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

REVIEW REPORT 18-03

August 9, 2018

Department of Justice

Summary: The first rule of processing access to information requests is that the records requested must be disclosed in full unless a specific and limited exemption applies. Such exemptions should only be applied to the specific information that satisfies the legal test set out in Nova Scotia's right to information law. To determine what must be severed, every single page and every single line on each page must be read and evaluated. In this case, it appears that a decision was reached to withhold whole classes of records contrary to this fundamental rule. The applicant requested copies of records from the Department of Justice related to the death in custody of a named individual. Aside from a few pages of partially released material, the Department refused to disclose the information, citing harm to law enforcement (s. 15 of the *Freedom of Information and Protection of Privacy Act*). The Commissioner finds that the Department failed to discharge its burden of proving that the law enforcement exemption applies to the records. Regarding the Department's assertion that harm would result from disclosure, no evidence was provided to connect the records at issue to the harm alleged. As a result, the Commissioner recommends that the Department conduct a line by line review of the withheld records to identify the small portions to which the personal information exemption applies and release the remaining information in full.

Statutes Considered: *Correctional Services Act*, SNS 2005, c 37, ss. 20, 21; *Fatality Investigations Act*, SNS 2001, c 31, ss. 26, 27; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 3, 15, 20, 31, 45; *Police Act*, SNS 2004, c 31, s. 42.

Authorities Considered: Alberta: Orders F2016-10, 2016 CanLII 20120 (AB OIPC); F2017-55, 2017 CanLII 46305 (AB OIPC); **British Columbia:** Orders 36-1995, [1995] B.C.I.P.C.D. No. 8; 00-28, 2000 CanLII 14393 (BC IPC); 00-52, 2000 CanLII 14417 (BC IPC); F15-22, 2015 BCIPC 24 (CanLII), F15-26, 2015 BCIPC 28 (CanLII), F16-28, 2016 BCIPC 30 (CanLII); **Nova Scotia**: Review Reports FI-10-71, 2015 CanLII 60916 (NS FOIPOP); 16-02, 2016 NSOIPC 2 (CanLII); **Ontario:** Orders P-285, 1992 CanLII 4129 (ON IPC); P-416, 1993 CanLII 4740 (ON IPC)

Other Sources Considered: Angela MacIvor, "Clayton Cromwell's death prompts stricter methadone policies in jail", CBC News, (Nov. 7, 2016): http://www.cbc.ca/news/canada/nova-scotia/methadone-nova-scotia-jail-burnside-clayton-cromwell-1.3836706; Government of Nova Scotia: Department of Justice - Correctional Services Policy & Procedures: https://novascotia.ca/just/Corrections/policy_procedures/Correctional_Services_Policies_Procedures.pdf; Government of Nova Scotia: Justice Major Incident Updates: https://novascotia.ca/just/updates.asp

INTRODUCTION:

[1] The applicant sought copies of records related to the death in custody of a named individual. Aside from a few pages of partially released material, for the most part the Department of Justice (Department) refused to disclose the information citing harm to law enforcement as the main exemption under the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). The applicant filed a request for review with this office.

ISSUES:

[2] There are two issues under review:

1. Is the Department authorized to refuse access to information under s. 15 of *FOIPOP* because disclosure of the information could reasonably be expected to harm a law enforcement matter?
2. Should the requested information be disclosed in the public interest pursuant to s. 31 of *FOIPOP*?

DISCUSSION:

[3] In most jurisdictions,[1] in custody deaths caused by means other than natural causes[2] trigger an automatic coroner's inquiry or inquest, which are held publicly. During coroner or medical examiner inquests,[3] a great deal of information about the circumstances leading to a death in custody is revealed to the public. Coroner's reports are generally considered public documents.[4]

[4] Nova Scotia does not require mandatory public inquiries for in custody deaths. Instead, deaths in custody in Nova Scotia only result in a public inquiry if the chief medical examiner recommends an inquiry and the minister orders it.[5] Nova Scotia has only had two such inquiries

[1] The exceptions are Nova Scotia, New Brunswick, Newfoundland and Quebec; however, Quebec does require mandatory investigations with public reports.
[2] Some jurisdictions that require mandatory coroner's inquests also exclude deaths that are "not preventable" (British Columbia and Alberta). In general, inquests are mandatory for any deaths caused by drug overdose, suicide, homicide or accident.
[3] Each province has either a coroner or medical examiner system, operating slightly differently.
[4] Provinces have different practices for releasing coroner's reports. Some provinces (Alberta and British Columbia) proactively disclose on their websites while others (Quebec) direct the public to make a request directly to the Office of the Coroner.
[5] *Fatality Investigations Act*, SNS 2001, c 31 ss. 26 and 27.

since 2010. The Department has publicly reported six deaths in custody since 2010. None have resulted in public inquiries.

[5] The Department describes itself as having "one of the most open and transparent approaches in the country when reporting what happens in our correctional facilities."[6] The Department of Justice has several policies relating to information it may choose to disclose publicly about deaths in custody. A comparison of approaches taken by other correctional services in other provinces confirms that the Department's proactive disclosure of summary information related to deaths in custody is more open than that of many other correctional services. The problem, of course, is that the information provided as a result of these discretionary disclosures is in no way equivalent to the amount of detail provided through a public inquiry process. Other provinces have the advantage of access to this type of information which allows the public to get a clearer understanding of the circumstances that lead to deaths in custody.

[6] In Nova Scotia, the only way to get more detailed information regarding the circumstances surrounding a death in custody is to make an access to information request under *FOIPOP*. That is what has happened in this case.

Background

[7] On April 7, 2014, an inmate died while in the custody of the Central Nova Scotia Correctional Facility (CNSCF). His death was the fourth death in custody at CNSCF since July 2011. The Department publishes brief descriptions of major incidents on its website generally within a few hours and up to a few days of a major incident. The Department also sometimes publishes a summary of its internal investigation reports of the major incidents on the same website. In the case of the April 7, 2014 death, no summary has yet been published.[7]

[8] The applicant is a journalist with a particular interest in understanding the cause of drug-related deaths in prisons. On December 19, 2014, the applicant filed an access to information request for any reports and follow up on the death in custody of a named individual that occurred on April 7, 2014.

[9] On January 26, 2015, the Department responded to the applicant. Most of the responsive records were wholly withheld. The applicant was provided with two copies of the medical distribution policy, four pages of emails (partially disclosed), a memo with the terms of reference for the internal review (partially disclosed) and a copy of the letter of condolence (partially disclosed). The remaining documents and DVDs were entirely withheld. The Department cited three exemptions under the *Freedom of Information and Protection of Privacy Act* as authority for withholding the information: harm to law enforcement, threat to health and safety and unreasonable invasion of personal privacy.

[10] During the informal resolution process, the applicant narrowed his request to internal reports created in response to the incident with supporting documents and appendices. Based on

[6] Chrissy Matheson, spokesperson for Department of Justice as cited in http://thechronicleherald.ca/canada/1350100-parents-of-dead-n.s.-inmate-want-more-details-surrounding-his-death

[7] The brief major incident descriptions and internal investigation report summaries are available online at https://novascotia.ca/just/updates.asp

this narrowing, the Department was provided with a list of the pages my office identified as remaining at issue.

[11] A careful review of the package originally provided to this office[8] and of the severed records provided to the applicant reveals that s. 20 (unreasonable invasion of third party personal privacy) was only applied to the names of offenders or other third parties. Section 20 appears on partially withheld email exchanges and correspondence and is applied to names. It is also listed on one section of the response that identifies 115 withheld pages. The cover sheet has a notation made by the Department that reads, "names of offenders s. 20(1)(d) and s. 20(3)(b)". Therefore, when the applicant indicated he was not interested in the names of offenders, s. 20 was removed as an issue.

[12] As a result, only s. 15, harm to law enforcement, remains at issue.

[13] The Department advised that since the matter was before the courts it was not prepared to revisit its decision to withhold the internal investigation report in full.

[14] The records that remain at issue are the Compliance and Internal Investigation Services unit (CIIS) internal investigation report and supporting appendices, and twenty pages of emails directly related to the internal investigation report. Because the Department's initial submissions contained no evidence in support of its application of s. 15, I made a second, detailed request for evidence. The Department's responses are detailed below.

Burden of Proof

[15] Pursuant to s. 45 of *FOIPOP*, the Department bears the burden of proving that the applicant has no right of access to a record.

Is the Department authorized to refuse access to information under s. 15 of *FOIPOP* because disclosure of the information could reasonably be expected to harm a law enforcement matter?

[16] The Department applied three subsections of the harm to law enforcement exemption to the withheld records: 15(1)(a), 15(1)(i) and 15(1)(k).

> 15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
> (a) harm law enforcement;
> (i) be detrimental to the proper custody, control or supervision of a person under lawful detention;
> (k) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[8] I refer here only to the records that remain at issue. The original response letter to the applicant dated January 26, 2015 indicated that in some parts of the whole record the names of offenders and information about criminal offences had been withheld under s. 20(3)(b). There is also a reference to s. 20(3)(h) in the response letter. However, this review relates to a subset of the response package. The exact page numbers were identified to the Department in advance of this review. The description of the use of s. 20 on these records is limited to names.

[17] The Department applied ss. 15(1)(i) and 15(1)(k) to all of the withheld information. The Department applied s. 15(1)(a) to the internal investigation report, a few of the appendices and to some of the emails.

[18] The focus of the Department's submission is on the fact that the records, if disclosed, would disclose confidential policies and procedures. To be clear, the records do not include copies of the confidential policies or procedures, instead they consist of the internal investigation report and appendices to the report that include information identified in the terms of reference and other documentation specifically related to activities of Correctional Services staff and offenders at and around the time of death. There are also 20 pages of email communication that followed the completion of the report.

[19] The internal investigation report does not include any complete copies of policies but it does include several brief excerpts of relevant policies.

Section 15(1)(a): harm to law enforcement

[20] Section 15(1)(a) of *FOIPOP* provides that the head of a public body may refuse to disclose information if the disclosure could reasonably be expected to "harm law enforcement". The term "law enforcement" is defined in *FOIPOP* as follows:

> 3(1)(e) "law enforcement" means
>
> (i) Policing, including criminal-intelligence operations,
>
> (ii) Investigations that lead or could lead to a penalty or sanction being imposed, and
>
> (iii) Proceedings that lead or could lead to a penalty or sanction being imposed

[21] The Department applied s. 15(1)(a) to the internal investigation report, appendices 24 and 25, a number of emails and a memo related generally to a discussion of the report.

[22] The term "law enforcement" is defined in s. 3(1)(e) of *FOIPOP* and includes policing, including criminal-intelligence operations, and investigations or proceedings that lead or could lead to a penalty or sanction being imposed.

[23] The Department made three arguments as to why s. 15(1)(a) applies:

1. Staff in correctional facilities are "peace officers" and based on the reasoning by an adjudicator in British Columbia, if they are peace officers they are engaged in policing and so fit the definition of law enforcement under s. 3(1)(e)(i) of *FOIPOP*.
2. The investigation by the Compliance and Internal Investigation Services unit was an 'investigation' that could have lead to a penalty or sanction being imposed as required under s. 3(1)(e)(ii) of *FOIPOP*.
3. The investigation, for the purposes of s. 3(1)(e)(ii) of *FOIPOP*, was the active police investigation still underway at the time of this access request.

Peace officers

[24] The definition of law enforcement in *FOIPOP* includes "policing". The Department appears to be claiming that because staff in correctional facilities are also "peace officers" they are therefore engaged in policing. I say "appears to be" because the submission asserts that staff are peace officers and then simply quotes from an adjudicator's decision from British Columbia that includes the sentence, "I am also persuaded that because staff members appointed under the *Correction Act* are peace officers, the disputed information includes information staff members would use in policing."[9]

[25] The Department cites the definition of "peace officer" in the Criminal Code, R.S.C., 1985, c. C-46, which includes, "keeper, jailer, guard and any other officer or permanent employee of a prison other than a penitentiary." The term "prison" is also defined in the Criminal Code and includes, "place in which persons who are charged with or convicted of offences are usually kept in custody." On that basis, I accept that employees in correctional facilities in Nova Scotia that satisfy this definition are indeed peace officers.

[26] Being a peace officer is only relevant if it can be shown that in this case, with respect to these records, the peace officers were engaged in "policing" within the meaning of the definition of "law enforcement" in *FOIPOP*. The Department provided no evidence or argument to support its apparent position that as peace officers, staff in correctional facilities, including the investigators in this case, must be engaged in policing. The connection is certainly not obvious. While the term "policing" is not defined in *FOIPOP*, s. 42 of the *Police Act*[10] lists the powers of police officers. There is no evidence before me that any of those powers apply to staff in correctional facilities. Further, in respect of this death in custody, the police were called in to investigate the death. This suggests that any "policing" activities in this matter were undertaken by the police and not CIIS investigators or other staff. I find that the Department has failed to satisfy its burden of proof that the matter in this case qualifies as "law enforcement" under s. 3(1)(e)(i) of *FOIPOP*.

Investigation by CIIS

[27] The Department submitted that the law enforcement matter that could be harmed by the disclosure of the records was an investigation that could have lead to a penalty or sanction being imposed within the meaning of s. 3(1)(e)(i) of *FOIPOP*.

[28] In order for a public body's investigation to meet the definition of "law enforcement" in *FOIPOP*, the public body must have a specific statutory authority or mandate to conduct the investigation and to impose sanctions or penalties.[11] Quite simply, s. 15 is intended to prevent harm to law enforcement or the enforcement of law. The foundation of the exemption must therefore be a clear statutory authority.

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[9] BC Order F15-22, 2015 BCIPC 24 (CanLII) at para 21.

[10] *Police Act*, SNS 2004, c 31 s. 42.

[11] This is the approach consistent with interpretations by the information and privacy commissioners in both Ontario and British Columbia. See for example B.C Orders 36-1995, [1995] B.C.I.P.C.D. No. 8, at p. 14; 00-52, 2000 CanLII 14417 (BC IPC); F15-26, 2015 BCIPC 28 (CanLII) and Ontario Order P-416, 1993 CanLII 4740 (ON IPC) at p. 5.

[29] The Department cited s. 21 of the *Correctional Services Act* which states that an inspector may conduct inspections, investigations and inquiries. The term "inspector" is further defined as meaning a person designated by the Minister in accordance with the regulations.[12] When specifically asked to confirm that the investigation at issue here was undertaken pursuant to s. 21, the Department failed to do so. Instead, the Department cited the section again and provided an explanation for how it works. The Department described a broad mandate for the CIIS as including investigations, periodic process reviews and compliance audits. Further, I directly asked the Department to confirm whether or not the individual who undertook the investigation had been designated as an "inspector" within the meaning of the *Correctional Services Act*. The Department failed to do so. The Correctional Services Policy & Procedures Subject No. 1.05.02 "Ministerial Designations and Delegations" outlines the classes of persons who are appointed under s. 20 and are considered inspectors for the purposes of conducting investigations.[13] Staff members from CIIS are not included in that list.

[30] Therefore, while it is clear that "inspectors" appointed under the *Correctional Services Act* can conduct investigations under s. 21 of the *Correctional Services Act*, there is no evidence to support that the records at issue here were the product of such an investigation nor that the individual appointed to investigate was an "inspector" for the purposes of s. 21.

[31] Further, even if the records at issue were the product of a CIIS investigation under s. 21 of the *Correctional Services Act*, *FOIPOP* requires that the investigation "lead or could lead to a penalty or sanction being imposed". In order to satisfy the definition of "law enforcement" the public body must have a specific statutory authority or mandate to conduct the investigation **and** to impose sanctions or penalties.[14] The Department did not cite any statutory basis for the imposition of a penalty or sanction as a result of the investigation. The internal investigation report itself makes no recommendations with respect to the imposition of any penalty or sanction.

[32] It appears that the actual authority for the investigation in this case was the Correctional Services Policy 5.00.00 which authorizes a variety of officials, including the executive director, to order an investigation.[15] In particular, s. 5.3.1 provides that investigations will normally be required where there has been a death of an offender while in custody. The Department's submission states that the purpose of the investigation was to determine if the staff were in compliance with the policies that were identified in the internal investigation report.[16] This is consistent with the directions provided in Policy 5.00.00. A policy basis for the investigation does not satisfy the requirement that the investigation be the result of a specific statutory

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[12] *Correctional Services Act*, SNS 2005, c 37, s. 20.
[13] Available online at: https://novascotia.ca/just/Corrections/policy_procedures/Correctional_Services_Policies_Procedures.pdf.
[14] This is the approach consistent with interpretations by the information and privacy commissioners in both Ontario and British Columbia. See for example B.C Orders 36-1995, at p. 14; 00-52; F15-26, and Ontario Order P-416.
[15] This policy is publicly available at: https://novascotia.ca/just/Corrections/policy_procedures/Correctional_Services_Policies_Procedures.pdf.
[16] Second Department submission, May 30, 2018, top of p. 4.

authority. There is no reference to s. 21 in Policy 5.00.00. Further, the definition of "law enforcement" does not generally extend to employment-related disciplinary matters.[17]

[33] The circumstances here can be contrasted with a recent decision in British Columbia involving a request by an individual for records relating to his employment with the Independent Investigations Office (IIO). The records withheld under the law enforcement exemption included an investigation into police-related incidents of death or serious harm the IIO said could lead to employee discipline, suspensions and termination. In that case, the law enforcement exemption was applicable for the following reasons:

> Although the IIO does not specifically say so, it is evident that the IIO's statutory mandate to investigate such matters is found in Part 7.1 of the *Police Act*. Part 7.1 also provides for a sanction or penalty. It states that if, after an investigation, the Director considers that an officer may have committed an offence under any enactment, including an enactment of Canada or another province, the Director must report the matter to Crown counsel. Therefore, I find that the IIO's investigations of officer-related incidents of death or serious harm qualify as "law enforcement" matters under s. 15 of *FIPPA*.[18]

[34] In the same decision, the senior adjudicator differentiates records related solely to an investigation of a disciplinary matter that had no basis in a statutory authority. Those records were determined not to satisfy the requirements of "law enforcement".[19]

[35] For all of the reasons cited above, I find that the Department has not met its burden to establish that the investigation by CIIS in this case satisfied the requirements of s. 3(1)(e)(ii) of *FOIPOP*.

Police investigation underway

[36] The Department's third argument was that the investigation for the purposes of s. 3(1)(e)(ii) of *FOIPOP* was the active police investigation still underway at the time of this access request. The Department claims that the disclosure of the records withheld under s.15(1)(a) in this case could have harmed the police investigation. The challenge with this argument is not whether the police investigation qualified as an "investigation that lead or could lead to a penalty or sanction," but rather, the challenge is the evidence connecting the release of the records at issue here to the harm alleged. I will discuss that issue below.

Section 15(1)(i): detrimental to the proper custody, control or supervision of a person

[37] The Department applied s. 15(1)(i) to all of the withheld information. The Department did not identify what specifically in the records could be used to cause a s. 15(1)(i) harm. Instead, in its assertions of harm discussed below, it did indicate that some of the harms related to the proper custody, control or supervision of inmates. It identified gaps in procedures, information about

[17] There is a long line of cases from Ontario supporting this proposition which is based on the essential understanding that "law enforcement" relates to the enforcement of law, not policy or general supervisory authority. See for example Ontario Order P-285. A recent British Columbia decision followed this reasoning: BC Order F16-28, 2016 BCIPC 30 (CanLII) at para 68.

[18] BC Order F16-28 at para 53.

[19] BC Order F16-28 at para 68.

rounds, contraband and safety generally as the types of detriment that might occur. I will discuss the harm assertions below.

Section 15(1)(k): harm security of any property or system

[38] The Department applied s. 15(1)(k) to all of the withheld information. The Department did not identify what specifically in the records could be used to cause a s. 15(1)(k) harm. In its discussion relating to potential harms, the Department identified safety generally and gaps in policies generally.

Evidence of "harm to law enforcement"

[39] The Department failed to discharge its burden of proving that the investigation conducted by the Department's CIIS investigators qualified as an "investigation" within the meaning of s. 3(1)(e) of *FOIPOP*. However, the Department has provided some evidence that a police investigation was still underway at the time of this access to information request. Further, ss. 15(1)(i) and 15(1)(k) may apply subject to evidence of harm as set out in those subsections. And so, I will now consider the evidence of harm provided.

[40] To meet a harms test:

1. There must be a clear cause and effect relationship between disclosure of the particular withheld information and the outcome or harm alleged;
2. The outcome or harm that would be caused by the disclosure must constitute damage or detriment and not simply hindrance or minimal interference; and
3. The evidence must be well beyond or considerably above a mere possibility of harm in order to reach the middle ground between that which is probable and that which is merely possible.[20]

[41] The Department provided no evidence of harm. Instead it provided assertions of harm from the individual responsible for managing its access to information requests. Those assertions focused on the references to the Correctional Services policies found in the withheld records:

- One other jurisdiction's information and privacy commissioner found that the release of portions of Correctional Services policies at issue in that case could harm law enforcement;
- Some of the policies referred to in the records are confidential as evidenced by the fact that the *Correctional Services Act* and Regulations require that Correctional Services staff keep confidential information they access in their duties and by the fact that Correctional Services has not published six of the 10 policies referenced and withheld in these records.

[20] The first two points are made repeatedly in a variety of Office of the Information and Privacy Commissioner of Alberta adjudications, particularly in relation to its law enforcement exemption. See for example Order F2016-10, 2016 CanLII 20120 (AB OIPC) at para 9 and Order F2017-55, 2017 CanLII 46305 (AB OIPC) at para 37. The connection between the withheld information and the harm alleged has also been articulated as requiring a rational connection between the feared harm and disclosure of the specific information. See BC Order 00-28 at p. 3. The third point is a summary of the test I have previously expressed in a variety of NS Review Reports including FI-10-71, 2015 CanLII 60916 (NS FOIPOP) and 16-02, 2016 NSOIPC 2 (CanLII).

- Records include interviews with staff that do not specifically name policies, but would still provide information that is not publicly available on the procedures for supervising offenders.
- The records at issue were not only intended to determine if staff followed all the correct procedures but also to identify if there were any gaps in procedures that need to be amended.
- Protected policies contain information that is sensitive and could be used to breach the security of the facilities. The submissions suggested that disclosure of the policies could make it easier for offenders to bring contraband into a facility or know when rounds happen which could allow assault to occur when staff are not in the immediate area.
- Offenders could escape or damage the facility if the interview transcripts are released.
- Correctional Services has protected policies to safeguard security measures that if known could allow inmates to harm themselves, each other or staff.
- If the policies that are not publicly available become publicly available, it could affect the ability of Correctional Services to manage correctional facilities safely and therefore harm law enforcement.
- With respect to the potential harm to the police investigation, the Department's evidence is a simple statement from the executive director that, "a police investigation was ongoing and was not complete until March 9, 2016. Release of the information related to this application may have impacted the investigation and could have caused harm under s. 15(1)(a)."

[42] Many of the assertions of harm were simply that the policies are treated as confidential so they must be confidential and therefore they cannot be released under *FOIPOP*. This circular reasoning does not qualify as a "harm" within the meaning of *FOIPOP*.

[43] As noted earlier, the policies were not included in the responsive records. Only a few excerpts were included on three pages of the records. Otherwise, records such as interview transcripts might have one or two-line references to polices either directly or by virtue of the manner in which a question was posed.

[44] The remaining assertions were that in effect, someone might take advantage of gaps identified in policies and if further information not otherwise made public is disclosed via these records, offenders might bring in more contraband or might use new knowledge about rounds to assault each other or even escape from prison. The Department does not point out any particular record that reveals a gap in policy nor does it identify what policy gaps are revealed or how the information could reasonably be used to facilitate an assault or escape.

[45] The Department did not connect its general harm assertions to any particular record or piece of information except for the specific recitation of brief policy excerpts found in the internal investigation report itself.

[46] With respect to concerns that offenders might somehow use the information contained in these records to bring in more contraband, the very brief excerpts from policy contained in the internal investigation report do not include any references to individual search policies. The records themselves do not disclose any contraband hiding strategies nor contraband searching

strategies and the Department certainly did not point to any record or information that could be used for the purposes of circumventing search procedures. I note that in fact, the Correctional Services publicly available policies include several policies on searches and contraband that include descriptions of search strategies.

[47] The records here do include some discussions of how certain medications are provided to inmates. However, that information is publicly known and was publicly discussed by Dr. Risk Kronfli, Clinical Director for Nova Scotia offender health services in a media interview he gave in November 2016.[21] In that interview, Dr. Kronfli provided detailed explanations regarding how drugs are smuggled into provincial prisons. It is difficult to see how any harm could result from the disclosure of far less detailed information provided in the interviews and investigation documents at issue here.

[48] The Department highlights concerns regarding various security-related procedures that might be disclosed in the records. Again, no particular record is identified. Having carefully read all of the withheld information at issue, I agree that, with some effort, an assiduous reader could glean some information about some security-related procedures. But, in my opinion, all of that type of gleanable information is publicly available on the Department's Major Incidents Updates website.[22] Documents on that website identify the following strategies and procedures in multiple cases. Presumably then, this type of disclosure, which is consistent with the information contained in the records at issue here, did not result in any reasonable expectation of harm to law enforcement:

- As per policy, facility was placed in lockdown.
- Appropriate searches were conducted.
- Emergency responders were on scene as per protocol.
- Timing of arrival of paramedics, police and medical examiner noted.
- Timing of rounds average 30 minutes, 15 minutes special watch.
- Correctional Services policy requires incident reporting to police services.
- Critical incident stress debriefings.

[49] In any event, the Department did not provide this office with copies of the policies it said would be revealed by the records at issue nor did it identify where or how these policies would be revealed by the records at issue here.

[50] The Department's submissions refer to information from the executive director of Correctional Services to the effect that a police investigation was ongoing at the time of the access to information request and was not complete until March 9, 2016. The executive director simply asserts that disclosure of the records withheld under s. 15(1)(a) could have impacted the investigation and could have caused harm under s. 15(1)(a). Again, no particular record is referenced, no evidence is provided to connect the records at issue here to the police

[21] Angela MacIvor, "Clayton Cromwell's death prompts stricter methadone policies in jail", *CBC News*, (Nov. 7, 2016): http://www.cbc.ca/news/canada/nova-scotia/methadone-nova-scotia-jail-burnside-clayton-cromwell-1.3836706

[22] Government of Nova Scotia: Justice Major Incident Updates (online: https://novascotia.ca/just/updates.asp)

investigation and no evidence was offered from the police service to support the assertion that the disclosure of these particular records could have in any way harmed the police investigation.

[51] I find that the information provided by the Department is not sufficient to discharge its burden of proof. Therefore, I find that s. 15 does not apply to the withheld information.

Should the requested information be disclosed in the public interest pursuant to s. 31 of *FOIPOP*?

[52] Because I have determined that s. 15 does not apply to the withheld information, there is no need to consider the applicant's s. 31 arguments. I would only add that s. 31 is among the weakest public interest disclosure provisions in Canada.[23] Where information is withheld under a discretionary provision, public bodies should, as a matter of course, always consider the public interest when evaluating their exercise of discretion.

FINDINGS & RECOMMENDATIONS:

[53] The Department's approach to this access to information request suggests that a reminder to all public bodies of three essential and fundamental requirements of Nova Scotia's right to information law is needed.

[54] First, *FOIPOP* prevails over all other laws and certainly it prevails over any policy that purports to limit access to information.

[55] Secondly, *FOIPOP*'s fundamental principle is that public bodies must disclose all information requested unless a specific and limited exemption enumerated in the law applies. Therefore, public bodies should begin with the assumption that the records requested will be disclosed, not the opposite.

[56] Thirdly, *FOIPOP* provides that the right of access does not extend to information exempt from disclosure and that to accomplish this, public bodies must sever that information from the record and provide the remainder to the applicant. The only way to determine what must be severed is to read every single page and every single line on each page. In this case, there was simply no connection between the harm argument and the information on the page. This leads to the inevitable conclusion that the Department simply determined that, for example, staff interviews would not be disclosed. There was no apparent assessment of the information within many of the withheld records but rather a broad decision was reached to withhold whole classes of records contrary to the requirement to sever.

[57] I find that the information provided by the Department is not sufficient to discharge its burden of proof. Therefore, I find that s. 15 does not apply to the withheld information.

[58] Because the Department used a blanket application of s. 15 to most of the records, it failed to identify small portions of the withheld records that contain the personal information of third

[23] In June 2017, I issued a report that outlines the significant shortcomings of our current *FOIPOP* Act including the fact that s. 31 fails to accomplish its stated purpose: Accountability for the Digital Age, at p. 18.

parties. The applicant has already indicated that he is not interested in names. However, there is some information that constitutes the personal health information of a third party. The Department must evaluate whether or not the disclosure of this small portion of a few of the responsive records would result in an unreasonable invasion of the third party's personal privacy within the meaning of s. 20 of *FOIPOP*.

[59] I recommend that the Department conduct a line by line review of the withheld documents to identify the small portions of the records to which s. 20 applies and that all other information withheld under s. 15 be released.

August 9, 2018

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

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