



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

**REVIEW REPORT 16-11**

**October 20, 2016**

**Executive Council Office**

**Summary:** An applicant sought access to details of a loan offer between the Province of Nova Scotia and Irving Shipbuilding. The Executive Council Office withheld information claiming that certain portions of the records were “not responsive” to the access request. The Executive Council Office claimed that disclosure of certain other information would variously harm the government’s economic interests, harm the business interests of a third party business, and unreasonably invade the personal privacy of third party individuals. The Executive Council Office’s representations relied on those provided by the Department of Business and considered in Review Report 16-10.

The Commissioner finds that none of the reasons for withholding information were established, and recommends full disclosure.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, [SNS 1993, c 5](#), ss. 13, 17, 20, 21, 45.

**Authorities Considered:** Nova Scotia: Review Report 16-10.

**Other Sources Considered:** Paul McLeod, “Irving payroll leans on taxpayers”, *The Chronicle Herald*, March 19, 2013: <http://thechronicleherald.ca/novascotia/1069112-irving-payroll-leans-on-taxpayers>;

**INTRODUCTION:**

[1] On March 30, 2012 former Premier Darrell Dexter announced that the Nova Scotia Government had made a decision to enter into a loan agreement with Irving Shipbuilding Inc. (Irving Shipbuilding) for up to \$304 million in loans. There was significant public discussion at the time regarding the loan agreement. This is the second of two review reports in relation to two separate requests for copies of the loan agreement although the requests were worded differently and sent to two different public bodies.

[2] Part of the loan approval process included the publication of an Order in Council (OIC) under the *Nova Scotia Jobs Fund Act*. OIC 2012-107 authorized the transfer of \$304 million to

the Nova Scotia Jobs Fund and authorized investment by way of loan to Irving Shipbuilding on the terms and conditions generally as outlined in Schedule A referenced in the OIC. In this case, the applicant requested a copy of Schedule A of the OIC 2012-107.

[3] On July 23, 2012 the Executive Council Office responded to the applicant advising him that it was providing partial access to the requested records. The Executive Council Office applied a number of exemptions to withhold portions of the requested information. The applicant then filed a request for review with this office on September 10, 2012.

[4] The responsibility for processing of this access request, including participating in the review proceeding, was given to the Information Access and Privacy Office (IAO) within the Department of Internal Services. The IAO provides centralized access and privacy services for a number of government departments including the Executive Council Office. For the purposes of the *Freedom of Information and Protection of Privacy Act (FOIPOP)*, it is the head of the public body that has custody or control of the records that is responsible for any decision made under *FOIPOP* with respect to the records. In this case, it is the Premier who is the head of the public body.

#### **ISSUES:**

[5] There were five issues listed in the Notice of Formal Review:

1. Is the Executive Council Office authorized to determine that portions of the responsive records are out of scope of the request and to withhold the portions that it deems non-responsive?
2. Is the Executive Council Office authorized to refuse access to information under s. 13 of *FOIPOP* because it would reveal the substance of deliberations of the Executive Council or any of its committees?
3. Is the Executive Council Office authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure could reasonably be expected to harm the economic interests of the public body?
4. Is the Executive Council Office 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?
5. Is the Executive Council Office 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?

[6] As noted below, the issues were reduced to the four following discussions during the course of the conduct of this review.

#### **DISCUSSION:**

##### **Background**

[7] The applicant in this case filed an access to information request in July 2012. His request is straightforward. He seeks a copy of Schedule A referred to in OIC 2012-107.

[8] As a result, the Executive Council Office produced twenty three pages of responsive records consisting of three documents:

1. A letter dated July 8, 2011.
2. A letter dated January 10, 2012.
3. A letter dated March 22, 2012.

[9] The disclosed portions of these documents indicate three things: the July 8, 2011 letter is titled, "Letter of Offer – Irving Shipbuilding Inc." and includes three appendices, the January 10, 2012 letter states that it is an amendment to the acceptance date contained in the July 8, 2012 letter, and the March 22, 2012 letter states that it is an amendment to the letter of offer.

[10] During preparation for this formal review, the Executive Council Office confirmed that Schedule A to OIC 2012-107 consisted of "the letter of offer plus three appendices."<sup>1</sup>

[11] The version of the documents originally provided to the applicant in response to his access to information request included severing of names, various terms and conditions and the bulk of the financial analysis of requested assistance set out in Appendix C to the July 8, 2011 letter. The Executive Council Office cited cabinet confidence (s. 13), harm to the economic interests of the public body (s. 17), unreasonable invasion of a third party's personal privacy (s. 20), harm to the business interests of a third party (s. 21), and "out of scope" as the basis for withholding the information.

[12] In the course of reviewing the material for this review it came to my attention that a number of the provisions withheld from the responsive records were publicly disclosed in a newspaper article that appeared on March 19, 2013. An investigator from this office spoke with the newspaper reporter who advised that shortly before he wrote the article he had made repeated requests to the government for a complete copy of the loan agreement. He believed that in response to a number of earlier newspaper articles on the topic and because of his repeated contacts with the government, a Vice President of Irving Shipbuilding provided him with a complete copy of the letter of offer. He no longer had a copy of the record provided by Irving Shipbuilding but it was on the basis of that document that he was able to disclose the details that appeared in his article.<sup>2</sup>

[13] I provided the third party and the Executive Council Office with a copy of the newspaper article and the information provided by the reporter and asked for any further comment. As a result, on August 26, 2016, the Executive Council Office provided a further release of information to the applicant.<sup>3</sup> The Executive Council Office disclosed many of the withheld terms and conditions and no longer relies on s. 13. Further, the Executive Council Office now

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<sup>1</sup> Email dated June 29, 2016 from the Corporate Information Access and Privacy Administrator for the Executive Council office to the OIPC.

<sup>2</sup> Paul McLeod, "Irving payroll leans on taxpayers", March 19, 2013 Chronicle Herald <http://thechronicleherald.ca/novascotia/1069112-irving-payroll-leans-on-taxpayers>.

<sup>3</sup> A similar release occurred in response to the second related request discussed in NS Review Report 16-10.

specifies s. 17(1)(b) as the relevant s. 17 provision relied upon to withhold a portion of the record.

[14] The responsive records provided in relation to a second access request from a different applicant were identical to documents #1 and #2 listed above. Review Report 16-10 issued at the same time as this report considers these two documents in relation to the decision of the Department of Business. The severing of the responsive records in this current request was identical to severing done in response to the later request to the Department Business.

[15] The Executive Council Office provided no submissions in support of the application of exemptions to the records in this case. In the course of our informal resolution process it became clear that the Department of Business was considered to be the Department responsible for the records and so the Executive Council Office was relying on that Department's expertise to support the decisions it made to withhold portions of the requested records. As a result, I first reviewed the only submissions I have which are in relation to the Department of Business request discussed in Review Report 16-10. Except for two additional pages provided in response to this request, the responsive records and exemptions applied are identical to the records discussed in Review Report 16-10. I will discuss the two additional pages responsive to this request in the s. 20 discussion below.

### **Burden of Proof**

[16] With respect to the application of s. 17 and "not responsive", it is the Executive Council Office that bears the burden of proof. Where the information being withheld is the personal information of people other than the applicant (s. 20), the applicant bears the burden of proof. Where the information being withheld is identified as confidential third party business information (s. 21) it is the third party that bears the burden of proof.

45 (1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.

(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.

(3) 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,

(a) in the case of personal information, 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; and

(b) in any other case, the burden is on the third party to prove that the applicant has no right of access to the record or part.

**1. Is the Executive Council Office authorized to determine that portions of the responsive records are out of scope of the request and to withhold the portions that it deems not responsive?**

[17] In Review Report 16-10 I discuss in detail the use of “out of scope” and “not responsive” as a basis for exempting information under *FOIPOP*. The applicant in this case pointed out that his request was for a copy of the OIC. How then can portions of the OIC be out of scope when he asked for the entire document? I agree.

[18] For the reasons set out in Review Report 16-10, I conclude that the Executive Council Office was not authorized to withhold any information from the records as “out of scope” or “not responsive”.

**2. Is the Executive Council Office authorized to refuse access to information under s. 17(1)(b) of *FOIPOP* because disclosure could reasonably be expected to harm the economic interests of the public body?**

[19] In its original response to the applicant, the Executive Council Office simply cited s. 17(1) as authority for exempting information from disclosure. In the recent updated release to the applicant, the Executive Council Office cited s. 17(1)(b) as the basis for withholding a portion of the record and so I have only considered the applicability of s. 17(1)(b):

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

(b) financial, commercial, scientific or technical information that belongs to a public body or to the Government of Nova Scotia and that has, or is reasonably likely to have, monetary value;

[20] Section 17(1)(b) has been applied to exactly the same information withheld by the Department of Business in response to a similar access request. Therefore, for the reasons set out in Review Report 16-10, I find that the Executive Council Office has failed to establish that the withheld information has “monetary value” within the meaning of s. 17(1)(b).

**3. Is the Executive Council Office 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?**

[21] Consistent with the approach taken by the Department of Business, the Executive Council Office withheld the name and position of an individual employee of a third party and two signatures of third parties claiming that the disclosure of this information would be an unreasonable invasion of a third party’s personal privacy within the meaning of s. 20 of *FOIPOP*. In addition, the Executive Council Office also withheld the name and position of an

individual employee of a third party on the additional two page document found responsive to this request.

[22] In Review Report 16-10 I examined the application of s. 20 to business contact information and specifically to names and positions of employees of third parties. For the reasons set out in Review Report 16-10, I find that the disclosure of the information withheld under s. 20 in this case would not be an unreasonable invasion of third party's personal privacy.

**4. Is the Executive Council Office 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?**

[23] In its original response to the applicant, the Executive Council Office withheld a variety of information citing s. 21 as authority for the exemption. However, following its recent review and disclosure, only one type of information continues to be exempted under s. 21: the breakdown of the value of infrastructure upgrades listed in Appendix B to the January 8, 2011 letter. The recent disclosure to this applicant in August 2016 included a disclosure of the list of items in the combat program but continued to withhold the value of the thirteen items listed. This is exactly the same approach taken by the Department of Business. Therefore, for the reasons set out in Review Report 16-10, I find the withheld information qualifies as financial information of a third party within the meaning of s. 21(1)(a) of FOIPOP. I further find that the information withheld in the Letter of Offer was not supplied in confidence and so does not meet the test in s. 21(1)(b). I also find that the evidence fails to establish a reasonable expectation of any of the harms listed in s. 21(1)(c).

**FINDINGS & RECOMMENDATIONS:**

[24] I find that:

1. The Executive Council Office is not authorized to withhold any information in the Letter of Offer or amendment letter as "out of scope".
2. The Executive Council Office failed to establish that the withheld information has "monetary value" within the meaning of s. 17(1)(b).
3. The disclosure of information withheld under s. 20 in this case would not be an unreasonable invasion of a third party's personal privacy.
4. The evidence fails to establish that the information withheld under s. 21 was supplied in confidence as required under s. 21(1)(b) and further, the evidence fails to establish a reasonable expectation of any of the harms listed in s. 21(1)(c).

[25] I recommend the full disclosure of the remaining withheld information.

October 20, 2016

A handwritten signature in black ink, appearing to be 'Catherine Tully', written over a faint, circular stamp or watermark.

Catherine Tully  
Information and Privacy Commissioner for Nova Scotia

