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

REVIEW REPORT FI-11-72 (Amended)

December 30, 2015

(Amended January 20, 2016)[1]

Public Prosecution Service

Summary: The Commissioner recommends that the public body disclose, in whole or in part, an additional 297 pages. She further recommends that the public body revisit a portion of the file and conduct a line by line review as required under the *Freedom of Information and Protection of Privacy Act* ("*FOIPOP*").

The applicant sought a copy of the prosecution's file relating to charges against his former employer. The public body withheld most of the record claiming that disclosure would reveal information used in exercising prosecutorial discretion, was protected by solicitor-client privilege, or the disclosure would be an unreasonable invasion of a third party's personal privacy.

The records were compiled by Crown Prosecutors for the conduct of a trial. The nature and purpose of the records results in a large portion of the information being protected by the exemption for prosecutorial discretion. However, the Commissioner finds that this does not allow the public body to withhold in full as much information as it has. The Commissioner considers the duty to sever and concludes that *FOIPOP* requires a public body to disclose the portions of records that are both intelligible and responsive to the request after information excepted from disclosure is removed from the record.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, Schedule 1; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5 ss. 2, 4, 5, 15, 16, 20, 45*; Occupational Health and Safety Act*, SNS 1996, c 7 s. 74.

Authorities Considered: **Alberta:** Order F2014-38, 2014 CanLII 72623 (AB OIPC); **British Columbia:** Investigation Report F08-03, 2008 CanLII 57363 (BC IPC); Orders 00-38, Workers' Compensation Board Record, Re, 2000 CanLII 14403 (BC IPC); 01-12, British Columbia Gaming Commission, Re, 2001 CanLII 21566 (BC IPC); 02-38, 2002 CanLII 42472 (BC IPC); 03-16, 2003 CanLII 49186 (BC IPC); F15-25, Insurance Corporation of British Columbia (ICBC) (Re), 2015 BCIPC 27 (CanLII); **Nova Scotia:** Review Reports FI-97-75&76, 1998

[1] This report has been amended to correct a typographical error. The date in paragraph 17 has been corrected from September 8, 2015 to September 8, 2008.

CanLII 3725 (NS FOIPOP); FI-04-42, 2005 CanLII 5391 (NS FOIPOP); FI-05-08, 2005 CanLII 18828 (NS FOIPOP); FI-08-104, 2011 CanLII 25161 (NS FOIPOP); FI-08-107, 2010 CanLII 47110 (NS FOIPOP); FI-09-29(M), 2012 CanLII 44742 (NS FOIPOP); FI-10-71, 2015 CanLII 60916 (NS FOIPOP); FI-10-94, 2015 CanLII 79099 (NS FOIPOP); FI-12-106, 2013 CanLII 61076 (NS FOIPOP); **Newfoundland:** Report A-2014-005, College of the North Atlantic (Re), 2014 CanLII 8571 (NL IPC); **Ontario:** Orders 24, Ontario (Attorney General) (Re), 1988 CanLII 1404 (ON IPC); MO-1241, Peel Regional Police Services Board (Re), 1999 CanLII 14476 (ON IPC); MO-1663-F, Waterloo Regional Police Service (Re), 2003 CanLII 53761 (ON IPC); MO-3215, Bradford West Gwillimbury (Town) (Re), 2015 CanLII 38835 (ON IPC); PO-1779, Ontario (Solicitor General) (Re), 2000 CanLII 20776 (ON IPC); PO-3446, Ontario (Attorney General) (Re), 2015 CanLII 1539 (ON IPC).

Cases Considered: *Descôteaux et al. v. Mierzwinski*, [1982] 1 SCR 860, 1982 CanLII 22 (SCC); *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104 (CanLII); *Cummings v. Nova Scotia (Public Prosecution Service)*, 2011 NSSC 38 (CanLII); *House (Re)*, 2000 CanLII 20401 (NS SC); *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372, 2002 SCC 65 (CanLII); *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate*, 2015 NSCA 38 (CanLII); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010] 1 SCR 815, 2010 SCC 23 CanLII); *R. v. Campbell*, [1999] 1 SCR 565, 1999 CanLII 676 (SCC); *Stevens v. Nova Scotia (Labour)*, 2012 NSSC 367 (Can LII); Sutherland v. Nova Scotia (Community Services), 2013 NSSC 1 (CanLII); *Tridel Corp. v. Canada Mortgage & Housing Corp.* (1996), [1996] F.C.J. No. 644 (Fed. T.D.).

Other Sources Considered: Manes and Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworth's, 1993).

INTRODUCTION:

[1] The applicant filed a request for records held by the Public Prosecution Service ("PPS"). The records related to a prosecution of the applicant's former employer. In response, the PPS disclosed a small portion of the record withholding in full almost 2000 pages. PPS stated that the disclosure of the remainder of the record could reveal information used in the exercise of prosecutorial discretion, was protected by solicitor-client privilege or that the disclosure would be an unreasonable invasion of a third party's personal privacy. The applicant filed a review to this office.

ISSUES:

[2] There are three issues under consideration:

1. Is the Public Prosecution Service authorized to refuse access to information under s. 15(1)(f) of the *Freedom of Information and Protection of Privacy Act* ("*FOIPOP*") because disclosure could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion?
2. Is the Public Prosecution Service authorized to refuse access to information under s. 16 of *FOIPOP* because it is subject to solicitor-client privilege?

3. Is the Public Prosecution Service 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] The applicant sought access to a prosecution file that related to charges against his former employer under the *Occupational Health and Safety Act and Regulations*. The charges related to the conditions at the applicant's workplace in 2005. The Occupational Health and Safety Division of the Department of Labour investigated the applicant's complaint against his employer and ultimately laid charges against the company on October 9, 2007. The trial was scheduled to begin on September 8, 2008. However, on the eve of the trial the Prosecutor determined that there was no longer a reasonable prospect of conviction and so offered no evidence at trial. As a result, the charges were dismissed.

[4] The applicant was and remains extremely disappointed with the outcome of the investigation and filed two access to information requests seeking further information regarding why the decision was made to discontinue the prosecution. The first request was for records held by the Department of Labour. That request was the subject of Review Report FI-09-04 by this office. The former Review Officer recommended full disclosure. In a subsequent appeal the Supreme Court of Nova Scotia disagreed with this outcome.[2] However the matter, for the most part, settled with two further disclosures by the Department of Labour. It is therefore not possible to gain any insight into the Court's view of the approach to these records from the decision itself.[3]

[5] Shortly after the applicant filed his access request with the Department of Labour, he filed a request for records held by the PPS. In response the PPS disclosed a portion of the records. The PPS stated that the disclosure of the remainder of the records could harm law enforcement, was protected by solicitor client-privilege and/or would be an unreasonable invasion of a third party's personal privacy. The applicant filed a request for review to this office, and the matter has now finally reached the final stage of our review.

[6] The PPS provided this office with one folder identified as records released to the applicant that contained 217 pages (the "disclosed" folder). The PPS also provided 2021[4] pages in six additional folders all labelled "records withheld" although within the folders 68 pages were tabbed as having been released to the applicant. A comparison between the two sets of folders revealed that 149 pages in the "disclosed" folder pages were not present in the "withheld" folder. Also, 13 tabbed pages in the "withheld" folders (indicating that they were released to the applicant) were not present in the "released" folder. In total then, it appears that PPS identified

[2] *Stevens v. Nova Scotia (Labour)*, 2012 NSSC 367 (Can LII)

[3] The Office of the Information and Privacy Commissioner is not a party to appeals before the Supreme Court of Nova Scotia.

[4] The pages are numbered 1 – 1980 but include two page #281 and two pages with no page number for a total of 1983 pages. The record also contains a 38 page document numbered p. 1955. Therefore the total number of pages is 1980 + 2 + 2 + 37 = 2021.

2170[5] responsive records of which it said it disclosed 217 to the applicant. The applicant says he received 62 pages.

[7] Section 15 of *FOIPOP* provides in part:

> 15(1)(f) The head of the public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal information relating to or used in the exercise of prosecutorial discretion.

[8] 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

[9] Section 20(1) of *FOIPOP* provides in part:

> 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.[6]

Burden of Proof

[10] The public body bears the burden of proving that the applicant has no right of access to a record except where the exemption applied is s. 20 - then the applicant 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.

1. Is the Public Prosecution Service authorized to refuse access to information under s. 15(1)(f) of *FOIPOP* because disclosure could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion?

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[5] 2021 pages + 149 pages missing from the "withheld" folders = 2170 responsive records.

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

General approach

[11] *FOIPOP* does not have a definition of "prosecutorial discretion". As a result, several decisions of previous Review Officers[7] determined that it would be appropriate to adopt the definition found in the British Columbia *Freedom of Information and Protection of Privacy Act* which provides:

> ***"exercise of prosecutorial discretion"*** *means the exercise by*
> *(a) Crown counsel, or a special prosecutor, of a duty or power under the* Crown Counsel Act, *including the duty or power*
> *(i) to approve or not to approve a prosecution,*
> *(ii) to stay a proceeding,*
> *(iii) to prepare for a hearing or trial,*
> *(iv) to conduct a hearing or trial,*
> *(v) to take a position on sentence, and*
> *(vi) to initiate an appeal*[8]

[12] The Nova Scotia Supreme Court agreed with this interpretation in a 2011 decision – *Cummings v. Nova Scotia (Public Prosecution Service)* [*Cummings*].[9] The Nova Scotia Court of Appeal disagreed with this approach in its recent decision in *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate,*[10] [*Fitzgerald*].

[13] The Court states,

> [39] Contrary to the conclusion of Justice Wright in *Cummings*, and in accordance with Justice Warner's decision, we are satisfied the effect of the lack of a definition of prosecutorial discretion in the *Act*, together with the meaning of the term prosecutorial discretion set out in *Krieger*, is that decisions concerning the preparation for, or conduct of litigation are not decisions within the ambit of prosecutorial discretion for purposes of s. 15(1)(f).

[14] In *Fitzgerald* the Court of Appeal thoroughly canvassed the meaning of "prosecutorial discretion" for the purposes of s. 15(1)(f) of *FOIPOP*. The Court of Appeal relied on the Supreme Court of Canada decision in *Kreiger v. Law Society of Alberta*[11] for its explanation of the meaning of "prosecutorial discretion". In summary those decisions stand for the following with respect to the meaning of s. 15(1)(f) of *FOIPOP*:

- Prosecutorial discretion is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor.[12]
- Decisions that are included in the phrase "prosecutorial discretion" include:[13]
    - The discretion whether to bring the prosecution of a charge laid by police;

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[7] See, for example, NS Review Reports FI-04-42 at p. 1 (Darce Fardy) and FI-12-106 at p. 15 (Dulcie MacCallum)
[8] *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 Schedule 1.
[9] Cummings v. Nova Scotia (Public Prosecution Service) 2011 NSSC 38 (CanLII) at paras. 20 and 24 [*Cummings*].
[10] Nova Scotia (Public Prosecution Service) v. FitzGerald Estate, 2015 NSCA 38 (CanLII) [*Fitzgerald*].
[11] Kreiger v. Law Society of Alberta, 2002 SCC 65 (CanLII) [*Krieger*].
[12] *Kreiger* at para. 43.
[13] *Kreiger* at para. 46 and *FitzGerald* at para. 38.

    - The discretion to enter a stay of proceedings in either a private or public prosecution;
    - The discretion to accept a guilty plea to a lesser charge;
    - The discretion to withdraw from criminal proceedings altogether;
    - The discretion to take control of a private prosecution.
- Decisions that do not go to the nature and extent of the prosecution, i.e. the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion.[14]
- Decisions concerning the preparation for, or conduct of litigation are not decisions within the ambit of prosecutorial discretion for the purposes of s. 15(1)(f).[15]
- Nothing in s. 15(1)(f) suggests that the source of the information or the fact that it was prepared at someone's request is relevant to the PPS's authority to withhold information under this section.[16]
- Steps taken by the police in the investigation of the offence is material that would have been used by the PPS in deciding whether to commence or continue a prosecution, which clearly is a discretionary decision involving the exercise of prosecutorial discretion.[17]
- Section 15(1)(f) applies where the records were used to analyze the case to see if the evidence, in light of the law, justified commencing or continuing a prosecution. Records can include statements, documents, notes and summaries prepared by the PPS. This is so even if the same records also served other purposes that do not engage prosecutorial discretion such as acting as an aid in the conduct of a trial or appeal.[18]
- A disclosure of relevant evidence to the defence is not a matter of prosecutorial discretion but rather is a legal duty.[19]

[15] After conducting a line by line review of the material withheld from disclosure under s. 15(1)(f) I have identified a total of 163 pages that were withheld under s. 15(1)(f) but contained no information relating to the exercise of prosecutorial discretion. Of the 163 pages to which s. 15(1)(f) does not apply, 47 are simply tabs. Disclosure of those 47 pages would not reveal any intelligible information. Therefore, I recommend the full disclosure of the remaining 116 pages. A complete list of these pages is set out in Appendix 1 this decision.[20] The records include:

- Records that relate to matters other than the exercise of prosecutorial discretion, particularly topics that arose after the prosecution ended. Records containing no substance and disclosing nothing relating to exercise of prosecutorial discretion such as fax cover sheets and emails setting up meetings - a total of 57 pages fell into this category.
- Records that relate only to the preparation for or the conduct of the litigation – no discussion of or disclosure of matters relating to the exercise of prosecutorial discretion.

[14] *Krieger* at para. 47 and *FitzGerald* at para. 38.
[15] *FitzGerald* at para. 39.
[16] *FitzGerald* at para. 42.
[17] *FitzGerald* at para. 44.
[18] *FitzGerald* at para. 45.
[19] *Kreiger* at paras. 5 and 54.
[20] Appendix 1 includes a complete list of all records I recommend be disclosed in full. Of the 173 pages listed, 116 are pages withheld under s. 15(1)(f) only to which I have found s. 15(1)(f) does not apply.

Matters in this category include scheduling, information about appearances (who and when), setting dates, summons preparation, assignment of Crown, adjournment arrangements and length of time needed for trial – a total of 43 pages fell into this category.

- Records that relate only to the legal duty to disclose to opposing parties – a total of 16 pages fell into this category.

[16] I will provide a complete list of the pages that fall within each of the categories above to the PPS.

[17] I find that a portion of the records, to which s. 15 does not apply for the reasons noted above, contain the personal information of third parties. I recommend that 86 pages listed in Appendix 2 be partially disclosed by severing the small portion of personal information contained on each page and disclosing the remainder. Records that fall into this category include:

- Records that relate only to the preparation for or the conduct of the litigation – no discussion of or disclosure of matters relating to the exercise of prosecutorial discretion. Matters that I included in this category include scheduling, information about appearances (who and when), setting dates, summons preparation, assignment of Crown, adjournment arrangements and length of time needed for trial – a total of 79 pages fell into this category.
- Records that relate only to the legal duty to disclose to opposing parties – 3 pages fell into this category.
- Records that had no content related to the exercise of prosecutorial discretion but contained some personal information. These records relate generally to correspondence that occurred after September 8, 2008 – 4 pages fell into this category.

[18] I will explain why s. 20 applies to these pages in the discussion below.

Duty to Sever

[19] Because of the manner in which the PPS withheld rather than severed most records, I will discuss here the duty to sever as it relates to the application of s. 15(1)(f) in this case.

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

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

[21] This is known as the duty to sever. In this case, the PPS identified 2170 pages responsive to this request. The PPS identified 230[21] pages it said it disclosed or partially disclosed to the applicant. Almost 2000 pages were withheld in full.

[21] 217 pages contained in the "disclosed" folder and the additional 13 pages in the "withheld" folders that were flagged as disclosed but not contained in the "disclosed" folder.

[22] In the case of records held by the PPS, *FOIPOP* provides that the *Act* does not apply to "a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed."[22] When this provision applies, there is no duty to sever because the *Act* does not apply to the record. However, when all proceedings in respect to the prosecution have been completed, then the usual *FOIPOP* process applies. Records formerly withheld in full, must now be reviewed and *FOIPOP* requires that everything must be disclosed unless an exemption applies.[23] Then, only that information to which the exemption applies may be withheld.

[23] *FOIPOP* requires that if the information "can reasonably be severed from the record" then the applicant has a right to the remainder of the record. Reasonable severing means that after the excepted information is removed from a record, the remaining information is both intelligible and responsive to the request.[24] While it is important to be pragmatic in the approach to what is reasonable, it is also essential that any interpretation of this standard not undermine *FOIPOP*'s stated purpose of providing for the disclosure of all government information, facilitating informed public participation in policy formulation, ensuring fairness in government decision-making and permitting the airing and reconciliation of divergent views.

[24] In this case the PPS provided no written submissions and at no point suggested that the records could not reasonably be severed. The responsive records consist of paper documents. Severing would require an individual to read each document, identify the information that is actually subject to s. 15, exercise discretion and only then sever it if that is the final decision. The remainder of the record must be disclosed. This is the standard request processing approach and one that is, in my opinion, entirely reasonable.

[25] The documents numbered 1 – 776 consist of various communications. The vast majority of the records between pages 1 and 776 to which I agree s. 15(1)(f) applies, also include information to which s. 15(1)(f) does not apply. For example, many of the records are email exchanges between Department of Labour employees. Employee names, the date and time of the email exchange, subject matters such as "let's meet" or "memo", signature blocks and often a portion of the content of the email can be disclosed because none of this discloses or reveals information relating to or used in the exercise of prosecutorial discretion. Content regarding scheduling, hearing location, holidays, personal matters/chat does not fall within s. 15(1)(f).

[26] Is this remaining information intelligible and responsive to the request? I find that it is. Instead of receiving the equivalent to 2000 blank pages, the applicant will receive several hundred additional pages with sufficient information to know what the nature of the withheld record is without knowing information to which s. 15(1)(f) applies. He will get a sense of the timing of the work on the prosecution file without knowing the content. Right now it is a complete mystery to him what might be in the withheld pages. Properly severing the pages and disclosing the remaining information will, in my view, provide additional responsive information to this applicant.

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[22] Section 4(2)(i) *FOIPOP*.
[23] Sections 2(b) and 5 of *FOIPOP* provides that a person has a right of access to any record in the custody or under the control of a public body subject only to limited and specific exemptions.
[24] This is also the approach taken in other jurisdictions. See for example BC OIPC Order 03-16 at para. 53 and Ontario Order 24 at p. 8.

[27] I find that aside from pages I have recommended be fully disclosed, all of the pages between pages 1 and 776 contain some information to which s. 15(1)(f) of *FOIPOP* does not apply (Appendix 3). I recommend that the Public Prosecution Service revisit these pages, determine the information to which s. 15(1)(f) and/or s. 20 apply, and release the remaining information.

[28] The nature of the documents located at pages numbered 777-1980 are such that, with few exceptions, s. 15(1)(f) applies to the whole of each document. Records to which s. 15(1)(f) properly applies include statements, documents, notes, summaries and research that was prepared by the Department of Labour or by the PPS.

[29] Based on my review of the content, the date of the work and the manner in which it was used I find that these records were created for two purposes. First, the records were initially created for the purpose of analyzing the case to see if the evidence, in light of the law, justified commencing or continuing the prosecution. The information was also intended for use in the conduct of the trial which does not fall within the exercise of prosecutorial discretion. However, as noted in *Fitzgerald*, since the first purpose engages discretionary decision-making within the prosecutorial discretion the records fall within s. 15(1)(f).[25]

[30] I identified only 7 pages between pages 777-1980 that could be partially severed: pages 1090, 1440, 1442, 1618, 1832, 1896 and 1957 (listed in Appendix 3). These records are all similar. Portions of each page contain generic titles and tab numbers. While disclosing this information to the applicant may not be meaningful in and of itself, it will help the applicant understand the general scope of the records without disclosing any information used in the exercise of prosecutorial discretion. I recommend that PPS revisit these pages and release portions of each of these seven pages to which s. 15(1)(f) does not apply including generic titles and tab numbers.

[31] In summary, I find that the 657 pages described in Appendix 3 contain only some information to which s. 15(1)(f) applies. In withholding the entire record the PPS failed to satisfy its duty to sever.

Exercise of Discretion

[32] Section 15 is a discretionary exception. It provides that a public body may refuse to disclose information to an applicant if the requirements of s. 15 are met. In this case, the PPS clearly exercised some discretion because it disclosed certain information that could have been subject to s. 15(1)(f) to the applicant. The information consists mainly of emails and medical reports supplied to the PPS by the applicant.

[33] In considering the Ontario Information Commissioner's role in reviewing exercise of discretion, the Supreme Court of Canada recently stated that the Commissioner should return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose;

[25] *Fitgerald* at para. 45.

the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations.[26]

[34] What are relevant considerations in the exercise of discretion? Relevant factors include:

- The general purposes of the legislation: public bodies should make information available to the public; individuals should have a right of access to personal information about themselves;
- The wording of the discretionary exception and the interests which the section attempts to balance;
- All other relevant interests and considerations on the basis of the facts and circumstances of the particular case;
- The nature of the record and the extent to which the document is significant and/or sensitive to the public body;
- Whether there is a sympathetic or compelling need to release materials;
- Whether the disclosure of the information will increase public confidence in the operation of the public body;
- The age of the record.[27]

[35] In the absence of submissions from the Public Prosecution Service it is unclear to me what factors the PPS took into account in exercising discretion and indeed, with respect to the majority of the records, whether PPS actually exercised any discretion. The letter the PPS sent to the applicant with its response to his access request does not discuss discretion at all aside from noting that the PPS determined it would release documents containing the applicant's own personal information.[28]

[36] In *Criminal Lawyers' Association*, the Supreme Court of Canada determined that the Ontario Information Commissioner had failed to properly investigate the exercise of discretion by the public body and so the Commissioner should be ordered to re-examine the issue. In deciding that exercise of discretion should be re-examined the Court noted that, "The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner."[29]

[37] Considering the volume of records withheld here, the nature of the withheld information (that some of it includes the personal information of the applicant), the age of the record, sympathetic need to release the records and the general purposes of *FOIPOP*, I recommend that the PPS reconsider its exercise of discretion in the application of s. 15 to the entire record.

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[26] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010] 1 SCR 815, 2010 SCC 23 CanLII) at para. 71 [*Canadian Lawyers' Association*].
[27] *Canadian Lawyers' Association* at para. 66; BC OIPC Order 02-38 at para. 149, BC Investigation Report F08-03 at paras. 33-38.
[28] Letter dated August 5, 2011.
[29] *Criminal Lawyers' Association* at para. 74.

[38] At Appendix 4 I have listed a total of 53 pages in particular where I recommend the PPS exercise discretion in favour of full disclosure either because the records were clearly at one time in the possession of the applicant or because they contain the applicant's personal information and were likely obtained as a result of obtaining the applicant's consent. Further, there is a sympathetic need to disclose the information because it relates to the applicant, the documents are therefore significant to the applicant and the age of the records all weigh in favour of exercising discretion to disclose.

2. Is the Public Prosecution Service authorized to refuse access to information under s. 16 of *FOIPOP* because it is subject to solicitor-client privilege?

[39] I have previously discussed the solicitor-client privilege exemption and I will summarize that discussion here for ease of reference.[30] 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.[31] In this case, the PPS applied s. 16 to a portion of the records. The PPS did not specify which branch of the privilege they were relying on, but given that there is no evidence that, at the time the request was made there was any ongoing prosecution or litigation of any kind, I can only conclude that it is the first branch of the privilege that the PPS has applied to the records, that is, legal advice privilege.

[40] 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.[32]

[41] Other Canadian Information and Privacy Commissioners also consistently apply the four elements of this test.[33]

[42] 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*"][34] explains the continuum as follows:

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[30] See NS Review Report 10-71 at paras. 15-22.
[31] 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).
[32] As applied in NS Reports FI-05-08 (Darce Fardy) and FI-08-104 (Dulcie McCallum).
[33] See for examples: BC Orders F15-25 and 00-38, AB Order 2014-38, ON Order PO-3446, and NFLD Order A-2014-05.
[34] *Canada* (*Public Safety and Emergency Preparedness*) v. *Canada* (*Information Commissioner*), 2013 FCA 104 (CanLII)

> [27] Part of the continuum protected by privilege includes "matters great and small at various stages… Include[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…
>
> [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?

[43] The PPS applied s. 16 to two types of records: (1) communications between the Crown and the Department of Labour and (2) communications between the Crown and lawyers for the defendant company.

[44] Can communications between a Crown attorney and a government department satisfy the requirements for the application of solicitor-client privilege? The leading case on this issue is *R. v. Campbell*, [1999] 1 S.C.R. 565. In that case the Court determined that a consultation by an officer of the Royal Canadian Mounted Police ("RCMP") with a Department of Justice lawyer fell squarely within the Court's functional definition of solicitor-client privilege:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived[35].

[45] Adjudicators with the Ontario Information and Privacy Commissioner considered the application of this functional definition to communications between the Crown and the police in a number of cases. Communications within the framework of the relationship between the Ontario Provincial Police and Crown and between a municipal police force and Crown were found to qualify for solicitor-client privilege under Ontario's access to information laws.[36] Ontario Adjudicators have also found that where the specific communications at issue and the surrounding circumstances fail to establish that the communications occurred as part of the seeking of legal advice by the police from the Crown the communications did not occur in the framework of a solicitor-client relationship.[37]

[46] In this case, the communications between the Department of Labour investigators and the Crown which have been withheld under s. 16 (solicitor-client privilege) are all clearly communications seeking or giving advice. The public body in this case applied s. 16 to a very limited number of the numerous communications between these two groups and it did so only to those that involve requests for or provision of advice. I am satisfied that these communications

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[35] *R. v. Campbell*, [1999] 1 S.C.R. 565 citing *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at p. 872.
[36] Ontario Orders PO-1779 and MO-1241.
[37] Ontario Order MO-1663-F at p. 4.

satisfy the four part test. I find that all communications between the Crown and Department of Labour investigators that were withheld under s. 16 were subject to solicitor-client privilege.

[47] The second type of record withheld under s. 16 were communications between the Crown attorneys and lawyers for the defendants. Privilege cannot attach to communications between opposing parties. The key to holding that privilege cannot possibly attach to communications between opposing parties is that in making such a communication, there cannot have been an intention of confidentiality, thus there is no room for the privilege to attach.[38]

[48] Therefore, I find that none of the communications between the Crown and lawyers for the defendant are subject to s. 16. Those records are: pages 93, 97, 113, 114, 281 (2 pages), 287, 288, 305, 306 and 307. However, the PPS also applied s. 15 to these records. I determined, for the reasons noted above, that s. 15 does not apply to eight of these pages and so should be fully disclosed.[39] Three of the records to which s. 16 does not apply, are subject to s. 15(1)(f). I find that pages 93, 113 and 114 do contain information, the disclosure of which would reveal information relating to or used in the exercise of prosecutorial discretion.

3. Is the Public Prosecution Service 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?

[49] *FOIPOP* permits the disclosure of third party personal information if such a disclosure would not be an "unreasonable invasion" of a third party's personal privacy. In order to determine whether or not a disclosure would result in an unreasonable invasion of personal privacy, public bodies must take a four step approach to their analysis:[40]

1. Is the requested information "personal information" within s. 3(1)(i)? If not, that is the end. Otherwise, the public body must go on.
2. Are any of the conditions of s. 20(4) satisfied? 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?

[50] In this case, with the exception of four pages, the PPS applied s. 20 to the names of witnesses.

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[38] Solicitor-Client Privilege in Canadian Law, Manes & Silver at pp. 147-148.
[39] They are included in the list of full disclosure recommendations in Appendix 1. For clarity, those pages are 97, 281 (2 pages), 287, 288, 305, 306 and 307.
[40] See for example *House (Re)*, 2000 CanLII 20401 (NS SC), and *Sutherland v. Dept. of Community Services*, 2013 NSSC 1. This approach has been consistently followed by former Review Officers. See for examples: NS Reports FI-08-107 and FI-09-29(M).

[51] With respect to pages 84, 85, 258, 259 and 260, the PPS has withheld information citing s. 20(3)(g). However, these five pages contain no personal information. The entity identified as the subject of these five pages is a limited company. Section 20 permits a public body to protect "personal information" of third parties. Section 20 only applies to identifiable individuals because the definition of "personal information" in s. 3 provides that "personal information" means recorded information about an identifiable individual. Section 3 includes a long list of characteristics that only a human being can possess. Consequently, information about corporations does not constitute "personal information" for the purposes of s. 20.[41] I find that s. 20 does not apply to pages 84, 85, 258, 259 and 260 and I recommend that these pages be disclosed to the applicant. They are included in the list of pages set out in Appendix 1.

[52] With respect to the remaining records to which the PPS applied s. 20 I will apply the four step approach. First, I find that names of individuals are clearly personal information as set out in s. 3(1)(i). There is nothing in s. 20(4) that applies in this circumstance. While the PPS gave no submission, the nature and content of the records leads me to find that s. 20(3)(b) applies in this case. That provision states that it is a presumed unreasonable invasion of a third party's personal privacy if 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.

[53] I conclude that "law" in this subsection refers to a statute or regulation enacted by or under the statutory authority of the Legislature, Parliament or another Legislature where a penalty or sanction could be imposed for violation of that law.[42]

[54] In this case, the records are contained in a record held by the PPS. The documents relate to a prosecution of a third party business under provisions of the *Occupational Health and Safety Act* and Regulations. Section 74 of the *Occupational Health and Safety Act* provides that a person who contravenes the *Act* or Regulations is guilty of an offence and liable on summary conviction to a fine or imprisonment. I am satisfied, therefore, that the presumption in s. 20(3)(b) applies to the personal information withheld in this case.

[55] The final step of the analysis requires that I consider whether the balancing of all relevant circumstances including those set out in s. 20(2) of *FOIPOP* lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not. In my opinion, the relevant considerations include the following:

- The personal information has been supplied in confidence. The PPS provided no evidence that the individuals were given any assurance that the information they supplied was supplied in confidence. Certainly the individuals at least anticipated that their names would become public if the matter proceeded to a hearing. However, the matter did not

[41] This finding is consistent with the decision of the Federal Court in *Tridel Corp. v. Canada Mortgage & Housing Corp.* (1996), [1996] F.C.J. No. 644 (Fed. T.D.).

[42] As stated in NS Review Report FI-10-95 at para. 31. Former Commissioner Loukidelis made a similar finding with respect to BC's equivalent provision (s. 22(3)(b)) in Order 01-12 at para. 17. See also ON Order MO-3215 at para. 36 that determined that the presumption requires that there be an investigation into a possible violation of law including a violation of a by-law.

proceed to hearing. The information was collected in the context of a prosecution and so I conclude that it is more likely than not that the individuals expected that their personal information was being supplied in confidence and that it would be used for the single identified purpose. I find that this factor favours withholding the information.

- The applicant considers this matter to be "his file". He had a keen interest in the outcome of the prosecution because he suffered an injury he attributes to the behaviour of his former employer. As a result, he believes he has an entitlement to the information contained in the file. I find that this factor is neutral.

[56] In the absence of any factor favouring disclosure of the personal information, and in light of the burden of proof on the applicant, I find that the disclosure of the withheld personal information would be an unreasonable invasion of a third party's personal privacy. I recommend that the PPS continue to withhold all of the information to which it applied s. 20 except pages 83, 84, 258, 259 and 260.

Records Disclosed to the Applicant

[57] The PPS provided this office with five folders it labelled "withheld" documents (numbered pages 1 – 1980). The PPS also provided one folder entitled, "Records Released to Applicant" which contained a total of 217 pages.

[58] Within the "withheld" records the PPS flagged a total of 72 pages it said it had disclosed to the applicant. Fifty nine of the 72 flagged pages were indeed also present in the "records released" folder. Thirteen were not. Therefore, a total of 230 pages (217 plus the missing 13 pages) should have been disclosed to the applicant. The applicant says he received only 62 pages.

[59] Given the confusion over what was and was not disclosed, I recommend that the PPS disclose all 217 pages contained in the folder titled, "Records Released to Applicant" plus the 13 additional pages flagged in the "withheld" folders as released but not contained in the "records released" folder. For clarity those pages are listed in Appendix 5.

"Public Documents"

[60] The PPS labelled a 38 page document page 1955 and affixed a note indicating that the document was "public n/a". I assume by that the PPS meant that since the document is publicly available, pursuant to s. 4(2)(a), *FOIPOP* does not apply to the record. However, if the PPS never tells the applicant the record is present and what it is, he cannot obtain the publicly available copy of the record. I can find no evidence that the applicant in this case was advised what the 38 page document labelled page 1955 is. Therefore, I recommend that the PPS disclose the document to the applicant.

FINDINGS & RECOMMENDATIONS:

[61] I find that:

1. Of the pages listed in Appendix 1, 116 of them contain no information relating to the exercise of prosecutorial discretion.

2. Of the pages listed in Appendix 2, 86 of them contain no information relating to the exercise of prosecutorial discretion but do contain some personal information of third parties to which s. 20 applies.
3. Section 15(1)(f) applies to all of the withheld documents numbered 777-1980 except pages 1090, 1440, 1442, 1618, 1832, 1896 and 1957.
4. The 657 pages described in Appendix 3 contain only some information to which s. 15(1)(f) applies. In withholding these records in full, the PPS failed to satisfy its duty to sever.
5. Section 16 applies to all of the records withheld under this section by the PPS except pages 93, 97, 113, 114, 281 (2 pages), 287, 288, 306 and 307.
6. I find that none of the communications between the Crown and lawyers for the defendant are subject to s. 16 (pages 93, 97, 113, 114, 281 (2 pages), 287, 288, 306 and 307). However s. 15 does apply to 93, 113 and 114.
7. Section 20 does not apply to pages 84, 85, 258 and 259 because these pages contain no "personal information" within the meaning of *FOIPOP*.

[62] I recommend that the Public Prosecution Service:

1. Fully disclose the 173 pages listed in Appendix 1 that contain no information relating to the exercise of prosecutorial discretion, solicitor-client privilege or personal information.
2. Fully disclose the 38 page "public" document located at page 1955 (also listed in Appendix 1).
3. Partially disclose the 86 pages listed in Appendix 2 that contain some personal information, but no s. 15 information, by severing the small portion of personal information contained in each and disclosing the remainder.
4. Revisit the 657 pages described in Appendix 3, determine the information to which s. 15(1)(f) and/or s. 20 apply, exercise its duty to sever under s. 5(2) and release the remaining information.
5. Reconsider its exercise of discretion with respect to the application of s. 15(1)(f) to the entire file and in particular to records listed in Appendix 4.
6. Disclose all 217 pages contained in the folder titled, "Records Released to Applicant" plus the 13 additional pages flagged in the "withheld" folders as released but not contained in the "records released" folder. For clarity those pages are listed in Appendix 5.

January 20, 2016

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

Appendix 1: Recommendation Summary

Appendix 1: Full Disclosure Recommended	
Full disclosure recommended **Total # = 173 pages**	1, 6, 10, 11, 12, 13, 25, 26, 28, 40, 41, 42, 55, 62, 83, 84, 85, 94, 97, 98, 99, 100, 108, 115, 193, 195, 196, 197, 198 211, 215, 218, 220, 223, 228, 229, 253, 258, 259, 260, 278, 279, 280, 281(2 documents), 287, 288, 289, 290, 291, 295, 296, 297, 298, 299 300, 301, 302, 303, 305, 306, 307, 308, 309, 316, 317, 318, 320 415, 420, 433, 439, 440, 452, 458, 489 516, 530, 537, 549, 576, 577, 594 617, 622, 623, 631, 632, 639, 671, 695 709, 710, 723, 724, 760, 766, 767, 770, 774, 775, 776 778, 897, 898, 905, 906, 927, 964 1054 1266 1439, 1470, 1471, 1472, 1473 1560, 1561, 1590, 1617 1774, 1775, 1776, 1777 1830, 1831, 1850, 1855, 1856, 1857, 1860, 1865, 1895 1955, 1955 (38 pages), 1956

Appendix 2: Partial disclosure (no s. 15 but s. 20 applies to part)	
Partial disclosure – no s. 15 but s. 20 continues to apply to part **Total # = 86 pages**	16, 17, 23, 24, 39, 64, 65, 66, 67, 74, 75, 82, 86, 87, 88, 89, 90, 91, 92, 94, 95, 96, 97 102, 104, 105, 106, 107, 109, 110, 111, 112 224, 225, 226 310, 311, 312, 313, 314, 315 435, 437, 438, 442, 470, 471, 472 566, 568 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 696, 697, 698, 699 701, 702, 703, 704, 705, 725, 726, 734, 735, 736

Appendix 3 – Partial Disclosure (s. 15 applies in part)	
Partial disclosure – sever only the portion of the record that fits the s. 15(1)(f) criteria **Total # = 657 pages**	All other pages from 1 – 776 (not otherwise listed in Appendices 1 & 2 above) = 650 pages heading & bullets: 1090, 1440, 1442, 1618, 1832, 1896, 1957 = 7 pages

Appendix 4 – Reconsider Exercise of Discretion	
Reconsider application of discretion – disclose in full except as noted **Total # = 53 pages**	152, 304 (except handwritten note) 377 – 414 inclusive 454, 485, 490, 492 510, 511, 542, 569, 574, 578 1866, 1867, 1868

Appendix 5 – Re-release Disclosure Package	
Applicant's Disclosure Package Full disclosure **Total # = 221 pages**	Release four pages flagged as "released to applicant" but not contained in the "Records Released to Applicant folder: 897, 898, 905, 906 Re-release 217 pages from folder labelled "Records Released to Applicant"