SUPREME COURT OF NOVA SCOTIA

Citation: *Raymond v. Halifax Regional Municipality*, 2022 NSSC 68

Date: 20220308
Docket: Hfx. No. 467138
Registry: Halifax

Between:

Michelle Hovey Raymond

Appellant

v.

Halifax Regional Municipality

Respondent

TRIAL DECISION

Judge: The Honourable Justice John P. Bodurtha

Heard: May 26, 27, 31 of 2021

Final Submissions: July 21, 2021

Written Decision: March 8, 2022

Counsel: Michele Hovey Raymond, Self-Represented Appellant
Karen E. MacDonald, Counsel for the Respondent

By the Court:

Introduction

[1] Michele Raymond appealed a decision of Halifax Regional Municipality's (HRM) delegated Responsible Officer, Nancy Dempsey pursuant to section 494(1) of the *Municipal Government Act,* SNS 1998, c. 18 (*MGA*) with respect to Access Request 14-298 (AR 14-298). For various reasons, the appeal has been rescheduled several times.

Background

[2] HRM's Access & Privacy Office is governed by Part XX - Freedom of Information & Protection of Privacy, of the *MGA*.

[3] On December 22, 2014, the HRM Access & Privacy Office received an Application for Access to a Record from the Appellant, Michele Raymond. This request (identified as AR 14-298) was for the following:

- Full size copy of Concept Plan "Boscobel-on-the Arm" (15 March 2012);
- All communications related to this plan, to/from all HRM departments and/or elective officials;
- Full text of Ekistics letter to Development Office;
- All records related to changes between the Concept Plan of 15 March 2012 and Concept Plan of 12 August 2012.

[4] On April 1, 2015, Nancy Dempsey (HRM's Access & Privacy Officer), issued her decision with respect to AR 14-298. In total, Raymond received 536 pages of records. Certain records were held back in their entirety and portions of other records provided were severed/redacted in accordance with the provisions of Part XX – Freedom of Information and Protection of Privacy of the *MGA*.

[5] On August 28, 2015 Raymond filed a Request for Review of Dempsey's decision with the Office of Information & Privacy Commissioner (OIPC) of Nova Scotia, pursuant to section 487(1) of the *MGA*.

[6] On June 12, 2017, Catherine Tully, the Review Officer for the OIPC, issued Review Report 17-05. Tully made 13 findings and 14 recommendations with respect to AR 14-298.

[7] On July 26, 2017, in accordance with section 493(1) of the *MGA*, Dempsey issued her decision with respect to the recommendations made by Tully in Review Report 17-05. Dempsey agreed in part with Tully's recommendations and an updated copy of the responsive records were provided to Raymond. This included the third-party information that was previously withheld pursuant to sections 477(1)(d) and 481(1) of the *MGA*.

[8] On August 3, 2017, Raymond was advised that there were some inconsistences in the Access & Privacy Office's response to Review Report 17-05, and further responsive records were released.

[9] The decisions of Dempsey, issued July 26, 2017 and August 3, 2017 (both with respect to AR 14-298) are the subject matter of this appeal.

[10] On September 27, 2017, Raymond wrote to HRM's Access & Privacy Office listing records she believed were still missing from the disclosure. HRM's Access & Privacy Office sent a copy of Raymond's request with respect to AR 14-298 to the applicable business units, and requested that they undertake a further search.

[11] On November 23, 2017, phone log entries and notes of Rosemary MacNeil (the Principal Planner and Development Officer with HRM) that were responsive to AR 14-298 were provided to Raymond. MacNeil had carriage of the Application for Subdivision Approval for Boscobel-on-the-Arm. MacNeil is an experienced employee of HRM who was knowledgeable in the subject matter of the request. As noted in her Affidavit of November 29, 2017, the full concept plan paper file for Boscobel-on-the-Arm was searched and a full copy was provided to HRM's Access & Privacy Office. Further, electronic records were searched by subdivision name and concept plan file number. A copy of any records produced out of that search was also forwarded to HRM's Access & Privacy Office.

[12] Following receipt of subpoenas issued by Raymond for five HRM employees, HRM's Access & Privacy Office asked those employees to conduct a search for meeting notes and phone logs responsive to AR 14-298. This request was made because the Access & Privacy Office was aware, through records

previously received from MacNeil, that phone logs and meeting notes may not have always been placed in the Planning & Development Concept Plan files.

[13] Additional records responsive to AR 14-298 were located and provided to the Access & Privacy Office from Mark Inness, Lisa Smith and Ashley Blissett. On November 15, 2018, these records were provided to Raymond, with redactions for non-responsive records.

Process of an Appeal Under the FOIPOP

[14] In *Coates v. Capital District Health Authority*, 2012 NSCA 4, the procedure to review sealed documents in an appeal under the FOIPOP was reviewed by the Nova Scotia Court of Appeal, at paras. 27-35. The procedure available to the Court is as follows:

(a) The Court may review the sealed documents before hearing argument, or may choose to proceed with argument prior to looking at the sealed documents;

(b) If the Court decides to proceed with argument first, and then review the sealed documents, the Court may request further submissions upon review of the sealed documents; and

(c) If, after reviewing the sealed documents, the Court has questions of clarification, the Court may meet with counsel for HRM in-camera to pose any questions the Court may have.

[15] For the purposes of this appeal, I reviewed all the sealed documents and the Hansen records. I did not need to hold an *in camera* hearing because I did not have any questions regarding why the responsible officer refused to give access to a record or part of a record. The remaining issue for my consideration was whether the responsible officer was authorized to do so.

Issues

[16] The issues for determination on this appeal are:

(a) Did HRM meet its duty to assist Raymond by conducting an adequate search for records as required by s. 467(1) of the MGA?

(b) Was HRM authorized to refuse access to records or parts thereof pursuant to s. 476 of the MGA?

(c) Was HRM required to refuse access to a record or parts thereof because disclosure of the information would be an unreasonable invasion of a third party's personal privacy pursuant to s. 480 of MGA?

(d) Was HRM authorized to refuse access to a record and parts thereof on the basis that the records were non-responsive to the request made?

(e) Was HRM authorized to refuse access to records on the basis that the records were duplicates of records already provided to Raymond pursuant to AR 14-298?

[17] Contrary to Raymond's brief of March 18, 2020 there are no records with redactions under s. 477(1)(d) and s. 481(1) of the *MGA* that are the subject matter of this appeal.

<u>Boscobel-on-the-Arm</u>

[18] AR 14-298 is a request for records related to the development known as "Boscobel-on-the-Arm". Raymond referenced files #18130 and #17674 in her Access to Information Application which are concept plan files in HRM's Planning & Development office.

[19] The development of the Boscobel-on-the-Arm subdivision, which Raymond discusses in her Affidavit and Brief, are irrelevant to the issues on appeal. The issue on appeal is whether HRM's Access and Privacy Officer was authorized to refuse to give access to a record or part of a record pursuant to the provisions of Part XX of the *MGA* (s. 495 of the *MGA*).

Analysis

(a) Did HRM meet its duty to assist Raymond by conducting an adequate search for records as required by s. 467(1) of the *MGA*?

[20] Section 467(1)(a) of the *MGA* reads:

> 467 (1) Where a request is made pursuant to this Part for access to a record, the responsible officer shall
>
> (a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely;

[21] The starting point for any FOIPOP appeal is the request made by the applicant. The obligation is on the applicant to determine the records they are seeking and clearly set out the request under s. 466(1)(b) of the *MGA*. Dempsey, in her testimony, advised that there are occasions when she will contact an applicant with questions regarding the request, but that is very rare in her experience. Raymond's request was clear. Dempsey understood what she was looking for.

[22] Raymond testified to confusion regarding the request because of changes that occurred to the two concept plans between two dates. HRM argued that by default any search for records would produce any records of changes to the two concept plans between those two dates should they exist. MacNeil advised the Court that superseded concept plans are not always kept by the Planning and Development Department because it is very common for individuals to come into the Planning Department, go over the plan, have changes suggested by planning staff and the individuals take those plans back with them for revision. HRM does not keep them because they do not need to. MacNeil explained this routine to Raymond in an email (see Raymond affidavit, January 28, 2021, at Tab 9). This explanation was provided to be of assistance to Raymond in understanding the lack of records and what happened to the concept plans. It should be noted that HRM was not obligated to provide an explanation.

[23] Also, there was no obligation on the responsible officer to query whether the applicant feels a certain record is responsive to their request. If HRM was obligated to do that for every single access request it would result in chaos and delays in the system. It is the responsible officer's duty to determine whether a record is responsive or not.

[24] In *Edmonton (City) v. Alberta (Information and Privacy Commissioner),* 2016 ABCA 110, the Alberta Court of Appeal considered the obligation of a public body to provide access to records under the *Freedom of Information and Protection of Privacy Act,* RSA 2000, c. F-25. That legislation, similar to the *MGA*, provides that the head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely. The Court of Appeal stated at para. 37:

> 37 The adjudicator found that the City was in default of its obligations under s. 10(1) of the *FOIPP Act*:

> 10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

While there are two components to s. 10 ("failure to assist", and "openly, accurately and completely"), the section should be interpreted as reflecting a single underlying obligation of the public body to be proactive in performing its duties under the *FOIPP Act*. Section 10 does not impose any absolute obligations, and only requires "every reasonable effort". The adjudicator did not examine whether the City's compliance with Ms. McCloskey's request was the result of "every reasonable effort", and appears to have assumed that s. 10 was breached just because the adjudicator disagreed with the City's decision on disclosure.

[25] In *Review Report FI-11-76; Nova Scotia (Department of Community Services) (Re)*, [2014] NSFIPPAR No. 14), Nova Scotia's Office of Information and Privacy Commissioner (OIPC) considered the equivalent of s. 467(1)(a) of the *MGA* as contained in section 7(1)(a) of the *Freedom of Information and Protection of Privacy Act*, RSNS 1993, c. 5. The OIPC noted that the duty to assist applicants is a duty found in access legislation across Canada. The Office of the Information and Privacy Commissioner of Ontario, summarized the relevant considerations in considering whether a public body had met that duty at paragraph 9:

9 An Order from the Office of the Information and Privacy Commissioner of Ontario summarized the relevant considerations as follows:

> [20] Important factors in assessing the reasonableness of the search will be whether the Appellant provided sufficient identifying information to assist the institution in its search and has provided a reasonable basis for concluding that such records exist.
>
> [21] The Act does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. To be responsive, a record must be "reasonably related" to the request.
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> [22] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.
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> [23] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control. [footnote omitted]

[26] In *Review Report 20-06; Cape Breton Regional Municipality (Re),* [2020] NSFIPPAR No. 5, the OIPC summarized the duty to assist:

> 20 The issue of the duty to assist has been the subject of many review reports, with the leading Nova Scotia case being Review Report FI-11-76. In that case, the former Commissioner noted the duty to assist applicants is a duty found in access to information legislation across Canada. I will not repeat the full discussion from Review Report FI-11-76 here but the same conclusion applies:
>
>> [13] What is clear from decisions across these Canadian jurisdictions is that where an applicant alleges a failure to conduct an adequate search the applicant must provide something more than mere assertion that a document should exist.
>>
>> [14] In response, the public body must make "every reasonable effort" to locate the requested record. The public body's evidence should include a description of the business areas and record types searched (for example emails, physical files, databases), should identify the individuals who conducted the search (by position type), and should usually include the time taken to conduct the search. If there is an explanation for why a record may not exist, it should be provided.
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> 21 Although the *MGA* does not impose a standard of perfection, a municipality's efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. [footnote omitted]

[27] The *MGA* does not impose an absolute obligation on HRM in conducting its search. The obligation to search records under s. 467(1)(a) requires a reasonable effort. The *MGA* does not require HRM to prove with absolute certainty that no further records exist. In searching for records, HRM's efforts must conform to what a fair and rational person would expect to be done or consider acceptable. In doing so, HRM must make "every reasonable effort" to locate the requested record. The standard is not perfection but the search must be thorough and comprehensive.

[28] On December 22, 2014, the Access & Privacy Office received AR 14-298 from Raymond. The Access & Privacy Office has a contact within each business unit in HRM who is tasked with locating all possible responsive records within that business unit. When the Access & Privacy Office receives an Application for Access to a Record, the Office identifies those business units within HRM that may have responsive records. Those business units are notified of the Application and are asked to search for responsive records. They are also asked to advise of anyone else who should be included in the retrieval of information responsive to

the request, so that the request can be forwarded accordingly. Once the search is concluded, the responsive records are then forwarded to the Access & Privacy Office for processing in accordance with Part XX of the *MGA*: Dempsey's Affidavit, filed October 27, 2017.

[29] Dempsey testified that the business units gather and send the records to her office. They do not vet the records. Dempsey determines if the records are responsive and queries the business units if any further clarification is required.

[30] On December 24, 2014, the contacts within Planning & Development and the Councillors' Office were notified of Raymond's Application and asked to search for responsive records. The Access & Privacy Office was also made aware that the Mayor's Office may have responsive records, the contact in the Mayor's Office was notified of their need to search for responsive records.

[31] After the business units completed their search, the Access & Privacy Office received records from Planning & Development, the Councillor's Office, the Mayor's Office, Fire and Emergency Services, Finance, Corporate Communications (CAO's Office) and Planning & Infrastructure.

[32] On April 1, 2015 Dempsey issued her decision with respect to AR 14-298. After Dempsey accepted some of the recommendations in the OIPC's Review Report 17-05 Raymond was provided with additional records. This included the third-party information that was previously withheld pursuant to sections 477(1)(d) and 481(1) of the *MGA*.

[33] On August 3, 2017, Raymond was advised that there were some inconsistencies in the Access & Privacy Office's response to Review Report 17-05 and further responsive records were released.

[34] McNeil was clear in her testimony that if a record existed, subject to applicable redactions and exemptions, it would be in the records Raymond received.

[35] Raymond suggests that HRM failed in its obligation to respond without delay to her request. I find that this delay was not caused by HRM. Raymond's request was received on December 24, 2014 and Dempsey's decision was made just over three months later, on April 1, 2015. A Request for Review was filed by Raymond with the OIPC on August 28, 2015, but it took almost two years before the OIPC issued a Review Report on June 12, 2017. Dempsey promptly responded

to the Review Report, issuing her decision with respect to her recommendations on July 26, 2017.

[36] It is Raymond's belief that a considerable amount of responsive materials have not been disclosed. Raymond must provide a reasonable basis for concluding that such records exist. Raymond's belief that a document should exist doesn't mean that it does exist or that HRM failed to conduct an adequate search for records as required by s. 467(1) of the *MGA*.

[37] In report *FI-13-97; Nova Scotia (Department of Community Services) (Re),* [2014] NSFIPPAR No. 9, the OIPC spoke about the onus on an applicant to provide some evidence, at paragraph 18:

> 18 Applicants must provide some evidence showing that the public body has the records in its custody or under its control; broad sweeping assertions or mere speculation will not suffice [*NS Report FI-12-106* and *Donham v. Nova Scotia (Community Services)*, 2012 NSSC 384].

[38] Raymond's affidavit of July 23, 2019, at para. 42, lists records that she believes exists. The majority of the list refers to explanations sought in relation to the content in the record rather than actual records. HRM argues that, if the explanation sought is not contained in a record, it has no further obligations under Part XX of the *MGA*.

[39] Justice Gabriel addressed HRM's obligation under s. 467(1) in *Raymond v. Nova Scotia (Information and Privacy Commission*), 2017 NSSC 322. Raymond brought a judicial review of a decision of the OIPC. Raymond made a request asking that HRM confirm or deny whether her home and access to it were discussed during specific meetings of HRM Council. The OIPC concluded that she did not have jurisdiction to conduct a review. The matter was considered concluded because Raymond was not seeking access to a record. Raymond had not satisfied the requirements of s. 466 of the *MGA*. As a result, there was no request requiring a response by HRM under the *MGA*, and no decision, act or failure to act in relation to a request under the *MGA*.

[40] Justice Gabriel dismissed the application for judicial review, and upheld the OIPC's conclusion that a valid application had not been made at first instance because Raymond was not seeking access to a record in the possession of HRM. This was a condition precedent to the applicant's right to request a review of HRM's decision under the *MGA*, the Commissioner was without jurisdiction to

proceed with a review. The decision was upheld in *Raymond v. Nova Scotia (Information and Privacy Commissioner*).

[41] Raymond, in the same Affidavit, set out other examples of where she believes documents are missing or have not been provided to her as part of AR 14-298. However, HRM is only obligated to provide records that are responsive to the request.

[42] Raymond also argued that HRM did not request or process any records from Halifax Water and therefore failed in its obligations under s. 267(1) of the *MGA*. Raymond has been informed on numerous occasions that HRM does not request records from Halifax Water upon receipt of a FOIPOP request because Halifax Water has its own responsible officer under the *MGA* and, in fact, Raymond filed an application for a request for records with Halifax Water.

[43] I find that Raymond has not met her burden in proving that an inadequate search was conducted by HRM. HRM acknowledges that, after the initial disclosure, Raymond submitted a list of records that she believed were missing and HRM found additional responsive records. These records were MacNeil's phone logs and notes. The records were provided to Raymond. HRM submits that the failure to provide these records initially was an oversight.

[44] HRM correctly conceded the initial search was not perfect. It is understandable that Raymond would have a certain level of mistrust towards HRM given their initial handling of AR 14-298. Raymond questions the scope and quality of the records provided by HRM, and holds HRM to a standard of perfection, but perfection is not the standard.

[45] I am not persuaded by Raymond's arguments and find there was not sufficient evidence to conclude that HRM failed in its duty pursuant to s. 467 of the *MGA*. The legislation does not impose absolute obligations, nor does it impose a standard of perfection. As HRM became aware of possible further sources of records, it conducted further searches and provided Raymond all responsive records received, subject to any applicable redactions. It is clear from the record that HRM continued to fulfill its obligations under s. 467.

Hansen Records

[46] During the hearing, it was revealed that there may be additional records contained in the Hansen reports. HRM agreed that the Hansen reports would

constitute a record and that HRM would provide those to Raymond. MacNeil testified Hansen is a tracking system used by Planning & Development for subdivision applications and those records had not been provided for any access to information requests in the past.

[47] Other HRM witnesses testified that the Hansen system is fluid, changing as the project moves through various stages of review and approval. The actual documents and reports themselves contained in Hansen are also in the physical concept plan file. For example, letters to the various agencies are not kept; there is a record of the outgoing letters to the various agencies and a record of the responses. Those responses come back in memo form and the hard copies are placed in the physical concept plan file. The hard copies would have been produced in response to a request for records.

[48] On June 7, 2021, the HRM Access & Privacy Office provided Raymond with 16 pages of Hansen records related to the Boscobel-on-the-Arm concept plan. A small section on one of the pages was redacted on the basis of solicitor-client privilege (s. 476 of the *MGA*) and personal information of a third party (s. 480(1) of the *MGA*). The parties agreed that it would be appropriate for me to accept the Hansen records and add them to the documents as part of my review.

[49] I have reviewed the Hansen records provided and the one page of redactions pursuant to section 495 of the *MGA* and conclude that the redactions were properly made by HRM in accordance with Part XX of the *MGA*.

[50] HRM argued that the Hansen records responsive to AR 14-298 did not provide any evidence that HRM failed in its duty to assist Raymond in conducting an adequate search for records.

[51] I am convinced that experienced and knowledgeable employees of HRM conducted a thorough and comprehensive search to locate records. They were responsive to Raymond's request for records. The HRM witnesses testified that the responses received from the various agencies are placed within the concept plan file. These responses were provided to Raymond (see some examples at Appeal Book, Volume 1, Tab 8, filed October 27, 2017, at pp. 212, 262, 305, 519, 271 and 477).

[52] Raymond made similar assertions regarding the Hansen records as was done with respect to the other records provided by HRM. Raymond speculated that other Hansen records existed based on the limited number of records produced.

The witnesses in their evidence provided me with a reasonable explanation for why the Hansen records were not provided. They testified that Hansen records had not been provided before in response to any prior access request because the system was a tracking system and all hard copies would be placed in the concept plan file and subsequently disclosed.

[53] In not initially disclosing Hansen records, HRM has contributed to Raymond's further distrust. Once again, perfection is not the standard. Ideally, public institutions would strive for perfection; however, it is not the standard against which they will be judged under the *MGA*. Mistakes occurred in AR 14-298. The decision not to disclose Hansen records regarding any access request is concerning, even though hard copies should be in the concept plan file. HRM has acknowledged these mistakes and tried to rectify them. HRM has made additional disclosures. Cumulatively, these mistakes have not persuaded me that HRM's efforts in searching for records would not conform to what a fair and rational person would expect.

[54] I find that HRM has fulfilled its obligations under section 467 of the *MGA,* and that every reasonable effort was made in its search for records responsive to AR 14-298 and that all records have been provided.

(b) Was HRM authorized to refuse access to records or parts thereof pursuant to s. 476 of the *MGA*?

[55] Section 476 of the *MGA* states:

> Solicitor-client privilege
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> 476 The responsible officer may refuse to disclose to an applicant information that is subject to solicitor-client privilege.

[56] HRM's Access & Privacy Officer withheld 18 pages identified as solicitor-client privilege in relation to AR 14-298. In addition one record was redacted within a disclosed record pursuant to section 476.

[57] Dempsey testified that the reviewing officer will seek legal advice when processing these requests. They are not experts and will reach out to legal staff in determining what is a responsive record, if they are not certain about the request and what can be withheld.

[58] In *Fuller v. Nova Scotia,* 2003 NSSC 58, Fuller applied to the Nova Scotia Department of Justice for access to all records related to a decision to increase fees for applications under the *FOIPOP Act*. Pursuant to Section 16 of the *FOIPOP Act* (which is similar to section 476 of the *MGA*) the head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege. Pickup, J. considering section 16 of the *FOIPOP Act* stated at paragraphs 31-36:

> **31** In *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 2779 and 2002 BCCA 665, Levine, J.A. writing for the British Columbia Court of Appeal commented on the solicitor client privilege in s. 14 of the British Columbia Act (which is identical to s. 16 of the Nova Scotia Act). At paras. 24 and 25 the British Columbia Court of Appeal stated:
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>> Section 14 of the Act imports all of the principles of solicitor client privilege at common law: see *Legal Services Society v. B.C. (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 at paras. 25-6 (B.C.S.C.), where Lowry J. said:
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>>> Certainly the purpose of the [Freedom of Information and Protection of Privacy] Act as a whole is to afford greater public access to information and the Commissioner is required to interpret the provisions of the statute in a manner that is consistent with its objectives. However, the question of whether information is the subject of solicitor-client privilege, and whether access to a record in the hands of a government agency will serve to disclose it, requires the same answer now as it did before the legislation was enacted. The objective of s.14 is one of preserving a fundamental right that has always been essential to the administration of justice and it must be applied accordingly.
>>
>> Thus, the issue of solicitor client privilege raised on this appeal does not involve balancing the interests of the parties in disclosure or confidentiality. ... The question is only whether the Documents are subject to solicitor client privilege as defined at common law.
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> **32** Like the British Columbia Act, I find that the Nova Scotia FOIPOP Act incorporates in s. 16 common law principles of solicitor client privilege. The question then becomes whether the severed documents in the withheld record are subject to solicitor client privilege as defined at common law and therefore exempt from disclosure under s. 16.
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> **33** In *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.* [2000] N.S.J. No. 258 and (2000) NSCA 96, Roscoe, J.A. for the Court of Appeal set out the common law principles of solicitor client privilege at paras. 14, 15 and 16 as follows:

> Parties to an action may withhold from production and disclosure documents for which they claim privilege. There are two distinct types of privilege relevant here: solicitor client privilege and litigation privilege (*Baker v. Commercial Union Assurance Company of Canada et al* (1995), 138 N.S.R. (2d) 169). The Supreme Court of Canada in *Solosky v. The Queen* [1980] 1 S.C.R. 821, adopted Wigmore's statement of the modern principle of solicitor client privilege at p. 835:
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>> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.
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> At p. 837 in *Solosky, supra*, Justice Dickson (as he then was), stated that in order to be protected by solicitor client privilege, a document must meet the following criteria:
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> (i) a communication between solicitor and client;
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> (ii) which entails the seeking or giving of legal advice; and,
>
> (iii) which is intended to be confidential by the parties.
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> More recently in *Descôteaux et al v. Mierzwinski*, [1982] 1 S.C.R. 860, Justice Lamer (as he then was), summarized the court's position as follows at p. 892:
>
>> In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to the employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the former retainer is established.

34 I adopt this statement of solicitor client privilege as the applicable principles to apply to a determination of solicitor client privilege under s. 16 of the Nova Scotia FOIPOP Act. In reviewing the withheld documents for which exemption has been claimed under s. 16, it is noted that several different lawyers were involved in the giving of advice respecting the changes to the FOIPOP Act. Counsel for the Respondent has explained the unique situation of government where more than one solicitor might be providing advice on any given issue, and I accept that submission.

> **35** However, only to the extent that a document reveals that legal advice was sought or given, from the named legal counsel, will that document be found to be privileged under s. 16 of the FOIPOP Act. Solicitor client privilege at common law as defined in Mitsui, supra, and for the purposes of s. 16 of the FOIPOP Act, includes the privilege that attaches to confidential communications between solicitor and client for the purpose of obtaining and giving legal advice.
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> **36** As noted above, because legal advice privilege protects the relationship between solicitor and client, the key question to consider is whether the communications is made for the purpose of seeking or providing legal advice, opinion or analysis. Legal advice type privilege arises only where a solicitor is acting as a lawyer, and giving legal advice to a client. Therefore, in each instance where such privilege is claimed herein, the question should be "was the named government lawyer acting as a lawyer and providing legal advice when he/she received, commented on or initiated a document or correspondence?" [emphasis added]

[59] In *Denike v. Dalhousie University*, 2018 NSSC 111, the Court again considered solicitor-client privilege in the context of a FOIPOP application. The applicant sought numerous documents from Dalhousie University, pursuant to the *FOIPOP Act*. Numerous redactions were made to the documents disclosed, including redactions for solicitor-client privilege. The appeal was dismissed in its entirety. Robertson, J. in determining that the two volumes of material at issue fell within the exemption of solicitor-client privilege stated, at paragraph 69:

> **69** Some of the emails in these two volumes contain background information included in the communications for the purpose of obtaining and giving legal advice. It relates directly to the privileged issue for which the advice was sought and has not therefore been disclosed, as it forms part of the continuum of advice.

[60] I have carefully reviewed the 18 pages that were redacted, in whole or in part, as well as the one entry that was redacted within a disclosed record pursuant to section 495 of the *MGA* and determined that HRM's Access & Privacy Officer was authorized to refuse to give access to the records pursuant to section 476 on the basis that the records are solicitor-client privileged communications. The records are entirely made up of written communications. The communications involved legal advice, information communicated to support the formulating of legal advice, or background information with respect to the advice given. The HRM lawyer was acting as a lawyer and providing legal advice when he/she received, commented on or initiated a document or correspondence. Therefore, the records in question are clearly subject to solicitor-client privilege. They represent communications intended to be confidential between the parties. This

confidentiality attaches to all communications made within the framework of the solicitor-client relationship, including any background information that may be provided in seeking the advice.

(c) Was HRM required to refuse access to a record or parts thereof because disclosure of the information would be an unreasonable invasion of a third party's personal privacy pursuant to s. 480 of the *MGA?*

[61] Personal Information is defined in section 461(f) of the *MGA* as follows:

> 461(f) "personal information" means recorded information about an identifiable individual, including
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> (i) the individual's name, address or telephone number,
>
> (ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,
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> (iii) the individual's age, sex, sexual orientation, marital status or family status,
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> (iv) an identifying number, symbol or other particular assigned to the individual,
>
> (v) the individual's fingerprints, blood type or inheritable characteristics,
>
> (vi) information about the individual's health-care history, including a physical or mental disability,
>
> (vii) information about the individual's educational, financial, criminal or employment history,
>
> (viii) anyone else's opinions about the individual, and
>
> (ix) the individual's personal views or opinions, except if they are about someone else;

[62] Section 480 of the *MGA* is mandatory and governs both disclosure of, and refusal to disclose, personal information. The responsible officer is obligated to withhold the information if the provisions are met. The section reads:

> Personal information
>
> 480 (1) The responsible officer shall refuse to disclose personal information to an applicant, if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the responsible officer shall consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the municipality to public scrutiny;

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;

(c) the personal information is relevant to a fair determination of the applicant's rights;

(d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;

(e) the third party will be exposed unfairly to financial or other harm;

(f) the personal information has been supplied in confidence;

(g) the personal information is likely to be inaccurate or unreliable; and

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

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

(a) relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation;

(b) was compiled, and is identifiable as, part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(c) relates to eligibility for income assistance or social service benefits or to the determination of benefit levels;

(d) relates to employment or educational history;

(e) was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations;

(h) indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations; or

(i) consists of the third party's name together with the third party's address or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure;

(b) there are compelling circumstances affecting anyone's health or safety;

(c) an enactment authorizes the disclosure;

(d) the disclosure is for a research or statistical purpose and is in accordance with this Part;

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a municipality;

(f) the disclosure reveals the amount of taxes or other debts due by the third party to the municipality;

(g) the disclosure reveals financial and other similar details of a contract to supply goods or services to a municipality;

(h) the information is about expenses incurred by the third party while travelling at the expense of a municipality;

(i) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a municipality, not including personal information supplied in support of the request for the benefit; or

(j) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a municipality, not including personal information that is supplied in support of the request for the benefit or that relates to eligibility for or the level of income assistance or social service benefits.

[63] With respect to the disclosure of personal information, section 498(2) places the burden on the applicant and reads as follows:

(2) Where the record or part that the applicant is refused access to contains personal information about a third party, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

[64] *Re House*, [2000] N.S.J. No. 473 is the leading authority in Nova Scotia with respect to the disclosure of third-party personal information. House was a private investigator who provided the Registry of Motor Vehicles with a vehicle plate number and requested the name and address of the registered owner, pursuant to the *FOIPOP Act*. The request for access to the information was denied on the ground that disclosure would constitute an unreasonable invasion of personal

privacy. The OIPC agreed with the administrator's decision. House appealed that decision to the Supreme Court.

[65] Justice Moir laid out the test with respect to whether the disclosure of personal information would be an unreasonable invasion of a third party's privacy at para. 6 (s. 20 of the *FOIPOP Act* is identical to s. 480 of the *MGA*):

> …
>
> With respect, I do not read *Dickie* or the provisions I just summarized as authorizing this approach. The commentary at pages 338, 339 and 341 of *Dickie* concerned the issues in that case and Cromwell, J.A. was concerned to state the steps to be followed "in this case" (p. 338 and p. 341). While the approach he followed is helpful in formulating parts of the approach I should follow, I do not believe his approach contained anything supporting Mr. Endres' second question. Subsection 20(4) does not create rebuttable presumptions. As I read it, if any of the nine circumstances specified in s. 20(4) applies then there is no unreasonable invasion of privacy, and the information would have to be produced. I propose to consider this appeal in the following way:
>
> (1) Is the requested information "personal information" within s. 3(1)(i)? If not, that is the end. Otherwise, I must go on.
>
> (2) Are any of the conditions of s. 20(4) satisfied? If so, that is the end. Otherwise ...
>
> (3) Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s. 20(3)?
>
> (4) In light of any s. 20(3) presumption, and in light of the burden upon the appellant 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?

[66] Moir, J. further held that a reasonable expectation of privacy was a relevant factor under section 20(2) of the *FOIPOP Act* (s. 480(2) of the *MGA*). He stated at paragraph 21:

> **21** I will record that the final subject is the one which carries the most weight in my determination of this appeal. Reasonable expectation of privacy was recognized as a relevant factor under s. 20(2) on the facts of Dickey (see p. 351), and it is a prominent factor arising in the present case. Especially in the urban parts of this province, but also in the rural parts, we have an expectation that we can move about with a degree of anonymity. Although there may be a reasonable expectation of privacy in the sheer fact that one owns a particular vehicle, the expectation of privacy that is of greater concern is that of the users of the vehicle.

> Where, as in this case, the subject of the inquiry is an individual, there is a high probability that release of the owners name and address will identify the user or the users, they being the owner or a member of the owners family. Release by the Registrar of one's name and address is not so much objectionable because people may discover that we own such and such a vehicle, as it is objectionable because people may discover where we have been or where we live. I think most people in this province value their privacy to the extent that they would be most offended by a law which required us to identify ourselves to strangers without knowing the purpose of the stranger's inquiry. We suffer the indignity of putting identifying plates on our vehicles because we know the indignity is outweighed by our interests in law enforcement and highway safety, and because we know our ownership of a vehicle will be disclosed to persons involved in law enforcement and highway safety, but not to others. I think it well known in Nova Scotia that the Registrar of Motor Vehicles does not automatically give out the name and address that corresponds to a motor vehicle plate number, and that, if we do not fall under suspicion of the police, the connection between those two pieces of information will likely be safeguarded. In this way, I would distinguish us from the citizens of those provinces where the information is readily provided. In those places the citizen may know that the government has determined to release such information, and may not share the privacy we have come to expect. Here, nothing has happened to dislodge that expectation. Our expectation is as reasonable as our expectation that we do not have to identify ourselves to the general public. The clients of private investigators are members of the general public, and automatic access to the name and address corresponding to a plate number would mean public display of our names and addresses.

[67] Volume 2, Tab 10 of the Appeal Book contains an unredacted copy of all the records that were provided to Raymond in which portions of the records were redacted. Most of the redacted information is initials, signatures, names, addresses, telephone numbers and email addresses. Additional information was redacted because it would identify the age, sex, or marital status of an individual. General third-party personal information that could identify the individual was also redacted. I examined these records pursuant to section 495 of the *MGA* and determined that HRM’s Access & Privacy Officer was authorized to refuse access to the records pursuant to section 480.

[68] I am satisfied that the redacted information is "personal information" within section 461(f) of the *MGA* and none of the conditions in section 480(4) are satisfied. In balancing all the relevant circumstances, including those listed in section 480(2), I find that HRM’s Access and Privacy Officer was authorized to refuse to disclose personal information because the disclosure would constitute an

unreasonable invasion of a third party's personal privacy pursuant to section 480(3).

[69] Raymond suggests that HRM asserted personal privacy for individuals who had not been consulted. The requirement to seek the consent of third parties to the release of information only applies with respect to requests that are made specifically for that third party's personal information. In this case, after reviewing the documents, the Court is satisfied that the third-party information that has remained redacted was not the subject matter of Raymond's request. It is only incidental to Raymond's request for access.

[70] HRM relies on the decision of Dulcie McCallum, Review Officer, in *Report F1-07-27; Nova Scotia (Children's Aid Society Inverness – Richmond)*, [2007] NSFIPPAR No. 6, for when it is required to give notice to third parties regarding an access request. The Society ultimately refused access to the record, citing section 20 of the *FOIPOP Act* (section 480 of the *MGA*). The Review Officer discussed when a third party needs to be contacted, at paragraph 32:

> 32 The Society appears to have misunderstood or mischaracterized what the Applicant was seeking. The Applicant has made it clear that this access request is for information about the child welfare report and his/her personal information in that report, and not information about any Third Party. Because the Applicant's request for access is for personal information, s. 22 of the *Act* has no applicability. The Third Parties did not need to be contacted or given notice pursuant to s. 22 unless the Society had decided to release the whole Record - the Applicant's personal information and the information of the Third Parties. In the case of the latter, pursuant to s. 20, it is mandatory for the public body to give notice to the Third Parties. This access request, however, was about personal information about the Applicant so no notice was necessary. This confusion may have arisen in part because of the way in which the Form 1 provided to the Applicant by the Society did not have a place for an Applicant to indicate that the request was for personal information.

[71] In request AR 14-298, Raymond was not seeking personal information with respect to a third party; therefore, no third party was required to be contacted. Pursuant to section 481(1) of the *MGA* Raymond sought information that was considered confidential information of a third party. This provision deals with confidential business information. With respect to that information, a notice was provided to the third parties in accordance with section 482 of the *MGA* and that information was subsequently disclosed to Raymond.

[72] To conclude, I find that HRM's Access and Privacy Officer was required to refuse access to a record or parts thereof because disclosure of the information would have been an unreasonable invasion of a third party's personal privacy pursuant to section 480 of the *MGA*.

(d) Was HRM authorized to refuse access to a record and parts thereof on the basis that the records were non-responsive to the request made?

[73] The Appeal Book contains records that are non-responsive to request AR 14-298, in their entirety and additional portions of records that have been redacted on the basis that they are non-responsive. I have reviewed the sealed material pursuant to section 495 of the *MGA* and confirm they were properly withheld and redacted on the basis of being non-responsive.

[74] HRM argued that, when an application for access is received, it is sent to multiple business units. Therefore, it is not uncommon to receive multiple documents and for the business units to err on the side of caution and send documents which are not responsive to the request. These non-responsive documents were correctly withheld.

[75] Raymond argued that "non-responsive" is unacceptable as a reason for refusing disclosure of a document and relies on the decision of the OIPC in *Review Report 16-10; Nova Scotia (Department of Business)*, [2016] NSFIPPAR No. 11.

[76] In *Review Report 16-10*, the Review Officer held that FOIPOP provisions do not permit severing or removing of information within a responsive record on the basis that public bodies are of the view that information is either outside the scope of the request or non-responsive. I disagree with the OIPC finding. It is illogical to say that non-responsive information could be withheld if it was in a completely separate document but can be disclosed if contained in a document that also contains responsive information. In support of my position I rely on the decision of Justice Scanlan (as he then was) in *Stevens v. Nova Scotia (Department of Labour and Workforce Development)*, 2012 NSSC 367. Justice Scanlan stated at paragraph 13:

> 13 There are a couple of issues that I wish to address further. It appears the initial review officer may have taken the position that the Respondent could not withhold documents on the basis that they were irrelevant. The Respondent referred to those materials as "not applicable". According to the Respondent the

> Review Officer suggested there was no recognized exemption under FOIPOP legislation for “non applicable" materials. Any such ruling would defy common sense. What possible relevance would it be to the Appellant if someone commented in a document that their grandmother had a wart removed from her nose. (Not that any such comment was made in the redacted materials). With e-mail communications the author on a number of occasions mixed personal or non relevant communications with information which was properly disclosed. The personal, non relevant, information is not something to which the Appellant is entitled to access. There are some things in records, such as e-mail, which are clearly irrelevant and should not be disclosed. The types of documents that fall in the "not applicable" category include, for example notes from unrelated investigations or proceedings. The Appellant has no right to see those types of documents just because they are in an officer's notebook. <u>As I have noted, to suggest non relevant documents are to be produced on a FOIPOP application defies common sense and the scope of the legislation.</u> [emphasis added]

[77] I find that HRM’s Access and Privacy Officer was authorized to refuse access to a record and parts thereof on the basis that the records were non-responsive to the request made.

(e) *Was HRM authorized to refuse access to records on the basis that the records were duplicates of records already provided to Raymond pursuant to AR 14-298?*

[78] The Access and Privacy Office considers a duplicate record to be a record that contains duplicate content of another record. The Access and Privacy Office does not release duplicate records: see Affidavit of Nancy Dempsey, October 27, 2017, at paragraph 22.

[79] In *Review Report 18-02; Department of Community Services (Re)*, [2018] NSFIPPAR No. 2 the OIPC addressed duplicates at paragraph 76:

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

[80] Raymond raised the issue of notes in the margin of various documents. HRM responded that if margin notes existed they would have been disclosed, subject to exemptions under the *MGA*, because it is not truly a duplicate. If it was

not disclosed, a reason would have been provided to Raymond. True duplicates are not disclosed. I agree with the position of HRM.

[81] Raymond received 536 pages of records once all duplicate records, non-responsive records and records withheld pursuant to Part XX of the *MGA* were removed: see Affidavit of Nancy Dempsey, October 27, 2017, at paragraph 23.

[82] I agree with HRM's position that providing Raymond with duplicate records, with all redactions made again pursuant to Part XX of the *MGA*, would serve no purpose. Providing duplicate records would result in unnecessary increased costs to the Applicant and an unnecessary use of additional HRM resources.

[83] A copy of the duplicates was contained in Volume 3 of the Appeal Book. I have reviewed the documents pursuant to section 495 of the *MGA* and find they were appropriately withheld as duplicates and that HRM's Access and Privacy Officer was authorized to refuse access to the records on the basis that the records were duplicates of records already provided to Raymond pursuant to AR 14-298.

Conclusion

[84] I find that HRM's Access and Privacy Office has conducted an adequate search for records that were responsive to Raymond's request in AR 14-298 in accordance with Part XX of the *MGA*. HRM's delegated Responsible Officer was authorized to refuse to provide access to the records, or parts thereof, in accordance with the relevant provisions of Part XX of the *MGA*.

[85] The appeal is dismissed. HRM advised that it would no longer be seeking costs, if successful, and I therefore award no costs.

Bodurtha, J.