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

REVIEW REPORT 23-13

October 19, 2023

Mount Saint Vincent University

Summary: The applicant requested records from Mount Saint Vincent University (public body). The public body withheld the requested records in full on the basis that disclosing the records would be an unreasonable invasion of multiple third parties' personal privacy (s. 20 of the *Freedom of Information and Protection of Privacy Act*). The Commissioner finds that the public body appropriately applied s. 20 to the responsive records. The Commissioner recommends that the public body continue to withhold the records.

INTRODUCTION:

[1] The applicant requested records from Mount Saint Vincent University (public body). Specifically, she asked for all emails or correspondence that were sent by or to a named public body employee that included her own name, the name of a student organization, or the name of a third party for a specified period.

[2] The public body withheld three pages of responsive records in full on the basis that it determined disclosure would be an unreasonable invasion of multiple third parties' privacy and so must be withheld under s. 20 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*).[1]

[3] This review raises competing interests of an applicant's right to know and employee privacy rights. This review discusses how these rights and interests are balanced under *FOIPOP*.

ISSUE:

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

[1] The responsive records contain one email that is dated after the date of the applicant's access request. This review does not address that email as it is out of scope.

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] 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.

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

[6] The public body withheld the three pages of responsive records in full 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 personal privacy. For the reasons set out below, I find that disclosure of the withheld records would result in an unreasonable invasion of multiple third parties' personal privacy.

[7] The applicant was looking for any emails or correspondence about her by a public body employee she named in her access request. This public body employee is referred to as a third party in this review. The applicant believes she should get the withheld records in full. She thinks she has a right to the records because she is the subject of them, and she believes she has a right to know if misleading or false accusations are being made against her by a third party. She wants to know why this third party was bringing up her name using the public body's email system, as she doesn't know why this third party would bring up her name. She was not taking a course with this third party. The applicant's position was that if a third party wants to gossip about a member of the public, they should refrain from communication using the public body's email system.

[8] In contrast, the public body was of the view that it was required to withhold the responsive records in full to protect the privacy interests of the third parties. Public bodies are mandated to withhold personal information if disclosure of it would result in an *unreasonable* invasion of a third party's personal privacy.

[9] It is well established in Nova Scotia that a four-step approach is required when evaluating whether or not s. 20 requires that a public body refuse to disclose personal information.[3] The four steps are:

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)?

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[2] *FOIPOP*, s. 45.

[3] As set out in *House, Re*, 2000 CanLII 20401 (NS SC) and *Sutherland v. Nova Scotia (Community Services)*, 2013 NSSC 1 (CanLII). The OIPC has consistently followed this approach.

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 disclosure would constitute an unreasonable invasion of privacy or not?

Step 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.

[10] "Personal information" is defined in s. 3(1)(i) of *FOIPOP* as recorded information about an identifiable individual including a non-exhaustive list of information captured by that definition, like name, contact info, health care history and employment history.

[11] The definition of "personal information" in s. 3(1)(i) of *FOIPOP* makes it clear that an individual's name, as well as their contact information, qualifies as personal information.

[12] Therefore, where the withheld records specify the name and/or contact information of any public body employee, that qualifies as personal information. The responsive records contain this type of information. In addition, in *NS Review Report FI-10-19*,[4] former Commissioner Tully noted that third party accounts of their actions in the workplace constitute the third party's personal information. In my view, the information withheld falls into this category and as such qualifies as personal information within the meaning of s. 3(1)(i) of *FOIPOP*.

Step 2: Are any of the conditions of s. 20(4) satisfied? If so, that is the end. Otherwise, the public body must go on.

[13] I do not find that any of the considerations set out in s. 20(4) of *FOIPOP* apply to the withheld information.

Step 3: Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?

[14] Section 20(3) of *FOIPOP* lists circumstances where disclosure is presumed to be an unreasonable invasion of privacy. These presumptions are rebuttable.

[15] Section 20(3)(d) provides:

> 20(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (d) the personal information relates to employment or educational history;
>
> …

[16] Similar to what former Commissioner Tully concluded in *NS Review Report FI-10-19*,[5] the presumption in s. 20(3)(d) applies to the information withheld in this case because it relates a third party's employment history.

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[4] *NS Review Report FI-10-19, Nova Scotia (Justice) (Re)*, 2015 CanLII 54095 (NS FOIPOP), at para. 22.
[5] *NS Review Report FI-10-19, Nova Scotia (Justice) (Re)*, 2015 CanLII 54095 (NS FOIPOP), at paras. 28-31.

Step 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 disclosure would constitute an unreasonable invasion of privacy or not?

[17] The final step in this analysis is the most important. Taking into account any presumptions and the burden of proof on the applicant, decision-makers must then balance all relevant circumstances including those listed in s. 20(2) to answer the ultimate question: would disclosure of the requested information constitute an unreasonable invasion of personal privacy?

Supplied in confidence – s. 20(2)(f)

[18] Section 20(2)(f) of *FOIPOP* provides that whether or not the personal information was supplied in confidence is a relevant factor.

[19] The Supreme Court of Nova Scotia has determined that a number of factors are relevant in assessing whether information was supplied in confidence for the purpose of s. 20(2)(f), including such things as the nature of the information, the purpose of the record and whether the information was voluntarily supplied or compelled.[6] One of these factors is whether the actions of the public body and the supplier of the record (in this case a third party) provide objective evidence of an expectation or concern for confidentiality. In my view, that is the case here.

[20] This consideration weighs against disclosure.

Other considerations

[21] Section 20(2) is not an exhaustive list. It requires that in deciding whether the disclosure of information would be an unreasonable invasion of a third party's personal privacy, the public body consider all relevant factors. One other factor is relevant – the sensitivity of the information.

[22] In this case, I will not get into the specifics in an effort to not inadvertently disclose the contents of the responsive records, except to say that the information is of a sensitive nature.

[23] This consideration weighs against disclosure.

[24] I find that the disclosure of the requested information would be an unreasonable invasion of multiple third parties' personal privacy.

[6] See, for example, *Keating v. Nova Scotia (Attorney General)*, 2001 NSSC 85 (CanLII), at para. 56.

FINDING & RECOMMENDATION:

[25] I find that the public body has properly applied s. 20 to the records withheld in full.

[26] I recommend that the public body take no further action.

October 19, 2023

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

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