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

REVIEW REPORT 21-12

October 1, 2021

Public Service Commission

Summary: The applicant requested all publicly releasable contact and salary information about employees of the Nova Scotia Government from the Public Service Commission (public body). The public body declined to provide the requested information because it said the information was a matter of public record per s. 4(2)(b) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). It also declined to provide the requested information on the basis that doing so would unreasonably interfere with its operations (s. 8(3)(b) of *FOIPOP*). The Commissioner rejects both these arguments. She recommends that the public body create and disclose the requested information, with as many of the requested 14 fields as possible, within 30 days of the date of this report.

INTRODUCTION:

[1] The applicant made a request for information to the Public Service Commission (public body). He requested the following information from the public body:

> *I am requesting under the Freedom of Information Act (FOIPOP), an electronic copy of all publicly releasable employees within the Nova Scotia Provincial Government. I would like this list to include the following fields of information:*
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> *First Name*
> *Last Name*
> *Job Title or Job Classification*
> *Office Name (working office name - eg: Branch, Division, Section etc)*
> *Main Department*
> *Office Address*
> *Office City*
> *Province*
> *Office Postal*
> *Phone*
> *Fax*

Email
Grade level
Salary

I understand that some of the fields listed above may not be available. The purpose of my request is to be able to notify applicable employees regarding specific government focused conferences and education related programs. I am also prepared to pay any costs required to prepare this information. I would prefer to receive this information in excel, fixed ASCII or ASCII comma delimited formats.

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[2] The public body refused to process the applicant's request and returned his $5 application fee. The public body based its denial on two sections of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). The first was s. 4(2)(b), which says that *FOIPOP* does not apply to material that is a matter of public record. The second was s. 8(3)(b), which requires a public body to create a record if doing so would not unreasonably interfere with its operations.

[3] The applicant appealed the public body's decision to the Office of the Information and Privacy Commissioner (OIPC). Informal resolution was not possible. As such, this file was forwarded to me to complete the review. This appeal raises issues relating to the duty to assist and the public body's obligation to create records.

ISSUES:

[4] There are three issues under review:

1. Was the requested information or part of the requested information "material that is a matter of public record" within the meaning of s. 4(2)(b) and therefore was not subject to *FOIPOP*?
2. Could a record of the requested information or part of the requested information have been created from a machine-readable record? If yes, would creating it have unreasonably interfered with the operations of the public body within the meaning of s. 8(3)(b) of *FOIPOP*?
3. Did the public body respond to the applicant openly, accurately, and completely as required by s. 7 of *FOIPOP* in its decision to the deny the applicant's request and return the application fee?

DISCUSSION:

Burden of proof

[5] Under s. 45(1) of *FOIPOP*, the burden is on the head of the public body to prove that the applicant has no right of access to a record or part of a record. *FOIPOP* is silent with regard to which party bears the burden of proof in relation to the duty to assist (s.7). Therefore, both parties must each submit arguments and evidence in support of their positions. However, it is the public body who made decisions on how to respond to the applicant and therefore is in the best position to discharge the burden of proof in relation to its duty to assist.

1. Was the requested information or part of the requested information "material that is a matter of public record" within the meaning of s. 4(2)(b) and therefore was not subject to *FOIPOP*?

[6] Like most pieces of legislation, *FOIPOP* has a provision that explains when it does and does not apply. *FOIPOP* sets out in s. 4(2)(b) that it does not apply to materials that are a matter of public record. For the reasons described below, I find that the requested material is not a matter of public record and therefore it is subject to *FOIPOP*.

[7] *FOIPOP* does not contain a definition of the phrase, "matter of public record". It appears that the only other jurisdiction that contains the same "matter of public record" exemption is Saskatchewan. In both jurisdictions, commissioners and courts have first looked to the Black's Law Dictionary for assistance in interpreting this phrase.[1] Black's Law Dictionary defines "public record" as, "A record that a governmental unit is required by law to keep, such as land deeds kept at a county courthouse. Public records are generally open to view by the public."[2]

[8] A few cases have also considered the phrase "public record". In *General Motors Acceptance Corporation of Canada v. Perozini*,[3] the Alberta District Court found that it "refers to certain records or documents which are kept by certain government officials whose duty it is to inquire into and record permanently matters and facts about public matters. Under this definition would fall vital statistic records, census records, Court and certain government tribunal records, etc." The Saskatchewan Information and Privacy Commissioner has explained that the phrase "a matter of public record" is quite distinct from the concept of "public records", as virtually all documents owned by a public sector organization could be said to be "public records". Rather, a "matter of public record" means, "…documents that one would typically find in a public register that the members of the public have ready access to. In other words, a matter of public record would be information collected and maintained specifically for the purpose of creating a record available to the general public."[4]

[9] Thus, in order to establish that the records the applicant requested were a matter of public record, the public body should have demonstrated how the requested information was collected and maintained for a publicly available record. That was not what the public body did in this case. Rather it made several other arguments.

[10] The public body's first argument was that it declined to treat the applicant's inquiry as a request for information under *FOIPOP* on the basis that the overwhelming majority of the information was publicly available. The public body directed the applicant to two publicly available sources where the applicant could find some components of his requested information and argued that because this information contained the overwhelming majority of what the applicant requested, it was a matter of public record and therefore not subject to *FOIPOP* further to s. 4(2)(b).

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[1] See for example, *605499 Saskatchewan Ltd. v Rifle Shot Oil Corp.*, 2019 SKCA 133 (CanLII) at para. 63 and *Gatemaster Inc. v. Nova Scotia (Department of Housing and Municipal Affairs),* (2000) 182 NSR (2d) 156 – 563 APR 156, 2000 CanLII 14362 (NS SC), at para. 16.

[2] *Black's Law Dictionary*, 8th ed, *sub verbo* "public records", at pg. 1279.

[3] *General Motors Acceptance Corporation of Canada v. Perozini*, 1965 CanLII 473 (AB QB).

[4] *SK Report LA–2007–002, Edenwold (Municipality) (Re),* 2007 CanLII 57137 (SK IPC) at para. 28.

[11] First, the public body directed the applicant to the Nova Scotia Government employee directory (http://novascotia.ca/psc/geds/). This resource is not a list of all employees. Rather, it is a search engine. In order to access the information on the search engine, you first need to already know the government employee's name and then you can search for that person in this directory. It is impossible to tell if all employees are able to be searched, or if only select employees can be searched. Of the 14 fields of requested information, the directory includes:

1. First name
2. Last name
3. Telephone number
4. Job title
5. Department

[12] Second, the public body pointed the applicant to a Public Accounts supplementary information document available at: http://www.novascotia.ca/finance/en/home/publications/publicaccounts/default.aspx.[5] This document alphabetically lists accumulative payments of employee salaries over $25,000 annually organized by department. The information is published once per year, for the previous year, which means it is not current information. Of the requested information, this document includes:

1. Employee name, organized alphabetically by department
2. Total remuneration by fiscal year

[13] These two resources do contain some of the information the applicant requested but certainly not all. They were missing such things as email addresses and mailing addresses.

[14] I cannot accept the public body's argument that because these two resources were available to the applicant, the information he requested was not subject to *FOIPOP* per s. 4(2)(b). In Canada, there are well established principles of statutory interpretation. The foundational principle is:

> The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament [6]

[15] The wording of s. 4(2)(b) states that *FOIPOP* does not apply to material that is a matter of public record. The section does not say that *FOIPOP* does not apply to material if the overwhelming majority of it is a matter of public record. The plain and ordinary meaning of s. 4(2)(b) is clear and unambiguous. I will not read in the wording suggested by the public body because doing so would change the meaning of s. 4(2)(b) and is contrary to principles of statutory interpretation.

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[5] The link provided is no longer active. It was likely the equivalent of this link: https://beta.novascotia.ca/public-accounts.

[6] Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths Ltd., 1983), a p. 87, as cited in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27.

[16] The public body also argued that publicly releasable contact information for all government employees was publicly available within the meaning of s. 4(2)(b) to an assiduous reader and therefore it did not need to be compiled for the applicant. What this would effectively mean is that the applicant would need to first go to the supplemental information document to find out each person's name. Then the applicant would need to go to the Nova Scotia Government employee directory, type in each person's name, and then a phone number would populate. This still would not produce email addresses or mailing addresses, but the public body noted that every department has a website with a "Contact us" page that includes a mailing address for the department. The public body also said that the applicant could have called and asked for each employee's email address.

[17] The problem with this argument is that it does not meet the test set out in the common law for establishing that a record is a matter of public record. A document is a matter of public record if the information in it is maintained specifically for the purpose of creating a record available to the general public. Piecemeal information from various sources does not meet this criterion. In terms of suggesting that the applicant call and ask for email addresses, that does not translate into being information that is a matter of public record. Something is not a matter of public record if gaining access to it requires the consent, cooperation and availability of the employees.

[18] In summary, the applicant requested a list of names and contact information for provincial government employees, with 14 pieces (fields) of data per person. Neither of the two sources identified by the public body was a list of employees containing 14 pieces of data for each person. Even between the two, only six pieces of data were available per person for those employees who met the threshold to have their salaries published in the Public Accounts supplementary information document. I disagree with the public body that the majority of the information requested by the applicant was material that was a matter of public record and therefore the public body was authorized to point the applicant to this information rather than supply it to him. As such, the public body was not authorized to refuse to supply it to the applicant on the basis of s. 4(2)(b) and must process the applicant's request under *FOIPOP*.

2. Could a record of the requested information or part of the requested information have been created from a machine-readable record? If yes, would creating it have unreasonably interfered with the operations of the public body within the meaning of s. 8(3)(b) of *FOIPOP*?

[19] Section 8(3) of *FOIPOP* requires the public body to create a record unless doing so would unreasonably interfere with its operations. The test in s. 8(3) is twofold:

a. Can the record be created from a machine-readable record using the public body's normal hardware, software, and technical expertise?
b. Would the creation of the record unreasonably interfere with the operations of the public body?

[20] If the answer is yes to the first part and no to the second part, then the public body must create a record to satisfy the applicant's request for information. For the reasoning set out below, I find that, in this case, the record could have been created from a machine-readable record and

that doing so would not have unreasonably interfered with the operations of the public body. Therefore, I find that the public body was required to provide the applicant with the requested record.

[21] In terms of the first part as to whether the record could have been created using the public body's normal hardware, software, and technical expertise, the public body set out no arguments in its representations about whether it could have produced the information from those sources except to say that the information could be created from the SAP system,[7] along with a caveat that it would still be limited to the data contained within SAP. Although not in its formalized representations, during the investigation[8] the public body said the records it had do not include business locations,[9] mailing addresses and email addresses.

[22] I have not viewed the SAP system to be able to confirm if it has records that encompass all of the applicant's requested fields aside from business location, mailing address and email address. I would note though, that as a government oversight body, my office uses the government email system. With the push of one button, I can easily, within a matter of seconds, pull up the alphabetized list of every government employee that includes each person's first and last name, title, phone, fax, office address, city, department, and email address. It does not include grade level, salary, office name, or postal code. In any event, it is clear to me that the public body could have produced a document that set out at least the majority of what the applicant requested using its normal hardware, software, and technical expertise.

[23] The next step of the analysis is whether creation of the record would have unreasonably interfered with the public body's operations. The public body said that creating the document would have been an unreasonable interference with its operations for a variety of reasons.

[24] The public body said that existing information and privacy commissioner decisions from various jurisdictions regarding the duty to create a record seem to focus on the ability to create a record but then turn to a question of "interference" without addressing how "reasonableness" is determined. The public body said that creating the record was not reasonable because the threshold for reasonableness in creating this particular record is extremely low and the time and effort that would have been required to create the record was greater than the threshold allows. The public body also said that what is reasonable is a contextual standard that must be considered on a case-by-case basis, must reflect the existing capability and resources of the public body, and must also take into consideration the wording of the request. There were no cases, review reports or laws supplied to support these interpretations of *FOIPOP*. As such I do not accept them.

[25] The public body also supplied four headings of arguments on why creating the record in this instance should be found to be unreasonable.

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[7] According to its website, SAP is a type of software: https://www.sap.com/canada/index.html.

[8] During the course of a request for review by the OIPC, all files go through an investigation period prior to the file going to the Commissioner for review to see if there is an opportunity to informally resolve and close the file without the need for a public review report. Any information gathered is available to the Commissioner as part of the review of the file. The Commissioner encourages public bodies to ensure that all relevant information is included in its representations.

[9] It is unclear to me what the public body meant by the term "business location".

Purely commercial purposes

[26] First, the public body noted that the request was for purely commercial purposes, as the applicant had indicated that the purpose of his request was to be able to notify applicable employees regarding specific government-focused conferences and education-related programs. The public body pointed me to *Gatemaster Inc. v. Nova Scotia (Department of Housing and Municipal Affairs)*,[10] wherein the judge, after having concluded that the requested information was public and therefore excluded from *FOIPOP*, noted that the information requested did not align with the stated purposes of *FOIPOP*, as set out in s. 2.

[27] The public body went on to note that in *Re House*,[11] the respondent asked the Court to dismiss an access to information request based on the reasoning in *Gatemaster*, arguing that the request should be dismissed because it was for a commercial purpose and therefore was outside the "goal posts" of *FOIPOP*. The public body noted that the judge in *Re House* refused to dismiss a *FOIPOP* request solely because its purpose was a commercial one. However, the public body supplied me with the below passage because it said the judge noted that intended use may be a balancing factor in a reasonableness test. The public body said this case supported its position that the threshold for what is an "unreasonable interference" with operations is very low in the circumstances:

> In *Gatemaster*, Cacchione, J. took into account the request being outside the purposes of the *Act* in his assessment under s.20(2), and I would do the same in this case. Intended — use would, I think, always be a relevant circumstance to consider under s.20(2), and where that use directly serves an element of the complex purpose of the Act, that circumstance would favour disclosure. The same value could not be assigned to a legitimate use that had profit as its purpose.

[28] The public body did not include the first part of the above-cited paragraph which pre-empts the above with the following:

> Relying on this passage, Mr. Endres suggests that when a request is not within the "goal posts" of the *Act*, the request should be refused. That is not what Cacchione, J. said in *Gatemaster*, and I think it goes too far. I have a narrower reason and a broader reason for saying so. The narrower reason is that, unless a statute provides otherwise, where the Legislature chooses to state the purpose of a statute, it does so to assist in interpretation, not to enact substantive law. The broader reason is that the purposes of a statute may be achieved indirectly. For example, no matter that people may exercise a "right of access to records" [s.2(a)(i)] for reasons of private gain, the exercise of the right may, nevertheless, tend "to ensure that public bodies are fully accountable to the public" [s.2(a)].

[29] When these passages are read in their entirety, they show the Court held that the purpose section of *FOIPOP* does not create "goal posts" that require an applicant to have a stated purpose for his request that aligns with the purposes as set out in s. 2. Rather, these comments were part of the Court's consideration of "unreasonable invasion of privacy" of third party personal

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[10] *Gatemaster Inc. v. Nova Scotia (Department of Housing and Municipal Affairs),* (2000) 182 NSR (2d) 156 – 563 APR 156, 2000 CanLII 14362 (NS SC), at para. 29.

[11] *House, Re*, (2000) S.H. No. 160555, 2000 CanLII 20401 (NS SC).

information under s. 20(2) of *FOIPOP*. Furthermore, I disagree with the public body that this case law supports its view that the threshold for unreasonable interference with operations is very low. I could not find such a statement in either case. They provide no assistance in interpreting s. 8(3)(b) of *FOIPOP*, except to confirm that an applicant need not have a purpose that aligns either directly or indirectly with the purposes of *FOIPOP*. Section 20(2) of *FOIPOP* requires the public body to "consider all relevant circumstances" in determining if a disclosure would be an unreasonable invasion of privacy. Section 8(3)(b) is distinct and distinguished from s. 20(2) on this point because s. 8(3)(b) does not require the public body to consider all relevant circumstances. Section 8(3)(b) requires the public body to first prove an interference with operations, and second to prove that the interference is unreasonable. These two cases do not support the public body's position.

The impact of FOIPOP's s. 20(3)(i)

[30] Secondly, the public body pointed me to s. 20(3)(i) of *FOIPOP* as being directly informative to the issue at hand. This section states that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information consists of the third party's name together with the third party's address or telephone number and is to be used for mailing lists or solicitations by telephone or other means. The applicant in the present review made it clear that the purpose of his request was for solicitation. The public body's position was that as such, the applicant's request ran counter to the one use of records that the Legislature specifically turned its mind to as being objectionable. This, the public body argued, was an important factor in determining the appropriate amount of effort that should be considered an unreasonable interference in the operations of a public body.

[31] The problem with this argument is that in *Re House*, the Court held that s. 20(4) is absolute. Section 20(4) enumerates nine circumstances where a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. The Court said that s. 20(4) does not create rebuttable presumptions. Rather, if any of the nine circumstances listed in s. 20(4) apply, then there is no unreasonable invasion of privacy. The Court established what is commonly referred to as the "House test", which this office has applied and followed since 2000. This four-part test requires a public body to first ask if the requested information is personal information. If it is not, the test ends. If it is, the second part asks if any of the conditions of s. 20(4) are satisfied. If yes, that is the end. Section 20(4)(e) states that it is not an unreasonable invasion of a third party's privacy if the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff. The information requested by the applicant in the present review fits squarely into this category. Following the reasoning in *Re House*, that is the end of the test. When s. 20(4) applies, there is no unreasonable invasion of privacy. There is no consideration of the factors in s. 20(3).

Allowing citizens to contact government

[32] Thirdly, the public body spoke about the issue of the Nova Scotia Government being a huge and constantly changing organization and how it is challenging to understand all of its workings. It noted that staff move around, departments merge or are divided, and website contact lists can be out of date as quickly as they are updated. The public body said to better support citizens trying to access government information, the Nova Scotia Government decided to move

away from individual points of contact listed on websites and instead provide general contact information by department. It said that this approach is preferable because each department can appropriately route citizens' questions. The public body's position was that this approach helps to ensure better service and enhance informed public participation in government actions. Overall, the public body's position was that because a staff list is likely to be out of date shortly after its development, any public purpose that it might satisfy is instead significantly hampered and only serves to frustrate citizens when they reach a wrong number due to staffing changes.

[33] In my view, the opposite argument could just as easily be made. The public may actually find it frustrating to not be able to easily identify provincial government employees and instead have to go through one central number. The public body's position that pointing to one central phone number ensures better service and enhances informed public participation in government actions is simply an assertion based on no evidence and no case law. I do not find this argument persuasive.

Security of personal information

[34] Fourthly, the public body argued that one of the longest standing and best recognized tactics to reduce spam and phishing emails is to avoid posting complete email addresses to websites, as recommended by the Government of Canada.[12] The public body argued that if it had created the list requested by the applicant, this would have run counter to the reasonable security efforts the Nova Scotia Government applies. The public body's position was that this serves to lower the threshold for what amount of effort ought to be considered reasonable in creating the record requested by the applicant. The public body further argued that federal legislation prohibits the applicant from using the list for solicitation purposes because Canada's anti-spam legislation requires the applicant to have express consent before sending any commercial electronic messages to individuals on the list.[13] This is not quite correct. Canada's anti-spam legislation allows the sending of commercial electronic messages not only when there is express consent, but also when there is implied consent. If you post your email address publicly online, that provides implied consent. But there is a way around this – you can post your email address with a statement that you do not wish to receive unsolicited commercial electronic messages. When that is done, the sender no longer has implied consent.[14] In any event, as set out above, the purpose of the request was not relevant outside a s. 20(2) analysis. It may be that the applicant would be prohibited under federal regulations from using the information to solicit government employees, and if the applicant does use the information in this way he could be subject to penalties set out in Canada's anti-spam legislation. However, this does not provide a basis on which to refuse an applicant's request for access to information.

[35] The public body's view was that whenever it must process a *FOIPOP* request, there is an impact on the normal operational procedures of the public body. It said that by enacting *FOIPOP*, the Legislature acknowledged the importance of public bodies devoting resources to

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[12] https://www.fightspam.gc.ca/eic/site/030.nsf/eng/00011.html.
[13] https://www.fightspam.gc.ca/eic/site/030.nsf/eng/00008.html.
[14] Section 10(9), *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* (S.C. 2010, c. 23).

give citizens the capacity to be informed about how their government functions. However, the public body said the Legislature equally recognized that access to information is not an absolute right and in some cases the interference with operations that results from creating a record will outweigh the good in creating it. The public body's view was that because the request ran directly counter to three of the stated purposes of *FOIPOP*, creating the record in this case would not have served the public good. Therefore, it said that the interference resulting from creating this record would have been an unreasonable burden. I disagree. Whether or not the requested information is in the public good does not impact the s. 8(3)(b) analysis.

[36] In terms of how compiling the list would have unreasonably interfered with the operations of the public body, the public body estimated that it would have taken seven hours to query the SAP system and extract the data. In addition, because that list would contain employee contact information that it said could not be released for reasons such as personal and job-related safety concerns, it would have taken three weeks to ensure that only "publicly releasable employees" were on the list.[15] The public body argued that the estimated three weeks to ensure that only "publicly releasable employees" were provided was a component of creating the record that the applicant requested, as opposed to severing it. The public body said that it would have first had to create the custom report and then find a way to strip the employee information that was not publicly releasable, which it said was a component of creating the record and not severing it.

[37] First, I would like to address the public body's argument that severing the record would have been a function of its creation. The former British Columbia Information and Privacy Commissioner considered the phrase "unreasonable interference with operations" in a case which involved a request for access to the information contained in an entire enforcement database. In *Ministry of Forests, Re,*[16] that Commissioner sought the expert opinion of a computer scientist to provide evidence of what would be involved in creating such a record. That evidence showed that the entire database on a proprietary software platform containing thousands of entries across some 50 categories could be rendered into a Microsoft Access database file in four hours. All that was required to do so was to "turn it on and walk away". In other words, the operator could run the program and walk away and do other things while it ran, then come back and collect the results four hours later. This did not mean it took four hours of staff time. Further, the Commissioner found that it was possible to export the data from Microsoft Access to Excel to facilitate authorized redactions of the information, and that applying the redactions and processing the record was not a consideration when deciding whether creating the record would unreasonably interfere with the operations of the public body.

[38] Any severing for personal or business security reasons, using approved exemptions applied under *FOIPOP*, come after the record is created and are therefore a function of severing and not creation. The public body's arguments in this regard speak more accurately to the burden of responding to the request in terms of the severing required. That is not a s. 8(3)(b) issue.

[39] In terms of the public body's argument that it would have taken three weeks to sever any information of employees that could not be released, I have not been convinced that it would have taken three weeks to do this. The public body said it would have had to contact every

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[15] The applicant's request was only for "publicly releasable employees". As he was prepared to accept that some employee names would be withheld for safety reasons, this review report will not delve into this issue.

[16] *Ministry of Forests, Re*, 2003 CanLII 49186 (BC IPC) at paras. 39-40.

department to determine if there were any employees or employee groups who should be excluded in addition to those already protected. Could one email not have been sent to all staff to ask them to contact the public body if they thought that an employee or employee group should be excluded? If there were individual employees who had previously requested that their contact information not be distributed for personal safety issues, I would assume there would be some existing record of that. In terms of finding a way to strip the information that was not publicly releasable about employees, could their information not simply be severed as with any other access to information request? In my view, the public body has not provided sufficient representations or evidence to convince me it would have taken three weeks to complete this request.

[40] The public body said that in the alternative (if modifying the list is found to be a function of severing), there were only three individuals in the unit who could get this information and two of those were not available, leaving only one person to do this task. The public body noted that while running the reports from the system is straightforward (approximately seven hours), it is the verification activity that would take time. The public body noted that any staff member assigned this work would had to have been taken away from other duties as three weeks of manual verification activity was not in the public body's workplan.

[41] In terms of having few staff to conduct this work, as the Supreme Court of British Columbia and many other decision-makers have long said, a public body cannot defeat the access to information regime by having insufficient resources. The public body mentioned three staff members in the unit who could have done this work but did not put that in context of how many employees it had at the time of the access to information request, which I can safely assume was significantly more than three, being a department of the Nova Scotia Government. In its own words, running the reports from the system is straightforward and would likely take seven hours to run from the SAP system. Again, I assume the seven hours is to initiate the query and walk away. Expecting a large Nova Scotia Government department to be adequately staffed to be able to run a seven-hour SAP query is not unreasonable to the extent required by s. 8(3)(b).

[42] In addition, the applicant supplied me with a copy of the public body's response to an almost identical request he made two years earlier in which the public body stated that it could supply the information requested and it estimated it would take 20 hours of work to locate, retrieve, produce, prepare, and provide a copy of the record. The public body's explanation to this was that it had only provided this as a fee estimate to which the applicant never responded. It did not explain how it thought it could complete this task in 20 hours at that time, but two years later the same task would take three weeks.

[43] The public body has not proved that creating a record to supply the information the applicant requested would have unreasonably interfered with its operations. The public body did not address in its representations what appears to be a straightforward source of business contact information, the directory of government employee email addresses, which contains many of the fields of information (9 out of 14)[17] that the applicant requested. What is not clear is if this public body "owns" the database used to populate the directory or if another public body does. Either way, the information is available within government and can easily be produced in list form.

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[17] There are three more fields available, but it appears they aren't ever used.

3. Did the public body respond to the applicant openly, accurately, and completely as required by s. 7 of *FOIPOP* in its decision to the deny the applicant's request and return the application fee?

[44] 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. In my view, this duty was not met in this case.

[45] The public body noted that it provided the applicant with the locations of where some of the information was located publicly so that he could compile the requested list himself. The public body acknowledged that it could have better explained why the request would have unreasonably interfered with its operations. I agree. The decision letters the public body provided to the applicant contained no rationale for why completing this task would have unreasonably interfered with its operations and the duty to assist requires the public body to have done that.

[46] My greater concern is the public body's apparent lack of communication with the applicant and the assumptions it made. This office has released a document entitled *Duty to Assist #1: Communication with Applicants*[18] that includes the following principles:

1. Public bodies and municipalities should adopt a liberal interpretation of the access request.
2. Any ambiguity should be resolved in favour of the applicant, in so far as the legislation allows.
3. Public bodies and municipalities should avoid narrow interpretations of the access request, unless agreed to by the applicant.
4. Public bodies and municipalities should initiate contact with an applicant and any applicable third parties as soon as reasonably practicable, generally within a few days of receipt of the request.
5. If a public body or a municipality fails to clarify a request, it cannot rely on a narrow interpretation of the request upon review.

[47] The public body communicated to the applicant that his request was broad, and he noted, "I understand that some of the fields listed above may not be available." The public body said that it took the applicant's request at "face value" such that the applicant understood he might not get some information.

[48] It is important to remember that the Public Accounts supplementary information document the public body pointed the applicant to contained only employee names, department, and salary. Then the applicant could individually type each name into the search engine, but that engine only provides a phone number. None of the resources the public body pointed the applicant to contained mail or email addresses. Yes, the applicant said he understood that some of the fields he requested might not be available, but he also explicitly said the purpose of the request was to be able to contact people. The applicant's correspondence demonstrated a willingness to frame the access to information request so as to simplify it while also communicating that the crux of

[18] https://oipc.novascotia.ca/sites/default/files/publications/18-00070%20Duty%20to%20Assist%201%20-%20Comm%20w%20App%20Guidelines%20Final%20%2823%20Jan%2019%29.pdf.

his request was contact information so that he could reach out to government employees and offer them future programming.

[49] In that context, I find it troubling that the public body would assume the applicant would be satisfied with not having access to mail and email addresses. In doing so, the public body not only incorrectly made this assumption, but actually narrowed the applicant's request without even communicating that to the applicant. As such, I find that the public body did not meet its duty to assist the applicant.

FINDINGS & RECOMMENDATIONS:

[50] I find that:

1. The requested information is not a matter of public record in Nova Scotia within the meaning of s. 4(2)(b) of *FOIPOP*.
2. Section 8(3)(b) of *FOIPOP* does not apply because the record can be created from a machine-readable record and doing so would not unreasonably interfere with the operations of the public body.
3. The public body contravened s. 7(1) of *FOIPOP* because it failed in its duty to assist the applicant.

[51] I recommend that:

1. The public body create the requested record containing as many of the 14 fields as possible within 30 days of receipt of this report. It must also provide written confirmation of any requested fields that do not exist.
    a. If the requested information is in the custody or control of another public body, I recommend that the public body immediately transfer the request to the appropriate public body who must fulfill the request within 30 days of receipt.

October 1, 2021

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

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