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

REVIEW REPORT 24-14

July 10, 2024

Department of Justice

Summary: An applicant asked the Department of Justice (public body) for information about adult offenders from the public body's Justice Enterprise Information Network (JEIN). In response, the public body partially disclosed the requested records to the applicant but withheld some of the information in them pursuant to s. 20 (personal information) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). The Commissioner finds that the information withheld under s. 20 does not qualify as the personal information of an identifiable third party and so recommends its disclosure.

INTRODUCTION:

[1] The applicant asked the Department of Justice (public body) for a machine-readable, itemized spreadsheet of information about adult offenders contained in the public body's Justice Enterprise Information Network (JEIN). More specifically, the applicant requested:

> Please provide a machine-readable itemized database, spreadsheet or dump/export (i.e. Microsoft Excel, Access, SQL or CSV file format, **not** .PDF) of the Justice Enterprise Information Network (JEIN) database (or, if I'm mistaken about that name, your correctional offender management system database) in a format similar to that used for the federal open data "Offender Profiles." Data should be a full historical record of warrant of committal admissions going back to 2000. If an ongoing record of all correctional warrant of committal admissions is not possible, monthly snapshots will suffice. The data should be record-level and include the following fields:
>
> - Demographic information, including: gender, religion, race, race grouping, date of birth, age;
> - Institutional information, including: major/most serious offence group, in custody/community, supervision type, institutional security level, offender security level, dynamic/need, static/risk, reintegration potential, motivation, hold status (remand, sentence, deferral, immigration, other), risk assessment levels and/or scores;
> - Name of sentencing judge;
> - Name of Crown prosecutor;
> - Name of the referring court house;

- Type of Controlled Drugs and Substances Act schedule (i.e. 1, 2, 3, etc.) where applicable;

Do **not** include names, addresses or other personally-identifiable information.

[2] It is important to highlight that the applicant was not seeking names of the adult offenders referenced in the responsive records. Rather, they wanted the information in a de-identified fashion.

[3] The public body provided the applicant with some of the information they requested in the responsive records but withheld some of the information under s. 20 (personal information) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*).

[4] The applicant objected to the severing applied by the public body and filed a request for review with the Office of the Information and Privacy Commissioner (OIPC). The matter was not able to resolve informally and so proceeded to this public review report.

ISSUE:

[5] There is one issue under review.[1] 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] 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] Section 20 of *FOIPOP* requires public bodies to withhold information if its release would be an unreasonable invasion of a third party's privacy. For the reasons provided below, I find that the public body did not meet its burden to show that the information withheld under s. 20 would identify a third party. Therefore, the information cannot be withheld.

[1] A second issue was added by the OIPC at its investigation stage. This second issue was whether the public body met its duty to assist the applicant by responding openly, accurately, and completely, as required by s. 7(1) of *FOIPOP*. In my opinion, this issue was erroneously added by the OIPC. As such, I will not address it in this review report.

[8] It is well established in Nova Scotia that a four-step test is required when evaluating whether s. 20 requires a public body to refuse to disclose personal information.[2] 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 the disclosure would constitute an unreasonable invasion of privacy or not?

[9] The public body created two Excel worksheets from JEIN in response to the applicant's request for information.

[10] The second Excel worksheet provided to the applicant was released in its entirety. However, the public body responded to the applicant with a decision to disclose the other Excel worksheet in part. The first Excel worksheet had two columns of information withheld under s. 20 (personal information) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). The two columns of information the public body withheld were ethnic origin (race) and age of admission (age).

Step 1: Is the requested information "personal information" within s. 3(1)(i)? If not, that is the end. Otherwise, the public body must go on.

[11] Step one of the *House* test is for the public body to establish that the information withheld meets the definition of "personal information" found at s. 3(1)(i) of *FOIPOP*. Personal information is defined in s. 3(1)(i) of *FOIPOP* 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.[3]

[12] The task of establishing that the information severed under s. 20 is the personal information of an identifiable third party can be challenging.

[13] As set out above, the applicant requested a spreadsheet or spreadsheets produced from JEIN detailing historical records of warrant of committal admissions going back to 2000, with no identifying information.

[14] Information contained in JEIN includes things like custody term dates, sentence dates, sentence length, institution name, religion, age, race, sex, indigenous status, the sentencing

[2] This test has been consistently applied in NS Review Reports and is based on the NS Supreme Court decision in *House, Re,* 2000 CanLII 20401 (NS SC) at p. 3.
[3] *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5. s. 3(1)(c).

judge, the prosecutor and more. To address the applicant's request, the public body produced two Excel worksheets containing 73,970 rows of various third parties' information, with each row having 50 columns of personal information relating to these third parties. Names of the third parties were not requested by or provided to the applicant. However, each third party was assigned a random identification number.

[15] The first Excel worksheet contains the following information responsive to the access request:

- Custody Term information (Custody term start date, custody term end date, admission date, remand expiry date, sentence date, released date, Earliest release date, Warrant committal date, aggregate sentence length and remission days);
- Institution name;
- Demographic information (Age of admission, sex, ethnic origin, Indian status, religion and country of origin);
- Most Serious Offence (MSO Statute, MSO section, MSO subsection, MSO paragraph and MSO subparagraph); and
- Scores based on Risk Level (Criminal history, family, education/employment, leisure/recreation, companions, alcohol/drug problem, pro criminal attitude and antisocial patterns).

[16] The second Excel worksheet contains the following information responsive to the access request:

- Number of Orders;
- Ordered date;
- Justice's name;
- Prosecutor's name;
- Defense type;
- Order type;
- Effective date;
- Order days;
- Court name; and
- Charges.

[17] The second Excel worksheet was provided in full to the applicant. In contrast, some information was withheld from the first Excel worksheet. Though some of the above-noted columns of information were not specifically requested by the applicant, additional columns of information within the Excel worksheets were provided. What ended up happening was that the public body withheld ethnic origin (race) and age of admission (age) columns of information in the first Excel worksheet, as it worried that including these columns of information, along with the already released columns of information, could identify the third parties through what is known as the mosaic effect.

[18] The problem with this was that the applicant was particularly interested in the race and age information. The issue then became, would releasing the age and race columns in the first Excel

worksheet (along with the previously released columns of information) serve to identify the third parties referenced in the Excel worksheet through a mosaic effect?

Could disclosure of the withheld information identify the third parties referenced in the responsive records through the mosaic effect?

[19] My role is to consider the parties' representations and review the content of the records to determine whether the withheld information could reasonably be expected to identify the third parties. In my view, without names, re-identification is only possible through what is termed the "mosaic effect".

[20] 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*.[4] When examining whether the mosaic effect applies:

> [O]ne 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.[5]

[21] Information will be about an identifiable individual where there is a serious possibility that an individual could be identified using that information, alone or in combination with other available information.[6]

[22] The applicant argued:

> Without explicitly released names, it is likely effectively impossible to reverse-engineer the identity of any single person in the information without relying on other sources which are already public. (The public nature of those other sources creates an additional issue, which I will address in the next section.)
>
> If the Office of the Information and Privacy Commissioner (OIPC) agrees with my analysis, then the information is not about an "*identifiable* individual" (emphasis mine) as defined under section 3(1)(i), and the information thus does not qualify as "personal information."

[4] *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], at para. 82.
[5] *AB Order F2023-19, Edgerton (Village) (Re)*, 2023 CanLII 44296 (AB OIPC), at para. 18.
[6] *Gordon v. Canada (Health)*, 2008 FC 258 (CanLII), at para. 34.

[23] The applicant also said:

> Once Justice had released its files to me, its hands were tied. For instance, say that I received a version of the data more or less as I requested it, but decided after the release that I wanted additional fields like the name of the jail in which a prisoner was serving out their term. If Justice had hewed to the request text as I'd provided it, I could have supplemented my request later on, and we could have negotiated on issues of identifiability at that point. Instead, the fields in the release made me unable to file supplementary requests.
>
> Similarly, Justice could have informed me in advance that it planned to redact the race and age fields. While I recognize this is unorthodox, I have successfully asked other jurisdictions for "redaction notices" of this sort in cases where I am expecting a large data set and want to make sure the final disclosure is useful to me. Being warned in advance that a certain field will likely be redacted allows me to horse-trade with the organization – say, taking away another field to allow for the inclusion of a higher priority one – and otherwise avoid the issues that arose in this case because I had already been issued a "final release" that could not be amended without purported identification issues.

[24] The public body provided the following argument in its representations:

> While the Applicant indicated he did not want "names, addresses or other personally-identifiable information", the broad range of information requested read as a whole we believed could still possibly lead to the identification of the individual. This is especially true in the smaller correctional facilities where they only held a very small number of people (Kings County Correctional Centre could only house 59; the Antigonish Correctional Facility could only house 17; the Lunenburg Correctional Centre could only house 23; the Colchester Correctional Facility could only house 44; the Guysborough Correctional Centre could only house 6 and the Southwest Correctional Facility can only hold 38 people). Therefore, some of the information was severed from the record to prevent individuals from being identified. The "Age at the Time of Admission" and "Ethnic Origin Cd" columns were severed from the record.

[25] The basis of the public body's argument is due to statisticians (like those at Statistics Canada) customarily refusing to disclose information in cells in a table that contain fewer than five persons. This is sometimes referred to as the rule of five.

[26] While one must always consider if someone can triangulate identifiable information using what was intended to be anonymized information, courts and information and privacy commissioners have taken "small cell counts" into consideration and are generally skeptical of such broad and speculative arguments. A public body advancing such arguments must establish

the harm with convincing evidence rather than mere assertion. As stated in *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*:

> 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***. [emphasis added][7]

[27] In much smaller jurisdictions, such as Nunavut,[8] commissioners 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.[9]

[28] This is supported by *PEI Order FI-16-007*,[10] where 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.

[29] I acknowledge that the caselaw above is specific to comparisons of the sizes of the populations for different provinces, which is not entirely comparable to the population of certain prisons in Nova Scotia. Regardless, the same principle applies. If I was to rely on the rule of five, the population sizes within smaller correctional facilities provided by the public body are above the threshold of five.

[30] I appreciate the public body's concern regarding the possibility of identifying the third parties, as public bodies are prohibited from disclosing personal information if the disclosure would be an unreasonable invasion of an identifiable third party's personal privacy.

[31] In the end, the public body's arguments were theoretical and speculative. There was no information provided to me to show how the mosaic effect could serve to identify third parties in this case. Speculation of identification is not enough. Rather, convincing evidence of a

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[7] *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar),* 2007 FC 766 (CanLII), [2008], at para. 84.
[8] 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>.
[9] *NU Review Report 19-148, Review Report 19-148 (Re),* 2019 NUIPC 1 (CanLII). See also *VinAudit Canada Inc v Yukon (Government of),* 2023 YKSC 68 (CanLII).
[10] *PEI Order FI-16-007, Prince Edward Island (Health) (Re),* 2016 CanLII 48833 (PE IPC), at paras. 25-27.

reasonable expectation of identification is required. The fact that there is some risk the disclosure could lead to the identification of third parties through the mosaic effect does not mean there is a reasonable expectation that it will.[11]

[32] In this matter, it would take a significant amount of effort, and additional information would be needed, to identify who the non-named third parties are. Therefore, it would not be reasonable to expect that releasing this information could identify someone within the records.

[33] Overall, 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 third parties and therefore, does not qualify as "personal information" under s. 3(1)(i) of *FOIPOP*. As such, it cannot be withheld and there is no need for me to complete the remainder of the *House* test.

FINDING & RECOMMENDATION:

[34] I find that the information withheld under s. 20 does not qualify as identifiable information.

[35] I recommend that the public body disclose the information severed under s. 20, within 45 days of the date of this review report.

July 10, 2024

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File: 19-00173

[11] *BC Order F10-29, British Columbia (Education) (Re)*, 2010 BCIPC 41 (CanLII), at paras. 34-35.