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

REVIEW REPORT 21-04

March 30, 2021

Department of Justice

Summary: The applicant requested video footage from the Department of Justice (Department) of an incident he was involved in while he was an inmate at a correctional facility. The Department withheld the footage in full, citing s. 15(1)(i) and (k) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*) (harm to law enforcement). The Department also claimed additional exemptions based on the images contained within some of the video files. Any images that showed correctional facility staff[1] or other public body staff were withheld on the basis of s. 15(1)(e) of *FOIPOP*. Any images that showed other inmates were withheld pursuant to s. 20(3)(b) of *FOIPOP* (personal information).

The Department made a decision to withhold the footage in full, contrary to the fundamental rule that records requested must be disclosed unless a specific and limited exemption applies. The Commissioner finds that the Department was not authorized to withhold the footage in full. The Commissioner also finds that the Department was not authorized to withhold the images of correctional facility staff pursuant to s. 15(1)(e). The Commissioner finds that the Department was authorized to withhold images of other inmates pursuant to s. 20(3)(b). Finally, the Commissioner finds that the Department met its duty to assist the applicant by conducting an adequate search for the requested records. The Commissioner recommends the Department disclose the video footage to the applicant severing only the images of other inmates.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 5, 6, 7, 15, 18, 20, 39, 45; *Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165* , s. 15

Authorities Considered: **Alberta:** Order F2016-10, 2016 CanLII 20120 (AB OIPC) ; Order F2017-55, 2017 CanLII 46305 (AB OIPC); **British Columbia:** Order 00-28, 2000 CanLII 14393 (BC IPC); Order 01-01, 2001 CanLII 21555 (BC IPC); Order 03-16, 2003 CanLII 49186 (BC IPC); Order F08-13, 2008 CanLII 41151 (BC IPC); **Nova Scotia:** FI-06-79, 2007 CanLII 39593 (NS FOIPOP); FI-09-40, 2010 CanLII 4229 (NS FOIPOP); FI-10-71, 2015 CanLII 60916 (NS

[1] Note that at times the video footage includes images of healthcare facility staff. Where this review report discusses analysis, findings and recommendations with respect to correctional facility staff, this is meant to include any other public body employees, such as healthcare facility staff.

FOIPOP); FI-11-76, 2014 CanLII 71241 (NS FOIPOP); 16-02, 2016 NSOIPC 2 (CanLII); 16-13, 2016 NSOIPC 13 (CanLII); 17-03, 2017 NSOIPC 3 (CanLII); 18-03, 2018 NSOIPC 3 (CanLII); 19-06, 2019 NSOIPC 7 (CanLII).

Cases Considered: *Houston v. Nova Scotia (Minister of Transportation and Infrastructure Renewal)* 2021 NSSC 23; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII); *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *British Columbia (Public Safety and Solicitor General) v. Stelmack*, 2011 BCSC 1244; *Ontario (Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII); *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36 (CanLII); *House (Re)*, 2000 CanLII 20401 (NS SC).

Other Sources Considered: OIPC Guidelines for Public Bodies and Municipalities, online: https://oipc.novascotia.ca/node/471; "Corrections employees charged in prison contraband 'crisis'", *Associated Press*, (April 25, 2018) online: <https://www.foxnews.com/us/corrections-employees-charged-in-prison-contraband-crisis>; Jacqueline Foster, "Corrections Officer Charged with Smuggling Drugs" *CTV*, (October 26, 2012), online: <https://atlantic.ctvnews.ca/video/corrections-officer-charged-with-smuggling-drugs-1.1012594>; Chris Vilela, "Former Corrections Canada employee charged with smuggling contraband", *The Kingstonist*, (June 11, 2020), online: <https://www.kingstonist.com/news/former-corrections-canada-employee-charged-with-smuggling-contraband/>; *Audit & Compliance Report F18-02 City of White Rock, Duty to Assist* 2018 BCIPC 52 (CanLII) (online: https://www.oipc.bc.ca/audit-and-compliance-reports/2260).

INTRODUCTION:

[1] The applicant sought information relating to an incident he was involved in at a correctional facility that included both paper and video footage. The applicant took no issue with the severed paper records he received. The Department of Justice (Department) withheld the video footage in full. The Department cited personal information and harm to law enforcement as the exemptions under the *Freedom of Information and Protection of Privacy Act (FOIPOP)*.[2] The applicant filed a request for review with the Office of the Information and Privacy Commissioner (OIPC).

ISSUES:

[2] There are three issues under review:

1. Was the Department authorized to withhold in full or in part, the video surveillance files from disclosure under s. 15(1)?
2. Was the Department required by s. 20(3)(b) to withhold the video surveillance files in full or in part as disclosure would unreasonably invade an individual's personal privacy?
3. Did the Department meet its duty to assist the applicant as set out in s. 7(1) of *FOIPOP*?

[2] SNS 1993, c 5.

PRELIMINARY MATTER

[3] During the review process, an additional issue with respect to the Department's duty to assist obligations was identified by the OIPC. The Department objected to the addition of a new issue by the OIPC during the review process. The Department noted that this issue arose while trying to resolve the file informally and that it did not create a formal decision as required by s. 7(2) of *FOIPOP* on that issue.

[4] The applicant did not provide any representations on whether an additional issue could be added as a result of the Department's actions through the course of the review process.

[5] The duties and powers of the Commissioner[3] on completing a review are set out in s. 39 of *FOIPOP*. This section requires the Commissioner to prepare a report setting out her recommendations with respect to the "matter". The term "matter" is quite broad. Section 39 does not specify that the recommendations must be limited to the decision of the public body. As such, it is within the discretion of the Commissioner to add additional issues even if those issues arise from the review process as opposed to the decision of the public body that was the basis for the appeal.

[6] Although the Commissioner may add additional issues, it is significant that the applicant did not provide representations. Furthermore, the issue itself has no bearing on my findings or recommendations in this review. As such, I will not explore it further.

DISCUSSION:

Background

[7] In 2016, the applicant submitted a request for information to the Department pursuant to s. 6 of *FOIPOP*. The applicant sought his own information as it related to an incident he was involved in at a correctional facility, including both paper and video files of the incident and any records about medical treatment or discipline.

[8] The responsive video footage contained multiple video surveillance files, some containing two or more camera angles. These files, recorded on one day in 2016, documented an incident that occurred involving the applicant in a unit of the correctional facility, his movements throughout the facility to obtain health care and his placement in a segregated cell. Most of the files contain only seconds to minutes of footage. However, the footage of the segregated cell was approximately 17 hours long.

[9] The Department provided the applicant with a decision to provide part of the paper records requested. The applicant took no issue with the severing of the paper records he received. Thus, the severing of the paper records is not at issue in this review.

[3] Note that the Commissioner is referred to as the "Review Officer" in *FOIPOP*.

[10] With respect to the video footage, the Department's decision letter indicated that there were multiple video files including video surveillance footage from a handheld camera. The Department's decision was to withhold the video footage in full, exempting the entire class of records from disclosure under s. 15(1)(i), and (k) of *FOIPOP*. The Department's decision letter also claimed additional exemptions based on the images contained within some of the video files. Where correctional facility staff or any other public body staff were viewable in the footage, those files were withheld under s. 15(1)(e) of *FOIPOP*. Where other inmates' images were viewable, those files were also withheld under s. 20(3)(b) of *FOIPOP*.

[11] The applicant took issue with the Department withholding the video footage and filed a request for review with this office seeking access to it.

Burden of proof

[12] Section 45(1) of *FOIPOP* states that the burden is on the head of the public body to prove that the applicant has no right of access to the record. Where the record contains personal information of third parties, it is the applicant who bears the burden to prove disclosure would not be an unreasonable invasion of the third party's privacy.

1. Was the Department authorized to withhold in full or in part, the video surveillance files from disclosure under s. 15(1)?

[13] The Department applied three subsections of the harm to law enforcement exemption to the withheld video footage: 15(1)(e), 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
> (e) endanger the life or physical safety of a law-enforcement officer or any other person;
> (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.

[14] The Department applied s. 15(1)(i) and s. 15(1)(k) to all the information as rationale for withholding the video footage in full. The Department also applied s. 15(1)(e) to any of the footage that captured images of correctional facility staff or other public body staff.

[15] Section 15 is a harms-based exemption. In *NS Review Report 18-03,*[4] former Commissioner Tully established that to meet a harms test, all three parts of the following test must be met:

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

[4] 2018 NSOIPC 3 (CanLII).

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. [5]

[16] More recently, the Nova Scotia Supreme Court in *Houston v. Nova Scotia (Minister of Transportation and Infrastructure Renewal)* described this test as follows:[6]

> [64] The test as to what evidence is required to establish disclosure "could reasonably be expected to" result in harm was set out by Cromwell J., in giving the majority judgment in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 when he stated at para. 201:
>
> > . . . I conclude that the English text of the statute suggests a middle ground between that which is probable and that which is merely possible. The intended threshold appears to be considerably higher than a mere possibility of harm, but somewhat lower than harm that is more likely than not to occur.
>
> [65] The formulation was further described by Cromwell and Wagner J.J. in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54:
>
> > This Court in *Merck Frosst*[7] adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.
>
> …

[5] 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*, 2000 CanLII 14393 (BC IPC) at p. 3. The third point is a summary of the test 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).

[6] 2021 NSSC 23 at paras 65 and 67.

[7] [2012] 1 SCR 23, 2012 SCC 3 (CanLII).

> [67] The evidence required to establish the harm would have to convince the court that there is a direct link between the disclosure and the apprehended harm and the harm could reasonably be expected to ensue from disclosure (*Merck Frosst* at para. 219).

Withholding in full pursuant to s. 15(1)(i): detrimental to the proper custody, control or supervision of a person and s. 15(1)(k): harm security of any person or system

[17] In terms of its application of s. 15(1)(i) and s. 15(1)(k), which the Department applied to withhold the records in full, the focus of the Department's representations centered on a concern that release of video surveillance could expose the viewing area of existing surveillance cameras, including whether there were any blind spots. The Department's position was that knowledge of the viewing area of the cameras could then be exploited by other inmates to engage in prohibited or illegal activities at the correctional facility. Further, the Department had a concern that if the viewing angles were exploited by inmates, that could mean that evidence of illegal activities might not be captured by the cameras which could make an investigation more difficult. This, in turn, the Department said, could lead to an increase in inmate attempts to engage in such activities at the correctional facility.

[18] With regard to s. 15(1)(i), the Department argued that to properly supervise inmates, there is some information that should only be available to the correctional facility staff and this includes what the viewing area is of the cameras and the clarity of the images. With regard to s. 15(1)(k), the Department said that the information in the videos directly affects the security in place at the correctional facility. It argued that to maintain security at the correctional facility there is some information that should only be available to correctional facility staff. The Department's concern was that releasing the viewing angles would put the safe and secure running of the facility at risk as surveillance cameras are an important security feature of correctional facilities to ensure the safety of correctional facility staff and inmates.

[19] In *British Columbia Order F08-13*,[8] an applicant similarly requested video footage of her time at a correctional facility and the public body refused to disclose it based on British Columbia's s. 15(1)(l) of its *Freedom of Information and Protection of Privacy Act*, which is identical to Nova Scotia's s. 15(1)(k). In that case, the adjudicator agreed that disclosure of gaps or blind spots in the surveillance system might compromise the effectiveness of the system in some circumstances. However, she went on to say that the nature of the blind spots was such that they were probably obvious to anyone who could see the camera's position and angle. Further, there was no evidence that the cameras were hidden or inaccessible, rather there was evidence that inmates often attempted to disable cameras which suggested that the cameras were easily identifiable. In other words, inmates could already deduce the blind spots because they would be apparent to anyone in the same room as the cameras. The adjudicator concluded there was not a clear and direct connection between the disclosure of the footage and the public body's assertion that release of the camera angles could harm the security of the correctional facility's surveillance system.[9] This conclusion was upheld at the Supreme Court of British Columbia by Justice Russell.[10]

---

[8] 2008 CanLII 41151 (BC IPC).
[9] BC Order F08-13 at para 45.
[10] *British Columbia (Public Safety and Solicitor General) v. Stelmack*, 2011 BCSC 1244.

[20] The Department argued that *Order F08-13*[11] is distinguishable from the current review because of two additional findings made by the adjudicator in that case. First, the adjudicator found that the public body's concerns that the footage would reveal the layout and security features of the jail were not likely to realize because the footage at issue in that case did not show the movement of officers or personnel through the various parts of the correctional facility and did not show the relationship of the various areas of the correctional facility to each other. Second, the adjudicator found that the public body's mosaic effect argument was unlikely and speculative because the footage was of the interior of two cells.[12] The mosaic effect is the effect that occurs when seemingly innocuous information can be connected with other already available information to generate information that is not innocuous and could inadvertently yield information excepted from disclosure under access to information legislation.[13] The Department argued that the risks in this review are much higher than in *Order F08-13* since the video surveillance in this instance does track movements through various parts of the correctional facility.

[21] It is important to remember that the footage at issue in this review contains both stationary room footage as well as footage that tracked the applicant through the correctional facility. Like the adjudicator in *Order F08-13*, I am of the view that the Department has not established that disclosure of footage of a stationary room would cause the harm enumerated in s. 15(1)(k). Like the adjudicator in *Order F08-13*, I draw an inference that any blind spots that might exist are likely obvious to anyone who could see the camera's position and angle, such as the applicant in this case who spent many hours in the segregation cell. Furthermore, the first step of the harms test requires the Department to show a clear cause and effect relationship between the disclosure of the withheld information and the outcome of the harm alleged. The concerns raised by the Department with respect to s. 15(1)(k) were generalized and speculative. There was no evidence put forward that was detailed enough to establish that disclosing footage of a stationary room could reveal the existence of blind spots which then could be manipulated to allow future inmates to engage in prohibited or illegal activities at the correctional facility. While I can accept that the issue of engaging in prohibited or illegal activities, such as bringing contraband into a correctional facility, is a live and concerning one to the Department, I do not see a clear cause and effect relationship that releasing this video footage of a stationary segregation cell would cause that harm to occur.

[22] That being said, I hear the Department's point that the adjudicator in *Order F08-13* noted that the video footage in that case did not show movement through various parts of the facility. Here, the situation is different in that there is footage tracking the applicant's movements through the correctional facility. The question is whether the Department has established that the footage capturing movement throughout the correctional facility would harm the security of the property or system as contemplated by s. 15(1)(k). At the end of the day, all the Department argued was that the risk is higher than in *Order F08-13* because the footage shows movement. The problem with this is that the Department did not explain why or how that was the case. In *Order F08-13*, the adjudicator accepted in camera representations on this issue.[14] It was open to

[11] 2008 CanLII 41151 (BC IPC).
[12] *BC Order F08-13* at paras 47-48.
[13] *BC Order 01-01*, 2001 CanLII 21555 (BC IPC), at para 40.
[14] See paras 35 and 38 of *BC Order F08-13*.

the Department to make a request to submit in camera representations to me, but it did not do so. Rather, the Department simply stated that the risk with videos showing movement through the facility was higher and did not provide any rationale for why that was its position.

[23] In this context, again, I conclude that the Department has not met its burden to establish that release of the video footage that tracks the applicant through the facility would harm the security of the correctional facility or any of its systems. The Department provided only mere assertions of harm that were speculative at best.

[24] In terms of s. 15(1)(i), the same analysis applies. I accept that bringing in contraband or engaging in other prohibited activities at the correctional facility is detrimental to the proper custody, control or supervision of a person under lawful detention. However, I do not accept that releasing this requested video footage could reasonably be expected to cause that harm. The Department's representations lack the causal connection between that potential harm and the disclosure of these responsive video files. The representations only assert that disclosure might cause the particular harm without specifically identifying how the images and video files at issue could result in this potential harm.

[25] I find that the Department was not authorized to refuse access to the video footage requested by the applicant under s. 15(1)(k) and s. 15(1)(i).

Section 15(1)(e): endanger the life or physical safety of a law-enforcement officer or any other person

[26] With respect to s. 15(1)(e), the Department said it applied this exemption to protect correctional facility staff from their images being released because it has no control over whether the applicant would further disseminate the video footage if it were supplied to him. The Department's concern was that if the applicant were to disseminate the video footage to the public, such as through the vehicle of social media, correctional facility staff could be identified from that footage. Then, if correctional facility staff were identified, they could be subject to pressure from inmates and those outside the facility to bring contraband items into the facility. The Department said this type of pressure happens regularly in the United States and Canada and pointed me to three news articles in that regard.[15]

[27] I reviewed the news articles supplied by the Department. They all speak to times when a correctional facility staff member smuggled contraband into a correctional facility. However, there is no mention in the articles that these staff members were pressured or threatened by inmates to bring in contraband. Nor do the articles say that any such pressure or threats were generated as a result of previous identification of a staff member. Although the Department characterized the articles in its representations as anecdotal evidence that this pressure happens regularly, the articles do not make mention of this.

[15] See: https://www.foxnews.com/us/corrections-employees-charged-in-prison-contraband-crisis; https://atlantic.ctvnews.ca/video/corrections-officer-charged-with-smuggling-drugs-1.1012594; https://www.kingstonist.com/news/former-corrections-canada-employee-charged-with-smuggling-contraband/

[28] In *Ontario (Community and Social Services) v. John Doe*,[16] the Ontario Court of Appeal found that the public body had not met its evidentiary burden to establish a reasonable risk of endangerment warranting that the videos at issue were appropriately withheld. This was despite the public body providing evidence in the form of a grievance settlement order which had been agreed to with the union because of the need to protect employees. This settlement order permitted employees to only give their first name and employee identification numbers to members of the public. In that case, the public body also put forward evidence of 24 documented threats made against its employees in general or to individual employees. The argument was also made that the applicant could disclose the information to the world. Despite this evidence, the Ontario Court of Appeal found that the public body had not met its burden of proof, noting the following factors:

- While there was evidence of documented threats, there was no evidence that the requester himself posed a threat to the 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.[17]

[29] In *NS Review Report 16-13*,[18] the applicant was seeking records relating to his father's prison term and the Department declined to disclose the names of the correctional officers in the responsive records. Former Commissioner Tully found that s. 15(1)(e) did not apply to the names of correctional officers. After having reviewed *Ontario (Community and Social Services) v. John Doe*, former Commissioner Tully noted that she had no evidence before her that the applicant would subject the employees to any risk of harm. There was nothing in the records that would suggest the behaviour of the applicant would change after reviewing the records. She remarked that it was unclear to her why a criminal intent on wanting to influence a correctional officer to bring drugs into a prison would need a freedom of information request response to get an officer's name since inmates within the system already know the officer's names – it was not uncommon for them to make access requests that include the full name of correctional officers. There was no evidence tendered by the public body to suggest that the officers had ever been the subject of threats or undue influence. Finally, while the media articles made clear there was a risk that correctional officers may bring contraband into prisons, the public body supplied no evidence connecting this activity to undue influence as a result of officers being identified by inmates.[19]

---

[16] 2015 ONCA 107 (CanLII).
[17] *Ontario (Community and Social Services) v. John Doe* at paras 27-30.
[18] 2016 NSOIPC 13 (CanLII).
[19] *NS Review Report 16-13* at para 16-18.

[30] I likewise have little evidence before me. The Department's representations consisted of assertions of possible harm. There was no evidence of documented threats or pressure to bring in contraband against any of the correctional facility staff who would be identifiable from the video, or even with regard to public body staff in general. There was no evidence that the applicant would subject the identifiable correctional facility staff to any risk of harm. Despite the Department's assertion that they did, the media articles did not establish that correctional facility staff are regularly pressured by inmates because an inmate had become aware of their identities. The media articles simply discussed past incidents where contraband had been brought into correctional facilities by correctional facility staff. There was no mention in those articles that the reason the correctional facility staff brought in contraband was because they had been threatened as a result of having been identified. How could this video expose those correctional facility staff members to any further harm than that resulting from their jobs themselves? Overall, the Department's arguments were merely speculative and did not establish a clear cause and effect relationship between disclosure of the video footage and the harm alleged.

[31] I find that s. 15(1)(e) does not apply to the identifiable images of correctional facility staff or any other public body staff in the records. The Department failed to meet its burden of proof that the disclosure of video footage with identifiable images of correctional facility staff or any other public body staff could reasonably be expected to endanger the life or physical safety of anyone.

Duty to sever and withholding in full

[32] At this point, I wish to touch briefly on the duty to sever, as the Department withheld the video footage in full. Section 5(2) of *FOIPOP* states:

> 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.

[33] This is colloquially referred to as the "duty to sever".

[34] The Department noted that s. 5(2) says that if the information can reasonably be severed it should be. It said that the risk is higher in these videos since they show movement through the facility as well as the relationship between the various areas. The Department took the position that it was not possible to review the videos frame-by-frame to determine if something in a particular video frame should have been severed. It said that the only option to protect the security of the facility was to withhold the videos in full.

[35] As former Commissioner Tully stated in *NS Review Report 17-03*,[20] *FOIPOP* does not create whole document carve outs. Rather, the law clearly establishes that public bodies are only permitted to withhold information exempted from disclosure. Everything else must be disclosed. Furthermore, the Supreme Court of Canada has stated that access legislation creates a presumption in favour of disclosure.[21] That presumption is reflected in s. 5(2) of *FOIPOP* which

[20] 2017 NSOIPC 3 (CanLII) at para 10.
[21] *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at para 41.

makes clear that public bodies can only exempt information as authorized by the legislation and further, where the information can reasonably be severed, public bodies must release the remainder of the record to the applicant.

[36] With respect, I do not accept an assertion that it was not possible to review the videos on a frame-by-frame basis. I have no evidence before me that there was a technical issue that prevented a frame-by-frame viewing. Even if the Department had made that argument, I am of the view that in this day and age, a public body that decides to use video surveillance technology should have the means to sever it. I am guided by comments made by former British Columbia Commissioner Loukidelis over 17 years ago:

> [64] It is not an option for public bodies to decline to grapple with ensuring that information rights in the Act are as meaningful in relation to large-scale electronic information systems as they are in relation to paper-based record-keeping systems. Access requests like this one test the limits of the usefulness of the Act. This is as it should be. Public bodies must ensure that their electronic information systems are designed and operated in a way that enables them to provide access to information under the Act. The public has a right to expect that new information technology will enhance, not undermine, information rights under the Act and that public bodies are actively and effectively striving to meet this objective.[22]

[37] Nor do I accept that the only option to protect the security of the facility was to withhold the videos in full. The responsive records included video files that captured the stationary footage of the segregation cell and a common room. This disposes of the Department's argument that the risk was higher because it showed movement through the facility. The Department could have at least provided the stationary room footage. There were also other options available to the Department like severing the footage so that blind spots were not viewable, or only disclosing one viewing angle of the video footage.

[38] Just as a paper record requires a line-by-line analysis, a video record requires a frame-by-frame analysis. To suggest that it is unreasonable to sever a video file is not adequate. Video surveillance is not new technology. It is reasonable to expect a public body collecting personal information in the form of a video record would also have a process by which to sever that record to ensure it can comply with the access to information legislation.

2. Was the Department required by s. 20(3)(b) to withhold the video surveillance files in full or in part as disclosure would unreasonably invade an individual's personal privacy?

[39] In addition to capturing images of the applicant, the video files contain the images of correctional facility staff and other public body staff such as healthcare workers, as well as other inmates.

[22] *Order 03-16*, 2003 CanLII 49186 (BC IPC).

[40] The applicant explained that he was not interested in the images of other inmates and would accept the footage with images of the other inmates severed. He accepted that the images of other inmates would not be released. As such, a detailed analysis is not required.

[41] I find that the Department was required to withhold the images of other inmates pursuant to s. 20.

3. Did the Department meet its duty to assist the applicant as set out in s. 7(1) of *FOIPOP*?

[42] The duty to assist is set out in s. 7(1)(a) of *FOIPOP* and provides that where a request is made pursuant to *FOIPOP*, the public body shall make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely.[23] As set out in *NS Review Report 19-06*,[24] the open element requires public bodies to conduct a reasonable search to find all records responsive to the request.[25] If responsive records are not found, openness requires that public bodies provide an explanation to the applicant for why no records were found.[26]

[43] The applicant believed that the Department did not conduct an adequate search because the responsive videos did not contain handheld footage. His rationale for this belief was that it was his understanding that handheld cameras are deployed when a code is called, like the one called during the incident at the core of the records. His thought was that since this is common practice, it should have happened with his case and therefore handheld footage exists. Furthermore, the decision letter provided to him by the Department indicated that there was handheld footage.

[44] In response, the Department explained that the reference to handheld footage in the decision letter was included by accident as there was no handheld footage taken of this incident. The information access and privacy (IAP) administrator went through the paper records generated from this incident and confirmed there was no mention of a handheld camera being used. The Department similarly searched its file and confirmed that there was no handheld footage. Finally, the Department noted that in the surveillance footage, it is obvious that no one is using a handheld camera.

[45] In *NS Review Report FI-11-76*,[27] former Commissioner Tully reviewed decisions from across Canada and concluded that "…where an applicant alleges a failure to conduct an adequate search, the applicant must provide something more than mere assertion that a document should exist. In response, the public body must make "every reasonable effort" to locate the requested record. The public body's evidence should include a description of the business areas and record types searched (for example emails, physical files, databases), should identify the individuals who conducted the search (by position type), and should usually include the time taken to conduct the search. If there is an explanation for why a record may not exist, it should be

[23] *FOIPOP*, s. 7(1).
[24] 2019 NSOIPC 7 (CanLII).
[25] See OIPC Guidelines for Public Bodies and Municipalities, "Duty to Assist #2: Conducting an Adequate Search" (online: https://oipc.novascotia.ca/sites/default/files/publications/18-00070%20Search%20Guidelines%20%282019%2002%2025%29.pdf).
[26] See also *Audit & Compliance Report F18-02 City of White Rock, Duty to Assist* 2018 BCIPC 52 (CanLII) at para 2.3.2 (online: https://www.oipc.bc.ca/audit-and-compliance-reports/2260).
[27] 2014 CanLII 71241 (NS FOIPOP).

provided."[28] The standard is reasonableness, not perfection.

[46] An adequate search requires that the public body make every reasonable effort to find responsive records. That was done in this case. The reference to the handheld footage in the decision letter was an error. Both the IAP administrator and the Department conducted additional searches. Finally, the surveillance footage itself does not contain footage of any person using a handheld camera.

[47] I find that the Department conducted an adequate search as required by s. 7(1)(a) of *FOIPOP* and met its duty to assist the applicant in this regard.

FINDINGS & RECOMMENDATIONS:

[48] I find that:

1. The Department was not authorized to refuse access to the video footage requested by the applicant under s. 15(1)(i).
2. The Department was not authorized to refuse access to the video footage requested by the applicant under s. 15(1)(k).
3. The Department was not authorized to refuse access to the video footage requested by the applicant under s. 15(1)(e).
4. The Department was required to refuse access to the video footage of other inmates under s. 20(3)(b).
5. The Department conducted an adequate search as required by s. 7(1)(a) of *FOIPOP* and met its duty to assist the applicant in this regard.

[49] I recommend that:

1. The Department disclose all of the requested video footage to the applicant severing only the images of other inmates within 30 days of acceptance of this recommendation.

March 30, 2021

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File: 16-00220

[28] *FI-11-76*, at paras 13-14.