Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner
Catherine Tully

REVIEW REPORT 19-05

June 18, 2019

Department of Justice

Summary: The Department of Justice responded to a request for records relating to the safety and security of a courthouse by withholding 73% of the information as "not responsive". The Commissioner determines that using "not responsive" to sever swathes and snippets of information out of responsive records creates an unlimited, non-specific, entirely arbitrary exemption that frees the public body from any constraints created by the law. This practice fundamentally undermines access to information legislation and is not authorized under the *Freedom of Information and Protection of Privacy Act*. The Commissioner recommends that the Department reprocess the request using only exemptions permitted under the law.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 15, 45; *Interpretation Act*, R.S.N.S. 1989, c. 235, s. 9.

Authorities Considered: British Columbia: Orders F15-23, 2015 BCIPC 25 (CanLII), F15-24, 2015 BCIPC 26 (CanLII); **Nova Scotia:** Review Reports 16-10, 2016 NSOIPC 10 (CanLII); 17-03, 2017 NSOIPC 3 (CanLII); 18-02, 2018 NSOIPC 2 (CanLII).

Cases Considered: *Nova Scotia (Office of the Ombudsman) v. Nova Scotia (Attorney General)*, 2019 NSCA 51 (CanLII); *O'Connor v. Nova Scotia (Priorities and Planning Secretariat)*, 2001 NSCA 132 (CanLII).

Other Sources Considered: *Concise Oxford English Dictionary*, (New York: Oxford University Press, 2011), "arbitrary"; Nova Scotia Assembly Debates, Monday November 8, 1993; Stokes Verworn, Brenda. *An Educator's Guide to Freedom of Information* (Aurora: Canada Law Book Inc., 1999).

INTRODUCTION:

[1] The applicant made a request for access to documents about the safety and security of the Truro Supreme Court. The response from the Department of Justice (Department) contained numerous blank pages with the notation "not responsive". In total, the Department's search returned 478 pages for processing in response to this request. The disclosure to the applicant removed 290 pages entirely as "not responsive". A further 59 pages were provided with portions

of information removed as "not responsive". Most of the remaining pages were severed in part under exemptions set out in the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). A handful of pages were released in full.

[2] In total, 73% of the records were withheld either in whole or in part as "not responsive".

[3] The applicant objected to the use of "not responsive" and filed a request for review with this office.

ISSUES:

[4] There are two related issues in this review:

1. Is the Department authorized to refuse access to whole records produced in response to the request for access to information which the Department deems "not responsive"?
2. Is the Department authorized to refuse access to information it deems "not responsive" within otherwise responsive records?

DISCUSSION:

Background

[5] Upon receipt of this initial request, the Information Access and Privacy (IAP) administrator for the Department determined, in consultation with Department of Justice officials, that the original wording was very broad and would require that every employee search 10 years of records.[1] As a result, she phoned the applicant. According to the IAP administrator's notes of the conversation, she explained that the search would take months and that there was no one file or one database containing the requested records.

[6] In a follow up conversation, the IAP administrator's notes indicate that the applicant told her that the request was at least in part prompted by an application to move a trial in early 2015 because of safety and security concerns at the Truro Supreme Court. The applicant identified a number of departmental employees by position she thought could have responsive records and confirmed that she wanted 10 years of records searched.

[7] Based on these two conversations, the IAP administrator amended the request on November 4, 2015 and wrote to the applicant to confirm that the request was amended to the following:

> Any and all documents (e-mails, reports, memos, etc.) received or sent from the Prothonotary or head Deputy Sheriff in Truro Supreme Court, Director of Court Services or Executive Director of Court Services about the safety and security of the Supreme Court in Truro from January 1, 2005 to present (November 4, 2015).

[1] In Nova Scotia access to information requests made to government departments are centrally processed by Information Access and Privacy Services – part of the Department of Internal Services. The department originally receiving the request remains responsible for decisions made as it is the public body under the law.

[8] In due course, the Department responded to the applicant's request providing partial access to the records as described above. Almost three quarters of the records were withheld as "not responsive".

[9] When the applicant received the package filled with blank pages and blank spaces labelled "not responsive" she filed a request for review stating that she wanted the public body to "remove redactions deemed "not responsive to request" in accordance with recent case law." She cited two British Columbia cases, Order F15-23 and Order F15-24,[2] in support of her request.

[10] As part of our normal review process, the parties were invited to engage in informal resolution discussions. The investigator assigned to this file provided the parties with an opinion and asked for comment. The Department did not participate in the informal resolution process. The applicant actively participated and, as a result of discussions with this office, withdrew her objection to the withholding of one type of non-responsive severing. The applicant agreed that where a table contained entries for courthouses other than the Truro Supreme Court, she did not object to severing of rows or columns clearly only relating to other courts.

Burden of Proof

[11] Usually it is the public body who bears the burden of proving that the applicant has no right of access to a record.[3] This is particularly true when the public body's refusal to disclose information is not based on any statutory provision.

Is the Department authorized to refuse access to whole records produced in response to the request for access to information which the Department deems "not responsive"?

[12] The first step in the processing of any access to information request is a search for records responsive to the request. In truth, the vast majority of a public body's records will be non-responsive. There is no question that a public body must identify responsive records and must then process them in response to an access to information request. It makes no sense to include a series of blank pages indicating that a whole document has been withheld as non-responsive because there will be thousands, if not millions of documents in the custody or control of a public body that are not responsive to every request the public body receives. It takes skill, judgement and a good understanding of the access to information request to identify responsive records.

[13] Following the agreement on the new scope of the request, the IAP administrator emailed staff in the Department and included a copy of the agreed upon request text. In response, knowledgeable Department officials returned 474 pages[4] of records they believed responded to the request as written. During the processing of the records returned in the search, nearly three quarters of the information was deemed "not responsive".

[2] BC Order F15-23, 2015 BCIPC 25 (CanLII) and BC Order F15-24, 2015 BCIPC 26 (CanLII).
[3] *FOIPOP*, SNS 1993, c 5, s. 45(1).
[4] Four of the original 478 pages were identified and removed as duplicates and so are not at issue.

[14] In its submission, the Department argues that the second iteration of the request is not the whole story. The Department asserts that in fact, the phone conversation between IAP Services and the applicant that led to the narrowed version of the request had further narrowed the request and that, based on the conversation, the Department more narrowly interpreted the request to be focused only on safety issues that related to the Truro Supreme Court building itself - building condition, security and continued location. The Department viewed this focus as excluding policies or procedures of sheriff services or court services put in place to generally manage courthouses or staff not tied to the building itself. Despite the fact that the conversation identified that the applicant's request was prompted by a decision to move an individual's trial based on safety concerns, the Department's submission states that it excluded any plans relating to security for an individual. It also says that it excluded plans regarding violence in the workplace assessments as these were done across the province and not specifically in relation to the Truro Supreme Court. Information about other courthouses was also removed as "not responsive".

[15] The Department provided no explanation for why it did not include this further narrowing in the version of the request IAP Services drafted and sent to the applicant for the applicant's approval on November 4, 2015.

[16] As noted above, the Department did not participate in the informal resolution process so did not provide its explanation for the further narrowing of the request until the formal review submission. As a result, the applicant was not provided with this explanation. The request the applicant agreed to was written by the Department's IAP administrator based on the telephone conversation. The November 4, 2015 version of the request is actually quite broad in terms of subject area. It states:

> Any and all documents (e-mails, reports, memos, etc.) received or sent from the Prothonotary or head Deputy Sheriff in Truro Supreme Court, Director of Court Services or Executive Director of Court Services about the safety and security of the Supreme Court in Truro from January 1, 2005 to present (November 4, 2015).

[17] The subject area agreed to by the applicant was, "the safety and security of the Supreme Court in Truro…." There is no indication in this request that the safety and security issues are limited to issues about the building itself. There is no indication that individual issues of safety or that any record touching on safety and security pertaining to the Supreme Court facility or operation are non-responsive.

[18] During this review, the applicant confirmed that this request was made on behalf of the municipality.[5] The municipality owns the building that houses the Supreme Court in Truro. The applicant explained that the court is very old and so was designed without modern security features. In addition, the building is mixed use. The municipality occupies space in the basement, first floor and third floor. The municipality also uses a boardroom on the second floor. In addition to attending court proceedings, the public frequently uses the building to access municipal services including the tax department and the planning department. Town Council meets on the third floor. The Department occupies space in the basement and second

[5] The applicant acts for the municipality and confirmed that this information could be publicly disclosed.

floor. Prisoners and the public travel the same hallways and stairwells. Sometimes metal detectors are set up on the second floor. The municipality is not given advanced notice or an explanation for these periodic, temporary security measures.

[19] The applicant explained that the municipality has responsibilities for the health and safety of its employees and of the public visiting municipal offices and attending meetings. The applicant expected that the request would be broadly interpreted to disclose any documents related to safety and security connected with the Truro Supreme Court building. This could include province-wide initiatives if those initiatives have an impact on safety and security policies and procedures in the Truro Supreme Court. While the applicant was not interested in the personal information of any individual, decisions made to move trials out of the Truro Supreme Court because of safety concerns could be relevant if they informed the applicant's understanding of security and safety in the building. Ultimately, the applicant sought as much information as possible to help inform the municipality's decisions about how to prevent or minimize risk to the public and to municipal staff.

[20] In my view, the phrase "safety and security" encompasses everything described by the applicant. It is important to recall that applicants do not have to provide reasons for their requests. What is most important here is that the request as written by the Department and agreed to by the applicant was for all information related to the safety and security of the Truro Supreme Court. There are no qualifiers in this description. The Department's decision to further narrow the request was completely inconsistent with the wording of the request.

[21] A careful review of the records that were wholly withheld by the Department reveals that only 10 of the 290 wholly withheld pages can be accurately described as non-responsive to the request as written. Nine of these pages relate to the processing of the access to information request – clearly non-responsive. One page is entirely unrelated and appears to have been included in error.

[22] The remaining 280 pages all deal with issues relating to safety and security that could potentially impact or inform safety and security at the Truro Supreme Court building. I agree with the Department staff who produced these records in response to the call for records. These records are without question responsive to this request.[6]

[23] In conclusion, I find that the Department is authorized to withhold records that are entirely non-responsive to an access to information request. However, I find that in this case, only 10 of the 290 pages wholly withheld as "not responsive" are in fact not responsive to this request.

[6] The applicant agreed in the informal resolution process that 33 pages need not be produced because they consisted of tables that clearly identified information by courthouse. Included in this group of 33 pages are both wholly withheld and partially withheld documents. On those types of records, the applicant agreed to receive only the entries relating to the Truro Supreme Court. For clarity those pages are: 137-140, 144-147, 156-157, 189-193 and 203-220.

Is the Department authorized to refuse access to information it deems "not responsive" within otherwise responsive records?

[24] I have evaluated the use of non-responsive severing in previous decisions. In this case, the Department chose to cut and paste its submission from a review heard 2 ½ years ago. The Department relies on cases from two jurisdictions with different provisions than Nova Scotia and on cases more than a decade old. It makes no attempt to address modern case law, including the cases cited by the applicant. It makes no attempt to address cases that do not support its position. Further, it makes no attempt to address the reasoning in the detailed discussion of non-responsive severing found in recent Nova Scotia cases including Review Reports 16-10, 17-03 and 18-02.[7]

[25] It is important to recall the basis for right to know legislation.[8] Prior to the enactment of the *Freedom of Information and Protection of Privacy Act*, government officials decided what information would be disclosed and even if information would be disclosed. In other words, disclosure of information to citizens was entirely discretionary and often arbitrary. This was the problem access to information legislation was intended to remedy. Donald C. Rowat explained the problem this way: "Public officials are too used to the old system of discretionary secrecy under which they arbitrarily withheld information for their own convenience or for fear of disapproval by their superiors and will not change their ways unless they are required by law to do so."[9]

[26] In 1993 when *FOIPOP* was introduced, then Minister of Justice, the Honourable William Gillis stated, "Nova Scotians want to know where they stand with their government. They want their rights to information and their rights to privacy defined with precision, and they want procedural fairness. What they do not want is an Act that allows the government to keep its secrets."[10]

[27] As this was the problem to be remedied, there were certain essential elements to the new law. First and foremost, the rule became that all information requested must be disclosed subject only to limited and specific exemptions. In responding to this access to information request, it appears that the Department has lost sight of this essential purpose and has created for itself an exemption that is essentially the approach intended to be remedied by the access to information law. Using "not responsive" to sever snippets of information out of responsive records creates an unlimited, non-specific, entirely arbitrary exemption that frees the public body from any constraints created by the law. It fundamentally undermines the purpose and objectives of Nova Scotia's access to information legislation.

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[7] NS Review Report 16-10, 2016 NSOIPC 10 (CanLII); NS Review Report 17-03, 2017 NSOIPC 3 (CanLII) and NS Review Report 18-02, 2018 NSOIPC 2 (CanLII).

[8] I note that such an approach is consistent with the recent decision of the Nova Scotia Court of Appeal in *Nova Scotia (Office of the Ombudsman) v. Nova Scotia (Attorney General)*, 2019 NSCA 51 (CanLII) at para 62 and with s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235.

[9] D.C. Rowat, "The Right to Government Information in Democracies" (1981), 2 Journal of Media Law and Practice 330 as cited in Brenda Stokes Verworn, *An Educator's Guide to Freedom of Information* (Aurora: Canada Law Book Inc., 1999) at page 6.

[10] The Honourable William Gillis, Minister of Justice, Introduction of FOIPOP, Nova Scotia Assembly Debates, Monday, November 8, 1993.

[28] Since I have already addressed all of the arguments in the Department's submission in the last case where it used that submission, I have nothing further to add than to recommend that the Department read Review Report 16-10.

[29] I conclude that *FOIPOP* does not permit severing or removing of information within a responsive record on the basis that the public body is of the view that information is "out of scope", "not responsive" or "not applicable" for five reasons, all fully discussed in Review Report 16-10:

a. It is the applicant and not the public body who defines what is and is not responsive to a request.
b. Nova Scotia's *FOIPOP* specifically provides for the right to "all government information" and access to "any" record.
c. Non-responsive severing is not a specific and limited exemption under *FOIPOP*.
d. Disclosing the full record is consistent with the purposes of *FOIPOP*.[11]
e. In order for a non-responsive exemption to exist, such an exemption would have to be "read in" to *FOIPOP*.

[30] I rely on the reasoning set out in paragraphs 15 to 74 in Review Report 16-10 and will not repeat that discussion here except to emphasize that there is a false assumption behind a public body determining that some piece of information within a responsive record is somehow not responsive to the applicant's request. It is for the applicant to decide whether the information adds context or furthers the goal of meaningful disclosure. Applicants do not have to give a reason for their request and so the background, context or relevance of portions of records may well be a mystery to the public body. In other words, it is very likely that something a public body may view as "not relevant" may be exactly the information the applicant was hoping to find within the requested record. There is no way a public body can know with certainty that information within a record is "out of scope" of the applicant's request without asking the applicant.[12]

[31] In addition to the many reasons set out in Review Report 16-10 for why non-responsive severing is not permitted under Nova Scotia's access to information law, in this case there is an additional reason – inconsistent severing. In fact, the manner in which "not responsive" was used in this case was arbitrary. The Concise Oxford English Dictionary defines "arbitrary" as "based on random choice."[13] This accurately describes the Department's approach as its

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[11] I note that the Court of Appeal has once again emphasized that through *FOIPOP*, "…the Legislature has imposed a positive obligation upon public bodies to accommodate the public's right of access and, subject to limited exception to disclose all government information so that public participation in the workings of government will be informed, that government decision making will be fair, and that divergent views will be heard. The *FOIPOP Act* ought to be interpreted liberally so as to give clear expression to the Legislature's intention that such positive obligations would ensure to the benefit of good government of its citizens*." Nova Scotia (Office of the Ombudsman) v. Nova Scotia (Attorney General)*, 2019 NSCA 51 (CanLII) at para 102 citing with approval *O'Connor v. Nova Scotia (Priorities and Planning Secretariat)*, 2001 NSCA 132 (CanLII) at paras 40-41.
[12] NS Review Report 16-10, 2016 NSOIPC 10 (CanLII).
[13] *Concise Oxford English Dictionary*, (New York: Oxford University Press, 2011), "arbitrary" at p. 66.

application of "not responsive" was without logic or internal consistency. Here are some examples:

- Although the Department's submission claims that information related to violence in the workplace is not responsive, sometimes this information is deemed responsive and sometimes it isn't.[14]
- The Department's submission states that the focus of the response included information about the building location yet on the same document information about building location is both responsive and not responsive.[15]
- Sometimes cover emails are responsive but the attachments are not and sometimes the attachments are responsive but the emails are not.[16]
- In one email string a question is responsive but the answer is not.[17]
- On a number of occasions, issues are treated as both responsive and not responsive. I cannot specify the issues because where they are treated as responsive, the information, for the most part, is severed under s. 15.[18]
- On other occasions, an email is responsive in one email string and the exact same email is not responsive in a second string.[19]
- According to the Department, the applicant specifically identified security issues arising out of an incident with an individual, yet the Department has withheld most of that information as not responsive.[20]

[32] I find that *FOIPOP* does not authorize a public body to withhold information within a responsive record on the basis that it is somehow "out of scope", "not relevant" or "not responsive".

FINDINGS & RECOMMENDATIONS:

[33] I find that:

1. The Department is authorized to withhold records that are entirely non-responsive to an access to information request. In this case, only 10 of the 290 pages wholly withheld as "not responsive" are in fact not responsive to this request.
2. *FOIPOP* does not authorize a public body to withhold information within a responsive record on the basis that it is somehow "out of scope", "not relevant" or "not responsive".

[34] I recommend that the Department reprocess every page of the records that Department staff returned in the search for responsive records and either release the information or use only

[14] See for example pp. 325-409 where a violence in the workplace assessment is mostly disclosed versus pp. 186-188 where it is wholly withheld as "not responsive".
[15] See p. 439.
[16] See for examples pp. 186-193; 247-249.
[17] Email requesting follow up on projects is responsive but the response is not (p. 87).
[18] See pp. 10, 22-26 and 250 versus pp. 262-263 and with respect to a different issue pp. 226-228 versus pp. 273-280.
[19] See pp. 71-72 versus pp. 75-76.
[20] Pp. 452-466.

exemptions authorized under *FOIPOP*. The Department need not reprocess the 10 pages I agree are clearly not responsive to the request and the 33 pages the applicant agreed were no longer at issue.

June 18, 2019

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

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