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

REVIEW REPORT 22-12

July 14, 2022

Halifax Regional Police

Summary: An applicant sought information from the Halifax Regional Police (Police) about its involvement in Halifax Regional Municipality's removal of temporary tents and shelters in public parks on August 18, 2021. She submitted four access to information requests to the Police. The Police withheld all the requested information in full. The four different types of responsive records were entirely withheld based on one or more law enforcement exemptions (s. 475(1)(a), (c), (e)), or as personal information (s. 480), under the *Municipal Government Act*. The Police failed to meet its burden when it chose not to provide any representations on how the discretionary law enforcement exemptions applied. The Commissioner recommends disclosure of the requested records, with the exception of the personal identifiers of injured officers, which should continue to be withheld. She also recommends that the Police implement policies, procedures and training for any of its staff involved in the access to information review process with the Office of the Information and Privacy Commissioner.

INTRODUCTION:

[1] In the summer of 2021, a number of tents and temporary shelters had been erected in Halifax's parks and green spaces. These temporary living spaces were being occupied by the city's homeless population. On August 18, 2021, officers employed by the Halifax Regional Police (Police) attended these sites to support Halifax Regional Municipality's removal of the temporary shelters and tents. There were many protesters at the site of a former library on Spring Garden Road. At that location, Police officers deployed riot gear and pepper spray and arrested several people.[1] Some officers received physical injuries.[2]

[1] Haley Ryan, *Protesters arrested, pepper-sprayed as Halifax police clear shelters from city land* (August 2021), online: CBC <https://www.cbc.ca/news/canada/nova-scotia/arrests-made-as-halifax-protestors-stand-against-clearing-of-shelters-from-city-land-1.6144592>.
[2] Francis Campbell, *Halifax police exerted appropriate force in shelter removal arrests, chief says* (August 2021), online: Saltwire <https://www.saltwire.com/atlantic-canada/news/halifax-police-exerted-appropriate-force-in-shelter-removal-arrests-chief-says-100625572/>.

[2] In her four access to information requests, the applicant requested:

- The Police's use of force policy.
- All use of force reports generated by the Police between August 18, 2021 and August 24, 2021.
- Reports generated by the Police (at inspector level or higher) relating to an operational debrief of events on August 18, 2021 (after action reports).
- Injury reports (i.e., incident reports) in relation to the event on August 18, 2021, that were filed by any member of the Police on August 18, 19 or 20, 2021, with identifying personal information excluded.

[3] The Police withheld all the requested records in full, stating that the information was being refused pursuant to s. 475 and s. 480 of the *Municipal Government Act* (*MGA*). The applicant objected to the Police withholding the requested records in full and filed four requests for review with this office. Given the extensive media coverage and discussion about the incidents, the applicant believes that even if the exemptions apply, the information should be disclosed because it would be in the public interest to do so.

ISSUES:

[4] There are five issues under review:[3]

1. Were the Police authorized to refuse access to the use of force policy under s. 475(1)(a) of the *MGA* because the disclosure could harm law enforcement?
2. Were the Police authorized to refuse access to use of force reports under s. 475(1)(c) of the *MGA* because the disclosure could harm the effectiveness of investigative techniques or procedures?
3. (a) Were the Police required to refuse access to the after action report under s. 480 of the *MGA* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?
   (b) Were the Police authorized to refuse access to the after action report under the following sections of the *MGA*:
      i. 475(1)(a), because the disclosure could harm law enforcement;
      ii. 475(1)(c), because the disclosure could harm the effectiveness of investigative techniques or procedures; and
      iii. 475(1)(e), because the disclosure could endanger the life or physical safety of a law-enforcement officer or any other person?
4. Were the Police required to refuse access to the incident/injury reports under s. 480 of the *MGA* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?
5. Should the requested information be disclosed in the public interest pursuant to s. 486 of the *MGA*?

[3] The issues in this report are set out differently than in previous NS OIPC review reports. Four cross-referenced review request files have been joined into this one report. The issues in this report are set out to address the four different file types that were requested in four separate access requests and the exemptions applied to withhold them in full.

DISCUSSION:

Burden of proof

[5] The Police bears the burden of proving that the applicant has no right of access to a record or part of a record.[4] Where the Police has established that s. 480 applies, s. 498(2) of the *MGA* 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.

Duty to sever

[6] In this case, the Police chose to withhold all the documents in full. Section 465 of the *MGA* establishes that applicants have a right to any record in the custody or under the control of a municipality,[5] subject only to limited and specific exemptions set out in the *MGA*. It is essential to an effective, meaningful and robust access law that municipalities fully appreciate the requirement to selectively sever records. The law does not create whole document carve-outs. Rather, the law makes clear that municipalities are only permitted to withhold information exempted from disclosure; everything else must be disclosed.[6]

1. Were the Police authorized to refuse access to the use of force policy under s. 475(1)(a) of the *MGA* because the disclosure could harm law enforcement?

[7] The Police fully withheld 17 pages of the use of force policy, pursuant to s. 475(1)(a) of the *MGA* on the basis that their release could harm law enforcement. For the reasons set out below, I find that this information does not qualify for exemption under s. 475(1)(a).

[8] Section 475(1)(a) gives municipalities discretion to withhold information that could reasonably be expected to harm law enforcement. In order to establish that s. 475(1)(a) applies, the Police must first demonstrate that there was a law enforcement matter as defined by s. 461(c) of the *MGA*. Second, it must establish that disclosure of the requested information could reasonably be expected to harm law enforcement. In *NS Review Report 18-03*,[7] former Commissioner Tully explained the following three criteria must be established to meet the harms test:

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 hinderance 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.

[9] Law enforcement exemptions should be approached in a sensitive manner in recognition of the challenges associated with predicting future events in a law enforcement context, while

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[4] *MGA* s. 498(1).
[5] Per s. 461(e) of the *MGA*, the term "municipality" includes municipal bodies. Halifax Regional Police is a municipal body.
[6] *NS Review Report 17-03, Nova Scotia (Fisheries and Aquaculture) (Re)*, 2017 NSOIPC 3 (CanLII), at para. 10.
[7] *NS Review report 18-03, Nova Scotia (Department of Justice) (Re)*, 2018 NSOIPC 3 (CanLII), at para. 40.

maintaining that the municipality must meet the evidentiary requirements to establish harm.[8] While the law enforcement exemption should be approached in a careful manner, the municipality must nevertheless set out the potential for harm from release of the requested records.

[10] In this case, despite being reminded that the burden was its to meet, the Police provided no representations on how the release of its use of force policy could reasonably be expected to harm law enforcement. That being said, I do have the benefit of the Police's decision letter to the applicant, which stated that the Police's policy was under review and being updated as required. The decision letter went on to state that most of the Police's policies also include the details of the related operational procedures and that in their current form, they cannot be released by virtue of s. 475(1)(a) of the *MGA*.

[11] A generic statement that its policies were under review and that they may include details of operational procedures does not meet the level of detail required to meet the burden under s. 475(1)(a). The status of the document(s) as being under review or updated is irrelevant to the test of whether s. 475(1)(a) applies.

[12] Furthermore, when applying an exemption under s. 475, it is not enough for a municipality to rely on the harms of disclosure being self-evident from the records themselves, or to rely on the fact that a law enforcement matter is ongoing as constituting a fulfillment of the requirements of the exemption.[9] Rather, the Police must explicitly set out how release of the requested information could harm law enforcement.

[13] Given that I received no representations, I am then left with no argument or rationale as to how release of the use of force policy could harm law enforcement. The Police did not meet its burden in establishing that the information qualifies for this exemption. Accordingly, I find that the information does not qualify for exemption under s. 475(1)(a).

2. Were the Police authorized to withhold access to use of force reports under s. 475(1)(c) of the *MGA* because the disclosure could harm the effectiveness of investigative techniques or procedures?

[14] The Police fully withheld multiple use of force reports, totalling 225 pages, which were generated following the August 18, 2021 incidents pursuant to s. 475(1)(c) of the *MGA*. This was done on the basis that the Police thought their release could harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement. For the reasons set out below, I find that this information does not qualify for exemption under s. 475(1)(c).

[15] The use of force reports requested by the applicant provide details about the officers, the situations, the types of force applied and the outcomes of the uses of force. There are standard form fields that have check marks as well as free text fields for descriptions to be documented.

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[8] See *Ontario (Attorney General) v. Fineberg*, 1994 CanLII 10563 (ON SC), cited with approval in *NS Review Report 22-06, Department of Justice (Re)*, 2022 NSOIPC 6 (CanLII), at paras. 16-18.
[9] *ON Order PO-2647*, *Ontario (Community Safety and Correctional Services) (Re)*, 2008 CanLII 11039 (ON IPC).

[16] The Ontario Information and Privacy Commissioner's Office recently considered the application of its equivalent to s. 475(1)(c) in *Order PO-4096*[10] which provides the following guidance:

> [47] In order to meet the "investigative technique or procedure" test in section 14(1)(c), the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public. Senior Adjudicator John Higgins stated in Order PO-2751 that:
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> > … The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that its effectiveness would not be hindered or compromised by disclosure and, accordingly, that the technique or procedure in question is not within the scope of section 14(1)(c).
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> [48] The techniques or procedures must be "investigative." The exemption will not apply to "enforcement" techniques or procedures.

[17] Therefore, in this case, in order to meet its burden of proof, the Police was required to establish that release of its use of force reports would reveal an identified investigative technique or procedure, and that the disclosure could reasonably be expected to hinder or compromise its effective utilization to the degree that it constitutes damage or detriment to law enforcement that is probable and not merely possible.

[18] Again, the Police provided no representations on this issue. Its decision letter to the applicant stated simply that the requested records were part of an open investigation and included a recitation of s. 475(1)(c).

[19] I am left with no argument or rationale as to how release of the use of force reports could harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement. The Police did not meet its burden in establishing that the information qualifies for this exemption. Accordingly, I find that the information does not qualify for exemption under s. 475(1)(c).

3. (a) Were the Police required to refuse access to the after action report under s. 480 of the *MGA* because disclosure of the information could be an unreasonable invasion of a third party's personal privacy?
(b) Were the Police authorized to refuse access to the after action report under the following sections of the *MGA*:
i. 475(1)(a), because the disclosure could harm law enforcement;
ii. 475(1)(c), because the disclosure could harm the effectiveness of investigative techniques or procedures; and
iii. 475(1)(e), because the disclosure could endanger the life or physical safety of a law-enforcement officer or any other person?

[10] *ON Order PO-4096, Ontario (Natural Resources and Forestry) (Re),* 2020 CanLII 103777 (ON IPC).

[20] The Police withheld a seven page after action report generated following the August 18, 2021 incidents pursuant to s. 475(1)(a), (c) and (e), as well as s. 480 of the *MGA*. For the reasons set out below, I find that this information does not qualify for the exemptions claimed.

[21] The after action report summarizes the activities of the Police in relation to Halifax Regional Municipality's removal of the temporary shelters on August 18, 2021. The record does contain the names of some of the officers involved in these activities.

Section 480

[22] Section 480 is a mandatory exemption that requires the Police to withhold information if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[23] Section 480 of the *MGA* provides a right of privacy to third parties in that their information must be withheld only if disclosure would be an unreasonable invasion of their privacy. It is well established in Nova Scotia that a four-step approach is required when evaluating whether or not s. 480 requires a municipality to refuse to disclose personal information.[11] The four steps are:

1. Is the requested information "personal information" within s. 461(f)? If not, that is the end. Otherwise, the municipality must go on.
2. Are any of the conditions of s. 480(4) satisfied? If so, that is the end. Otherwise, the municipality must go on.
3. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 480(3)?
4. In light of any s. 480(3) presumption, and in light of the burden upon the applicant established by s. 498(2), does the balancing of all relevant circumstances, including those listed in s. 480(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?

[24] The Police did not identify whether there were portions of the record it believed s. 480(1) applied to or whether it was the whole document. Notably, the Police also did not cite any subsections within s. 480 to identify why it believed disclosure would constitute an unreasonable invasion of personal privacy.

[25] Even though the Police did not provide representations on any part of the test, because the personal information exemption is mandatory, I must complete the analysis.

Step 1: Is the requested information "personal information" within s. 461(f)? If not, that is the end. Otherwise, I must go on.

[26] Yes. The names of officers are personal information. There is no other information within the report that meets the definition of personal information under s. 461(f) of the *MGA*. However, I must go on to assess whether their release would be an unreasonable invasion of the officers' privacy.

[11] *House (Re)*, [2000] N.S.J. No. 473, 2000 CanLII 20401 (NS SC); and *Sutherland v. Dept. of Community Services*, 2013 NSSC 1, 2013 NSSC 1 (CanLII).

Step 2: Are any of the conditions of s. 480(4) satisfied? If so, that is the end. Otherwise, I must go on.

[27] Yes. Section 480(4)(e) applies. It states:

> 480(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
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> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a municipality;

[28] In this case, the analysis ends at step two of the test. As set out in s. 480(4)(e), the disclosure of officers' positions and functions are not an unreasonable invasion of a third party's personal privacy.

[29] I find that the Police was not required to withhold the record in full or in part, including the officers' position titles and names as they relate to their positions and functions under s. 480(4)(e) of the *MGA*.

Sections 475(1)(a), 475(1)(c) and 475(1)(e)

[30] The tests for s. 475(1)(a) and (c) are set out above.

[31] Section 475(1)(e) gives the Police discretion to withhold information that could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. In order for s. 475(1)(e) to apply, the Police must provide evidence that release of the requested information could endanger the life or physical safety of a person.

[32] In *Nova Scotia Review Report 16-13*,[12] former Commissioner Tully explained that she could not find the exemption applied because there was no evidence before her that the applicant would subject the named employees to any risk of harm, that the employees had ever been the subject of threats or undue influence or that upon receipt of the information the applicant's behaviour would likely change.

[33] Again, the Police provided no representations, despite being reminded of its burden to meet. Its decision letter simply recited the sections applied. As such, I have no hesitation in finding that the information in the after action report does not qualify for exemption under s. 475(1)(a), (c), or (e). The Police failed to discharge its burden.

4. Were the Police required to refuse access to the incident/injury reports under s. 480 of the *MGA* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

[34] The Police fully withheld multiple incident/injury reports, totalling 21 pages, pursuant to s. 480 of the *MGA*, on the basis that their release would be an unreasonable invasion of a third

[12] *Nova Scotia Review Report 16-13, Nova Scotia (Justice) (Re)*, 2016 NSOIPC 13 (CanLII). A similar comment was made in *NS Review Report 21-04, Department of Justice (Re)*, 2021 NSOIPC 4 (CanLII). These reports speak to the requirements for establishing the application of s. 15 in the *Freedom of Information and Protection of Privacy Act*, which has almost identical wording to s. 475 of the *MGA*.

party's personal privacy. For the reasons set out below, I find that s. 480 applies to the portions of the reports that identify injured officers but not to the remainder of the incident/injury reports.

[35] The four steps to a s. 480 analysis were set out in issue #3 above.

[36] Again, the Police provided no representations on why it was required to withhold this information. However, it did note in its decision letter to the applicant that it was relying on s. 480(3)(a) of the *MGA*, which states that a disclosure is presumed to be an unreasonable invasion of a third party's personal privacy if it "relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation."

Step 1: Is the requested information "personal information" within s. 461(f)? If not, that is the end. Otherwise, I must go on.

[37] Yes. The records comprise a number of standard data points related to workplace incidents and injuries, most of which involve a yes/no response. There are also fill in the blank fields to supply more information about the incidents. Some fields are blank. Others are completed.

[38] The forms also include recorded information about named individuals that meets the definition of "personal information" set out in s. 461(f) of the *MGA*.

[39] Blank fields do not constitute personal information. On their own, the description of data points to be filled out are not personal information. However, when completed and combined with personal information, this information also qualifies as personally identifying.

Step 2: Are any of the conditions of s. 480(4) satisfied? If so, that is the end. Otherwise, I must go on.

[40] Yes. Section 480(4)(e) applies to some of the information.

[41] One of the responsive records includes not only information about an injured officer but also information about another non-injured officer. Section 480(4)(e) applies to the reference to the non-injured officer because the information is about the officer's functions as an employee, as opposed to their injuries. In other words, disclosing that information would not be an unreasonable invasion of a third party's personal privacy.

[42] The forms also include information about other officers that witnessed these events. The officers who witnessed the incidents were present because they were paid to be there as employees of the Police. This information is about their functions as employees.

[43] Therefore, s. 480(4)(e) applies as it relates to those third parties' positions and functions as employees of the Police.

[44] In my opinion, the remainder of the personal information, namely that which relates to the injured officers, does not attract s. 480(4)(e). While officers may at times get injured on the job, getting injured is not a function their employment. It's more akin to a byproduct of it. Details and information of officer injuries are not about their functions as employees of the Police. Therefore, the analysis will continue for the personal information about the injured officers.

Step 3: Would the disclosure of personal information be a presumed unreasonable invasion of privacy pursuant to s. 480(3)?

[45] Yes. Section 480(3)(a) applies. Section 480(3)(a) of the *MGA* states:

> 480 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information
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> (a) relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation;

[46] Section 480(3)(a) applies to all the information on the records that identifies the injured officers' medical and health care history. This information is presumed to be an unreasonable invasion of a third party's personal information. Therefore, the analysis will continue.

Step 4: In light of any s. 480(3) presumption, and in light of the burden upon the applicant established by s. 498(2), does the balancing of all relevant circumstances, including those listed in s. 480(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?

[47] The final step of the analysis is to balance all the relevant circumstances, including those listed in s. 480(2). The first factor listed is relevant here and states:

> 480 (2) In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the responsible officer shall consider all the relevant circumstances, including whether
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the municipality to public scrutiny;

[48] At this point in the test, because there is a presumption that disclosure of the injured officers' personal information would be an unreasonable invasion of privacy, s. 498(2) establishes a burden on the applicant to prove that disclosure would not be an unreasonable invasion of their personal privacy.

[49] The applicant's original access request for injury reports excluded any personally identifying information. In representations to this office, the applicant stated the purpose of the request was to learn of the number, type, severity and probable causes of injuries among officers attending the events of August 18, 2021. The applicant would be satisfied to learn about the injuries without learning who sustained them.

[50] The applicant also said that this access request was one of four submitted to the Police to gain access to records of the events of August 18, 2021, as it related to the officers' use of force on that day. Disclosure of the incident/injury reports would assist the public in understanding the full context of the officers' use of force, and whether the decisions and actions of the officers complied with policies.

[51] It was the Police's duty to sever the records as set out in s. 465 of the *MGA*. The applicant has submitted to both the Police and this office that she is not interested in personally identifying

information, but instead is looking for the types, volume and causes of injuries among officers. This information would also assist in subjecting the Police to public scrutiny.

[52] It was the Police's duty to sever the personally identifying details of the injured officers (such as names). I agree with the Police that where the records identify the officers injured, this is personal information that qualifies to be withheld under s. 480(3)(a).

[53] However, if the personally identifying details about the injured officers were to be removed from the incident/injury reports, they would no longer qualify as being "about an identifiable individual" as required in the definition of personal information in s. 461(f) of the *MGA*. This would make the incident/injury reports releasable.

[54] In my opinion, the Police were not required to withhold the records in full under s. 480(3)(a). I do agree that portions of the records that serve to specifically identify injured officers (such as names) should be withheld under s. 480(3)(a). However, once the identifiers are removed, the information is not personal information and should therefore be released. In addition, the information to which s. 480(4)(e) applies should also be released.

5. Should the requested information be disclosed in the public interest pursuant to s. 486 of the *MGA*?

[55] Section 486 of the *MGA* sets out an authority for disclosure in the public interest. The applicant submitted arguments on why the withheld documents should be disclosed in the public interest. Because I have found that s. 475 does not apply to the withheld information and that all the information severed under s. 480 should be disclosed aside from those portions that would identify injured officers, and because the applicant is not interested in the identifying information, there is no need to consider the applicant's s. 486 arguments.

CONCLUSION

[56] The Police's decision to not provide any arguments in the form of representations at all during the review process warrants comment. This is especially so where the records are withheld in full and the applicant makes public interest arguments, which is the case here.

[57] The purposes of *Part XX* of the *MGA* include giving the public access to records (unless the *MGA* sets out an exception to that right) in order to facilitate informed public participation in policy formulation, ensure fairness in government decision-making, and permit the airing and reconciliation of divergent views.[13] The *MGA* sets out a procedure for reviews of access decisions by the Office of the Information and Privacy Commissioner (OIPC) and gives power to the Commissioner to make any recommendations that she considers appropriate. It clearly explains that at a review into a decision to refuse an applicant access to records, the burden is on the municipality to prove that the applicant has no right of access to the records.[14]

[13] Section 462 of the *MGA*.
[14] Section 498(1) of the *MGA*. Sections 498(2) and (3) speak to the burden on the applicant with regard to personal information.

[58] A decision to not submit any representations at all during the review process in an effort to meet its statutory burden is concerning. For that reason, I have included recommendations related to the OIPC review process.

FINDINGS & RECOMMENDATIONS:

[59] I find that:

1. Section 475(1)(a) does not apply to the use of force policy.
2. Section 475(1)(c) does not apply to the use of force reports.
3. Sections 475(1)(a), (c), and (e), as well as s. 480 do not apply to the after action report.
4. Section 480 applies to the portions of the incident/injury reports that identify injured officers but not to the remainder of them.

[60] I recommend that the Police:

1. Disclose the use of force policy in full within 45 days of the date of this review report.
2. Disclose the use of force reports in full within 45 days of the date of this review report.
3. Disclose the after action report in full within 45 days of the date of this review report.
4. Disclose those portions of the incident/injury reports that do not identify injured officers within 45 days of the date of this review report.
5. Implement policies and procedures for engaging in the access to information review process with the OIPC within six months of the date of this review report.
6. Provide training on the policies and procedures implemented per Recommendation #5 to staff involved in the access to information review process with the OIPC within eight months of the date of this review report.

July 14, 2022

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC Files: 21-00448, 21-00449, 21-00450, 21-00451