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

REVIEW REPORT 17-02

January 10, 2017

Public Service Commission

Summary: The applicant requested copies of interview notes created during an internal workplace investigation. Although the Public Service Commission denied him access to the interview notes of third parties, it provided him with a summary of those notes and with a complete copy of the notes from his own interview. The Commissioner finds that the applicant in this case has failed to satisfy the burden of proof he bears when attempting to gain access to third party personal information. The Commissioner concludes that the Public Service Commission properly withheld third party personal information and fully satisfied its duty to assist when it created the record summary.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 3, 5, 7, 20, 45.

Authorities Considered: BC: Order 03-16, 2003 CanLII 49186 (BC IPC). **Nova Scotia:** Review Reports FI-10-19, 2015 CanLII 54095 (NS FOIPOP); FI-10-95, 2015 CanLII 79097 (NS FOIPOP); FI-11-71, 2015 CanLII 79099 (NS FOIPOP); FI-11-72, 2015 NSOIPC 10 (CanLII); FI-12-36, 2016 NSOIPC 5 (CanLII); 17-01; 16-03, 2016 NSOIPC 3 (CanLII);16-04, 2016 NSOIPC 4 (CanLII); **Ontario**: Order 24, 1988 CanLII 1404 (ON IPC).

Cases Considered: *Dickie v. Nova Scotia (Department of Health)*, 1999 CanLII 7239 (NS CA); *House, Re*, 2000 CanLII 20401 (NS SC); *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate*, 2015 NSCA 38 (CanLII).

INTRODUCTION:

[1] The applicant requested copies of an internal workplace investigation conducted by Grant Thornton. In particular, he sought copies of interview notes. In response, the Public Service Commission (PSC) refused access to interview notes of third parties under s. 20 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). The PSC did, however, provide the applicant with a summary of the third party interviews. The PSC also provided the applicant with a complete copy of the notes from his interview. The applicant is not satisfied with the summary and seeks a copy of the interview notes with only the names of third parties withheld under s. 20.

ISSUE:

[2] Is the PSC 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] This story begins five years ago when the applicant filed an access to information request seeking copies of a series of workplace investigations on December 1, 2011. The request involved two public bodies: the Department of Justice and the Public Service Commission. In total the applicant filed seven requests for review of decisions related to this original access to information request. The issues ranged from time extensions and delays, adequacy of search, fees and severing. This is the final appeal. Four appeals were resolved during the informal resolution process and two others were the subject of Review Reports.[1]

[4] This appeal relates to one particular investigation conducted by Grant Thornton investigators. The PSC originally responded to the request for this record on June 5, 2012. The applicant filed a request for review of the PSC's decision alleging that records were missing, including notes and correspondence from the Grant Thornton investigation. On July 28, 2013 the PSC provided the applicant with a summary of the notes from the interviews by the Grant Thornton investigators and a complete copy of the record of the applicant's own interview. This resolved the adequate search issue.

[5] However, the applicant was not satisfied with the information disclosed and sought a further review, this time of the severing done by the PSC. The PSC's view was that it could not disclose a severed version of interview notes of third parties because to do so would be an unreasonable invasion of a number of the third parties' personal privacy within the meaning of s. 20. Instead, the PSC completed a summary of the third party interviews. During the informal resolution process the PSC located two further documents responsive to the applicant's request and disclosed these documents with some information withheld under the third party personal privacy exemption. Those documents included the investigation plan and a list of questions the investigators planned to ask.

Burden of proof

[6] Usually it is the public body who bears the burden of proving that the applicant has no right of access to a record. However, where the information being withheld is the personal information of people other than the applicant (s. 20), the applicant bears the burden of proof.

[1] NS Review Reports FI-12-36 and 17-01.

Is the PSC 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?

[7] The PSC withheld all of the interview notes citing s. 20 – unreasonable invasion of a third party's personal privacy as authority for its decision. The PSC also withheld information in the investigation plan for the same reason. Where the information being withheld is the personal information of people other than the applicant (s. 20), the applicant bears the burden of proof.

[8] Although the PSC provided no submissions in this matter, s. 20 is a mandatory exemption and so I must, in any event, determine whether or not s. 20 applies. I encourage public bodies to provide submissions when matters proceed to formal review because they are in the best position to identify factors relevant to determining whether or not a disclosure of third party personal information would be an unreasonable invasion of a third party's personal privacy. While the public body does not bear the burden of proof, public bodies cannot meet their duty to assist openly, accurately and completely[2] without first carefully evaluating whether or not an exemption applies, no matter what exemption. A failure to do so would be a failure to respond openly and completely. Therefore, public bodies will clearly have information relevant to whether or not a chosen exemption was properly applied.

[9] In his submissions to this office, the applicant emphasizes his desire to see the questions that were actually asked. He points out that the actual questions asked could be entirely different from the planned questions. He believes that the questions could be disclosed without identifying the individual who was the subject of the questioning. Further the applicant raises concerns that information already disclosed to him indicates that investigators planned to ask about an investigation by police in relation to the applicant. He asks where the notes, complaint and corresponding communications from the Department to the police are. Such records, if they exist, were not within the scope of this review request which is focussed on the interview notes created by Grant Thornton.

[10] In order for s. 20 to apply to information the public body must conduct a four part analysis as follows:[3]

1. 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.
2. Are any of the conditions of s. 20(4) satisfied? If so, that is the end.
3. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?
4. In light of any s. 20(3) presumption, and in light of the burden upon the 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?

[2] Pursuant to s. 7 of *FOIPOP*.

[3] I have applied this test in a number of NS Review Reports including FI-10-95, FI-11-71, 16-03 and 16-04 which are based on the Nova Scotia Supreme Court decision in *House, Re*, 2000 CanLII 20401 (NS SC) at p. 3.

1. 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.

[11] The record at issue consists of two documents: interview notes and the investigation plan. These documents contain the names of the individuals interviewed, positions, identity of numerous third parties either as the topic of questions asked or in the responses given, opinions of the witnesses about their own activities (including activities that were the subject of complaints or the activities of others that were the subject of complaints), personal opinions about the quality of the character of others and complaints and concerns of witnesses. The PSC provided the applicant with a complete copy of his own interview. A small portion of that document was severed because it contained information supplied by another identified witness.

[12] I find that the withheld information qualifies as third party personal information.

2. Are any of the conditions of s. 20(4) satisfied? If so, that is the end.

[13] Section 20(4) lists the types of personal information the disclosure of which would not constitute an unreasonable invasion of personal privacy. I find that s. 20(4) does not apply to the records at issue here.

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

[14] Section 20(3) provides in part:

> 20(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
> (d) the personal information relates to employment or educational history

[15] In Review Report FI-10-19 I reviewed the application of s. 20(3)(d) to workplace investigation records and concluded that the presumption in s. 20(3)(d) applies to the following types of information:

- Third party responses to complaints and allegations against them;
- Third party descriptions of decisions they made about certain workplace administrative matters that reflect on their own performance;
- Third party accounts of dealings with the applicant and others in the workplace and comments about their own actions or behaviour; and
- The identities of individuals who were subject to allegations such as racism, bullying and harassment.[4]

[16] Further, I determined that the actual identity (names) of witnesses who supplied the statements is the personal information of these third parties. However, the identity of individuals simply as witnesses, is not in my opinion, subject to the presumption in s. 20(3)(d) of *FOIPOP*. To be clear, the identity of any witness who was also the subject of the complaint investigation would be subject to the s. 20(3)(d) presumption.

[4] I have generalized here what I said in para 31 of NS Review Report FI-10-19.

[17] I find that all of the withheld information in this matter is subject to the s. 20(3)(d) presumption except for the identity of witnesses who were not the subject of any workplace investigation.

4. 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?

[18] In previous reviews involving workplace investigation records I have determined that a number of circumstances may be relevant. Section 20(2) lists three of them that, in my view, are relevant considerations in this matter.

> 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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> (e) the third party will be exposed unfairly to financial or other harm;
>
> (f) the personal information has been supplied in confidence
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

[19] I have previously examined the case law regarding the application of s. 20(2)(f) (supplied in confidence) to workplace investigations.[5] Without repeating that analysis I have applied the same principles here.

[20] I am of the view that the following are relevant considerations in this case:

- The allegations made were serious including inappropriate workplace behaviour, sexual harassment and racism. In that context my view is that witnesses and those subject to the allegations would have expected the information to be kept confidential.
- The workplace was small. Even without names, witnesses and those under investigation are easily identifiable from the description of events, from their particular job duties and/or from the information they disclose.
- There is no explicit statement of confidentiality nor is there any evidence of an agreement or understanding regarding confidentiality. However, I note that s. 20(2)(f) refers to "supplied" in confidence and so it is the perception of the supplier of the information that is most at issue here.

[21] Overall I conclude on the balance of probabilities that the participants in these workplace investigations had an expectation that they were supplying the information in confidence. This weighs against disclosure.

[5] NS Review Report FI-10-19 at paras 38 – 42.

[22] Further, I am of the view that allegations such as those contained in the interview notes can significantly impact an individual's career.[6] I find further that the presumption in s. 20(2)(e) and 20(2)(h) apply to the remaining records and weigh against disclosure in this case.

Other considerations

[23] Section 20(2) is not an exhaustive list. It requires that in deciding whether the disclosure of information would be an unreasonable invasion of a third party's personal privacy, the PSC considered all the relevant factors. One other factor is relevant – the sensitivity of the information.

Sensitivity of the information

[24] In this case, the information at issue relates to serious allegations of inappropriate workplace behaviour, sexual harassment and racism. This is sensitive information and so this factor weighs against disclosure.

[25] The withheld information is subject to the presumption in s. 20(3)(d) and there are three considerations that weigh against disclosure: the information was supplied in confidence, disclosure could unfairly damage the reputation or expose third parties unfairly to harm, and the sensitivity of the information.

[26] The applicant bears the burden of proving that the disclosure of this information would not be an unreasonable invasion of a third party's personal privacy. Further, the Nova Scotia Supreme Court has made clear that when a presumption in s. 20(3) applies, as it does to this category of information in this case, it is an error in law to treat the absence of evidence as satisfying a burden of proof to overcome a statutory presumption.[7] I find that the applicant has not satisfied the burden of proof with respect to the information that falls within the s. 20(3) presumption.

The summary and the duty to sever

[27] The applicant believes that portions of questions could be disclosed without disclosing the identity of any third party. The PSC withheld the interview notes in their entirety but the PSC took the additional step of summarizing two things: the applicant's own personal information and other third party information supplied during the interviews. To be clear, under *FOIPOP* a public body is required to create a summary of only the applicant's own personal information where it is supplied in confidence and then only if the summary can be prepared without disclosing the identity of the third party who supplied the personal information.[8]

[28] In this case, the summary of third party interviews (not including the applicant's own personal information) was prepared outside of the *FOIPOP* summary requirement. However, the broader summary demonstrates that the PSC was prepared to be subjected to scrutiny and to create a degree of transparency in its investigative process. By creating the summary, the PSC disclosed extensive information on the topic areas, the scope of the questions asked generally,

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[6] I made a similar observation in NS Review Report FI-10-19 at para 43, consistent with the findings of the Nova Scotia Court of Appeal in *Dickie v. Nova Scotia (Department of Health)*, 1999 CanLII 7239 (NS CA).
[7] *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate*, 2015 NSCA 38 (CanLII) at para 92.
[8] *FOIPOP* s. 20(5).

the broad scope of the investigation, details regarding the range of opinions given on the various topics and some specifics with respect to the incidents of concern during the investigation.

[29] 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.

[30] *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.[9] 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 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.[10]

[31] I have carefully reviewed both the summary and the original interview notes. I am satisfied that what very little information might be disclosed from the original record as not constituting third party personal information has already been disclosed in a significantly more intelligible fashion in the summary provided to the applicant by the PSC. As a result, I find that the PSC has properly applied s. 20 to the records at issue. I recommend that the PSC take no further action.

FINDING & RECOMMENDATION:

I find that the PSC has properly applied s. 20 to the records at issue. I recommend that the PSC take no further action.

January 10, 2017

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

OIPC File FI-13-70

[9] 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.
[10] I made the same observations in NS Review Report FI-11-72 at para 23.