



Office of the Information and Privacy Commissioner for Nova Scotia  
Report of the Commissioner  
Catherine Tully

**REVIEW REPORT 19-06**

**August 14, 2019**

**Department of Energy and Mines**

**Summary:** The applicant has been waiting almost five years for an open, accurate and complete response to his access to information request. The responses he received thus far have convinced the applicant that the Department of Energy and Mines is actively hiding information and is using the access to information process not to promote transparency but rather to thwart his right to know. The Commissioner finds that the Department's responses so far have included excessive fees, numerous unauthorized time delays, over-severing unsupported by any evidence and a failure to process clearly responsive documents. The Commissioner recommends that the Department reprocess the entire access to information request with few if any allowable exemptions. The Commissioner further recommends that the Department refund the applicant's fee.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, [SNS 1993, c 5](#), ss. 5, 6, 7, 9, 11, 13, 14, 17, 20, 21, 22, 23, 39, 45; *Freedom of Information and Protection of Privacy Regulations*, [NS Reg 105/94](#), s. 6; *Freedom of Information and Protection of Privacy Act*, [RSBC 1996, c 165](#), s. 58.

**Authorities Considered:** **British Columbia:** Audit & Compliance Report F18-02 [2018 BCIPC 52](#); **Newfoundland and Labrador:** Review Report A-2011-010 [2011 CanLII 47545 \(NL IPC\)](#); **Nova Scotia:** Review Reports FI-12-01 [2015 CanLII 54096 \(NS FOIPOP\)](#); 16-05 [2016 NSOIPC 5 \(CanLII\)](#); 16-10 [2016 NSOIPC 10 \(CanLII\)](#); 19-05 [2019 NSOIPC 6 \(CanLII\)](#).

**Cases Considered:** *A.B. v. Griffiths*, [2009 NSCA 48 \(CanLII\)](#); *Atlantic Highways Corporation v. Nova Scotia*, [1997 CanLII 11497 \(NS SC\)](#); *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [\[2011\] 2 SCR 306, 2011 SCC 25 \(CanLII\)](#); *House (Re)*, [2000 CanLII 20401 \(NS SC\)](#).

**Other Sources Considered:** Nova Scotia Department of Energy and Mines: Oil and Gas, Offshore, "Play Fairway Analysis Atlas: The Analysis", <https://energy.novascotia.ca/oil-and-gas/offshore/play-fairway-analysis/analysis>; OETR Association, "OETR Association Play Fairway Program: Using geoscience to revitalise interest in exploring Nova Scotia's Offshore." GSEG Recorder, Vol. 34 No. 7, September 2009, <https://csegrecorder.com/articles/view/oetr-association-play-fairway-program>; OIPC Guidelines for Public Bodies and Municipalities, "Duty to Assist #1: Communication with Applicants" (January 25, 2019)

<https://oipc.novascotia.ca/sites/default/files/publications/18-00070%20Duty%20to%20Assist%201%20-%20Comm%20w%20App%20Guidelines%20Final%20%2823%20Jan%2019%29.pdf>; OIPC Guidelines for Public Bodies and Municipalities, “Duty to Assist #2: Conducting an Adequate Search” (February 25, 2019) <https://oipc.novascotia.ca/sites/default/files/publications/18-00070%20Search%20Guidelines%20%282019%2002%2025%29.pdf>; OIPC Guidelines for Public Bodies and Municipalities, Duty to Assist #3: Third Party Notice (March 25, 2019) <https://oipc.novascotia.ca/sites/default/files/publications/18-00192%20Duty%20to%20Assist%20-%20Third%20Party%20Notice%20Guide%20%282019%20March%29.pdf>; OIPC Guidelines for Public Bodies and Municipalities, “Duty to Assist #4: How to Calculate Fees” (July 25, 2019) <https://oipc.novascotia.ca/sites/default/files/publications/19-00109%20Fees%20Guidelines%20%282019%20July%2025%29.pdf>.

## **INTRODUCTION:**

[1] The applicant sought access to all records relating to RPS Canada and RPS Group PLC. In processing the applicant’s request, the Department of Energy and Mines (Department) took a number of steps that convinced the applicant that the Department was actively hiding information and using the access to information process to thwart the applicant’s right to know.

[2] In a series of responses over the course of almost five years, the Department released two batches of records. The first batch was released three times with an increasing amount of information disclosed with each iteration. On reviewing the records supplied, the applicant became convinced that the Department was selecting meaningless documents (in the first batch) and relying on a high fee estimate, time delays and excessive severing in an effort to undermine his right of access to documents of substance in the second batch.

[3] The applicant’s appeal raised numerous issues relating to the duty to assist, adequacy of search, timeliness, fairness of fees and applicability of exemptions. While a few matters were resolved informally, the majority of issues remain unresolved and are set out below.

## **ISSUES:**

[4] There are 11 issues in this review:

### **Duty to assist and timeliness**

- i. Were the Department’s decision letters open, accurate and complete as required by s. 7(1)(a) of the *Freedom of Information and Protection of Privacy Act (FOIPOP)*?
- ii. Did the Department meet its duty to assist the applicant by conducting an adequate search for records as required by s. 7(1)(a) of *FOIPOP*?
- iii. Did the Department comply with the statutory timelines to respond to an access to information request as required by s. 7(2) of *FOIPOP* when it placed the application on hold?
- iv. Were the time extensions taken by the Department authorized under s. 9 of *FOIPOP*?

## **Fees**

- v. Were the fees charged for the first release calculated accurately and in compliance with the requirements of s. 11 of *FOIPOP*?

## **Exemptions**

- vi. Is the Department authorized to refuse access to information under s. 13 of *FOIPOP* because disclosure of the information would reveal the substance of deliberations of the Executive Council or any of its committees?
- vii. Is the Department authorized to refuse access to information under s. 14 of *FOIPOP* because disclosure of the information would reveal advice or recommendations?
- viii. Is the Department authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure of the information could reasonably be expected to harm the economic interests of the public body?
- ix. Is the Department required to refuse access to information under s. 20 of *FOIPOP* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?
- x. 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?
- xi. Is the Department authorized to refuse access to information it deems "not responsive" within otherwise responsive records?

## **DISCUSSION:**

### **Background**

[5] The applicant has a particular interest in Nova Scotia's efforts to market offshore oil and gas. RPS Canada (RPS) was a company hired to assist with a project intended to identify regions around offshore Nova Scotia with potential hydrocarbon resources. The analysis and mapping of these regions was known as the Play Fairway Analysis. This was a \$15 million project funded by taxpayer dollars.<sup>1</sup>

[6] The applicant received four responses to his access to information request<sup>2</sup> in two batches. Batch #1 consisted of slightly more than 2500 pages. Batch #2 consisted of about 3700 pages for a total of 6200 responsive pages. In addition, our investigation has identified 127 missing records – the number of pages is unknown.

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<sup>1</sup> Nova Scotia Department of Energy and Mines: Oil and Gas, Offshore, "Play Fairway Analysis Atlas: The Analysis" (online: <https://energy.novascotia.ca/oil-and-gas/offshore/play-fairway-analysis/analysis>); OETR Association, "OETR Association Play Fairway Program: Using geoscience to revitalise interest in exploring Nova Scotia's Offshore." GSEG Recorder, Vol. 34 No. 7, September 2009 (online: <https://csegrecorder.com/articles/view/oetr-association-play-fairway-program>).

<sup>2</sup> During the informal resolution process, the applicant made a second access to information request related to the batch #1 records in order to gain access to records to which ss. 14 and 17 no longer applied because of the passage of time. Although the Department removed some severing in an effort to resolve some issues informally, it declined to revisit severing on the basis of passage of time and so the applicant was required to file a new request for the same records. This decision required the Department to reprocess the batch #1 records twice.

[7] The request was processed by a number of different individuals over a five year period. In addition, it appears that the large volume of records clearly created significant challenges for the Department in terms of consistency and timeliness.

### **Burden of proof**

[8] Usually it is the Department who bears the burden of proving that the applicant has no right of access to a record. However, where the information being withheld is the personal information of people other than the applicant (s. 20), the applicant bears the burden of proof.<sup>3</sup> Where the Department relies on s. 21, it bears the burden of proof except where the third party files the request for review.<sup>4</sup> Generally, the third party must produce evidence of harm for s. 21 to apply because public bodies are simply not in a position to satisfy their burden of proof regarding s. 21 without evidence from the third party.

### **Duty to assist and timeliness**

[9] The first four issues relate to the Department's duty to assist set out in s. 7 of *FOIPOP* and its timeliness in responding to the access to information request:

- i. Were the Department's decision letters open, accurate and complete as required by s. 7(1)(a) of *FOIPOP*?
- ii. Did the Department meet its duty to assist the applicant by conducting an adequate search for records as required by s. 7(1)(a) of *FOIPOP*?
- iii. Did the Department comply with the statutory timelines to respond to an access request as required by section 7(2) of *FOIPOP* when it placed the application on hold?
- iv. Were the time extensions taken by the Department authorized under s. 9 of *FOIPOP*?

[10] Section 7 provides that public bodies must "make every reasonable effort to assist the applicant and to respond without delay, openly, accurately and completely". This provision goes to the heart of the purposes of access to information law.

[11] Time is of the essence in responding to an access to information request and two further provisions set out rules specific to response times. Section 7(2) specifies that the public body must respond within 30 days of receipt of the request and s. 9 provides limited circumstances under which this time may be extended.

[12] In meeting the duty to assist, the law requires that the Department make "every reasonable effort". The duty to assist exists to ensure that public bodies make a timely, positive, thorough and fulsome effort to respond to applicants in a manner that results in accountability and transparency. Is that an accurate description of the Department's efforts here? The applicant asserts that the effort was a reluctant, desultory, minimal one that lead to increasing frustration on the part of applicant and a belief that the Department was intentionally hiding information.

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<sup>3</sup> *FOIPOP* s. 45.

<sup>4</sup> Under s. 45(3)(b) of *FOIPOP*, the third party bears the burden of proof at a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party. In this case, the Department determined that it would deny access to the record it says contains information that relates to a third party. Therefore, the burden is on the Department to establish that s. 21 was properly applied.

[13] There are four elements included in the duty to assist.

1. **Without delay:** Section 7 emphasizes that the timeline for response is “without delay” meaning that while the maximum permitted time is 30 days, in fact, public bodies must respond as soon as possible to a maximum of 30 days or longer with permitted extensions. In order to meet this requirement, public bodies must make every reasonable effort. This includes ensuring that there is adequate staff to fulfill this statutory obligation.<sup>5</sup> Any time a public body takes a time extension or places a file on hold it must be in compliance with *FOIPOP*.

2. **Open:** There are numerous elements to openness including:

- Interpreting the access to information request in a fair, reasonable, open and flexible manner.<sup>6</sup> Public bodies should avoid narrow interpretations and resolve any ambiguity in favour of the applicant.
- Communicating with the applicant to explain the steps in the process and to obtain necessary clarifications as to the nature and scope of the request.<sup>7</sup>
- Conducting a reasonable search to find all records responsive to the request.<sup>8</sup> If responsive records are not found, openness requires that public bodies provide an explanation to the applicant for why no records were found.<sup>9</sup>
- Applying the principle that all information in the custody or control of the public body must be released unless a specific and limited exemption applies.<sup>10</sup> Openness requires that only information subject to an authorized exemption must be severed so that the applicant receives as much information as possible.
- Any responses to the applicant must be open. In other words, the responsive records must be clearly marked to indicate where and why information has been withheld.
- Response packages, especially large packages, must have page numbers so that if the applicant has questions he or she can easily communicate with the public body about the pages of concern. This promotes open and clear communication.
- Explanations in response letters, fee letters and time extension notifications must all be clear and must provide comprehensible, thorough explanations for the decision the public body is making. Such responses promote transparency and support a meaningful right to access government information. Section 7(2) of *FOIPOP* provides further detail on information that must be provided to the applicant in response to an access to information request.

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<sup>5</sup> The Assistant Commissioner in Newfoundland made a similar finding in NL Review Report A-2011-010 [2011 CanLII 47545 \(NL IPC\)](#) at para 34.

<sup>6</sup> See NS Review Report 16-05 [2016 NSOIPC 5 \(CanLII\)](#) at para 40 for a list of best practices when interpreting access to information requests and for deciding how to determine whether further particulars are required.

<sup>7</sup> See OIPC Guidelines for Public Bodies and Municipalities, “Duty to Assist #1: Communication with Applicants” (online: <https://oipc.novascotia.ca/sites/default/files/publications/18-00070%20Duty%20to%20Assist%201%20-%20Comm%20w%20App%20Guidelines%20Final%20%2823%20Jan%2019%29.pdf>).

<sup>8</sup> See OIPC Guidelines for Public Bodies and Municipalities, “Duty to Assist #2: Conducting an Adequate Search” (online: <https://oipc.novascotia.ca/sites/default/files/publications/18-00070%20Search%20Guidelines%20%282019%2002%2025%29.pdf>).

<sup>9</sup> See also Audit & Compliance Report F18-02 City of White Rock, Duty to Assist 2018 BCIPC 52 (CanLII) at para 2.3.2 (online: <https://www.oipc.bc.ca/audit-and-compliance-reports/2260>).

<sup>10</sup> Consistent with s. 5(2) of *FOIPOP* which permits public bodies to withhold information “exempted from disclosure pursuant to this Act.”

3. **Accurate:** An accurate response requires that a public body:

- Completes a line-by-line review of all responsive records and only applies exemptions where the evidence available supports the application of the exemption.
- Discloses the full scope of the responsive records even if some of the records are withheld in full. It should be clear to the applicant how many responsive records there are, how many (if any) have been withheld, and for what reason.<sup>11</sup>
- Ensures that any explanations for decisions made are accurate. Explanations for delay, explanations for fee calculations, third party notices and explanations for why information has been withheld must all be accurate and must all comply with the law.

4. **Complete:** A complete response includes the following:

- All responsive records are accounted for. If, for example, the public body finds 700 responsive pages but withholds 250 pages under s. 17, the applicant should be able to tell from the package received that there are in total 700 responsive pages but that 250 have been wholly withheld under s. 17.
- The response package is organized in a way that the applicant can tell where information has been withheld. So, for example, if an email includes a 15 page PowerPoint presentation attachment that is withheld, the applicant's package should include a page immediately following the email that indicates that the 15 page attachment to the preceding email has been withheld and the statutory provision under which this decision was made.
- If the records include emails, a complete response would include all attachments to each email.
- All explanations given to the applicant must also be complete. So, for example, all reasons for withholding information under the law must be noted, all fee calculations must be complete and all explanations for delay must be complete.
- The applicant receives all notices to which he or she is entitled under the law. So, for example, if third party notices have been given, the law requires that public bodies provide the applicant with initial notice of the decision to consult with third parties and a second notice of the decision of the public body with respect to third party information.<sup>12</sup>

[14] The communications between the applicant and the Department revealed from the outset that the relationship between the two was strained. The applicant clearly had no trust in the Department. His access to information request included a request for fee waiver because he said his request was an “investigation of crimes” presumably committed by the Department. The Department accused the applicant of having an “insulting and abusive tone”. This was a difficult start to a challenging request.

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<sup>11</sup> This obligation is supported by s. 7(2)(a)(ii) which requires that public bodies provide a written explanation to applicants where access to a record or part of a record is refused by a public body and that such explanation include the reasons for the refusal and the provision of *FOIPOP* on which the refusal is based.

<sup>12</sup> Sections 22 and 23 of *FOIPOP* set out the process for giving third party notices. See also OIPC Guidelines for Public Bodies and Municipalities, “Duty to Assist #3: Third Party Notice” (online: <https://oipc.novascotia.ca/sites/default/files/publications/18-00192%20Duty%20to%20Assist%20-%20Third%20Party%20Notice%20Guide%20%282019%20March%29.pdf>).

**i. Were the Department's decision letters open, accurate and complete as required by s. 7(1)(a) of FOIPOP?**

[15] Decision letters to the applicant were the primary means by which the Department communicated with the applicant. The evidence provided by the Department itself reveals that the Department failed to communicate openly, accurately or completely as required by s. 7(1)(a) of FOIPOP. The list of failures is long and can be summarized as follows:

***General communication inadequacies***

[16] The Department failed to communicate openly, accurately and completely resulting in lengthy delays and in a failure to address issues raised by the applicant.

- Applicant was not provided with third party notification letters as required by s. 23.
- Response letters to the applicant are either missing mandatory notification of the right to appeal or public body contact information – both essential elements and required by s. 7(2) of FOIPOP.
- The Department claims that the information access and privacy (IAP) administrators who processed the request made frequent contact with the applicant. However, a careful review of the correspondence reveals that no meaningful attempt was made to narrow the request to reduce fees which the applicant clearly objected to. The result was a lengthy delay in the processing of batch #2 which only occurred with the intervention of Office of the Information and Privacy Commissioner (OIPC) investigators.
- On January 5, 2015, the Department issued a large fee estimate to the applicant in relation to batch #2. That letter had no deadline and the Department closed the file without communicating with the applicant even though the applicant had filed a request for review in relation to the fee on March 13, 2015 prior to the file being closed by the Department.
- On two occasions, the Department advised the applicant that the time for processing had been extended to a date that depended on the OIPC approving such a time extension. On both occasions the time extension was not approved by the OIPC, but the Department never told the applicant that the extension had been denied and further, acted as if, in fact, it had been approved.

***Full documents withheld without notice***

[17] Evidence gathered during the review process revealed that full documents were withheld without notice to the applicant.

- On March 30, 2015, the Department withheld numerous whole documents in batch #1. The applicant was provided with a one-sided, single page list of withheld documents in the original batch #1 response package. On July 2, 2019, more than four years later, the Department advised the OIPC that the list was actually two-sided and so the applicant had never received notice of a further 359 pages that had been wholly withheld (for a total of 934 withheld pages).

### ***No longer relevant***

[18] During the informal review process it came to light that the Department had withheld information as “no longer relevant” but had never advised the applicant of this decision.

- On July 4, 2019, more than four years after the appeal was filed with the OIPC, the Department provided the OIPC with a further 832 pages that had been included in the original fee paid by the applicant but removed from batch #1 for a variety of reasons. A total of, 785 pages were removed as “no longer relevant” or “reviewed”. The applicant never received notice of this decision nor had his fee been refunded for the removed pages.
- The pages removed as no longer relevant or “reviewed” consist of clearly relevant email exchanges on similar or identical topics as were already included in the original two batches of records, duplicates of documents disclosed to the applicant elsewhere, email exchanges with RPS or in relation to RPS. There are only a few records within this group that can reasonably be classified as not relevant to the request. The remainder, based on the Department’s approach, are clearly relevant.
- Included in the 832 pages are 58 pages withheld under an exemption. My comments on the application of the various exemptions set out below apply to these pages.

### ***Information withheld without claiming an exemption***

[19] Section 7(2)(a)(ii) of *FOIPOP* requires that when access to a record or part of a record is refused, the reasons for the refusal and the provision of the Act on which the refusal is based must be communicated to the applicant. The Department failed to do so as follows:

- The Department severed information on six pages of batch #2<sup>13</sup> without claiming an exemption.

[20] In summary then, the Department:

- failed to comply with mandatory notifications to the applicant;
- withheld hundreds of pages of records without notifying the applicant of the reason for removal and for many, the very existence of the records;
- removed responsive records from the original response without notice (and despite charging a fee for processing the records); and
- withheld some information for no apparent reason under the law.

[21] **Finding #1:** On that basis, I have no hesitation in finding that the Department’s decision letters and communications generally with the applicant were not open, accurate or complete as required by s. 7(1)(a) of *FOIPOP*.

### **ii. Did the Department meet its duty to assist the applicant by conducting an adequate search for records as required by s. 7(1)(a) of *FOIPOP*?**

[22] The responses provided by the Department are missing over one hundred responsive records, including 78 unprocessed email attachments. The evidence of this is the records themselves which show that the responsive emails had attachments. No exemption was applied to the attachments and despite repeated requests these attachments have never been produced to

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<sup>13</sup> Pages 2657, 2668, 2671, 2685, 2847 and 2849.



this office for review. The applicant was never advised of the number of pages of attachments simply missing from the response.

[23] In addition to the unprocessed e-mail attachments, the responses contain numerous e-mails, meeting minutes and meeting agendas that are records of discussions about files, documents, presentations and other records that appear to be responsive to the applicant's request. Although it appears that some of these records may have been withheld in full, it is not clear from the Department's response. Furthermore, it appears that the Department did not search for many of these records because the Department initially took a narrow interpretation of the applicant's request and therefore overlooked numerous types of records related to the project. OIPC investigators identified 127 documents missing from the responses. I will provide the Department with a complete list of the missing documents.

[24] Also, it was not until July 4, 2019, almost five years after the original access to information request, that the Department discovered that it had withheld an additional 832 pages, most as "no longer relevant". It is unclear when this decision was made. This may have been a failure to conduct an adequate search or it may have been a failure to respond openly, accurately and completely. In either case, it was not in compliance with the law.

[25] The Department initially did not produce the missing attachments. This is clear from its fee estimates which indicate that staff processing the request were aware the attachments existed and that they had not been produced.<sup>14</sup> Since March 2018, OIPC staff attempted repeatedly to get the Department to produce the attachments and other missing documents. The Department produced a small number (104 pages) of attachments as part of the batch #1 version #2 release on June 19, 2018. The Department has not produced any further missing records. As noted above, our review of the response package indicates that there are at least 127 documents missing from the record.

[26] An adequate search requires that a public body make every reasonable effort to find responsive records. In this case, the Department knows there are missing records, knows where they are, has been repeatedly asked to produce those records and has failed to do so. The Department's responses to the applicant were incomplete with hundreds of pages missing. Additionally, the Department did not notify the applicant of the missing pages.

[27] **Finding #2:** I find that the Department failed to conduct an adequate search in violation of the duty to assist in s. 7(1)(a) of *FOIPOP*.

**iii. Did the Department comply with the statutory timelines to respond to an access to information request as required by section 7(2) of *FOIPOP* when it placed the application on hold?**

[28] The Department made significant time errors in the form of unauthorized "on-hold" time, unauthorized time extensions, unauthorized delays and late responses. In the end, the Department took 4.5 years to process this request.

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<sup>14</sup> The Department provided the OIPC with a summary of how the initial fee estimate was calculated on January 30, 2018. Included in the breakdown is an acknowledgement that "Attachments not processed, number of pages not yet identified".

[29] On October 16, 2014, the Department claims that it put the request on hold for clarification. There are only two statutory permissions for on-hold time – when the applicant fails to provide sufficient particulars to allow an individual familiar with the subject matter to identify the record or for payment of any fee. The letter dated October 16, 2014 was not a request for clarification. It was a request that the applicant narrow the scope of his request. The Department was clear in the letter that the problem it identified with the request was that it would “likely result in a substantial number of records”. Further, it is clear the Department required no clarification to identify responsive records because it got none yet it still processed the request.

[30] In response to the October 16, 2014 letter, the applicant provided a sarcastic dictionary definition of each of the original words of his original request. At the time, the individual tasked with processing the request acknowledged in an email to this office dated January 8, 2015, “We reactivated the application on October 31, 2014 when the applicant confirmed that he would not provide further clarification.”

[31] Interestingly, the Department asserts in its first submission to this office that the October 16, 2014 letter was a request for clarification. It characterized the applicant’s sarcastic response as a clarification. In its second submission to this office discussing fees, the Department asserts that the October 16, 2014 letter was an attempt “to focus the applicant’s request in order to assist the Applicant and avoid fees.” To use an aphorism, the Department cannot have its cake and eat it too. Either it believes the request was a clarification or it believes its request was an attempt to narrow the scope – it is not both. The evidence clearly supports that the Department did not want to have to process such a large request and so wanted the applicant to narrow his focus. There’s nothing wrong with that, but such an effort does not mean that the applicant provided insufficient particulars to allow the public body to identify responsive records and so no clarification was required and most importantly, the Department could not put the request on hold.

[32] **Finding #3:** I find that the on-hold time taken between October 16 and October 31, 2014 was not authorized under ss. 7(2) and 6(b) of *FOIPOP*. The response was therefore due on November 22, 2014.<sup>15</sup> As a result, the Department was out of time when it purported to extend the time to respond to the access to information request due to a large volume of records and to consult with third parties on November 24, 2014.

**iv. Were the time extensions taken by the Department authorized under s. 9 of *FOIPOP*?**

[33] The Department took a number of time extensions in relation to the two batches of records. In most cases, the Department cited s. 9 of *FOIPOP* as authority for the extensions. In one case, it simply restarted the clock for itself.

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<sup>15</sup> The Department says that the request dated September 26, 2014 was not received until October 7, 2014. The original due date was therefore November 6, 2014. The Department issued a fee on November 5, 2014 when it had one day left to process the request. This put the request on hold. The Department advised that it received the fee deposit dated November 18, 2014 on November 21, 2014. This reactivated the request and so the new due date was November 22, 2014. The Department then attempted to extend the time for processing the request on November 24, 2014 but time had, by then, already expired.

### ***Batch #1 records***

[34] On November 24, 2014, the Department attempted to take a 30 day time extension to consult with third parties about the batch #1 records. However, because the first on-hold time was not authorized, the request was due on November 22, 2014. So, time could not be extended on November 24, 2014. A further concern with this attempted time extension is that the third party consultations did not begin until February 10, 2015 – three months later, and was completed by March 5, 2015 when consent to disclosure was received by all third parties. Taking three months to conduct third party consultations is not compliant with the duty to act without delay.

[35] On January 5, 2015, the Department advised the applicant that the new date for batch #1 was March 9, 2015, based on an application to the OIPC for a time extension. That extension was not granted. Despite this, the Department never informed the applicant of the time extension denial and in fact, failed to meet its own due date as noted below.

### ***Batch #2 records***

[36] On January 5, 2015, the Department issued a second fee estimate, this one in relation to the batch #2 records consisting of about 3000 pages. The applicant did not pay the fee estimate but instead, filed a review with the OIPC. The Department simply closed his file on May 19, 2015 with no further communication on the topic until the OIPC began the review process in October 2017.

[37] As a result of the OIPC's intervention, the applicant narrowed his request on February 16, 2018. The Department issued a new fee estimate for the batch #2 records and the applicant paid a deposit on April 20, 2018. On April 26, 2018, the Department purported to open a "new request". It is unclear on what basis a new request could have been created since the narrowing was communicated on February 13, 2018 (not April 26, 2018) and was, in any event, part of the processing of the original October 7, 2014 request. *FOIPOP* provides that public bodies must respond "within thirty days after the application is received". April 26, 2018 was not the date the request was received. The request was received October 7, 2014 and was due November 22, 2014. The only other possible "received" date would have been February 13, 2018 – the date the narrowed request was communicated to the Department. There is no authority under *FOIPOP* for public bodies to randomly select a new "received" date in order to reset the 30 day clock.

[38] On May 17, 2018, the Department then gave itself a time extension on the new request date citing a large volume of records. On June 26, 2018, the Department requested a further time extension from the OIPC which the OIPC did not grant because the OIPC did not agree that the processing of the second batch of records constituted a new access request. At best the Department should have used February 13, 2018 as the start date since this was when the applicant redefined his request. Despite not being authorized to extend the time by the OIPC, the Department gave itself 90 additional days to process the request and communicated a new due date of September 24, 2018 to the applicant. As noted below, the Department did not meet its own timelines and did not provide a copy of the batch #2 records until five months after its own unauthorized due date.

[39] The Department advised the applicant on June 26, 2018 that it was seeking a further time extension in order to conduct third party consultations on the batch #2 records. The Department never conducted third party consultations on batch #2.

[40] The Department also effectively took additional time extensions in the form of unauthorized delays and late responses.

#### ***Unauthorized delays***

[41] By March 6, 2015, the Department had consent to disclose the records at issue in batch #1 from all third parties. Despite this, the Department notified the applicant that it intended to await the 20 day appeal period for third parties.<sup>16</sup> Pursuant to s. 23(4), the Department had no need to delay its response because it had third party consent.

#### ***Late responses***

[42] The Department was late in responding to the applicant's request even using the Department's self-selected dates.

- The first set of responsive records for batch #1 was not released until March 30, 2015, four months late. The actual due date was November 22, 2014.
- The applicant paid the fee deposit on batch #2 of the response on April 26, 2018. Even using the Department's calculation (which was inaccurate), batch# 2 was due to the applicant on June 25, 2018 (since the OIPC time extension was not granted). Batch # 2 was not released until February 13, 2019, one year after the request was narrowed, eight months late by the Department's calculations and 4 ½ years after the original request was made.

[43] **Finding #4:** I find that the time extensions taken by the Department on November 24, 2014, January 5, 2015, April 26, 2018, May 17, 2018 and June 26, 2018 were not authorized under s. 9 of *FOIPOP*. Further, I find that the time extensions the Department granted itself in the form of the new "received" date, unauthorized delays and late responses were also not authorized under *FOIPOP*.

#### **v. Were the fees charged for the first release calculated accurately and in compliance with the requirements of s. 11 of *FOIPOP*?**

[44] The fifth issue raised by the applicant is in relation to the fee charged originally on November 5, 2014. On that day, the Department issued a fee estimate of \$1270 in response to the applicant's access to information request. The applicant paid a fee deposit of \$635 on November 21, 2014. Prior to releasing the first batch of records the applicant paid an additional \$355 for a total of \$990. The applicant objects to this fee. The applicant also objects to the fees for the second batch, which the Department ultimately refunded during the informal resolution process of the review.

[45] *FOIPOP* provides fairly detailed guidance on how to calculate a fee. The first rule of fee calculation is that the chargeable fee is the lesser of the actual cost of processing the request and the fee estimate based on the guidelines in the Regulations.<sup>17</sup> This means that in order to

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<sup>16</sup> Section 23(3) of *FOIPOP*.

<sup>17</sup> *Freedom of Information and Protection of Privacy Regulations*, s. 6(2).

accurately calculate a fee, public bodies must keep track of the hours spent actually processing the request and of actual photocopying costs so that they can calculate an actual fee and compare it to the fee estimate they prepare before beginning the processing of a request.

[46] So for example, the Regulations, written 25 years ago, allow a public body to charge up to 20 cents per page for photocopying. Photocopying was significantly more expensive 25 years ago. The actual cost for photocopying a page today is more realistically in the range of 3 cents per page.<sup>18</sup> Public bodies are permitted to charge a maximum of \$30 per hour for a person to locate, retrieve and prepare a record. Thirty dollars per hour translates into about \$55,000 per year. So, depending on who did the work, the \$30 may be an accurate maximum charge or the actual cost may be lower.

[47] The Department did not keep track of the actual cost of processing the request. There is no record of the actual cost of copying or of the actual number of hours spent performing the tasks associated with processing the request. The final fee, according to the calculations provided by the Department, was clearly based only on the estimate. The Department provided no evidence that the estimate was less than the actual cost of processing the request.

[48] Another issue with the fees is that the Department's math doesn't add up. In its submissions, it insists that it processed in excess of 3000 pages, yet the applicant only had to pay \$990. However, in January 2018, the Department provided a detailed list of calculations for the fee. Included in that calculation was a list of the number of pages the Department said it actually processed broken down by staff member. The "processed" records included records that were partially disclosed to the applicant and records that were withheld. The total number of pages "processed" as provided by the Department was 1198. Using this number, for the sake of argument, the original fee should have been \$750 not \$990.<sup>19</sup>

[49] This of course does not solve the more significant problem that the Department never kept a record of the actual cost of processing. Was it more or less than \$750? The law is mandatory and states clearly, "fees payable for services under the Act shall be the actual costs to the public body" up to the maximum amounts set out in the Regulations.<sup>20</sup>

[50] This is, without question, a case where the Department has made so many errors and was so late in its response to this applicant that one obvious remedy is that the Department refund any fee paid. Nova Scotia's law is quite outdated and does not include a provision other laws have that provides that an appropriate remedy where the public body is late in responding to a request is to order the refunding of the fee.<sup>21</sup> However, our law does provide that I can make any

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<sup>18</sup> This is the cost the OIPC pays per page including the cost of paper, the per page copy cost and the copier leasing costs. See OIPC Guidelines for Public Bodies and Municipalities, "Duty to Assist #4: How to Calculate Fees". (online: <https://oipc.novascotia.ca/sites/default/files/publications/19-00109%20Fees%20Guidelines%20%282019%20July%2025%29.pdf>).

<sup>19</sup> Location and retrieval \$60, review and sever .75 X 1198 = 899 minutes, 899 minutes = 15 hours x \$30 per hour = \$450, photocopy 1198 x .2 = \$240, so the total = \$60 + \$450 + \$240 = \$750.

<sup>20</sup> *Freedom of Information and Protection of Privacy Regulations*, s. 6(2) and 6(3).

<sup>21</sup> See for example British Columbia's *Freedom of Information and Protection of Privacy Act*, s. 58(3)(c).

recommendations with respect to a matter under review that I consider appropriate.<sup>22</sup> I will do so below.

[51] **Finding #5:** I find that the Department's fee for batch #1 was not authorized because it was not calculated in compliance with s. 11 of *FOIPOP* and s. 6 of the Regulations.

***Exemptions to disclosure***

[52] The remaining six issues all deal with the various reasons given by the Department for withholding information from the record.

[53] As a preliminary comment, the Department's submissions characterize the Department's application of exemptions as "properly exercising discretion". This is an indication of the underlying problem with the Department's approach to applying *FOIPOP*. That is, the first step is not a discretionary one. The first step is to determine whether or not there is evidence to support that a limited and specific exemption under *FOIPOP* applies to any portion of the record. This is not a discretionary exercise. It is an exercise in applying the law to the record. It is only if the legal test is met that discretion factors into the equation and then, of course, only if the applicable exemption is a discretionary one.

[54] This is a significant point because if public bodies think that they are exercising discretion in applying the law, they are misapprehending the fundamental purpose of the law. As I noted in Review Report 19-05:

It is important to recall the basis for right to know legislation. Prior to the enactment of the *Freedom of Information and Protection of Privacy Act*, government officials decided what information would be disclosed and even if information would be disclosed. In other words, disclosure of information to citizens was entirely discretionary and often arbitrary. This was the problem access to information legislation was intended to remedy. Donald C. Rowat explained the problem this way: "Public officials are too used to the old system of discretionary secrecy under which they arbitrarily withheld information for their own convenience or for fear of disapproval by their superiors and will not change their ways unless they are required by law to do so."<sup>23</sup>

**vi. Is the Department authorized to refuse access to information under s. 13 of *FOIPOP* because disclosure of the information would reveal the substance of deliberations of the Executive Council or any of its committees?**

[55] The Department applied s. 13 to a small amount of information related to the Treasury Board on pages 260-263 of batch #1. The Treasury Board qualifies as one of the Executive Council's committees. Most of the withheld information can accurately be characterized as revealing advice submitted to the Treasury Board within the meaning of s. 13.

[56] **Finding #6:** I find that s. 13 was appropriately applied on pages 261-262 of batch #1. On page 263, the Department's application of s. 13 was overbroad.

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<sup>22</sup> *FOIPOP* s. 39(2).

<sup>23</sup> NS Review Report 19-05 [2019 NSOIPC 6 \(CanLII\)](#) at para 25.

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

[57] Under s. 14(1), a public body may withhold information if the information would reveal advice or recommendations developed by or for a public body or minister. Under s. 14(2), a public body cannot withhold background information under s. 14 and under s. 14(3), a public body cannot withhold information under s. 14(1) if the record has been in existence for five or more years.

[58] The applicant's access to information request was dated September 26, 2014.

[59] Four factual observations with respect to the application of s. 14 are:

- The Department applied s. 14 to anything that appeared to be a draft, usually by withholding the whole document as if s. 14 was synonymous with "draft" and as if the mandatory requirement that information be severed did not exist.
- The Department applied s. 14 to information that even on a cursory examination it could not apply to, such as the name of contractors.
- The Department's application of s. 14 was inconsistent. The Department released batch #1 three times and appeared not to have looked back to see what it had done before. Very frequently, information is both fully released and fully withheld under s. 14 on the same documents in different releases. Further, there are duplicates of batch #1 records in batch #2. Sometimes s. 14 is applied in batch #1 but not batch #2 and sometimes vice versa. The end result is that much of the information withheld under s. 14 is released somewhere in the thousands of pages of records.
- All of the information withheld under s. 14 is now more than five years old.

[60] **Finding #7:** I find that s. 14(3) now applies to all of the information withheld under s. 14(1) and so s. 14 cannot apply to the records at issue.

[61] Public bodies in Nova Scotia frequently argue that the law should be applied as it applied when the original decision was made, not when the review is conducted. In this case, the due date for this request was a moveable one from the Department's perspective. As noted above, through a series of unauthorized on-hold periods, unnecessary appeal periods, and by creating a "new request" to restart the 30 day clock, the Department did not commit to any firm date. It failed to meet the statutory timeline and indeed failed to meet its own calculated timelines. In addition, I have found that the Department failed to satisfy its duty to assist in numerous ways.

[62] One of the remedies to this problem would be for the Department to not make the applicant jump through further administrative hoops. By that I mean this applicant could now make a new access request for all information withheld under s. 14. Section 14 would not apply. Instead of making the applicant take the initiative, it would be a step toward remediating the failure to assist if the Department would now simply release all of the records withheld or severed under s. 14.

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

[63] Section 17 is a harms-based exemption. The Department bears the burden of proving that disclosure could reasonably be expected to harm the economic interests of the public body. In this case, the Department provided no evidence whatsoever in support of its assertion that harm would result from disclosure. Instead, the Department cited a few cases setting out the test under s. 17 and then as “evidence” restated the words of the section and said it therefore applied to the records. The submissions specifically state that the records are too voluminous to address individual severing. The submissions make no reference at all to any particular type of information withheld under s. 17, provide no explanation for why s. 17 might apply to those information types and provide no explanation for what possible harm could come from the disclosure.

[64] Two factual observations about the manner in which s. 17 was applied to the records are:

- Section 17 is applied to information that even on a cursory review it clearly and without question cannot apply to. I include in this category company names, government entity names, names of individuals and names of wells.
- The Department’s application of s. 17 is inconsistent. Frequently s. 17 is applied to any monetary amounts. Because there are multiple copies of most documents, particularly email strings, virtually every number withheld under s. 17 is disclosed somewhere else in the documentation. It is impossible to see how harm could arise from the disclosure of information when the information has already been disclosed and it seems the Department never noticed. How can the Department prove that there is a reasonable expectation of harm from disclosure when it repeatedly discloses information and asserts no consequent harm from the disclosure?

[65] **Finding #8:** I find that the Department has failed to satisfy its burden of proving that s. 17 applies to any of the information withheld under this provision.

**ix. Is the Department required to refuse access to information under s. 20 of FOIPOP because disclosure of the information would be an unreasonable invasion of a third party’s personal privacy?**

[66] Public bodies in Nova Scotia are challenged by the right to privacy set out in *FOIPOP*. They are fearful that in releasing a name, they are violating privacy. Almost 20 years ago the Nova Scotia Supreme Court laid out a four-step approach to be taken in determining whether or not releasing personal information, including names, is permitted in response to an access to information request.<sup>24</sup> Unfortunately, rather than applying this four-step test, most public bodies instead simply sever every name they see in responsive records. This practice is colloquially referred to as “see a name, take a name”. That appears to have been what happened here. If the name was not of a Departmental employee, it was removed. The problem with this practice is that it does not comply with the law.

[67] The right to privacy under s. 20 is that third party information must be withheld only if the disclosure of that information would be an unreasonable invasion of personal privacy. The Nova

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<sup>24</sup> *House (Re)*, [2000 CanLII 20401 \(NS SC\)](#), at para 14.



Scotia Supreme Court set out a four-part test to determine when release of information would result in an unreasonable invasion of personal privacy under *FOIPOP*:

- i. Is the requested information “personal information” within the meaning of s. 3(1)(i)? If not, that is the end. Otherwise, I must go on.
- ii. Are any of the conditions of s. 20(4) satisfied? If so, that is the end.
- iii. Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s. 20(3)?
- iv. In light of any s. 20(3) presumption, and in light of the burden upon the applicant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?

[68] I have previously discussed the application of s. 20 to the identity of individuals in their business capacity.<sup>25</sup> In the current case, almost all of the individuals whose names are severed under s. 20 are conducting work under a contract to provide service to Nova Scotia or as part of the team working to guide the Play Fair analysis led by the Department. All of the correspondence in the records is highly professional, focussed on applying expertise to issues that these individuals were hired to evaluate. The work they are doing is on behalf of the Province. With perhaps two or three very minor exceptions, the conversations are focussed strictly on work.

[69] The names of individuals are clearly personal information. I agree with the Department that nothing in s. 20(4) applies to these names. I disagree with the Department when it asserts that two presumptions – s. 20(3)(d) and s. 20(3)(f) apply to this information. The law states:

20(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party’s personal privacy if:

- (d) the personal information relates to employment or educational history; and
- (f) the personal information describes the third party’s finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

[70] This discussion relates only to the withholding of names of individuals in a business capacity. The Department did not identify what record it thought s. 20(3)(f) applied to. It certainly does not apply to the names as they appear in the responsive records.

[71] With respect to s. 20(3)(d), I have previously examined the issue of whether or not this provision applies to names that appear in a business context. I pointed out that jurisdictions across Canada have determined that disclosure of names in this context is not an unreasonable invasion of personal privacy because such information lacks a distinctly personal dimension. In

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<sup>25</sup> See for example NS Review Report FI-12-01 [2015 CanLII 54096 \(NS FOIPOP\)](#).

some jurisdictions, the courts have determined that this type of information does not even qualify as personal information because it is not “about” an individual.<sup>26</sup>

[72] Further, the Nova Scotia Court of Appeal had this to say about the proper interpretation of the term “employment history”:

[36] In order to be found to be employment or educational history, the information must do more than simply have some sort of link to employment or education. The words “employment and educational” are not nouns, but adjectives which describe the word “history”. The presumption against disclosure will only arise if the information relates to “employment or educational history” in the fuller sense set out in the jurisprudence.<sup>27</sup>

[73] Names that appear in the record of work performed under contract with the Province is simply a link to employment and consistent with the decision of the Court of Appeal, do not qualify as employment history. I find that s. 20(3)(d) does not apply.

[74] This leaves the final question: would the disclosure constitute an unreasonable invasion of personal privacy? There are three relevant considerations. The disclosure of the information is desirable for the purposes of subjecting the activities of the public body to scrutiny. That is, these individuals used their expertise to perform tasks and to make recommendations and decisions that have significant financial implications in terms of the potential value of hydrocarbon resources in Nova Scotia waters. As noted earlier, significant public funds were dedicated to support this project and the outcome of the project also had significant potential public benefit in the form of potential revenue.<sup>28</sup> This factor favours disclosure.

[75] A second consideration is that the names are supplied strictly in a work context. The information associated with the names is professional and work-oriented. There is no reason to believe that the individuals had any expectation of privacy in this context. Certainly, the Department offered no argument or evidence that this was the case.

[76] The final consideration is that in numerous cases the names of individuals withheld on some occasions are disclosed elsewhere. I counted at least 17 different individuals whose names are sometimes withheld and sometimes disclosed. Included in the 17 were the three or four individuals whose names appear throughout the correspondence. To say that sometimes the disclosure of the names is an unreasonable invasion of personal privacy and sometimes not in the context of these records makes no sense.

[77] The Department also applied s. 20 to information that is clearly not personal information, such as the names of companies. Obviously, that was an error and s. 20 cannot and does not apply to such information.

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<sup>26</sup> For a complete discussion of these two points see NS Review Report 16-10 [2016 NSOIPC 10 \(CanLII\)](#), at paras 96 – 101.

<sup>27</sup> *A.B. v. Griffiths*, [2009 NSCA 48 \(CanLII\)](#), at para 36.

<sup>28</sup> Nova Scotia Department of Energy and Mines: Oil and Gas, Offshore, “Play Fairway Analysis Atlas: The Analysis” (online: <https://energy.novascotia.ca/oil-and-gas/offshore/play-fairway-analysis/analysis>).

[78] There were a couple of occasions where s. 20 was properly applied. In one instance there is a brief discussion relating to a child's school and on another occasion the identity of an access to information applicant was withheld under s. 20. Both were appropriate applications of s. 20.

[79] **Finding #9:** I find that the disclosure of the names of individuals provided strictly in a business context would not result in an unreasonable invasion of the personal privacy of any of these individuals.

**x. 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?**

[80] The Department bears the burden of proving that s. 21 has been properly applied to the record. To do so, it must prove that all three parts of the s. 21 test have been satisfied:

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).

[81] The Department took the position that it is the third party who bears the burden of proof that s. 21 was properly applied. This is incorrect. Section 45(3) provides that the burden of proof shifts to the third party only where the review is into a decision to give an applicant access to all or part of a record containing information that relates to the third party. In this case, the appeal is of a decision to not give access. In other words, the Department agreed that s. 21 applied. This was not a third party appeal. Therefore, the Department bears the burden of proof to establish that s. 21 was properly applied. The Department provided no evidence to support the application of s. 21 except the following statement: "The Department believes the disclosure could have harmed the competitive position of the third party and result (sic) in undue financial loss or gain." The right to access government information is a quasi-constitutional right.<sup>29</sup> Any abrogation of that right must be in accordance with the limited and specific exemptions set out in FOIPOP and must be evidence-based. Clearly, a belief statement falls well short of that fundamental requirement.

[82] The Department asserts that it applied s. 21 to protect the commercial interests of two companies. I have several factual observations about the application of s. 21.

- Much of the information withheld under s. 21 does not relate to either of the two named companies. I include in this category the information about the Department's budget reconciliation, contractor names, company names, requisition numbers and the names of cities.
- One of the two named companies in the Department's submissions consented to the disclosure of any of its information withheld under s. 21 during the informal resolution process with this office. This third party confirmed its consent in writing and that

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<sup>29</sup> *Canada (Information Commissioner) v. Canada (Minster of National Defence)*, [2011] 2 SCR 306, 2011 SCC 25 (CanLII), at para 40.

confirmation was provided to the Department in February of this year. By virtue of s. 21(4) of *FOIPOP*, this information cannot be withheld under s. 21.

- At times, information severed under s. 21 is later disclosed, sometimes on the same page. These types of inconsistencies mean that it is both unlikely the information was supplied in confidence and that the disclosure of the information would result in the type of harm set out in *FOIPOP*.
- Section 21 was applied as a justification to withhold contracts and contractual terms. It is long established law in Nova Scotia that where information is part of a negotiated agreement, such as a contract, s. 21 will generally not apply.<sup>30</sup>

[83] One third party continued to object to the disclosure of information. The submissions from the third party briefly assert that the information is trade secret information. However, the contractual terms, for example, are certainly not trade secrets as they were terms negotiated between the third party and the Department. The third party provides no evidence to support its assertion that the withheld information is trade secret information. Further, in terms of evidence of harm, the third party's evidence is speculative, stating simply, "the release of the information could undermine [the third party] on future competitive tenders."

[84] Much of the withheld information is information supplied under the terms of the contract. It is apparent from the records that the third party has used its expertise to provide the information and analysis, but that is what Nova Scotian taxpayers were paying for. Further, at least two of the disclosed contracts with the third party provide that the information produced by the third party is the exclusive property of the Government of Nova Scotia. The third party does not address this contractual provision.

[85] **Finding #10:** I find that the Department's evidence (as supplied by the third party) falls well short of establishing that s. 21 was properly applied to the withheld records.

**xi. Is the Department authorized to refuse access to information it deems "not responsive" within otherwise responsive records?**

[86] A small portion of information within responsive records is withheld as not responsive. I have extensively canvassed the issues related to the use of "not responsive" within responsive records in previous decisions.<sup>31</sup> The Department made no new arguments on this issue during informal resolution and provided no submissions at all in support of the application of "not responsive" during the formal review process.

[87] **Finding #11:** I find that *FOIPOP* does not authorize a public body to withhold information within a responsive record on the basis that it is somehow "out of scope", "not relevant" or "not responsive".

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<sup>30</sup> *Atlantic Highways Corporation v. Nova Scotia*, 1997 CanLII 11497 (NS SC).

<sup>31</sup> See for example, NS Review Report 19-05 [2019 NSOIPC 6 \(CanLII\)](#).

## FINDINGS & RECOMMENDATIONS:

[88] In summary, I find that:

1. The Department's decision letters and communications generally with the applicant were not open, accurate or complete as required by s. 7(1)(a) of *FOIPOP*.
2. The Department failed to conduct an adequate search in violation of the duty to assist in s. 7(1)(a) of *FOIPOP*.
3. The on-hold time taken between October 16 and October 31, 2014 was not authorized under ss. 7(2) and 6(b) of *FOIPOP*.
4. The time extensions taken by the Department on November 24, 2014, January 5, 2015, April 26, 2018, May 17, 2018 and June 26, 2018 were not authorized under s. 9 of *FOIPOP*. The time extensions the Department granted itself in the form of the new "received" date, unauthorized delays and late responses were also not authorized under *FOIPOP*.
5. The Department's fee for batch #1 was not authorized because it was not calculated in compliance with s. 11 of *FOIPOP* and s. 6 of the Regulations
6. Section 13 was appropriately applied on pages 261-262 of batch #1. On page 263, the Department's application of s. 13 was overbroad.
7. Section 14(3) now applies to all of the information withheld under s. 14(1) and so s. 14 cannot apply to the records at issue.
8. The Department has failed to satisfy its burden of proving that s. 17 applies to any of the information withheld under this provision.
9. The disclosure of the names of individuals provided strictly in a business context would not result in an unreasonable invasion of the personal privacy of any of these individuals.
10. The Department's evidence (as supplied by the third party) falls well short of establishing that s. 21 was properly applied to the withheld records.
11. *FOIPOP* does not authorize a public body to withhold information within a responsive record on the basis that it is somehow "out of scope", "not relevant" or "not responsive".

[89] I recommend that the Department review the entire response package and issue a new release as follows:

1. Search for and produce all of the missing records. I will provide the Department with a list of all of the missing records we have identified in our review.
2. Review all of the pages removed as "no longer relevant" or "reviewed" and disclose all pages responsive to this request.
3. Release the six pages of records in batch #2 withheld without any exemption cited (pages 2657, 2668, 2671, 2685, 2847 and 2849).
4. Conduct a line-by-line review of the application of s. 13 and ensure that it has only been applied to information that falls within that provision.
5. Release all information withheld under ss. 14, 17, 21 and all information withheld as "not responsive".
6. Release all names of individuals that appear in a business capacity. Continue to withhold under s. 20 the name of an access to information applicant and some minor details in relation to a child's education.

7. Issue the new release within 50 days of receiving this review report.
8. Refund the applicant's fee for batch #1.

August 14, 2019

Catherine Tully  
Information and Privacy Commissioner for Nova Scotia

OIPC Files: 15-00103, 15-00104, 15-00192, 18-00283 and 18-00497