Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Tricia Ralph

REVIEW REPORT 20-07

November 30, 2020

Public Prosecution Service

Summary: The applicant requested records held by the Public Prosecution Service (PPS) about himself. Following receipt of the records from the PPS, the applicant further questioned the comprehensiveness of the search. The PPS conducted further searches and answered targeted questions related to its search. For these reasons, the Commissioner finds that the PPS has conducted an adequate search as required by s. 7(1)(a) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*) and recommends that the PPS take no further action with respect to searching for the records.

In its original decision, the PPS provided significantly more records than were requested and did not provide an index explaining that eight of the items did not exist. During this review, the PPS provided the applicant with a new disclosure package that included an index and identified where records did not exist. As such, the Commissioner finds that the PPS met its duty to assist the applicant as required by s. 7(1)(a) of *FOIPOP* and recommends that the PPS take no further action with respect to its duty to assist.

The PPS redacted portions of the records citing s. 15(1)(f) (prosecutorial discretion) of *FOIPOP*. The nature and purpose of the records allowed a large portion of the information to be withheld pursuant to s. 15(1)(f). The Commissioner finds that s. 15(1)(f) does not apply to two pages of records and recommends that they be disclosed to the applicant. The Commissioner finds that the PPS need not take any further action with regard to disclosing any additional information redacted pursuant to s. 15(1)(f).

This review highlighted an area where *FOIPOP* could be improved. As such, a copy of this report will be sent to the Minister of Justice so that he may consider putting forward an amendment to the Legislative Assembly.

Statutes Considered: *Access to Information and Protection of Privacy Act*, RSY 2002, c 1, s. 53(1); *Access to Information and Protection of Privacy Act*, SNL 2015, c A-1.2, s. 97(2); *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20, s. 34(2); *Act Respecting Access to Documents Held by Public bodies and the Protection of Personal Information*, CQLR c A-2.1, s. 129; *Freedom of Information and Protection of Privacy Act*, CCSM c F175, s. 50(1); *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s.56(1); *Freedom of*

Information and Protection of Privacy Act, RSBC 1996, c 165, s. 44; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s. 52; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 7, 15, 20, 45; *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, s. 53(1); *Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01, s. 54; *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6, s. 64.2(b).

Authorities Considered: British Columbia: Audit & Compliance Report F18-02 City of White Rock, Duty to Assist 2018; Order 02-38, 2002 CanLII 42472 (BC IPC); Nova Scotia: Review Reports FI-02-37, 2002 CanLII 17967 (NS FOIPOP); FI-04-42, 2005 CanLII 5391 (NS FOIPOP); FI-11-72, 2015 NSOIPC 10 (CanLII); FI-11-76, 2014 CanLII 71241 (NS FOIPOP); FI-12-106, 2013 CanLII 61076 (NS FOIPOP); FI-13-52, 2014 CanLII 4519 (NS FOIPOP); 16-05, 2016 NSOIPC 5 (CanLII); 19-06, 2019 NSOIPC 7 (CanLII); 20-04, 2020 NSOIPC 4 (CanLII).

Cases Considered: *Cummings v. Nova Scotia (Public Prosecution Service)*, 2011 NSSC 38 (CanLII); *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)

Other Sources Considered: OIPC Guidelines for Public Bodies and Municipalities, online: https://oipc.novascotia.ca/node/471

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 conducted by the Nova Scotia PPS in another jurisdiction. The applicant requested twenty-two specific items. In response, the PPS provided 843 pages of records that were heavily redacted pursuant to ss. 15, 18 and 20 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). The applicant filed a request for review to this office.

ISSUES:

[2] There were three issues under review:

1. Did the PPS conduct an adequate search as required by s. 7(1)(a) of *FOIPOP*?
2. Did the PPS meet its duty to assist the applicant by accurately, openly and completely identifying the responsive records as required by s. 7(1)(a) of *FOIPOP*?
3. Is the PPS authorized to refuse access to information under s. 15 of *FOIPOP* because the disclosure would reveal information relating to or used in the exercise of prosecutorial discretion?

DISCUSSION:

Background

[3] On January 26, 2016, the applicant made an application for access to information from the PPS. The information requested related to criminal proceedings that the applicant had been involved in. The applicant provided a list of records requested, consisting of twenty-two specific items.

[4] On August 4, 2016, the PPS provided the applicant with partial access to the records (package #1) but withheld the majority of the information under ss. 15, 18 and 20 of *FOIPOP*. The PPS also withheld some information as "not relevant". The records disclosed consisted of 843 pages, severed almost entirely. An index or legend was not provided to the applicant. The PPS also did not tell the applicant that some of the records he requested were not in its custody or control.

[5] On August 30, 2016, the applicant submitted a request for review of the PPS's decision to this office, the Office of the Information and Privacy Commissioner for Nova Scotia (OIPC), raising severing and duty to assist issues on the request for review form.

[6] Due to the backlog at the OIPC, an OIPC investigator was not assigned to this file until August 13, 2019.

[7] On February 24, 2020, the PPS provided the applicant with an updated decision letter and communicated to the applicant that five of the twenty-two requested items did not exist, and one item was available publicly. The OIPC investigator later identified that two more of the requested twenty-two items were not provided to the applicant (for a total of eight missing).

[8] On May 26, 2020, the OIPC investigator provided a formal opinion letter to both parties, setting out the steps required for a resolution of the file, including a requirement that the PPS conduct targeted searches for the outstanding eight items that it claimed did not exist, or, if no records could be located, answering a list of questions related to the search. The OIPC investigator also requested that the missing records be provided to the applicant if found. Finally, the OIPC investigator requested that the PPS remove from the disclosure package records that were outside the scope of the request.

[9] On June 22, 2020, the PPS provided the applicant with a second revised disclosure decision (package #2) that stated that the eight items did not exist. The decision consisted of approximately 297 pages and included an index that identified which of the requested twenty-two items the responsive records correlated with. While the PPS communicated to the applicant that the eight outstanding items did not exist, it did not respond to the search questions as requested by the OIPC investigator, nor identity if a second search had been conducted. The PPS also removed its application of s. 18 from the records and applied s. 20 to information previously withheld as "not relevant".

[10] On July 3, 2020, the applicant agreed to remove s. 20 from the scope of the review. Thus, the only remaining issues were the PPS's application of s. 15 to the records, as well as its efforts with regard to searching for the records and its duty to assist the applicant.

[11] While some issues were resolved, informal resolution of all issues was not possible; therefore, this file was forwarded to me to complete the review.

Burden of proof

[12] Section 45(1) of *FOIPOP* establishes the burden is on the public body to prove that the applicant has no right of access to a record or part of a record.

[13] With respect to the duty to assist set out in s. 7(1), *FOIPOP* is silent as to who bears the burden of proof. Therefore, the parties must each submit representations and evidence in support of their positions.[1] However, it is the PPS who made the decisions which are under review and who is in the best position to discharge the burden of proof.

Issue #1: Did the PPS conduct an adequate search as required by s. 7(1)(a) of *FOIPOP*?

[14] Section 7(1)(a) of *FOIPOP* provides:

> 7(1) Where a request is made pursuant to this Act for access to a records, the head of the public body to which the request is made shall
>
> (a) make every reasonable effort to assist the applicant and to respond without delay, openly, accurately and completely;

[15] As set out in the background section above, in this case, the applicant submitted a list of twenty-two items that he was seeking. In response, the PPS provided some records but did not provide any records in response to eight of the twenty-two requested items. The applicant questioned the adequacy of the search conducted by the PPS. He noted that he believed the records should exist because a Prosecutor's Manual from another jurisdiction would have required the Crown prosecutors to develop the requested items. He said that he would be satisfied that the records did not exist if he was supplied with an affidavit from the Crown prosecutors affirming that the records did not exist. This option was presented to the PPS, but it declined to provide an affidavit.

[16] The OIPC investigator instead asked the PPS to conduct a new search and requested that the PPS respond to a series of questions as follows:

a) Where no record(s) is found, please provide a representation to the OIPC including answers to the following search questions:
   i. What business area(s) were searched?
   ii. What types of records were searched (i.e. emails, physical files, databases)?
   iii. What key words were used in the search?
   iv. Do the relevant staff use personal email accounts/devices/applications ("apps")? If so, were personal email addresses included in your on-site search?
   v. Were personal email accounts/devices of staff searched?

[1] See para. 12 of Nova Scotia *Review Report FI-11-76.*

vi. What employee(s) conducted the search (job title/business area)?
vii. How much time was spent searching by each person and /or business area?
viii. Were any requested records destroyed in accordance with an approved retention policy? If so, please provide a copy of the policy and the retention paperwork.
ix. If there is another explanation why records are missing/lost, please provide it.
x. Is there any other relevant information you would like to add regarding the search for the identified record(s)?

[17] At formal review, the PPS provided the following responses to the OIPC investigator's questions:

i. Emails of the Crown prosecutors were searched and the search terms were outlined.
ii. The Central Registry was searched for all files related to the applicant.
iii. PICS was searched for all files related to the applicant.
iv. The offices and files of the Crown prosecutors were searched for all files and documents related to the applicant.
v. No personal email accounts/devices/apps were used by the Crown prosecutors in relation to this file.
vi. No requested records were destroyed by the PPS in accordance with an approved retention policy.
vii. Each Crown prosecutor spent approximately one to two full days searching their emails, offices and files.
viii. Records staff and the director of business affairs spent a full day searching for files in the Central Registry and on PICS.

[18] In terms of its representations, the PPS highlighted that the leading case on searching for records in Nova Scotia is *Review Report FI-11-76*, which states:

> [13] What is clear from decisions across these Canadian jurisdictions is that where an applicant alleges a failure to conduct an adequate search the applicant must provide something more than mere assertion that a document should exist.
>
> [14] In response, the public body must make "every reasonable effort" to locate the requested record. The public body's evidence should include a description of the business areas and record types searched (for example emails, physical files, databases), should identify the individuals who conducted the search (by position type), and should usually include the time taken to conduct the search. If there is an explanation for why a record may not exist, it should be provided.

[19] In response to the applicant's argument that the records should exist, the PPS explained that the way it took carriage of this file was to obtain its information from the another jurisdiction's police agency and not the other jurisdiction's Crown Prosecutors Office. Thus, it might not have the same information that the applicant may have obtained from the other jurisdiction. The PPS maintained that it processed all the records related to this file that were in its custody.

[20] On September 4, 2020, I asked the PPS to clarify whether it had ever conducted a second search for the records, as that was not clear to me from its representations. The PPS advised that it conducted a second search and also a third search immediately preceding the submission of its representations for review. As set out above, the PPS also answered the questions posed by the OIPC investigator that were based off the requirements set out in *Review Report FI-11-76*. The responses to the questions indicated that the second and third searches were comprehensive, and as such I am satisfied the PPS has conducted an adequate search. I find that in conducting an additional search and answering the OIPC investigator's questions, the PPS met its duty to assist this applicant by conducting an adequate search for records as required under s. 7(1)(a) of *FOIPOP*.

[21] Before I move on, I do wish to address the issue of the PPS declining to provide affidavit evidence to this office and the applicant. Nova Scotia's *FOIPOP* does not contain provisions that would allow the Commissioner's office to compel oral or written evidence on oath or affirmation. This is unlike almost every other Canadian jurisdiction including Alberta,[2] British Columbia,[3] Manitoba,[4] Saskatchewan,[5] Ontario,[6] Quebec,[7] Newfoundland,[8] Prince Edward Island,[9] the Northwest Territories[10] and the Yukon.[11] New Brunswick has a provision that provides its Ombudsman the power to "converse in private with any officer or employee of a public body."[12] The other jurisdiction that does not contain this authority is Nunavut. Thus, I have no power to require the PPS to produce an affidavit. However, in many cases, affidavits may be desirable because an affidavit is evidence given under oath, in comparison with an assertion or statement made that is not given under oath. Not having this power is a significant flaw in Nova Scotia's *FOIPOP*. This flaw is compounded by weak offence provisions that do not make it an offence to willfully obstruct, mislead or make a false statement to the Commissioner.

[22] Access and privacy laws in every other jurisdiction in Canada make it an offence to obstruct or impede the Commissioner.[13] Aside from the federal legislation, all of the provincial

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[2] See s. 56(1) of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25.
[3] See s. 44(1) of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165.
[4] See s. 50(1) of the *Freedom of Information and Protection of Privacy Act*, CCSM c F175.
[5] See s. 54 of the *Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01.
[6] See s. 52 of the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31.
[7] See s. 129 of *Act Respecting Access to Documents Held by Public bodies and the Protection of Personal Information*, CQLR c A-2.1.
[8] See s. 97(2) of the *Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c A-1.2.
[9] See s. 53(1) of the *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01.
[10] See s. 34(2) of the *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20.
[11] See s. 53(1) of the *Access to Information and Protection of Privacy Act*, RSY 2002, c 1.
[12] See s. 64.2(b) of the *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6.
[13] The offence provisions are as follows*: Access to Information Act*, RSC 1985 c A-1, s. 67, *Privacy Act* RSC 1985 c. P-21 s. 68, *Freedom of Information and Protection of Privacy Act* (Alberta) RSA 200, c F-25, s. 92, *Freedom of Information and Protection of Privacy Act* (British Columbia) RSBC 1996 c. 165, s. 74, 74.1, *Freedom of Information and Protection of Privacy Act* (Manitoba), CCSM c. F175, s. 85, s. 86, *Right to Information and Protection of Privacy Act* (New Brunswick), SNB 2009 c R-10.6, s. 82, *Access to Information and Protection of Privacy Act 2015* (Newfoundland and Labrador), SNL 2015, c A-1.2, s. 115, *Access to Information and Protection of Privacy Act* (Northwest Territories) SNWT 1994 c 20 s. 59, *Access to Information and Protection of Privacy Act* (Nunavut) SNWT (Nu) 1994, c 20, *Freedom of Information and Protection of Privacy Act* (Saskatchewan), SS 1990-91, c F-22.01, s. 68, *Freedom of Information and Protection of Privacy Act* (Ontario) RSO 1990 c F.31 s. 61, *Freedom of Information and Protection of Privacy Act* (PEI)

and territorial pieces of legislation also make it an offence to wilfully or knowingly mislead the Commissioner or make a false statement to the Commissioner. I wish to be crystal clear that I am not suggesting the PPS was attempting to mislead or provide false statements in this case. However, I think it is important to highlight for the public that this office does not have the power to compel evidence under oath. We are required to simply take public bodies at their word in an environment that does not make it an offence if they are untruthful.

Issue #2: Did the PPS meet its duty to assist the applicant by accurately, openly and completely identifying the responsive records as required by s. 7(1)(a) of *FOIPOP*?

[23] Section 7(1)(a) of *FOIPOP* provides:

> 7(1) Where a request is made pursuant to this Act for access to a records, the head of the public body to which the request is made shall
>
> (a) make every reasonable effort to assist the applicant and to respond without delay, openly, accurately and completely;

[24] The question here is whether the PPS met its duty to assist the applicant by accurately, openly and completely identifying the records it considered to be responsive to the applicant's request, as required by s. 7(1)(a) of *FOIPOP*.

The applicant's representations

[25] In his request for review, the applicant raised the following duty to assist issues:

- The "failure to provide the specific information requested";
- "…none of what I have requested was provided";
- "if the information does exist it should be disclosed and not hundreds of pages of e-mails all of the content of which has all been redacted";
- "If the information does not exist such would be a satisfactory explanation to the specific request"; and
- The applicant also explained that he was provided with information he did not ask for, as he already has the information in his possession (for example, emails between the Crown prosecutors and defence counsel).

The PPS's representations

[26] The PPS's representations on this issue highlighted that s. 7(1)(a) requires a threshold of reasonableness. It said that what is "reasonable" depended on the circumstances of each case. It pointed to Nova Scotia *Review Report FI-13-52,* wherein former Review Officer McCallum explained:

> The statutory duty to assist requires public bodies to take all reasonable and relevant circumstances into consideration when deciding what is appropriate to meet its duty…[14]

RSPEI 1988, c F-15.01 s. 75, *Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information,* CQLR c A-2.1 s. 160, 161, *Access to Information and Protection of Privacy Act* (Yukon) RSY 2002 c 1, s. 67.

[14] Nova Scotia *Review Report FI-13-52,* p. 8.

…

In the *Nova Scotia Freedom of Information and Protection of Privacy Review Officer's 2011 Annual Report*, I stated the following:

> *A public body must determine what is appropriate to meet the duty to assist based on the circumstances of each case.*
>
> *Not all applicants will need the same level of assistance, so it is best practice for a public body to contact an applicant to assess what is appropriate, unless it is absolutely clear from the wording of the Application for Access to a Record.*[15]

…

What is reasonable? **Reasonable means not excessive or extreme but feasible, practical and fair**.[16] (**emphasis added by the PPS**).

Analysis

[27] Section 7 of *FOIPOP* goes to the heart of the purposes of access to information law. In meeting the duty to assist, *FOIPOP* requires that public bodies make "every reasonable effort". The duty to assist exists to ensure that public bodies make a timely, positive, thorough and fulsome effort to respond to applicants in a manner that results in accountability and transparency. Is that an accurate description of the PPS's efforts here?

[28] Three of the four elements of the duty to assist are relevant in this case.[17] These three elements were set out in Nova Scotia *Review Report 19-06* as follows:

1. ***Open***: There are numerous elements to openness including:
   - Interpreting the access to information request in a fair, reasonable, open and flexible manner.[18] Public bodies should avoid narrow interpretations and resolve any ambiguity in favour of the applicant.
   - Communicating with the applicant to explain the steps in the process and to obtain necessary clarifications as to the nature and scope of the request.[19]

[15] Nova Scotia *Review Report FI-13-52*, p. 8.
[16] Nova Scotia *Review Report FI-13-52*, p. 9.
[17] The duty to assist also requires public bodies to respond "without delay". The response time is not at issue here so I will not discuss the requirement to respond without delay.
[18] See NS *Review Report 16-05* 2016 NSOIPC 5 (CanLII) at para. 40 for a list of best practices when interpreting access to information requests and deciding how to determine whether further particulars are required.
[19] See OIPC Guidelines for Public Bodies and Municipalities, "Duty to Assist #1: Communication with Applicants" (online: https://oipc.novascotia.ca/sites/default/files/publications/18-00070%20Duty%20to%20Assist%201%20-%20Comm%20w%20App%20Guidelines%20Final%20%2823%20Jan%2019%29.pdf).

- Conducting a reasonable search to find all records responsive to the request.[20] If responsive records are not found, openness requires that public bodies provide an explanation to the applicant for why no records were found.[21]
- Applying the principle that all information in the custody or control of the public body must be released unless a specific and limited exemption applies.[22] Openness requires that only information subject to an authorized exemption must be severed so that the applicant receives as much information as possible.
- Any responses to the applicant must be open. In other words, the responsive records must be clearly marked to indicate where and why information has been withheld.
- Response packages, especially large packages, must have page numbers so that if the applicant has questions he or she can easily communicate with the public body about the pages of concern. This promotes open and clear communication.
- Explanations in response letters, fee letters and time extension notifications must all be clear and must provide comprehensible, thorough explanations for the decision the public body is making. Such responses promote transparency and support a meaningful right to access government information. Section 7(2) of *FOIPOP* provides further detail on information that must be provided to the applicant in response to an access to information request.

2. ***Accurate***: An accurate response requires that a public body:
   - Completes a line-by-line review of all responsive records and only applies exemptions where the evidence available supports the application of the exemption.
   - Discloses the full scope of the responsive records even if some of the records are withheld in full. It should be clear to the applicant how many responsive records there are, how many (if any) have been withheld, and for what reason.[23]
   - Ensures that any explanations for decisions made are accurate. Explanations for delay, explanations for fee calculations, third party notices and explanations for why information has been withheld must all be accurate and must all comply with the law.
3. ***Complete***: A complete response includes the following:
   - All responsive records are accounted for. If, for example, the public body finds 700 responsive pages but withholds 250 pages under s. 17, the applicant should be able to tell from the package received that there are in total 700 responsive pages but that 250 have been wholly withheld under s. 17.
   - The response package is organized in a way that the applicant can tell where information has been withheld. So, for example, if an email includes a 15 page PowerPoint presentation attachment that is withheld, the applicant's package should include a page immediately following the email that indicates that the 15 page

[20] See OIPC Guidelines for Public Bodies and Municipalities, "Duty to Assist #2: Conducting an Adequate Search" (online: https://oipc.novascotia.ca/sites/default/files/publications/18-00070%20Search%20Guidelines%20%282019%2002%2025%29.pdf).
[21] See also Audit & Compliance Report F18-02 City of White Rock, Duty to Assist 2018 BCIPC 52 (CanLII) at para. 2.3.2 (online: https://www.oipc.bc.ca/audit-and-compliance-reports/2260).
[22] Consistent with s. 5(2) of *FOIPOP* which permits public bodies to withhold information "exempted from disclosure pursuant to this Act."
[23] This obligation is supported by s. 7(2)(a)(ii) which requires that public bodies provide a written explanation to applicants where access to a record or part of a record is refused by a public body and that such explanation include the reasons for the refusal and the provision of *FOIPOP* on which the refusal is based.

attachment to the preceding email has been withheld and the statutory provision under which this decision was made.
- If the records include emails, a complete response would include all attachments to each email.
- All explanations given to the applicant must also be complete. So, for example, all reasons for withholding information under the law must be noted, all fee calculations must be complete and all explanations for delay must be complete.
- The applicant receives all notices to which he or she is entitled under the law. So, for example, if third party notices have been given, the law requires that public bodies provide the applicant with initial notice of the decision to consult with third parties and a second notice of the decision of the public body with respect to third party information.[24]

[29] In package #1, the PPS originally provided the applicant with 843 heavily redacted pages as responsive to his request and did not identify that eight of the twenty-two items he requested did not exist. Through the course of the investigation, the OIPC investigator identified that only 314 of the 843 pages were ultimately responsive to the applicant's request. This was highlighted to the PPS by the OIPC investigator. On June 22, 2020, the PPS further narrowed the responsive records down to approximately 297 pages (package #2). It is the decision the PPS made concerning disclosure of those 297 pages that proceeded to me for review. Furthermore, in package #1, the PPS provided the applicant with five sets of severed records sorted by year, rather than by item, making it difficult for the applicant to decipher whether the requested twenty-two items were provided in the responsive package. The PPS also made substantial improvements to this aspect of its response during the OIPC review process by providing the applicant with a new package (package #2) that included an index explaining that some records were provided in package #1, a description of the record, and which exemptions were being applied. Significant work was done by the PPS in the investigation stage of this review in an attempt to comply with s. 7(1)(a) of *FOIPOP*.

[30] Package #2 provided to the applicant was not perfect. In some cases, it would reference page numbers from package #1 that were off by one or two pages. For example, for item 3, package #2 said it contained pages 86-92 from package #1 but it actually contained pages 87-90. For requested item 3, the index provided said it contained pages 70-73 from package #1 but in fact did not contain those pages. It appears the PPS only provided pages from package #1 in its second disclosure (package #2) if it had changed the severing from the original severing applied in package #1. What that effectively meant was that the applicant and I had to go back to the OIPC investigator's opinion letter to determine what pages were actually responsive and then pull those to add to package #2 in order to have one complete response package.

[31] However, as pointed out by the PPS in its representations, the duty to assist does not require perfection but rather reasonableness. In my view, in providing package #2 with its index, the PPS met its duty to assist the applicant. While it would have been better for one final package

[24] Sections 22 and 23 of *FOIPOP* set out the process for giving third party notices. See also OIPC Guidelines for Public Bodies and Municipalities, "Duty to Assist #3: Third Party Notice" (online: https://oipc.novascotia.ca/sites/default/files/publications/18-00192%20Duty%20to%20Assist%20-%20Third%20Party%20Notice%20Guide%20%282019%20March%29.pdf).

to be provided so that the applicant did not have to go back to package #1, the requirement to respond openly, accurately and completely was met. I find that the PPS has now met its duty to assist the applicant by openly, accurately and completely responding to the applicant.

Issue #3: Is the PPS authorized to refuse access to information under s. 15 of *FOIPOP* because the disclosure would reveal information relating to or used in the exercise of prosecutorial discretion?

[32] The PPS redacted a substantial amount of the information released to the applicant pursuant to s. 15 of *FOIPOP*. The specific subsection it relied upon was s. 15(1)(f), which states that the public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion.

[33] *FOIPOP* does not contain a definition of "prosecutorial discretion". Because of this, in several previous decisions,[25] Review Officers[26] determined that it would be appropriate to adopt the definition of "prosecutorial discretion" 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[27]

[34] The Nova Scotia Supreme Court agreed with the adoption of the definition in the 2011 decision of *Cummings v. Nova Scotia (Public Prosecution Service)* [*Cummings*].[28] However, the Nova Scotia Court of Appeal disagreed with this approach in the 2015 decision of *Nova Scotia (Public Prosecution Service) v. Fitzgerald Estate* [*Fitzgerald*].[29] In that decision, the Court stated:

> [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

[25] See for example, NS *Review Reports F1-04-42*, 2005 CanLII 5391 (NS FOIPOP), at p. 1 (Darce Fardy) and *F1-12- 106*, 2013 CanLII 61076 (NS FOIPOP), at p. 15 (Dulcie MacCallum).
[26] The Information and Privacy Commissioner for Nova Scotia is also known as the Review Officer and is appointed as the independent oversight authority under the *Freedom of Information and Protection of Privacy Act*, *Part XX* of the *Municipal Government Act*, the *Personal Health Information Act*, and the *Privacy Review Officer Act*.
[27] *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 Schedule 1.
[28] *Cummings v. Nova Scotia (Public Prosecution Service)*, 2011 NSSC 38 (CanLII), at paras. 20 and 24 [*Cummings*].
[29] *Nova Scotia (Public Prosecution Service) v. Fitzgerald Estate*, 2015 NSCA 38 (CanLII) [*Fitzgerald*].

of litigation are not decisions within the ambit of prosecutorial discretion for purposes of s. 15(1)(f).

[35] Rather than adopting the definition from the British Columbia legislation, the Court of Appeal in *Fitzgerald* relied upon the Supreme Court of Canada decision in *Kreiger v. Law Society of Alberta*[30] for its explanation of the meaning of "prosecutorial discretion". In summary, *Krieger* and *Fitzgerald* set out the following principles with respect to the meaning of s. 15(1)(f) of *FOIPOP*:

- "Prosecutorial discretion" is a term of art. It does not merely refer to any discretionary decision made by a Crown prosecutor.[31]
- Decisions that are included in the phrase "prosecutorial discretion" include:[32]
    a) The discretion whether to bring the prosecution of a charge laid by police;
    b) The discretion to enter a stay of proceedings in either private or public prosecution;
    c) The discretion to accept a guilty plea to a lesser charge;
    d) The discretion to withdraw from criminal proceedings altogether; and
    e) The discretion to take control of a private prosecution.
- Decisions that do not go to the nature and extent of the prosecution do not fall within the scope of prosecutorial discretion, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court are not encompassed in the scope of prosecutorial discretion.[33]
- 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).[34]
- 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.[35]
- 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.[36]
- 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 starting 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.[37]
- A disclosure of relevant evidence to the defence is a legal duty, not a matter of prosecutorial discretion.[38]

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[30] *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372, 2002 SCC 65 (CanLII) [*Krieger*].
[31] *Krieger* at para. 43.
[32] *Krieger* at para. 46 and *Fitzgerald* at para. 38.
[33] *Krieger* at para. 47 and *Fitzgerald* at para. 38.
[34] *Fitzgerald* at para. 39.
[35] *Fitzgerald*, at para. 42.
[36] *Fitzgerald* at para. 44.
[37] *Fitzgerald* at para. 45.
[38] *Krieger* at paras. 5 and 54.

[36] The approach set out in *Krieger* and *Fitzgerald* has been followed in previous reports issued by the OIPC.[39]

Position of the applicant

[37] The applicant's representations started by highlighting the purpose of *FOIPOP* as set out in s. 2. The applicant emphasized three of the purposes outlined in that section:

> 2 The purpose of this Act is
> (a) to ensure that public bodies are fully accountable to the public by
> **(i) giving the public a right of access to records,**
> **(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,**
> **(iii) specifying limited exceptions to the rights of access, [emphasis added]**
> (iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
> (v) providing for an independent review of decisions made pursuant to this Act; and
> (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to
> (i) facilitate informed public participation in policy formulation,
> (ii) ensure fairness in government decision-making,
> (iii) permit the airing and reconciliation of divergent views;
> (c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.

[38] The applicant said that this section indicates that the purposes of *FOIPOP* include giving the public the right of access to records and giving individuals access to personal information about themselves. He noted that this section also indicates that the right to access information is subject to limited exceptions.

[39] The applicant highlighted *Krieger* and *Fitzgerald* as outlining the correct approach to take in terms of how to apply s. 15(1)(f) of *FOIPOP*.

Position of the PPS

[40] Like the applicant, the PPS also brought to my attention to the approach taken in *Krieger* and *Fitzgerald* in its representations. The PPS emphasized that in *Fitzgerald*, the Court found that "information that was provided and "**solely**" used by the crown about tactics or conduct before the court shouldn't be withheld." The PPS went on to say, "Documents in the file can be used for more that (sic) one purpose and it is only documents that were "**solely**" used to determine tactics or conduct before the court that should not fall in the definition of prosecutorial discretion."

[39] See for example *Review Report FI-11-72* (Amended) December 30, 2015 and *Review Report 20-04* July 30, 2020.

[41] The PPS said that it was important to understand the context in that the Crown prosecutor was using the documents for prosecution of charges under the *Criminal Code* and in that this file was referred from another province to Nova Scotia because it was a conflict file. With that in mind, the PPS said:

> …the entire file, including issues with the charges that were laid and documents used to support decision to lay, withdraw or proceed with charges, is all "information relating to or used in the exercise of prosecutorial discretion."

[42] The PPS noted that it has a policy that Crown prosecutors must follow called the *Decision to Prosecute* and explained that the document "outlines all the considerations that a Crown must review to make decisions on a file." The PPS said that this is a complex process to determine whether "every charge has a realistic prospect of conviction" by reviewing all of the evidence provided by police. As required by this policy, to reach this determination, the Crown prosecutor must review witness statements, police officer notes, reports, file summaries or any other material produced by the police during its investigation into the offence.

[43] The PPS argued that even when a prosecution is complete, the information used in prosecutorial discretion should be protected. It said, "The protection afforded the decision-making process of Crown Attorney's wouldn't needed (sic) to be protected in the *Act* otherwise." It pointed to previous Nova Scotia *Review Report FI-02-37*, which it said confirmed that s. 15(1)(f) can be applied even after the prosecution has been completed:

> With respect to s. 15 (law enforcement), which in my view is the crucial exemption in this case, ss. 15(1)(f) applies even after a police investigation is over and a decision has been made not to prosecute. Any documents containing information used by the PPS to determine whether charges should be laid, in my view, fall under the exemption in s. 15(1)(f).[40]

[44] The PPS said that it exercised discretion in applying s. 15(1)(f) to the records by considering the following points: "the information was used by the Crown in determining whether to proceed with charges; the nature and extent of the prosecution; if the information was used to determine if there is sufficient evidence to proceed; if the information was used to determine if the public interest is best served by prosecution of the case; and the harm from disclosure and the purpose of the *FOIPOP Act*."

[45] The PPS also argued that the information redacted under s. 15(1)(f) "will not inform the public about government operations to facilitate participating in policy making decisions, or ensure fairness in government decision-making, or dealing with divergent views." The PPS said that records were "clearly provided as a result of the enforcement agency's investigation into an offence for the Crown to use in prosecuting those offences." The PPS further submitted that there was no wider public interest in releasing the documents as doing so would only be of interest to the applicant.

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[40] *Review Report FI-02-37*, 2002 CanLII 17967 at p. 3.

[46] Overall, the PPS said that the information it withheld under s. 15(1)(f) was redacted to protect prosecutorial discretion. It maintained that it exercised discretion in redacting those records and releasing information that was "solely" used by the Crown about tactics or conduct.

Analysis

[47] I conducted a line-by-line review of the records withheld by the PPS. This required me to review the records released in package #2. Where that decision did not address other pages that the OIPC investigator's opinion identified as responsive, I went back to package #1 and based my findings on the unchanged severing in that decision.

[48] When it provided its initial decision (package #1), the PPS heavily redacted the disclosed material pursuant to s. 15. However, during the investigation, the OIPC investigator suggested that a significant number of the redactions be removed. This was because, in her opinion, the information either did not fall under s. 15(1)(f), or it did but she thought that the PPS should exercise its discretion and release the information despite s. 15(1)(f) being applicable. The PPS largely complied with the OIPC investigator's suggestions and removed much of its s. 15(1)(f) redactions in its June 22, 2020 (package #2) decision to the applicant. The PPS meaningfully engaged in the investigation process.

[49] There were only two pages where the PPS continued to withhold the information where I disagree that s. 15(1)(f) applies. Those pages were in relation to item 3 and were contained in package #1 at pages 70 and 120. The information on these pages related to scheduling and procedural matters that could not reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion. I find that those pages should be disclosed to the applicant.

[50] Next, I wish to address the topic of the PPS's exercise of discretion in applying s. 15(1)(f) redactions. With every discretionary exemption, once a public body has determined that the exemption can be applied, it needs to ask itself if the exemption should be applied. In 2010, the Supreme Court of Canada stated, in considering the Ontario Information and Privacy Commissioner's role in reviewing exercise of discretion, that the Commissioner should return the matter for reconsideration where the decision was made in bad faith or for an improper purpose, the decision took into account irrelevant considerations or the decision failed to take into account relevant considerations.[41] The relevant factors that should be addressed when applying s. 15(1)(f) were cited in Nova Scotia *Review Report FI-11-72* and 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 exemption 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;

[41] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010] 1 SCR 815, 2010 SCC 23 CanLII) at para. 71 [Canadian Lawyers' Association].

- 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.[42]

[51] The PPS maintained that it exercised discretion in this case and set out the factors upon which it relied (see above under the heading "Position of the PPS"). In this particular case, I agree with the PPS. The exercise of discretion is made on a case-by-case basis. Here, the PPS did not withhold documents in full but rather assessed each record on a line-by-line basis. When it issued a new decision on June 22, 2020 (package #2), it removed redactions from a significant amount of the records where s. 15(1)(f) did apply but where it had discretion to release more information. The factors the PPS considered were relevant. While it appeared that the PPS did not consider the age of the records in its exercise of discretion, s. 15 does not have sunset clause, unlike other discretionary exemptions in *FOIPOP*. Furthermore, the records all related to ongoing proceedings that ended only shortly before the applicant made his request for information. For all these reasons, I find that the PPS exercised its discretion in refusing to disclose information under s. 15(1)(f).

FINDINGS & RECOMMENDATIONS:

[52] This review highlighted a serious deficiency in *FOIPOP* in that *FOIPOP* does not afford the Commissioner the authority to compel oral or written evidence on oath or affirmation and also does not make it an offence to willfully obstruct, mislead or make a false statement to the Commissioner. An amendment to *FOIPOP* should be put forward to rectify this problem. As such, a copy of this report will be sent to the Minister of Justice so that he may consider putting forward an amendment to the Legislative Assembly.

[53] I find that:

1. The PPS conducted an adequate search for the records as required by s. 7(1)(a) of *FOIPOP*.
2. The PPS has met its duty to assist the applicant by accurately, openly and completely identifying the responsive records as required by s. 7(1)(a) of *FOIPOP*.
3. Section 15(1)(f) does not apply to the information redacted on pages 70 and 120 in package #1 (related to item 3).
4. The PPS exercised its discretion in withholding the information redacted pursuant to s. 15(1)(f).

[54] I recommend that:

1. The PPS take no further action with respect to conducting a new search for the eight items (items 1, 10, 11, 12, 13, 15, 18 and 21).

[42] *Canadian Lawyers' Association* at para. 66; *BC OIPC Order 02-38* 2002 CanLII 42472 (BC IPC) at para. 149; FI-11-72, 2015 NSOIPC 10 (CanLII).

2. The PPS take no further action with respect to its duty to assist.
3. The PPS disclose the information redacted on pages 70 and 120 of package #1 (related to item 3) within 10 days of acceptance of this recommendation.
4. The PPS take no further action with regard to disclosing any additional information redacted pursuant to s. 15(1)(f).

November 30, 2020

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

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