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

REVIEW REPORT 22-06

February 15, 2022

Department of Justice

Summary: An applicant sought information related to an altercation that broke out between staff and youth at the Nova Scotia Youth Facility, located in Waterville, Nova Scotia. In response, the Department of Justice (public body) partially disclosed the requested records to the applicant but withheld information under several of the law enforcement provisions in s. 15 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). The Commissioner finds that s. 15(1)(g), s. 15(1)(i) and s. 15(1)(k) do not apply to the information withheld under those sections and recommends its disclosure. The public body also withheld some of the information on the responsive records pursuant to s. 20 of *FOIPOP* (personal information). The Commissioner finds that some of the information withheld under s. 20 does not qualify as the personal information of an identifiable individual and so recommends its disclosure.

INTRODUCTION:

[1] The Nova Scotia Youth Facility (Waterville Facility) is a correctional facility located in Waterville that houses sentenced and remanded youth in Nova Scotia. On September 4, 2016, there was an altercation between youth and staff at the Waterville Facility.

[2] A few months after the altercation, the applicant requested information about it from the Department of Justice (public body). The public body responded and provided the applicant with records that were partially redacted. The applicant was not satisfied with the response and asked the Information and Privacy Commissioner to a conduct a review of the public body's decision.

[3] During the course of the informal resolution process leading up to this review report, the applicant narrowed the scope of his review to specific documents and pages of the response package he received. He also said that he did not want any names of Waterville Facility staff or youth. In other words, the applicant agreed to accept the responsive records with all names redacted from them. This reduced the package of responsive records under review down to 40 pages.[1]

[1] The original page numbers were kept on the responsive records. Accordingly, this review report will reference page numbers into the 130s, however only 40 of the original 540 pages remain at issue.

ISSUES:

[4] There are five issues under review:

1. Was the public body authorized to refuse access to information under s. 15(1)(i) of *FOIPOP* because the disclosure would be detrimental to the proper custody, control or supervision of a person under lawful detention?
2. Was the public body authorized to refuse access to information under s. 15(1)(k) of *FOIPOP* because the disclosure would harm the security of any property or system?
3. 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?
4. Was the public body required to refuse access to information under s. 20 of *FOIPOP* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?
5. Did ss. 116 and 119 of the *Youth Criminal Justice Act* limit, restrict or prohibit access to the responsive records?

DISCUSSION:

Burden of proof

[5] 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]

[6] Where the public body has established that s. 20(1) applies, s. 45(2) shifts the burden to the applicant to demonstrate that the disclosure of third party personal information would not result in an unreasonable invasion of personal privacy.

1. Was the public body authorized to refuse access to information under s. 15(1)(i) of *FOIPOP* because the disclosure would be detrimental to the proper custody, control or supervision of a person under lawful detention?

2. Was the public body authorized to refuse access to information under s. 15(1)(k) of *FOIPOP* because the disclosure would harm the security of any property or system?

[7] The public body applied both s. 15(1)(i) and s. 15(1)(k) to a portion of the responsive records. It also addressed these subsections as one and the same in its representations. In order to prevent duplication, I will address these two distinct issues together. For the reasons set out below, I find that the public body failed to discharge its burden in establishing that s. 15(1)(i) or s. 15(1)(k) applies to the withheld information.

[8] Section 15(1)(i) gives the public body discretion to refuse to disclose information that could reasonably be expected to be detrimental to the proper custody, control or supervision of a person under lawful detention.

[2] *FOIPOP*, s. 45.

[9] Section 15(1)(k) gives the public body discretion to refuse to disclose information that could reasonably be expected to harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

The records

[10] The records redacted under these two subsections can be categorized into three broad groups. Group #1 contains a Violence Hazard Risk Assessment and Correction Form (Risk Assessment) shown in table format at pages 2-21. The Risk Assessment sets out the potential hazards, existing controls in place, risk rating and recommendations for follow-up action in relation to a number of activities at the Waterville Facility. Aside from the above-described table headings, which have already been released to the applicant, all of the information within this table was redacted pursuant to s. 15(1)(i) and s. 15(1)(k).

[11] Group #2 contains a document that details various concerns raised by the employees' union as a result of the altercation and the public body's response to the union, at pages 72-76. Aside from releasing an introductory paragraph, the public body withheld all of the information on these pages pursuant to s. 15(1)(i) and s. 15(1)(k).

[12] Group #3 contains a number of emails and an investigation report. The public body selectively redacted information on pages 83, 85-86, 88, 91 and 108[3] of the responsive records pursuant to s. 15(1)(i) and s. 15(1)(k).

Requirement to show harm

[13] Section 15(1)(i) and s. 15(1)(k) are harms-based exemptions. In *NS Review Report 18-03*,[4] former Commissioner Tully established that to meet the harms test, all three parts of the criteria listed below 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
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]

The public body's evidence of harm

[14] The public body prefaced its representations on evidence of harm by stating that it was not possible for it to make representations to show evidence that disclosure would cause harm

[3] The public body applied only s. 15(1)(i) to p. 108, which is an internal investigation report.
[4] 2018 NSOIPC 3 (CanLII).
[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).

without referring to information that could reveal the information that was severed. The public body asked me to take this into account when including information in this public report. I detailed my reasoning for why I cannot comply with such a request in *NS Review Report 21-16*.[6] The same reasoning applies in this review.

[15] Moving on to the substantive portion of the public body's representations, the public body explained that the information it severed under s. 15(1)(i) and s. 15(1)(k) includes information on the types of tools that are available to staff, how staff are to respond to disturbances, controls in place and security features. The public body's position was that releasing this information could allow future youth inmates to exploit it to cause harm to themselves, other youth inmates or the staff. The public body had concerns that if youth were aware of information about how staff respond to disturbances and potential gaps in processes used to manage youth, that would cause safety concerns because youth could then use the information to plan countermeasures. Finally, the public body noted that some of the withheld information discusses the potential for items to be weaponized. The public body was concerned that this information could identify potential weapons or could be a safety concern in that youth could know that staff have not identified that a particular item had the potential for weaponization.

Analysis

[16] In *Ontario (Attorney General) v. Fineberg*,[7] the Court noted that the law enforcement exemption should be approached in a sensitive manner in recognition of the challenges associated with predicting future events in a law enforcement context. The Court further noted that, nevertheless, a public body is still required to meet the harms test set out above. It must provide detailed evidence about the potential for harm from release of the requested records. It is not sufficient to provide evidence amounting to speculation of possible harm – more is needed.[8]

[17] In *NS Review Report 18-03*,[9] the public body refused disclosure of several records related to the death in custody of a named individual, including the results of an internal investigation and supporting appendices. Similar arguments to the ones made in this review appear to have been made by the public body in *NS Review Report 18-03*. Those arguments stated that releasing the information may allow inmates to take advantage of gaps identified in policies and use it to bring in more contraband, use knowledge about rounds to assault each other or escape from prison. Former Commissioner Tully rejected these arguments on the basis that the public body failed to connect its general harm assertions to a particular record or piece of information.[10] She also noted that while an assiduous reader could glean some information about some security-related measures, that information had already been published on the public body's Reportable Incident Updates website.[11]

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[6] *NS Review Report 21-16, Department of Environment and Climate Change (Re),* 2021 NSOIPC 16 (CanLII).
[7] *Ontario (Attorney General) v. Fineberg*, 1994 CanLII 10563 (ON SC). Cited with approval more recently in *Order PO-3436, Ontario (Community Safety and Correctional Services) (Re),* 2014 CanLII 77318 (ON IPC) at para. 43.
[8] *ON Order PO-2037, Ontario (Attorney General) (Re*), 2002 CanLII 46439 (ON IPC) upheld on judicial review in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 1998 CanLII 7154 (ON CA), 41 O.R. (3d) 464 (C.A.).
[9] *NS Review Report 18-03, Nova Scotia (Department of Justice) (Re)*, 2018 NSOIPC 3 (CanLII).
[10] *Ibid*. at para. 45.
[11] https://novascotia.ca/just/updates.asp.

[18] While the law enforcement exemption should be approached in a careful manner, the public body must nevertheless set out the potential for harm from release of the requested records. Detailed and convincing evidence about the potential for harm must be supplied by the public body.[12] Otherwise, there is a risk of a broad, categorical exemption of virtually all records relating to the security of a correctional facility and the supervision of persons under lawful detention. Clearly such a result is contrary to *FOIPOP*'s purpose of disclosure of all government information to hold public bodies fully accountable subject only to limited and specific exemptions.

[19] After having read the withheld information, in my opinion, the representations provided by the public body were not sufficient to discharge its burden of proof. The public body did not establish a reasonable basis for believing that danger or harm would result from disclosure. Most of the information is generic in nature. The public body did not point out specific aspects of the redacted records that identify gaps in processes, controls and procedures. It also did not explain how that information could reasonably be used to facilitate an assault or otherwise cause harm aside from a generalized assertion that because the information addresses security issues, it could be exploited by youth and therefore cause harm. The public body did not connect its general harm assertions to any particular piece of information set out in the redacted records. Furthermore, some of the withheld information is publicly available on the public body's Reportable Incident Updates website.[13]

[20] Overall, the public body failed to discharge its burden of establishing that releasing the information redacted pursuant to s. 15(1)(i) and s. 15(1)(k) could reasonably be expected to be detrimental to the proper custody of a person under lawful detention or harm the security of the Waterville Facility. Accordingly, I find that the information does not qualify for exemptions under s. 15(1)(i) or s. 15(1)(k) of *FOIPOP*.

3. 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 severed some information on the responsive records, on pages 101-108 and 132, based on s. 15(1)(g). This exemption gives the public body discretion to refuse to disclose information that could deprive a person of the right to a fair trial or an impartial adjudication. For the reasons set out below, I find that the public body failed to discharge its burden of proving that 15(1)(g) applies to the withheld information.

[22] Following the altercation, the public body conducted an internal investigation and produced an internal investigation report, which was responsive to the applicant's request for information. The public body provided the applicant with the investigation report but severed information under the headings "chronology of events" and "findings"[14] pursuant to s. 15(1)(g).

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[12] *ON Order PO-3436, Ontario (Community Safety and Correctional Services) (Re)*, 2014 CanLII 77318 (ON IPC) at para. 43.

[13] Government of Nova Scotia: https://novascotia.ca/just/updates.asp, *NSYF Assault, September 4, 2016*, added October 28, 2016 (online: https://novascotia.ca/just/global_docs/NSYF_Assault.pdf).

[14] Note that other sections of the internal investigation report were also severed but the applicant clarified he was only interested in the information under the headings "chronology of events" and "findings".

[23] The public body said that releasing the chronology and detailing any circumstances of the incident would have impacted the right to have a fair trial of those charged with assault stemming from their involvement in the altercation. It also said that the records were provided to police to further investigations that could lead to a penalty or sanction being imposed. That was the extent of its representations regarding its application of s. 15(1)(g).

[24] Several reviews and court cases out of Ontario have made it clear that it is not enough for a public body to take the position that the harms set out in the Ontario access to information law's equivalent of Nova Scotia's s. 15 of *FOIPOP* are self-evident from the records themselves, or that because a law enforcement matter is ongoing, that alone is sufficient to meet the threshold.[15]

[25] The public body's representations did not meet the threshold required to substantiate the harm described in s. 15(1)(g). It was helpful to know that the records were provided to police but that was not enough to satisfy the harms test. The public body did not provide me with any information about whether the persons named in the records were charged, whether any of the charges were dropped, whether a trial was held, whether the information at issue in this review was used in that trial, whether there was a jury trial or a judge-alone trial, or whether the law enforcement matter is still ongoing. The public body also did not explain how the information could deprive the individuals named in the investigation report of the right to a fair trial when the applicant was not requesting the release of those names because he agreed to accept the records with all names redacted. In any event, a statement that the records were provided to police along with a recitation of the wording of the exemption is not sufficient to discharge the public body's burden in this matter. Rather, the public body was required to show a clear cause and effect relationship between disclosure of the withheld information and the outcome of the harm alleged.

[26] Overall, the public body failed to discharge its burden of establishing that releasing the information redacted pursuant to s. 15(1)(g) could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication. Accordingly, I find that the information does not qualify for exemption under s. 15(1)(g) of *FOIPOP*.

Exercise of discretion

[27] Because I have found that the three discretionary exemptions applied by the public body are not authorized, it is not necessary for me to consider the public body's exercise of discretion. However, I note that despite indicating in its representations that it was required to provide reasons as to how it exercised its discretion, the public body did not do so in this case. It is important that public bodies set out how they exercised discretion when applying discretionary exemptions.

[15] See *ON Order PO-2332, Ontario (Public Safety and Security) (Re)*, 2004 CanLII 56449 (ON IPC); *ON Order PO-2040, Ontario (Community, Family and Children's Services) (Re)*, 2002 CanLII 46442 (ON IPC); *ON Order P-534, Ontario (Attorney General) (Re)*, 1993 CanLII 4858 (ON IPC) which was appealed in *Ontario (Attorney General) v. Fineberg*, 1994 CanLII 10563 (ON SC).

4. Was the public body required to refuse access to information under s. 20 of *FOIPOP* because disclosure of the information would be an unreasonable invasion of a third party's privacy?

[28] The public body severed information on the responsive records on pages 101-108 and 131-132,[16] under s. 20 of *FOIPOP*, which requires public bodies to withhold information if its release would be an unreasonable invasion of a third party's privacy. For the reasons provided below, I find that some of the information withheld under s. 20 does not qualify as the personal information of an identifiable individual and so it cannot be withheld.

[29] In order for s. 20 to apply to information, the public body must conduct a four-part test as follows:[17]

1. Is the requested information "personal information" within the meaning of s. 3(1)(i)? If not, that is the end. Otherwise, the public body must go on.
2. Are any of the conditions of s. 20(4) satisfied? If so, that is the end. Otherwise, the public body must go on.
3. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?
4. In light of any s. 20(3) presumption, and in light of the burden upon the applicant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that the disclosure would constitute an unreasonable invasion of privacy or not?

[30] Step one of the test is for the public body to establish that the information is personal information within the meaning provided in the definition of "personal information" found at s. 3(1)(i) of *FOIPOP*.

[31] The task of establishing that the information severed under s. 20 is the personal information of an identifiable individual is a challenging task in the context that the applicant agreed to accept the records with all names of youth and staff redacted. In other words, the records at issue describe events with associated names but the applicant was seeking only the description information and not the names.

[32] The public body said it was required to withhold the information pursuant to s. 20 of *FOIPOP*. It pointed me to s. 20(3)(b) which states that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's privacy if the personal information was compiled and is identifiable as part of an investigation into a possible violation of law. The key here is that when drafting *FOIPOP*, the Legislature included the word "identifiable". The public body provided no representations on how records with names redacted would meet the threshold of identifying the third parties. Aside from simply stating that "…the information could lead to the identification of an individual," the public body did not provide representations on any potential risk of a mosaic effect, which can occur when seemingly innocuous unidentifiable

[16] There were names redacted pursuant to s. 20 on various other pages of the responsive records but the applicant was not seeking names and so those pages are not at issue.
[17] This test has been consistently applied in NS Review Reports and is based on the NS Supreme Court decision in *House, Re*, 2000 CanLII 20401 (NS SC) at p. 3.

information is later linked with already available information to form a more comprehensive picture and possibly result in identifying an individual.

[33] Except for the names, which the applicant is not seeking, none of the information severed under s. 20 qualifies as the personal information of an identifiable third party. That is the end, as the public body cannot get past step one of the test. Accordingly, with the exception of the names of the third parties, I find that the remainder of the information the public body redacted under s. 20 of *FOIPOP* cannot be withheld pursuant to that section.

5. Did ss. 116 and 119 of the *Youth Criminal Justice Act* limit, restrict or prohibit access to the responsive records?

[34] The public body also argued that it had to consider ss. 116 and 119 of the *Youth Criminal Justice Act* (*YCJA*) in making its decision to withhold the requested information.

[35] Section 116 of the *YCJA* provides the circumstances in which a department or agency of any government in Canada may keep records containing information obtained by the department or agency relating to minors involved in the legal system. Section 119 of the *YCJA* lists the people who are allowed to have access to the records that can be kept under s.116. The public body also noted s. 110 of the *YCJA*, which makes it an offence for a person to publish or release identifying information about a youth being dealt with under the *YCJA*.

[36] The public body noted that the applicant is not on the list of people set out in s. 119 of the *YCJA* that are allowed to have access to the records.

[37] Aside from pointing out the sections to me and noting that the applicant is not on the list of people set out in s. 119 of the *YCJA*, the public body made no argument about these sections. In any event, these sections of the *YCJA* are irrelevant to the analysis of whether the applicant is entitled to the requested information. Section 116 addresses when records can be kept. The fact that s. 116 states that a department or agency of any government in Canada has the authority to keep the records does not limit or exclude the application of *FOIPOP*. Section 119 of the *YCJA* lists a number of people who may or shall be given access to the records. Similar to s. 116 of the *YCJA*, it does not restrict access nor explicitly exclude *FOIPOP*. Section 4A of *FOIPOP* states which Act prevails in cases of conflict with other enactments. Here there is no conflict, meaning *FOIPOP* applies.

[38] At the end of the day, the records are under the custody and control of the public body and are responsive to the applicant's request. The records' status in relation to the *YCJA* does not affect the analysis of whether the applicant is entitled to the records under *FOIPOP*. In other words, no, ss. 116 and 119 of the *YCJA* do not limit, restrict or prohibit access to the responsive records.

FINDINGS & RECOMMENDATIONS:

[39] I find that:

1. Section 15(1)(i) and/or s. 15(1)(k) do not apply to the information withheld on pages 2-21, 72-76, 83, 85-86, 88, 91 and 108.
2. Section 15(1)(g) does not apply to the withheld information on pages 101-108 and 132.
3. Aside from names, the information withheld under s. 20 does not qualify as the personal information of an identifiable third party, as found on pages 101-108 and 131-132.
4. Sections 116 and 119 of the *YCJA* do not allow the public body to withhold any information on the responsive records.

[40] I recommend that the public body:

1. Release all the information severed pursuant to s. 15(1)(i) and/or s. 15(1)(k), found on pages pages 2-21, 72-76, 83, 85-86, 88, 91 and 108, within 45 days of the date of this review report.
2. Release all information severed pursuant to s. 15(1)(g) on pages 101-108 and 132 (keeping names of staff and youth redacted), within 45 days of the date of this review report.
3. Disclose the information severed under s. 20 on pages 101-108 and 131-132 (excluding names), within 45 days of the date of this review report.

February 15, 2022

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia