



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

REVIEW REPORT 22-03

January 18, 2022

Workers' Compensation Board of Nova Scotia

Summary: The applicant, an injured worker, sought identifying information related to a witness (source) who provided information to the Workers' Compensation Board of Nova Scotia (public body) that the applicant may have been misrepresenting his abilities to the public body. The Commissioner determines that the Special Investigation Unit of the public body was engaged in law enforcement and that the identity of the source was provided in confidence. The Commissioner finds that the public body is authorized to withhold the information that could reasonably be expected to reveal the identity of a confidential source of law enforcement information pursuant to s. 15(1)(d) of the *Freedom of Information and Protection of Privacy Act*. She recommends that the public body continue to withhold the information.

INTRODUCTION:

[1] In June 2016 the Special Investigation Unit (SIU) of the Workers' Compensation Board of Nova Scotia (public body) received information that the applicant, an injured worker, was possibly misrepresenting his abilities to the public body. Following an investigation, the public body decided to discontinue the applicant's benefits. The applicant requested a copy of the SIU file. Initially, the public body applied a variety of exemptions to the records. Following the informal resolution process through this office, one issue remains outstanding between the parties. The public body withheld information on six pages of the records that it said could be used to identify a confidential source of law enforcement information.

[2] The information at issue in this review is a single piece of information repeated on six different pages of the responsive records.¹ In each instance, the public body withheld the information because it asserted disclosure had the potential to identify a confidential source of law enforcement information (s. 15(1)(d) of the *Freedom of Information and Protection of Privacy Act (FOIPOP)*).

¹ On pages 22, 23, 54, 68, 109 and 121.

ISSUE:

[3] Was the public body authorized to refuse access to information under s. 15(1)(d) of *FOIPOP* because the disclosure would reveal the identity of a confidential source of law enforcement information?

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.²

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

[5] The public body withheld information on the responsive records pursuant to s. 15(1)(d) of *FOIPOP*, which 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
(d) reveal the identity of a confidential source of law-enforcement information;

[6] For the reasons set out below, I find that s. 15(1)(d) applies to the withheld information.

[7] In order for s. 15(1)(d) to apply, three elements must be established:

1. The investigatory body must be engaged in law enforcement.
2. The source of law enforcement information must be a “confidential source”.
3. The disclosure must “reasonably be expected to reveal the identity” of the confidential source.

Was the public body’s SIU engaged in law enforcement?

[8] The applicant did not take issue with the public body’s position that its SIU was engaged in law enforcement within the meaning of *FOIPOP*.

[9] The term “law enforcement” is defined in s. 3 of *FOIPOP* and means, among other things, “investigations that lead or could lead to a penalty or sanction being imposed.” 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.³

² *FOIPOP* s. 45.

³ *NS Review Report 18-03, Nova Scotia (Department of Justice) (Re)*, [2018 NSOIPC 3 \(CanLII\)](#) at para. 28. This approach is consistent with interpretations by the Information and Privacy Commissioners in both Ontario and British Columbia. See for example *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 *ON Order P-416, Ontario (Attorney General) (Re)*, [1993 CanLII 4740 \(ON IPC\)](#) at p. 5.

[10] Section 15 is intended to prevent harm to law enforcement. The foundation of the exemption must therefore be a clear statutory authority.

[11] In this case, the SIU has a law enforcement mandate set out in ss. 178 – 182 of the *Workers' Compensation Act (WCA)*.⁴ Section 84(1) of the *WCA* sets out the duties of every worker to mitigate the impacts of an injury and co-operate with the public body. Section 84(2) provides that the public body may suspend, reduce or terminate any compensation otherwise payable to a worker where the worker fails to comply with s. 84(1). Pursuant to s. 208 of the *WCA*, every person who contravenes s. 84, in addition to any other penalty, is guilty of an offence and is liable to a penalty of not more than two thousand dollars for a first offence.

[12] The existence of a special investigations unit within a workers' compensation board system is a common feature in other provinces. In a recent Office of the Information and Privacy Commissioner of Alberta decision relating to Alberta's Workers' Compensation Board investigation files, an adjudicator stated:

I agreed that an investigation by the Public Body into a claimant's alleged misrepresentation of her injury fell within the definition of "law enforcement". Misleading the Public Body and failing to report certain information to the Public Body that could affect a claimant's compensation is a contravention of the *Workers' Compensation Act (WCA)*, section 151.1(1) which is an offence under that Act (section 152).⁵

[13] In this case, the responsive records make clear that a penalty or sanction could and did arise as a direct result of the SIU investigation.⁶ The sanction imposed was a discontinuation of the applicant's benefits.

[14] In conclusion, I find that in this case, the SIU was engaged in law enforcement within the meaning of s. 15(1)(d) of *FOIPOP*.

Was the source confidential?

[15] In its representations, the public body asserted that it receives information from individuals who contact the public body in confidence and that the identity of those sources is held in the strictest confidence. I note that this is not evidence, but only argument. The public body did not provide me with any policies, procedures or other evidence that establishes a practice of assuring sources of anonymity. It also did not provide me with any expert evidence that set out its practice of assuring sources of anonymity. It is reasonable to expect that when a public body asserts it has a practice in place, it would also have experts, in the form of experienced employees with direct personal knowledge of the practice, available to provide their opinions on the nature of that

⁴ *Workers' Compensation Act*, SNS 1994-95, c. 10.

⁵ *AB Order F2018-75, Workers' Compensation Board (Re)*, [2018 CanLII 122772 \(AB OIPC\)](#) at para. 100. This decision is consistent with two earlier Alberta decisions: *AB Order 99-010, Workers' Compensation Board (Re)*, [1999 CanLII 19665 \(AB OIPC\)](#); and *AB Order 2001-009, Workers' Compensation Board (Re)*, [2001 CanLII 38133 \(AB OIPC\)](#); and with *BC Order 164-1997, Workers Compensation Board, Re*, [1997 CanLII 981 \(BC IPC\)](#).

⁶ Page 68 of the responsive records.

practice. Such an opinion would be supported by direct experience and could easily be provided in the form of a letter or affidavit setting out the employee's experience and opinion.

[16] In any event, a portion of the records already disclosed to the applicant reveals that the SIU received information that the applicant was possibly misrepresenting his abilities to the public body. The Special Investigation Referral Form indicates that the information was provided by an "anonymous" source.

[17] For his part, the applicant asserted that the source was likely not confidential and was potentially a source closely affiliated with his workers' compensation claim. The applicant provided no evidence to support his position. This assertion is merely speculation.

[18] Previous decisions of this office make clear that the identities of witnesses reporting wrongdoing under a statute are treated as confidential. The identity of confidential informants under child welfare legislation, witnesses to an investigation in relation to a firearms acquisition certificate, informants who supplied information to a probation officer in confidence and welfare fraud investigation informants have all been found to be subject to s. 15(1)(d) and so were not disclosed.⁷ It is also common to protect the identity of a complainant in relation to bylaw infractions.⁸

[19] The public body bears the burden of proof in this matter. The public body asserted that it always treats identity as confidential. Nothing in this file contradicts that assertion. There is no indication that any attempt was made to identify the source. In this case, the source was reporting potential wrongdoing under a statute. It is reasonable, in my opinion, to assume sources of this nature expect that their identity will be protected. Such an approach is consistent with previous decisions of this office. Most persuasively, the source clearly intended to be anonymous. On balance, I am satisfied that the source of the information provided to the public body was a confidential one.

Would disclosure reasonably be expected to reveal the identity of the source?

[20] As noted above, the records indicate that the source provided information anonymously. However, sources of information can still be identifiable by the information they provide. For example, it may be that only one person knows a certain fact so that if that fact is disclosed, the identity of the source is also disclosed.

[21] It is not possible to go into any detail about the nature of the withheld information without potentially identifying the source. However, I am satisfied on the facts of this case that disclosure of the withheld information on six pages of the responsive records could reasonably be expected to identify a confidential source of law enforcement information.

⁷ *NS Review Report FI-07-72, Children's Aid Society Inverness – Richmond (Re)*, [2008 CanLII 69114 \(NS FOIPOP\)](#) (confidential informants in a child welfare file withheld); *NS Review Report FI-99-41, Nova Scotia (Department of Justice) (Re)*, [1999 CanLII 2466 \(NS FOIPOP\)](#) (witness identity in firearms acquisition certificate investigation withheld); *NS Review Report FI-04-35, Department of Community Services (Re)*, [2004 CanLII 23480 \(NS FOIPOP\)](#) (witness to welfare fraud investigation identity withheld); *NS Review Report FI-02-03, Nova Scotia (Department of Justice) (Re)*, [2002 CanLII 10000 \(NS FOIPOP\)](#) (information supplied to a probation officer protected).

⁸ The leading case on the application of the equivalent of NS. s. 15(1)(d) to bylaw enforcement informant identity is *BC Order 00-01, Langley Township Bylaw Enforcement Records*, [Re 200CanLII 9670 \(BCIPC\)](#).

[22] I find that s. 15(1)(d) of *FOIPOP* applies to the withheld identifying information.

Other statutory provisions

[23] Although the public body did not apply any other exemptions to the identifying information, in my opinion, the public body likely should have applied s. 20 of *FOIPOP*. Section 20 provides that a public body must refuse to disclose personal information where the disclosure of that information would result in an unreasonable invasion of a third party's personal privacy. Because I have found that s. 15(1)(d) applies to the withheld information, I will not evaluate the application of s. 20 except to note that disclosure of personal information compiled and identifiable as a part of an investigation into a possible violation of law is presumed to be an unreasonable invasion of personal privacy.

FINDINGS & RECOMMENDATIONS:

[24] I find that:

1. Section 15(1)(d) of *FOIPOP* applies to the information withheld on pages 22, 23, 54, 68, 109 and 121 of the responsive records.

[25] I recommend that:

1. The public body continue to withhold the information under s. 15(1)(d) of *FOIPOP* on pages 22, 23, 54, 68, 109 and 121 of the responsive records.

January 18, 2022

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia