Nova Scotia Freedom of Information and Protection of Privacy
Report of Review Officer
Catherine Tully

REVIEW REPORT FI-10-19

July 16, 2015

Department of Justice

Summary: The applicant sought access to a copy of an investigation report concerning complaints that she was subjected to racism, bullying and harassment in the workplace. The applicant received a copy of the report, less third party names. Investigators' notes of their interview with the applicant were disclosed in full. Notes summarizing the content of witness interviews were withheld entirely based on s. 20(1) as they could not reasonably be severed per s. 5(2). The notes contained information about the applicant. Therefore, a summary was provided to the applicant per s. 20(5). The Review Officer found that the applicant was entitled to: non-personal information; her own complaint information against the respondents; and her own personal information, including the statements or opinions made about the applicant. However the Review Officer determined that the personal information of the applicant was inextricably interwoven with third party personal information and that it was therefore not reasonably possible to sever third party information from the record. The Review Officer determined that a summary was required under s. 20(5). The Review Officer found that the existing summary did not satisfy the requirements of s. 20(5) and recommended that a new summary be prepared. Guidance was offered on the preparation of a complaint summary. Names of third parties were not an issue in this review.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 3(1)(f), 5, 20, and 45; *Ombudsman Act*, RSNS 1989, c 327, s. 14.

Authorities Considered: BC Orders 331-1999; 01-07; 01-19; 02-21; 04-33; F08-03, F08-16; [2001] B.C.I.P.C.D. No. 20, NS Review Reports FI-07-38; FI-08-107; FI-09-29(M); FI-09-59(M); FI-10-59(M), Ontario Order P-651, [1994] O.I.P.C. No. 104; PO 1885 [2001] O.I.P.C.D. 59.

Cases Considered: *Canada (Information Commissioner)* v. *Canada (Canadian Transportation Accident Investigation and Safety Board)* [2006] F.C.J. No. 704 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 259; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 SCR 66, 2003 SCC 8; *Chesal v. Nova Scotia (Attorney General) et. al.*, 2003 NSCA 124; *House (Re)*, [2000] N.S.J. No. 473; *Dickie v. Nova Scotia (Department of Health)*1999 CanLII 7239 (NSCA), *Keating v. Nova Scotia (Attorney General)*, 2001 NSSC 85; *Nova Scotia (Public Prosecution Service)* v. *FitzGerald Estate*, 2015 NSCA 38; *O'Connor* v. *Nova Scotia*, 2001 NSCA 132.

INTRODUCTION:

[1] On December 29, 2009 the applicant submitted a request for access to an investigation report completed in April 2009 in response to a workplace complaint the applicant had filed. On February 11, 2010 the Department responded by providing partial access to the records. The Department relied on s. 20(1) of the *Freedom of Information and Protection of Privacy Act*[1] ("*FOIPOP*") as authority for withholding the information. On March 7, 2010 the applicant requested a review of the Department's decision.

ISSUES:

[2] Is the Department required by s. 20 of *FOIPOP* to withhold the information?
Is the Department required to summarize the information as set out in s. 20(5) of *FOIPOP*?

DISCUSSION:

A. Background

[3] In the spring of 2009 the applicant made a complaint with respect to certain activities in her workplace. The applicant identified seven individuals she alleged subjected her to bullying, harassment and racism in her workplace. Two investigators were assigned to investigate and, in the spring and summer of 2009 they conducted a series of interviews. The investigation was concluded with a three page investigation report. Attached to the report were type written notes taken by the investigators recounting the witness interviews.

[4] In response to the applicant's request for a copy of the investigation report, the applicant was provided with the three page report, four pages of notes regarding her interview and a one page summary of the investigator notes relating to the interviews of five other witnesses. Thirteen pages of investigator notes were withheld entirely. The investigation report was entirely disclosed except for the names and positions of the five witnesses. The investigator notes of the applicant's interview (four pages) were entirely disclosed to the applicant. The one page summary was created in response to the applicant's access request and was intended to summarize the 13 withheld pages. The Department cited s. 20 of *FOIPOP* as the authority for its decision.

[5] Section 20 of *FOIPOP* provides:

> 20 (1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
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> (2) In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether
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> > (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;
> >
> > (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;

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

(c) the personal information is relevant to a fair determination of the applicant's rights;
(d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;
(e) the third party will be exposed unfairly to financial or other harm;
(f) the personal information has been supplied in confidence;
(g) the personal information is likely to be inaccurate or unreliable; and
(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
(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;
(c) the personal information relates to eligibility for income assistance or social-service benefits or to the determination of benefit levels;
(d) the personal information relates to employment or educational history;
(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax;
(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;
(h) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations; or
(i) the personal information consists of the third party's name together with the third party's address or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
(a) the third party has, in writing, consented to or requested the disclosure;
(b) there are compelling circumstances affecting anyone's health or safety;
(c) an enactment authorizes the disclosure;
(d) the disclosure is for a research or statistical purpose and is in accordance with Section 29 or 30;
(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

(f) the disclosure reveals financial and other similar details of a contract to supply goods or services to a public body;
(g) the information is about expenses incurred by the third party while travelling at the expense of a public body;
(h) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the request for the benefit; or
(i) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the request for the benefit or is referred to in clause (c) of subsection (3).

(5) On refusing, pursuant to this Section, to disclose personal information supplied in confidence about an applicant, the head of the public body shall give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

(6) The head of the public body may allow the third party to prepare the summary of personal information pursuant to subsection (5).

B. Burden of Proof

[6] Usually it is the Department who bears the burden of proving that the applicant has no right of access to a record. However, where the exemption applied is s. 20, it is the applicant who bears the burden of proof:

45 (1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.
(2) Where the record or part that the applicant is refused access to contains personal information about a third party, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.
(3) At a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party,
(a) in the case of personal information, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and
(b) in any other case, the burden is on the third party to prove that the applicant has no right of access to the record or part.

[7] The Nova Scotia Court of Appeal recently further clarified the burden of proof in circumstances where a presumption under s. 20(3) of *FOIPOP* applies to the personal information.[2] In *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate*[3] ["*Fitzgerald*

[2] The application of s. 20(3) to the information at issue here is discussed below on page 10.
[3] 2015 NSCA 38.

Estate"] the court notes that s. 45(3)(a) places the burden of proof on the person seeking the personal information and further, that when a presumption applies under s. 20(3) it is an error of law to treat the absence of evidence as satisfying a burden of proof to overcome a statutory presumption.[4]

C. General approach to records containing personal information

[8] Section 20 of *FOIPOP* sets out the rules regarding when and if personal information of a third party may be disclosed. The design of s. 20 fits well within the overall purposes of *FOIPOP*. The Nova Scotia Court of Appeal in *O'Connor v. Nova Scotia,* 2001 NSCA 132 highlighted the uniqueness of the purpose provisions in Nova Scotia's *FOIPOP*:

> [54] (…) I find that the purpose clause in the Nova Scotia statute is unique (among FIPPAs). This is the only province whose legislation declares as one of its purposes a commitment to ensure that public bodies are "fully accountable to the public" (underlining mine)…
>
> [55] In summary, not only is the Nova Scotia legislation unique in Canada as being the only Act that defines its purpose as an obligation to ensure that public bodies are *fully* accountable to the public; so too does it stand apart in that in no other province is there anything like s. 2(b)…
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> [57] I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada (…)

[9] The court emphasized the need for public bodies to be fully accountable and highlighted that any limitations on full disclosure must be limited and specific. Section 20 is therefore a limited and specific exemption.[5] It contemplates that personal information may be disclosed, it even contemplates that such disclosure may be an invasion of third party personal privacy. What it prohibits is a disclosure that would result in an "unreasonable invasion of personal privacy".[6]

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[4] *Ibid*, at para. 92.

[5] The Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)* 2003 SCC 8 at para. 21 discussed the balance between the privacy rights set out in the federal *Privacy Act* and access rights provided for in the *Access to Information Act*. The court states, "The statement in s. 2 of the *Access Act* that exceptions to access should be "limited and specific" does not create a presumption in favour of access. Section 2 provides simply that the exceptions to access are limited and that it is incumbent on the federal institution to establish that the information falls within one of the exceptions". This is the approach I take here.

[6] The authority to disclose personal information is set out in s. 27 of *FOIPOP* which provides in s. 27(a) that a public body may disclose personal information only in accordance with this *Act* or as provided pursuant to any other enactment. Based on s. 27(a) public bodies are authorized to disclose third party personal information in response to access to information requests as set out in s. 20 of *FOIPOP*.

[10] 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.[7] The four steps are:

1. Is the requested information "personal information" within s. 3(1)(i)? If not, that is the end. Otherwise, I must go on.
2. Are any of the conditions of s. 20(4) satisfied? Is so, that is the end.
3. Is the personal information presumed to be an 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 appellant 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?

D. Position of the Parties

[11] When the Department of Justice responded to the applicant's request it said that it was withholding the information pursuant to s. 20 of *FOIPOP* and it cited sections 20(2)(f) (supplied in confidence) and s. 20(3)(d) (work history) as the relevant considerations in its decision to deny access to a portion of the records. In its submission to the Review Officer the Department also relied upon sections 20(2)(g) (information likely inaccurate or unreliable) and s. 20(2)(h) (unfairly damage the reputation of a third party). With respect to the one page summary the Department now says that it agrees that the summary could have had more details. I will examine the Department's submissions in the discussion of each of these provisions below.

[12] The applicant's submission focussed on what she believes was a lack of transparency in the investigation of her workplace complaint. She states that she was only interviewed once, that she learned by coincidence that the investigation had ended and that the only people who participated in the investigation other than herself were the persons whose actions were behind the filing of her complaint. She emphasized her belief that in filing the complaint she had a right to know the outcome. She states, "I kindly ask you to allow me to have access to the full investigation file after deleting the names of the person's involved. At this stage I don't care about who said what but I do care about transparency, fairness of the process and the professionalism of the people who conducted the investigation." The applicant was not willing to accept a summary of the withheld information.

[13] Given that the applicant has received the full investigation report with only the witness names redacted and a complete unredacted copy of the investigator's notes of her interview, the only records at issue are the thirteen pages of notes regarding witness interviews. The names of those interviewed are not at issue, the applicant is not seeking that information.

[7] See for example *House (Re),* [2000] N.S.J. No. 473, and, *Sutherland v. Dept. of Community Services,* 2013 NSSC 1. This approach has been consistently followed by former Review Officers. See for example FI-08-107 and FI-09-29(M).

FINDINGS & RECOMMENDATIONS:

A. Is the Department required by s. 20 of *FOIPOP* to withhold the information?

[14] I will apply the four step approach to the records at issue in this case.

1. Is the requested information personal information?

[15] Personal information is broadly defined in s. 3(1)(i) of *FOIPOP*:

> "personal information" means recorded information about an identifiable individual, including
>
> (i) the individual's name, address or telephone number,
> (ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,
> (iii) the individual's age, sex, sexual orientation, marital status or family status,
> (iv) an identifying number, symbol or other particular assigned to the individual,
> (v) the individual's fingerprints, blood type or inheritable characteristics,
> (vi) information about the individual's health-care history, including a physical or mental disability,
> (vii) information about the individual's educational, financial, criminal or employment history,
> (viii) anyone else's opinions about the individual, and
> (ix) the individual's personal views or opinions, except if they are about someone else;

[16] Personal information is defined in s. 3 of *FOIPOP* as recorded information <u>about</u> an identifiable individual including a non-exhaustive list of information captured by that definition. A few general observations about this definition are in order. First, the information must relate to an "identifiable" individual. Therefore, the evidence must establish that the information at issue can be related to an identifiable individual. The fact that an individual is named is an obvious identifier but sometimes, it is the content of the document itself that identifies the individual even where no name is present.

[17] Second, the information must also be "about" that identifiable individual. Just because a person is named in a document does not mean that the <u>other</u> information contained in the document is "about" that individual.

[18] Finally, it is not at all unusual for information contained in a document to be information "about" more than one individual. In fact the same information can be about several people. When records contain the combined information of several people they can be very challenging to evaluate under *FOIPOP*.

[19] The proper approach to evaluating whether or not information, particularly combined information, is "personal information" is discussed by the Nova Scotia Court of Appeal most

recently in *FitzGerald Estate.*[8] The court noted that the first step of the analysis is to determine whether or not the information at issue is "personal information" within the meaning of s. 3 of *FOIPOP*. In discussing the motions judge reasoning, the court states, at para. 67:

> It appears that the motions judge also reasoned that extracts of "personal information" relinquished that status because the extracts appeared in documents that generally were "about [Mr. FitzGerald] and his involvement in the crime for which he was convicted". In other words, the documents' connection to Mr. FitzGerald's prosecution subsumed the extracts' connection to the third party's privacy. Insofar as the judge adopted that reasoning, he misinterpreted "personal information" in s. 3(1)(i) and its place in the test under s. 20. By trumping the third party's privacy interest with Mr. FitzGerald's disclosure interest at the threshold definitional stage, the judge engaged in a premature balancing exercise contrary to the principles set out in Dickie, pars. 34-36.

[20] In this case the applicant was interviewed by the investigators. In the course of her interview the applicant identified third parties and gave opinions about these third parties including opinions regarding the quality of their work. The identity of the applicant as the complainant and those portions of her statement relating to her own history and qualifications were clearly her personal information. However her opinions about third parties were the third parties' personal information. Yet on request, the Department provided her with a complete copy of the investigator's notes of her interview. This disclosure was authorized not because the applicant's witness statement as a whole was her "personal information" – it clearly was not. The disclosure was authorized because it was not an unreasonable invasion of the third party's personal privacy. The information disclosed back to the applicant was information and opinions she had provided. She already knew all of the information contained in the statement. This is a relevant consideration in determining whether or not a disclosure would be an unreasonable invasion of personal privacy. Passage of time, the sensitivity of the information, the nature of the circumstances in which the original information was supplied will also be relevant in weighing this factor overall.

Personal information in witness statements

[21] The British Columbia *Freedom of Information and Protection of Privacy Act* [9]contains a provision very similar to s. 20 of the Nova Scotia *FOIPOP*. In a series of cases the former British Columbia Information and Privacy Commissioner set out a number of observations with respect to information typically found in witness statements that does and does not qualify as "personal information" that I adopt as applicable under Nova Scotia law:

- Witnesses' observations about relevant facts – namely daily events and practices at the worksite and events do not qualify as "personal views or opinions" of those making the statements nor are these factual statements otherwise personal information of the individuals making the statement.

[8]*FitzGerald Estate* at paras. 62-67 citing with approval *Nova Scotia (Health) v. Dickie*, 1999 NSCA 62 at paras. 34-35.

[9] RSBC 1996, c 165.

- Witnesses' descriptions of his or her perceptions of what happened including who said what at the time do not qualify as personal information of that witness.
- A witnesses' statement about what she or he did – or when or how – are the personal information of that employee even though they are factual observations about how that person performed his or her employment duties.
- One employee's statements about the where, when and how of another employee's performance of her or his job constitutes the personal information of that other employee.[10]
- Information that relates solely to the witnesses' past jobs, individual actions, reactions, personal views and behaviours in the workplace constitutes personal information and employment history.[11]

[22] I find that the witness statements consist of four categories of information as described below:

Third party personal information:

- The identity of the interviewees (third parties) some of whom may also have been the subject of the applicant's complaint;[12]
- Third party responses to the applicant's complaints and allegations;
- Third party descriptions of decisions they made about certain workplace administrative matters;
- Third party accounts of their dealings with the applicant in the workplace and comments about their own actions or behaviour; and,
- A list of five individuals identified by one witness as having been present during one of the alleged incidents (at page 9 of the records). The list only provides names and positions for two individuals, names for two others and position only for the fifth individual. The list indicates that these individuals were present in their work capacity at the time of an incident.

Personal information of the applicant:

- Description of the applicant's actions during the incidents described in her complaint which include opinions about the quality of the applicant's work or some evaluation or description of her behaviour.

Personal information of the applicant combined with the personal information of third parties:

- Second hand retelling of opinions regarding the applicant allegedly supplied by other identified employees. These statements in this case fall short of factual observations of the witness providing the statement. Because of the manner in which the notes are written it is unclear whether the information is first, second or even third hand

[10] BC Order 01-19, [2001] B.C.I.P.C.D. No. 20 at para. 24, Order 04-33 at para. 20.
[11] BC Order 04-33, at para. 20.
[12] In order to avoid disclosing the identity of the interviewees I cannot confirm whether any of the interviewees were also individuals that were the subject of the applicant's complaints.

information – closer to hearsay than observation. It is the identity of these other employees as witnesses that constitutes third party personal information. Their opinions of the applicant constitute the applicant's personal information.

Non-personal information:

- Description of work related processes generally;
- Description of tasks assigned specifically to the applicant or any other employee with no evaluative comment.

[23] I will next determine whether the disclosure of any of the third party personal information would be an unreasonable invasion of a third party's personal privacy.

2. Are any of the conditions in s. 20(4) satisfied?

[24] Section 20(4)(e) provides, as follows:

> A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if (…)
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff

[25] One witness statement contains the names of four individuals present during an incident and identifies a fifth individual by position only. The observation that these individuals were present during an incident is factual not personal. Two of the four individuals are also identified by position. This information (name plus position) falls within section 20(4)(e) since they are identified as employees of a public body. Therefore I find that s. 20 does not apply to the two names and positions of these third parties. With respect to the fifth individual in the list, he or she is identified only by position. Section 20 does not apply because there is no identifiable individual associated with that information.

3. Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s. 20(3)?

[26] The record at issue consists of thirteen pages of typed investigator notes that provide the investigator's report of the interview of five witnesses. The notes were entirely withheld in response to the access request although a one page summary was provided.

[27] The Department's position is that the presumption in s. 20(3)(d) applies to the witness statements. Section 20(3)(d) provides:

> 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.

[28] The witness statements here contain very similar information to that discussed in BC Order 04-33 at para. 29:

> Most of the withheld information in the records is, in my view, the employment history of both the third parties and the applicant, in that it consists of the third parties' responses to the applicant's complaints and allegations or their comments about their involvement in the workplace incidents in question, as well as related matters, involving both the applicant and the third parties. In these portions, the third parties describe decisions they made about certain workplace administrative matters involving the applicant, recount their dealings with the applicant in the workplace and make comments about his actions or behaviour or describe their part in certain incidents involving the applicant, recount their dealings with the applicant in the workplace, make comments about his actions or behaviour or describe their part in certain incidents involving the applicant. These portions all relate to the matters about which the applicant complained and incidents in which the applicant took part.

[29] The Department's position is that the presumption in s. 20(3)(d) applies to this information because it is the employment history of third parties.

[30] The Court of Appeal in *Dickie v. Nova Scotia (Department of Health)*[13] ["*Dickie*"] determined that the following type of information constituted employment history within the meaning of s. 20(3)(d) of *FOIPOP*:

> [44] By way of contrast, the Case Record sets out the responses of the third party to questioning by his employer about the substance of the complaint. This, in my opinion, is part of his employment history within the meaning of s. 20(3)(d) because it sets out statements about his conduct elicited in an interview by his employer and as part of an investigation into his work-related conduct.
>
> [45] The term "employment history" is not defined in the Act, but both the words themselves and the context in which they are used suggest that the ordinary meaning of the words in the employment context is intended. In the employment context, employment history is used as a broad and general term to cover an individual's work record. As Commissioner Flaherty put it in Order No. 41-1995; British Columbia (Minister of Social Services), [1995] B.C.I.P.C.D. No. 14:
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> > I agree ... that employment history includes information about an individual's work record. I emphasize the word "record" because in my view this incorporates significant information about an employee's performance and duties. (at p. 6)
>
> [46] Section 20(3)(d) emphasizes the generality of the expression by speaking not simply of personal information which is employment history, but of personal information

[13] 1999 CanLII 7239 (NSCA).

which "relates to" employment history. The importance of privacy in this area is further underlined by the specific prohibition of disclosure respecting labour relations matters in s. 21(1) and by the much more confined entitlement to information relating to the "position, functions or remuneration as an officer ... of a public body ..." in s. 20(4).

[31] Applying the principles from the *Dickie* decision I find that the presumption in s. 20(3)(d) applies to the following types of information:

- Third party responses to the applicant's complaints and allegations against them;
- Third party descriptions of decisions they made about certain workplace administrative matters that reflect on their own performance;
- Third party accounts of their dealings with the applicant in the workplace and comments about their own actions or behaviour;
- The identities of individuals who were the subject of allegations of racism, bullying and harassment.

[32] The actual identity (names) of the witnesses who supplied the statements is the personal information of these third parties. Identity of individuals simply as witnesses, is not in my opinion, subject to the presumption in s. 20(3)(d). However, the identity of the individuals who are the subject of allegations of racism, bullying and harassment are, in my opinion subject to the presumption in s. 20(3)(d) of *FOIPOP*.[14] The content of the witness statements in this case makes clear whether the witness is also the subject of the complaint. It is this combined information – name and the fact that the individual is the subject of complaints of racism, bullying and harassment that constitutes employment history for the purposes of s. 20(3)(d).

4. 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?

[33] There are three types of third party personal information potentially present in the record: [15]

1. Work history information subject to the presumption in s. 20(3)(d);
2. The identity of the third party witnesses who supplied statements but were not the subject of the complaints - this is simply personal information not subject to any presumption in s. 20(3); and
3. The identity of third parties not interviewed but whose opinions and identity are disclosed by individuals who were interviewed – again personal information not subject to any presumption in s. 20(3).

[14] This approach is consistent with the decision of the Nova Scotia Court of Appeal in *Dickie v. Nova Scotia (Department of Health)*1999 CanLII 7239 at paras. 36 and 43.

[15] The applicant is not aware of the identity of the witnesses. She believes that they are only the individuals who were the subject of her complaints. In order to avoid disclosing the content of the record I have considered the possibility that the record contains both witnesses who were the subject of the complaint and those who were not.

[34] I must now evaluate whether or not the disclosure of the personal information would constitute an unreasonable invasion of the third parties' personal privacy. The burden of proof on this issue rests with the applicant.

[35] Four considerations were raised by the parties as being relevant to determining the appropriate balancing. Those considerations were:

> 20(2) In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether,
> (…)
> (c) the personal information is relevant to a fair determination of the applicant's rights;
> (f) the personal information has been supplied in confidence;
> (g) the personal information is likely to be inaccurate or unreliable; and
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant;

Section 20(2)(c): fair determination of rights

[36] In essence the applicant's position is that the information is necessary for a fair determination of her rights as contemplated in s. 20(2)(c). In Ontario Order P-651, [1994] O.I.P.C. No. 104, the equivalent of s. 20(2)(c) was held to apply only where *all* of the following circumstances exist:

> 1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
>
> 2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
>
> 3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
>
> 4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.

[37] This formulation has been followed in other jurisdictions and I agree that it applies with respect to s. 20(2)(c) of Nova Scotia's *FOIPOP*.[16] The applicant indicated that she had no other proceeding underway and that she might, at some future time, contemplate a complaint to the Ombudsman. Without any clear indication of an intention to proceed and the nature of the proceeding, it is impossible to know whether a legal right would be involved and whether the information in question could have some bearing on, or significance for, determination of the right in question. I further note that the *Ombudsman Act*[17] provides that the Ombudsman has discretion to refuse to investigate a matter if the complainant has knowledge of the matter for

[16] See for example Review Report FI-09-29(M) and BC Orders 02-21 and 01-07.
[17] *Ombudsman Act*, RSNS 1989, c 327, as amended, s. 14(1)(d).

more than one year before complaining to the Ombudsman. Six years have now passed since the events in question took place. It is equally difficult to determine whether the personal information is necessary in order to prepare for the potential proceeding. On that basis I am unable to find that s. 20(2)(c) is a relevant factor in this case.

Section 20(2)(f): supplied in confidence

[38] The Department's evidence is that the investigator's notes did not mention whether the information was provided in confidence. The IAP Administrator for the Department stated that she contacted both investigators. Neither recalled mentioning that the information would be kept confidential but, given the passage of time, both couldn't say for sure that they didn't provide the assurance. One investigator believed it would have been reflected in the notes had they mentioned confidentiality. The notes make no reference to confidentiality.

[39] The Department points to a list of factors set out in *Keating v. Nova Scotia (Attorney General)*, 2001 NSSC 85 at para. 56 ["*Keating*"] as being relevant in determining whether or not information is "supplied" in confidence. That paragraph actually discusses whether information was "received" in confidence. As I stated in Review Report FI-09-59(M)[18] where the term "supplied" is used the focus is more on the intention the supplier had to keep the information confidential. Where the term "received" is used the focus is on the intentions of both parties.[19] Keeping in mind then that the fact that the use of the term "supplied" means it is necessary to focus on the intention of the supplier, I am of the view that the following factors from the *Keating* decision are relevant to considering whether information is supplied in confidence:

> 1. What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?
>
> 2. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
>
> 3. Was the record in question explicitly stated to be provided in confidence? (This may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to receive the record in confidence or may not actually have understood there was a true expectation of confidentiality.)
>
> 4. Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)
>
> 5. Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?
>
> 6. Do the actions of the public body and the supplier of the record - including after the supply - provide objective evidence of an expectation of or concern for confidentiality?

[18] Nova Scotia Review Report FI-10-59(M) at para. 38.
[19] Nova Scotia Review Report FI-10-59(M) at para. 38.

> 7. What is the past practice of the recipient public body respecting the confidentiality of similar types of information when received from the supplier or other similar suppliers? [20]

[40] The nature of the information in this case is work history, including allegations of misconduct by some of the third parties. For others, it is merely their identity as witnesses. The investigation was a workplace investigation into serious allegations of misconduct including bullying, harassment and racism by employees. The Department argues that employees participating in such an investigation would reasonably believe that their statements would be kept confidential.

[41] The Nova Scotia Court of Appeal in *Dickie* said this about workplace investigations and the expectation of confidentiality at para. 60:

> I agree with the respondent that simply labeling documents "confidential" or "without prejudice" does not, of itself, make the documents confidential. However, it is widely understood that when an employee is required to provide information in relation to allegations of misconduct of a fellow employee, the information will be treated as confidential to the process for which it was elicited….The fact that the information may have to be communicated for the purposes of and within the process does not make it any less confidential.

[42] The Department refers to the current Respectful Workplace Policy as providing evidence of confidentiality. There are two difficulties with this. First, there is no evidence that this investigation was conducted pursuant to that policy. Second, the policy provided is dated as being effective July 3, 2012. This investigation took place in the summer of 2009.

[43] Considering the seven factors listed by the court in the *Keating* decision, I am of the view that the following are relevant considerations in this case:

- Some of the information at issue is sensitive. It is responses to allegations of racism and bullying in the workplace. Such allegations have the potential to significantly impact an individual's career. Individuals subject to such an investigation could reasonably expect that they were supplying their own personal information in confidence.
- The record was prepared for the purposes of conducting a workplace investigation. While there would likely have been an expectation among the participants that some information would be disclosed in the final report, this would not, in my opinion, undermine what the Nova Scotia Court of Appeal noted is the "widely understood" expectation that information supplied in this context would be treated as confidential to the process for which it was elicited.

[20] BC Order 331-1999 at para. 37, cited with approval in *Keating v. Nova Scotia (Attorney General),* 2001 NSSC 85 at para. 56, *Chesal v. Nova Scotia (Attorney General) et al.,* 2003 NSCA 124 at para. 72 and NS Review Report FI-07-38 at p. 13 and NS Review Report FI-10-59(M).

- There is no evidence of an explicit statement of confidentiality nor is there any evidence of an agreement or understanding regarding confidentiality. The investigators indicate that they would likely have mentioned confidentiality in the investigation notes had they given any assurances of confidentiality. I note, however, that s. 20(2)(f) refers to "supplied" in confidence and so it is the perception of the supplier of the information that is most at issue here.
- The Department argues that if individuals who are subject to these types of complaints fail to participate, they face the prospect of disciplinary actions based on the complaints made against them. Therefore, the Department says, they had no option but to participate. Mandatory participation, as noted above, is a factor that favours finding that information is not supplied in confidence.
- I was not provided with any evidence with respect to factors 6 and 7 noted above.

[44] Overall I conclude on the balance of probabilities that the participants in this workplace investigation had an expectation that they were supplying information in confidence.

Section 20(2)(g) likely to be inaccurate or unreliable

[45] The Department points out that some of the information in the record includes witnesses claiming that other individuals made certain statements about the events or about the applicant. This is the information I refer to as "hearsay" above. The Department points out that this information could be inaccurate. I agree with respect to this specific type of information.

[46] The Department however, also states that because the documents at issue (including statements of witnesses who were interviewed) are typed notes from interviews, the interviewers may have inaccurately recorded information provided by the witnesses.

[47] If this is the case, my view is this factor favours disclosure as much as exemption. If the information contains factual inaccuracies about the applicant she should have the opportunity to correct her personal information which can only occur with disclosure. The Department's point though is that the information may also be inaccurate with respect to what the witnesses actually said or did.

[48] I am not satisfied that this factor weighs heavily in either direction with respect to witnesses who were interviewed. The investigators were hired to conduct the investigation. It was their job to accurately record information gathered and it was this information that they used to reach the conclusions in their investigation. There is nothing about the documentation that appears to have been created contemporaneously with the interviews, that suggests that it is inherently unreliable. I conclude that evidence fails to support a finding that the information is likely to be inaccurate or unreliable with one exception noted above.

Section 20(2)(h) unfairly damage the reputation of any person

[49] The Department argues that many of the individuals that were the subject of the applicant's complaints or who otherwise participated in this investigation still work in the same workplace. As a result it says that disclosure of the witness statements could damage the reputation of these individuals because of the serious nature of the allegations. This despite the fact that the

investigation determined that the allegations were unfounded. In my view this factor is most relevant to whether or not the identity of the individuals who were the subject of the complaint should be disclosed.

Other general factors to consider

[50] Section 20(2) provides that public bodies shall consider all relevant circumstances including those enumerated in s. 20(2). Other factors relevant to this case are how sensitive the third party information is and any general considerations of the knowledge of the applicant. The sensitive nature of the allegations in my opinion weighs against disclosure. The fact that the applicant knows the identity of the individuals who are the subject of the allegations of racism, bullying and harassment is a relevant consideration that weighs in favour of disclosure of this information in this case.

Findings with respect to "unreasonable invasion of personal privacy"

[51] As noted above, there are three types of third party personal information at issue here.

1. Work history information subject to the presumption in s. 20(3)(d);
2. The identity of the third party witnesses who supplied statements but were not the subject of the complaints - this is simply personal information not subject to any presumption in s. 20(3); and
3. The identity of third parties not interviewed but whose opinions and identity are disclosed by individuals who were interviewed – again personal information not subject to any presumption in s. 20(3).

[52] With respect to the information subject to the presumption in s. 20(3)(d) the court in *Fitzgerald Estate* has made it clear that the burden of proof on the applicant cannot be satisfied in the absence of evidence. In this case, I conclude that the applicant has not satisfied the burden of proof. The presumption is not outweighed by any of the considerations in s. 20(2) or generally.

[53] I find that it would be an unreasonable invasion of the third parties' personal privacy to disclose any of the following information:

- Third party responses to the applicant's complaints and allegations against them;
- Third party descriptions of decisions they made about certain workplace administrative matters that reflect on their performance;
- Third party accounts of their dealings with the applicant in the workplace and comments about their own actions or behaviour;
- The identities of individuals who were the subject of allegations of racism, bullying and harassment.

[54] With respect to the disclosure of the identity of any third party witness who was not the subject of a complaint – the factors in favour of non-disclosure are that the individuals likely believed they were supplying information in confidence and that the information would only be used for the purposes of the workplace investigation. Factors in favour of disclosure include the fact that such information is not sensitive personal information. These individuals participated in the investigation as part of their workplace duties. The Court in *Dickie* concluded in similar

circumstances that the disclosure of the identity of such witnesses should be released.[21] Likewise other jurisdictions have concluded that the disclosure of the identity of employees as witnesses to workplace incidents is not an unreasonable invasion of the employees' personal privacy.[22]

[55] The applicant has indicated that she no longer wishes to know the identity of the witnesses and for this reason I conclude that the information need not be disclosed as it is now outside the scope of her request.

[56] The final category of third party personal information is the identity of third parties not interviewed but whose opinions and identity are disclosed by individuals who were interviewed – again personal information not subject to any presumption in s. 20(3). In my view, there is a higher probability that this information is inaccurate. The individuals named by witnesses are unaware that this information was provided and have not been given the opportunity to provide the information directly. Their reputations could be affected, particularly if the second hand telling of the information is inaccurate. On that basis I am of the view that the balance favours finding that the disclosure of this information would be an unreasonable invasion of the personal privacy of these individuals. However, where the only information disclosed is the name of a potential witness without any indication of his or her opinions or role, I am of the view that the balance favours the disclosure of name alone.

[57] I find that it would be an unreasonable invasion of personal privacy to disclose the opinions and identity of individuals who were not interviewed.

[58] I find that it would not be an unreasonable invasion of personal privacy to disclose the name of an individual identified simply as a potential witness.

Duty to sever

[59] I began this discussion by identifying information that qualified as "personal information" and some information that did not. The applicant is entitled to information that qualified as her own personal information, non-personal information, information to which s. 20(4) applies and third party information that can be disclosed without unreasonably invading the third party's personal privacy.

[60] The final step is to determine whether the Department can provide this information to the applicant as set out in section 5(2) of *FOIPOP*, which reads as follows:

> 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.

[61] The challenge here is that the applicant is well aware of the identity of the various individuals in the workplace. Even non-personal information such as the description of the

[21] *Dickie* at para. 72.
[22] BC Order 01-19 at para. 47.

applicant's work duties could potentially identify the witness because the statements are from each individual's unique perspective. In many cases it appears that only one person could have provided the information or the perspective given. Further, the personal information of the applicant is inextricably interwoven with third party personal information.

[62] I find that it is not possible to reasonably sever the witness statements to protect the personal information of third parties while disclosing the remainder of the record to the applicant. Therefore I recommend that the Department continue to withhold the witness statements in their entirety.

[63] In the case of personal information of the applicant, *FOIPOP* provides another possible solution in the form of a summary.

B. Is the Department required to summarize the information as set out in s. 20(5) of *FOIPOP*?

[64] Section 20(5) sets out the circumstances when a public body has an obligation to create a summary, it reads:

> 20(5) On refusing, pursuant to this Section, to disclose personal information supplied in confidence about an applicant, the head of the public body shall give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

[65] The requirement to create a summary is mandatory but several preconditions must exist for s. 20(5) to apply:

- The personal information about an applicant must have been supplied in confidence;
- The information to be summarized must be personal information about the applicant, not any third party personal information; and
- The summary must be prepared without disclosing the identity of a third party.

[66] In this case I have already determined that the information was supplied in confidence. I have also determined that a portion of the record contains the personal information of the applicant. Therefore it remains to be determined whether a summary can be prepared without disclosing the identity of any third party.

[67] I note in passing that s. 20(6) of *FOIPOP* permits the Department to allow the third party to prepare a summary in appropriate circumstances. This is not, in my opinion, an appropriate case for a third party prepared summary mainly because the best strategy for protecting the identity of the third parties in this case is preparing a combined summary, not individual summaries.

[68] The Department already attempted to prepare a summary some time ago. The Department in its submission conceded that the summary "could have had more detail". I agree. I find that

the existing summary does not satisfy the requirements of s. 20(5) in that it fails to adequately summarize the personal information of the applicant.

[69] The same or similar questions were asked of a number of individuals about the applicant, her allegations and her dealings with others. Even where similar questions were not asked, witnesses were each asked for their perspective on the applicant's various allegations, usually by the date of the incident. I believe it is possible to create a summary under headings that are either questions asked of more than one witness or headings that simply identify the alleged incident being discussed followed by a summary of the various answers to these questions without revealing the identities of the third parties who supplied this information in confidence.

[70] I recommend that the Department prepare a new summary that includes the following information:

- A summary of questions asked of more than one witness followed by a summary of the answers that contain the personal information of the applicant.
- A summary/heading identifying the alleged incident at issue followed by a summary of the answers that contain the personal information of the applicant.
- In general the summary should include information related specifically to the applicant – the nature of her work tasks, opinions about the quality of her work including the various expressions of concerns regarding the applicant.
- The summary should not, of course, reveal the identities or other personal information of the third parties.

SUMMARY OF FINDINGS & RECOMMENDATIONS:

A. Is the Department required by s. 20 of *FOIPOP* to withhold the information?

[71] Yes the Department is required by s. 20 of *FOIPOP* to withhold portions of the information contained in the witness statements. I make the following findings with respect to the application of s. 20 to the records at issue:

1. It would be an unreasonable invasion of the third parties' personal privacy to disclose any of the following information:
    - Third party responses to the applicant's complaints and allegations against them;
    - Third party descriptions of decisions they made about certain workplace administrative matters that reflect on their performance;
    - Third party accounts of their dealings with the applicant in the workplace and comments about their own actions or behaviour;
    - The identities of individuals who were the subject of allegations of racism, bullying and harassment.

2. Since the applicant has indicated that she no longer wishes to know the identity of the witnesses I conclude that the information need not be disclosed as it is now outside the scope of her request.

3. It would be an unreasonable invasion of the personal privacy of third parties to disclose the opinions and identity of individuals who were not interviewed.

4. It would not be an unreasonable invasion of personal privacy to disclose the names of individuals identified simply as a potential witness.

[72] Because the personal information of the applicant is inextricably interwoven with third party personal information I find that, pursuant to s. 5 of *FOIPOP* it is not possible to reasonably sever the witness statements to protect the personal information of third parties while disclosing the remainder of the record to the applicant.

2. Is the Department required to summarize the information as set out in s. 20(5) of *FOIPOP*?

[73] I find that the Department is required to summarize the information about the applicant as set out in s. 20(5) of *FOIPOP* and that the existing summary does not satisfy the requirements of s. 20(5).

[74] **Recommendation #1:** I recommend that the Department continue to withhold the witness statements in their entirety.

[75] **Recommendation #2:** Consistent with s. 20(5) of *FOIPOP* I recommend that the Department prepare a new summary that includes the following information:

- A summary of questions asked of more than one witness followed by a summary of the answers that contain the personal information of the applicant.
- A summary/heading identifying the alleged incident at issue followed by a summary of the answers that contain the personal information of the applicant.
- In general the summary should include information related specifically to the applicant – the nature of her work tasks, opinions about the quality of her work including the various expressions of concerns regarding the applicant.
- The summary should not, of course, reveal the identities or other personal information of the third parties.

[76] **Recommendation #3:** I recommend that the new summary be provided to the applicant within 60 days of receipt of this report.

July 16, 2015

Catherine Tully
Freedom of Information and Protection of Privacy Review Officer for Nova Scotia