



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

REVIEW REPORT 18-01

April 23, 2018

Halifax Regional Water Commission

Summary: Broad general assertions of harm will not satisfy the burden of establishing that the disclosure of the particular information at issue could reasonably be expected to harm the security of a system. On that basis, the Commissioner recommends full disclosure of a video inspection report relating to underground sewer and storm pipes.

Statutes Considered: *Municipal Government Act*, [SNS 1998, c 18](#), ss. 475, 498.

Authorities Considered: **Nova Scotia:** Review Report [FI 10-71, 2015 CanLII 60916](#) (NS FOIPOP); **Ontario:** Order MO-3089, [2014 CanLII 50828 \(ON IPC\)](#).

Cases Considered: *Ontario (CSCS) v. Ontario (IPC)*, [2014 SCC 31, \[2014\] 1 SCR 674](#).

Other Sources Considered: Laurie Van Leuven, “Water/Wastewater Infrastructure Security: Threats and Vulnerabilities” in R.M. Clark et al. (eds.) *Handbook of Water and Wastewater Systems Protection*, (New York: Springer Verlag, 2011) 27; *National Strategy for Critical Infrastructure*. Ottawa: Public Safety Canada, 2009 (online: <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/srtg-crtcl-nfrstrctr/index-en.aspx>); *Action Plan for Critical Infrastructure*. Ottawa: Public Safety Canada, 2009 (online: <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/pln-crtcl-nfrstrctr/index-en.aspx>).

INTRODUCTION:

[1] The applicant sought a copy of a video inspection report of sewer and storm pipes located under his street. The Halifax Regional Water Commission (Halifax Water) agreed to provide a portion of the record withholding the remainder because it says disclosure could reasonably be expected to harm the security of a property or system.

ISSUE:

[2] Is Halifax Water authorized to refuse access to information under s. 475(1)(k) of the *Municipal Government Act (MGA)* because disclosure of the information could reasonably be expected to harm the security of any property or system?

DISCUSSION:

Background

[3] On August 7, 2014 and again on August 26, 2014, water flooded into the applicant's basement. The applicant's quest since that time has been to determine the cause of the flooding. He initially contacted both the Halifax Regional Municipality and Halifax Water. Inspectors were sent, discussions occurred, and eventually Halifax Water commissioned a video inspection of the sewage and storm systems on the applicant's street. The video inspection resulted in the creation of a report (the "CCTV Report").

[4] In November 2014, the applicant made a request for all documentation associated with the Halifax Water investigation into the source of the flooding in his home. Halifax Water began processing this request and with respect to the CCTV Report, the applicant was invited to a meeting in December 2014 where the report was discussed but those present were not allowed to examine it in detail nor were they provided with a copy. The applicant, who has an engineering background, was not satisfied and continued to request that he receive a full copy of the report.

[5] On January 13, 2015, Halifax Water disclosed two pages of the 40-page CCTV Report to the applicant.¹ The letter stated simply that an "excerpt" of the report was enclosed. The cover letter provided no rationale for the decision to provide only an excerpt of the CCTV Report. On January 14, 2015, Halifax Water sent a follow-up letter in which it explained that the full CCTV Report had not been provided because it showed third party laterals and other public infrastructure information that Halifax Water said was not relevant to the applicant's property and because the CCTV Report contained critical Halifax Water infrastructure information that was not released to the public for security reasons as provided for in clause 475(1)(k) of the *MGA*. On February 10, 2015, Halifax Water provided a second decision in response to the applicant's request and repeated the rationale for not disclosing the full CCTV Report. It stated, "The rationale for non-disclosure of the report relates to the security and protection of critical infrastructure, i.e. the wastewater system."

[6] The applicant filed a request for review of Halifax Water's response to his access request. During the course of the informal resolution process, Halifax Water disclosed five further pages of the CCTV Report. Halifax Water relied only on s. 475(1)(k) of the *MGA* to support its decision to withhold the remaining 33 pages of the CCTV Report.

Burden of Proof

[7] In accordance with s. 498(1) of the *MGA*, at a review into a decision to refuse an applicant access to all or part of a record, the burden is on the responsible officer for the municipal body (Halifax Water) to prove that the applicant has no right of access to the record or part of the record.

¹ Includes a cover page and cover map along with the 38-page CCTV Report.

Is Halifax Water authorized to refuse access to information under s. 475(1)(k) of the MGA because disclosure of the information could reasonably be expected to harm the security of any property or system?

[8] Section 475(1)(k) provides:

- (1) The responsible officer may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
- (k) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[9] Section 475(1)(k) has two essential requirements. First, the municipal body must establish that the disclosure of the information could reasonably be expected to cause harm. Second, the harm must be to the security of any property or system.

[10] Halifax Water bears the burden of proving that this exemption applies to the record. In 2014, the Supreme Court of Canada reviewed decisions on the “reasonable expectation of harm test” contained in access to information legislation and summarized the appropriate test as follows:

[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.²

[11] As I have stated in a number of previous reports, what is clear from the recent 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.³

[12] The record at issue contains a summary of the findings of the video inspection of a portion of the storm sewer and the sanitary sewer lines that run down the applicant’s street. The CCTV Report consists of a series of reports. Three reports describe the main sewer and storm lines (plan view) that run down the applicant’s street. The remainder of the reports describe inspection of laterals – the storm and sewer pipes that go to each house on a section of the applicant’s street. The CCTV Report does not include an inspection of the water system. Two pages of the CCTV Report consist of the cover page and a map that provides context.

[13] The reports disclose the diameter and length of the pipes and identify any issues, such as debris or damage to the pipe. The exact geographic position is not identified. Issues of interest, such as potential damage or blockages, are noted and photographs from points of particular

² *Ontario (CSCS) v. Ontario (IPC)*, [2014 SCC 31](#), [2014] 1 SCR 674.

³ For a full discussion of the test and examination of the case law see NS Review Report [FI-10-71](#) at paras 40-47.

interest are also included. The plan view of the mainline illustrates the number of laterals from that section of the sanitary or sewer line.

[14] The applicant's position is straightforward. He believes that since the report was commissioned as a part of the investigation into the flooding in the basement of his house, it is very much relevant to his property. He notes that while Halifax Water asserts that public security is at risk, it provides no support for that position, simply asserting the *MGA* subsection with no further information provided. Because the flooding smelled like sewage, the applicant believes that this would suggest there is a public health and safety aspect that supports disclosure of the report. Finally, he says that at the meeting in December 2014, where the CCTV Report was discussed, he was told that Halifax Water would not provide a copy of the report because Halifax Water does not give out these reports to laypersons. Lay people would not understand this engineering report. The applicant argues that providing the report to him would allow him to get an independent qualified reviewer to explain the results to him.

[15] For its part, Halifax Water originally simply asserted that the portion of the report that pertains to the applicant's address was provided to him and that the remainder contains critical Halifax Water infrastructure that is not released to the public for security reasons as provided in clause 475(1)(k). In follow-up conversations during the informal resolution process, Halifax Water made reference to two public documents: *Action Plan for Critical Infrastructure*⁴ and *National Strategy for Critical Infrastructure*.⁵ Halifax Water argues that it operates critical public infrastructure and that disclosure of information that describes this infrastructure poses a threat. In Halifax Water's view, once this information is disclosed, there is a risk that individuals may rely on it to commit acts of vandalism, sabotage and/or terrorism.

[16] With respect to Halifax Water's first assertion that the portion of the report that pertains to his address was provided to him, a careful review of the CCTV Report revealed that the applicant was not provided with the three pages that actually related specifically to the laterals to his property. Instead, the applicant was originally provided with two pages that are details of the inspection of one section of the sanitary sewer mainline (plan view). This report provides details of the exact location of each of the laterals (relative to the identified manholes) and includes a photograph of an obstacle found in the mainline. When this was pointed out to Halifax Water, it agreed to provide the three pages of the CCTV Report that related to the laterals to the applicant's property. It also agreed to provide the plan view of the storm water system.

[17] Halifax Water submits that its whole system is critical infrastructure and that on that basis it cannot disclose the entire CCTV Report. The *Action Plan for Critical Infrastructure* calls for the creation of sector risk profiles. In other words, public authorities are called upon to identify where the specific risks lie in their physical infrastructure. The Action Plan does not assert that every portion of physical infrastructure is at risk. It does say that there is a rapidly evolving risk environment and that the goal of the Action Plan is to enable partners to anticipate and address new risks. The version provided by Halifax Water was dated 2009. More recent versions are

⁴ The *Action Plan for Critical Infrastructure* is available at: <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/pln-crtcl-nfrstrctr/index-en.aspx> .

⁵ The *National Strategy for Critical Infrastructure* is available at: <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/srtg-crtcl-nfrstrctr/index-en.aspx> .

available online. What is key though, is that sector participants are expected to do their own risk assessments to identify areas of the infrastructure that are at risk with a view to identifying and sharing common vulnerabilities. In turn, the risk profiles will assist each sector network in identifying priority areas for action including research and work plans.

[18] It is Halifax Water’s position that while individual elements of the CCTV Report do not create risk, the bigger picture does.

[19] In this case, Halifax Water must establish that disclosing this CCTV Report could reasonably be expected to harm the security of the storm and sewage system. Halifax Water was asked to provide the risk assessment associated with the storm pipe and sewer pipe infrastructure in a residential neighbourhood. Halifax Water stated in response that it “did not conduct a risk assessment for this specific section of pipe but has relied on its overall risk assessments, which are broader in scope, with an all hazards approach on a system-wide basis.”⁶

[20] The municipal body bears the burden of establishing the connection between the disclosure of the record and the identified harm. Threats to wastewater infrastructure come in three forms: natural disasters, human-caused and workforce/infrastructure events.⁷ Halifax Water identified only the second type, human-caused, as the source of risk from the disclosure of the CCTV Report. There are three broad classes of intentional threats to water utilities: physical threats, chemical contamination threats and cyber threats.⁸ Human-caused risks to water infrastructure relate mainly to drinking water storage reservoirs, overflow storage containers, vaults that provide access to electrical panels and equipment, and large transmission and conveyance pipelines.⁹ Given that the CCTV Report does not include water supply, risks of chemical contamination are not at issue nor is there any potential cyber threat from the disclosure. The only remaining potential risk is physical threat.

[21] From a layperson’s perspective, the most vulnerable section of sewage pipe infrastructure appears to be the manholes. The manholes are easily observed by anyone walking on any street in Halifax. Manholes are where a motivated individual could reasonably be expected to access the underground pipe system. Pipes buried under streets are not otherwise easily accessible without heavy equipment. Further, the fact that each house on a street has laterals connected to storm and sanitary sewer mains is a matter of common knowledge. Halifax Water has already disclosed the only information in the CCTV Report that might be characterized as “big picture” – the mainline plans for part of the sewer and sanitary lines on the street. There is no evidence that such disclosure has resulted in any risk to the Halifax Water system.

[22] In a decision in 2014, the Ontario Information Commissioner’s office reviewed a decision of the City of Toronto’s water department. In that decision, the city’s water department identified specific risks it said could arise from the disclosure of the record. But as noted in the decision, the water department failed to prove that the disclosure of the withheld portions of the

⁶ Halifax Water submission dated February 15, 2018.

⁷ Laurie Van Leuven, “Water/Wastewater Infrastructure Security: Threats and Vulnerabilities” in R.M. Clark et al. (eds.) *Handbook of Water and Wastewater Systems Protection*, (New York: Springer Verlag, 2011) 27.

⁸ Van Leuven at p. 32.

⁹ Van Leuven at pp. 35-36.

records could reasonably be expected to reveal any information that would assist parties in undertaking the actions identified by the city.¹⁰ In this case, Halifax Water has not identified any specific risk to the sewage system let alone connected such risks to the exact information at issue here. Broad general assertions of harm will not satisfy the burden of establishing that the disclosure of the particular information at issue could reasonably be expected to harm the security of a system.

FINDINGS & RECOMMENDATIONS:

[23] I find that Halifax Water has failed to satisfy the burden of establishing that disclosure of the remaining withheld information would reasonably be expected to harm the security of the system. I recommend that Halifax Water fully disclose the remainder of the CCTV Report.

April 23, 2018

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

OIPC File 15-00042

¹⁰ Order MO-3089, [2014 CanLII 50828](#) (ON IPC).