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

REVIEW REPORT 16-13

November 30, 2016

Department of Justice

Summary: An applicant sought access to records relating to his father's prison term. The Department of Justice (Department) disclosed portions of two of the 24 pages to the applicant. The Department denied access to the names of correctional officers. It argued that releasing this information would lead to correctional officers facing pressure to import contraband and thereby harm law enforcement. The Department denied access to the administrative forms used to manage the applicant's father's prison term, claiming disclosure would be unreasonable invasion of the father's privacy.

The Commissioner finds that the Department's evidence did not establish that the anticipated harms to law enforcement were more than merely possible. She recommends disclosure of the correctional officers' names.

The Commissioner finds that the template material from the forms was not personal information and therefore the Department could not apply the third party personal information exemption to the information. Finally, the Commissioner finds that disclosure of the father's personal information would not be an unreasonable invasion of his privacy and recommends full disclosure. The evidence the applicant supplied showed a relationship of trust between the applicant and his father. The Commissioner finds the personal information involved – once the fact of the father's incarceration had already been disclosed – was not highly sensitive. In addition, the applicant's demonstrated knowledge of his father's circumstances evinced a compassionate consideration supporting disclosure.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s.17; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s. 14; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 3, 5, 15, 20, 45.

Authorities Considered: Alberta: F2002-001, 2002 CanLII 61587 (AB OIPC); F2004-015, 2005 CanLII 78658 (AB OIPC); F2015-02, 2015 CanLII 4586 (AB OIPC); **British Columbia:** Orders 62-1995, 1995 CanLII 416 (BC IPC); 01-27, 2001 CanLII 21581 (BC IPC); 03-16, 2003 CanLII 49186 (BC IPC); F10-22, 2010 BCIPC 33 (CanLII); **Nova Scotia**: Review Reports FI-10-95, 2015 CanLII 79097 (NS FOIPOP); FI-11-71, 2015 CanLII 79099 (NS FOIPOP); FI-11-72, 2015 NSOIPC 10 (CanLII); 16-01, 2016 NSOIPC 1 (CanLII); 16-03, 2016 NSOIPC 3

(CanLII); 16-04, 2016 NSOIPC 4 (CanLII); 16-08, 2016 NSOIPC 8 (CanLII); **Ontario:** Orders 24, 1988 CanLII 1404 (ON IPC); P-673, 1994 CanLII 6595 (ON IPC).

Cases Considered: *House, Re*, 2000 CanLII 20401 (NS SC); *Monkman v. Serious Incident Response Team*, 2015 NSSC 325; *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate*, 2015 NSCA 38 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* [2014] 1 S.C.R. 674, 2014 SCC 31 (CanLII); *Ontario (Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

INTRODUCTION:

[1] The applicant sought copies of records relating to his father's brief term of incarceration in 1998. In response, the Department of Justice (Department) provided him with partial access to the records. The Department cited harm to law enforcement and unreasonable invasion of a third party's personal privacy as the reasons for withholding the information. The applicant is seeking full disclosure of the records.

ISSUES:

[2] There are two issues under review:

1. Is the Department authorized to refuse access to information under s. 15(1)(e) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*) because disclosure of the information could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person?
2. Is the Department 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?

DISCUSSION:

Background

[3] In 1997, the applicant's father had a dispute with the local municipality in relation to a building code requirement. Ultimately the dispute resulted in a court hearing where the applicant's father was found guilty of a violation of the code and was fined. When the applicant's father refused to pay the fine he was required to serve a brief term in the local provincial institution. The applicant seeks a copy of all records relating to his father's incarceration at a provincial institution in 1998.

[4] In response to the applicant's request the Department of Justice located 24 pages of records. The Department withheld in full 22 pages of records, provided one page (the Warrant of Committal) in full, and provided one further partially severed page disclosing that the applicant was an approved visitor. The Department states that it withheld the identity of all prison staff under s. 15(1)(e) of *FOIPOP* (harm to law enforcement) and the remainder of the information under s. 20 of *FOIPOP* (third party personal information).

[5] The applicant requested a review of the decision seeking full disclosure of all of the documents.

Burden of Proof

[6] The Department bears the burden of proving that s. 15(1)(e) applies to the withheld information. The applicant bears the burden of proving that the disclosure of the information would not be an unreasonable invasion of the third party's (his father's) personal privacy.[1]

1. Is the Department authorized to refuse access to information under s. 15(1)(e) of *FOIPOP* because disclosure of the information could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person?

[7] Section 15(1)(e) of *FOIPOP* provides:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> (e) endanger the life or physical safety of a law-enforcement officer or any other person

[8] I have, in a number of previous review reports, discussed the current state of the law with respect to the meaning of "reasonable expectation of harm".[2] The leading case in Canada is *Ontario (CSCS) v. Ontario (IPC)* [2014] 1 S.C.R. 674.[3] The Nova Scotia Supreme Court recently reviewed the law with respect to this test as it applies in Nova Scotia and concluded that in order to establish a reasonable expectation of harm the burden falls on the public body to show that it is more than merely possible, but at a standard less than a balance of probabilities that the disclosure could harm law enforcement.[4]

[9] In its submissions, the Department states that it is the practice of the Department to sever the names of correctional facility staff below a deputy superintendent because "we have no control over what the applicant may choose to do with the information they receive." The Department states that it is concerned that correctional staff can be subject to pressure from inmates and those outside the facilities to bring contraband items into the facilities. In support of this identified harm the Department provided six news articles all about correctional officers caught attempting to smuggle drugs into prisons in Nova Scotia, British Columbia and the United States. None of the articles connect the activity of the correctional officers to any allegations of undue influence or pressure from criminal elements or elsewhere.

[10] The Department cites an Order of an adjudicator with the British Columbia Office of the Information and Privacy Commissioner as supporting its position. In that Order, a media outlet sought a list of all police officers and their salaries. Eight police forces resisted disclosure citing, in part, potential endangerment to the life or physical safety of undercover officers under s.

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[1] Section 45 of *FOIPOP* describes this burden of proof. A complete copy of *FOIPOP* is available at: http://nslegislature.ca/legc/statutes/freedom%20of%20information%20and%20protection%20of%20privacy.pdf.
[2] See for example, NS Review Report 16-01 at paras 30-35.
[3] The Supreme Court of Canada summarizes its review of the reasonable expectation of harms test at paras 53-54.
[4] *Monkman v. Serious Incident Response Team*, 2015 NSSC 325 at para 61.

15(1)(f) of the BC access law. That section is identical to Nova Scotia's s. 15(1)(e). In support of their position, the police forces provided affidavit evidence of officers with considerable experience working undercover. Those officers were able to provide evidence of efforts made by criminals, including organized crime, to obtain the names of undercover officers. The adjudicator concludes, "I am satisfied by the evidence that the police and the BCPA have provided, including a small amount of information the BCPA provided in camera, that there are individuals who seek to know the identities of undercover officers and would do them harm."[5]

[11] The adjudicator orders that s. 15(1)(f) of the BC law applies to the names of undercover officers and officers who could reasonably be expected to work undercover. However, the adjudicator also found that the evidence did not support applying s. 15(1)(f) to the names of officers who do not work undercover and are not likely ever to do so.

[12] The *Ontario (Community and Social Services) v. John Doe* Ontario Court of Appeal recently considered the application of Ontario's equivalent to s. 15(1)(e).[6] In Ontario the relevant provision is s. 14(1)(e) of the *Freedom of Information and Protection of Privacy Act*[7] which provides, "A head may refuse to disclose a record where the disclosure could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person."

[13] In *Ontario v. John Doe,* the applicant was a support payor. The Family Responsibility Office (FRO) was the Ontario government office tasked with enforcing support payments. The applicant believed the FRO had mismanaged his file and sought copies of all records in relation to his file. The public body denied access to the names of the employees of the Family Responsibility Office arguing that disclosure of the names could reasonably be expected to endanger the life or physical safety of its employees. In support of its position, the public body provided a copy of a grievance settlement order that permitted employees to only give the public their first names and employee identification numbers. The public body and the employees' union had agreed to this order because of the need to protect staff. The public body also provided evidence of 24 documented threats made to FRO staff generally or to individual employees. Finally, it argued that even if the applicant did not use the information, he could potentially disclose the information generally, in other words, disclosure to the applicant was disclosure to the world.

[14] The Ontario Court of Appeal held that the names should be disclosed – agreeing with both the Information and Privacy Commissioner and with the Ontario Divisional Court. The Court of Appeal determined that the public body had not met its evidentiary burden, which the Court said was "a middle ground between that which is probably and that which is merely possible."[8]

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[5] BC Order F10-22 at para 31.
[6] *Ontario (Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII) [*John Doe*]
[7] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s. 14(1)(e).
[8] *John Doe* at para 25 citing *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII) at para 54.

[15] In deciding that the public body had not met its burden of proof the Court notes a number of relevant factors:

- While there was evidence of documented threats, there was no evidence that the requester himself posed a threat to the FRO employees;
- As to the risk arising if the requester disseminated the names of the employees disclosed in the records, there was no evidence that the employees whose names were going to be disclosed had ever been the subject of threats by the requester or anyone else;
- The requester had the names of at least seven employees that he had not disseminated;
- There was nothing inflammatory in the records that suggested the behaviour of the requester would change after reviewing the records sought; and
- With respect to the argument that disclosure to the applicant was disclosure to the world the Court concluded that the evidence did not support that this was a significant factor in the circumstances.[9]

[16] In this case, I have no evidence before me that the applicant himself would subject the employees identified in the record to any risk of harm. It is unclear to me why a criminal intent on wanting to influence a correctional officer to bring drugs into a prison would need an access to information response to get a correctional officer's name. Prisoners within the system know the officers' names – it is not uncommon for them to make access requests that include the full name of correctional officers. They interact with the officers for months and sometimes years. In the smaller centres they live in the same town. Further, while the media articles provided make clear that there is a risk that correctional officers may bring drugs and cell phones into prisons, there was no evidence connecting this activity to undue influence or any influence from an outside source.

[17] In addition, the records in question are almost 20 years old. The employees identified in the records may or may not still be employed as correctional officers. No evidence was offered to suggest that these employees whose names were going to be disclosed had ever been the subject of any threats or undue influence by the applicant or anyone else or that they were still employed as correctional officers. Finally, the content of the records themselves has nothing inflammatory to suggest that the behaviour of the applicant would change after reviewing the records.

[18] I find that s. 15(1)(e) does not apply to the names of correctional staff in the records. The Department has failed to meet its burden of proof that the disclosure of names in these almost 20 year old records could reasonably be expected to endanger the life or physical safety of anyone.

[9] *John Doe* at paras 27 -30.

2. Is the Department 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?

Approach to s. 20 Analysis

[19] The proper approach to the s. 20 analysis in Nova Scotia is well established. I have discussed the four step approach to the s. 20 analysis in a number of recent review reports and so will not repeat that analysis here.[10] In summary, the four steps are:

a. Is the requested information "personal information" within the meaning of s. 3(1)(i)? If not, that is the end. Otherwise the public body must go on.
b. Are any of the conditions of s. 20(4) satisfied? If so, that is the end.
c. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?
d. In light of any s. 20(3) presumption, and in light of the burden upon the applicant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that the disclosure would constitute an unreasonable invasion of privacy or not?

Analysis

a. Is the requested information personal information?

[20] "Personal information" is defined in s. 3(i) of *FOIPOP* and means recorded information about an identifiable individual including race, sex, age and health care history.[11]

[21] The majority of the withheld information consists of questions on forms. Rather than simply severing out the personal information that was added to the forms in response to the questions, the Department withheld the entire documents.

[22] Section 5(2) of *FOIPOP* provides:

> 5(2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Act, but if that information can reasonably be severed from the record an applicant has the right of access to the remainder of the record.

[23] *FOIPOP* requires that if the information "can reasonably be severed from the record" then the applicant has a right to the remainder of the record. Reasonable severing means that after the excepted information is removed from a record, the remaining information is both intelligible and responsive to the request.[12] While it is important to be pragmatic in the approach to what is reasonable, it is also essential that any interpretation of this standard not undermine *FOIPOP*'s

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[10] NS Review Reports FI-10-95, FI-11-71, 16-03, 16-04 and 16-08 which are based on the Nova Scotia Supreme Court decision in *House, Re*, 2000 CanLII 20401 (NS SC) [*House*] at p. 3.
[11] Section 3(1)(i)(ii), s. 3(1)(i)(iii) and s. 3(i)(vi) include these factors in the list of information that qualifies as personal information within the meaning of *FOIPOP*.
[12] This is also the approach taken in other jurisdictions. See for example BC OIPC Order 03-16 at para 53 and Ontario Order 24 at p. 8.

stated purpose of providing for the disclosure of all government information, facilitating informed public participation in policy formulation, ensuring fairness in government decision-making and permitting the airing and reconciliation of divergent views.[13]

[24] The Department was clear that s. 15(1)(e) was only applied to the names of staff members in the correctional facility below the level of deputy superintendent. This means that the remaining information was withheld under s. 20. The withheld documents are all forms that have been completed with information in relation to the applicant's father. With that information removed, all that is left is the forms.

[25] All of the forms are standard forms used to manage inmates. It is unclear why the Department chose to withhold the entire form, including the non-personal information. That is, a blank form would not generally disclose any personal information unless it happened to be a form that suggested a particular disciplinary action or medical treatment for example. Neither is true in this case. The forms that make up 21 of the 22 pages are standard administrative type documents. The only thing their existence in the file discloses is that the third party was an inmate in the institution. But this fact was, of course, already disclosed by the Department when it supplied a complete copy of the Warrant of Committal and the severed copy of the third party's "Inmate Approved Visitor List".

[26] The question then is, do the blank forms contain intelligible information responsive to the request? In my opinion they do. They would allow the applicant to know generally what type of information was gathered about his father without actually disclosing the personal information of his father.

[27] I find that the questions on the forms do not constitute personal information within the meaning of *FOIPOP*. Information added to the forms specifically in relation to the applicant's father does fall within the meaning of personal information including such data as: birth date, eye colour, religion, date of birth, information in relation to the offence, terms of custody and release, and information in relation to medical treatment. One document is a photograph of the applicant's father and this also constitutes the personal information of a third party.

b. Are any of the conditions of s. 20(4) satisfied?

[28] The Department submits that none of the considerations set out in s. 20(4) of *FOIPOP* apply to the withheld information. Since the Department did not apply s. 20 to employee names, I agree.[14] I find that s. 20(4) does not apply to the records at issue in this case.

[13] I made the same observations in NS Review Report FI-11-72 at para 23.

[14] Had the Department applied s. 20 to employee names I would have pointed out that s. 20(4)(e) would apply so that s. 20 could not be applied to employee names in this context.

c. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?

[29] The third step in the analytical process is to determine whether a rebuttable presumption[15] in s. 20(3) applies. The Department argues that s. 20(3)(b) is a relevant consideration in this case. Section 20(3)(b) provides:

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

[30] The Department argues that the purpose of the records that are collected in the offender files is to supervise the offender as the result of being held on remand awaiting trial or as a result of being sentenced on charges that resulted from an investigation. The person would not be in jail, the Department states, if there wasn't an investigation into a violation of law. The Department concludes that the fact that a person is in jail reveals that the person was investigated and sentenced or is awaiting trial.

[31] The rationale offered by the Department does not fit within the actual wording of the presumption. Section 20(3)(b) requires that the personal information be "compiled and is identifiable as a part of an investigation". This phrase requires that three things must be true:

- the information must be compiled as part of an investigation and
- the information must be identifiable as part of an investigation and
- there must be an investigation.

[32] In this case, the records consist only of a series of forms completed as part of the management of an offender in a correctional facility. There is no evidence that they were compiled as part of an investigation, nor is there any evidence that they are identifiable as part of an investigation. Disclosing the records would disclose nothing about any investigation that preceded the sentencing of the third party. The fact that the existence of the corrections branch records means that an investigation likely took place does not satisfy the essential requirements of s. 20(3)(b).

[33] The records at issue here are a series of forms completed in the normal course to manage an individual incarcerated in a provincial institution.

[34] In support of the argument that there is a presumed unreasonable invasion of personal privacy in disclosing this type of information, the Department points to two cases that examined the meaning of "criminal history" in the definition of "personal information" found in the Alberta and British Columbia access to information laws.[16] That same phrase is also found in

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[15] Courts in Nova Scotia have clearly established that the presumptions set out in s. 20(3) are rebuttable by considerations described in s. 20(2). See for example, *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate*, 2015 NSCA 38 (CanLII) [*Fitzgerald*] at p. 57.

[16] Alberta Order F2002-001 and BC Order 01-27.

Nova Scotia's *FOIPOP*. Both cases cited simply stand for the proposition that information relating to the court order, warrant information and bail-related information all constitute "criminal history" and as such, qualify as personal information. As noted above, I have already accepted that this type of information contained in the responsive records constitutes the personal information of a third party. Such a finding does not mean that s. 20(3)(b) applies since s. 20(3)(b) does not say that the disclosure of "criminal history" information would result in a presumed unreasonable invasion of personal privacy.

[35] Next the Department points to Order F2015-02 of the Alberta Office of the Information and Privacy Commissioner that determined that disclosure of criminal history would constitute a presumed unreasonable invasion of personal privacy.[17] The adjudicator in that case determined that a presumption set out in s. 17(4)(g) of Alberta's access law applied to criminal history in the form of video surveillance tapes from inside a prison and paper records relating to an incident that occurred while the applicant was incarcerated. However, Alberta's access law is not the same as Nova Scotia's.

[36] Alberta's s. 17(4) serves the same purpose as Nova Scotia's s. 20(3) – they both set out circumstances where disclosure is presumed to be an unreasonable invasion of personal privacy. However, s. 17(4)(g) of Alberta's *Freedom of Information and Protection of Privacy Act* states:

> 17(4) A disclosure of persona. Information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> (g) the personal information consists of the third party's name when
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> (i) it appears with other personal information about the third party, or
>
> (ii) the disclosure of the name itself would reveal personal information about the third party

[37] Nova Scotia's s. 20(3) does not have an equivalent provision to s. 17(4)(g) of Alberta's law. Alberta on the other hand, does have a provision similar to Nova Scotia's s. 20(3)(b). Interestingly, this presumption was not relied on by the Alberta adjudicator in the case cited by the Department.[18]

[38] I find that the presumption in s. 20(3)(b) of *FOIPOP* does not apply to the records at issue here.

d. In light of any s. 20(3) presumption, and in light of the burden upon the applicant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that the disclosure would constitute an unreasonable invasion of privacy or not?

[39] The final step in this analysis is the most important. In this case, taking into account the burden of proof on the applicant, I must balance all relevant circumstances including those listed

[17] In support of this the Department cites paragraph 58 of Alberta Order F2015-02.

[18] Section 17(4)(b) of *Alberta's Freedom of Information and Protection of Privacy Act* states: 17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation.

in s. 20(2) to answer the ultimate question: would disclosure of the requested information constitute an unreasonable invasion of personal privacy?

[40] Section 20(2) provides in part:

> 20(2) In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;
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> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

[41] The Department states that none of the considerations in s. 20(2) weigh in favour of disclosure in this case.

[42] The applicant argues that his father was wrongly charged, wrongly convicted and wrongly imprisoned. Further, the applicant says that his father suffered a sudden illness because he was placed into a cell with a chain smoker. The applicant is aware of the dates of incarceration and aware of the fact that his father was released to hospital due to a sudden illness. He provided the Department with details of the charges, dates and location of incarceration and his father's date of birth.

Public Scrutiny – s. 20(2)(a)

[43] The Department argues that this factor is not applicable because it says that in order to determine if public scrutiny would be desirable, the information must be more than about a single incident involving a single offender. It should be an activity performed on a regular basis by the public body. The Department makes this argument on the basis that s. 20(2)(a) provides that it is the "activities" of the public body that may be subject to public scrutiny. This request is for information about the applicant's father and an allegation by the applicant that the treatment of his father by the Department affected his respiratory ailment.

[44] The Offices of the Information and Privacy Commissioners in Ontario, British Columbia and Alberta have each considered the meaning of public scrutiny in their respective access laws. They have enumerated a number of considerations that adjudicators believe are relevant to determining whether or not disclosure is desirable for the purpose of subjecting the activities of a public body to public scrutiny:

- Is there evidence that the activities of the public body have been called into question which necessitates the disclosure of personal information to subject the activities of the public body to public scrutiny?[19]
- Has public scrutiny been called for by more than one person? This factor is less significant where the activity that has been called into question arises from a specific

[19] Alberta Order 97-002 at para 96, British Columbia Order 62-1995 at p. 10 where the adjudicator specifically notes that the public interest concerns are confirmed by the Ombudsman and an Ontario Court.

event known only to those immediately involved if the activity is such that it would be of concern to the broader community had its attention been brought to the matter.[20]

- Has the public body previously disclosed a substantial amount of information so that the release of personal information is not likely to be desirable for the purpose of subjecting the activities of the public body to public scrutiny?[21]
- Does the seriousness of the matter at issue require that public body officials be sufficiently transparent to enable those affected and the public generally to know whether the public body's response was appropriate?[22]

[45] In this case, only the applicant has suggested that the activities of the public body require scrutiny. He has not provided any evidence in support of his allegation. He states that his father's incarceration aggravated a respiratory problem but provided no evidence in support of this allegation. The public body has not disclosed any substantial amount of information. The allegations do not suggest a systemic issue and relate to events that occurred almost 20 years ago. On the basis of all of these considerations I find that s. 20(2)(a) is not a factor that weighs in favour of disclosure in this case.

Damage to Reputation – s. 20(2)(h)

[46] The Department states that s. 20(2)(h) weighs against disclosure in that releasing the information could harm the reputation of the third party. In particular, the Department is concerned that further publication of the records would mean that others could become aware that the third party spent time in jail.

[47] The applicant provided a copy of a newspaper article from the Chronicle Herald dated June 20, 1998. In that article the applicant's father is interviewed by a reporter. The article states that the applicant's father, a 70 year old grandfather, chose to spend eight days in a correctional centre instead of paying a fine on principle.

[48] I conclude that s. 20(2)(h) is not relevant and does not weigh against disclosure in this case.

Other Considerations

[49] Section 20(2) is not an exhaustive list. Rather, it requires that the public body consider all of the relevant factors, including those listed. In this case, I have considered four other relevant factors:

(i) sensitivity of the information
(ii) passage of time and death of the third party
(iii) knowledge of the applicant
(iv) compassion for family members

[20] Alberta Order F2004-15 at para 89.
[21] Ontario Order P-673 at p. 5, British Columbia Order 62-1995 at p. 10.
[22] Alberta Order F2004-15 at para 92.

(i) Sensitivity of the information

[50] The information at issue here is a series of completed standard forms used to manage the third party during his short period of incarceration. There are duplicates of pages 5, 6 and 17 indicated using the brackets in the list below. The records fall into three categories: records containing no personal information; records containing very basic, non-sensitive personal information and those that contain somewhat sensitive personal information. They are described below.

No personal information:

- One document is a blank form and contains no personal information: p. 21.

Non-sensitive personal information:

It is difficult to describe this information without disclosing the information itself but generally this category includes:

- Basic information generally about the applicant: pp. 1, 2, 4, 14 and 20.
- Several of the documents simply repeating the charges, sentence and actual term of incarceration: parts of p. 5 (15 and 18) most of p. 10, p. 12, p. 13, parts of p. 17(22).
- Some of the information simply describing the third party that any observer could have noted: parts of p. 5 (15 and 18), parts of p. 17 (22).
- Some of the information the applicant already knows: parts of p. 5 (15 and 18), parts of p. 17 (22).

Somewhat sensitive personal information:

- Some of the information, while not particularly sensitive, is specific to the third party and would not necessarily be known by any other person outside of the Department: pp. 3, 6 (16 and 19), p. 7, p. 8, last answer on p. 10, p. 11.
- Some of the information discloses the identities of other third parties: p. 23.

[51] I conclude that overall, the nature of the information is not particularly sensitive. Perhaps the most sensitive element is the fact that the applicant's father spent time in prison, but, as noted above, the applicant's father disclosed this in a very public way shortly after being released from prison in 1998. This is a unique set of records in the sense that while they deal with a period of incarceration, they consist only of 23 pages of very limited information. I find that pages 3, 6 (16 and 19), 7, 8, last answer on page 10 and page 11 have some sensitive information and that this weighs somewhat against disclosure of that information.

(ii) Passage of time and death of the third party

[52] I have, in previous decisions, discussed the effect of passage of time and death of a third party.[23] I agree that the dead do have privacy rights and that such rights may diminish over time. In this case the records are 20 years old, relate to a very short period of incarceration and relate to a third party who died four years ago. There has not been sufficient passage of time since the death of the third party to diminish the third party's privacy rights. However, the age of the records does, in this case slightly favour disclosure.

[23] See for example, NS Review Report 16-03 at paras 42 – 51.

(iii) Knowledge of the applicant

[53] The applicant clearly knows that his father was incarcerated and that he was released temporarily due to some medical considerations. The Department disclosed the Warrant of Committal which simply confirmed for the applicant all of the information he already knew about the nature of the charges, the date of committal and the length of the sentence. The applicant lived in a house beside his parents and was an authorized visitor when his father was incarcerated. One of the documents is a photograph of his father. Clearly the applicant knew what his father looked like. With respect to the photograph in particular, I find that this factor strongly favours disclosure of the information. With respect to the remainder of the information, I find that the applicant's general knowledge of his father's health and the circumstances of his incarceration favour disclosure of the information.

(iv) Compassion for family members

[54] I previously discussed the relevance of compassion and concluded that this factor has two core considerations: are there any indications of what the deceased would have wanted and what are the needs of the grieving relatives?[24]

[55] With respect to indications of what the deceased may have wanted, it is relevant to consider the nature of the relationship between the applicant and the deceased and to also consider the knowledge of the applicant with respect to the deceased's personal information. In this case, the applicant clearly knew his father had spent time in prison. He was on his father's visitor list. Further, the applicant provided a copy of his father's Power of Attorney which named the applicant as the alternate attorney. This suggests a relationship of trust between the applicant and his father.

[56] In this case, it is also relevant to consider that the applicant's father did not make an access to information request in relation to his incarceration. It is unclear whether he shared his son's view that the incarceration had any effect on his health. It is also unclear why the applicant waited until after his father had died to make his access to information request. The request would certainly have been more straightforward if he had obtained his father's consent.

[57] Another relevant consideration in terms of what the deceased would have wanted is the nature of the information at issue. Here, the information is not highly sensitive. As I have previously noted, it consists of a series of forms completed in the normal management of an inmate. Given the evidence supporting the relationship of trust, the lack of sensitivity of most of the information, and limited sensitivity of the remainder of the information, it is certainly possible that the applicant's father would not have had any objections to his son viewing the information at issue here. I find that these compassionate considerations weigh in favour of disclosure of the withheld information.

Balancing of Considerations

[58] In summary, the considerations that are neutral or that weigh for or against the disclosure are summarized below.

[24] NS Review Report 16-08 at para 38.

[59] Factors that are neutral; weighing neither for nor against disclosure:

- Public scrutiny
- Damage to reputation
- Death of the third party

[60] Factor against disclosure:

- Nature of the records – sensitivity of the information on eight pages

[61] Factors for disclosure:

- Passage of time
- Knowledge of the applicant
- Compassion for family members

[62] The applicant bears the burden of proof in this case. I find that he has provided sufficient evidence to establish that, on balance, the disclosure of his father's personal information in this case would not result in an unreasonable invasion of any third party's personal privacy. I recommend full disclosure of the records at issue.

FINDINGS & RECOMMENDATIONS:

[63] I find that:

1. Section 15(1)(e) does not apply to the names of correctional staff in the records;
2. The questions on the forms do not constitute personal information within the meaning of *FOIPOP*;
3. Information added to the forms specifically in relation to the applicant's father does fall within the meaning of personal information;
4. Section 20(4) does not apply to the records at issue in this case;
5. The presumption in s. 20(3)(b) of *FOIPOP* does not apply to the records at issue here;
6. On balance, the disclosure of the third party's personal information in this case would not result in an unreasonable invasion of any third party's personal privacy.

[64] I recommend full disclosure of the records at issue.

November 30, 2016

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

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