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

REVIEW REPORT 24-05

March 13, 2024

Department of Justice

Summary: The applicant's family member was the victim of a homicide many years ago. The homicide remains unsolved, and the Royal Canadian Mounted Police consider the investigation open. The applicant asked the Department of Justice (public body) for their deceased family member's autopsy report and medical certificate of death. The public body withheld the records in full, citing s. 15(1)(a) (harm law enforcement), s. 15(1)(g) (deprive right to fair trial) and s. 20 (personal information) of the *Freedom of Information and Protection of Privacy Act*. Obtaining as much information as possible regarding the circumstances surrounding a family member's death is often a vital part of the family's grieving process. Being denied access to records related to a loved one's death is difficult and frustrating for family members. However, in the circumstances of this case, the Commissioner finds that releasing the responsive records would amount to an unreasonable invasion of a third party's personal privacy and so they should not be released to the applicant.

INTRODUCTION:

[1] This review arises from a request for records about a tragic homicide. Many years ago,[1] a family member of the applicant was the victim of a homicide that remains unsolved to this day. The applicant seeks to find justice for their deceased family member. To that end, they asked the Department of Justice (public body) for a copy of their deceased family member's autopsy report and medical certificate of death.

[2] The public body has custody and control of the responsive records because the Nova Scotia Medical Examiner Service (MES) is part of the Department of Justice. The MES investigates deaths of persons who die from criminal violence and is responsible for determining the cause and manner of such deaths.[2] At times during this review report I refer to the public body as the

[1] Out of an abundance of caution, the number of years that have passed is not specified in this review report. However, I will say that the amount of time is significant. It is longer than 20 years.
[2] *Fatality Investigations Act*, SNS 2001, c 31.

MES. This is because the MES has a specific mandate. However, the MES is part of the public body and any reference to it is meant to be interpreted as the public body.

[3] In response to the applicant's access request, the public body withheld the nine pages of responsive records in full under s. 15(1)(a) (harm law enforcement), s. 15(1)(g) (deprive the right to fair trial) and s. 20 (personal information) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*).

[4] The applicant was not satisfied with the public body's response to their access request and filed a request for review. This matter was not resolved informally so proceeded to this public review report. The applicant continues to seek access to the responsive records that were withheld in full.

ISSUES:

[5] There are three issues under review:

1. Was the public body authorized to refuse access to information under s. 15(1)(a) of *FOIPOP* because the disclosure could harm law enforcement?
2. Was the public body authorized to refuse access to information under s. 15(1)(g) of *FOIPOP* because the disclosure could deprive a person of the right to a fair trial or impartial adjudication?
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

[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.[3]

[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.

1. Was the public body authorized to refuse access to information under s. 15(1)(a) of *FOIPOP* because the disclosure could harm law enforcement?

[8] Section 15(1)(a) gives the public body discretion to withhold information that could reasonably be expected to harm law enforcement. For the reasons set out below, I find that s. 15(1)(a) applies to the withheld responsive records however the public body failed to demonstrate that it exercised discretion in deciding to withhold the information.

[9] Section 15(1)(a) is a harms-based exemption. To withhold information under s. 15(1)(a), the public body must establish that its release could reasonably be expected to harm law enforcement.

[3] *FOIPOP*, s. 45.

[10] 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 Office of the Information and Privacy Commissioner (OIPC),[4] the Supreme Court of Nova Scotia[5] and the Supreme Court of Canada.[6] In *NS Review Report 18-03*,[7] 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.[8]

[11] 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. As Justice Coughlin said, "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."[9]

[12] The question for me in this review is whether release of the responsive records could reasonably be expected to harm a law enforcement matter – the investigation into the homicide of the applicant's family member. Information and privacy commissioners' offices in other jurisdictions have noted that there must be an ongoing, specific investigation to qualify for consideration under the harm to law enforcement exemption.[10] The exemption does not apply to completed or potential law enforcement matters. In addition, the fact that an investigation remains ongoing is not enough on its own to determine that the harm to law enforcement

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[4] See for example: *NS Review Report 18-03, Nova Scotia (Department of Justice) (Re),* 2018 NSOIPC 3 (CanLII), and *NS Review Report* 22-06, *Department of Justice (Re),* 2022 NSOIPC 6 (CanLII).
[5] *Houston v. Nova Scotia (Minister of Transportation and Infrastructure Renewal)*, 2021 NSSC 23, at paras. 64 - 65 and 67.
[6] 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.
[7] *NS Review Report 18-03, Nova Scotia (Department of Justice) (Re)*, 2018 NSOIPC 3 (CanLII), at para. 40.
[8] 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).
[9] *Houston v. Nova Scotia (Minister of Transportation and Infrastructure Renewal)*, 2021 NSSC 23 at para. 67.
[10] See for example, *BC Order F05-24, Abbotsford Police Department, Re*, 2005 CanLII 28523 (BC IPC), at para. 19; and *Ontario Order MO-3999, Ontario (Solicitor General) (Re),* 2019 CanLII 102302 (ON IPC), at para. 36.

exemption applies. Rather, it is also necessary to demonstrate that disclosure could reasonably be expected to harm the ongoing investigation.[11] I agree with this approach.

Is the investigation ongoing?

[13] The public body argued that there is still an ongoing investigation into the homicide of the applicant's family member.

[14] The applicant disagreed with the characterization of the Royal Canadian Mounted Police's (RCMP) investigation as being ongoing. The applicant said that the RCMP's case has been closed for decades. The applicant said that the RCMP has been promising a review of the file and a follow up since their initial discussions with the RCMP in late 2017. The applicant said that although they have given the RCMP information they consider to be new on several occasions, the RCMP refuses to confirm or deny this information.

[15] The applicant also noted that the RCMP has refused to provide them with any tangible evidence that it is still working on the investigation. The applicant included the following in their representations:

> The RCMP has never provided any tangible evidence – employment records of officers working on the case, sworn statements by detectives known to be responsible for the file (3 or 4 different ones since 2017) that they have spent "any time" working on the file, or even a letter from head of major crimes indicating that a number of hours has been spent on the file – showing to us that it is an active file.

[16] The applicant argued that in this context, their request for the responsive records is harmless to the police investigation. The applicant thinks there is virtually no possibility the RCMP will ever lay charges. On the other hand, the applicant said that the information on the responsive records would be helpful to their family in their investigation and in their pursuit of justice for their deceased family member. The applicant's hope is that receiving the responsive records will help get charges laid on the person(s) responsible for the homicide.

[17] The uniqueness of the matter is that the responsive records are in the hands of the Department of Justice. As described above, the MES is a part of the Department of Justice. The role of the MES is to issue an autopsy report that sets out the cause and manner of death.[12] The public body has no role in investigating, laying charges or prosecuting homicides.

[18] In terms of whether the RCMP's investigation into this homicide is ongoing, when the public body gathered the records in response to the applicant's access request, the records had a note on them stating that the RCMP still considered this an active investigation and requested the records be kept confidential. More recently, during the OIPC review process, the public body again asked the RCMP for its position. The RCMP responded by saying it still considers this an ongoing investigation. The RCMP reiterated its ask that the responsive records not be released.

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[11] *BC Order F05-24, Abbotsford Police Department, Re*, 2005 CanLII 28523 (BC IPC), at para. 19.

[12] The medical certificate of death was likely created by Vital Statistics. As of the date of this review report, Vital Statistics is responsible for issuing death certificates, and likely was when the record was created many years ago. Regardless, the medical certificate of death is in the custody or control of the public body.

[19] The RCMP met with the applicant as recently as 2017, about a year before the applicant made this access request, which indicates to me that the RCMP still considered the investigation ongoing around the time of the access request.

[20] The applicant said that they also met with the Nova Scotia Public Prosecution Service (PPS), although they did not say when. Nevertheless, the fact that the PPS met with the applicant also demonstrates that the investigation is ongoing.

[21] The public body also pointed me to its website, which lists cases where it is offering cash rewards for information about major unsolved crimes.[13] There remains a reward for information about the homicide of the applicant's family member on this website.

[22] In addition, I am mindful that there is no statute of limitations for the indictable offence of homicide in Canada. This means that a suspect can be charged at any future date should the RCMP proceed with charging a person(s) with the homicide of the applicant's deceased family member.

[23] I am also aware that the law enforcement exemption must be approached in a sensitive manner, in recognition of the difficulty of predicting future events in a law enforcement context.[14] Tips could still come in and new investigative techniques could be used in the future to assist in the solving of the homicide.

[24] Considering all these factors, I am satisfied that there is an ongoing investigation into the homicide of the applicant's family member, despite the length of time that has passed since their death.

Could disclosure reasonably be expected to harm the ongoing investigation?

[25] Demonstrating that there is an ongoing investigation is not enough. The public body must also demonstrate that disclosure of the requested records could reasonably be expected to harm the ongoing investigation.[15] The public body argued its position that release of the responsive records could harm law enforcement. The applicant disagreed.

[26] The public body explained that information about the cause of death and details of how a person died are frequently used as supporting and critical evidence to obtain a conviction at trial. The public body also explained that it does not have the rest of the RCMP's file on this homicide. It worried that in this vacuum of knowledge, disclosure of the responsive records could release information that the RCMP believes would only be known to the person(s) who caused the death, which in turn, could jeopardize the RCMP's investigation. It worried that information on the records "…could be used by someone to prevent the arrest of the person(s)

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[13] Department of Justice, *Rewards for Major Unsolved Crimes* (undated), online: Government of Nova Scotia <https://novascotia.ca/just/public_safety/rewards/>.
[14] See *Ontario (Attorney General) v. Fineberg*, 1994 CanLII 10563 (ON SC), cited with approval in *NS Review Report 22-06, Department of Justice (Re),* 2022 NSOIPC 6 (CanLII), at paras. 16-18.
[15] *BC Order F05-24, Abbotsford Police Department, Re*, 2005 CanLII 28523 (BC IPC), at para. 19.

who committed the crime if they knew what evidence had been collected about how [the third party] died."

[27] In my view, the public body's arguments verged close to speculation, which would not meet the harms test. However, in *Merck Frosst Canada Ltd. v. Canada (Health)*[16] the Supreme Court of Canada explained:

> However, as noted in *McDougall*, "context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences" (para. 40). Proof of risk of future harm, for example, is often not easy. Rothstein J. (then of the Federal Court) captured this point in *Canada v. Canada* where he noted that there is a "heavy onus" on a party attempting to prove future harm while underlining that the obligation to do so requires proof on a balance of probabilities (p. 476). Therefore, I conclude that a third party must establish that the statutory exemption applies on the balance of probabilities. However, what evidence will be required to reach that standard will be affected by the nature of the proposition the third party seeks to establish and the particular context of the case.

[28] This case requires me to consider the inherent probabilities that release of the responsive records could have. In that context, I agree with the public body's arguments that the responsive records could harm the ongoing law enforcement matter. I cannot say much about what is shown on the records for fear of inadvertently disclosing their contents. What I can say is, after considering the public body's arguments, and after having reviewed the responsive records, I agree with the public body that releasing the responsive records could reveal information that might only be known by the person(s) responsible for the death or could be used in a prosecution. This, in turn, could reasonably be expected to harm the ongoing investigation.

[29] Not knowing the information shown on the responsive records is understandably very difficult for the applicant. I am sympathetic to the applicant's feelings and frustration and do not make this finding lightly. However, the representations of the public body and the records themselves lead me to find that release of the responsive records could reasonably be expected to harm law enforcement. As such, I find that s. 15(1)(a) applies to the responsive records.

[30] That being said, in order to withhold records under s. 15(1)(a), the public body must not only demonstrate that the section applies but also demonstrate that it exercised discretion when making its decision to withhold the records. The public body did not do so in this case. It simply asserted that it had exercised discretion but did not explain what it had considered in making that determination. As such, I must continue with my analysis of whether the responsive records should be withheld under another provision of *FOIPOP*.

[16] *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 (CanLII), [2012] 1 SCR 23, at para. 94.

2. Was the public body authorized to refuse access to information under s. 15(1)(g) of *FOIPOP* because the disclosure could deprive a person of the right to a fair trial or impartial adjudication?

[31] Because I have found that s. 15(1)(a) applies to the information withheld by the public body pursuant to that exemption, and given my findings below under s. 20, it is not necessary for me to conduct this analysis.

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?

[32] The public body relied on s. 20(1) to withhold the responsive records in full. 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 the withheld responsive records.

[33] 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.[17] 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.
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.

[34] 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.

[35] The information on the withheld responsive records is clearly the personal information of the applicant's family member and so I must move on to the next step.

[17] 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.

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.

[36] 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.

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

[37] 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)(a) and s. 20(3)(b).

[38] Section 20(3) states in part:

> 20 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> (a) the personal information relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation;
> (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;
> …

[39] I agree with the public body that s. 20(3)(a) applies here. The responsive records consist of the type of information described in s. 20(3)(a). Its disclosure would be presumed to be an unreasonable invasion of a third party's personal privacy.

[40] I similarly agree that s. 20(3)(b) applies. Disclosure of the responsive records would be presumed to be an unreasonable invasion of a third party's personal privacy because the personal information on the responsive records was compiled and is identifiable as part of an investigation into a possible violation of law.

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?

[41] 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 also not whether release of the information would invade a third party's privacy. Rather, the test is whether the disclosure of third party personal information would result in an *unreasonable* invasion of third party personal privacy.

[42] The public body said that none of the factors listed in s. 20(2) apply to mitigate its conclusion that disclosure of the information withheld under s. 20 would constitute an unreasonable invasion of a third party's privacy. The applicant disagreed and said that s. 20(2)(a) is a relevant 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;

[43] The applicant argued that s. 20(2)(a) applies because release of the requested information is needed so that they can assess the efficacy of the PPS and law enforcement in circumstances such as these, where charges have not been laid and a homicide remains unsolved. The applicant took the position that there needs to be a method by which the public can hold the PPS and police accountable for their actions in investigating and prosecuting a homicide. The applicant argued that if the responsive records were withheld simply because a crime remains unsolved, in this case or any other, this would in effect create a permanent barrier to scrutinizing the actions of the PPS and the police. The applicant indicated that there are compelling public policy issues at play, as there needs to be a method for the public to hold police and the PPS accountable in terms of whether they have adequately done their jobs.

[44] In response to this, the public body explained that it has no role to play in the laying of charges resulting from crimes. Rather, it said the only role the MES plays is to determine the cause and manner of death. The public body noted that police are responsible for investigating crimes and determining if charges will be laid and that the PPS is responsible for prosecuting any charges laid. As such, it argued that s. 20(2)(a) does not apply here.

[45] The MES is a public body (as part of the Department of Justice) and so falls under s. 20(2)(a). However, the applicant has not expressed any concern about the MES's role in the investigation and prosecution of any person for their family member's death. There is no allegation that the autopsy report or medical certificate of death was faulty in some fashion or any explanation of why and how disclosure of the responsive records could subject the activities of the MES to public scrutiny. As stated above, the MES does not have a role to play in laying charges or in making decisions related to prosecution.

[46] Similarly, the PPS is a public body and so s. 20(2)(a) of *FOIPOP* can apply to it. However, the applicant did not explain why and how disclosure of the autopsy report and medical certificate of death could be used to achieve the goal of subjecting the activities of the PPS to public scrutiny given that PPS did not create the responsive documents.

[47] The police in question are the federally regulated RCMP. Section 20(2)(a) speaks only to scrutinizing the Government of Nova Scotia or a public body to scrutiny. The RCMP is not captured in this provision because it is federally regulated and so does not meet *FOIPOP*'s definition of a "public body", and it is not a part of the Government of Nova Scotia. As such, subjecting the RCMP's actions to scrutiny is not a relevant circumstance to consider under s. 20(2)(a).

[48] I empathize with the applicant's position that there should be some kind of method for the public to hold police and the PPS accountable in terms of whether they have adequately done their jobs. However, I don't agree that release of the autopsy report or the medical certificate of death would add to the applicant's understanding of the sufficiency of the RCMP and PPS's investigation into the third party's death. As expressed by former British Columbia Information and Privacy Commissioner Loukidelis, an applicant's perceptions about the conduct of the RCMP and the PPS is not relevant for the purposes of weighing whether an applicant is entitled to third party personal information.[18]

[49] Section 20(2) is not an exhaustive list. Other relevant factors can be considered. One of those factors is the sensitivity of the information. The information on the responsive records is the personal health information of the third party, which is generally considered as particularly sensitive. This weighs against disclosure.

[50] The applicant also argued that because their family member is deceased, they should not have any privacy rights. However, as former Commissioner Tully explained, although privacy rights diminish over time following a death, the dead do have privacy rights.[19] This too weighs against disclosure.

[51] Finally, research conducted in Ontario indicates that for bereaved family members, understanding the full details and circumstances surrounding a loved one's death is an integral part of the grieving process.[20] The applicant said that they know how the third party died, which is as a result of gunshot wound(s). This manner of death has not been kept secret from the applicant, the third party's family or the general public. The applicant also said that they have learned what the "working theory" is in terms of more specific information about the amount of gunshot(s) fired, angles, proximities and places. I cannot confirm or deny whether the applicant's working theories are correct but it is clear that they are generally aware of the cause of death. Any additional specifics on the responsive records are likely to be critical to the successful charging and prosecution of the person(s) responsible for the shooting. If that information was released now, it could jeopardize that process.

[52] For all these reasons, I find that disclosure of the responsive records would result in an unreasonable invasion of a third party's personal privacy.

FINDINGS & RECOMMENDATION:

[53] I find that section 15(1)(a) applies to the withheld records but that the public body failed to exercise its discretion in deciding to withhold the responsive records under this section.

[54] I find that it would be an unreasonable invasion of a third party's personal privacy to disclose the information withheld by the public body under s. 20.

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[18] *BC Order F05-24, Abbotsford Police Department, Re,* 2005 CanLII 28523 (BC IPC), at para. 31.
[19] *NS Review Report 16-13*, *Nova Scotia (Justice) (Re),* 2016 NSOIPC 13 (CanLII), at para. 52.
[20] *Ontario Order MO-2404, Durham Regional Police Services Board (Re),* 2009 CanLII 15435 (ON IPC), at pp. 10-11.

[55] I recommend that the public body continue to withhold the responsive records requested by the applicant.

March 13, 2024

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

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