



**Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Carmen Stuart**

REVIEW REPORT FI-13-67

June 12, 2014

Serious Incident Response Team

Summary

The Applicant made an Application for Access to a Record [“Access Request”] to the Serious Incident Response Team [“SiRT”], under the *Freedom of Information and Protection of Privacy Act* [“Act”]. The record is a report on the investigation into the death of the Applicant’s father while in police custody. SiRT withheld portions of the record under two of the law enforcement exemptions. The Review Office found that the exemptions did not apply and recommended disclosure of the severed information.

Statutes Considered

Freedom of Information and Protection of Privacy Act, sections 2(b), 3(1)(e), 15(1)(a), 15(1)(f), 45(1); Police Act, sections 26I(3)(a), 26J, 26K

Other Sources

Nova Scotia Review Reports FI-09-04, FI-10-26, FI-07-58, FI-04-09(M), FI-09-40, FI-06-79; Halifax Herald Ltd. v. Nova Scotia (Workers’ Compensation Board), 2008 NSSC 369; Unama’ki Board of Police Commissioners v. Canadian Broadcasting Corporation, 2003 NSCA 124; O’Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat) (2001), 197 N.S.R. (2d) 154; Canada (Information Commissioner) v. Canada (Chairperson, Immigration and Refugee Board), 1997 CanLii 5922, Cummings v. Nova Scotia (Public Prosecution Service) 2011 NSSC 38; Alberta Order F2010-017; and British Columbia Order F05-18.

Background

The Applicant’s father died while in police custody.

According to its website, SiRT’s mandate is to investigate all matters that involve death, serious injury, sexual assault and domestic violence or other matters of significant public interest that

arise from actions of any police officer in Nova Scotia. The purpose of a SiRT investigation is to determine whether the facts of the case justify any charges against a police officer or officers. Upon completion of the investigation, the primary investigator is required to submit an investigative report, which is reviewed by the Director. The Director determines whether charge(s) should be laid in relation to the actions of the police officer(s) who were the subject of the investigation. If a charge is laid, SiRT turns the case over to the Crown for prosecution.

In this case, the Director found there were no grounds to consider charges against any police officer and in the publicly published summary, the efforts by the police to save the Applicant's father's life were commended.

On May 10, 2013 the Applicant made an Access Request to SiRT for a copy of the SiRT report on its investigation into the death of his/her father while in police custody.

On July 18, 2013 SiRT provided the Applicant with a disclosure decision. Access was provided in part. Information was severed under four exemptions, two of which have since been resolved in addition to section 15(1)(a) [harm to law enforcement] and section 15(1)(f) [reveal prosecutorial discretion]. The majority of the information in the Record was disclosed; the severing was applied selectively.

On July 28, 2013 [received August 6, 2013] the Applicant filed a Request for Review ["Review"]. The Applicant took issue with all of exemptions, and wanted access to the entire report with no severing.

As a result of informal resolution, the Review Office and the Applicant were satisfied by SiRT's representations that two of the exemptions that had been applied were appropriate. Those severances have been removed from the scope of this Review Report.

The information that is at issue has been described by SiRT as "the opinions of the Investigator expressed in his report." The majority of the severed information is found in the findings and conclusions sections of the report.

Both the Applicant and SiRT were cooperative and participated meaningfully in the Review process.

Issues

The issues I must decide are the following:

1. Whether SiRT is authorized to withhold information under section 15(1)(a) of the *Act* because disclosure could reasonably be expected to harm law enforcement; and
2. Whether SiRT is authorized to withhold information under section 15(1)(f) of the *Act* because disclosure could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion.

Discussion

Issue #1: Will disclosure harm law enforcement?

The purpose of this exemption is to give a public body discretion to refuse access to information in records in circumstances in which disclosure could reasonably be expected to interfere with a law enforcement matter.

Section 45(1) of the *Act* places the burden for this discretionary exemption on SiRT. SiRT bears the burden of proof to:

1. Show what specific law enforcement matter is affected; *and*
2. Identify the expected harm; *and*
3. Directly connect the disclosure of the information in the record with the contemplated harm.

[NS Report FI-09-04]

The exemption carries the “reasonable expectation of harm test” in order for it to apply; speculative harm will not suffice *[NS Report FI-09-04]*.

What specific law enforcement matter is affected?

The information that has been severed has been described by SiRT as “the opinions of the Investigator expressed in his report.”

The definition of “law enforcement” can be found in section 3(1)(e) of the *Act*:

Interpretation
3 (1) In this Act,

(e) “law enforcement” means

- (i) policing, including criminal-intelligence operations,*
- (ii) investigations that lead or could lead to a penalty or sanction being imposed, and*
- (iii) proceedings that lead or could lead to a penalty or sanction being imposed;*

The *Police Act* distinguishes between the investigation [section 26I(3)(a) of the *Police Act*] and the report that is prepared at the conclusion of investigation [section 26J of the *Police Act*] as being two distinct parts of the process.

SiRT has provided no arguments or evidence to show how the opinions of an investigator, found in a report completed after the investigation was concluded, meet the definition of law enforcement. Had the investigation notes been the responsive record, those might have attracted the protection intended by this exemption.

I find that because no law enforcement matter has been identified, this part of the test has not been met and the exemption cannot apply.

As SiRT is a new public body, likely with little access to information experience, a full analysis of its position would be helpful given this type of Access Request may come up again.

The previous Review Officer has determined that it is necessary for the public body to provide concrete evidence of an **ongoing** investigation involving the subject matter found in the record. Failing or refusing to provide tangible evidence will work against the public body's ability to prove the exemption applies [NS Report FI-10-26].

SiRT expressed its position in its representations of November 14, 2013:

[T]here is no mention of a restriction to an ongoing investigation in any of the situations contemplated in Section 15. If the Legislature had intended it to be restricted in that fashion, it could have simply stated same. Instead, it left the wording broad. This makes good sense.

Nova Scotia's courts have routinely found that exemptions applied to restrict the right to access information must be read restrictively or narrowly, not broadly as SiRT suggests. For example:

- The right to any record is to be broadly construed, and is subject only to specific narrowly-defined exemptions [*Halifax Herald Ltd. v. Nova Scotia (Workers' Compensation Board)*, 2008 NSSC 369].
- In keeping with the promotion of openness and accountability of government, exemptions to disclosure are to be construed narrowly [*Unama'ki Board of Police Commissioners v. Canadian Broadcasting Corporation*, 2003 NSCA 124].
- I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada. Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation; ensure fairness in government decision making; and permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives [*O'Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat)* (2001), 197 N.S.R. (2d) 154].

In the Federal Court of Canada decision, *Canada (Information Commissioner) v. Canada (Chairperson, Immigration and Refugee Board)*, 1997 CanLii 5922 [*Canada v. Canada*], the federal equivalent of this exemption was examined. In that case, the Court found that the legislation must be guided by the purpose section of the *Act*. The purpose of the *Act* is to provide for the disclosure of all government information with necessary exemptions, that are limited and specific [section 2(b)].

As such, I agree with my predecessor's interpretation that this exemption is limited for use where there is an **ongoing** law enforcement matter or investigation.

Although not specifically identified by SiRT, certainly the law enforcement matter that SiRT is referring to is the investigation that SiRT conducted under section 26I(3)(a) of the *Police Act*. Upon conclusion of the investigation, the report - as required by section 26J of the *Police Act* - was completed and submitted to the Director. This report is the responsive record.

I find that because the investigation is completed, this part of the test has not been met and the exemption cannot apply.

All three parts of the burden of proof must be met for the exemption to apply. As I have found the first part of the test has not been met it is unnecessary for me to proceed. In this case, I will continue with a view to providing a full analysis as previously mentioned.

What is the expected harm?

The *Act* does not define “harm”. Caselaw has defined harm as damage or detriment, not merely hindrance or minimal interference [*AB Order F2010-017*].

SiRT identified the harm in its November 14, 2013 representations:

Limiting the candor of SiRT investigators would be very contrary to the public interest, in the current and future investigations. There is no question that should their frank opinions be subject to disclosure, that would have a deleterious impact on the quality of advice I am able to receive from them. This would be a serious impediment to ensuring that the public of Nova Scotia can have the utmost trust and confidence in the investigations we conduct and the quality of decisions I must make based on those investigations.
[Emphasis added.]

“Limited candor”, “impacted quality of advice” and “impeded public trust and confidence” do not fit into the category of “damage or detriment”; they fit into the “hindrance or interference” category. This can be likened to a general “chilling effect”.

I find that because no harm has been identified, this part of the test has not been met and the exemption cannot apply.

How will the disclosure of this information in this record cause the harm?

SiRT must give sufficient evidence to show that a specific harm is likelier than not to flow from disclosure of the requested information in the record. There must be evidence of a connection between disclosure of the information and the anticipated harm. The connection must be rational or logical. The harm feared from disclosure must not be fanciful, imaginary or contrived [*NS Report FI-07-58*]. Where the foreseen harm is mere speculation or mere possibility, the burden of proof will not be met [*NS Reports FI-04-09(M)* and *FI-09-40*].

In *Canada (Information Commissioner) v. Canada (Chairperson, Immigration and Refugee Board)*, Justice Richard found that “one cannot refuse to disclose information [under the *Act*] on the basis that to disclose it would have a chilling effect on possible future investigations.”

When examining the equivalent section, British Columbia's ["BC"] Information and Privacy Commissioner also had the following to say:

*The [public body] must do more than assert what amounts to a general "chilling effect" argument in order to foreclose access under s. 15(1)(a) to any records generated during an investigation conducted by the [public body].
[BC Order F05-18]*

SiRT has not addressed the linkage of the disclosure of this information to this Applicant causing the proposed harm other than citing "limited candor", "impacted quality of advice" and "impeded public trust and confidence" in current and future investigations. This vagueness is similar to claims that disclosure would have a "chilling effect" in general.

I find that because SiRT has not demonstrated the connection of the disclosure of this specific information to a harm that is probable, any harm is speculative. This part of the test has not been met and the exemption cannot apply.

I find that SiRT is not authorized to withhold information under section 15(1)(a) of the Act.

Exercising Discretion

It is important to note that this exemption is discretionary, not mandatory. It is discretionary because section 15 employs the word 'may'. This means that even if the exemption applies, a public body may choose not to apply it and release the information. This is achieved through the exercise of the public body's discretion.

In FI-06-79, the Review Officer wrote at length on the exercise of discretion, emphasizing that the public body must consider **all** relevant factors.

It is unnecessary for me to consider whether or not SiRT considered all relevant factors in its exercise of discretion because I have found that the exemption cannot apply; however, if the facts were different and the exemption was found to apply, I would have considered the following factors relevant:

- No charges were laid
- The seriousness of the situation
- Applicant is a close family member
- Compassion for grieving family
- SiRT's mission

I make no finding in regards to SiRT's exercise of discretion.

Issue #2: Will disclosure reveal any information relating to or used in the exercise of prosecutorial discretion?

SiRT did not identify the portion(s) of the record to which it had applied the section 15(1)(f) exemption. Normally, in such a case, the Review Officer would not be in a position to decide that the exemption applies and disclosure would be recommended. In this case, SiRT was not provided the opportunity to rectify this apparent oversight. For the purposes of this Review, I will assume that all of the information severed is also subject to section 15(1)(f).

The Court in *Cummings v. Nova Scotia (Public Prosecution Service)* 2011 NSSC 38 [Cummings], has said the following about section 15(1)(f):

*The statutory exemption for documents relating to or used in the exercise of prosecutorial discretion is **intended to protect the decision-making process of the Crown Prosecutor.***
[Emphasis added.]

Section 45(1) of the *Act* places the burden for this discretionary exemption on SiRT. SiRT bears the burden of proof to demonstrate:

1. That prosecutorial discretion was exercised; **and**
2. That there is information in the file records that relates to or was used in the exercise of that discretion; **and**
3. That disclosure of the information in the records withheld could reasonably be expected to reveal such information.

[Cummings]

The phrase “exercise of prosecutorial discretion” is not defined in the Nova Scotia *FOIPOP Act*; however, the counterpart legislation in BC, and relied upon in *Cummings*, provides that the exemption means the Crown Prosecutor’s exercise of a duty or power to:

- a) *Approve or not to approve a prosecution*
- b) *Stay a proceeding*
- c) *Prepare for a hearing or trial*
- d) *Conduct a hearing or trial*
- e) *Take a position on a sentence*
- f) *Initiate an appeal*

According to the Nova Scotia Public Prosecution Service’s website, its role is to prosecute charges that have been laid. Under the authority set out in section 26K of the *Police Act*, the Director of SiRT “shall decide whether a charge will be laid.” And from SiRT’s website:

*The Director determines whether a charge should be laid in relation to the actions of the police who were the subject of the investigation. Throughout the investigative process SiRT liaises, as necessary, with the NS Public Prosecution Service (Crown). **If a charge is laid,***

*SiRT turns the case over to the Crown for prosecution and the SiRT investigator(s) may provide support to the Crown in its prosecution.
[Emphasis added.]*

SiRT's May 5, 2014 representations on the applicability of this exemption are:

[The opinions of the SiRT investigators are] connected to decisions relating to the exercise of prosecutorial discretion in that they impact on whether charges will be laid against a police officer.

In this case, the Director determined that there were no grounds to consider charges against any police officer. As no charges were laid, there were no decisions that had to be made regarding prosecution by the Crown.

I find that section 15(1)(f) does not apply to any part of this record.

Exercising Discretion

Because of my finding that the exemption does not fit, I do not need to address whether SiRT considered all relevant factors in its decision to apply the exemption. However, the same relevant factors listed above on page 6 would also apply to this discretionary exemption.

Conclusion

Access Requests must be assessed on their own merit, not in a global approach. Exemptions must be interpreted narrowly. SiRT has not made its case that the two exemptions apply in this case.

Recommendations

Under the authority of section 39 of the *Act*, I recommend that SiRT:

1. Disclose all information that has been severed under section 15(1)(a) of the *Act* to the Applicant, and copy it to the Review Officer within 30 days of acceptance of this recommendation.
2. Disclose all information that has been severed under section 15(1)(f) of the *Act* to the Applicant, and copy it to the Review Officer within 30 days of acceptance of this recommendation.

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