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

REVIEW REPORT 23-17

December 21, 2023

Dalhousie University

Summary: The applicant requested access to an investigation report commissioned by Dalhousie University (public body) to assess allegations of work-related misconduct by a named public body employee. The public body released information about the process followed in the investigation and the investigator's brief findings. It withheld in full the investigator's summaries of third party witness statements, the named employee's responses to them and the investigator's detailed assessments and conclusions on the basis that disclosing that information would be an unreasonable invasion of multiple people's 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 the public body continue to withhold in full the pages it withheld under s. 20.

INTRODUCTION:

[1] The applicant asked for records from Dalhousie University (public body). Specifically, they requested an 87-page report (investigation report) written by an external investigator who was retained by the public body to assess allegations of work-related misconduct by a named public body employee (named employee) during a specified time period. The public body redacted some information and withheld multiple pages of the investigation report in full from the applicant on the basis that their release would be an unreasonable invasion of multiple third parties' personal privacy pursuant to s. 20 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*).

[2] Pages 1-9 of the investigation report detail the process followed in the investigation and the investigator's brief findings. The public body agreed to release these pages to the applicant, severing only the names of third parties and some limited third party personal information. It did not sever the personal information of the named employee on these pages. The applicant agreed to accept pages 1-9 of the investigation report with the limited severing applied by the public body to them.

[3] In contrast, the public body withheld the remainder of the investigation report (pages 10-87) in full. These pages set out the investigator's summaries of multiple third party witness

statements, the named employee's responses to them and the investigator's detailed assessments and conclusions.

[4] The applicant objected to the public body's decision to withhold pages 10-87 of the investigation report in full. As such, this matter proceeded to this public review report.

ISSUE:

[5] 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

[6] The public body bears the burden of proving that the applicant has no right of access to a record or part of a record.[1]

[7] 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?

[8] The public body withheld in full pages 10-87 of the investigation report under s. 20 of *FOIPOP*, which requires public bodies to withhold information if its disclosure would be an unreasonable invasion of a third party's privacy. For the reasons provided below, I find that the public body appropriately applied s. 20 to the pages it withheld in full and as such, the public body should continue to withhold those pages from the applicant.

[9] Section 20 of *FOIPOP* provides in part:

> 20(1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[10] It is well established in Nova Scotia that a four-step approach is required when evaluating whether s. 20 requires that a public body refuse access to personal information, often referred to as the *House* test.[2] 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.

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[1] *FOIPOP*, s. 45.

[2] 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.

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.

[11] "Personal information" is a term defined in s. 3(1)(i) of *FOIPOP* 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.

[12] The information on the withheld pages is clearly the personal information of various third parties, including the named employee, and other public body staff and private individuals who supplied third party witness statements to the investigator. The pages contain things like names, ages, opinions about various third parties and information about various third parties' employment histories.

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] Section 20(4)(e) of *FOIPOP* says a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff.

[14] The investigation report contains details of a workplace investigation. The information withheld on pages 10-87 does not qualify as information about a position within the meaning of s. 20(4)(e) of *FOIPOP*. Rather, it is more in the character of work history, which is discussed below under s. 20(3). As such, I do not find that any of the considerations set out in s. 20(4) of *FOIPOP* apply to the withheld pages.

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

[15] Section 20(3) of *FOIPOP* lists circumstances where disclosure is presumed to be an unreasonable invasion of privacy. However, unlike s. 20(4), s. 20(3) lists rebuttable presumptions.

[16] The public body argued there were two presumptions in play in this case: s. 20(3)(d) and s. 20(3)(h):

> 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;
> …
> (h) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations; or
> …

[17] In relation to s. 20(3)(d), the withheld pages set out what are effectively third party witness statements. The information on the withheld pages describes the complaints made by multiple third parties, as well as the named employee's responses to those complaints. Finally, the withheld information includes the investigator's evaluation of the evidence and their conclusions about the alleged workplace misconduct of the named employee. All of this constitutes employment history and as such falls within the s. 20(3)(d) presumption.[3]

[18] In relation to s. 20(3)(h), where the withheld information indicates a third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations, disclosure of this information would presumptively be an unreasonable invasion of that third party's personal privacy.

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?

[19] The final step is to assess whether disclosure of the information would result in an unreasonable invasion of a third party's personal privacy. Section 20(2) of *FOIPOP* directs the public body to consider all relevant circumstances. It lists several potential circumstances but also leaves room for other possible considerations. 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 a third party's personal privacy.

[20] The withheld pages contain information presumed to be an unreasonable invasion of the named employee and multiple other third parties' personal privacy under s. 20(3)(d) and s. 20(3)(h) of *FOIPOP*. The question is whether those presumptions are rebutted after having considered the factors set out in s. 20(2).

[21] The applicant's position was that because the named employee held a senior position with the public body and was receiving a significant salary funded by taxpayers, the named employee should have been held to a higher standard. The applicant argued that since the named employee was acting in a public role, their conduct should not be shielded from the public or from public scrutiny. The applicant's view was that if these records were to continue to be withheld, the

[3] *Dickie v. Nova Scotia (Department of Health)*, 1999 NSCA 62 (CanLII), at para. 44.

public would lose its ability to hold the public body to account. Finally, the applicant thought that the public body had an incentive to protect the named employee's image and reputation because doing so would protect its own image and reputation.

[22] The public body was cognizant of s. 20(2)(a) of *FOIPOP*, which states that a relevant circumstance is whether the disclosure is desirable for the purpose of subjecting the activities of the public body to public scrutiny. Its position was that by releasing the majority of the information about the process of the investigation and the investigator's brief findings on pages 1-9 of the responsive records, this would allow for public scrutiny of its response to the complaints while protecting the privacy of the individuals involved in the report.

[23] There is a public interest in ensuring that a public body investigates and responds to allegations of work-related misconduct by public body employees. This weighs in favour of disclosure. However, release of the information on pages 1-9 of the investigation report demonstrates that the public body was prepared to be subjected to scrutiny and to create a degree of transparency in its investigative process. I agree with the public body that the information it released on pages 1-9 of the investigation report achieves the public scrutiny goal. This weighs against disclosure.

[24] The public body also said that s. 20(2)(f) of *FOIPOP* was relevant in this case. Section 20(2)(f) requires the public body to consider whether the third party personal information was supplied in confidence. The public body noted that all the third parties participated in the investigation with an expectation of confidence. They were instructed to maintain confidentiality during the investigation. The public body was also worried about the possible ramifications for future investigations if confidentiality was not maintained. It wanted to ensure that in response to future complaints, complainants would be able to provide frank and unbiased accounts of what occurred without fear of being known to the respondent or other complainants.

[25] In *Dickie v. Nova Scotia (Minister of Health)*,[4] the trial judge interpreted s. 20(2)(f) to mean that in order to be confidential, the supplier of the information must believe that the information will never be revealed. On appeal, the Nova Scotia Court of Appeal disagreed with this finding. It said that the fact that information may be revealed in a future proceeding, such as an arbitration, does not, of itself, make the information less confidential.[5] It said that it is widely understood that information collected in relation to alleged misconduct of a fellow employee will be treated as confidential to the process for which it was elicited.[6] The same is true in this case. This consideration weighs against disclosure.

Duty to sever

[26] Section 5(2) of *FOIPOP* requires that if information "can reasonably be severed from the record" then the applicant has a right to the remainder of the record. Reasonable severing means

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[4] *Dickie v. Nova Scotia (Minister of Health),* 1998 CanLII 31109 (NS SC).
[5] *Dickie v. Nova Scotia (Department of Health)*, 1999 NSCA 62 (CanLII), at paras. 59-60. A similar finding was made in *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate*, 2015 NSCA 38 (CanLII).
[6] *Dickie v. Nova Scotia (Department of Health)*, 1999 NSCA 62 (CanLII), at para. 60.

that after the exempted information is removed from a record, the remaining information is both intelligible and responsive to the request.[7] This is known as the duty to sever.

[27] The public body's position was that releasing a severed version of the pages withheld in full would enable the identification of the personal information of third parties contained within those pages.

[28] Records of workplace investigations are challenging to review under access to information laws because they often contain intertwined personal information of employees. It is a difficult task to try to distinguish disclosures that would be an unreasonable invasion of personal privacy from those that would not.

[29] The pages withheld in full in this case do not contain innocuous things like the dates and times of email exchanges. Rather, the information on the withheld pages set out the investigator's summaries of multiple third party witness statements, and the named employee's responses to them. The third party witness statements describe multiple third parties' actions, perceptions and opinions.

[30] In my view, it is not possible to reasonably sever the pages that were withheld in full in a manner that also protects the personal information of the named employee and the multiple third parties. The information cannot be reasonably severed of personal information in an intelligible fashion.

FINDING & RECOMMENDATION:

[31] I find that it would be an unreasonable invasion of multiple third parties' personal privacy to disclose the pages the public body withheld in response to the applicant's access to information request.

[32] I recommend that the public body continue to withhold in full the pages it withheld under s. 20 of *FOIPOP*.

December 21, 2023

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

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[7] *NS Review Report FI-11-72 (Amended), Public Prosecution Service (Re)*, 2015 NSOIPC 10 (CanLII), at para. 23.