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

REVIEW REPORT 23-15

November 23, 2023

Department of Labour, Skills and Immigration

Summary: An applicant asked for records from the Department of Labour, Skills and Immigration (public body) relating to their family member's tragic workplace fatality at a workplace. The public body provided the applicant with responsive records but heavily redacted information or fully withheld some pages of records citing s. 15(1)(f) (prosecutorial discretion), s. 15(1)(k) (harm security of property or system), and s. 20 (personal information) of the *Freedom of Information and Protection of Privacy Act*. The Commissioner finds that the representations provided by the public body were not sufficient to discharge its evidentiary burden of proof with respect to the information withheld under s. 15 and so recommends its release to the applicant (except to the extent that it must continue to be withheld under s. 20). She finds that some information must continue to be withheld under s. 20 but the remainder should be released to the applicant.

INTRODUCTION:

[1] This review arises from a tragic workplace fatality. A business in Nova Scotia contracted a company (contractor) to conduct an inspection at the business. An employee of the contractor was killed while conducting the inspection.

[2] Following the fatality, the Occupational Health and Safety Division of the Department of Labour, Skills and Immigration (public body)[1] conducted an investigation into the workplace fatality, as required by the *Occupational Health and Safety Act*.[2] Charges were laid against the contractor. In advance of the trial into this matter, the contractor entered a guilty plea, which means that a trial never took place. Had this matter gone to trial, much of the information at issue in this review would likely have been entered publicly into evidence and thus would have been accessible to the applicant. However, since the trial did not take place, the information was not

[1] At the time the access to information request was made, the public body was titled the Department of Labour and Advanced Education. Subsequent to the applicant filing their access request, this public body was divided into two public bodies: the Department of Advanced Education and the Department of Labour, Skills and Immigration.
[2] *Occupational Health and Safety Act*, SNS 1996, c 7.

made publicly available. As a result, the grieving applicant has not had access to the details of the public body's investigation into the events surrounding the tragic workplace fatality of their family member. The applicant seeks to fully understand the circumstances of their family member's workplace death.

[3] The records at issue consist of the public body's entire investigation file on this matter. The investigation file includes all of the public body's written communication relating to the investigation, various documents, the public body's expert report, an engineer's assessment of the business commissioned by it (Engineer Report), witness statements of some third parties (some of the third parties were also witnesses, while others were not) collected by the public body and audio recordings of the third party witness statements.

[4] In response to the applicant's access request, the public body provided the applicant with approximately 160 of the total 586 pages of responsive records that composed the public body's entire investigation file. The public body heavily redacted information within the 160 disclosed pages, and withheld hundreds of pages in full under s. 15(1)(f) (prosecutorial discretion), s. 15(1)(k) (harm security of property or system), and s. 20 (personal information) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*).

[5] The applicant was not satisfied with the public body's response to their access request and filed a request for review with the Office of the Information and Privacy Commissioner (OIPC). This file was not able to resolve informally so proceeded to this public review report. The applicant seeks access to the public body's entire investigation file. The applicant does not seek names of third parties.

ISSUES:

[6] There are three issues under review:

1. Was the public body authorized to refuse access to information under s. 15(1)(f) of *FOIPOP* because the disclosure could reveal information relating to or used in the exercise of prosecutorial discretion?
2. Was the public body authorized to refuse access to information under s. 15(1)(k) of *FOIPOP* because the disclosure could harm the security of any property or system?
3. 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?

Burden of proof

[7] 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]

[8] 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.

[3] *FOIPOP*, s. 45.

1. Was the public body authorized to refuse access to information under s. 15(1)(f) of *FOIPOP* because the disclosure could reveal information relating to or used in the exercise of prosecutorial discretion?

[9] Section 15(1)(f) gives the public body discretion to redact information that could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion. For the reasons set out below, I find that the representations provided by the public body were not sufficient to discharge its evidentiary burden of proof.

[10] The public body's investigation file comprises of both the Engineer Report (110 pages) and the public body's own investigation records (476 pages and audio files).

[11] The Engineer Report was largely disclosed in full, with only some redacted information. In contrast, the public body withheld the vast majority of its own investigation records, releasing only 29 pages in full or in part. Twenty-one of the released pages simply identified which pages were being withheld in full and the exemptions relied upon, including s. 15(1)(f).

[12] The public body's rationale for withholding this information was that it was provided to a Crown attorney for use in the prosecution of charges relating to the workplace fatality under the *Occupational Health and Safety Act*.[4] The public body asserted that the records had to be withheld under s. 15(1)(f) because they were reviewed and considered by a Crown attorney to determine how to proceed in terms of charges related to the workplace fatality. To support this assertion, the public body provided me with an email in which a public body employee said that the public body's entire investigation file was provided to a Crown attorney. It said that in this context, the entire investigation file is information relating to or used in the exercise of prosecutorial discretion.

[13] A discussion of how the term "prosecutorial discretion" is to be interpreted is set out in *NS Review Report F-11-72(Amended)*.[5] "Prosecutorial discretion" is a term of art. It does not refer to any discretionary decision made by a Crown attorney.[6] Rather, only information contained within a Crown attorney's file that also relates to or was used in the exercise of prosecutorial discretion is afforded this protection. Section 15(1)(f) is not so broad that it means everything in a Crown attorney's file is automatically considered as information relating to or used in the exercise of prosecutorial discretion. In *Medicine Hat Police Services (Re)*, an applicant sought records that were withheld under s. 20(1)(g) of Alberta's freedom of information law, which is identical to s. 15(1)(f) of Nova Scotia's *FOIPOP*. The adjudicator in that case set out this helpful statement:

> [79] For section 20(1)(g) to apply, the information must relate to prosecutorial discretion or have been used in exercising prosecutorial discretion. Further, information merely *related to* information used in exercising prosecutorial discretion is not covered by section 20(1)(g); information cannot be withheld under this provision merely because it

[4] *Occupational Health and Safety Act*, SNS 1996, c 7.
[5] *NS Review Report FI-11-72 (Amended), Public Prosecution Service (Re),* 2015 NSOIPC 10 (CanLII), at paras. 11-14.
[6] *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372, 2002 SCC 65 (CanLII) [*Krieger*], at para. 43.

> relates to a case being prosecuted, unless the information also relates to the exercise of prosecutorial discretion. [7]

[14] In light of the above, the OIPC asked the public body for additional evidence demonstrating that the information withheld under s. 15(1)(f) relates to or was used in the exercise of prosecutorial discretion. In response, the public body provided me with a policy from the Nova Scotia Public Prosecution Service that sets out what Crown attorneys must consider when deciding whether to prosecute. It said that because this policy requires the Crown attorney to review things like third party witness statements and reports, and the withheld information for this file contains this type of information, this means that the withheld information was used by the Crown attorney in the exercise of their prosecutorial discretion. It declined to provide the OIPC with a letter or statement from a Crown attorney stating that the responsive records actually did relate to or were used in the exercise of prosecutorial discretion.

[15] In support of its position, the public body pointed me to *British Columbia Order F16-21*.[8] In that case, the public body provided the adjudicator with a letter from a public body employee stating that the information requested by the applicant matched what was in the prosecution file along with a statement from a Crown prosecutor who asserted that the requested information related to and was used in the exercise of prosecutorial discretion. The adjudicator found this sufficient to find that the information at issue would reveal information in the prosecution file but did not find it sufficient enough to conclude that the information would reveal information relating to or used in the exercise of prosecutorial discretion. When assessing the exercise of prosecutorial discretion, the adjudicator noted that he had only an assertion from *a* Crown prosecutor to that effect, but did not have an assertion from *the* Crown prosecutor who actually reviewed the information. However, given the information at issue was information that would likely have been considered in the exercise of prosecutorial discretion, the adjudicator accepted the assertion from a Crown prosecutor even though it wasn't clear that particular Crown prosecutor was directly involved with that file.

[16] Unlike the adjudicator in *British Columbia Order F16-21*, I do not have a similar statement from a Crown attorney in Nova Scotia. Based on the information supplied by the public body, I accept that the information was provided to a Crown attorney, but that is not enough to satisfy the public body's burden to demonstrate that s. 15(1)(f) applies. I also need evidence that shows the information actually relates to or was used in the exercise of prosecutorial discretion. The public body did not provide me with any cases where a public body successfully asserted prosecutorial discretion on behalf of a Crown attorney without the input of a Crown attorney.

[17] In my view, a statement by an employee that the records were provided to a Crown attorney and a policy saying that Crown attorneys should review investigation documents when deciding whether to prosecute are not enough to establish that the records relate to or were used by a Crown attorney in exercising their prosecutorial discretion.

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[7] *AB Order F2014-02, Medicine Hat Police Service (Re),* 2014 CanLII 98326 (AB OIPC), at para. 79.
[8] *BC Order F16-21, Vancouver Police Department (Re)*, 2016 BCIPC 23 (CanLII).

[18] It is the public body's burden to establish that the information at issue relates to or was used in the exercise of prosecutorial discretion. The representations provided by the public body were not sufficient to discharge its burden of proof.

Exercise of discretion

[19] Before moving on, although I do not need to consider the public body's exercise of discretion since I have found that s. 15(1)(f) does not apply, I do wish to comment on the public body's representations on this issue. Section 15 is a discretionary exemption. It provides that a public body *may* refuse to disclose information to an applicant if the requirements of s. 15 are met. However, the public body also has discretion to release some or all of the information subject to s. 15(1)(f).

[20] When considering the Ontario Information and Privacy Commissioner's role in reviewing exercise of discretion, the Supreme Court of Canada said that the Commissioner should return the matter for reconsideration where "the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations."[9] It said that the exercise of discretion should consider the purpose of the exemption and all other relevant interests and considerations based on the facts and circumstances of the particular case.[10] Other relevant factors include

- the general purposes of the legislation: public bodies should make information available to the public; individuals should have a right of access to personal information about themselves;
- the wording of the discretionary exemption and the interests which the section attempts to balance;
- the nature of the record and the extent to which the document is significant and/or sensitive to the public body;
- whether there is a sympathetic or compelling need to release materials;
- whether the disclosure of the information will increase public confidence in the operation of the public body;
- the age of the record.[11]

[21] In this case, the public body said it exercised its discretion by releasing the majority of the Engineer's Report. It also said it considered the following factors in exercising its discretion:

- the information was supplied by the public body to be used by the Crown in determining whether to proceed with charges;
- the nature and extent of the prosecution;
- whether the information was to determine if there was sufficient evidence to proceed;

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[9] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 SCR 815, at para. 71.
[10] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 SCR 815, at para. 66.
[11] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 SCR 815, at para. 66; *BC Investigation Report F08-03, British Columbia (Children & Family Development) (Re),* 2008 CanLII 57363 (BC IPC), at paras. 33-38.

- whether the information was used to determine if the public interest was best served by prosecution of the case;
- the harm from disclosure; and
- the purpose of *FOIPOP*.

[22] The public body said there was nothing on the records that would inform the public about government operations, facilitate participating in policy-making decisions, ensure fairness in government decision-making, or deal with divergent views. It said that the records were clearly provided to the Crown attorney for use in any prosecution resulting from the workplace fatality. The public body said there was no public interest in releasing the documents. These are all relevant factors to consider in the exercise of discretion.

[23] However, it is concerning to me that the public body took the position that there was no public interest in releasing the requested information. The public body is tasked with investigating workplace safety when there is a major incident or fatality in a workplace.[12] That information is then used to inform any prosecution. Workers and their loved ones have no choice but to rely on the public body's investigation into a workplace incident or fatality. In my view, there is a strong public interest in scrutinizing the public body's actions in this regard.

[24] The public body also made no mention of considering where there was a sympathetic or compelling reason for releasing the requested information. With respect to the needs of the applicant as a grieving relative, research conducted in Ontario indicates that for bereaved adults and children alike, understanding the full details and circumstances surrounding a loved one's death is an integral part of the grieving process.[13] Based on that research, adjudicators in Ontario have concluded that greater knowledge of the circumstances of a loved one's death is, by its very nature, compassionate.[14] While these findings relate to compassion and were made in relation to the personal privacy exemption, in my view, the same rationale should have been applied in this case when assessing whether there was a sympathetic rationale for releasing the information.

[25] Finally, it does not appear that the public body considered the age of the records in exercising its discretion. The records at issue are eight years old. In this case, the prosecution is long over and deadlines for appeal have passed. This should have been considered in the exercise of discretion.

[26] In future, I encourage the public body to consider these additional factors when exercising its discretion in cases where applicants are seeking access to information about the workplace fatality of a loved one.

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[12] Government of Nova Scotia, *Workplace accidents and fatalities: investigation process* (undated), online: <https://novascotia.ca/workplace-accidents-and-fatalities-investigation-process/>.
[13] *Ontario Order MO-2404, Durham Regional Police Services Board (Re),* 2009 CanLII 15435 (ON IPC), at pp. 10-11.
[14] *Ontario Order MO-2245, Halton Regional Police Services Board (Re),* 2007 CanLII 82541 (ON IPC), at p. 6.

Duty to sever

[27] The public body largely withheld the records in full rather than severing in a line-by-line fashion. Section 5(2) of *FOIPOP* provides:

> 5(2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Act, but if that information can reasonably be severed from the record an applicant has the right of access to the remainder of the record.

[28] This is known as the duty to sever.

[29] The public body's position was that where s. 15(1)(f) was applied to withhold pages in full, it was not possible to sever those pages in a way that would show where s. 20 was applied in a meaningful manner. It went on to say that since s. 15(1)(f) was applied to the entire page, severing for only s. 20 was not necessary.

[30] Section 4(2)(i) of *FOIPOP* states that the Act does not apply to a record relating to prosecution if all proceedings in respect of the prosecution have not been completed. When this provision applies, there is no duty to sever because *FOIPOP* does not apply to the record. However, when all proceedings in respect to the prosecution have been completed, then the usual *FOIPOP* process applies. Records formerly excluded must now be reviewed and *FOIPOP* requires that everything must be disclosed unless an exemption applies.[15] In this case, the prosecution is long over and deadlines for appeal have long passed.

[31] *FOIPOP* requires that if the information "can reasonably be severed from the record" then the applicant has a right to the remainder of the record. Reasonable severing means that after the exempted information is removed from a record, the remaining information is both intelligible and responsive to the request.[16] It is important to be pragmatic in the approach to what is reasonable. It is also essential that any interpretation of this standard does not undermine *FOIPOP*'s stated purpose of providing for the disclosure of all government information, facilitating informed public participation in policy formulation, ensuring fairness in government decision-making, and permitting the airing and reconciliation of divergent views.

[32] Severing requires the public body to read each page, identify the information that is actually subject to s. 15(1)(f), exercise discretion and only then sever it if that is the final decision. The remainder of the record must be disclosed. This is the standard approach to processing access to information requests.[17]

[33] I have reviewed the pages of records that were withheld in full, and in my view, they could and should have been severed. Right now, it is a complete mystery to the applicant what might be on the withheld pages. Properly severing the pages and disclosing the remaining information

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[15] See *NS Review Report FI-11-72 (Amended), Public Prosecution Service (Re),* 2015 NSOIPC 10 (CanLII), at para. 22. This is also the approach taken in other jurisdictions. See for example *BC OIPC Order 03-16, Ministry of Forests, Re,* 2003 CanLII 49186 (BC IPC), at para. 53 and *Ontario Order 24, Ontario (Attorney General) (Re), 1988 CanLII 1404 (ON IPC)* at p. 8.

[16] *NS Review 17-02, Nova Scotia (Public Service Commission) (Re),* 2017 NSOIPC 2 (CanLII), at paras. 29-30.

[17] *NS Review Report FI-11-72 (Amended), Public Prosecution Service (Re),* 2015 NSOIPC 10 (CanLII), at para. 24.

would provide additional responsive information to this applicant. In withholding entire pages from the applicant, the public body failed to satisfy its duty to sever.

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

[34] Section 15(1)(k) gives the public body discretion to redact or withhold information that could reasonably be expected to harm the security of any property or system. For the reasons set out below, I find that the representations provided by the public body were not sufficient to discharge its evidentiary burden of proof.

[35] Section 15(1)(k) is a harms-based exemption. To withhold information under s. 15(1)(k), the public body must establish that its release 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.

[36] The test as to what evidence is needed to establish that disclosure could reasonably be expected to result in harm is often referred to as the "harms test". The evidentiary burden of the harms test has been extensively canvassed by the Nova Scotia OIPC,[18] the Supreme Court of Nova Scotia[19] and the Supreme Court of Canada.[20] In *NS Review Report 18-03*,[21] former Commissioner Tully explained that to meet a harms test, all three parts of the following test 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.[22]

[37] In a nutshell, to establish that disclosing the requested information could reasonably be expected to cause harm, the public body must demonstrate a risk of harm that is well beyond the merely possible. A public body is not required to prove that disclosure will in fact result in harm.

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[18] See for example: *Nova Scotia (Department of Justice) (Re),* 2018 NSOIPC 3 (CanLII), and *NS Review Report* 22-06, *Department of Justice (Re),* 2022 NSOIPC 6 (CanLII).

[19] *Houston v. Nova Scotia (Minister of Transportation and Infrastructure Renewal)*, 2021 NSSC 23, at paras. 64 - 65 and 67.

[20] See for example: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23, at para. 201; and *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), [2014] 1 SCR 674, at para. 54.

[21] *NS Review Report 18-03, Nova Scotia (Department of Justice) (Re)*, 2018 NSOIPC 3 (CanLII), at para. 40.

[22] 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).

"The evidence required to establish the harm would have to convince the court that there is a direct link between the disclosure and the apprehended harm, and the harm could reasonably be expected to ensue from disclosure."[23]

[38] Wherever the responsive records contain a technical drawing and/or plan, the public body withheld the drawing/plan but mostly released the text showing that the page contains some sort of technical drawing and/or plan.

[39] To meet its evidentiary burden, the public body explained that revealing the redacted information would interfere with keeping the business and its systems secure. It argued that disclosure to any applicant should be considered the same as releasing it publicly because the public body does not have control over how an applicant will share the information. The public body was concerned that if the information redacted under s. 15(1)(k) were released, it could be used by a bad actor to sabotage the business's dam to cause flooding to the surrounding area, which could cause ecological harm and damage to property. It said that release of the information could allow someone to find a weakness in the system if someone had the technical know-how to use it. Finally, the public body also said it consulted with the business and the business confirmed that releasing technical drawings and/or plans could lead to damage.

[40] In summary, the public body asserted a harm that only arises if the applicant were to disclose the information publicly, allowing a bad actor with the technical know-how to abuse the information by accessing it from that public disclosure and then using it to harm the security of the business. The question for me is whether this assertion is enough to satisfy the public body's evidentiary burden.

[41] My assessment of the public body's position is that it is an assertion of a generalized risk of harm without supporting evidence. In a case that the public body gave me to support its position, *ON Order PO-3871*,[24] the record at issue was a table of contents of a level 3 probabilistic risk assessment for a nuclear generating station. A similar argument was made that if disclosed, someone with the technical know-how could use the information to exploit the nuclear power generating system and cause harm or sabotage it. The evidence supplied by that public body to support its position included an affidavit from the director, nuclear safety, as well as background information on the nuclear power industry in Ontario and a document from the Office for Nuclear Safety in the United Kingdom. Even with that supporting evidence, the Ontario adjudicator found that the table of contents was not exempt from disclosure, except for those parts that identified specific "release category" numbers and "plant damage state" numbers.

[42] The public body in this case did not provide me with evidence to support its assertions of possible harm. Nevertheless, law enforcement exemptions "must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context."[25] As

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[23] *Houston v. Nova Scotia (Minister of Transportation and Infrastructure Renewal)*, 2021 NSSC 23 at para. 67.
[24] *ON Order PO-3871, Ontario Power Generation (Re),* 2018 CanLII 74226 (ON IPC).
[25] *Ontario (Attorney General) v. Fineberg,* 1994 CanLII 10563 (ON SC). Although s. 15(1)(k) is not restricted to law enforcement situations, the same principle applies to s. 15(1)(k) (see *ON Order PO-3871, Ontario Power Generation (Re),* 2018 CanLII 74226 (ON IPC), at para. 66.

such, I accept that it is within the realm of possibility that public release of a technical drawing and/or plan of any business could be abused by a bad actor to harm its security. However, this could be said of almost any property or system. The harms test requires that the public body supply detailed and convincing evidence about the potential for harm from releasing the specific information in this particular case. Otherwise, there is a risk of a broad, categorical exemption of virtually all records relating to the security of a business. 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.

[43] Unlike the situation in *ON Order PO-3817*, where the public body supplied detailed evidence about how the disclosure of each piece of information could cause harm, I was not provided with such detail. The public body in this case did not explain how the specific technical drawings and/or plans that were withheld under s. 15(1)(k) could reasonably be expected to harm this business's security. What detail could be exploited by a technically knowledgeable party with malevolent intent and how? The public body's representations did not explain this.

[44] The public body has not established that the anticipated harms were more than merely possible. Instead, what the public body provided amounts to generalized assertions that release of the business's technical drawings and/or plans could reasonably be expected to harm its security. This is not enough; the evidentiary burden requires more. Therefore, I find that the representations provided by the public body were not sufficient to discharge its evidentiary burden of establishing that releasing the withheld information could reasonably be expected to harm the business's security.

3. 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?

[45] The public body relied on s. 20(1) to redact information and withhold some full pages of responsive records.[26] Section 20(1) requires the public body to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. For the reasons provided below, I find that s. 20 applies to some of the information withheld but not to the remainder of it.

[46] 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.[27] Referred to as the *House* test, 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.

[26] Section 20 was applied to the following pages: 2, 10, 61, 82, 85, 87-88, 109-110, 113-119, 180-184, 188, 193, 195-199, 202-213, 219-248, 252-277, 344-583, audio files.

[27] 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.

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 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.

[47] The first step of the test requires that the information be "personal information" as defined by *FOIPOP*. Personal information is defined in s. 3(1)(i) as recorded information about an identifiable individual and includes things like names, addresses, information about an individual's health care history, education, finances, employment history and anyone else's opinions about the individual.

[48] During the OIPC's review of this file, the public body agreed that a number of the pages do not in fact contain personal information and removed its reliance on s. 20 with regard to those specific pages.[28] Where the information withheld does not constitute personal information, the public body cannot rely on s. 20 to withhold it as the first step of the *House* test is not met and therefore s. 20 cannot apply. I find this information must be released to the applicant.

[49] The remaining information to which s. 20 was applied[29] includes things like names, dates of birth, contact information, position titles, training certificates, licenses and curricula vitae. I agree with the public body that this constitutes personal information. Similarly, equipment serial numbers also qualify as personal information where the equipment, such as a helmet, was either owned or used by only one individual. Finally, any information about employment history is personal information.

[50] I also agree with the public body that the audio recordings of third party witness statements are the personal information of third parties. Not only are the third party witnesses identified by name during the recordings, but the content of the audio also provides further clues to their identities. Also, the voice of each individual is unique and constitutes personal information.[30]

[51] The withheld information also includes transcripts of third party witness statements. Third party witnesses are named in the witness statements. These statements contain observations made by the witnesses about what transpired the day of the workplace fatality, including accounts of their own actions, the actions of other third parties, and witness descriptions of normal or routine practices at the worksite.

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[28] For the public body's reference, the following pages do not contain personal information: 181, 198-199, 203, 205, 211, 213, 223, 345, 493, 497-499, 504, 506, 508, 510, 512, 514, 520-521, and 525-529.
[29] Pages 2, 10, 61, 82, 85, 87-88, 109-110, 113-119, 180, 182, 183-184, 188, 193, 195-199, 202, 206-210, 219-221, 224-241, 243-244, 249-281, 344, 346-492, 494-496, 500-503, 505, 507, 509, 511, 513, 515-519, 523-524, 530-583, audio files
[30] *NS Review Report 19-03, Department of Health and Wellness (Re)*, 2019 NSOIPC 3 (CanLII), at para. 16.

[52] In *NS Review Reports FI-10-19*[31] and *19-03*,[32] former Commissioner Tully explained that not all information contained in witness statements constitutes personal information:

> The witness statements appear in two parts of the record. First, the full witness statements are contained on the CD. Secondly, there are summaries of each witness statement found in the paper record. The witness statements include names of the witnesses and names of other individuals present. This is obviously personal information. A witness's statements about what she or he did – or when or how – are the personal information of that witness, even though they are factual observations. But not all information in witness statements constitutes personal information. Factual observation of witnesses such as the recounting of a witness's observations of an accident, does not qualify as the personal information of that witness. In the recounting, the witness may include an opinion about the character of another individual or may provide information that reveals lifestyle choices or interests of another individual that could qualify as third party personal information. Further, if the content of the witness statement identifies the witness (even if the name of the witness is removed), this constitutes personal information of the witness.[33]

[53] In light of the above, and consistent with the findings of former British Columbia Information and Privacy Commissioner Loukidelis in *BC Order 01-19*,[34] I find the following information contained within the transcripts of third party witness statements, with names and identifying information removed, is not personal information:

- Factual observations of witnesses such as the recounting of their observations of the workplace fatality.
- Witness observations about relevant facts like normal workplace practices or the conditions of the worksite.

[54] In contrast, the following information contained in the third party witness statement transcripts does constitute personal information:

- A witness's statements about what they did, including when or how they did it, even though those are factual observations.
- A witness's opinions about another third party and any commentary about another third party's performance of their job duties.
- Any information in the third party witness statement transcripts that could identify a third party (even if the name of the third party is removed).

[55] I will move on to the remainder of the *House* test only for those items that I have found do make up personal information.

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[31] *NS Review Report FI-10-19, Nova Scotia (Justice) (Re),* 2015 CanLII 54095 (NS FOIPOP).
[32] *NS Review Report 19-03, Department of Health and Wellness (Re)*, 2019 NSOIPC 3 (CanLII).
[33] *NS Review Report 19-03, Department of Health and Wellness (Re)*, 2019 NSOIPC 3 (CanLII), at para. 12.
[34] *BC Order 01-19, Workers' Compensation Board, Re*, 2001 CanLII 21573 (BC IPC), at paras. 24-27.

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.

[56] I agree with the public body that none of the conditions set out in s. 20(4) apply. As such, the analysis continues to step 3 for the pages that contain personally identifying information.

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

[57] Section 20(3) of *FOIPOP* lists circumstances where disclosure is presumed to be an unreasonable invasion of privacy. The public body argued there were two presumptions in play in this case: s. 20(3)(b) and s. 20(3)(d).

> 20 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
> …
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
> …
> (d) the personal information relates to employment or educational history;
> …

[58] The responsive records were compiled as part of the public body's investigation into a possible violation of law under the *Occupational Health and Safety Act* and as such, s. 20(3)(b) is relevant.

[59] With regard to s. 20(3)(d), much of the withheld information includes the names of multiple third parties and relates to employment or educational history.

[60] I agree with the public body that disclosure of the personal information on the responsive records would be a presumed unreasonable invasion of multiple third parties' personal privacy pursuant to s. 20(3)(b) and/or 20(3)(d). All personally identifying information such as names and contact information is subject to this presumption. All information that relates solely to a third party's past jobs, individual actions, reactions, personal views and behaviours in the workplace is subject to a s. 20(3) presumption. It is the same with any medical information of third parties. Finally, a third party witness's statement(s) about what they did in relation to the workplace fatality, even though they are factual observations, are subject to the presumption, as are a witness's opinions about another third party or any statements about another third party's performance of their job duties.

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?

[61] The final step in the *House* analysis is the most important. Finding that a presumption applies is not enough. A presumption can be rebutted. 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? The test is not whether the information is third party personal information; the test is whether the disclosure of third party personal information would result in an *unreasonable* invasion of third party personal privacy.

[62] The public body said that none of the factors listed in s. 20(2) applied to mitigate its conclusion that disclosure of the information withheld under s. 20 would constitute an unreasonable invasion of a third party's privacy.

[63] I disagree with the public body that s. 20(2)(a) was not a factor to consider. Section 20(2)(a) states that the public body shall consider whether

> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;

[64] As set out earlier, the public body is tasked with investigating workplace safety when there is a major accident or fatality. That information is then used to inform any prosecution. Members of the public have no choice but to rely on the public body to respond to workplace deaths of their loved ones and to conduct sufficient investigations to ensure that responsible parties are held accountable. Furthermore, there are news stories in Nova Scotia where the loved ones of people who died in workplace fatalities have publicly called for more information to scrutinize the public body's actions regarding its workplace investigations.[35] This factor weighs heavily in favour of disclosure.

[65] While s. 20(2)(a) weighs in favour of disclosure, it does not fully rebut the presumptions in s. 20(3)(b) and 20(3)(d).

[66] With respect to names of witnesses, in *BC Order 01-19,*[36] former British Columbia Information and Privacy Commissioner Loukidelis stated:

> I do not find, however, that disclosure of the witnesses' names and occupations, in this case, would be an unreasonable invasion of their personal privacy. They were the applicant's late husband's co-workers. The material before me indicates she knows them and it is possible she already knows their occupations. Even if she does not, I do not find that disclosing this information constitutes an unreasonable invasion of their personal privacy in this case.

[67] With respect to the third party witnesses' names, I do not have the same type of information before me as Commissioner Loukidelis did in *BC Order 01-19*. Furthermore, the applicant explained to the OIPC when they filed this review request that they did not need names. For this reason, the public body should continue to withhold names of third parties.

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[35] See, for example: https://www.cbc.ca/news/canada/nova-scotia/acute-workplace-fatalities-safety-prevention-1.6002049; https://www.cbc.ca/news/canada/nova-scotia/workplace-fatalities-2018-awareness-prevention-1.5187801.

[36] *BC Order 01-19, Workers' Compensation Board, Re*, 2001 CanLII 21573 (BC IPC), at para. 47.

[68] Another factor to consider is whether the information was supplied in confidence (s. 20(2)(f)). Consistent with the findings in *NS Review Report 19-03*,[37] I find that the personal information of third parties contained on the responsive records was supplied in confidence and that this weighs against the disclosure of this information.

[69] Overall, I find that the personal information on the responsive records subject to the presumptions in s. 20(3)(b) and/or s. 20(3)(d) must continue to be withheld.

Duty to give notice

[70] When a public body determines that the information must be withheld under s. 20, s. 22(1) mandates notification to a third party unless s. 22(1A) applies. In this case, the public body provided a s. 22 notification to the business in relation to its Engineer Report because names of third parties contained within it were severed.

[71] However, the business is not the third party, the third parties named in the Engineer Report are. As are the third parties named in the public body's investigation records. None of those third parties received notice.

[72] From the information provided to me by the public body, it appears that it did not provide third party notice to any of the actual third parties mentioned on the responsive records. It also did not appear that the public body had examined the views or interests of the third parties, which would have triggered s. 22(1A). Instead, the public body inserted its own views for those of the third parties. This improperly removed the possibility that a third party would have consented to the release of the requested information, which could have resolved this matter many years ago. Particularly given the facts of this file, some third parties may have consented to the release of their personal information for sympathetic or compassionate reasons. Section 22 of *FOIPOP* required the public body to have consulted with all third parties. This was not an optional action, it was a statutorily required one.

FINDINGS & RECOMMENDATIONS:

[73] I find that:

1. The representations provided by the public body were not sufficient to discharge its evidentiary burden of proof to establish that s. 15(1)(f) applies to the withheld information. Therefore, s. 15(1)(f) does not apply.
2. The representations provided by the public body were not sufficient to discharge its evidentiary burden of proof to establish that s. 15(1)(k) applies to the withheld information. Therefore, s. 15(1)(k) does not apply.
3. Pages 181, 198-199, 203, 205, 211, 213, 223, 345, 493, 497-499, 504, 506, 508, 510, 512, 514, 520-521, 525-529 of the responsive records do not contain personal information.

[37] *NS Review Report 19-03, Department of Health and Wellness (Re)*, 2019 NSOIPC 3 (CanLII), at paras. 25-29.

4. With names and identifying information withheld, the following information does not constitute personal information:
    a. Factual observations of witnesses such as the recounting of their observations of the workplace fatality.
    b. Witness observations about relevant facts like normal workplace practices or the conditions of the worksite.
5. Disclosure of the remainder of the personal information withheld under s. 20 would result in an unreasonable invasion of the third parties' personal privacy.
6. The public body did not comply with its mandatory obligation to give s. 22 notice to third parties.

[74] I recommend that the public body:

1. Release the information withheld under s. 15(1)(f), except to the extent that the information must be withheld under s. 20, within 45 days of the date of this review report.
2. Release the information withheld under s. 15(1)(k), except to the extent that the information must be withheld under s. 20, within 45 days of the date of this review report.
3. Continue to withhold all third party names and identifying information referenced on the responsive records under s. 20.
4. Continue to withhold the audio files in full under s. 20.
5. Continue to withhold any medical information and employment history of third parties under s. 20.
6. Release the pages referenced in the above-noted Finding # 3, which do not contain personal information, within 45 days of the date of this review report.
7. Within 45 days of the date of this review report, release the above-noted information referenced in Finding #4, which does not constitute personal information:
    a. Factual observations of witnesses such as the recounting of their observations of the workplace fatality.
    b. Witness observations about relevant facts like normal workplace practices or the conditions of the worksite.

November 23, 2023

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File: 18-00147