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

REVIEW REPORT 17-01

January 10, 2017

Department of Justice

Summary: The applicant worked for the Department of Justice (Department) in a unit that endured a series of complaints and counter-complaints. Those complaints resulted in a number of internal investigations by the Department. The applicant was the subject of some of these investigations; in other investigations he was a complainant; in still others a witness. The applicant sought access to records relating to all of the investigations.

Records of workplace investigations are challenging to review under access laws. They often contain intertwined personal information of employees. In this case, the Department argued that disclosure of certain records could variously reveal advice to the public body or minister; harm law enforcement, disclose information protected by solicitor-client privilege and unreasonably invade the privacy of third parties.

The Commissioner concludes that, for the most part, the Department correctly applied the exemptions. The Commissioner recommends some further disclosure where the Department fails to meet its burden of proof. She recommends that a summary be prepared of the applicant's own personal information and finally she confirms that under Nova Scotia's access law public bodies cannot withhold information as "non-responsive".

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 3, 7, 14, 15, 16, 20, 45.

Authorities Considered: Nova Scotia: Review Reports FI-05-08, 2005 CanLII 18828 (NS FOIPOP); FI-08-104, 2011 CanLII 25161 (NS FOIPOP); FI-10-19, 2015 CanLII 54095 (NS FOIPOP); FI-10-71, 2015 CanLII 60916 (NS FOIPOP); FI-10-95, 2015 CanLII 79097 (NS FOIPOP); FI-11-71, 2015 CanLII 79099 (NS FOIPOP); FI-11-76, 2014 CanLII 71241 (NS FOIPOP); 16-03, 2016 NSOIPC 3 (CanLII);16-04, 2016 NSOIPC 4 (CanLII);16-10, 2016 NSOIPC 10 (CanLII).

Cases considered: *Dickie v. Nova Scotia (Department of Health)*, 1999 CanLII 7239 (NS CA); *House, Re*, 2000 CanLII 20401 (NS SC); *John Doe v. Ontario (Finance), [2014] 2 SCR 3*, 2014 SCC 36 (CanLII); *Monkman v. Serious Incident Response Team*, 2015 NSSC 325 (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).

INTRODUCTION:

[1] The applicant originally sought access to information relating to of a series of internal investigations by the Department of Justice and the Public Service Commission (PSC). In response, the PSC transferred a portion of the applicant's request to the Department of Justice . The Department provided the applicant with a partial response to his request, withholding portions of the records under a number of exemptions set out in the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). The Department also withheld a portion of the information claiming that the information was "non-responsive".

[2] The applicant believes that some records are missing from the response package and the applicant seeks further disclosure of the records without the names of third parties or information that would identify those individuals.

[3] Review Report 17-02 deals with the related request to the Public Service Commission.

ISSUES:

[4] There are six issues under review:

(a) Did the Department meet its duty to assist the Applicant by conducting an adequate search for records as required by s. 7(1)(a) of *FOIPOP*?
(b) Is the Department authorized to refuse access to information under s. 14 of *FOIPOP* because disclosure of the information would reveal advice or recommendations?
(c) Is the Department authorized to refuse access to information under s. 15 of *FOIPOP* because disclosure of the information could reasonably be expected to harm a law enforcement matter?
(d) Is the Department authorized to refuse access to information under s. 16 of *FOIPOP* because it is subject to solicitor-client privilege?
(e) Is the Department required to refuse access to information under s. 20 of *FOIPOP* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?
(f) Is the Department authorized to determine that portions of the responsive records are out of scope of the request and to withhold the portions that it deems non-responsive?

DISCUSSION:

Background

[5] The applicant worked in a unit that endured a series of complaints and counter-complaints. Those complaints resulted in a number of internal investigations by the Department. The applicant was the subject of some of these investigations; in other investigations he was a complainant; in still others a witness. The applicant seeks access to records relating to these internal investigations. The responsive records were extensive. Through the active participation

of both the applicant and the public body in the informal resolution process, the outstanding issues were narrowed to thirteen pages where the applicant had concerns regarding to the adequacy of the search and a limited list of pages where the applicant continued to have concerns with the exemptions applied.

[6] A significant challenge in the review of this matter was the lack of consistency in the severing of the information in this file. Workplace investigation files are, without a doubt, difficult to review under the *Freedom of Information and Protection of Privacy Act*. Inevitably, personal information of a number of individuals gets intertwined. Trying to distinguish disclosures that would be an unreasonable invasion of personal privacy from those that would not is a difficult task. In this case, the approach taken originally resulted in identical documents being severed differently. Sometimes the identities of third parties were disclosed in the context of complaints made against them and partial details of the complaints and identities of witnesses were disclosed. In other places this type of information was entirely withheld.

Burden of proof

[7] With respect to the application of the exemptions under ss. 14, 15, 16 and "not responsive", it is the Department that bears the burden of proof. Where the information being withheld is the personal information of people other than the applicant (s. 20), the applicant bears the burden of proof.[1] 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 both parties must each submit arguments and evidence in support of their positions.

(a) Did the Department meet its duty to assist the applicant by conducting an adequate search for records as required by s. 7(1)(a) of *FOIPOP*?

[8] Section 7(1) of *FOIPOP* sets out the duty to assist:

> *Where a request is made pursuant to this Act for access to a record, 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 to the applicant openly, accurately and completely.*

[9] In Review Report FI-11-76 I discussed the nature of the duty to assist and what it means to make every reasonable effort under s. 7(1). Some of the relevant considerations I discussed were:

- Whether the applicant has provided sufficient identifying information to assist the public body in its search and has provided a reasonable basis for concluding such records exist;
- That the *Act* does not impose a standard of perfection;
- That a public body's search for records must conform with what a fair and rational person would expect to be done or consider acceptable; and
- That the public body's evidence should include a candid description of all potential sources of records and identify those searched and those not searched with explanations. Ideally the public body will also describe the amount of time spent completing the search.

[1] Pursuant to s. 45 of *FOIPOP*.

[10] In this case, the evidence in support of the applicant's concerns that the search was not adequate were the records themselves. Thirteen pages of the responsive records refer to attachments that the applicant says he did not receive.[2]

[11] On August 8, 2012 the Associate Chief IAP Officer at the time provided this office with an extensive explanation for why attachments appeared to be missing. In its submissions in response to the Notice of Formal Review in this matter the Department relies on this submission and states that "there are no grounds to question that 2012 explanation."

[12] The explanations provided by the Department in the 2012 letter were that either the documents were drafts or that attachments were in the custody or control of another government department – the Public Service Commission.

[13] It appears that in 2012 there may have been a belief that drafts were somehow not subject to *FOIPOP*. This is of course, not the case. Any record responsive to a request and in the custody or control of a public body is subject to *FOIPOP*. Only the specific and limited exemptions set out in *FOIPOP* may be relied upon to withhold information contained in responsive records. There is no exemption for "drafts". Also in 2012, the Department claimed that one of the outstanding attachments was in the custody or control of the Public Service Commission. However, the attachment was clearly within the custody of the Department and was part of a responsive record. The Department could certainly have consulted the PSC on the content of the attachment but the record itself, as an attachment to responsive correspondence, fell within the scope of the applicant's request to the Department.

[14] In August, 2012 the Department provided this office with records it said were the attachments to the emails at pages 43, 398, 394 and 680. The Department at the time explained that the attachments were drafts (page 394), records in the custody or control of the PSC (page 398) or both (pages 43 and 680). However, the Department clearly had custody of all four attachments since it provided copies to us. Despite requests from this office, the Department has not confirmed that these attachments have now been provided to the applicant (or a response under *FOIPOP* provided).

[15] Therefore, with respect to pages 43, 398, 394 and 680 I find that the Department has not met its duty to respond without delay openly, accurately and completely.

[16] **Recommendation #1**: I recommend that the Department process the attachments to the four emails at pages 43, 398, 394 and 680 and provide a response to the applicant within 60 days of receipt of this report. For ease of reference, I will provide the Department with a copy of the attachments to these four pages it supplied to this office in August, 2012.

[17] The attachment referred to on page 335 was included in the original response to the applicant. It is the withheld document at pages 336 to 338. These documents were withheld under s. 20 and are discussed below.

[2] The Notice of Formal Review lists pp. 43, 324, 346, 347, 349, 351, 394, 398, 664 and 680 as related to the search issue and pp. 335, 553 and 633 as severed attachments.

[18] The applicant also believed that there was an attachment missing from page 553. However, page 554 is a response to that email and the disclosed content reveals that while the original email referred to an attachment, the recipient never received an attachment. Therefore, I am satisfied that no attachment existed for this email.

[19] With respect to the attachments referred to on page 633, in August 2012 the Department explained that it had already withheld these attachments. Obviously the applicant is not in a position to know this. The responsive records should have included the attachments to page 633 even if they were duplicates of early documents because with the cover email the documents are not an exact duplicate of the earlier documents. However, a review of the file confirms that both records were processed as part of this access application. There are two copies already present in the responsive record at pages 485-507 and pages 610-625. These documents were withheld under s. 20 and are discussed below.

[20] With respect to the remaining six pages where attachments are referred to in the cover email but not provided, in the course of conducting the informal resolution process, the Department agreed to conduct a second search for missing attachments. It did so by contacting the one person still in the employ of the Department who originally had access to these responsive records. The Department explained that at the time the responsive records were created the email system was known as GroupWise. That system has since been retired and the employee no longer has access to those emails. I am satisfied that with respect to the attachments to pages 324, 346, 347, 349, 351 and 664 the Department has now conducted an adequate search for the records.

[21] **Recommendation #2:** I recommend that the Department take no further action with respect to the search for attachments to pages 324, 346, 347, 349, 351 and 664.

(b) Is the Department authorized to refuse access to information under s. 14 of *FOIPOP* because disclosure of the information would reveal advice or recommendations?

[22] Section 14 provides:

> (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister.
> (2) The head of a public body shall not refuse pursuant to subsection (1) to disclose background information used by the public body.
> (3) Subsection (1) does not apply to information in a record that has been in existence for five or more years.
> (4) Nothing in this Section requires the disclosure of information that the head of the public body may refuse to disclose pursuant to Section 13.

[23] Section 14 applies to advice or recommendations. The Supreme Court of Canada recently pointed out that the term "advice" has a distinct meaning from "recommendation" and that the legislative intention must have been that the term "advice" has a broader meaning than the term

"recommendations".[3] Material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised falls into the category of recommendations.[4]

[24] Advice includes:[5]

- Policy options;
- Advice regarding options;
- Considerations to take into account by the decision maker; and
- Opinion of the author as to the advantages and disadvantages of alternatives.

[25] Evidence of an intention to communicate is not required, therefore drafts may be considered advice whether or not a final communicated version was ever produced.[6]

[26] Determining whether s. 14 applies involves a three step process. First, determine whether the record contains any advice or recommendations within the meaning of s. 14. Second, if s. 14 may apply to the record, determine whether the considerations set out in s. 14(2)-14(4) apply. If s. 14 may still apply to the record the public body should then determine whether it should nonetheless disclose the information in light of the fact that the provision is discretionary

[27] The Department applied s. 14 to eight pages.[7] The first step in determining whether or not s. 14 applies is to assess whether or not the documents contain any advice or recommendations. I find that the following type of information found in these documents qualifies as advice:

- Considerations to be taken into account by the decision maker;
- Potential options, sometimes revealed in questions;
- Recommendations regarding potential courses of action.

[28] I agree that the information withheld on pages 25-26 and 553-554 qualify as advice within the meaning of s. 14. I find that a portion of the information withheld on pages 545, 549, 561 and 704 does not qualify as advice or recommendations within the meaning of s. 14.

[29] **Recommendation #3**: I recommend that the Department disclose a portion of the information withheld under s. 14 on pages 545, 549, 561 and 704. I will provide the Department with a copy of these four pages with the information that falls within s. 14 highlighted.

[30] The next step is to determine whether any of the considerations set out in s. 14(2)-14(4) apply.

[31] Section 14(2) states that the public body shall not refuse to disclose background information used by the public body pursuant to this section. "Background information" is defined in s. 3(1)(a) to mean factual material among other things. I find that a portion of the

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[3] *John Doe v. Ontario (Finance), [2014] 2 SCR 3*, 2014 SCC 36 (CanLII) [*John Doe*] at para 24.
[4] *John Doe* at para 23.
[5] *John Doe* at paras 34 and 47.
[6] *John Doe* at para 51.
[7] Pages 25-26, 545, 549, 553-554, 561 and 704.

withheld information on page 704 contains a factual description that does not disclose any policy options or advice regarding options.

[32] Further, s. 14(3) provides that subsection (1) does not apply to information in a record that has been in existence for five or more years. In this case, the records at issue are all dated December 2011 or earlier. One record is now more than five years old. In one month, all of the records will be more than five years old and so s. 14(3) will apply so that s. 14 cannot be applied to these five documents. While the original decision under review was taken in May 2012, the passage of time is a relevant consideration with respect to the application of discretion in this matter.

[33] The Department originally made its decision in May, 2012. It has taken four years for this matter to make its way to the final review stage. While this length of time is obviously not satisfactory in terms of fairness to the parties, it does create an opportunity for Department to reconsider its position. It is an opportunity now to exercise discretion taking into account all relevant considerations.

[34] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23,[8] the court confirmed that discretionary decisions under privacy and access legislation must not be made in bad faith or for an improper purpose, must not take into account irrelevant considerations and must take into account relevant considerations. Some relevant considerations in the exercise of discretion include:

- the wording of the discretionary exception and the interests which the section attempts to balance;
- the historical practice of the public body with respect to the release of similar types of documents;
- the nature of the record and the extent to which the document is significant and/or sensitive to the public body;
- whether the disclosure of the information will increase public confidence in the operation of the public body;
- the age of the record;
- whether there is a sympathetic or compelling need to release materials;
- whether previous orders of the Commissioner have recommended that similar types of records or information should or should not be subject to disclosure; and
- when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.

[35] In this case, the original decision was four years ago, but, as noted above, the Department has an opportunity now to reconsider its position, particularly in light of the passage of time and the fact that s. 14(3) will soon apply to bar the application of s. 14 to these records. The Department can choose to decide that it properly applied its discretion four years ago and so refuse to exercise discretion now in favour of release. But the applicant can then simply make a fresh access to information request for these eight pages and the Department would then have to go through the work of re-processing these same documents and could not apply s. 14.

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

[36] For this practical reason, I recommend that the Department revisit the application of s. 14 to pages 25-26, 545, 549, 553-554, 561 and 704 and re-evaluate its exercise of discretion, particularly in light of the passage of time.

[37] **Recommendation #4:** Reconsider its exercise of discretion for all information severed under s. 14, particularly in light of the passage of time.

(c) Is the Department authorized to refuse access to information under s. 15 of *FOIPOP* because disclosure of the information could reasonably be expected to harm a law enforcement matter?

[38] The Department applied s. 15(1)(a) to two lines of information in one email.[9] Section 15(1)(a) provides:

> *The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expect to*
> *(a) harm law enforcement*

[39] The term "law enforcement" is defined in s. 3(1)(e) of *FOIPOP*. I am satisfied that the withheld information relates to a matter of law enforcement. In order to qualify under this exemption the Department, who bears the burden of proof, must establish that the disclosure of the information could reasonably be expected to harm law enforcement. The test for establishing a reasonable expectation of harm under *FOIPOP* was recently stated by the Nova Scotia Court of Appeal and requires that the public body show that it is more than merely possible, but at a standard less than a balance of probabilities, that the disclosure could harm law enforcement.[10]

[40] The Department states that harm may result from disclosure in a general, broad way. The Department states in its submission that any person in the position of the applicant, knowing the type of information found in this record, could potentially cause harm to law enforcement. There is no evidence or indeed allegation that this applicant can or will cause such a harm, no evidence to actually establish the existence of the facts asserted in the record, nor any evidence that anyone with firsthand knowledge of the facts alleged had reason to believe that the harm described was more than merely possible. This does not satisfy the standard set by the Nova Scotia Court of Appeal to establish a reasonable expectation of harm. Therefore, I find that the Department has failed to satisfy the burden of proof with respect to s. 15(1)(a).

[41] **Recommendation #5:** I recommend the disclosure of the information withheld under s. 15(1)(a) found on page 541.

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

[42] Section 16 of *FOIPOP* provides that a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege. The Department withheld 37 pages in full

[9] Section 15(1)(a) was applied to p. 541. I note that s. 15(1)(a) was also applied to p. 680 but that the applicant did not object to this severing. Page 680 is at issue with respect to the allegation of a missing attachment only.
[10] *Monkman v. Serious Incident Response Team* 2015 NSSC 325 (CanLII) at pp. 22-23.

citing s. 16 of *FOIPOP* as authority for doing so.[11] In this case the Department relies on legal advice privilege.[12]

[43] In Review Report FI-10-71 I summarized the law with respect to the meaning of s. 16 in *FOIPOP* and solicitor-client privilege.[13] Without repeating that analysis I have applied the test I described in Review Report FI-10-71 to the records in this case. In order to decide if legal advice privilege applies, the following test must be satisfied:

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.[14]

[44] Applying the four part test above, I find that 36 of the 37 pages consist of written confidential communications between the Department and a legal advisor directly related to the seeking, formulating or giving of legal advice. On that basis, I find that s. 16 applies to the 37 pages withheld under that provision. However, one page, page. 679, was withheld in full under s. 16. The majority of the withheld information does not qualify as s. 16. One line in the email repeats advice received from legal counsel. The rest is unrelated to the seeking or receiving of legal advice. In fact, the Department disclosed this email in severed fashion with just the one line withheld under s. 16 later in the response package. A portion of page 679 is also severed under s. 20 discussed below.

[45] **Recommendation #6:** I recommend that the Department revisit its application of s. 16 to page 679 and revise it consistent with the requirements of s. 16 and its approach to the identical email that was partially disclosed.[15]

(e) Is the Department required to refuse access to information under s. 20 of *FOIPOP* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

[46] The Department withheld the majority of the information at issue citing s. 20, unreasonable invasion of a third party's personal privacy, as authority for its decision. Where the information being withheld is the personal information of people other than the applicant (s. 20), the applicant bears the burden of proof.

[47] In his submissions to this office, the applicant made clear that he is no longer seeking the names of third parties or any information that would identify those individuals. A number of the

[11] Pages 147-158 (12 pp.), 312-313 (2 pp.), 322-323 (2 pp.), 354-362 (9 pp.), 367-369 (3 pp.), 401-407 (7 pp.), 679 (1 p.) and 735 (1 p.).
[12] Section 16 applies to both legal advice privilege and litigation privilege. See NS Review Report FI-10-71 for a discussion on this point at para 15.
[13] NS Review Report FI-10-71 at paras 15 to 21.
[14] As applied in NS Review Reports FI-05-08 (Darce Fardy) and FI-08-104 (Dulcie McCallum).
[15] In order to avoid disclosing the contents of p. 679, I will advise the Department directly which page is identical to p. 679.

documents at issue only had third party names removed, no other information was removed. I have not considered these documents in light of the applicant's submission.[16]

[48] In order for s. 20 to apply to information the public body must conduct a four part analysis as follows:[17]

1. Is the requested information "personal information" within the meaning of 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? If so, that is the end.
3. Would the disclosure of the personal information be a presumed 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 applicant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that the disclosure would constitute an unreasonable invasion of privacy or not?

1. Is the requested information "personal information" within the meaning of s. 3(1)(i)? If not, that is the end. Otherwise the public body must go on.

[49] The types of information withheld under s. 20 can be separated into five groups:

(a) Work history and disciplinary information[18]

- Identity of third parties with complaints against them, descriptions of complaints made against other employees (sometimes including identity of third party complainants), discipline letters, work history of third parties and observations and/or conclusions of investigators with respect to complaints against third parties.
- Responses by third parties to complaints made against them, including interview notes.
- Identity of complainants and their opinions other than their opinions about the applicant.

(b) Scheduling information associated with identifiable individuals[19]

Four pages at issue have information withheld that relates to third party work or holiday schedule information.

(c) Third party personal information supplied by the applicant[20]

One record (two copies) is a witness statement of the applicant that includes third party personal information.

[16] Pages 268A, 269B, 296-297, 520, 550, 553, 692, and 729.
[17] I have applied this test in a number of NS Review Reports including FI-10-95, FI-11-71, 16-03 and 16-04 which are based on the Nova Scotia Supreme Court decision in *House, Re*, 2000 CanLII 20401 (NS SC) at p. 3.
[18] The vast majority of the withheld information falls within this category, therefore I have only specified the relevant pages for the other categories of information listed below.
[19] Information included in this category is at pp. 529, 598, 659 and 662.
[20] Pages 498-500 and pp. 623-625.

(d) Personal information of the applicant[21]
Several witnesses provided information that relates to the applicant. In doing so, the information was mixed with the personal information of the third party witnesses. One other document severed under s. 20 contained the applicant's personal information.

(e) Not third party personal information[22]
Three records containing severing that is simply not personal information of a third party and will be discussed below.

[50] The *Act* defines personal information as including names, employment history and personal views. All of the records described in paragraphs (a) to (d) above include this type of information. Therefore, I find that information in groups (a), (b), (c) and (d) listed above all qualify as containing third party personal information within the meaning of s. 20.

[51] One document that was withheld in full under s. 20 is a form and with two small pieces of information removed, the remainder of the form contains only form content and the identity of an outside service provider. I find that the content of the form at pages 521-523 does not qualify as the personal information of any identifiable individual. On one other page a single line withheld under s. 20 contains no personal information and the content of the sentence is revealed in the header of the email in any event. I recommend disclosure of the one line on page 651. Finally, one document contained severing under s. 20 but the information withheld relates only to the applicant once the names of two individuals are withheld. I recommend further disclosure of information withheld on page 342.

[52] **Recommendation #7**: In summary, I recommend that the Department revisit the application of s. 20 to five pages (521-523, 651 and 342) so that only the identifiable personal information of third parties is withheld under s. 20.

2. Are any of the conditions of s. 20(4) satisfied? If so, that is the end.
[53] The Department submits that none of the considerations in s. 20(4) apply to the records in this case. In particular, the records that disclose details of the workplace investigation that could include descriptions of work duties the Department argues would not fall within s. 20(4)(e) of *FOIPOP*. That provision states that it is not an unreasonable invasion of personal privacy to disclose information about the "position, functions or remunerations" of an employee.

[54] I agree. Work history that is disclosed in these investigation records does not qualify as information about a position within the meaning of s. 20(4)(e) of *FOIPOP*. I find that s. 20(4) does not apply to the records at issue here.

[21] Pages 551-552, 718, and 720-721.
[22] Pages 342, 651 and 521-523. Also note that below, I have applied the remaining 3 steps of the s. 20 analysis to these three documents and concluded that the disclosure of all of the third party personal information identified following implementation of recommendation #7 would result in an unreasonable invasion of the third party's personal privacy (see para 73).

3. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?

[55] The Department submits that s. 20(3)(d) applies to the records at issue here. Section 20(3) provides in part:

> 20(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
> (d) the personal information relates to employment or educational history

[56] The applicant states simply that he is unaware of who was interviewed or what they were actually asked. He believes that the information could be severed adequately to protect the identity of the individuals.

[57] In Review Report FI-10-19 I reviewed the application of s. 20(3)(d) to workplace investigation records and concluded that the presumption in s. 20(3)(d) applies to the following types of information:

- Third party responses to complaints and allegations against them;
- Third party descriptions of decisions they made about certain workplace administrative matters that reflect on their own performance;
- Third party accounts of dealings with the applicant and others in the workplace and comments about their own actions or behaviour; and
- The identities of individuals who were subject to allegations such as racism, bullying and harassment.[23]

[58] Further, I determined that the actual identity (names) of witnesses who supplied the statements is the personal information of these third parties. However, identity of individuals simply as witnesses, is not in my opinion, subject to the presumption in s. 20(3)(d) of *FOIPOP*. To be clear, the identity of any witness who was also the subject of the complaint investigation would be subject to the s. 20(3)(d) presumption.

[59] I find then that all witness statements, disciplinary letters, draft letters and emails disclosing investigation outcomes or contents of interviews all fall within the s. 20(3)(d) presumption. I exclude from that category only the identity of witnesses not subject to any workplace investigation. Since the applicant is not seeking the identity of third parties I will not evaluate further the application of s. 20 to this specific information.

[23] I have generalized here what I said in para 31 of NS Review Report FI-10-19.

4. In light of any s. 20(3) presumption, and in light of the burden upon the applicant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that the disclosure would constitute an unreasonable invasion of privacy or not?

[60] The Department submits that the relevant considerations in s. 20(2) are set out in s. 20(2)(e) and (f). In my opinion s. 20(2)(h) is also relevant:

> 20(2) In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances including whether
>
> (e) the third party will be exposed unfairly to financial or other harm;
> (f) the personal information has been supplied in confidence
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

[61] The applicant's view is simply that as an employee and as someone who was the subject of some of the investigative activity revealed in these records, he has a right to be made aware of the content of the records.

[62] I have previously examined the case law regarding the application of s. 20(2)(f) (supplied in confidence) to workplace investigations.[24] Without repeating that analysis I have applied the same principles here.

[63] I am of the view that the following are relevant considerations in this case:

- The allegations made were serious and related to inappropriate workplace behaviour, sexual harassment and racism. In that context my view is that witnesses and those subject to the allegations would have expected the information to be kept confidential.
- The workplace was small. Even without names, witnesses and those under investigation are easily identifiable from the description of events, from their particular job duties and/or from the information they disclose.
- There is no explicit statement of confidentiality nor is there any evidence of an agreement or understanding regarding confidentiality. However, I note that s. 20(2)(f) refers to "supplied" in confidence and so it is the perception of the supplier of the information that is most at issue here.

[64] Overall, I conclude on the balance of probabilities that the participants in these workplace investigations had an expectation that they were supplying the information in confidence. This weighs against disclosure.

[24] NS Review Report FI-10-19 at paras 38 – 42.

[65] The Department also argues that reputations could be harmed by the disclosure of the information because of the serious nature of the allegations. I agree that allegations of this nature can significantly impact an individual's career.[25]

[66] I note however, that s. 20(2)(e) and (h) both refer to "unfairly" damage reputation or exposure "unfairly" to harm. In Review Report 16-04 I considered the meaning of "unfair". I noted that the Concise Oxford English Dictionary defines "unfair" as "not based on or showing fairness; unjust, contrary to the rules of the game."[26] I have already determined above that, on the balance of probabilities, there was an expectation that information supplied during these workplace investigations were supplied in confidence. Therefore a disclosure would be "contrary to the rules of the game" in this particular case. I find that the presumption in s. 20(2)(e) and 20(2)(h) apply to the remaining records and weigh against disclosure in this case.

Other considerations

[67] Section 20(2) is not an exhaustive list. It requires that in deciding whether the disclosure of information would be an unreasonable invasion of a third party's personal privacy, the Department considered all the relevant factors. The applicant has made a general fairness argument that he should be entitled to the records at issue. Two other considerations are relevant.

Sensitivity of the information

[68] In this case, some of the information at issue relates to serious allegations including inappropriate workplace behaviour, sexual harassment and racism. This is sensitive information and so this factor weighs against disclosure.

Knowledge of the applicant

[69] A portion of the record at issue is a statement given by the applicant. While the statement includes information about third parties, the applicant knows the content, because he supplied it. The fact that that applicant supplied the third party information is a consideration that favors disclosure of the record.

[70] I will now examine the application of s. 20 to each of the four outstanding categories of information withheld under s. 20.

(a) Work history and disciplinary information

[71] The vast majority of the withheld information is witness statements, statements of individuals accused of wrongdoing, summaries of these statements, findings with respect to third parties who were the subject of these investigations, and disciplinary letters. This information is subject to the presumption in s. 20(3)(d) and there are three considerations that weigh against disclosure: the information was supplied in confidence, disclosure could unfairly damage the reputation or expose third parties unfairly to harm, and the sensitivity of the information.

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[25] I made a similar observation in NS Review Report FI-10-19 at para 43, consistent with the findings of the Nova Scotia Court of Appeal in *Dickie v. Nova Scotia (Department of Health)*, 1999 CanLII 7239 (NS CA).
[26] NS Review Report 16-04 at paras 25-30.

[72] The applicant bears the burden of proving that the disclosure of this information would not be an unreasonable invasion of a third party's personal privacy. Further, the Nova Scotia Supreme Court has made clear that when a presumption in s. 20(3) applies, as it does to this category of information in this case, it is an error in law to treat the absence of evidence as satisfying a burden of proof to overcome a statutory presumption.[27] I find that the applicant has not satisfied the burden of proof with respect to the information that falls within the s. 20(3) presumption.

[73] **Recommendation #8**: I recommend that the Department continue to withhold the work history and disciplinary information of third parties.[28]

(b) Scheduling information associated with identifiable individuals[29]

[74] Four pages included information regarding scheduling of employees. This information does not fall within the presumption set out in s. 20(3)(d). With respect to the s. 20(2) considerations it was not information supplied in confidence, it is not sensitive and the information is not current, but is better characterized as historical scheduling information. Finally, and perhaps most importantly, with the names of individuals removed (because the applicant is not seeking this information) the remaining information does not qualify as identifiable third party personal information. Therefore, I find that the disclosure of this information would not be an unreasonable invasion of a third party's personal privacy.

[75] **Recommendation #9:** I recommend disclosure of all scheduling information withheld under s. 20.

(c) Third party personal information supplied by the applicant[30]

[76] The records include two copies of a witness statement given by the applicant. While the information contained in the statement includes work history of third parties that would fall within the presumption set out in s. 20(3)(d), the fact that the applicant knows the content of this information and in fact supplied it himself weighs heavily in favour of disclosure. The document makes clear that the information is a recording of a witness statement given by the applicant. It does not present the information as true or untrue; it is simply a recording. On that basis I find that disclosing a copy of a witness statement back to the applicant/witness would not, in the circumstances of this case, be an unreasonable invasion of a third party's personal privacy.

[77] **Recommendation #10:** I recommend full disclosure of the witness statement given by the applicant, although the Department may choose to withhold the names the applicant provided given that he has made clear in his submissions that he is not seeking names.

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[27] *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate*, 2015 NSCA 38 (CanLII) at para 92.
[28] This results in no further disclosure on the following pp.: 22, 24, 26, 330-334; 336-338, 352, 466, 485-497, 508-519, 524-528, 543-544, 560, 610-622, 627-630, 655, 658, 672 and 713. In addition, no further disclosure is required with respect to the third party personal information identified as a result of recommendation #7.
[29] Information included in this category is at pp. 529, 598, 659 and 662.
[30] The applicant's witness statement begins about ¼ of the way down p. 498 and ends ¼ of the way down p. 500. The same is true for the copy that begins on p. 623 and ends on p. 625.

(d) Personal information of the applicant[31]

[78] Some of the withheld information includes personal information of the applicant. The challenge with this information is that the content of the statements or the manner in which the documents were originally severed means that it is difficult to give the applicant his own personal information without identifying the witness. The presumption in s. 20(3)(d) does not apply to the identification of witnesses, but the applicant has said he is not seeking this information. Relevant considerations under s. 20(2) are that the information was part of a workplace investigation and, as noted above, was provided in confidence.

[79] Section 20(5) provides that where a public body refuses to disclose personal information supplied in confidence about an applicant, the public body shall give the applicant a summary of that information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information. I find that a summary can be provided in this case.

[80] **Recommendation #11:** I recommend that the Department summarize the applicant's personal information withheld on pages 551-552, 718, 720 and 721. I will provide the Department with a recommended summary for these five pages.

Is the Department authorized to determine that portions of the responsive records are out of scope of the request and to withhold the portions that it deems non-responsive?

[81] The Department cited "N/R" as the reason for withholding information as follows:

- Page 342 – partially withheld information, also under s. 20;
- Pages 367-369 – fully withheld, also cited s. 20, 16;
- Pages 485-507 – full withheld, also cited s. 20;
- Page 541 – partially withheld, also cited s. 15;
- Pages 610-625 – fully withheld, also cited s. 20.

[82] In Review Report 16-10, I examined this issue in great depth and concluded that public bodies in Nova Scotia are not entitled to withhold any information as "non-responsive" under *FOIPOP*.[32] I adopt the reasoning set out in Review Report 16-10 and apply it here. I find that the Department was not entitled to withhold any information as non-responsive.

[83] **Recommendation #12:** I recommend the disclosure of any information withheld only as non-responsive. All of the other records were also subject to other severing provisions which I have already discussed above.

Final note

[84] Eight pages were listed in the Notice of Formal Review as being at issue that did not, in fact, have any information removed and so I have not discussed them in this Review Report: pages 23, 298-299, 343, 632, 652, 688 and 710.

[31] Pages 551-552, 718 and 720-721.
[32] NS Review Report 16-10 at paras 15-74.

FINDINGS & RECOMMENDATIONS:

[84] I find that:

[85] **Duty to assist (s. 7)**

1. With respect to pages 43, 398, 394 and 680 the Department has not met its duty to respond without delay openly, accurately and completely.
2. The Department has now conducted an adequate search for the attachments to pages 324, 346, 347, 349, 351 and 664.

[86] **Policy advice (s. 14)**

3. Section 14 applies to only a portion of the information withheld on pages 545, 549, 553, 554, 561 and 704.

[87] **Harm to law enforcement (s. 15)**

4. The Department has failed to satisfy the burden of proof with respect to s. 15(1)(a) and so s. 15(1)(a) does not apply to page 541.

[88] **Solicitor-client privilege (s. 16)**

5. Section 16 applies to the 36 pages withheld under that provision. Section 16 only applies to a portion of the withheld information on page 679.

[89] **Unreasonable invasion of third party personal privacy (s. 20)**

6. A portion of the information withheld under s. 20 does not qualify as the personal information of an identifiable third party.
7. Section 20(4) does not apply to the records at issue here.
8. The presumption in s. 20(3)(d) applies to all witness statements, disciplinary letters and draft letters and emails disclosing investigation outcomes or contents of interviews. I exclude from that category only the identity of witnesses not subject to any workplace investigation.
9. Disclosure of scheduling information would not constitute an unreasonable invasion of any third party's personal privacy.
10. Disclosure of the applicant's own witness statement back to him would not constitute an unreasonable invasion of any third party's personal privacy.
11. Section 20(5) requires that the Department prepare a summary of the applicant's own personal information withheld under s. 20.

[90] **Non-responsive information**

12. The Department was not authorized to withhold any information as non-responsive.

[91] I recommend that the Department:

1. Process the attachments to pages 43, 398, 394 and 680 and provide a response to the applicant within 60 days of receipt of this report.

2. Take no further action with respect to the search for attachment to pages 324, 346, 347, 349, 351 and 664.
3. Disclose a portion of the information withheld under s. 14 on pages 545, 549, 561 and 704 to the applicant as marked on the copy of the records delivered to the Department with its copy of this report.
4. Reconsider its exercise of discretion for all information severed under s. 14, particularly in light of the passage of time.
5. Disclose the information withheld under s. 15(1)(a) found on page 541.
6. Revisit the application of s. 16 to page 679 and revise it consistent with the requirements of s. 16 and its approach to the identical email that was partially disclosed.
7. Revisit the application of s. 20 to five pages so that only the identifiable personal information of third parties is removed. (pages 521-523, 651 and 342).
8. Continue to withhold work history and disciplinary information of third parties.
9. Disclose scheduling information withheld under s. 20 on pages 529, 598, 659 and 662.
10. Disclose the applicant's own witness statement back to him (found on pages 498-500 and 623-625). The Department may choose to withhold the names the applicant provided given that he has made clear in his submissions that he is not seeking names.
11. Prepare a summary of the applicant's own personal information withheld on pages 551-552, 718, 720 and 721.
12. Disclose any information withheld only as non-responsive (page 342 paras 1 and 5).

January 10, 2017

Catherine Tully
Information and Privacy Commissioner for Nova Scotia