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

REVIEW REPORT 23-16

November 30, 2023

Department of Health and Wellness

Summary: The quality of care provided to elderly people in publicly funded long-term care facilities is a matter of public concern. The applicant requested all investigation reports of founded allegations of abuse that occurred at publicly funded long-term care facilities in Nova Scotia for a specified period. The Department of Health and Wellness (public body) withheld large portions of the responsive records on the basis that disclosing the withheld information would be an unreasonable invasion of multiple third parties' personal privacy (s. 20 of the *Freedom of Information and Protection of Privacy Act*). There are no names of third parties contained on the records. The applicant was not seeking identifying information such as names. In addition, the applicant agreed to the public body withholding specific dates and times of the incidents referenced on the records, dates of death, and any unique or memorable diagnostic and medical information. With that information withheld, the Commissioner finds that the remaining information withheld from the requested records is not about *identifiable* individuals and as such cannot be withheld under s. 20. The Commissioner recommends the public body release that remaining information to the applicant.

INTRODUCTION:

[1] The applicant requested all investigation reports of founded allegations of abuse that occurred at publicly funded long-term care facilities in Nova Scotia for a specified period from the Department of Health and Wellness (public body). In response, the public body provided the applicant with 125 pages of both founded and unfounded investigation reports prepared pursuant to the *Protection for Persons in Care Act* (*PPCA*)[1] but severed much of the information under s. 20 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). The public body claimed that releasing the information redacted from the records would be an unreasonable invasion of multiple third parties' personal privacy.

[2] In Nova Scotia, the *PPCA* creates a duty on health facility administrators to protect patients and residents from abuse. It also requires health facility administrators to report all allegations of abuse against patients and residents to the Minister of Health and Wellness. On receiving such a report, the Minister must then inquire into the matter and consider whether a more extensive

[1] *Protection for Persons in Care Act*, SNS 2004, c 33.

investigation is warranted.[2] If the Minister determines there are reasonable grounds to believe that a patient or resident is being abused or is likely to be abused, the Minister must appoint an investigator to carry out a more extensive investigation.[3] After investigating, the assigned investigator is required to set out their conclusions and the reasons for them in an investigation report and give it to the Minister.[4]

[3] The applicant objected to the severing the public body applied and filed a request for review with this office. The matter was not able to resolve informally and so proceeded to this public review report.

ISSUE:

[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?

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.[5]

[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.

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?

[7] The public body relied on s. 20 to withhold much of the information on the responsive records. Section 20 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 set out below, I find that with specific dates and times of the incidents, dates of death, and any unique or memorable diagnostic and medical information severed, the remaining withheld information is not about *identifiable* individuals and as such cannot be withheld under s. 20.

[2] *Protection for Persons in Care Act*, SNS 2004, c 33, at s. 8(1).
[3] *Protection for Persons in Care Act*, SNS 2004, c 33, at s. 8(2).
[4] *Protection for Persons in Care Act*, SNS 2004, c 33, at s. 10(1).
[5] *FOIPOP*, s. 45.

[8] It is well established in Nova Scotia that a four-step approach is required when evaluating whether s. 20 requires a public body refuse to disclose personal information.[6] 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)?
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.

[9] To qualify as personal information as defined in s. 3(1)(i) of *FOIPOP*, the withheld information must be recorded information about an *identifiable* individual.

[10] It is the public body's burden to prove that the withheld information is the personal information of third parties. As none of the third parties are named on the responsive records, the question of what information withheld on the responsive records constitutes personal information is not straightforward in this review.

[11] The records under review consist of 38 investigation reports resulting from allegations of abuse at long-term care facilities. None of the investigation reports contain names. Instead, terms from the public body's *Protection for Persons in Care Act Policy* are used, such as "affected patient or resident" (the person who experienced the alleged abuse or likely abuse), or "implicated person(s)" (the person or persons who were accused of bringing about the alleged abuse or likely abuse by their actions).[7] Each investigation report also specifies a file number, the long-term care facility name, the facility administrator's name, the investigator's name, and the date the allegation was reported – all of which were released to the applicant in response to their access request. The investigation reports all follow a similar format with the following headings: Overview, Summary of Facts, Additional Information, Findings, and Directives.[8] Broadly, the public body withheld most information about the nature of the alleged abuse and facts related to it, as well as a large portion of the findings and directives in the investigation reports.

[12] The applicant and the public body disagreed over whether the information in the requested investigation reports constitutes personal information. The applicant argued that the investigation reports do not contain personal information because without names, the information within them is not about *identifiable* individuals. The applicant also explained that they were not seeking

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[6] See for example *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).
[7] Department of Health and Wellness, *Protection for Persons in Care Act Policy* (2013), online: <https://novascotia.ca/dhw/ppcact/PPC_Administrative_Manual.pdf>, at pp. 35-36.
[8] These headings were released by the public body to the applicant in response to their access request.

identifiable information. In making this access request, the applicant was not interested in names, ages, races, contact information, dates and times of incidents referenced on the records, unique or memorable diagnostic and medical information, or any dates of death. The applicant was only interested in the types of abuses that happened in long-term care facilities, the public body's responses to those abuses, and any directives issued from them.

[13] The public body believed the information in the investigation reports does include personal information about identifiable individuals. The public body argued that even though names and exact identifiers are not used in the investigation reports, the narrative contained in each investigation report would serve to identify the individuals involved. It said the narratives reveal things like possible violations of law and descriptions of individuals in vulnerable, sensitive and potentially embarrassing states.

[14] The public body explained that while the investigation reports were written with some de-identification measures in that names and exact identifiers were not used, the investigation reports are not truly de-identified.

[15] The public body also said that it had to withhold the investigation reports because "[e]very long-term care facility in the province is a discrete small community." The public body argued that releasing the severed information would "…create a narrative report that would serve to make the individuals discussed identifiable." Its position was that "[i]t is a more than reasonable expectation that the small size of long-term care facilities in Nova Scotia, the small size of Nova Scotia, and the nature of the incidents would lead to the involved individuals being identifiable regardless of the passage of time."

[16] I appreciate the public body's concern regarding the possibility of identification of individuals even though the investigation reports do not contain names. Under s. 20 of *FOIPOP*, public bodies are prohibited from disclosing personal information if the disclosure would be an unreasonable invasion of an identifiable third party's personal privacy.

[17] My role is to consider the parties' representations and the content of the records to determine whether the withheld information could reasonably be expected to identify the third parties discussed in the investigation reports.

[18] The mosaic effect is the principle that occurs when seemingly innocuous information, which in isolation appears meaningless or trivial, is connected with other available information to yield information that should be withheld pursuant to *FOIPOP*.[9] In this exercise, "…one must look at the information in the context of the record as a whole, and consider whether the information, even without personal identifiers, is nonetheless about an identifiable individual on the basis that it can be combined with other information from other sources to render the individual identifiable."[10] Information will be about an identifiable individual where there is a

[9] *BC Order 01-01, Children's and Women's Health Centre of British Columbia, Re,* 2001 CanLII 21555 (BC IPC), at para. 40; *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766 (CanLII), [2008] 3 FCR 248, at para. 82.
[10] *AB Order F2023-19, Edgerton (Village) (Re)*, 2023 CanLII 44296 (AB OIPC), at para. 18.

serious possibility that an individual could be identified through the use of that information, alone or in combination with other available information.[11]

[19] The public body insisted that it was not relying on the mosaic effect to rationalize its severing of the investigation reports. It rejected the idea of a mosaic effect and said instead that "…the individuals are identifiable directly from the reports even though individuals are not named." I disagree. In my view, the information withheld could only serve to identify the individuals in the investigation reports through a mosaic effect.

[20] In British Columbia, former Commissioner Loukidelis has explained, "As for the mosaic effect generally, a public body will be able to invoke it only where the evidence it has adduced establishes that it applies. Cases in which the mosaic effect applies will be the exception and not the norm."[12]

[21] In another British Columbia report, in response to a public body's argument that there was no guarantee some individuals would not be identifiable, Senior Adjudicator Celia Francis explained that just because there was some risk this may occur does not translate into there being a reasonable expectation that it would occur.[13] On this issue, the Federal Court of Canada said:

> …the mosaic effect, on its own, will not usually provide sufficient reason to prevent disclosure of what would otherwise appear to be an innocuous piece of information. Thus, further evidence will generally be required to convince the Court that a particular piece of information, if disclosed, would be injurious to international relations, national defence or national security. *Consequently the Attorney General, at minimum, will have to provide some evidence to convince the Court that disclosure would be injurious due to the mosaic effect. Simply alleging a "mosaic effect" is not sufficient. There must be some basis or reality for such a claim, based on the particulars of a given file*.[14] [emphasis added]

[22] In terms of the public body's argument that the records are not truly de-identified, I agree. This is because de-identification typically refers to the processing of a dataset containing personal information to develop a new dataset where the individuals can no longer reasonably be identified from the de-identified dataset along or in combination with other available datasets.[15]

[23] In terms of the public body's concern of identification due to the small size of long-term care facilities, all but one of the facilities have 32 to 272 beds.[16] One facility has eight beds. Also, many incidents in the investigation reports took place at long-term care facilities in the Halifax

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[11] *Gordon v. Canada (Health)*, 2008 FC 258 (CanLII), at para. 34.
[12] *BC Order 01-01, Children's and Women's Health Centre of British Columbia, Re,* 2001 CanLII 21555 (BC IPC), at para. 45.
[13] *BC Order F10-29, British Columbia (Education) (Re),* 2010 BCIPC 41 (CanLII), at paras. 34-35.
[14] *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar),* 2007 FC 766 (CanLII), [2008] 3 FCR 248, at para. 84.
[15] *NU Review Report 22-21-RR, Department of Health (Re),* 2022 NUIPC 4 (CanLII), at para. 58.
[16] Department of Health and Wellness, *Nursing Homes and Residential Care Facilities Directory* (2023), online: <https://novascotia.ca/dhw/ccs/documents/Nursing-Homes-and-Residential-Care-Directories.pdf>.

Regional Municipality, which has a current population of approximately 480,582.[17] Statisticians such as those at Statistics Canada customarily refuse to disclose information in cells in a table that contain fewer than five persons (sometimes referred to as the rule of five). The information we are talking about for this review is from long-term care facilities that have at least eight residents at any given time. More importantly, even in much smaller jurisdictions, such as Nunavut,[18] Commissioners have questioned the use of the rule of five approach and instead have said that there is no blanket rule or magic number to mark the cut-off in any case. Rather, as former Nunavut Commissioner Keenan Bengts aptly said:

> Each situation must be assessed on its own merits, taking into account not only the number in the statistical outline, but also a whole range of factors that could result in the identification of individuals.[19]

[24] Furthermore, as the applicant noted in their representations, although the number of beds in each long-term care facility is publicly available, the names of residents who occupy those beds are not publicly available. The public is not generally aware of the names of people in long-term care facilities.

[25] In *PEI Order FI-16-007*,[20] former Commissioner Rose spoke to community knowledge in small communities. Former Commissioner Rose noted that the public body could not be expected to control the community "grapevine". She said that the public body had no control over the accuracy of a community's knowledge of the identities of those involved in an incident. She said that her analysis of whether the redacted information could reasonably be expected to identify a third party must be based on the content of the withheld information and the evidence brought forward by the parties. I agree.

[26] In my view, the public body's arguments were hypothetical and speculative. Speculation of identification is not enough. Rather, convincing evidence of a reasonable expectation of identification is required. The fact that there is some risk the disclosure could lead to the identification of individuals through the mosaic effect does not mean there is a reasonable expectation that it will.[21] The public body has not presented sufficient evidence of a reasonable expectation that releasing the information severed from the records could identify the individuals mentioned in them. No specific information was identified by the public body that could link the investigation reports to identifiable individuals.

[27] Additional support for this is evidenced by the third party notification letters sent by the public body. Section 22 of *FOIPOP* includes a mandatory obligation to consult with third parties. In this case, the public body consulted with the long-term care facilities but not the unnamed individuals discussed on the records. The facilities are not the third parties in this case. The

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[17] Statistics Canada, *Population estimates, July 1, by census metropolitan area and census agglomeration, 2016 boundaries* (January 2023), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710013501>.
[18] Nunavut has a population 10 times smaller than Halifax with approximately 40,526 people. Statistics Canada, *Population estimates, July 1, by census metropolitan area and census agglomeration, 2016 boundaries* (January 2023), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710013501>.
[19] *NU RR 19-148, Review Report 19-148 (Re),* 2019 NUIPC 1 (CanLII).
[20] *PEI Order FI-16-007, Prince Edward Island (Health) (Re),* 2016 CanLII 48833 (PE IPC), at paras. 25-27.
[21] *BC Order F10-29, British Columbia (Education) (Re),* 2010 BCIPC 41 (CanLII), at paras. 34-35.

unnamed individuals are. In other words, despite the public body's argument that the individuals are identifiable from the records, the public body did not consult with those third parties.

[28] The public body has not established a nexus connecting the investigation reports, or any other information, with any individual discussed in them. In my view, there is insufficient evidence to establish that releasing the withheld information could cause a reasonable expectation of identifying the third parties. Accordingly, I find that the information at issue is not about identifiable individuals and therefore, does not qualify as "personal information" under s. 3(1)(i) of *FOIPOP*. As such, it cannot be withheld.

[29] In light of this finding, it is not necessary to proceed with the remaining steps in the s. 20 analysis.

FINDING & RECOMMENDATIONS:

[30] I find that with the specific dates and times of incidents, dates of death, and any unique or memorable diagnostic and medical information withheld, the remaining information redacted under s. 20 of *FOIPOP* does not qualify as recorded information about *identifiable* individuals. Therefore, its release would not amount to the disclosure of "personal information" as defined in s. 3(1)(i) of *FOIPOP*.

[31] I recommend the public body:

1. Continue to withhold the specific dates and times of incidents, dates of death, and any unique or memorable diagnostic and medical information under s. 20 since the applicant has confirmed they are not seeking that information.
2. Release the remaining withheld information to the applicant within 45 days of the date of this review report.

November 30, 2023

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia