Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
David Nurse

REVIEW REPORT 25-10

August 15, 2025

Department of Justice

Summary:
The applicant requested paper records and video footage from the Department of Justice (public body). The footage relates to incidents the applicant was involved in at a provincial court building. The public body withheld the video footage in full, citing s. 15(1)(e), s. 15(1)(i), and s. 15(1)(k) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). The public body also withheld names of public body staff contained within the paper records under s. 15(1)(e).

The Commissioner finds that the public body did not meet its burden to demonstrate that it was authorized to withhold the video footage in full under s. 15(1)(e), 15(1)(i) and 15(1)(k) of *FOIPOP*. Further, the public body did not meet its duty to sever. The Commissioner recommends that the public body reconsider its decision, process and sever the video records, and release the unsevered portions of the video footage to the applicant.

He also finds that the public body did not meet its burden to demonstrate that it was authorized to withhold the names of public body staff in the paper records under s. 15(1)(e) of *FOIPOP* and so he recommends that information be released to the applicant.

INTRODUCTION:

[1] The applicant made three separate access requests for paper records and video footage from the Department of Justice (public body). However, for the purposes of this review report, I will address all three files together. The public body and the applicant are the same in each file, and the nature of the records and the legal issues are the same.

[2] The responsive records included both paper records and video footage. With respect to the paper records, the public body's decision was to sever all names of public body staff contained within them pursuant to s. 15(1)(e) of the *Freedom of Information and Protection of Privacy Act*

(*FOIPOP*). With respect to the video footage, the public body's decision was to withhold the video footage in full, exempting the records from disclosure under s. 15 of *FOIPOP*.

[3] The applicant was not satisfied with the public body's responses to their access requests and filed three requests for review. These matters were 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:

[4] There are four issues under review:

1. Was the public body authorized to refuse access to information under s. 15(1)(e) of *FOIPOP* because the disclosure could endanger the life or physical safety of a law-enforcement officer or any other person?
2. Was the public body authorized to refuse access to information under s. 15(1)(i) of *FOIPOP* because the disclosure could be detrimental to the proper custody, control or supervision of a person under lawful detention?
3. Was the public body authorized to refuse access to information under s. 15(1)(k) of *FOIPOP* because the disclosure could harm the security of any property or system?
4. Did the public body meet its duty to sever exempted information from the responsive records as required by s. 5(2) of *FOIPOP?*

ANALYSIS:

Burden of proof

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

Brief introduction to section 15

[6] In this case, several clauses of subsection 15(1) were applied by the public body. Section 15 is below, and the relevant clauses – (e)(i) and (k) – are highlighted:

> 15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> (a) harm law enforcement;
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> (b) prejudice the defence of Canada or of any foreign state allied to or associated with Canada or harm the detection, prevention or suppression of espionage, sabotage or terrorism;

[1] *Freedom of Information and Protection of Privacy Act, SNS 1993, c 5*, s. 45.

(c) harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement;

(d) reveal the identity of a confidential source of law enforcement information;

(e) endanger the life or physical safety of a law-enforcement officer or any other person;

(f) reveal any information relating to or used in the exercise of prosecutorial discretion;

(g) deprive a person of the right to a fair trial or impartial adjudication;

(h) reveal a record that has been confiscated from a person by a peace officer in accordance with an enactment;

(i) be detrimental to the proper custody, control or supervision of a person under lawful detention;

(j) facilitate the commission of an offence contrary to an enactment; or

(k) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system(emphasis added).

[7] Section 15 of *FOIPOP* is a harm-based exemption. A harm-based exemption applies only if the specified harm or risk of harm is present. 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."

[8] The evidentiary burden for the harms test has been extensively canvassed by the Supreme Court of Nova Scotia[2] and the Supreme Court of Canada,[3] as well as in countless Office of the Information and Privacy Commissioner for Nova Scotia (OIPC) review reports and court cases from other jurisdictions. In 2014, the Supreme Court of Canada summarized the current law in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*:

> This Court in *Merck Frosst*[4] adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that

[2] *Houston v. Nova Scotia (Minister of Transportation and Infrastructure Renewal)*, 2021 NSSC 23, at paras. 64 - 65 and 67.
[3] 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.
[4] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

> which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.[5]

How to establish that disclosure could reasonably be expected to result in the harm alleged

[9] When establishing whether there is a reasonable expectation of probable harm, the evidence for harm is dealt with on a case-by-case basis, because how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and the "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[6]

[10] While there are no general rules as to the sufficiency of evidence, descriptions of possible harm, even in substantial detail, are insufficient in themselves. At minimum, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Federal Court of Canada has stated that:

> Court[s] must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged.[7]

[11] Without some form of evidence to support the reasoning for the probable harm, it is merely speculation. In the context of determining the issue of whether a public body exercised their discretion, the Federal Court of Appeal has provided an explanation on the difference between a reasoning as a matter of logic and speculation:

> Drawing an inference is a matter of logic. As stated by the Newfoundland Supreme Court (Court of Appeal) in *Osmond v. Newfoundland (Workers' Compensation Commission)* (2001), 200 Nfld. & P.E.I.R. 203 at paragraph 134:
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> > [...] Drawing an inference amounts to a process of reasoning by which a factual conclusion is deduced as a logical consequence from other facts established by the evidence. Speculation on the other hand is merely a

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[5] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), at para. 54.
[6] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), [2014] 1 SCR 674, at para. 54.
[7] *Criminal Trial Lawyers' Association v. Canada (Justice),* 2020 FC 1146 (CanLII), at para. 50.

> guess or conjecture; there is a gap in the reasoning process that is necessary, as a matter of logic, to get from one fact to the conclusion sought to be established. Speculation, unlike an inference, requires a leap of faith.[8]

[12] To summarize, a party resisting disclosure must provide some logical explanation to show why disclosure could lead to a particular identifiable harm. Consequently, *the more specific and substantiated the evidence to prove disclosure would lead to a particular identifiable harm, the stronger the case for confidentiality.*[9]

[13] I will now move into the specific arguments that were made by the public body to establish that harm could reasonably be expected to result from disclosure of the records requested in this matter.

1. Was the public body authorized to refuse access to information under s. 15(1)(e) of *FOIPOP* because the disclosure could endanger the life or physical safety of a law-enforcement officer or any other person?

[14] The public body applied 15(1)(e) to withhold names of public body staff contained in the responsive paper records. It also relied on s. 15(1)(e) to withhold the faces of public body staff in the responsive video footage. For the reasons set out below, I find that the public body failed to discharge its burden in establishing that s. 15(1)(e) applies to the withheld records.

[15] Section 15(1)(e) of *FOIPOP* gives the public body discretion to refuse to disclose information that could reasonably be expected to endanger the life or physical safety of a law-enforcement officer or any other person:

> 15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> …
>
> (e) endanger the life or physical safety of a law-enforcement officer or any other person;
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> …

[16] The public body explained to me that it was withholding the requesting information because it was trying to protect the safety and well being of sheriffs. It goes without saying that it is important that employers protect the safety and well-being of staff. While I am sympathetic to the difficulties that Department of Justice staff face in doing their work on a daily basis, I am not convinced that releasing their names could reasonably be expected to amount to the level of harm that is contemplated in s. 15(1)(e). Context is important here and so is directly linking disclosure to the alleged harm.

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[8] *Attaran v. Canada (Foreign Affairs)*, 2011 FCA 182 (CanLII), at para 32.
[9] *Criminal Trial Lawyers' Association v. Canada (Justice), 2020 FC 1146 (CanLII),* at para. 50.

[17] There are numerous cases in which the release of the names of law enforcement officers along with other information, such as their badge number or phone number, has been found not to meet the threshold for s. 15(1)(e).[10]

[18] Turning to the present case, my understanding is that members of the public attending court are able to see a sheriff's name badge and may overhear or request their first name. Further – while not particularly strong evidence – I also noted that several Nova Scotia sheriffs have public LinkedIn profiles including their names, and, in some cases, photographs. Members of the public, including accused persons, regularly interact with sheriffs and other court staff, and I do not see that the release of their names alone could reasonably be expected to endanger their lives or physical safety.

[19] As such, I find that the public body failed to establish that s. 15(1)(e) of *FOIPOP* applies to the withheld information in the responsive records.

2. Was the public body authorized to refuse access to information under s. 15(1)(i) of FOIPOP because the disclosure could be detrimental to the proper custody, control or supervision of a person under lawful detention?

3. Was the public body authorized to refuse access to information under s. 15(1)(k) of FOIPOP because the disclosure could harm the security of any property or system?

[20] The public body applied both subsections 15(1)(i) and 15(1)(k) to withhold the entirety of the video footage. The correct approach would have been for the public body to process each piece of video footage individually and assess the harms test in respect of each piece of video footage. My understanding is that the records include footage from cameras outside the court building, footage from more public areas of the court building, and footage from more secure areas of the court building. Presumably, the potential for harm may vary based on the location of the cameras, and specific nature of the footage. Providing specific evidence on the potential harms of the disclosure of a particular record (in this case, a piece of video footage) would likely provide a stronger case for exempting the records.

[21] For the reasons set out below, I find that the public body failed to discharge its burden in establishing that s. 15(1)(i) or s. 15(1)(k) applies to the withheld video footage.

[22] Section 15(1)(i) gives the public body discretion to refuse to disclose information that could reasonably be expected to be detrimental to the proper custody, control or supervision of a person under lawful detention:

> 15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> …

[10] For example, Peterborough (Police Service Board) (Re), 2018 CanLII 59413 (ON IPC), <https://canlii.ca/t/hsrr0>, retrieved on 2025-07-29; Ontario (Community Safety and Correctional Services) (Re), 2018 CanLII 92302 (ON IPC), <https://canlii.ca/t/hvdcq>, retrieved on 2025-07-29; Ontario (Community Safety and Correctional Services (Re), 2012 CanLII 16456 (ON IPC), <https://canlii.ca/t/fqtdc>, retrieved on 2025-07-29.

(i) be detrimental to the proper custody, control or supervision of a person under lawful detention;

…

[23] Section 15(1)(k) gives the public body discretion to refuse to disclose information that could reasonably be expected to harm the security of any property or system, including a building, a vehicle, a computer system or a communications system:

> 15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> …
>
> (k) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.
>
> …

[24] The public body provided several arguments in its attempt to establish why disclosure of the requested records could reasonably be expected to result in harm. However, the evidence provided does not meet the threshold of demonstrating a "reasonable expectation of probable harm."

[25] First, the public body argued that release of the video footage could expose the viewing area of existing surveillance cameras, including whether there were any blind spots and that this could in turn harm security at the court building. I assume that the public body also believes it would be detrimental to the "proper custody, control and supervision" of a person under lawful detention. I accept that the issues are inter-related; if the security of the court building is undermined, this, in itself, could be detrimental to the custody and handling of detained persons. However, the public body has not provided evidence that there is direct connection between the video footage in this case and the potential harm.

[26] The public body did not provide evidence to demonstrate that there are any blind spots in the camera coverage at the court building. The public body could have provided *in camera* submissions that explained whether there were in fact blind spots, whether there are other cameras that capture those blind spots and any other relevant information about how this and other cameras (if there are any) in the court building are organized, operated and utilized. The public body could have provided a schematic showing the viewing angles of the cameras.

[27] The public body has not provided me with sufficient evidence "well beyond" or "considerably above" a mere possibility that release of the video footage could reasonably be expected to cause the harms set out in s. 15(1)(i) and (k) of *FOIPOP.* Without further evidence, I do not see a direct link that release of the video footage could result in the alleged harm. Therefore, I find that the public body cannot rely on s. 15(1)(i) or (k) to withhold the video footage from the applicant.

4. Did the public body meet its duty to sever exempted information from the responsive records as required by s. 5(2) of FOIPOP?

[28] Section 5(2) of *FOIPOP* provides:

> 5(2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Act, but if that information can reasonably be severed from the record an applicant has the right of access to the remainder of the record.

[29] This is often referred to as a the "duty to sever." This duty has been discussed by the OIPC in a variety of prior cases, including in Review Report 21-04, which also involved the Department of Justice. As my predecessor Tricia Ralph found in that case, public bodies must make reasonable efforts to sever records, including electronic records; her analysis beginning at para 36 also applies here:

> [36]…I am guided by comments made by former British Columbia Commissioner Loukidelis over 17 years ago:
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> > [64] It is not an option for public bodies to decline to grapple with ensuring that information rights in the Act are as meaningful in relation to large-scale electronic information systems as they are in relation to paper-based record-keeping systems. Access requests like this one test the limits of the usefulness of the Act. This is as it should be. Public bodies must ensure that their electronic information systems are designed and operated in a way that enables them to provide access to information under the Act. The public has a right to expect that new information technology will enhance, not undermine, information rights under the Act and that public bodies are actively and effectively striving to meet this objective.[11]
> >
> > …

[30] Just as a paper record requires a line-by-line analysis, a video record requires a frame-by-frame analysis. To suggest that it is unreasonable to sever a video file is not adequate. Video surveillance is not new technology. It is reasonable to expect a public body collecting personal information in the form of a video record would also have a process by which to sever that record to ensure it can comply with the access to information legislation.

[31] In the present case, the public body argued that none of the video records can reasonably be severed. Unfortunately, I do not believe this is a defensible approach. In the present case, several of the videos show outside areas of the court building or public areas – some from multiple angles. Arguments about blind spots in video coverage – as discussed in 21-04 – really do not apply to an exterior camera on parts of a public building that is accessible to the general public. Further, in 2025, there are a variety of tools – from the ability to blur videos, edit or zoom clips, or create still images – that would substantially reduce or eliminate the risks of the harms discussed in section 15. In areas where there are multiple cameras, the public body could release one angle and not the others – to mitigate against the perceived risks. Measures such as blurring

[11] Order 03-16, 2003 CanLII 49186 (BC IPC).

or creating still images – while not strictly severing the record – would also contribute to the public body meeting its obligations to assist applicants and facilitate access to records that are not exempt from disclosure.

[32] The public body likely has a strong argument for withholding all or portions of videos of detention cells, and hallways in secured areas. However, by failing to take a video-by-video, frame-by-frame approach to severing, and failing to employ other tools – such as creating still images, blurring or otherwise modifying the video to facilitate some access, the public body undermines its own arguments. I find the public body did not meet its duty to sever.

FINDINGS & RECOMMENDATIONS:

[33] I find that the public body did not process the records as contemplated by *FOIPOP*.

[34] I also find that the public body was not authorized to refuse access to the video footage requested by the applicant under s. 15 of *FOIPOP*.

[35] I recommend that the public body:

1. Reconsider its decision for the video footage records, and process each piece of video footage on an individual basis, applying the harms test to each piece of footage, and release any unsevered video footage within 90 days of the date of this review report.
2. Commit to review the best practices of similar public bodies in other jurisdictions with respect to severing or editing video records within 90 days of the date of this review report.
3. Consider whether video recordings from prescribed locations/institutions should be exempted from the application of *FOIPOP*. The public body's approach has been consistent for many years; video records are not severed or released and effectively treated as an exempt class of records.
4. Disclose the information in the paper records withheld under s. 15(1)(e) of *FOIPOP* within 45 days of the date of this review report.

August 15, 2025

David Nurse
Information and Privacy Commissioner for Nova Scotia