



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

REVIEW REPORT FI-10-76

September 17, 2015

Department of Justice

Summary: This is a companion case to NS Review Report FI-10-71. The applicant is a former employee of the Department of Justice (“Department”). He 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*”) and/or it was subject to solicitor-client privilege under s. 16. The Commissioner found that the Department correctly applied s. 20(1) of *FOIPOP* to all but a small portion of the record. The evidence in the record revealed that s. 16 was 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: *Freedom of Information and Protection of Privacy Act*, [SNS 1993, c 5](#), ss. 16, 20, 45; *Municipal Government Act*, [SNS 1998, c 18](#), s. 480.

Authorities Considered: Nova Scotia: Reports [FI-10-19](#), [2015 CanLII 54095 \(NS FOIPOP\)](#); [FI-12-01\(M\)](#), [2015 CanLII 54096 \(NS FOIPOP\)](#).

Cases Considered: *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate* [2015 NSCA 38](#).

INTRODUCTION:

[1] On August 25, 2010 the applicant, a former employee of the Department, requested access to records relating to an investigation into alleged misconduct by the applicant. The Department provided partial access to the records citing the need to protect third party personal information and the need to protect solicitor-client privilege. The applicant filed a review of the Department’s decision to this office on October 12, 2010.

ISSUES:

[2] There are two 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 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] This applicant initially filed a request for records relating to this matter in June, 2010. In response, the Department provided him with partial access to records. The Department's response to his first request prompted the applicant to file a second request. The Department's second response included records that were already included in the first request. In his request for review to this office the applicant stated, "I am not interested in third party information, names address. I just want what is being said about me."

[4] This request for review is related to matters already discussed in Review Report FI-10-71. I will discuss the overlap below.

[5] In this case the Department relied on s. 16 (solicitor-client privilege) and s. 20 (third party privacy) of *FOIPOP* as authority to withhold portions of the responsive record.

[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 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

[8] 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.

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

(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.

[9] 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 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

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

[10] In Review Report FI-10-71 I examined whether the Department was authorized by s. 16 to refuse access to information on 12 pages of records. In this case the Department withheld a total of 13 pages citing s. 16.⁵ However, four of those pages are exact duplicates so in total nine pages were withheld. The nine pages (pages 16-24, copies at pages 44-46 and 39) are identical to pages 48-56 discussed in Review Report FI-10-71.

[11] Therefore, I will not repeat the discussion contained in Review Report FI-10-71 and for the purposes of this report I adopt my findings and recommendations as follows:

[12] I find that the Department was authorized under s. 16 to withhold pages 16-24 including the duplicates located at page 39 and pages 44-46.

[13] As with Review Report FI-10-71, 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 revisit its decision to apply s. 16 and consider whether or not to exercise discretion in favour of disclosure.

² The application of s. 20(3) to the information at issue here is discussed below on page 5.

³ 2015 NSCA 38.

⁴ *Supra* note 2, at para. 92.

⁵ I note that page 25 of the record was also identified as a document at issue in the Notice of Formal Review. The Department pointed out in its submissions that page 25 was fully disclosed and so is not at issue.

(b) 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?

[14] Since the applicant has made clear that he is not interested in receiving the identity of any third party there is only one record remaining at issue. Page 27 of the response package is a letter to a third party, partially withheld by the Department under s. 20 of FOIPOP.

Position of the Parties

[15] The applicant repeats his position that he did not want any third party information, just the body of what was being said about him and to see if it was used in his dismissal. His submissions make clear that he believes he knows the identity of the third party and he asserts that the identity of the third party was disclosed to him by a Deputy Minister in a meeting held in 2010.

[16] The Department states only that since the burden of proof rests with the applicant the Department will not be making any representations on the information that was severed under s. 20.

Discussion

[17] In Review Reports FI-10-19 and FI-12-01(M)⁶ 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*.⁷ I summarized the four step approach to the application of this exemption. I adopt that discussion here without repeating it.

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

1. Is the requested information personal information?

[19] The record at issue contains the name and address of a third party, the names of Department employees, two sentences that contain an opinion about the employees and several words that would serve to identify the third party (references to the connection between the third party and the applicant). All of this information, in my opinion, qualifies as third party personal information. In addition, the Department severed the first three full sentences of the letter at page 27.

[20] With respect to the first sentence of the letter, it appears that this sentence, while it does not contain any personal information, may have been severed because of a fear that to disclose it would be to disclose the identity of the third party. I accept that this qualifies as personal information for this reason.

[21] With respect to the second sentence of the letter, there is a minor piece of personal information about the writer of the letter, whose identity is disclosed.

⁶ NS Review Reports FI-10-19 and FI-12-01(M).

⁷ *Municipal Government Act*, SNS 1998, c 18, s. 480.

[22] With respect to the third sentence of the letter, there is no personal information contained in this sentence and I fail to see how the information in the third sentence could serve to identify the third party.

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

[23] Section 20(4)(e) states:

20(4) 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

[24] The record includes a personal opinion about two employees. Such an opinion does not, in my view, qualify as information about their position, functions and remunerations. Rather, it is more in the character of work history – discussed below under s. 20(3). I am of the view that s. 20(4) does not apply in this case.

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

[25] The Department only identified s. 20(1) as the relevant provisions and did not provide any submissions on the appropriate application of s. 20 to the withheld information. It is therefore left to me to consider what elements of s. 20(3) might apply to the record.

[26] Section 20(3)(d) and 20(3)(g) provide:

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;

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;

[27] In my opinion, both presumptions apply to the two sentences that relate to an opinion about two Department employees.

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?

[28] In my view, none of the circumstances listed in s. 20(2) are relevant to the current circumstances. Some general considerations in respect of the issue are:

- The third party employee personal information (opinions about the employees) while subject to a presumption under s. 20(3)(d) and 20(3)(g) has already been disclosed at least once to an external third party as evidenced by the letter.

- With respect to the second sentence of the letter, while the sentence includes some minor personal information about the author, it includes no detail, was a historical fact at the time and was disclosed to the third party as evidenced by the letter.
- The applicant has already indicated that he is not interested in knowing the identity of third parties or of receiving the names or addresses of third parties.

[29] The applicant has provided no evidence in support of his contention that s. 20 should not be applied to third party personal information. As noted above, the burden of proof rests with the applicant in this case. With respect to any information to which the statutory presumption in s. 20(3) applies, the Nova Scotia Court of Appeal has been clear that it is an error in law to treat the absence of evidence as satisfying a burden of proof to overcome a statutory presumption.

[30] Taking into consideration all of the matters listed above, I find that the Department is required by s. 20 to refuse to disclose:

- Name and address of the third party and all references to the connection between the third party and the applicant.
- The two sentences that contain an opinion about two Department employees.
- The first sentence of the letter because it may allow the applicant to identify the third party.

[31] I find that the Department is not authorized to refuse to disclose the following information:

- The second sentence of the letter because, while it contains a minor amount of personal information, the disclosure of that information would not be an unreasonable invasion of the personal privacy of the author of the letter.
- The third sentence of the letter because it does not contain any personal information and could not, in my opinion, serve to identify any third parties.

FINDINGS & RECOMMENDATIONS:

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

1. Authorized under s. 16 of *FOIPOP* to refuse to disclose pages 16-24 including the duplicates located at page 39 and pages 44-46.
2. Required by s. 20 to refuse to disclose:
 - Name and address of the third party and all references to the relationship between the third party and the applicant.
 - The two sentences that contain an opinion about two Department employees.
 - The first sentence of the letter because it may allow the applicant to identify the third party.
3. Not authorized to refuse to disclose the second and third sentences of the letter at page 27 of the record.

[33] I recommend that the Department of Justice:

1. Consider whether, as a matter of discretion, pages 16-24 and the duplicates at pages 39, and 44-46 should 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 27 to which s. 20 does not apply. A copy of the recommended disclosure is enclosed with the Department's copy of this report.

September 17, 2015

Catherine Tully
Information and Privacy Commissioner