Office of the Information & Privacy Commissioner
Nova Scotia

Darrin White
Investigator
PO Box 181
Halifax, NS B3J 2M4

Email: Darrin.White@novascotia.ca
Tel: (902) 424-2908
Fax: (902) 424-8303
Website: https://oipc.novascotia.ca

September 7, 2021

CONFIDENTIAL

Michael Gorman
Applicant
Sent via email to: michaeltgorman@gmail.com

///and///

Lauren Smith
IAP Administrator for
Department of Environment and Climate Change
Sent via email to: Lauren.Smith@novascotia.ca

Dear Mr. Gorman and Ms. Smith,

INVESTIGATOR'S OPINION

Public Body:	**Department of Environment and Climate Change ("the public body")**
OIPC File:	**21-00245**
Public Body File:	**2021-00670-ENV**

This letter provides you with an update of the investigation and my opinion of the decision currently under review and suggested actions for each issue.

I have reviewed the materials, each party's representations and done my own research into this matter.

As provided below, my opinion is that the public body's decision is not in compliance with the legislation.

I have set out below the reason for my opinion, and the actions that could be taken to resolve the issue(s).

1. **Issue(s)**

Is the public body authorized to refuse access to information under s. 14 of *FOIPOP* because disclosure of the information would reveal advice, recommendations or draft regulations?

2. Analysis

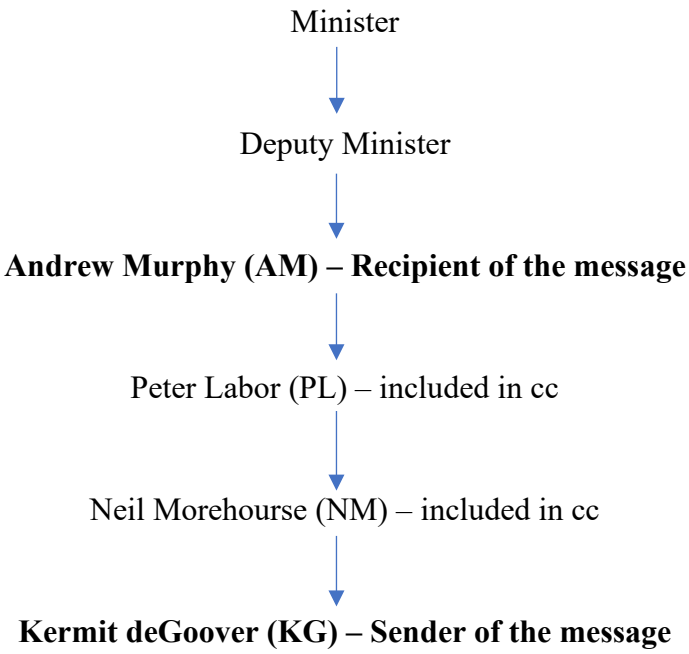
The default position of the Freedom of Information Act and Protection of Privacy Act is that information retained by Government is accessible to the public. In fact, the act exactly states (s. 5(1)):

> ***"A person has a right of access to any record in the custody or under the control of a public body upon complying with Section 6."***

It then goes on to provide some specific, and limited, exemptions. In circumstances where exemptions apply, those are to be applied with discretion.

Public Body Staff Relationships

In this case, the applicant has requested two (2) specific pages which are an email conversation between a public servant (KG) and the person at three organizational levels above them (AM). Both messages include as cc the sender's direct supervisor (NM) who reports to PL, and NM's supervisor PL who reports to AM, who in turn reports to the Deputy Minister.[1] Organizationally, it looked like this.



I will articulate further below how those reporting relationships are a factor in analyzing the public body's claim that s. 14(1) applies.

[1] These relationships are presented as they were at the time of the application.

Section 14

S. 14(1) states:

> *"The head of a 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."*

First, no part of the information severed is "draft regulations". So, what remains is to analyze whether the information is advice or recommendations developed by or for a public body or minister.

It is important to revisit the purpose of the policy advice exemption as stated by the Supreme Court of Canada. The Court provides the following explanation of the rationale for the exemption for advice given by public servants as follows:

> *To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies.*
>
> *It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness*.[2]

The process for determining whether s. 14(1) applies involves three steps[3]:

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 s. 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.

It is also important to consider former Commissioner Tully's in Review Report 18-02[4] in which she canvases all of cases in which Nova Scotia courts considered s.14. She sets out from those cases examples of types of information that do not fit within the exemption.

---

[2] *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36 (CanLII), at para 44 quoting with approval stated by Evans J in *Canadian Council of Christian Charities v. Canada (Minister of Finance),* [1999] 4 FC 245, 1999 CanLII 8293 (FC), at para 31.

[3] See OIPC Review Report 19-03 Department of Health and Wellness (Re) https://canlii.ca/t/hxv1d

[4] Department of Community Services (Re), 2018 NSOIPC 2 https://canlii.ca/t/hrx0s

The Records

The severed information is all within the originating email from KG, a "Protected Area Planner", to AM, the "Executive Director, Sustainability and Applied Science". After an introductory paragraph (paragraph 1), the next paragraph in the body is severed (paragraph 2). Then paragraph 3 (unsevered) introduces a series of six bullet points as "background information". The precise line is "*As background information, some history for Owls Head is summarized below."*

Of the bullet points:

1. Point 1 is unsevered
2. Point 2 is severed entirely
3. Point 3 is unsevered
4. Point 4 is severed entirely
5. Point 5 is severed entirely
6. Point 6 has two sentences. The first is unsevered while the second is severed entirely.

Finally, a closing line and salutation are unsevered.

Paragraph 1 (unsevered) indicates that the remainder of the letter represents some concerns stemming from a branch conference call. Arguably, paragraph 1 places the entire message in the realm of an opinion that a person is made aware of to keep him informed, a "conversation summary"[5], which does not qualify as advice or recommendations[6]

Paragraph 2 (severed entirely) is best characterized as a set of factual statements and an opinion about public comments that do not align with those factual statements.

Bullet point 1 (unsevered) contains facts about the land in question

Bullet point 2 (severed) also contains facts about the land in question. Other than the facts themselves, it is indistinguishable from point 1 and unclear why bullet point 1 is unsevered but bullet point 2 is severed.

Bullet point 3 (unsevered) also contains facts about the land in question.

Bullet point 4 (severed) is the largest of the 6 points. It contains some historical context and facts from the author's knowledge.

Bullet point 5 (severed) is similarly a statement of fact.

Bullet point 6 (severed in part) is particularly notable in that there is no distinguishable feature between the type of unsevered information conveyed in the first part (a fact) and the type of severed information conveyed in the second part (a fact that logically follows the first).

[5] OIPC NS Review Report 18-02; O'Connor 2001 at para [21]
[6] OIPC NS Review Report 18-02; *O'Connor* 2001 NSSC 6 at para 25 as affirmed in 2001 NSCA 132.

John Doe v. Ontario (Finance)

John Doe v. Ontario (Finance), 2014 SCC 36[7] is an important case in Canadian law as it clarifies the protections afforded like those in Nova Scotia that preserves an effective and neutral public service so as to permit public servants to provide full, free and frank advice.

It is important, though, to note what records were under review in John Doe. This can be found in paragraph [5] of the decision (emphasis mine):

> *The Ministry located six records, five of which are at issue in the present appeal ("Records"). **The Records are undated drafts of a policy options paper examining the possible effective dates of the amendments**. Records I through IV are entitled "**Draft Option Paper**: Tax Haven Corporations — Timing of Implementation" and set out options regarding when the amendments could take effect. All the Records except Record IV include express statements regarding which options are not recommended. Record V, entitled "Note on Tax Avoidance Strategy", **lists three options and contains a statement from which the author's recommended option can be easily inferred** (Court of Appeal decision, 2012 ONCA 125, 109 O.R. (3d) 757, at paras. 4-5; IPC Order, at p. 5).*

Those records are in stark contrast to the records under review in this file. The records at issue here contain a civil servant's unsolicited concerns provided for his supervisors' information, along with the author's knowledge of historical context and fact.

Public Body's Representations

In the representations the public body cited several passages from the John Doe decision (emphasis mine):

> "***Policy options are lists of alternative courses of action*** to be accepted or rejected in relation to a decision that is to be made. They would include matters such ***as the public servant's identification and consideration of alternative decisions that could be made***."
>
> "Records containing policy options can take many forms. They ***might include the full range of policy options for a given decision, comprising all conceivable alternatives, or may only list a subset of alternatives*** that in the public servant's opinion are most worthy of consideration. ***They can also include the advantages and disadvantages of each option***, as do the Records here. But the list can also be less fulsome and still constitute policy options. For example, a public servant may prepare ***a list of all alternatives*** and await further instructions from the decision maker for which options should be considered in depth. Or, if the advantages and disadvantages of the policy options are either perceived as being obvious or have already been canvassed orally or in a prior draft, the ***policy options might appear without any additional explanation***. ***As long as a***

[7] https://canlii.ca/t/g6sg3

list sets out alternative courses of action relating to a decision to be made, it will constitute policy options."

"Interpreting "advice" in s. 13(1) ***as including opinions*** of a public servant as to the range of alternative policy options…"

"The policy options in the Records in this case present both an ***express recommendation*** against some options and ***advice regarding all the options***."

"The ***information consists of the opinion of the author*** of the Record as to advantages and disadvantages of alternative effective dates of the amendments."

Indeed, citing this case serves to illustrate the difference between the records under review and those records to which the Supreme Court was speaking and has the added bonus of providing key features to look for when analyzing the records at issue.

The public body has the burden of proving the applicant has no right of access to the records. I examined their representations to determine for each severance, how they might be considered by the public body as advice or recommendations instead of factual statement. The public body offers in its representations:

"Within the email string is one possible option among many that the decision-maker could accept or reject."

"ECC would include within this analysis the information in the bullets under the heading 'background information.' ECC is conscious of the FOIPOP s. 14(2) prohibition on withholding information under s. 14(1) that is considered "background information" within the meaning of the Act. Equally, we must also take note that the label attached is not determinative of what is considered "background information." Clearly, the information in the bullets reflects an analysis of the situation and is not exclusively an objective statement of facts. Within these bullets, the evaluative analysis is inseparable from the factual material"

In conducting a line-by-line analysis, I could not find anything that resembled an option or was presented as an option to be considered, and the public body did not attempt to direct my attention to it. There are no recommendations to a public body. No advice is offered by the author. There are no alternatives presented, whether comprehensive or partial. The author never opines on advantages or disadvantages to any course of action.

Despite the public body's note above that just because something is labelled as "background information" doesn't determine that it is, a reasonable person would use that as a starting point. The author could have used "Options" or "Recommendations" or "Analysis" but did not. So, a reasonable person could easily conclude that in a section that is self-described as "background information" is exactly that. Beyond the title chosen by the author, the content of the information is factual information from the knowledge of the author. In my opinion, the information withheld in the bullet points is no different from the information released and cannot be described as anything but background information as presented by the author.

Evaluative Analysis

From the records, it is apparent that the author of the message and his team are charged with assessing land around the province. The author has knowledge of the land in question and the history of the scientific assessment of it. The comments present objective results and historical facts. The information withheld is not the sort of "evaluative analysis" of policy options described by the Supreme Court of Canada.

It is reasonable that *after* the objective assessments of fact are reported and recorded, the processes of valuation, evaluation, and determination of what happens to a parcel of land begins. The facts generated as objective data collection and analysis may then be used in a *deliberative process* in which public servants include (or not) these findings as they prepare opinions, options, or recommendations. The "evaluative analysis" part is when a public servant considers all these facts, including government goals and objectives, ministerial mandate and direction, and many more factors, along with their expertise and experience, to guide, inform, and set out the various policy options. It is clear from the author's opening paragraph that he is not part of this type of deliberative process. The author is unsure what is being considered and expresses concern that decision-makers may not have all the facts. This is what gives rise to the author sending unsolicited concerns and background factual information from the author's knowledge. It is clear from the entire content of the message that the author is not engaged in the government's deliberative process. The message is not advice developed by or for the public body in order to be used as part of a deliberative process of policy options. The message contains the unsolicited background informational knowledge of a public servant. The public servant clearly was not part of any policy options deliberative process and articulated as his objective to provide background factual information which may or may not be consistent with public statements made by government.

While the drafters of this legislation very clearly sought to protect the process by which decisions are reached within government, as confirmed by the Supreme Court, they also, and equally clearly, articulated that the background material (objective facts and history) underlying those decisions are not protected from disclosure. A significant part of citizens being able to hold their government to account per s. 2(a) is knowing what objective facts existed at the time a government made a decision. This is why the very next line in s. 14(2) says (emphasis mine):

> "The head of a public body **shall not refuse** pursuant to subsection (1) to disclose **background information** used by the public body."

In the complete absence of any language in the email message that resembles options, advice, deliberation, recommendation, or analysis as part of a deliberative process, my opinion is that all of the information severed is *background information* and the public body has not met its burden of proof.

Use of Discretion

Keeping in mind the stated purpose of the act, public bodies are afforded the ability to use their discretion to disclose records. S. 31 articulates this discretionary ability as follows:

31 (1) Whether or not a request for access is made, the head of a public body may disclose to the public, to an affected group of people or to an applicant information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people; or
(b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Before disclosing information pursuant to subsection (1), the head of a public body shall, if practicable, notify any third party to whom the information relates.

(3) Where it is not practicable to comply with subsection (2), the head of the public body shall mail a notice of disclosure in the prescribed form to the last known address of the third party.

(4) This Section applies notwithstanding any other provision of this Act.

There can be little doubt that public interest in the matter related to these records is high as evidenced by:

- Signs on roads and buildings both for and against development
- Over 100 media articles[8]
- Two "GoFundMe" accounts[9]
- A Change.org petition with over 35,000 signatures as of this opinion date

The public body says:

> *"Environment and Climate Change discretion to refuse access by reliance section 14 was a reasonable exercise of authority given the importance of the context."*

This is problematic as the public body has the *ability* (where applicable) to refuse access under s. 14 where s.14 clearly applies to the records, but it has the *discretion* to disclose the records despite that ability. Discretion is not meant to be used as an additional means of restricting access. Furthermore, the public body appears to recognize the importance of the information contained within the records citing that as a reason to severe the records. This is not the intent of the act.

The public body goes on to say:

> *"Public confidence in the public body can be at least as effectively addressed in the final public discussion the Department is engaging on the issue and is not substantively impacted by the information released under FOIPOP."*

That, frankly, is simply not the case. The public body cannot be the sole determiner of what is important to the public and what is not. No part of the act indicates that this is the case.

[8] A Google search for "'Owl's Head' Nova Scotia" returned 119 news articles

[9] Fundraiser for Patricia Egli by Richard Bell : Let's Go to Court to Save Owls Head! (gofundme.com), Fundraiser for Caitlin Grady by Kristina Boerder : Support science at Owls Head Provincial Park (gofundme.com),

These two passages demonstrate that the public body failed to properly exercise its discretion and, knowing that public interest and scrutiny was high, did, in fact, use its discretion as a means to withhold information it knew was important to the public.

In my opinion, s.14 does not apply to the records at issue. Further, it is my opinion that if I am wrong about s.14 application, that the public body has demonstrated that it ignored relevant factors or failed to consider reasonable factors that weigh in favour of disclosing the records at issue.

3. Suggestions for resolution

Because my opinion is that the public body has *not* adequately met the test for withholding the requested information, I suggest that the public body take the following steps to informally review the matter:

Disclose the information to the applicant.

4. Next Steps

The parties have 14 days (**September 22, 2021**) to make a decision whether or not to accept the suggestion(s) above.

Possible outcomes:

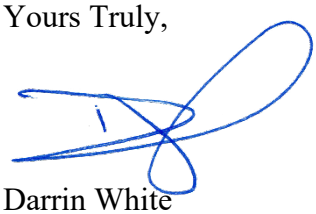
- If the parties accept all of the above suggestions, the review will informally resolve, and the file will be closed, once the actions are complete. A public report will not be issued.
- If the parties agree to accept some of the suggestions but not others, only those that are unresolved will move forward as an issue under review at Stage 3 – Public Review Report.
- If the parties do not accept any of the above suggestions, all the issues will move forward as an issue under review at Stage 3 – Public Review Report.

The party responsible for the action will have only an additional 7 days to complete the action agreed upon, unless I determine more time is required. If the action(s) is not completed within the assigned timeframe, the issue will proceed to Stage 3 – Public Review Report.

If this file proceeds to Stage 3, the Commissioner will review the complete file and all materials compiled to date. There will be no additional opportunity for the parties to submit representations unless the Commissioner formally asks you for further representations or answers to questions.

Please advise within 14 days (September 22, 2021) whether you wish to informally resolve some or all of the matters by accepting (or not) the above noted suggestions.

Yours Truly,



Darrin White
Investigator