



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

REVIEW REPORT 25-01

January 15, 2025

Halifax Regional Police

Summary: An applicant asked Halifax Regional Police (HRP) for records related to its use of facial recognition technology. HRP withheld portions of the requested information under s. 472(1)(b) (intergovernmental affairs) and s. 475(1)(k) (harm the security of any property or system) of Part XX of the *Municipal Government Act (MGA)*. The Commissioner finds that HRP failed to meet its burden when it did not provide any representations to explain why it thought it was allowed to withhold the information it did. The Commissioner recommends disclosure of the requested records to the applicant, with the exception of one piece of personal information contained in them.

While HRP disclosed additional information to the applicant during the review process with the Office of the Information and Privacy Commissioner (OIPC) to comply with its legal obligations under the *MGA*, it declined to provide representations or evidence to support its decision to continue to withhold the remaining information, despite its burden to do so. In light of this, the Commissioner also makes similar recommendations as those she previously made in *NS Review Report 22-12*:¹ that HRP implement policies and procedures for engaging in the access to information review process with the OIPC and provide training on those policies and procedures to staff involved in the access to information review process. The Commissioner strongly urges that in future, HRP meaningfully complies with its legal obligations under the *MGA* by providing representations and evidence to demonstrate why it believes it has met its burden to withhold information from applicants.

INTRODUCTION:

[1] Facial recognition technology (FRT) is a category of biometric software that maps an individual's facial features to confirm an individual's identity using their face. It involves the collection and processing of very sensitive personal information – biometric facial data. This

¹ *NS Review Report 22-12, Halifax Regional Police (Re)*, [2022 NSOIPC 12 \(CanLII\)](#), at para. 60.

data is highly distinctive, with little to no overlap with other individuals. It is unlikely to change significantly over time, although it can be varied through cosmetics, disguises or surgery.²

[2] When used responsibly and in the right circumstances, FRT has the potential to offer significant benefits to society. This is particularly so when FRT is used to assist in solving crimes. It is a powerful tool that has become of interest to law enforcement entities. This does not change the reality that FRT can be a highly invasive surveillance technology and as such its use is fraught with risks. Studies have shown that it can and has provided racially biased results, particularly in the identification of Black people and other people of colour. There have been multiple incidents of wrongful arrests based on use of incorrect facial recognition results.³

[3] Given its risks, the use of FRT tools has been highly controversial. An example of this controversy centres on the use of FRT by law enforcement agencies across the world offered by Clearview AI Inc. (Clearview AI).⁴ Clearview AI's facial recognition software allows users to upload an image of a face and match it against their database. On February 28, 2020, Halifax Regional Police (HRP) confirmed to media outlets that their officers were using FRT software that was being offered by Clearview AI Inc., despite the software being under investigation by the Privacy Commissioner of Canada.⁵

[4] In May 2020, the applicant made a request for information for all documents, receipts, correspondence, briefs, memorandums, instructions or otherwise pertaining to the use of FRT by HRP and/or any of its members between January 1, 2017 and May 2020.

[5] In response, HRP found 64 pages of responsive records. HRP provided them to the applicant but withheld some information in them, stating that the information was being withheld pursuant to s. 472(1)(b) (intergovernmental affairs), s. 475(1)(k) (harm the security of any property or system) and s. 480 (personal information) of Part XX of the *Municipal Government Act (MGA)*.

[6] The applicant was not satisfied with HRP's response to their access request and filed a request for review with the Office of the Information and Privacy Commissioner (OIPC).

[7] HRP agreed to release some of the information it withheld under s. 480 during the OIPC's investigation process and so this issue was initially dropped from this review report. However, the OIPC subsequently determined that there is some personal information on page 46 of the responsive records that the HRP had erroneously withheld under s. 475(1)(k) of the *MGA*. The information on page 46 is in fact personal information and not information that should be

² *Data at Your Fingertips Biometrics and the Challenges to Privacy* (February 2011), online: Office of the Privacy Commissioner of Canada https://www.priv.gc.ca/en/privacy-topics/health-genetic-and-other-body-information/gd_bio_201102/.

³ Nathan Freed Wessler, *Police Say a Simple Warning Will Prevent Face Recognition Wrongful Arrests. That's Just Not True* (April 30, 2024), online: ACLU <https://www.aclu.org/news/privacy-technology/police-say-a-simple-warning-will-prevent-face-recognition-wrongful-arrests-thats-just-not-true>.

⁴ <https://www.clearview.ai/>.

⁵ Alexander Quon, *Halifax Police Confirm Use of Controversial Clearview AI Facial Recognition Technology* (February 28, 2020), online: CBC News <<https://globalnews.ca/news/6607993/halifax-police-confirm-clearview-ai-facial-recognition-technology/>>.

withheld because it could reasonably be expected to harm the security of any property or system, so this issue was added back into this review report.

[8] For the remainder of the issues, the applicant objected to HRP's decision to continue to withhold this information and so this matter proceeded to this public review report.

ISSUES:

[9] There are three issues under review:

1. Was HRP authorized to refuse access to information under s. 472(1)(b) of the *MGA* because disclosure of the information could reasonably be expected to reveal information received in confidence?
2. Was HRP authorized to refuse access to information under s. 475(1)(k) of the *MGA* because disclosure could reasonably be expected to harm the security of any property or system?
3. Was HRP required to refuse access to information under s. 480 of the *MGA* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

DISCUSSION:

Burden of proof

[10] HRP bears the burden of proving that the applicant has no right of access to a record or part of a record.⁶

1. Was HRP authorized to refuse access to information under s. 472(1)(b) of the *MGA* because disclosure of the information could reasonably be expected to reveal information received in confidence?

[11] HRP withheld a portion of the responsive records pursuant to s. 472(1)(b) of the *MGA*.⁷ For the reasons provided below, I find that this information does not qualify for exemption under s. 472(1)(b) and so I recommend it be released.

[12] Section 472(1) of the *MGA* states:

- 472(1) A responsible officer may refuse to disclose information to an applicant, if the disclosure could reasonably be expected to
- (a) harm the conduct by the municipality of relations between the municipality and any of the following or their agencies:
 - (i) the Government of Canada or a province of Canada,
 - (ii) the Government of Nova Scotia,
 - (iii) another municipality,

⁶ *Municipal Government Act*, [SNS 1998, c 18](#), s. 498(1).

⁷ HRP is considered a "municipality" pursuant to s. 461(e) of the *Municipal Government Act*, [SNS 1998, c 18](#).

- (iv) an education entity as defined in the *Education Act*,
- (v) an aboriginal government; or
- (b) reveal information received in confidence from a government, body or organization listed in clause (a), or their agencies, unless the government, body, organization or its agency consents to the disclosure or makes the information public.

...
(3) This Section does not apply to information in a record that has been in existence for fifteen or more years.

[13] In this matter, it is evident from the records that the withheld information consists of correspondence that was sent by a government, body or organization that is listed in 472(1)(a). The next step is to determine whether the information was received in confidence.

[14] To determine whether information is received in confidence, there must be consideration to the circumstances as a whole, including the content of the information, as well as its purposes and the conditions under which it was prepared and communicated.⁸ Accordingly, the Nova Scotia Court of Appeal has laid out relevant factors for public bodies to determine whether information is received in confidence.⁹

[15] HRP did not provide any argument or evidence to substantiate how the information was received in confidence. As stated in previous review reports and Supreme Court of Nova Scotia cases, it is not enough that the supplier of the information states, without further evidence, that it is confidential. Otherwise, a party supplying the information could ensure the information was not released. Likewise, a page simply marked confidential is not conclusive that the information was supplied in confidence. If such were the case, the mere marking of information as “confidential” would prevent its release.¹⁰

[16] HRP opted not to demonstrate how the information at issue was received in confidence from a government, body or organization listed in s. 472(1)(a), or their agencies. Without meeting that criterion, it did not demonstrate how it was authorized to withhold the information under s. 472(1)(b) of the *MGA*. As such, I find that s. 472(1)(b) does not apply to any information in the responsive records. I recommend that the information that HRP withheld pursuant to s. 472(1)(b) be released.

⁸ NS Review Report FI-04-46, *Nova Scotia (Office of Economic Development), Re*, [2005 CanLII 8185 \(NS FOIPOP\)](#). Note that the analysis in this case was for s. 12(1)(b) of the *Freedom of Information and Protection of Privacy Act*, [SNS 1993, c 5](#), however the same analysis applies to s. 472(1)(b) of the *MGA*.

⁹ NS Review Report FI-07-12, *Acadia University (Re)*, [2007 CanLII 30653 \(NS FOIPOP\)](#). See also *BC Order 331-1999, Inquiry regarding Vancouver Police Board's Refusal to disclose complaint-related records*, para. 37. See also *Chesal v. Nova Scotia (Attorney General) et. al.*, [2003 NSCA 124](#), paras 71-72.

¹⁰ NS Review Report 20-06, *Cape Breton Regional Municipality (Re)*, [2020 NSOIPC 6 \(CanLII\)](#), at para. 61.

2. Was HRP authorized to refuse access to information under s. 475(1)(k) of the MGA because disclosure could reasonably be expected to harm the security of any property or system?

[17] HRP withheld a portion of the responsive records pursuant to s. 475(1)(k) of the *MGA*. For the reasons provided below, I find that this information does not qualify for exemption under s. 475(1)(k) and so I recommend it be released.

[18] Section 475(1)(k) of the *MGA* provides:

475 (1) The responsible officer may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

(k) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[19] Section 475(1)(k) has two essential requirements. First, HRP must establish that the disclosure of the information could reasonably be expected to cause harm. Second, the harm must be to the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[20] While the *MGA* does not define “harm,” the Supreme Court of Canada has outlined the test for meeting a harm-based exemption. In *Merck Frosst Canada Ltd. v. Canada (Health)*,¹¹ the Court specified that “[t]he intended threshold appears to be considerably higher than a mere possibility of harm, but somewhat lower than harm that is more likely than not to occur.”

[21] Consequently, this exemption requires HRP to provide evidence that is “well beyond” or “considerably above” a speculative or a mere possibility of harm to use a harm-based exemption.¹²

[22] Again, HRP declined to provide any arguments, evidence or information to substantiate how it was authorized to withhold information under 475(1)(k).

[23] Law enforcement exemptions should be approached in a sensitive manner in recognition of the challenges associated with predicting future events in a law enforcement context, while maintaining that the holder of the information must meet the evidentiary requirements to establish harm.¹³

[24] It is not enough to simply state that release of the information would harm the system and therefore it should not be disclosed.¹⁴ Rather, HRP must set out the specific risks to the system and also connect such risks to the exact information at issue.¹⁵

¹¹ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012 SCC 3](#), at para. 201.

¹² *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012 SCC 3](#), at para. 201.

¹³ See *Ontario (Attorney General) v. Fineberg*, [1994 CanLII 10563 \(ON SC\)](#), cited with approval in *NS Review Report 22-06, Department of Justice (Re)*, [2022 NSOIPC 6 \(CanLII\)](#), at paras. 16-18.

¹⁴ *NS Review Report 22-11, Halifax Regional Police (Re)*, [2022 NSOIPC 11 \(CanLII\)](#), at para. 14.

¹⁵ *NS Review Report 22-11, Halifax Regional Police (Re)*, [2022 NSOIPC 11 \(CanLII\)](#), at para. 14.

[25] Without arguments, evidence or information, I am unable to determine that HRP provided evidence “well beyond” or “considerably above” a speculative or a mere possibility of harm. Therefore I find that s. 475(1)(k) does not apply to any information in the responsive records. The information that HRP withheld pursuant to s. 475(1)(k) should be released, except for portions of information found on page 46 of the responsive records. While HRP relied on 475(1)(k) to withhold the entirety of the information found on page 46, there is personal information on this page that falls under s. 480 of the *MGA*, which is a mandatory exemption. This means that I must next analyze this page to ensure information that must be withheld is not released.

3. Was HRP required to refuse access to information under s. 480 of the *MGA* because disclosure of the information would be an unreasonable invasion of a third party’s personal privacy?

[26] As mentioned above, there is personal information on page 46 of the responsive records that falls under s. 480 of the *MGA*. In this case, HRP withheld this information pursuant to s. 475(1)(k). As set out below, I find that the personal information on page 46 must be withheld pursuant to s. 480 of the *MGA*.

[27] To balance the information rights of the applicant against the privacy rights of third parties, the Supreme Court of Nova Scotia determined that the proper application of the third-party personal privacy exemption requires a four-step test.¹⁶ The test and my analysis are as follows:

- 1. Is the requested information “personal information” within the meaning of s. 461(f)? If not, that is the end. Otherwise, I must go on.**
 - a. The information in this matter is “personal information” within the meaning of s. 461(f) of the *MGA*.
- 2. Are any of the conditions of s. 480(4) satisfied? If so, that is the end. Otherwise, I must go on.**
 - a. There was no evidence or argument in this case that any provision in s. 480(4) might apply.
- 3. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 480(3)?**
 - a. I agree that, if disclosed, there would be a presumed unreasonable invasion of a third-party’s personal privacy for portions of personal information that was compiled and is identifiable as part of an investigation into a possible violation of law.

¹⁶ *House, Re*, [2000 CanLII 20401 \(NS SC\)](#).

4. ***In light of any s. 480(3) presumption, and in light of the burden upon the applicant established by s. 498(2), does the balancing of all relevant circumstances, including those listed in s. 480(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?***

I find that s. 480 of the *MGA* applies to small portions of personal information found on page 46 of the responsive records, and that none of the factors in s. 480(2) warrant its release. Therefore, I recommend that this personal information should remain withheld.

CONCLUSION:

[28] I am faced with a similar issue that I have previously addressed in *NS Review Report 22-12*.¹⁷ While HRP did disclose more information during the review process with the OIPC, I must again comment on its decision to not provide any arguments in the form of representations during the review process.

[29] As I have previously stated, the *MGA* sets out that at a review into a decision to refuse an applicant access to records, the burden is on the municipality to prove that the applicant has no right of access to the records.¹⁸ Despite repeated requests by the OIPC, as well as reminders that HRP has a statutory burden to meet when substantiating the withholding of information, HRP declined to provide information to meet its burden. By taking this approach, HRP did not comply with its statutory obligations under the *MGA* and prevented this office from fully assessing the application of the exemptions applied.

[30] In light of this, I am making two of the same recommendations I made in *NS Review Report 22-12*, but with shorter timelines for implementation.

FINDINGS & RECOMMENDATIONS:

[31] I find that:

1. HRP was not authorized to withhold information under s. 472(1)(b) of the *MGA*.
2. HRP was not authorized to withhold information under s. 475(1)(k) of the *MGA*.
3. HRP was required to withhold the personal information contained on page 46 of the responsive records under s. 480 of the *MGA*.

[32] I recommend that HRP:

1. Disclose the information withheld under s. 472(1)(b) of the *MGA* within 45 days of the date of this review report.
2. Disclose the information withheld under s. 475(1)(k), except for portions of information found on page 46 that should be withheld under s. 480 of the *MGA*, within 45 days of the date of this review report.

¹⁷ *NS Review Report 22-12, Halifax Regional Police (Re)*, [2022 NSOIPC 12 \(CanLII\)](#), at paras. 56-58.

¹⁸ Section 498(1) of the *MGA*. Sections 498(2) and (3) speak to the burden on the applicant with regard to personal information.

3. Withhold the personal information contained on page 46 of the responsive records.
4. Implement policies and procedures for engaging in the access to information review process with the Office of the Information and Privacy Commissioner within two months of the date of this review report.
5. Provide training on the policies and procedures implemented per Recommendation #4 to staff involved in the access to information review process within four months of the date of this review report.

January 15, 2025

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia