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

REVIEW REPORT 21-16

December 23, 2021

Department of Environment and Climate Change

Summary: The Department of Environment and Climate Change[1] withheld records relating to a property in the applicant's neighbourhood. In doing so, the public body claimed that disclosure would harm a law enforcement matter and deprive a person to the right to a fair trial per s. 15(1)(a) and (g) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). The Commissioner finds that the public body's representations with respect to potential harm from disclosure were neither detailed nor convincing. The Commissioner further determines that a charge laid one and a half years after the decision to deny access could not have formed the basis for the denial of access under *FOIPOP*. She recommends disclosure of all of the withheld information.

INTRODUCTION:

[1] In the spring of 2017, the applicant made a complaint to the Department of Environment and Climate Change (public body), raising concerns about an industrial neighbour's activities. In particular, the applicant was concerned about impacts to wetlands.

[2] Unsatisfied with the public body's response to the complaint, the applicant filed an access to information request seeking all records relating to the property over a five-month period. In response to the access to information request, the public body provided partial access to a response package consisting of 144 pages. Information was withheld under a variety of exemptions. The applicant objected in particular to severing on 25 pages she identified.[2] Following the informal resolution process with this office, two issues remain with respect to the 25 pages.

[1] The name of the public body at the time the access to information request was made was the Department of Environment but has since been changed to the Department of Environment and Climate Change.
[2] The 25 pages at issue are pages 47-48, 57-61 and 64-81.

ISSUES:

[3] There are two issues under review:

1. Was the public body authorized to refuse access to information under s. 15(1)(a) of *FOIPOP* because the disclosure would harm law enforcement?
2. Was the public body authorized to refuse access to information under s. 15(1)(g) of *FOIPOP* because the disclosure would deprive a person of the right to a fair trial or impartial adjudication?

DISCUSSION:

Burden of proof

[4] The public body bears the burden of proving that the applicant has no right of access to a record or part of a record.[3]

1. Was the public body authorized to refuse access to information under s. 15(1)(a) of *FOIPOP* because the disclosure would harm law enforcement?

[5] The public body applied s. 15(1)(a) to all 25 pages at issue which includes investigation reports, *Environment Act*[4] directives and investigation material. Section 15(1)(a) of *FOIPOP* provides that the public body may refuse to disclose information if the disclosure could reasonably be expected to harm law enforcement. For the reasons set out below, I find that the public body failed to satisfy its burden to establish that s. 15(1)(a) applies to the withheld information.

[6] In order to establish that s. 15(1)(a) applies, the public body must demonstrate that there is a law enforcement matter within the meaning of *FOIPOP* and that disclosure of the requested information could reasonably be expected to harm law enforcement.

[7] The term "law enforcement" is defined in *FOIPOP* as:

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

Law enforcement

[8] In its representations, the public body noted the definition of law enforcement in s. 3(1)(e) of *FOIPOP* and stated that "inspectors in the Environment are responsible for ensuring that people comply with the *Environment Act* and its *Regulations*. They respond to complaints about violations of the Act or Regulations. They also manage investigations that could lead to a penalty or sanction being imposed and provide their investigation records to prosecutors if charges are

[3] *FOIPOP* s. 45.
[4] *Environment Act*, SNS 1994-95, c 1.

warranted. Therefore, their records can be subject to exemptions under the Law Enforcement section of *FOIPOP*."

[9] In order for a public body's investigation to meet the definition of "law enforcement" in *FOIPOP*, the public body must have a specific statutory authority or mandate to conduct the investigation and to impose sanctions or penalties.[5] Quite simply, s. 15 is intended to prevent harm to law enforcement or the enforcement of law. The foundation of the exemption must therefore be a clear statutory authority.

[10] The public body did not cite any statutory provisions to support its assertion that the matter was a law enforcement matter. Nevertheless, the *Environment Act* lists a variety of powers granted to inspectors. The *Environment Act* promotes reporting of potential offences and requires the Minister to ensure that investigations are conducted in response to these complaints where the Minister considers it necessary.[6] There are a variety of potential outcomes from inspections and investigations. The Minister may discontinue an investigation,[7] an inspector may issue a directive,[8] the Minister may issue an order[9] or a prosecution may be commenced.[10] Based on my review of these provisions of the *Environment Act*, I am satisfied that the investigation in this case satisfied the requirements of "law enforcement" as defined in *FOIPOP*.

Evidence of harm

[11] In order to meet the harm criteria, the public body is required to set out whether disclosure of the withheld information could "reasonably be expected to harm law enforcement." The test tries to mark out a middle ground between that which is probable and that which is merely possible. A public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground.[11]

[12] In this case, the public body cited a number of reviews and decisions from other jurisdictions on the meaning of "reasonable expectation of harm" noting that there must be a direct link between the release of the information and the harm that would result, and that the evidence must be "detailed and convincing". I agree.[12]

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[5] This is the approach consistent with interpretations by the Information and Privacy Commissioners in both Ontario and British Columbia. See for example *BC Order 36-1995*, [1995] B.C.I.P.C.D. No. 8, at p. 14; *BC Order 00-52, British Columbia Securities Commission Investigation Records, Re*, 2000 CanLII 14417 (BC IPC); *BC Order F15-26, Ministry of Environment (Re)*, 2015 BCIPC 28 (CanLII); and *Ontario Order P-416, Ontario (Attorney General) (Re)*, 1993 CanLII 4740 (ON IPC) at p. 5.
[6] *Environment Act*, ss. 114 and 116.
[7] *Environment Act*, s. 116(3).
[8] *Environment Act*, s. 122A.
[9] *Environment Act*, ss. 125 – 128.
[10] *Environment Act*, s. 158.
[11] A paraphrase of the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), [2014] 1 S.C.R. 674 at para. 54.
[12] Please note that there are more recent cases that set out the test for harm from the Supreme Court of Canada (*Merck Frosst Canada Ltd. v. Canada (Health*), 2012 SCC 3 (CanLII), [2012] 1 SCR 23), Nova Scotia Courts (*Houston v. Nova Scotia (Minister of Transportation and Infrastructure Renewal)*, 2021 NSSC 23 (CanLII)), and this Office (*NS Order 18-03, Nova Scotia (Department of Justice) (Re)*, 2018 NSOIPC 3 (CanLII)).

[13] The public body prefaced its representations on evidence of harm with the following statement:

> It is not possible to make a representation to show the evidence that there is harm without referring to information that could reveal the information that was severed. The Department would ask that you take this into account when adding information to your public report or when quoting from these representations.

[14] In response, I wish to remind the public body that this office has long-established procedures in place for the public body to make a request to submit its representations in camera, meaning that I would not disclose the material to the applicant or in a public review report. In camera representations are only accepted when the representations themselves would reveal the information that is under review or if the in camera representations contain information that the legislation requires the public body to keep confidential.

[15] In camera representations are accepted sparingly because they impact procedural fairness and constrain me from providing clear reasons in a public review report. It is important to remember that administrative tribunals are required to provide reasons for their decisions whenever possible.[13]

[16] Any request to be allowed to make in camera representations must be made early in the process. In such cases, I review the public body's request and make a decision on whether to allow the public body to *submit* its representations in camera. If approved, I review the representations themselves, and make a second decision as to whether the representations warrant being *accepted* in camera.

[17] As set out earlier in this review report, it is the public body's burden to prove that the applicant has no right of access to the records. In situations where this burden cannot be met without revealing the specific content of the records, it is open to the public body to make a request to submit in camera representations. The public body did not do so in this case. I have no authority to dispel of the public body's statutory burden requirement, particularly where there is a long-established procedure for the public body to request to submit its representations in camera.

[18] Furthermore, such a request puts me in the precarious situation of trying to parse out which portions of the representations revealed information *FOIPOP* requires the public body to withhold. Sometimes that may be obvious. In this case, there was a portion of the representations that discussed timelines.[14] Because the remainder of the representations on s. 15 were generic in nature and would not reveal the content of the withheld records, I suspect it was this portion of the representations that the public body was asking me to take into account when writing this public review report. However, without further context, it is not clear to me why. In any event, this portion of the representations was not sufficient to discharge the public body's burden.

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[13] *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817.
[14] Second paragraph under the heading "Evidence of Harm" on page 3 of the public body's representations.

[19] The public body also offered a simple assertion that releasing the information "could have impacted" a law enforcement matter. In my opinion, this is not evidence. It is not detailed and it is not convincing. The public body has not met the threshold of providing evidence that is "well beyond" or "considerably above" a mere possibility of harm. Furthermore, an impact on a matter is below the threshold of a harm.

[20] The public body bears the burden of proof in this matter and has failed to satisfy that burden. Accordingly, I find that s. 15(1)(a) does not apply to the withheld information.

2. Was the public body authorized to refuse access to information under s. 15(1)(g) of *FOIPOP* because the disclosure would deprive a person of the right to a fair trial or impartial adjudication?

[21] The public body also applied s. 15(1)(g) to the 25 pages severed under s. 15(1)(a). Section 15(1)(g) provides:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to…
>
> (g) deprive a person of the right to a fair trial or impartial adjudication;

[22] For the reasons set out below, I find that the public body failed to satisfy its burden to establish that s. 15(1)(g) applies to the withheld information.

[23] As part of the normal review process, the parties were invited to provide their representations and evidence in a Notice of Investigation. As noted above, in its representations, the public body simply asserted that releasing the information "could have impacted" a law enforcement matter. There was no mention of any pending trial or adjudication in the public body's representations.

[24] Following receipt of the public body's representations, the OIPC investigator sent the parties her opinion letter. The investigator's opinion was that the public body had not met its burden of proof. In response, and for the first time, the public body advised the investigator that "charges are still before the court." It indicated that there was an upcoming trial proceeding. With further probing, the public body advised that the charges were laid on October 16, 2018.

[25] There are two problems with this submission. First, the public body applied s. 15(1)(g) to the records in a decision dated July 20, 2017. There is no evidence that there was any trial, proceeding or adjudication underway at that time. In fact, the public body has provided no evidence to support the application of s. 15(1)(g) at the time its decision was made.

[26] Second, the public body has provided no evidence or argument to connect the upcoming trial to the records at issue here. The records at issue were created between December 30, 2016, and June 6, 2017. These records were created one and a half years before the charges were laid in the upcoming trial proceeding. The burden of proof rests with the public body. The public body could have provided the evidence of a knowledgeable employee who could explain if and how the 25 pages at issue here are connected to the upcoming trial. The public body failed to do so.

[27] As a result, the public body has failed to meet its burden of proof. I find that s. 15(1)(g) does not apply to the withheld information.

[28] Since I have found that neither s. 15(1)(a) nor 15(1)(g) applies to the withheld information, I will not review the public body's application of discretion in this case.

FINDINGS & RECOMMENDATIONS:

[29] I find that:

1. The public body has failed to satisfy the burden of proving that s. 15(1)(a) or s. 15(1)(g) applies to the withheld information.

[30] I recommend that:

1. The public body disclose all information it withheld under s. 15(1)(a) and s. 15(1)(g) on the 25 pages at issue to the applicant within 45 days of receipt of this report.

December 23, 2021

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia