



# Are You FOIPOP Ready?

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# Agenda

1. Latest privacy/FOIPOP trends
2. General purposes/intent of FOIPOP
3. Application & access requests
4. Personal & confidential information
5. Good FOIPOP hygiene
6. Disclosure & exemptions



# Exciting Times: Trends in FOIPOP/Privacy Issues

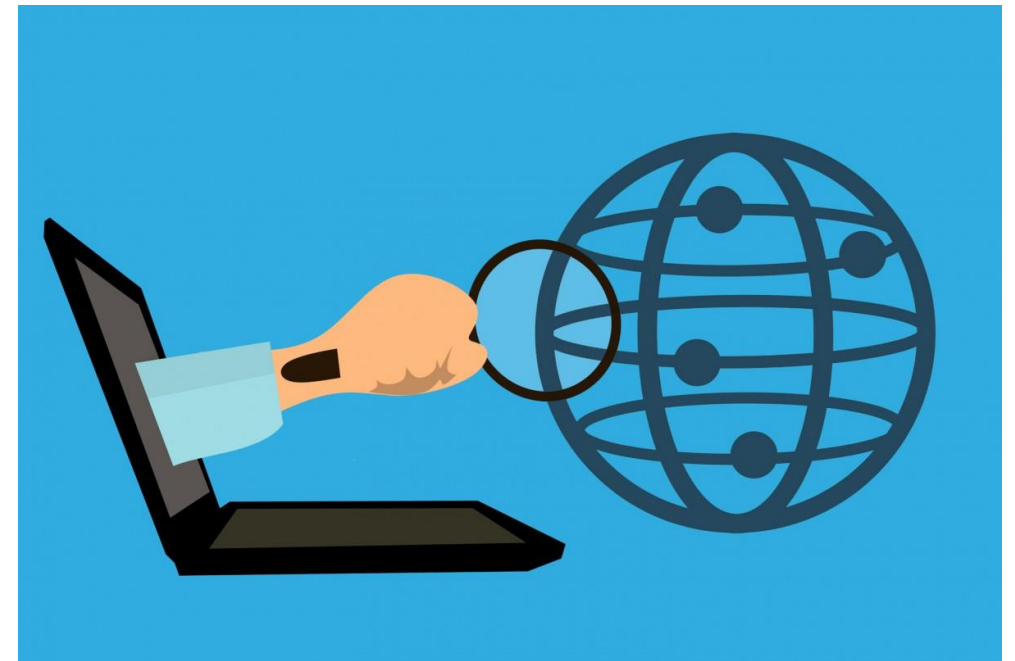
- Expect changes to FOIPOP/Part XX
- New Privacy Commissioner – Tricia Ralph
- New Role – Executive Director
- Premier of NS has hinted at giving Privacy Commissioner the power to issue orders and possibly fines.
- NSHA found to violate FOIPOP



# Why Does FOIPOP Matter (particularly in NS)?

- “...the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada.”

- *O'Connor v. Nova Scotia*, 2001 NSCA 132





# General Purpose and Application of Part XX

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“Government, for example, collects information from third parties ... which may include trade secrets and other confidential commercial matters. Such information may be valuable to competitors and disclosing it may cause financial or other harm to the third party who had to provide it. Routine disclosure of such information might even ultimately discourage research and innovation... **There must, therefore, be a balance between granting access to information and protecting these other interests in relation to some types of third party information.**”

***Merck Frosst Ltd. v. Canada (Health), 2012 SCC 3***

## At its Core...

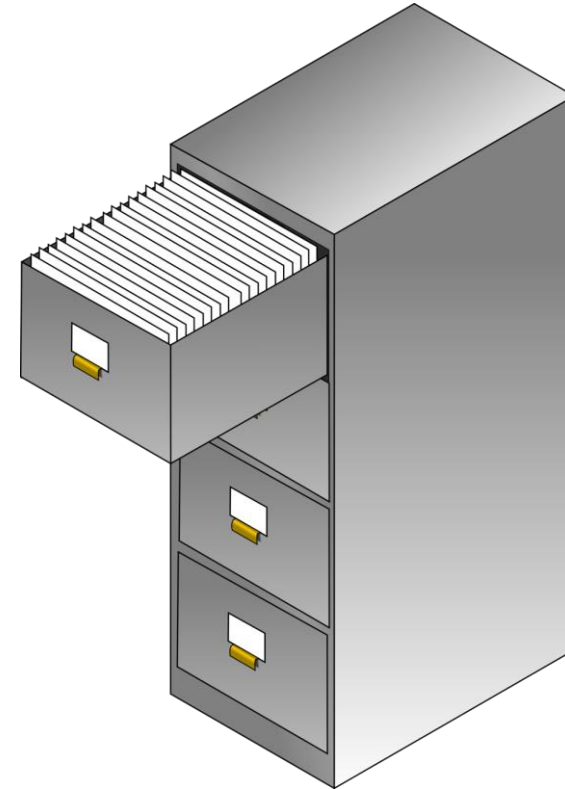
- Part XX has two core purposes (s. 462 of MGA):
  1. A commitment to ensure that municipalities **are fully accountable to the public**; and
  2. To ensure the disclosure of **all** municipal information with necessary exemptions, that are limited and specific.
- “A purposive analysis of FOIPOP requires disclosure unless a limited and specific exemption found in the Act applies to withhold the information” – Commissioner Tully in *Department of Business (Re)*, 2016 NSOIPC 10

## At its Core...

- Access & privacy legislation does not create unfettered access to all documents, however

# How does Part XX Apply?

- Applies to all municipalities, including service commissions or municipal bodies
- Part XX applies to all **records** in the **custody or under the control of a municipality**[s. 463(1)]



# What are Records?

- Under s. 461(h) of the Act, “**records**” are defined as including:
  - books
  - documents
  - maps
  - drawings
  - photographs
- vouchers
- Papers
- And any other thing on which information is recorded...

# What are Records?

Q: Please confirm the municipality did not do “X”...

A: We cannot confirm a document does or does not exist. We have conducted a thorough search and provided the results pursuant to Part XX

- If an applicant is dissatisfied with the results of their request, they must provide something more than a mere assertion that a document should exist. – Commissioner Tully in *Nova Scotia (Community Services) (Re)*, 2014 CanLII 71241

# Is it in Custody or Control?

Is it in custody or control? *Denike v. Dalhousie University*, 2018 NSSC 111

- You may find many things on your server/network that are not in your custody or control.
- There may also be many things that are not on your server/network that are in your custody or control
- **Key question:** Does the record relate to municipal, departmental, or operational matters?

# Considering the Custody or Control Factors

- Was the record created by an officer or employee of the institution?
- What use did the creator intend to make of the records?
- Does the institution have possession of the record?
- If not, it is held by an officer or employee for the purposes of their duties/obligations?
- Does the institution have a right to possession of the record?
- Does the content relate to its mandate or functions?
- Do they have the authority to regulate the record's use and disposition?
- To what extent was it relied upon?
- How closely is the record integrated with other records?
- Does the public body have the authority to dispose of the record?

# General Request for Access under Part XX

- Requests must be in writing, give sufficient information to identify the record(s), and be accompanied by the required fees, if any (see s. 466)
- Municipality has to respond in writing within 30 days (there is some ability to extend this deadline) (see s. 467(2))
- If access to the record is refused, reasons must be given (see s. 467(2)(ii))
- If a written response is not given, notice is deemed to have been given of a decision to refuse access (see s. 467(3))



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# Fees

\$5 Application fee + “the actual costs to the public body of providing the following services”:

- a) locating, retrieving and producing the record (\$15 per 30 mins);
- b) preparing the record for disclosure;
- c) shipping and handling the record;
- d) providing a copy of the record.

(s. 6(2) of Freedom of Information and Protection of Privacy Regulations,  
NS Reg 105/94

# Requests Involving Third Parties

- Section 482 requires that notice be given to a third party if there is a request for information that must not be disclosed per s. 480 (personal information) or s. 481 (confidential information)
- Third party has 14 days to consent or explain why the information shouldn't be disclosed (see s. 482(c))
- Municipality cannot make a decision before earlier of: (1) 15 days after notice to third party or (2) third party response is received (see s. 482(3))
- After notice of public body decision, third party has 20 days to ask for a review (see s. 482(5))



# Best Practices for 3<sup>rd</sup> Party Notices

- Recommended eight-step process to be followed (see Privacy Commissioner Review Report 18-10, *Waterfront Development Corporation Limited*)?
  1. Review the records
  2. Time extension
  3. First letter to 3<sup>rd</sup> party
  4. First letter to applicant
  5. Make a decision
  6. Second letter to 3<sup>rd</sup> party
  7. Second letter to applicant
  8. Send Access to Information response to applicant



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# Overview of Exemptions

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# Exemptions from Disclosure

- There are a variety of records that can be exempt from disclosure (see ss. 472-481 of MGA)
- Exemptions under Part XX can be split into two categories:
  1. Documents which the responsible officer **may** refuse to disclose; and
  2. Documents which the responsible officer **must** refuse to disclose.



# Information which May Not be Disclosed (ss. 12-19)

- Intergovernmental affairs (s. 472)
- Council/commissioner deliberations held in private (s. 473)
- Advice or draft resolutions developed by or for council/commissioners (s. 474)
- Certain law enforcement matters (s. 475)
- Solicitor-client privilege (s. 476)
- Financial or economic interests of municipality (s. 477)
- Health and safety of others if harm could result from disclosure (s. 478)
- Conservation (s. 479)



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# Information which Shall Not be Disclosed

- **Personal information** - if the disclosure would be an unreasonable invasion of a third party's privacy (see s. 480)
- **Confidential Information** - if disclosure of the requested information could reasonably be expected to cause one or more of the harms enumerated in the Act (see s. 481)





# Exemptions: Personal Information

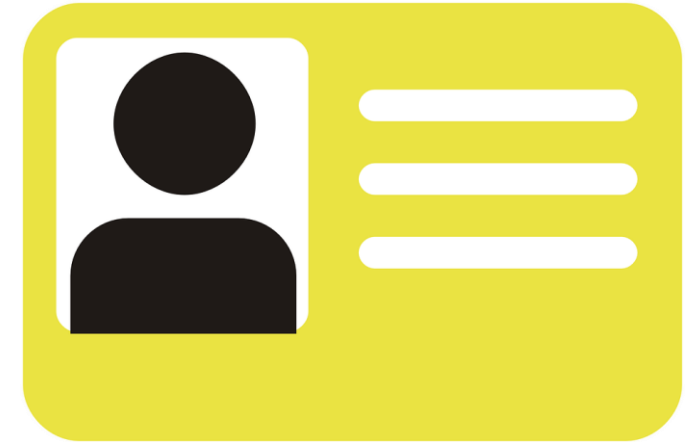
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# Let's Start with "Personal Information" (s. 480)

**Recorded information about an identifiable individual, including:**

- name, address, or telephone number
- race, national or ethnic origin, colour, or religious or political beliefs
- age, sex, sexual orientation, marital or family status
- fingerprints, blood type or inheritable characteristics
- information about health care history
- information about educational, financial, criminal or employment history
- anyone else's opinion about the individual
- personal views or opinions, except about someone else



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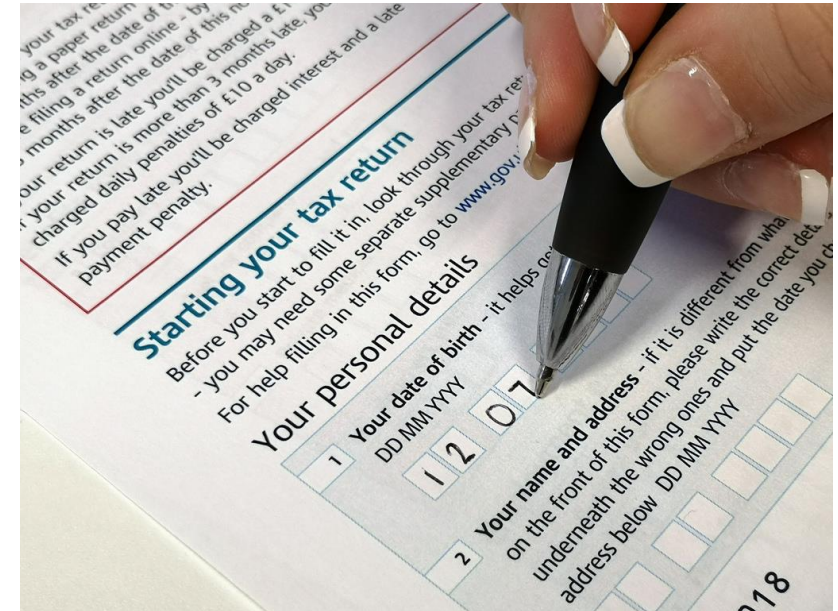
# Test to Exempt Personal Information (s. 480 Analysis)

1) Is the requested information “personal information”

- If no → end of analysis and information should be disclosed
- If yes → to #2

2) Are any of the conditions of s. 480(4) satisfied? (i.e., conditions are those that do not constitute an unreasonable invasion of privacy – see list on next slide)

- If yes → end of analysis and information should be disclosed
- If no → to #3



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# What is not an Unreasonable Invasion of Privacy?

- Third party has consented to or requested the disclosure (in writing)
- Compelling circumstances affecting anyone's health or safety
- Details of a licence, permit, or other discretionary benefit granted to a third party
- Disclosure reveals financial and other details of a contract to supply goods or services to a municipality
- Information is about expenses incurred by the third party while travelling at the expense of a municipality

## Test to Exempt Personal Information (s. 480 Analysis cont.)

3) Would the disclosure of the personal information be a presumed unreasonable invasion of privacy per s. 480(3) (see list on next slide)?

4) Does the balancing of all relevant circumstances (in s. 480(2)) lead to a conclusion that disclosure would constitute an unreasonable invasion of privacy?



# What is a Presumed Unreasonable Invasion of Privacy? (Step 3)

- Relates to:
  - medical, dental, psychiatric, psychological or other health care history, diagnosis, condition, etc.
  - eligibility for income assistance or other benefits
  - employment or educational history
- Describes the 3<sup>rd</sup> party's finances, income, assets, liabilities, etc.
- Consists of personal recommendations/evaluations, character references
- Indicates the 3<sup>rd</sup> party's racial or ethnic origin, sexual orientation or religious/political beliefs or affiliations
- Identifiable as part of an investigation into violation of law



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# If Unreasonable Invasion, is it Outweighed by Other Factors? (Step 4 balancing)

- Disclosure is:
  - desirable for the purpose of subjecting the activities of the municipality to public scrutiny
  - likely to promote public health and safety or to promote the protection of the environment
  - relevant to a fair determination of the applicant's rights
  - will assist in researching the claims, disputes or grievances of aboriginal people



# ... Or is Presumption of Invasion of Privacy Further Bolstered?

- Disclosure will unfairly expose third party to financial or other harm
- Personal information was supplied in confidence
- Personal information is likely to be inaccurate
- Disclosure will unfairly damage reputation of person referred to in the record



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# Exemptions: Confidential Information

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# Test to Exempt Confidential Information (s. 481 Analysis)

- 1) Does the withheld information constitute trade secrets, commercial, financial, labour relations, scientific or technical information of the third party?
- 2) Was the information supplied implicitly or explicitly in confidence?
- 3) Would disclosure reasonably be expected to cause one or more of the harms listed in s. 481(1)(c) (see list of harms on next slide)?

# What is Information Shared “in Confidence”?

- **Nature of the information:** Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential?
- **Purpose of the information:** Was the record prepared for a purpose that would not be expected to require disclosure in the ordinary course
- **Explicit statements:** Was the record in question explicitly stated to be provided in confidence?
- **Agreement/Understanding between the parties:** Was there an agreement with respect to confidentiality?

Can't contract out of Part XX or restrict Part XX through contract

# What is a Reasonable Expectation of Harm?

- **Disclosure could reasonably be expected to:**
  - Harm significantly the competitive position or interfere significantly with the negotiating position of the third party
  - Result in similar information no longer being supplied to the public body
  - Result in undue financial loss or gain to any person



# Reasonable Expectation of Harm (cont.)

- Middle ground between that which is probable and that which is merely possible
  - **Need evidence well beyond a mere possibility of harm**
- Assertions or speculations of harm will rarely be sufficient
- Evidence of previous harm from similar disclosures or a highly competitive market may support argument
- Empirical, financial, or statistical evidence is generally required;
- Consider confidentiality agreements or NDAs to highlight how all parties agree to the sensitivity of the information

**Connection between disclosure of the  
type of information at issue and the harm**

## ***Houston v. Nova Scotia (Minister of Transportation and Infrastructure Renewal), 2021 NSSC 23***

- BFL and Province argued disclosure of the management fee would undermine BFL's competitive position moving forward, as competitors and its suppliers would learn of its revenue and negotiate based on that information.
- Court rejected this argument, noting the BFL testified it approached each negotiation differently depending on different factors. Impact to BFL's competitive position was speculative. Court said there must be a "direct link between disclosure and the apprehended harm".



# Tips & Recommendations for Good Records Management

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# Records Management: Good FOIPOP Hygiene

- Before drafting an e-mail, consider whether it is the most appropriate means of communication in the particular case
  - Would a face-to-face meeting or phone call be more appropriate?
  - Pretend you are writing on company letterhead
  - Remember anyone may see what you wrote
- Be careful in your expressions and terms - embarrassment is not a permitted exception



# Records Management: Think Before Sending

- Consider the sensitivity of the message:
  - If the message contains confidential and/or privileged information – highlight in the subject line and body
  - Protect confidential information by using encrypted attachments
- Do not resend attachments with a reply unless necessary
- Consider one topic per message
- Regularly file or delete records, paper and electronic (sent and received), in accordance with document retention policy
- Trusty “black book” for all notes?



# Exemptions: Council Deliberations

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# Council/commissioner deliberations held in private

s. 473

- *Raymond v. Nova Scotia (Freedom of Information and Privacy Commissioner)*, 2017 NSSC 322
- Applicant sought records of discussions *in camera*, then asked for substance of discussions that took place *in camera*.
  - “written confirmation or denial that I (Michelle Raymond)...or my home...Boscobel Rd, or access to my home was/were discussed in-camera ...”
- Both requests properly declined

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# Exemptions: Advice/Draft Resolutions

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# Advice, Recommendations, Draft Resolutions, Policies, By-laws...

## s. 474

- Exemption does not capture “background information” – factual material provided to inform or aid decision-making
  - “background information” is not interpretations of factual material, or reactions or advice in respect of facts
- “[...] advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.” - *O'Connor v. Nova Scotia*, 2001 NSSC 6

# Advice, Recommendations or Draft Resolutions, Policies, By-laws...

## s. 474

- “Local governments need to be able to receive candid and comprehensive advice suggesting a course of action knowing that it will be up to their FOIPOP Administrator to make a decision as to whether or not to exercise his or her discretion to release information to an applicant. Section 474 is the exemption that recognizes the necessity for the Municipality to have this discretion for its day to day operations in planning the business of the Municipality.” - *District of Lunenburg (Municipality) (Re)*, 2009 CanLII 43597



# Exemptions: Solicitor-Client Privilege

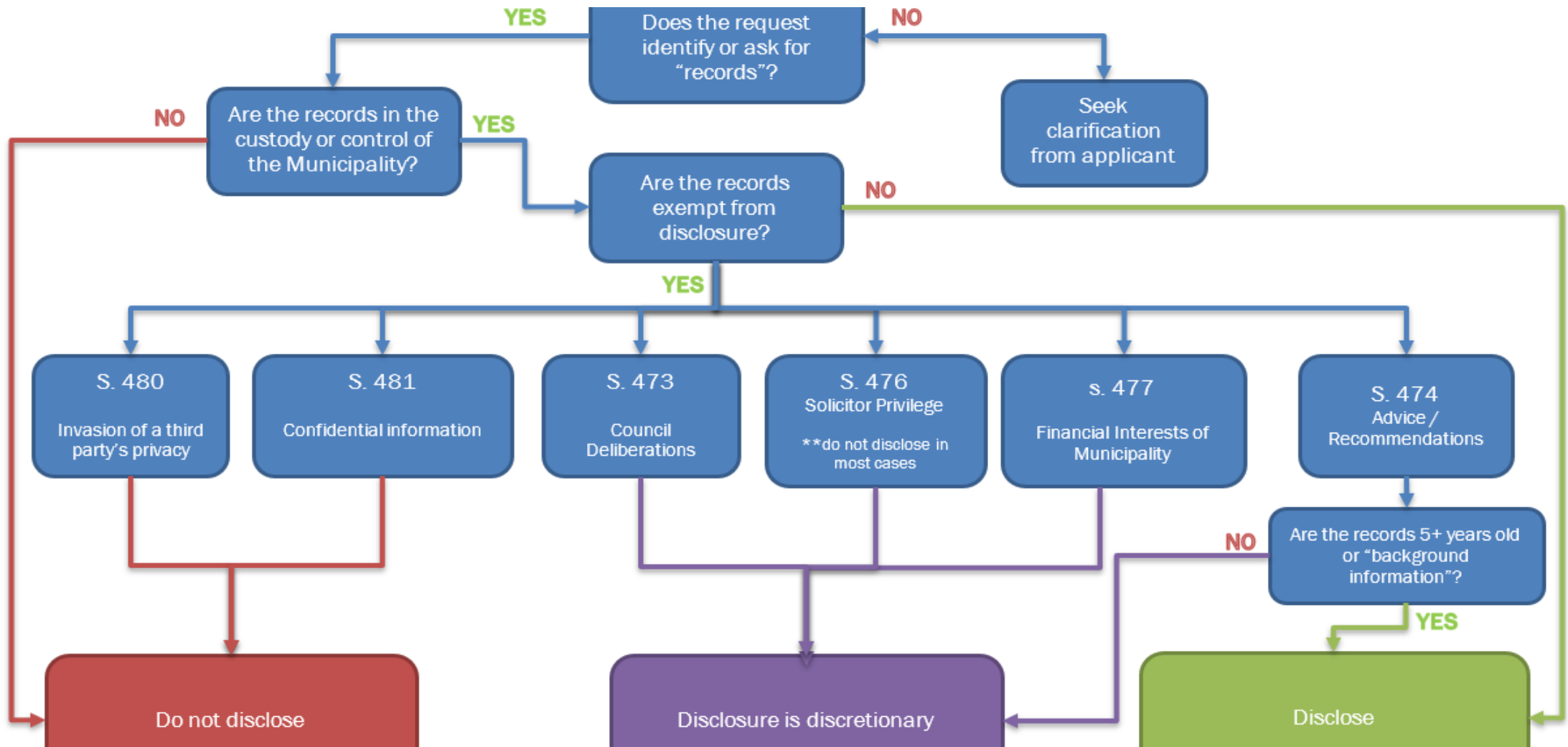
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# Solicitor-Client Privilege

## s. 476

- Communications between lawyer and client provided strong protections.
- Covers a “continuum of communications” with the ultimate purpose of seeking advice.
- May also covered documents protected by “litigation privilege”—documents prepared or received for the “dominant purpose” of preparing for litigation



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# FOIPOP Tools

- Office of the Information & Privacy Commissioner (NS) Access & Privacy Essentials Toolkit
  - <https://oipc.novascotia.ca/sites/default/files/publications/Access%20%26%20Privacy%20Essentials%20Toolkit%20%28FOIPOP%20%26%20MGA%29%202019%2012%2005.pdf>

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Thank you  
Questions/Comments

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