire land lease agreement should be withheld under s. 21(1) of FOIPOP.

[16] The public body did not agree that the land lease agreement met the criteria required to withhold it under s. 21(1). The public body then notified the third party that it intended to release the land lease agreement to the applicant with only some severing under s. 17, despite the third party’s concerns. The third party then filed a request for review with the OIPC, arguing that the entire land lease agreement could not be disclosed pursuant to s. 21(1).

[17] Section 21(1) states:

- 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,
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
 - (iii) result in undue financial loss or gain to any person or organization, or
 - (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour-relations dispute.

[18] The test for the application of s. 21 of *FOIPOP* is clearly set out in the provision. The burden is on the third party to establish that:

1. Disclosure of the requested information would reveal trade secrets, or commercial, financial, labour relations, scientific or technical information of a third party;
2. The requested information was supplied implicitly or explicitly in confidence; and
3. Disclosure of the requested information could reasonably be expected to cause one or more of the harms enumerated in s. 21(1)(c).⁷

[19] As set out in *Atlantic Highways Corporation v. Nova Scotia*,⁸ s. 21(1) must be read conjunctively. This means the party seeking to apply it to restrict access to information must satisfy all of the lettered subsections of s. 21(1) in order to establish that the information must be withheld.

Does the withheld information reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party (s. 21(1)(a))?

[20] Section 21(1)(a) of *FOIPOP* requires that two things be true: (1) the information would reveal trade secrets, or commercial, financial, labour relations, scientific or technical information; and (2) the information be “of a third party”.

[21] The third party argued that the entire land lease agreement had to be withheld because it includes not only explicit or inferred financial data, but also non-financial aspects such as rental pricing structures and services, and obligations being shared and exchanged by the parties to the land lease agreement – all of which it said provides its commercial and financial information.

[22] The third party argued that the land lease agreement should be withheld in full so I must remind it of the public body’s duty to sever. *FOIPOP* establishes that applicants have a right to any record in the custody or under the control of a public body, subject only to limited and specific exemptions in the law. It is essential to an effective, meaningful and robust access law that public bodies and third parties fully appreciate the requirement to selectively sever records. The law does not create whole document carve-outs. Rather, the law makes clear that public bodies are only permitted to withhold information exempted from disclosure; everything else must be disclosed.⁹ The public body rightly disagreed with the third party that the land lease agreement should be withheld in full under s. 21. Even a quick glance at the responsive records makes it clear that the land lease agreement cannot be withheld in full. The public body understood this well-established area of law. The third party did not and requested that the land lease agreement be withheld in full.

⁷ *NS Review Report 19-06, Nova Scotia (Energy and Mines) (Re)*, [2019 NSOIPC 7 \(CanLII\)](#), at para. 80.

⁸ *Atlantic Highways Corp. v. Nova Scotia*, [1997 CanLII 11497 \(NS SC\)](#), at p. 7. See also *NS Review Report 17-08, Department of Health and Wellness*, [2017 NSOIPC 8 \(CanLII\)](#), at para. 39.

⁹ *NS Review Report 17-03, Nova Scotia (Fisheries and Aquaculture) (Re)*, [2017 NSOIPC 3 \(CanLII\)](#), at para. 10.

Commercial and financial information

[23] The third party argued that the land lease agreement includes both commercial and financial information of the third party.

[24] The terms “commercial” and “financial” are not defined in *FOIPOP*. Previous OIPC review reports and Nova Scotia court cases have generally accepted that dictionary meanings provide the best guidance in these circumstances, and that it is sufficient for the purposes of the exemption that information relate or pertain to matters of finance, commerce, scientific or technical matters, as those terms are commonly understood.¹⁰

[25] The Concise Oxford English Dictionary defines “finance” as including “the monetary resources and affairs of a state, organization or person.”¹¹ “Commerce” is defined in the Concise Oxford English Dictionary as, “the activity of buying and selling, especially on a large scale.”¹²

[26] Several previous OIPC review reports have established that commercial information includes information about the exchange of services and could include pricing structure.¹³

[27] I agree with the third party that the land lease agreement contains some commercial and financial information. As the third party explained, it contains things like rental amounts, pricing structures, and services and obligations being shared and exchanged by the parties to the land lease agreement. However, the majority of the land lease agreement does not include this type of information and so cannot be withheld under s. 21(1). The analysis below speaks only the small portion of information on the responsive records that I agree is commercial or financial information.

Of a third party

[28] The next step of the analysis is to determine whether disclosure of this information would reveal information “of a third party”.

[29] The third party did not provide arguments to establish that the land lease agreement is “of a third party”. Because s. 21 is a mandatory exemption, I must analyze this element of the exemption to ensure information that must be withheld is not released.

[30] The leading Nova Scotia decision on this topic is *Atlantic Highways*, where the Supreme Court of Nova Scotia held that information in an omnibus agreement to construct a toll highway was not commercial or financial information of a third party because the information had either already been exposed to publication or was so intertwined with the Provincial input by way of the requirements of the request for proposal or modified by the negotiation process that it clouded the third party’s claim to a proprietary interest in the information.¹⁴

¹⁰ *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD) at p. 268 cited with approval in *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012 SCC 3 \(CanLII\)](#), [\[2012\] 1 SCR 23](#), at para. 139; *NS Review Report 17-06, Nova Scotia (County of Kings)*, [2017 NSOIPC 6 \(CanLII\)](#), at para. 17.

¹¹ Concise Oxford English Dictionary, 12th ed (Toronto: Oxford University Press) at p. 532.

¹² Concise Oxford English Dictionary, 12th ed (Toronto: Oxford University Press), at p. 287.

¹³ *NS Review Report 17-06, Municipality of the County of Kings (Re)*, [2017 NSOIPC 06 \(CanLII\)](#), at paras. 16-23; *NS Review Report 17-08, Department of Health and Wellness*, [2017 NSOIPC 8 \(CanLII\)](#) at para. 19.

¹⁴ *Atlantic Highways Corp. v. Nova Scotia*, [1997 CanLII 11497 \(NS SC\)](#) at pp. 8-9.

[31] The words “of a third party” imply that the third party must have some kind of proprietary interest in the information.¹⁵

[32] It is long-established case law in Nova Scotia that where information is part of a negotiated agreement, such as a contract, s. 21 will generally not apply.¹⁶ More specifically, pricing information incorporated into a contract is not “of a third party” (as required under s. 21(1)(a) of *FOIPOP*) and is not “supplied” (as required under s. 21(1)(b) of *FOIPOP*).¹⁷ Any commercial and financial information in the land lease agreement arose from negotiation with the public body. Thus, once the financial and commercial terms were incorporated into the land lease agreement, this clouded the third party’s claim to a proprietary interest in them. As such, it does not qualify as information “of a third party.” It is clear from the contents of the records and from the well-established case law that the information is not “of a third party”.

[33] Public expenditures are a key type of government information to which access laws are intended to provide access. Like former Commissioner Tully,¹⁸ I agree with my colleagues in Newfoundland and Labrador and in Prince Edward Island that nothing is more central to the goals of accountability and transparency than the right to information about what public bodies and municipalities are spending public money on, and what they are receiving in return.¹⁹

[34] As such, I find that once the commercial and financial information was incorporated into the final land lease agreement, it became information that was not “of a third party”.

[35] Since the three parts of s. 21(1) must all be satisfied (read conjunctively), I conclude that s. 21 does not apply to the information contained in the land lease agreement. Since the first part of the test is not met, it is not necessary for me to consider the remaining requirements of s. 21.

FINDINGS & RECOMMENDATION:

[36] I find:

1. Section 17 does not apply to the withheld information.
2. Section 21 does not apply to the withheld information.

¹⁵ *Beverage Industry Association of Newfoundland and Labrador v. Newfoundland and Labrador (Minister of Finance)*, [2019 NLSC 222 \(CanLII\)](#) at para. 55.

¹⁶ *NS Review Report 19-06, Nova Scotia (Energy and Mines) (Re)*, [2019 NSOIPC 7 \(CanLII\)](#), at para. 82.

¹⁷ *NL Report A-2016-001, Office of the Chief Information Officer (Re)*, [2016 CanLII 9490 \(NL IPC\)](#), at para. 11; *PEI Order No. FI-17-002, Prince Edward Island (Finance) (Re)*, [2017 CanLII 19215 \(PE IPC\)](#), at para. 15; *BC Order F17-14, British Columbia (Provincial Health Services Authority) (Re)*, [2017 BCIPC 15 \(CanLII\)](#), at para. 18; *NS Review Report 17-06, Nova Scotia (County of Kings)*, [2017 NSOIPC 6 \(CanLII\)](#), at para. 26.

¹⁸ *NS Review Report 17-06, Nova Scotia (County of Kings)*, [2017 NSOIPC 6 \(CanLII\)](#), at para. 27.

¹⁹ This point was made by former PEI Commissioner Rose in *PEI Order No. FI-17-002, Prince Edward Island (Finance) (Re)*, [2017 CanLII 19215 \(PE IPC\)](#), at para. 15 and former NFLD Commissioner Molloy in *NL Report A-2017-014, Memorial University of Newfoundland (Re)*, [2017 CanLII 37267 \(NL IPC\)](#), at para. 16.

[37] I recommend that within 65 days of the date of this review report, the public body disclose the land lease agreement to the applicant in full.²⁰

April 2, 2024

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File: 18-00297

²⁰ Pursuant to s. 40 of *FOIPOP*, the public body has 30 days from the date of receipt of this amended review report to issue its decision in response to the Commissioner's recommendation to the applicant and third party.