Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Catherine Tully

REVIEW REPORT FI-10-71

September 17, 2015

Department of Justice

Summary: The applicant, a former employee of the Department of Justice ("Department"), requested access to records relating to a disciplinary matter. The Department refused to disclose the records on the basis that disclosure would be an unreasonable invasion of third party personal privacy under s. 20(1) of the *Freedom of Information and Protection of Privacy Act* ("*FOIPOP*"). Other information was withheld as it was subject to solicitor-client privilege under s. 16 and/or disclosure could reasonably be expected to threaten somebody else's safety under s. 18. The Commissioner found that the Department correctly applied s. 20(1) of *FOIPOP* to all but one small portion of the record. The evidence in the record revealed that ss. 16 and 18 were correctly applied but that the Department failed to demonstrate that it exercised its discretion in deciding whether the exemption should have been relied upon to withhold access.

Statutes Considered: *Access to Information Act*, RSC 1985, c A-1; *Freedom of Information and Protection of Privacy Act*, CCSM c. F175, s. 24; *Freedom of Information and Protection of Privacy Act*, RSA 200, c F-25, s. 18(1); *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, s. 19; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F31, s. 20; *Freedom of Information and Protection of Privacy Act,* SNS 1993, c 5*,* ss. 16, 18, 20, 45; *Municipal Government Act*, SNS 1998, c 18, s. 480.

Authorities Considered: Alberta: Order F2014-38, 2014 CanLII 72623 (AB OIPC); **British Columbia:** Orders 323-1999, 1999 CanLII 779 (BC IPC); 00-28, 2000 CanLII 14393 (BC IPC); 01-01, 2001 CanLII 21555 (BC IPC); F15-25, 2015 BCIPC 27 (CanLII); Order 00-38, 2000 CanLII 14403 (BC IPC); **Newfoundland**: Order A-2014-05, 2014 CanLII 8571 (NL IPC); **Nova Scotia:** Reports FI-97-75&76, 1998 CanLII 3725 (NS FOIPOP); FI-04-22, 2004 CanLII 4006 (NS FOIPOP); FI-05-08, 2005 CanLII 18828 (NS FOIPOP); FI-07-75, FI-08-104, 2011 CanLII 25161 (NS FOIPOP); FI-10-19, FI-12-01(M); **Ontario**: Orders PO-1939, 2001 CanLII 26138 (ON IPC); PO-2003, 2002 CanLII 46405 (ON IPC); PO-3446, 2015 CanLII 1539 (ON IPC).

Cases Considered: *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII); *Minister of Public Safety and Emergency Preparedness and the Minister of Justice v. the Information Commissioner of Canada*, 2013 FCA 104; *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate* 2015 NSCA 38; *R. v. Campbell,* [1999] 1 SCR 565, 1999 CanLII 676 (SCC); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII).

Other Sources Considered: *Canadian Oxford Dictionary*, (New York: Oxford University Press, 2011), "safe" and "safety"; Nova Scotia Barristers' Society. *Code of Professional Conduct*, updated February 22, 2013, (online: http://nsbs.org/regulation); Ronald Manes and Michael Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths Canada Ltd., 1993).

INTRODUCTION:

[1] On June 21, 2010 the applicant, a former employee of the Department, requested access to records relating to a disciplinary matter. The Department provided partial access to the record citing the need to protect third party personal information, health and safety concerns and the need to protect solicitor-client privilege. The applicant filed a review of the Department's decision to this office on August 25, 2010.

ISSUES:

[2] There are three issues raised by this request:

(a) Is the Department authorized to refuse access to information under s. 16 of *FOIPOP* because it is subject to solicitor-client privilege?
(b) Is the Department authorized to refuse access to information under s. 18 of *FOIPOP* because disclosure of the record could reasonably be expected to threaten anyone else's safety?
(c) Is the Department required to refuse access to information under s. 20 of *FOIPOP* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

DISCUSSION:

Background

[3] In the spring of 2010 the applicant sought access to the contents of his personnel file he believed was held at a correctional facility where he had worked. He further sought access to his human resources file held by the Department along with a variety of other documents in relation to an investigation conducted by the Department that eventually led to his dismissal.

[4] The Department consulted with a third party and, on August 23, 2010 issued its decision to disclose portions of the requested record. The Department cited s. 20(1) (third party privacy), s. 18 (health and safety), and s. 16 (solicitor-client privilege) of *FOIPOP* as authority for withholding portions of the record.

[5] The applicant filed a request for review and, in the course of mediation, confirmed that he was not seeking any third party names.

[6] Section 16 of *FOIPOP* provides:

> 16 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege

[7] Section 18 of *FOIPOP* provides:

> (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
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> (a) threaten anyone else's safety or mental or physical health; or
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> (b) interfere with public safety.
>
> (2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

[8] Section 20(1) 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.[1]

Burden of Proof

[9] 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.
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> (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.
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> (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,
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> (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
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> (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.

[1] A complete copy of the *Freedom of Information and Protection of Privacy Act* is available on our website at: www.foipop.ns.ca .

[10] Therefore, for the purposes of this review, the Department has the burden of proving that ss. 16 and 18 apply and the applicant has the burden of proving that s. 20 does not.

(a) Is the Department authorized to refuse access to information under s. 16 of *FOIPOP* because it is subject to solicitor client-privilege?

[11] Section 16 of *FOIPOP* states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege. The Department applied s. 16 to a total of 12 pages (pages 33-35, 48-56). The pages consist of interrelated email strings.

Position of the Parties

[12] The Department, through its Information, Access and Privacy Administrator ("Administrator"), provided written submissions that focus, for the most part, on the application of s. 16 to the records. The Administrator notes that the records subjected to s. 16 are a series of interrelated emails between in-house counsel and Departmental staff. The Administrator makes a number of points. First, she asserts that the fact that advice is from a government legal counsel does not change the nature of the privilege. Further, the Administrator cites *Solicitor-Client Privilege in Canadian Common Law* for the proposition that:

> It is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice.[2]

[13] The Administrator notes in particular that in order for a solicitor to provide advice on an issue, he or she must be provided with the necessary background information and any relevant records in order to give an informed opinion. The Administrator provides a short discussion on how vital privileged communications are to a fair legal system. On the issue of waiver of privilege, the Administrator notes that only the client can waive privilege and that the Nova Scotia Barristers' Society Code of Professional Conduct further reinforces the duty lawyers have to maintain client confidentiality.[3]

[14] The applicant states:

> *There were 6 emails in total that the information was refused because of Sec 16. Well if the information in them was used in my dismissal then I feel they did not met the requirement of Nova Scotia (Department of Justice), Re, 2003 Can LII498234 (NS FOIPOP).*

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[2] Ronald Manes and Michael Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths Canada Ltd., 1993) pp. 8-9.

[3] Nova Scotia Barristers' Society, *Code of Professional Conduct*, updated February 22, 2013, Rule 3.3, p. 24 (online: http://nsbs.org/regulation).

Discussion of the Application of s. 16

[15] There are two types of privilege found at common law, both of which are encompassed by s. 16 of *FOIPOP*: legal advice privilege and litigation privilege.[4] In this case, the Department claims that the 12 withheld pages are subject to legal advice privilege.

[16] In order to decide if legal advice privilege applies, the decisions of previous Review Officers have consistently applied the following test:

1. there must be a communication, whether oral or written;
2. the communication must be of a confidential nature;
3. the communication must be between a client (or his agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating or giving of legal advice.[5]

[17] Other Canadian Information and Privacy Commissioners also consistently apply the four elements of this test.[6]

[18] Another aspect of the legal advice privilege that is relevant to the discussion of the records at issue here is that the privilege applies to communications in the continuum in which the solicitor tenders advice. The Court in *The Minister of Public Safety and Emergency Preparedness and the Minister of Justice v. the Information Commissioner of Canada* 2013 FCA 104 ("*Minister of Public Safety*") explains the continuum as follows:

> [27] Part of the continuum protected by privilege includes "matters great and small at various stages… includ[ing] advice as to what should prudently and sensibly be done in the relevant legal context" and other matters "directly related to the performance by the solicitor of his professional duty as legal advisor to the client…
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> [28] In determining where the protected continuum ends, one good question is whether a communication forms "part of that necessary exchange of information of which the object is the giving of legal advice"…If so, it is within the protected continuum. Put another way, does the disclosure of the communication have the potential to undercut the purpose behind the privilege – namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them?

[19] The Court in *Minister of Public Safety* goes on to note that in some circumstances the end products of legal advice do not fall within the continuum and are not privileged. As an example, the Court points to policies that may be shaped by the advice of counsel because they are operational in nature and relate to the conduct of the general business of the organization. Further, the Court says that care must be taken not to "overshoot the mark" and render

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[4] Solicitor-client privilege has been discussed in numerous decisions of previous Review Officers. It is well accepted in those decisions that both branches of solicitor-client privilege are encompassed by s. 16. See for examples: NS Reports FI-97-75&76 (Darce Fardy) and FI-08-104 (Dulcie McCallum).

[5] As applied in NS Reports FI-05-08 (Darce Fardy) and FI-08-104 (Dulcie McCallum).

[6] See for examples: BC Orders F15-25 and 00-38, AB Order 2014-38, ON Order PO-3446, and NFLD Order A-2014-05.

information confidential even though it does not disclose advice or other communications essential to the purposes served by the privilege. To do so would "simply be secrecy for secrecy's sake".[7]

[20] The applicant cites Nova Scotia Report FI-03-04, a decision of former Review Officer Darce Fardy. FI-03-04 considers the application of the second type of solicitor-client privilege – litigation privilege. In that decision, the Review Officer determined that the records created in that case were created for the dominant purpose of determining the appropriateness of discipline and as such did not satisfy one of the three elements of the "dominant purpose test". That test is not relevant in this case because the Department is not claiming litigation privilege here.

[21] I take no issue with the Department's assertion that government lawyers can and do provide legal advice that can be subject to solicitor-client privilege. In support of this assertion the Department cited *R v. Campbell* [1999] 1 S.C.R. 565. I would only add to this by noting that the Court in *R. v. Campbell* also stated:

> It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental knowledge. Advice given by lawyers on matters outside the solicitor-client relationship is not protected.[8]

[22] The records at issue consist of a series of emails; some form an email string and others are related or contain related emails. The challenge here is that the emails begin with a series of questions but the initial email and several subsequent emails do not include legal counsel. Eventually legal counsel is included and does supply an opinion.

[23] Applying the four part test I find:

1. There must be a communication, whether oral or written;

[24] The record at issue is a series of emails containing information and questions. I find that these emails certainly qualify as written communication.

2. The communication must be of a confidential nature;

[25] The Department provided no evidence on the issue of confidentiality. It is left for me to evaluate the confidential nature based on the content of the record. There is no claim of confidentiality within the text of any of the emails. There are no signature blocks with the usual

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[7] *Minister of Public Safety and Emergency Preparedness and the Minister of Justice v. the Information Commissioner of Canada* 2013 FCA 104 at paras. 30, 41-42.
[8] *R. v. Campbell,* [1999] 1 SCR 565, 1999 CanLII 676 (SCC) at para. 50.

assertion of confidentiality and the lawyer in particular did not claim solicitor-client privilege in the subject line, body or signature block of his email. However, the content of the records makes it clear that the issue is a sensitive one, requiring expert advice. There is a clear desire to obtain legal advice on the topic. On that basis and on the balance of probabilities I find that the communication was intended to be in confidence.

3. The communication must be between a client (or his agent) and a legal advisor;

[26] The original email in the string (page 48) includes a number of recipients, not all of which are legible because the copies we have all cut off the recipients' list. Legal counsel is not included in the legible part of the list and given that the email is later forwarded to legal counsel it is likely that he was not an original recipient.

[27] The remainder of the emails have a clear list of recipients. The Department asserts that "these emails are clearly between Department of Justice staff and a solicitor or were forwarded to a solicitor for their opinion." A review of the emails shows that at least one recipient was an employee of the Public Service Commission and the remainder all appear to have been employees of the Department. The individual from the Public Service Commission appears to have been functioning as a human resources consultant to the Department of Justice at that time. I find that, except for one email (page 48), the communications were between the Department (including the Department's agent from the Public Service Commission) and a legal advisor.

4. The communication must be directly related to the seeking, formulating or giving of legal advice.

[28] Within minutes of receiving the original email, two individuals immediately include legal counsel in the discussion and seek his legal advice. I am satisfied that, except for page 48, the content of the emails make clear that the communication is directly related to the seeking, formulating or giving of legal advice.

[29] With respect to the original email that does not appear to include any legal counsel or any attempt to obtain legal advice, I am of the view that this email falls within the "continuum" of legal advice and to disclose it would potentially undercut the purpose behind the privilege. Alternatively the disclosure of the email would indirectly reveal such solicitor-client communications. I find that the Department was authorized under s. 16 to withhold pages 33-35 and pages 48-56.

Exercise of Discretion

[30] Section 16 is a discretionary provision. As such, the last step in any decision made by a head of a public body is to answer the question – should the information be withheld? Aside from noting that only the client can waive the privilege, the Department provided no information regarding the exercise of discretion.

[31] As a matter of regular practice, whenever a public body determines that it has the authority to apply a discretionary exemption, before actually severing the information, the head of the public body must consider whether or not to exercise discretion in favour of disclosure despite

the fact that the exemption applies. During the sign off process, I encourage access administrators to provide the individuals who have the delegated authority to apply exemptions with a list of considerations relevant to the exercise of discretion. That way, if the exemption is questioned, the administrator is in a position to clearly identify the factors considered in the exercise of discretion.

[32] In a recent decision, *Minister of Public Safety,*[9] the Federal Court of Appeal considered the application of solicitor-client privilege in the context of the federal *Access to Information Act.*[10] After determining that the first three paragraphs of an agreement were subject to solicitor-client privilege and the remaining fourteen were not, the Court then went on to consider the exercise of discretion. Factors the Court highlighted for the consideration of the public body in the exercise of discretion were:

- Might disclosure bolster in the eyes of the public the credibility and soundness of the documentary procedures the RCMP and Department of Justice are following?
- Might there now be a greater public interest in disclosing the paragraphs?
- Are there still important considerations that warrant keeping the information confidential?
- Discretion should be exercised mindful of all of the relevant circumstances of the case and the purposes of the *Act*.

[33] In this case the Department provided no information in relation to its exercise of discretion. In the absence of this information I recommend that the Department consider whether, as a matter of discretion, a portion of the record could be disclosed even though it is exempt from disclosure under *FOIPOP* s. 16.

(b) Is the Department authorized to refuse access to information under s. 18 of *FOIPOP* because disclosure of the record could reasonably be expected to threaten anyone else's safety?

[34] Section 18 of *FOIPOP* provides that public bodies may refuse to disclose information, including personal information about the applicant in two circumstances. The public body in this case relies on the circumstance set out in s. 18(1)(a): the disclosure could reasonably be expected to threaten anyone else's safety or mental or physical health.

[35] The Department applied s. 18 to a total of twelve pages consisting of a transcript of an interview and handwritten notes of an interview.

[36] One of the challenges in this case is that any detailed discussion of the basis upon which s. 18 might apply to the records could disclose the content of the withheld documents. This is a common issue in these cases.[11] Within those constraints I have set out below the arguments of the parties.

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[9] *Minister of Public Safety, supra* note 6 at paras. 47-49.
[10] *Access to Information Act*, RSC 1985, c A-1.
[11] See for examples BC Order 01-01 at para. 13 and NS Report FI-04-22.

Position of the Parties:

[37] The Department argues that the reasonable expectation of harm set out in s. 18, "*must be more than speculation and based on what a reasonable person would conclude that the harm is more likely than not to occur. The evidence must be weighed on a case by case basis. A public body should consider not only factual background, but the information that is being requested, the circumstance of the third party, who the Applicant is and possible uses of the information*."

[38] The Department's submissions regarding the records at issue are such that a repetition of the arguments could disclose the content of the records. I have carefully considered the submissions in my discussion below.

[39] The applicant is aware that the records at issue consist of a transcript of an interview and handwritten notes. He emphasizes that he is not interested in the identity of the third party but just wants the body of the interview. He argues that if he had received these records he would not have plead guilty to common assault. The applicant appears to be mistaken regarding the timing of his access request because the records indicate that the guilty plea was entered on May 17, 2010 and the original access to information request was made one month later on June 22, 2010. He further argues that the safety concerns were unnecessary because this was taken care of with an undertaking required by the court and so the Department must feel that "the court is not capable of doing the job of protecting the third party".

Discussion of Application of s. 18

[40] As with all of the exemptions to disclosure found within Nova Scotia's *FOIPOP*, s. 18 is common to other Canadian access laws.[12] Section 18 has also been considered by previous Review Officers on a number of occasions. I agree with those earlier decisions that the test for applying s. 18 was well-stated in BC Order 00-28 by former Commissioner Loukidelis:

> As I have said in previous orders, a public body is entitled to, and should, act with deliberation and care in assessing - based on the evidence available to it - whether a reasonable expectation of harm exists as contemplated by the section. In an inquiry, a 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. In determining whether the objective test created by s. 19(1)(a) has been met, evidence of speculative harm will not suffice. The threshold of whether disclosure could reasonably be expected to result in the harm identified in s. 19(1)(a) calls for the establishment of a rational connection between the feared harm and disclosure of the specific information in dispute.
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> It is not necessary to establish certainty of harm or a specific degree of probability of harm. The probability of the harm occurring is relevant to assessing whether there is a reasonable expectation of harm, but mathematical likelihood is not decisive where other contextual factors are at work. Section 19(1)(a), specifically, is aimed at protecting the

[12] See for examples: *Freedom of Information and Protection of Privacy Act*, RSA 200, c F-25, s. 18(1), *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, s. 19, *Freedom of Information and Protection of Privacy Act*, CCSM c. F175, s. 24 and *Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F31, s. 20.

> health and safety of others. This consideration focuses on the reasonableness of an expectation of any threat to mental or physical health, or to safety, and not on mathematically or otherwise articulated probabilities of harm.[13]

[41] In a recent decision the Supreme Court of Canada discussed the "could reasonably be expected to" language in access to information statutes:

> [54] This Court in Merck Frosst 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 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 [...]. [citations omitted][14]

[42] What is clear from the cases is that evidence of speculative harm will not meet the test, certainty of harm need not be established, rather the test is a middle ground requiring evidence well beyond a mere possibility of harm but somewhat lower than harm that is more likely than not to occur.

> [204] This interpretation serves the purposes of the Act. A balance must be struck between the important goals of disclosure and avoiding harm to third parties resulting from disclosure. The important objective of access to information would be thwarted by a mere possibility of harm standard. Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason.[15]

[43] As noted above, the public body bears the burden of establishing that all of the requirements of s. 18 have been satisfied. In order for s. 18 to apply, the public body must establish that the disclosure of the disputed information could reasonably be expected to threaten anyone else's safety or mental or physical health.

[44] Commissioner Loukidelis also listed a number of factors relevant to a consideration of whether or not s. 18 (s. 19 in the BC *Act*) should apply:

> This does not mean, however, that the head of a public body should ignore important factual background in cases such as this. It cannot seriously be disputed there is ongoing controversy and debate about abortion services in British Columbia. More to the point, it is common knowledge - of which I take official notice - that health care professionals who provide abortion services have been subjected to threats, intimidation and violence (including attempted murder). There is also evidence of this before me. Where an access request is made for general or personal information related to abortion services, a

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[13] BC Order 00-28 at p. 3. Later cited in, for example, NS Report FI-07-75 at p. 17.

[14] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* [2014] 1 SCR 674, 2014 SCC 31.

[15] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 at para. 204.

decision-maker can legitimately rely on this factual background as one factor in reaching his or her decision.

It should be emphasized, however, that this is only one of many factors that may be relevant in such cases. Among other things, the nature of the information being sought, the circumstances affecting the public body or third party individuals, the identity of the requester and evidence as to possible uses of the information, are all factors that may be relevant to the decision in a given case.[16]

[45] While the Ontario law is not identical to Nova Scotia's law because it requires that the disclosure could reasonably be expected to <u>seriously</u> threaten the safety of an individual, cases discussing this provision can assist in identifying other relevant factors including:

- an individual's subjective fear,[17]
- where the individual's behaviour is such that the recipient reasonably perceives it as a "threat";[18] and,
- the content of the records themselves can provide evidence with respect to the application of the exemption.[19]

[46] In this case the focus is on whether or not the disclosure could reasonably be expected to threaten anyone else's safety. The word "safety" is not defined in *FOIPOP*. The Concise Oxford Dictionary defines "safety" as follows:

Safety: the condition of being safe.[20]

Safe: (adj.) 1. protected from harm or not exposed to danger or risk; not likely to be harmed or lost. ▪ not causing or leading to harm or injury.[19]

[47] In summary then, in determining whether the objective test set out in s. 18(1)(a) has been met:

- 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;
- 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;
- Safety includes freedom from danger or risks;

[16] BC Order No. 323-1999 at p. 5.
[17] ON Order PO-2003 at p. 12. I note that the adjudicator went on to say that subjective fear, while certainly an important consideration in a s. 20 claim (Ontario's equivalent to s. 18), is not in and of itself sufficient to establish its application.
[18] ON Order PO-1939.
[19] *Supra* note 17 at p. 16.
[20] *Concise Oxford Dictionary*, 12th ed, *sub verbo* "safety" and "safe", p. 1266.

- 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;
- Relevant factors will include: factual background, the nature of the information being sought, the circumstances affecting the public body or third party individuals, the identity of the requester, evidence as to possible uses of the information and the subjective fear of individuals.

[48] I am not convinced by the applicant's submission that a court ordered undertaking supports a finding that he would not pose a threat to the safety of another. In fact, the existence of such an undertaking and the fact that he plead guilty to common assault suggest that a reasonable person might expect that he does indeed pose some threat. In the case at issue here, the records themselves provide some evidence in support of the application of the exemption. Two other considerations also support the application of the exemption to these records. As noted above, I am not able to provide a detailed explanation of these considerations without disclosing the content of the withheld documents. The evidence provided by the Department made it extremely challenging to make a determination in this case. Additional evidence connecting the disclosure of the requested information to the likelihood of harm would have been preferable.

[49] However, on the balance of probabilities I conclude that s. 18 applies to a portion of the records. I find that s. 18 applies to the identity of the witness and to any information that could be used to identify the witness and in particular to certain information provided at pages 23-25 and pages 29-31. The records include both the questions asked and the answers given.

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

> 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.

[51] It is not possible, in my opinion, to reasonably sever this information without effectively disclosing the identity of the witness. Therefore I find that the Department is authorized under s. 18 of *FOIPOP* to refuse to disclose pages 21-32 of the record in dispute.

[52] One final note, s. 18 is another discretionary exemption. It is within the power of the Department to determine that, despite the risks identified, it chooses to exercise its discretion in favour of disclosure. I am not able to identify in this particular case, any factor that would support the application of discretion in favour of disclosure and so, while it is certainly within the power of the Department to exercise discretion to disclose, I do not make any recommendation with respect to a reconsideration of the application of discretion in this instance.

(c) Is the Department 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?

[53] The Department applied s. 20 to the same records to which it applied s. 18 (transcript of the interview and handwritten notes). Given my finding about with respect to s. 18 I will not evaluate whether or not s. 20 also applied to those records.

[54] The Department also applied s. 20 to third party names on pages 11, 13, 16 and 19. The applicant has indicated he is not interested in receiving that information and so I will not evaluate the application of s. 20 in those four instances. What remains is the application of s. 20 to one line of text on page 9 and two lines of text on page 38.

Position of the Parties:

[55] The Department states only that, "since the Applicant has the burden to prove he is entitled to the personal information that was not his, the Department will not be making any representations on the information that was severed under s. 20. The Department maintains this is personal information that is not the Applicant's and confirms that our position has not changed on the application of section 20 to those records." On the records themselves the Department indicated that it was applying s. 20(1) and s. 20(2)(e) of *FOIPOP*.

[56] The applicant notes that he did not want any third party information, he is convinced he knows who the third party was and claims, in any event, that the identity of the witness/third party was disclosed to him in a meeting with a Deputy Minister in May 2010.

Discussion of the Application of s. 20

[57] In Review Reports FI-10-19 and FI-12-01(M),[21] I extensively canvassed the meaning and application of the third party personal information exemptions found in both *FOIPOP* and the *Municipal Government Act, Part XX*.[22] I summarized the four step approach to the application of this exemption. I adopt that discussion here without repeating it.

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

1. Is the requested information personal information?

[59] The information withheld on page 9 contains a third party name and an opinion about the third party. Both pieces of information are clearly third party personal information. At page 38 only a portion of the information withheld qualifies as personal information including the name, phone number and one other identifier of the third party. The identified third party personal information can reasonably be severed from the document. The remainder of the information on page 38 severed under s. 20 is not personal information.

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[21] NS Reports FI-10-19 and FI-12-01(M).

[22] *Municipal Government Act*, SNS 1998, c 18, s. 480.

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

[60] None of the conditions in s. 20(4) apply.

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

[61] In my opinion, s. 20(3)(g) applies to the information withheld on page 9. Section 20(3)(g) provides:

> 20(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if:
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations

[62] The information withheld includes a personal evaluation of a third party. No other presumption applies to the withheld information.

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?

[63] As noted above, it is the applicant who bears the burden of proving that the disclosure of third party personal information is not an unreasonable invasion of the personal privacy of the third party. In addition, where 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.[23]

[64] Section 20(2)(e) of *FOIPOP* was cited by the Department on page 38 of the record. Section 20(2)(e) provides that a relevant circumstance is that the third party "will be exposed unfairly to financial or other harm". Given my finding above regarding the application of s. 18, I am satisfied that s. 20(2)(e) is a relevant consideration.

[65] The applicant argues that he knows who the witness is and that, in addition, the identity of the witness was disclosed to him by a Deputy Minister in 2010. The document he supplied in support of this assertion is not proof of this. But even if a Deputy Minister disclosed the identity of the witness in 2010, unless the previous disclosure was an authorized disclosure, it would not be appropriate to rely on such a disclosure to repeat a mistake in the past.

[66] The applicant has failed to satisfy the burden of proof set out in s. 45(3)(a), particularly in respect of information to which s. 20(3) applies.

[67] I find that the Department is required under s. 20 of *FOIPOP* to refuse to disclose the personal information of a third party located on pages 9 and 38. I find that the Department is not authorized to withhold a small portion of information on page 38 as it does not qualify as

[23] *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate,* 2015 NSCA 38 at para. 92.

personal information of a third party. I will provide the Department with a recommended severing of that document.

FINDINGS & RECOMMENDATIONS:

[68] I find that the Department of Justice is:

1. Authorized under s. 16 of *FOIPOP* to refuse to disclose pages 33-35 and pages 48-56.
2. Authorized under s. 18 of *FOIPOP* to refuse to disclose pages 21-32 of the record in dispute.
3. Required under s. 20 of *FOIPOP* to refuse to disclose third party personal information located on pages 9 and 38.

[69] I recommend that the Department of Justice:

1. Consider whether, as a matter of discretion, pages 33-35 and 48-56 or some portion thereof could be disclosed even though they are exempt from disclosure under *FOIPOP* s. 16. Such further decision should be communicated in writing to the third party and the Commissioner (Review Officer) within 60 days of receipt of this report.
2. Release a small portion of information located on page 38 that does not qualify as third party personal information within 60 days of receipt of this report.

September 17, 2015

Catherine Tully
Information and Privacy Commissioner