



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

**REVIEW REPORT 24-15**

**August 13, 2024**

**Halifax Regional Centre for Education**

**Summary:** The applicant made a request to the Halifax Regional Centre for Education (public body) for records related to both provincial and individual school assessment results in literacy and math over a five-year period. The applicant also requested a list of which schools the public body deemed as “priority schools”, the criteria used to deem a school as “priority” and records showing how funding was allocated to priority schools. The public body applied s. 18(1)(a) (health and safety) and s. 20 (personal information) of the *Freedom of Information and Protection of Privacy Act* to withhold the responsive record in full. The Commissioner finds that s. 18(1)(a) does not apply and so the record cannot be withheld under that section. Regarding s. 20, the Commissioner finds that after balancing all relevant circumstances, disclosure of the withheld record would not be an unreasonable invasion of any third party’s privacy. The Commissioner recommends the withheld record be released in full to the applicant.

**INTRODUCTION:**

[1] The Halifax Regional Centre for Education (HRCE)<sup>1</sup> (public body) operates English public schools throughout the Halifax Regional Municipality. It employs more than 11,000 staff who serve more than 58,000 children, students and families in 137 schools. It is the largest school system in Atlantic Canada.<sup>2</sup>

[2] The applicant asked the public body for records related to school performance. More specifically, the applicant asked the public body for:

- a) "Comprehensive analysis of the past five years of provincial assessment results in literacy and math." (Report No. 2015-10-38).
- b) List of HRSB/HRCE "priority schools" and criteria used for identification.
- c) Any other relevant data or information produced in support of the Priority Schools initiative, including budget and school-by-school allocations.

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<sup>1</sup> HRCE was created on April 1, 2018. Prior to this, there existed the Halifax Regional School Board (HRSB). HRSB ceased to exist on April 1, 2018, and is now part of HRCE. At times there is reference to the HRSB in this review report because of the age of the records.

<sup>2</sup> *Halifax Regional Centre for Education*, online: <<https://www.hrce.ca/about-hrce/about-us>>.

- d) Might I request a copy of the comprehensive staff analysis and/or report assessing literacy and math scores by school, over that five year period?
- e) Might I have a list of those schools classified as "priority schools" in need of such support?
- f) How much was allocated to the Priority Schools project each year? How was the funding allocated on a school-by-school basis?

[3] Following some additional releases of information, the responsive record at issue in this review report is a 54-page report (Assessment Report) related to compilation and analysis of aggregate individual and provincial school performance (by grade) on standardized student tests for math and literacy, covering the years 2008-09 to 2013-14. The Assessment Report largely consists of charts of data showing school performance on key indicators over time. Some charts and tables also include socioeconomic and race data. The Assessment Report also lists schools that have been designated as priority schools (meaning schools that are underperforming and so need additional supports).<sup>3</sup> There are no names of any persons included in the Assessment Report. The Department of Education and Early Childhood Development annually releases aggregate data of student performance on things like reading and math scores by regional education centres in the province. However individual school-based data is not made publicly available.<sup>4</sup>

[4] The public body withheld the Assessment Report in full from the applicant. It relied on s. 18(1)(a) (health and safety) and s. 20(1) (personal information) of the *Freedom of Information and Protection of Privacy Act (FOIPOP)* to do so.

[5] The applicant objected to the public body's decision to withhold the Assessment Report in full and requested a review with the Office of the Information and Privacy Commissioner (OIPC). The OIPC's informal resolution process did not resolve this matter. As a result, it proceeded to this public review report.

## **ISSUES:**

[6] There are two issues under review:

1. Was the public body authorized to refuse access to information under s. 18(1)(a) of *FOIPOP* because disclosure of the information could reasonably be expected to threaten anyone else's safety or mental or physical health?
2. 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?

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<sup>3</sup> The public body has provided the applicant with budget documents that identify priority schools and show budget information relating to those schools.

<sup>4</sup> See for example *2023-2024 Nova Scotia Assessment Reading, Writing and Mathematics in Grade 6* (undated), online: Department of Education and Early Childhood Development <<https://plans.ednet.ns.ca/sites/default/files/documents/2023-24-RWM6.pdf>>.

## DISCUSSION:

### 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.<sup>5</sup>

[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.

### 1. Was the public body authorized to refuse access to information under s. 18(1)(a) of *FOIPOP* because disclosure of the information could reasonably be expected to threaten anyone else's safety or mental or physical health?

[9] Section 18(1)(a) of *FOIPOP* gives the public body discretion to withhold information that could reasonably be expected to threaten anyone's safety or mental or physical health. For the reasons set out below, I find that s. 18(1)(a) does not apply to the Assessment Report.

[10] Section 18(1)(a) provides:

18 (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health;

[11] As s. 18 is a harms-based exemption, the public body has the burden to establish that disclosure of the withheld information could reasonably be expected to harm anyone else's health or safety.

[12] While *FOIPOP* does not define "harm", the Supreme Court of Canada has outlined the test for meeting a harms-based exemption. In *Merck Frosst Canada Ltd. v. Canada (Health)*, the Court stated that the harm that could reasonably be expected to result "...suggests a middle ground between that which is probable and that which is merely possible. The intended threshold appears to be considerably higher than a mere possibility of harm, but somewhat lower than harm that is more likely than not to occur."<sup>6</sup>

[13] In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, the Supreme Court of Canada expanded upon this test by adding a provision that an "institution must provide evidence 'well beyond' or 'considerably above' a mere possibility of harm in order to reach that middle ground".<sup>7</sup>

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<sup>5</sup> *FOIPOP*, s. 45.

<sup>6</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012 SCC 3](#), at para. 201.

<sup>7</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014 SCC 31 \(CanLII\)](#), [2014] 1 SCR 674, at para. 54.

[14] More recently, in *Houston v. Nova Scotia (Minister of Transportation and Infrastructure Renewal)*, the Supreme Court of Nova Scotia stated:

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 (*Merck Frosst* at para. 219). The words “harm significantly” in s.21(1)(c)(i) of the Act mean harm which is important enough to have an effect, not minor or trivial.<sup>8</sup>

[15] As set out in *NS Review Report 19-08*, s. 18(1)(a) requires an objective test to determine whether there is a reasonable expectation of harm to anyone else’s health or safety. The following factors should be considered:

- a) The harm must be related to the disclosure of the information at issue; there must be evidence to connect the disclosure of the information to the risk identified.
- b) The public body must provide evidence, the clarity and cogency of which is commensurate with a reasonable person’s expectation, that disclosure of the information could threaten the safety or mental or physical health of anyone else.
- c) Safety includes freedom from danger or risks.
- d) The public body must demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative to reach the middle ground between what is probable and what is merely possible.<sup>9</sup>

[16] The applicant’s request stemmed from their reading of a report published by the public body on October 28, 2015, titled *Creating Conditions to Support Student Success in our Priority Schools* (Priority Schools Report).<sup>10</sup> In the Priority Schools Report, it was explained that individual elementary schools whose achievement results in literacy and math were consistently below the provincial average were labelled as “priority schools” and that these schools may require additional resources. As stated in the Priority Schools Report, its purpose was:

To provide the Governing Board with information outlining how the Halifax Regional School Board is providing support to improve student achievement in elementary schools whose achievement results in literacy and math over the past five years of provincial achievement indicate additional support is required.

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<sup>8</sup> *Houston v. Nova Scotia (Minister of Transportation and Infrastructure Renewal)*, [2021 NSSC 23](#), at para. 67. Note that while this case referred to s. 21 of *FOIPOP*, the same analysis applies to any exemption in *FOIPOP* with a requirement that disclosure “could reasonably be expected” to cause harm.

<sup>9</sup> *NS Review Report 19-08, Halifax Harbour Bridges (Re)*, [2019 NSOIPC 9 \(CanLII\)](#), at para. 10.

<sup>10</sup> In their representations, the applicant provided a link (<https://www.hrsb.ca/sites/default/files/hrsb/2015-10-38.pdf>) to the public body’s Priority Schools Report (2015), however the link was broken at the time of drafting this review report. As such, I located the [Priority Schools Report](#) by inserting the link provided by the applicant into the [Wayback Machine Internet Archive](#).

[17] The cover page of the Priority Schools Report states that in May 2014:

[A] comprehensive analysis of the past five years of provincial assessment results in literacy and math was completed to answer the superintendent's question: *Which of our schools have gained traction with their school improvement efforts, and which schools have not?* Staff identified elementary schools trending below the provincial average. The Board's school improvement leadership team provided direction to all department staff that it was their priority to support the work to strengthen improvement at these schools.

[18] The applicant's request for records was for information that supported the drafting of the Priority Schools Report. The applicant explained to the public body that they were looking for the above-noted "comprehensive analysis" including any supporting information that informed the development of the Priority Schools Report.

[19] In response, the public body located the 54-page Assessment Report at issue here but relied on s. 18 to withhold it from the applicant because it believed its release would harm the mental health of students, educators and school communities. It also said that disclosure of the Assessment Report to the applicant would cause harm because it would stigmatize individual students whose information could be inferred from it.

[20] The public body argued that along with having a stigmatizing effect on students (discussed below), release of the Assessment Report would have a negative effect on the mental well-being of educators. To support this argument, the public body cited *No Quick Fixes: Perspectives on Schools in Difficulty*. In this book, the authors Kate Myers and Harvey Goldstein stated:

Publishing the average test scores of schools in the form of rankings or league tables has encouraged competition rather than collaboration and cooperation between schools and thereby undermines one of the pre-requisites for school improvement – the opportunity and capacity of schools to learn from each other. Along with numerous other reform initiatives that have involved teachers learning, 'unlearning' and 'relearning' new curricula, new teaching strategies and new structures within a very short period of time, some of these changes have fostered a climate of fear and retribution. For many heads and teachers, the combined effect of the changes and related pressures has had a negative impact on their morale, resilience and self-esteem.<sup>11</sup>

[21] The public body also relied on the following book chapter to support its position that release of the Assessment Report could reasonably be expected to harm educators: *The Impact of State Intervention on "Underperforming" Schools in Massachusetts: Implications for Policy and Practice*. In this document, the author summarized the remarks of educators when asked about having their schools labelled as "underperforming":

These remarks from the interviews suggest that teachers internalize the underperforming label. They view it as a reflection of the caliber of their work and their contribution to students' success or failure. In addition, it affects their morale. They perceive

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<sup>11</sup> Louise Stoll & Kate Myers, ed, *No Quick Fixes: Perspectives on Schools in Difficulty*, ([London: Falmer Press, 1998](#)) at pp. 176-177.

themselves as being looked down upon not only by the “president,” as one teacher put it, but more importantly by their local community.<sup>12</sup>

[22] There are key differences between the landscape of the education system in Massachusetts and in Nova Scotia. The writer of this Massachusetts study interviewed staff following the implementation of the American federal *No Child Left Behind Act* in 2002.<sup>13</sup> This Act permitted state intervention in schools not making adequate yearly progress in student proficiency based on state-specific assessments. Schools that failed to meet expectations for four consecutive years could be referred for various corrective actions. Schools that failed to meet expectations for five consecutive years could be ordered into radical restructuring (converted into a charter school, be taken over by a private company or have the state take responsibility for running the school). According to the study, educators were frustrated because they were held responsible for student proficiency with little support provided to them to improve it, all with the overhanging element that state intervention could occur if their students’ proficiency did not improve.

[23] The public body did not point me to any legislation in Nova Scotia that would wield the same power over schools or centres for education as that in Massachusetts. In fact, the opposite appears to be true in Nova Scotia. As set out in the Priority Schools Report, the goal of the public body is not to penalize underperforming schools, but rather to identify ways to support them and for schools to work as a team. About its efforts to support underperforming schools, the Priority Schools Report noted:

Principals provided feedback after the first year. Feedback was overwhelmingly positive. Principals have expressed appreciation for the support and the opportunity to work within a team environment to improve student learning, embrace new strategies and problem solve around perceived barriers to improvement.<sup>14</sup>

[24] In my view, the landscape for release of aggregate individual school test score data in Nova Scotia does not reach the threshold for harm to mental or physical health of educators required for the application of s. 18 of *FOIPOP*.

[25] On the issue of harm to students, the public body noted it had provided the applicant with information showing budget information for identified priority schools. What was not disclosed was the aggregate data of standardized test results, socioeconomic data and racial data (all compiled by grade, not individual student). The public body argued that disclosure of this more detailed information would very likely cause harm to students.

[26] The public body supplied excerpts from scholarly and media sources to support its position. It said these sources conclude there is a negative correlation between students knowing about their school’s performance ranking relative to other schools, their own well-being and

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<sup>12</sup> Patrick McQuillan, *The Impact of State Intervention on “Underperforming” Schools in Massachusetts: Implications for Policy and Practice* (2008) 16:18 Education Policy Analysis Archives at p. 16, online: <<https://www.redalyc.org/pdf/2750/275020545017.pdf>>.

<sup>13</sup> *No Child Left Behind Act*, [Public Law 107-110](#).

<sup>14</sup> Halifax Regional School Board, *Creating Conditions to Support Student Success in our Priority Schools* (October 28, 2015), online: <<https://web.archive.org/web/20211127145045/https://www.hrce.ca/sites/default/files/hrsb/2015-10-38.pdf>>, at p. 2.

motivation to succeed. For example, the public body stated that research by the University of Colorado Boulder found:

In districts in which dropout rates suggest that many students already experience a fragile relationship to school, research affirms our concern that students' knowledge of their positioning as less than proficient in key content areas such as reading may discourage, rather than encourage, students' investment in school (e.g., Wortham, 2006).

[...]

Research with urban students in high-poverty schools suggests that students' feelings of decreased control over important aspects of their schooling impacts their perceptions of their ability to forge a positive path toward high school graduation (Diamond & Spillane, 2004; Lee, Smith, Perry, & Smylie, 1999; Oakes, 2005; Valenzuela, 2005; Vasquez-Heilig & Darling-Hammond, 2008; Marquez-Zenkov, 2007).<sup>15</sup>

[27] The public body said that one of the most publicized school ranking reports is an annual report released by the Fraser Institute.<sup>16</sup> The Fraser Institute annually releases school rankings and report cards for most schools in British Columbia, Alberta, Ontario and Quebec, based in part on information about school performance data publicly released by those provinces. The public body noted that there has been criticism of these annual rankings as:

“damaging to learners”<sup>17</sup> and can hurt morale for students already experiencing challenges at school due to the effect of being compared to top academic performers.<sup>18</sup>

[28] In one of these cited CBC news articles, the reporter noted that the British Columbia School Trustees Association (BCSTA) initially asked the British Columbia Government to not release results of its foundation skills assessments (which is an annual province-wide assessment of students' academic skills)<sup>19</sup> due to concerns about how that data was being used by third parties (i.e., Fraser Institute). The BCSTA said the practice of ranking schools is “harmful and

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<sup>15</sup> Elizabeth Dutro & Makenzie K. Selland, “*I Like to Read, but I Know I'm Not Good at It*”: Children's Perspectives on High-Stakes Testing in a High-Poverty School” (2012) 42:3 Curriculum Inquiry at 340-367, online: <[https://www.researchgate.net/profile/Elizabeth-Dutro-2/publication/259926727\\_I\\_Like\\_to\\_Read\\_but\\_I\\_Know\\_I'm\\_Not\\_Good\\_at\\_It\\_Children's\\_Perspectives\\_on\\_High-Stakes\\_Testing\\_in\\_a\\_High-Poverty\\_School/links/5b6cbb62299bf14c6d97d6e5/I-Like-to-Read-but-I-Know-Im-Not-Good-at-It-Childrens-Perspectives-on-High-Stakes-Testing-in-a-High-Poverty-School.pdf](https://www.researchgate.net/profile/Elizabeth-Dutro-2/publication/259926727_I_Like_to_Read_but_I_Know_I'm_Not_Good_at_It_Children's_Perspectives_on_High-Stakes_Testing_in_a_High-Poverty_School/links/5b6cbb62299bf14c6d97d6e5/I-Like-to-Read-but-I-Know-Im-Not-Good-at-It-Childrens-Perspectives-on-High-Stakes-Testing-in-a-High-Poverty-School.pdf)>, at pp. 359 and 361.

<sup>16</sup> See for example Fraser Institute, *School Rankings Alberta* (undated), online: <<https://www.compareschoolrankings.org>>.

<sup>17</sup> Ash Kelly, *School trustees call for end to 'harmful and unfortunate' school rankings* (October 11, 2017), online: CBC News <<https://www.cbc.ca/news/canada/british-columbia/school-trustees-call-for-end-to-harmful-and-unfortunate-school-rankings-1.4351017>>.

<sup>18</sup> CBC News, *Quebec school ranking list flawed: educators* (October 22, 2010), online: <<https://www.cbc.ca/news/canada/montreal/quebec-school-ranking-list-flawed-educators-1.887399>>.

<sup>19</sup> British Columbia Government, *Foundation Skills Assessment* (May 1, 2024), online: <<https://www2.gov.bc.ca/gov/content/education-training/k-12/administration/program-management/assessment/foundation-skills-assessment>>.

unfortunate.” However, it went on to clarify that the data should still be available to parents and school boards but argued the practice of ranking schools was the problem. In other words, it was not the aggregate data itself that was harmful, or its release, but rather the subsequent *use* of this information by other parties to rank schools that was harmful.

[29] The applicant provided a scholarly article written by Dr. Helen Raptis,<sup>20</sup> which provides some helpful nuance to the difference between aggregate standardized test score data and school rankings. In this article, Dr. Raptis explored the criticism of the Fraser Institute’s practice of ranking schools. The criticism was based on the additional factors (aside from aggregate test scores) that the Fraser Institute uses to develop its ranking and report cards. Dr. Raptis noted that 50% or less of a school’s rating or report card is derived from test scores. She pointed out that the rankings and report cards are also based on multiple other indicators that some argue do not paint a fair, accurate or evidence-based picture of how a school is or should be ranked.<sup>21</sup>

[30] Dr. Raptis went into much detail about how the term “school rankings” has been erroneously and unhelpfully conflated with standardized test scores. In my view, this is a critical distinction. While the terms are somewhat related, I do not believe they are interchangeable, and I agree with Dr. Raptis that this unfortunate practice has confused the debate on release of aggregate test scores versus ranking of schools. The information in the Assessment Report is dissimilar to the Fraser Institute’s ranking and report card approach. It does not contain information or assessments on various factors that the Fraser Institute uses, ones that have been criticized for not painting an accurate picture of a school’s well-being. Instead, it consists of aggregate test scores by school and priority designation.

[31] Other provinces routinely provide more detailed information (such as each school’s aggregate test scores, as well as aggregate data on race and socioeconomic factors) at both the school and provincial level. In British Columbia, one can search by school and find out the number of students, the participation rate, overall scores, racial information, socioeconomic information and vulnerability indicators (for example physical health and well-being).<sup>22</sup> To protect privacy, very small population numbers are not released. On a quick review, it appears that statistics below 10 are masked.

[32] In response to the public body’s arguments, the applicant said they were surprised that the public body cherry-picked a few “rather dated academic articles...as reasons for denying access to such information.” In the applicant’s view, the issue of whether school-by-school analyses run the risk of causing harm is far from a settled conclusion. The applicant provided a long list of scholarly articles, news reports and opinion pieces that they said showed a more balanced and academically sound list of works on this issue.

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<sup>20</sup> Helen Raptis, *Ending the Reign of the Fraser Institute’s School Rankings* (2012), online: Canadian Journal of Education <<https://files.eric.ed.gov/fulltext/EJ968811.pdf>>.

<sup>21</sup> Helen Raptis, *Ending the Reign of the Fraser Institute’s School Rankings* (2012), online: Canadian Journal of Education <<https://files.eric.ed.gov/fulltext/EJ968811.pdf>>.

<sup>22</sup> British Columbia Government, *Information to support parents and student learning*, online: <<https://studentsuccess.gov.bc.ca/>>.



[33] The public body also relied on *NS Review Report 19-08*<sup>23</sup> as an authority to justify “withholding of information on the grounds that it poses a risk to the safety of a potential group (as opposed to specific people). . . .” In that report, an applicant sought information relating to suicide or mental health episodes on two local bridges over a ten-year period. Halifax Harbour Bridges (HHB) refused to disclose any information in response to the request because it claimed disclosure of the information could threaten the safety or mental or physical health of vulnerable individuals who might be emboldened to commit suicide if the information were released. Although former Commissioner Tully recommended that the HHB continue to withhold specific information describing the exact location on the bridge where the events occurred, she also recommended that the statistical information relating to mental health incidents on the bridges, including month, year, number of attempts, gender and outcome, be released. Commissioner Tully focused on how release of non-specific statistical data is important because it serves two of the purposes of s. 2 of *FOIPOP* – facilitating informed public participation in policy formulation and ensuring fairness in government decision-making.

[34] In my view, there is only a mere possibility that releasing the requested Assessment Report could cause harm. This is not enough to meet the Supreme Court of Canada’s requirement that the evidence shows the likelihood of harm to be well beyond or considerably above a mere possibility.<sup>24</sup> Providing aggregate data (not individual outcomes) is a critical component of transparency and accountability regarding the money used to fund schools in this province. As such, I find that s. 18(1)(a) of *FOIPOP* does not apply to the Assessment Report.

## **2. 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?**

[35] Section 20 of *FOIPOP* requires a 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 release of the information in the Assessment Report would not be an unreasonable invasion of any third party’s personal privacy and as such cannot be withheld under s. 20.

[36] It is well established in Nova Scotia that a four-step approach (*House* test) is required when evaluating whether s. 20 requires a public body to refuse to disclose personal information.<sup>25</sup> 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)?

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<sup>23</sup> *NS Review Report 19-08, Halifax Harbour Bridges (Re)*, [2019 NSOIPC 9 \(CanLII\)](#).

<sup>24</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014 SCC 31 \(CanLII\)](#), [2014] 1 SCR 674, at para. 54.

<sup>25</sup> *House (Re)*, [2000] N.S.J. No. 473, [2000 CanLII 20401 \(NS SC\)](#).

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.***

[37] 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.

[38] Most of the information withheld in the Assessment Report does not contain any personal information. It is aggregate data of standardized test scores by school, as well as each school’s priority designation. The Assessment Report does not contain any names. However, there are some pages of the Assessment Report (pages 9, 11, 13, 25, 35 and 44) that contain aggregate data related to race or socioeconomic factors. Aside from these pages, the information contained in the remaining pages does not qualify as personal information, so I will not go into an analysis of it – that information cannot be withheld under s. 20.

*Pages 9, 11, 13, 25, 35 and 44 of the Assessment Report*

[39] The public body argued that “the information at issue is an individual’s race and/or economic status, which is personal information.”

[40] The public body also said that where “a sample size is small (for instance, a group of 2 students identified as “African”), it is not difficult to use other readily available information (for example, a group class photo), to identify an individual.”

[41] However, it is important to remember that (a) there are no names of individuals identified in the aggregate statistical data in the Assessment Report, (b) the information in the Assessment Report is broken down by school, not by class, and (c) the racial and socioeconomic data is not connected to a school’s test score information. There are no charts that tie these factors to the results of the standardized test scores. Rather, the withheld information simply identifies the makeup of the school’s population.

[42] For the public body’s argument to succeed, one would need the racial and socioeconomic information in the Assessment Report as well as the photos of numerous classes, in each grade of the schools listed, over the six-year period of the Assessment Report. Or at the very least, one would need a photo of the entire school for each year covered by the Assessment Report. Furthermore, not all racial and socioeconomic factors are visually identifiable from a picture.

[43] I am not satisfied that the link is as straightforward as the public body asserted, especially given the lack of argument regarding how a person would obtain group class photos and identify students from those class photos.<sup>26</sup> In my view, the aggregate socioeconomic and race data in this case does not qualify as identifiable personal information and so cannot be withheld under s. 20 of *FOIPOP*. However, given that children are particularly vulnerable, I will give the public body the benefit of the doubt and entertain that individuals are able to view school photos/yearbooks

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<sup>26</sup> The public body did not advise if class photos are readily available (e.g., on a school’s website).

or combine other information that would serve to identify individuals when combined with the racial and socioeconomic data in the Assessment Report. As such, I will go through the remainder of the *House* test for the pages containing racial and socioeconomic aggregate data.

***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.***

[44] Section 20(4) sets out situations when disclosure of personal information would not be considered an unreasonable invasion of a third party's personal privacy. If any of these situations are met, then the test ends and the public body cannot withhold the information under s. 20 of *FOIPOP*.

[45] The applicant argued that s. 20(4)(d) of *FOIPOP* is relevant here. Section s. 20(4)(d) provides that disclosure of personal information is not an unreasonable invasion of a third party's privacy if it is for a research or statistical purpose and is in accordance with s. 29 or s. 30 of *FOIPOP*. Section 30 is not relevant here, but the applicant argued that s. 29 was triggered because they intend to use the information for academic purposes. The applicant stated that they "have offered, several times, to provide assurances that I would adhere to established academic protocols...subject to conditions to safeguard the privacy of individuals...."

[46] Under s. 29, a public body may disclose personal information for research purposes so long as its subclauses are met. While the applicant indicated that they intend to use the information for research purposes, the public body did not approve this option. Thus s. 20(4) does not apply and I must continue to the rest of the test.

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

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

[48] 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

...

(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;

...

[49] The public body cited *NS Review Report FI-05-75* for its s. 20(3)(d) argument:

I do not agree that s.20(3)(d) applies because the records do not contain the employment or educational history of the complainant or some other witnesses. The Ontario Freedom of Information and Privacy Commission has ruled that "for information to qualify as

‘employment or educational history’, the information must contain some significant part of the history of the person’s employment or education.” (*Order MO-1343*) The British Columbia Government’s Policy and Procedures Manual for its FOIPOP Act, reads: “educational history refers to any information regarding an individual’s schooling. This includes names of schools, colleges or universities attended, courses taken and grades achieved.” While this list is not exhaustive I believe it’s clear that the B.C. Government would not regard the information in these records as educational history.<sup>27</sup>

[50] The public body argued that test scores over time should be viewed as a “significant part” of student history and as such should be presumed to be an unreasonable invasion of privacy under s. 20(3)(d) of *FOIPOP*. I would tend to agree if the test scores were tied to individual students. However, they are not. All the information in the Assessment Report is aggregate data. From my read, there is not a way to tie any of the test scores to an individual student in any school. As such, I find that s. 20(3)(d) does not apply.

[51] The public body also relied on s. 20(3)(h) to support its decision to withhold the Assessment Report. Section 20(3)(h) presumes that disclosure of personal information is an unreasonable invasion of a third party’s personal privacy if the personal information indicates the third party’s racial or ethnic origin, sexual orientation or religious or political beliefs or associations. Similar to the above, the issue is the connection to a third party. The withheld information only identifies that a school had a certain number or percentage of racialized students. It does not identify who those students were. For this reason, I find that s. 20(3)(h) does not apply.

***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?***

[52] 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 including those listed in the subsections of 20(2).

[53] As a reminder, the test is not whether the disclosure of third party personal information would result in an invasion of a third party’s personal privacy; the test is whether the disclosure of third party personal information would result in an *unreasonable* invasion of a third party’s personal privacy.

[54] The public body argued that s. 20(2)(h) is relevant here because the disclosure of the information in the Assessment Report may unfairly damage the reputation of students referenced in it. I think this is a broad characterization in this instance. The pool of students for each school is large considering it is over a six-year period. More importantly though, even if a student attended a school that is labeled as underperforming, there is no link to show that specific student

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<sup>27</sup> *NS Review Report FI-05-75, Tri-County Regional School Board, 2006 CanLII 408 (NS FOIPOP)*, at p. 6.

was underperforming. I do not believe that simply attending an underperforming school at some point over a six-year timeframe is enough to assert unfair damage to reputation. As such, I do not find s. 20(2)(h) to be a relevant consideration in favour of withholding the Assessment Report.

[55] In contrast, s. 20(2)(a) of *FOIPOP* explains that a relevant circumstance to consider is whether the disclosure is desirable for the purpose of subjecting the activities of the public body to public scrutiny. The information withheld would allow the public to scrutinize which schools need more support or allow the public to understand why certain schools receive more support than others. The allocation of support is a public body activity and one that warrants scrutiny. I find this weighs strongly in favour of disclosure.

[56] Therefore, weighing all the factors, I find the responsive record should not be withheld under s. 20.

### **CONCLUSION:**

[57] Overall, this was a challenging case and decision. This is a topic on which there are strong opinions on both sides. On the one hand, advocates for disclosure argue that the data is important for accountability. On the other, there is the argument that public release of this type of data could cause harm to students, teachers and schools. Both parties realized the significance of releasing the Assessment Report in terms of protecting students, educators and school communities.

[58] The public body said in its representations that it is extremely important to it that harms to students and to student communities be avoided. I have no doubt that the public body is genuinely concerned about the well-being of its students. However, in my view, the public body applied an overabundance of caution in withholding the Assessment Report.

[59] While approaching their concern from different lenses, it was clear to me that the parties were well-intentioned and put a lot of effort into this file and I thank them for their in-depth arguments on this matter.

### **FINDINGS & RECOMMENDATION:**

[60] I find that:

1. Section 18(1)(a) does not apply to the Assessment Report.
2. Release of the information withheld under s. 20 would not be an unreasonable invasion of any third party's personal privacy.

[61] I recommend that the public body release the Assessment Report in full to the applicant within 45 days of the date of this review report.

August 13, 2024

Tricia Ralph  
Information and Privacy Commissioner for Nova Scotia