REPORT
Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum FI-06-79

Report Release Date: September 10, 2007

Public Body: Department of Justice

Issue: Whether s. 15 and s. 18 of *the Freedom of Information and Protection of Privacy Act* ["*Act*"] allow a public body to withhold videotapes containing the personal information of the Applicant.

Summary: An Applicant requested a Review of a decision by the Department of Justice ["Justice"], not to provide a copy of a videotape showing the Applicant being tasered by correctional workers. Justice refused to disclose the videotape initially citing s. 15(1)(k), and s. 15(a)(l) of the *Act* and subsequently s. 18(1)(a), as late exemption. Justice stated it had never disclosed a video or audio tape, or provided a screening of correctional facility tapes because of the related property security, law enforcement and health and safety issues.

The Applicant submitted that the names and identities of correctional staff could not be determined from the videotape as they are wearing disguises and that the cells of the correctional facility have been shown on television in the past.

Justice provided the Applicant with a transcript of the audio portion of the first videotape during mediation. There was a material error in the transcription and when it was corrected, Justice apologized for this mistake. Neither party objected to reference to the transcription in this Review despite it being a part of the mediation process.

The Review Officer found that Justice had failed to exercise its discretion contrary to the *Act*, had inappropriately relied on particular exemptions, had not provided any evidence to support the use of the discretionary exemptions, and had filed late exemptions with the Review Officer, without explanation.

Recommendations: That Justice reconsider its initial decision to withhold and exercise its discretion appropriately in granting access to the Applicant's personal information.
The Review Officer provided options to Justice to assist in meeting this recommendation.

Key Words: apology, correctional facility, correctional officer, duty to assist, exercise of discretion, fettered discretion, function as an employee or officer, late exemptions, mandatory exemptions, mediation, personal information, source of law enforcement information, taser, third party, transcript, videotape

Statutes Considered: *Nova Scotia Freedom of Information and Protection of Privacy Act s. 2, 3(1)(i), 3(1)(k),3(1)(m), 7(1)(a), 8(2),15(1)(d), 15(1)(k), 18(1)(a), 20(4)(e)*

Case Authorities Cited: *BC Order 00-01; Langley Township Bylaw Enforcement Records, Re, 2000 CanLII 9670 (BC I.P.C.); Cyril House and 144900 Canada Inc. (Abacus Security Consultants and Investigators)(2000) unreported S.H. No. 160555 (N.S.S.C.); House, Re, 2000 CanLII 20401 (NS S.C.); Dickie v. Nova Scotia (Department of Health) (1999), 176 N.S.R. (2d) 333; 1999 CanLII 7239 (NS C.A.); FI-06-07; Halifax Regional Police (Re), 2007 CanLII 12675 (NS F.O.I.P.O.P.); Order F07-17 Ministry of Forests and Range, July 31, 2007; FI-02-56; Nova Scotia (Executive Council) (Re), 2002 CanLII 22727 (NS F.O.I.P.O.P.); FI-06-77; Dalhousie University (Re), 2007 CanLII 16212 (NS F.O.I.P.O.P.); BC Order 325-1999; Workers' Compensation Board, Re, 1999 CanLII 4017 (BC I.P.C.); FI-99-49; Halifax Regional Police (Re), 1999 CanLII 1999 (NS F.O.I.P.O.P.).*

Other Cited: *Procedures Manual - FOIPOP (2005) [Late Exemptions; Mediation]; Review Office "Citing Late Exemptions Policy"*

REVIEW REPORT FI-06-79

BACKGROUND

The Applicant made an application for access to information on October 18, 2006 for the following:

> *All information contained in my correctional services file from the Central Nova Scotia Correctional Facility. Starting from March 15/06 to March 22/06 [inclusive]. I am also requesting all information contained in my personal medical file at the C.N.S.C.F. [Central Nova Scotia Correctional Facility] from March 15 to March 22/06*
>
> *Along with the written information in these files, I am requesting [copies of] C.N.S.C.F.'s video and audio leading up to as well as the video of the March 21/06 incident. Where C.N.S.C.F. staff used a taser on me.*

The Applicant's original access to information request was sent to the Department of Health. Pursuant to s. 10(1) of the *Freedom of Information and Protection of Privacy Act ["Act"]*, the Department of Health transferred the request to the Department of Justice ["Justice"]. According to Justice, the personal medical file component was in the custody of the Capital District Health Authority and a partial transfer was made by Justice. The latter is not part of the Record at issue in this Review.

On December 1, 2006 Justice made a decision with respect to the Central Nova Scotia Correctional Facility ["CNSCF"] paper files and the videotape requested by the Applicant. The paper records were partially released with minimal severing under s. 15(1)(d) and the videotape was withheld under s. 15(1)(k) of the *Act*. On December 15, 2006, Justice received a Request for Review from the Applicant dated December 5, 2006. Justice forwarded the Request for Review to its proper location, the Freedom of Information and Protection of Privacy Review Office ["Review Office"]. The Request for Review arrived at the Review Office on December 19, 2006. In a letter dated December 18, 2006 Justice explained to the Applicant the meaning of the exemptions they had relied on for withholding a portion of the paper files and the videotape.

The Review Office asked the Applicant to review the December 18, 2006 letter of explanation from Justice to determine if that elaboration satisfied his outstanding interests as outlined in his Request for Review dated December 5, 2006. The Applicant responded and remained dissatisfied with the information received from Justice and indicated that he believed s. 15(1)(k) of the *Act* did not apply to the videotape. The Applicant, at that time, confirmed that the videotape was the sole Record at issue in the Review and he took no issue with the partially severed paper records that had been released.

In an email dated January 23, 2007, Justice informed the Review Office that releasing the videotape could compromise security procedures in allowing an offender to study emergency response procedures and effect counter measures, identify staff

members who could become targets in the community and compromise the physical layout and static security features of the facility.

In the course of mediation, Justice did attempt to make some additional information available to the Applicant. A transcript of the audio portion of the videotape was produced in-house at Justice. At the time of providing the transcript, Justice claimed two new exemptions. There was a material mistake in the transcription, to which the Applicant took great exception. The error in the transcript was that there was no reference to the taser being applied a second time to the Applicant. The Applicant's confidence that Justice was providing him with access to his personal information was eroded due to the inaccuracy of the first transcript. This resulted in the failure of the proposed mediated resolution based on providing a transcript of the audio portion of the videotape.

On May 25, 2007 the Applicant made his election, in writing, to proceed to a formal Review which he did not withdraw even when, subsequently, Justice acknowledged its error by providing the Applicant with a corrected version of the transcription and an apology. With that Notice, the Applicant provided a formal submission to the Review Officer. The Review Office informed Justice on June 6, 2007 that the matter was being forwarded to formal Review and asked for its formal representations. On June 15, 2007, Justice sent its representations to the Review Officer.

In both the Applicant's and Justice's submissions there was mention of a transcript being provided during the mediation process. As both parties made reference to the transcript in their submissions, though no copy had been provided to her [the Review Office copy of the original transcript was in the sealed mediation file], the Review Officer requested a copy of the transcript. At the Review Officer's request, Justice forwarded a copy of the original transcript (sent to the Applicant during the mediation process) and a second "corrected" transcript, which had also been sent to the Applicant.

During the Review, Justice was also asked to do a further search for the Record. The Applicant's access to information request included specifically *video and audio material* ***leading up to*** *as well as the video of the March 21/06 incident.* ***[Emphasis added]*** As the only Record provided by Justice was of the March 21, 2006 incident, and as there was no correspondence to or from Justice regarding the time leading up to that date, the Review Officer asked Justice to do a second search to establish whether or not any additional videotapes of the Applicant were still in the custody of the correctional facility.

Justice advised the Review Officer on August 8, 2007 that two additional videotapes had been located, copies of which would be provided, along with an explanation from staff as to the "usual procedure" regarding tapes. Those tapes were received and reviewed on August 13, 2007. Justice indicated that these two tapes are from the surveillance video system that is without audio. The explanation given by Justice in this respect is as follows:

Also be advised that these two videos exist only because they were pulled from the rack on the day of the incident and included in a package in case additional info, from that area, from that day was required.

Justice indicated to the Review Officer that according to Correctional Services ["Corrections"], when the initial request for access to information from the Applicant was received by the facility, these two additional videotapes were not discovered. The videotapes were not discovered in the initial search for the Record because they were in a different location from the videotape of March 21, 2006 which was located on the Applicant's file. The Correctional staff person responsible for records advised as follows:

Upon hearing of the problem with the videotapes of the [Applicant's] incident, although he has no recollection of the original request, he remembers copying the 8MM tape of the incident and including it with copies of the written reports in a "police file", as he normally does, and setting it aside should police become involved or an investigation be initiated. The other surveillance videos of the day in question were packaged separately and not seen as directly related to the TASER incident and at some point later in time would have been combined in one file by a clerk for storage."

In its August 8, 2007 correspondence, Justice advised that there is no other written policy regarding videotapes or recording equipment other than the Correction's "Approved Security Equipment" policy that provides the following with respect to recording equipment:

3.1 Photography equipment and video recorders, while not considered protective or restraint and control equipment are approved for use in correctional facilities when recording the utilization of any protective, restraint or control equipment.

3.2 Video recorders are used to provide a record for:
3.2.1 staff training,
3.2.2 operational debriefing,
3.2.3 clarification of the incident,
3.2.4 defusing an incident by demonstrating to the leader(s) of the disturbance that their actions are being recorded, and
3.2.5 for court evidence.
[Emphasis added]

Upon obtaining the two additional videotapes, the Review Officer took two further steps. One was to inform the Applicant that two additional videotapes had been located. Justice also advised the Applicant that two new videotapes had been located and were being withheld under the same exemptions as Videotape #1. This correspondence was copied to the Review Office. At this stage, the Review Office confirmed with the Applicant that he did not wish to make any further submissions to the Review Officer.

The second step was to request that Justice provide a copy of any and all other correspondence sent to the Applicant. Specifically, as the second transcript was not

copied to the Review Office when it was sent to the Applicant, the Review Officer inquired as to whether or not there was a cover letter sent to the Applicant when he was provided with a copy of the second transcript of the audio portion of the initial videotape. Justice responded by forwarding a copy of a letter dated June 15, 2007 to the Applicant, which stated:

> *On further review of the videotape and a discussion with Correctional Services, it was determined that the transcript of the videotape needed to be corrected. It was very difficult to detect the taser button being pushed again to give the second shock. You did receive two shocks from the taser.*
>
> *I apologize for the unintended oversight and have attached a revised transcript for your information.*

On August 16, 2007 Justice made a further submission to the Review Officer listing the late exemptions being claimed. The Review Officer directed Justice to the Late Exemption Policy posted on the Review Office website that had been circulated to all FOIPOP Administrators. The same information was conveyed to the Applicant by Justice in a letter dated August 17, 2007, claiming the same three exemptions ostensibly late, in the case of the two new videotapes. As this part of the Record had just been located, the Late Exemption Policy does not apply to the two new tapes.

The August 16, 2007 letter to the Review Officer simply identifies s. 15(1)(d), 15(1)(k) and 18(1)(a) with no additional arguments or evidence to support their applicability. All three videotapes have been viewed by the Review Officer as part of the Review. Only Videotape #1 has audio and has twice been transcribed. Subsequent to receiving the initial transcript of the audio portion of Videotape #1, the Review Officer viewed it for a second time with the transcript in hand. When the second transcript was provided, the Review Officer viewed Videotape #1 again.

RECORD AT ISSUE

The Record at issue is videotape recordings of the Applicant while he was being held in custody at CNSCF, a facility and its operations for which Justice is responsible. The first videotape [Videotape #1] provided was of events that transpired on March 21, 2006. In response to a request made by the Review Officer on August 8, 2007, during the formal Review, Justice indicated that there were two other videotapes [Videotape #2 and Videotape #3] of the Applicant with respect to events leading up to the March 21, 2006. Videotape #2 can be characterized as recording an incident when the Applicant is being transported in the hall. Videotape #3 is a restricted view captured by the paper-covered surveillance camera in which the Applicant does not appear. All three videotapes are the Record at issue in this Review.

The Review Officer is satisfied that Corrections, in response to the Review Officer's request to do a second search, has located all videotapes relevant to this request. Specifically, there are no other videotapes of the Applicant for the period of March 15 – 20, 2006 inclusive.

APPLICANT'S SUBMISSION

In his first submission to the Review Office in a letter dated January 10, 2007, the Applicant made four major points, which can be summarized as follows:

1. The video should be released as it contains personal information about himself and how he was treated while in the correctional facility;
2. Section 15(1)(k) should not apply because the identity of the correctional staff would not be revealed as they are nameless and their faces are shielded by balaclavas;
3. There is a precedent from Ontario where a videotape in a prison setting was released; and
4. The purpose of the Review Office is to protect the right of access to information in just such a situation of a videotape containing personal information.

On February 14, 2007 the Applicant made a submission as part of the mediation process, a portion of which he wanted considered as part of the Review. The points made in that submission can be summarized as follows:

1. The Applicant does not want to know the names of the correctional staff and believes their identities cannot be determined from the videotape as they are wearing disguises;
2. The view of the cell reveals nothing unique [all prisoners would know what they look like] or reveals nothing about the operations of the correctional facility; and
3. Being able to view the video would be no different than seeing an inmate in a cell extraction on any documentary on prisoners in federal or other prisons.

After electing to proceed to a formal Review, the Applicant provided the office with a further submission, which can be summarized as follows:

1. He considers that he was treated in an unjust and abusive manner while in custody and considers having access to the videotape to be part of finding a fair and just resolution;
2. The videotape is important to him because he believes it will show that his right to expedient, professional and humane health care was callously violated because there was no evidence to support the actions of the correctional staff;
3. A transcript of the audio portion of the videotape is not sufficient because first, it will not provide an accurate picture of the demeanour of the Applicant and the correctional staff; second, because Justice already provided one copy of the transcript that was missing an important segment of the audio, they cannot be trusted to provide an accurate copy;
4. There is nothing unique or confidential about a CNSCF cell. In that regard, the Applicant stated:

The cells of the CNSCF have been shown on ATV in the past. It's a square box with a concrete bed, a basic window & a bad paint colour. It doesn't take an academic to picture a prison cell.

PUBLIC BODY'S SUBMISSION

In its original Decision letter to the Applicant dated December 1, 2006, Justice relied on two discretionary statutory exemptions and stated:

> *You are entitled to most of the records requested, and your application has been granted in part. We have severed confidential information under exemptions found with the Freedom of Information and Protection of Privacy Act.* ***For the severed information we claim exemptions under subsections 15(1)(d) for the paper files and clause 15(1)(k) for the videotape.***
>
> ***[Emphasis added]***

In summary, Justice withheld the Record based on the claim that its release would place the security of a property or system including a building in harm's way. Section 15(1)(k) reads as follows:

> *15(1) The head of a public body* **may** *refuse to disclose information to an applicant if the disclosure could reasonable be expected to*
> *(k) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.*
> ***[Emphasis added]***

Subsequent to the Applicant requesting a formal Review, in a letter dated June 15, 2007, the Department of Justice made a submission to the Review Officer, which made the following arguments, the majority of which are quoted rather than summarized:

1. "The Department of Justice has never disclosed a video or audio tape, or provided a screening of correctional facility tapes, because of the related security and health and safety issues";
2. Justice made reference to the four "options" proposed by the Mediator during the mediation which were:
    a. Disclosing the tape in part;
    b. Providing the applicant with an opportunity to screen the video tape;
    c. Releasing the applicant only the audio portions of the tape; and/or
    d. Providing a transcript of the tape.
3. "There is no known Canadian precedent for disclosing a videotape containing the type of information collected on this tape."
4. "[We] have concerns that security and emergency procedures could be compromised, which could compromise the safety of the correctional workers and other incarcerated offenders. There is also a safety concern regarding correctional employees being identified leading to them being targeted outside of work";

5. "The provision of only the audio portion of the tape may also compromise the safety of personnel who may be identified through voice recognition and due to the Correctional Workers referring to each other by name in the tape," protected under s. 18(1)(a).

In its submissions to the Review Officer, Justice cites a number of statutory exemptions in addition to the one relied upon in its Decision letter to the Applicant. The public body states:

1. The identities of the correctional staff can be discerned because they refer to each other by name on the videotape and their voices would be recognizable by the Applicant and therefore should be protected under s. 15(1)(d) of the *Act*;
2. Identification [through personal information] should be withheld where, if it is released it could reasonably be expected to threaten someone else's safety or mental or physical health pursuant to s. 18(1)(a). This fear could be extended from the correctional worker to her or his family at home;
3. Viewing the videotape may result in harm to the security of a building because security procedures would be compromised because the Applicant could study the physical layout and emergency response procedures of the facility, relevant under s. 15(1)(k).

In its initial response to the Applicant dated December 1, 2006, Justice cited only s. 15(1)(k). Justice did not give written notice to the Applicant of any additional exemptions including its reliance on s. 15(1)(d) and 18(1)(a) until they were listed in a cover letter to the Applicant dated February 8, 2007, which accompanied the first transcript of the audio portion of the Record. This correspondence was eventually copied to the Review Office at the request of the Mediator during mediation. It was subsequently made available to the Review Officer during the formal Review at her request.

When Justice provided the two newly located additional videotapes, it cited the same three exemptions claimed for Videotape #1. In its final submission letter dated August 16, 2007, Justice added to its brief with respect to s. 18(1)(a) regarding threatening safety or personal health that in addition to correctional officers, there is a concern that bystanders could be targeted.

The Review Officer has chosen to do two things in response to this situation. First, to respond to each of the arguments advanced by Justice. This Review finds the exemptions claimed do not apply to this case and the discussion may assist public bodies to understand when those exemptions do not apply. Second is to include a brief discussion with respect to overlying issues such as late exemptions, mediation and exercise of discretion, which follows.

DISCUSSION

The purpose of the *Act*, which has been a broad and purposeful interpretation, provides:

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,
(iv) preventing the unauthorized collection, use or disclosure or personal information by public bodies, and
(v) providing for an independent review of decisions made pursuant to this Act and...
(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.***
[Emphasis added]

Section 3(1)(i) of the *Act*, provides a definition of *personal information:*

personal information means ***recorded*** *information about* ***an identifiable individual****, including*
(vi) information about the individual's health-care history, including a physical or mental disability,
(vii) information about the individual's…criminal… history
[Emphasis added]

The Applicant has a right of access to any record in the custody or under the control of a public body pursuant to s. 5, once a request has been received. Section 3(1)(k) of the *Act* defines record as follows:

"record" includes...papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records

The three videotapes, the Record at issue in this Review, fall within the definition of record for the purpose of the *Act*. In a case where a record is a videotape, the *Act* provides that a public body can do the following:

8 (2) The head of a public body may give access to a record that is a microfilm, film, sound recording, or information stored by electronic or other technological means by
(a) permitting the applicant to examine a transcript of the record;
(b) providing the applicant with a copy of the transcript of the record;
(c) permitting, in the case of a record produced for visual or aural reception, the applicant to view or hear the record or providing the applicant with a copy of it; or
(d) permitting, in the case of a record stored by electronic or other technological means, the applicant to access the record or providing the applicant a copy of it.
(3) The head of a public body shall create a record for an applicant if

(a) the record can be created from a machine-readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise; and
(b) creating the record would not unreasonably interfere with the operations of the public body.

The public body initially defended its withholding of the Record pursuant to s. 15(1)(k) which for ease is reproduced again:

15(1) The head of a public body ***may*** *refuse to disclose to an applicant if the disclosure could reasonable be expected to*
(k) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

There is no evidence to support the contention that the release could reasonably be expected to harm the security of any property or system. There is nothing on the videotapes that would provide information to the Applicant as to the layout of the correctional facility other than the two rooms he was in and the hallway between the two, with which he would already be familiar. The public body has failed to provide any evidence to demonstrate that s. 15(1)(k) applies or that viewing the Record could reasonably be expected to harm the security of any property or system. In fact, by Justice's own admission in a letter to the Applicant dated August 17, 2007, one of the videotapes "consists of the restricted view captured by the paper-covered surveillance camera prior to, during and after the tasering incident and the correctional workers after the incident removing the covering. While the camera is covered, you and the activities inside the cell are not visible. You are also not visible in the video tape when the covering over the camera is being removed." Videotape #3 contains no personal information and as the view is restricted it is impossible to conclude that security could be threatened.

In its last submission, as a basis for denying access to Videotapes #2 and #3, Justice cited the same sections of the *Act* previously relied upon for Videotape #1. There are no late exemptions for Videotapes #2 and #3 as the exemptions were claimed within days of their discovery.

The first additional exemption cited by Justice in February 2007 was s. 15(1)(d) which provides:

15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
(d) reveal the identity of a confidential source of law-enforcement information

Citing this exemption raises two important issues. First, this exemption has been interpreted to apply in quite a different situation from this case. The rationale behind this section is to protect the identities of informants who act as sources of important information for law enforcement purposes, who if their identities were not kept confidential, would not otherwise come forward. Many public bodies have a policy with respect to information received in these circumstances. A decision from the British

Columbia Commissioner, under a very similar statutory provision, in interpreting a policy about confidential sources, held:

> *The explicit assurance of confidentiality is qualified because there is a duty to disclose to an accused all information relevant to the proceedings. For the purposes of this inquiry, however, I accept that this notice means anyone who complains about a bylaw infraction using this form is a "confidential source of law enforcement information" for the purposes of s. 15(1)(d) of the Act. Disclosure of the name or other identifying information of informants would "reveal the identity" of those confidential sources of law enforcement information. Accordingly, Langley is authorized to refuse to disclose that information to the applicant.*
> *[BC Order 00-01; Langley Township Bylaw Enforcement Records, Re, 2000 CanLII 9670 (BC I.P.C.)]*

The Record does include employees of the correctional facility where the videotape was recorded. These employees would not have any expectation of confidentiality with respect to their work and do not fall within the meaning of "confidential source of law enforcement information."

Second, even if correctional workers could fall within that definition, which I specifically find they do not, the identity of the employees is largely unavailable due to protective gear being worn including balaclavas as headgear. The Applicant has been very clear that he does not want to know the identity of the correctional officials. The *Act* provides that personal information about a third party will not automatically be withheld as an invasion of privacy if the Record included a person in the course of their employment.

Section 20 provides that a public body must refuse to disclose personal information to an Applicant if there is an unreasonable invasion of a third party's privacy. Third party is defined in the *Act* as follows:

> *3(1)(m) in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than*
>
> *(i) the person who made the request, or*
> *(ii) a public body;*

By this definition, therefore, correctional workers who appear on the Record are third parties. The *Act* provides, however, that it will not be considered an unreasonable invasion of a third party if it involves the identification of employees in the course of their employment:

> *20 (1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
> *(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*

(e) ***the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff***
[Emphasis added]

In *Cyril House (Abacus Security Consultants),* Justice Moir held that the approach in *Dickie v. Department of Health* under s. 20 was not binding and he proposed a helpful four step process for determining whether or not disclosure would constitute an unreasonable invasion of privacy:

1. *Is the requested information "personal information" within s. 3(1)(i)? If not, that is the end. Otherwise, I must go on.*
2. *Are any of the conditions of s. 20(4) satisfied? If so, that is the end. Otherwise. . .*
3. *Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s. 20(3)?*
4. *In light of any s. 20(3) presumption, and in light of the burden upon the appellant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?*
   [Cyril House and 144900 Canada Inc. (Abacus Security Consultants and Investigators)(2000) unreported S.H. No. 160555 (N.S.S.C.); House, Re, 2000 CanLII 20401 (NS S.C.), at p. 3]

Adopting that approach to this Review, the analysis is as follows:

1. the Record is personal information within s. 3(1)(i) of the *Act.*
2. the condition in s. 20(4) contained in paragraph (e) applies to this situation where the information relates to third parties functions as an employee of a public body.

Thus, it is unnecessary to go to steps three and four, in this case because the information on the Record involves the third parties as employees.

Section 20 regarding disclosure of personal information is a mandatory exemption. As such, whenever an access request is for personal information, public bodies should begin by determining if s. 20 applies. In this case, Justice made no submission with respect to s. 20.

The Record in this case cannot be withheld under s. 20 because the personal information is about correctional officials who are captured on the Record while doing their job as employees of a public body. A recent job posting and job description for the position of Correctional Officer helps to put the work of employees in this kind of situation into perspective:

JOB DESCRIPTION:

Working Environment (Unavoidable Hazards)
Institution environment is para-military and differs substantially from normal office conditions due to constraints on space, verbal threats, potential for assault and an overall negative sensory stimulation present by institutional security features…

Typical Duties
Occasional
Takes appropriate action when prisoners require discipline. Conducts appropriate physical interventions involving the use of force and restraint equipment…

JOB POSTING:

Qualifications
Should possess knowledge of program delivery and a knowledge of restraint, control and security equipment.
Ability to respond to crisis situations.

Once s. 20 is found not to apply, the Review Officer must return to the discretionary provisions to determine if the public body properly exercised its discretion to withhold.

The second additional exemption cited by Justice was s. 18(1)(a), which provides:

18 (1) The head of a public body ***may*** *refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to*
(a) threaten anyone else's safety or mental or physical health;
[Emphasis added]

Justice argues that release of the Record could threaten both the correctional worker and his or her family at home. For disclosure to meet the test that it *could reasonably be expected to threaten anyone else's safety* there must be a rational connection between the disclosure and the threat to safety and not simply amount to a fear of a possibility. Review Report FI-06-71(M), recently issued by this Review Officer, stated:

In this case, however, neither the Police nor the Third Party supplied the Review Office with any evidence that the Applicant poses a threat to health or safety. There must be a "rationale connection" between the threat to health and safety and the disclosure.

> *"Although [section] involves the same standard of proof as other sections of the Act, the importance of protecting third parties from threats to their*

health or safety means public bodies in the Ministry's position should act with care and deliberation in assessing the application of this section. A public body must provide sufficient evidence to support the conclusion that disclosure of the information can reasonably be expected to cause a threat to one of the interests identified in the section. ***There must be a rational connection between the disclosure and the threat.*** *[(2000) Order 00-02 BCIPC]"*
FI-06-71(M), at p. 5.
[Emphasis added]

Employees working within Corrections are well aware of the risks assumed in the course of their work. Justice has not provided any evidence to suggest that the employees' families are at risk from this Applicant having access to his personal information contained on the Record. The Applicant has made it patently clear he is not interested in the identities of the employees, much less their families.

ISSUE #1 – DUTY TO ASSIST AND LATE EXEMPTIONS

On September 30, 2004, the Review Office issued a policy to all FOIPOP Administrators, which reads as follows:

After the public body has been notified by the Review Office that a Request for Review has been received, the Public Body may claim additional exemption sections within 15 days of the review notification.

The Public Body must give written notice to the Applicant ***and to the Review Office*** *of any additional exemption sections claimed. Any additional exemption sections claimed outside the15 day period* ***may*** *not be considered during the review process.*
[www.foipop.ns.ca; See Policies and Procedures]
[Emphasis added]

The FOIPOP Procedures Manual makes reference to this policy when it states:

The Review Office has also adopted a practice that after a public body has been notified by the Review Office that a Request for Review has been received, the public body may claim additional exemption sections within 15 days of the review notification. The Review Office further asks that the public body give written notice to the applicant and the Review Office of any additional exemption sections claimed. The Review Office has stated that it will not consider, during the review process, any additional exemptions claimed outside the 15 day period. ***Administrators need to ensure that all exemptions to be claimed on an application are clearly outlined in the submission to the Review Office***
[Procedures Manual - FOIPOP (2005), c. 7]
[Emphasis in the original text]

The reference in the Procedures Manual actually goes further than the wording of the Review Office Policy, which provides that it is discretionary as to whether or not late exemptions claimed will be considered during a formal review.

The degree to which the public body has given an applicant sufficient notice of exemptions claimed and time to respond are certainly factors the Review Officer would consider in exercising its discretion to consider a late exemption. In this case, the original decision letter dated December 1, 2006 did not fully explain the rationale for the decision to withhold. When the Applicant sent the Request for Review incorrectly to Justice, the Applicant was then provided with rationale for the exemptions cited [s. 15(1)(d) and s. 15(1)(k)] on December 18, 2006. It was not until February 8, 2007 that Justice informed the Applicant of the additional exemptions being applied, beyond the 15 days stipulated in the policy and the manual.

Public bodies should make every effort to refer to all applicable exemptions in their original response to a request for access. This approach may assist applicants to understand why a record is being withheld, may avoid unnecessary Requests for Review and is consistent with the statutory duty to assist. Section 7(1)(a) provides:

> *7(1) 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;***
> ***[Emphasis added]***

There will be circumstances, however, where it becomes necessary for a public body to make an additional exemption claim(s). In this case, a public body must remember to give notice to the Applicant as well as the Review Office and to do so at the earliest possible time. Applicants will be given the opportunity to make additional submissions in a formal review in response to these additional claims, where they choose to do so.

Public bodies must, however, be cognizant of the fact that the Review Officer may, under the policy cited above, elect not to consider exemptions claimed late and in doing so would consider a public body's failure to give notice to an applicant as being highly relevant. Every effort must be made under the duty to assist to locate all records responsive to the request for access to information and to claim any and all exemptions upon which the public body wants to rely at the outset. This complete and accurate response should not be prompted by an Applicant's Request for a Review. When an exemption is claimed late, public bodies should provide the Review Officer and the Applicant with an explanation as to the reasons.

In addition to clarity about exemptions relied upon, the duty to assist also encompasses the importance of accuracy with respect to any alternative formats of a record put forward by a public body. In this case, the initial transcript of the audio provided to the Applicant had a serious mistake in it that was very unfortunate and avoidable. The second transcript was improved and corrected the mistake but the Applicant had already indicated he wished to proceed to formal Review.

At the end of the formal Review, on August 16, 2007, Justice submitted an additional outline of the late exemptions claimed, which they had already addressed in prior correspondence. There was still no explanation in this final correspondence as to the reasons why the exemptions were claimed late in February.

ISSUE #2 - MEDIATION

For potential applicants and public bodies, it is important to note the importance of maintaining confidentiality in the mediation process. Confidentiality is one of the cornerstones to the integrity and success of all forms of mediation. Parties must be able to be candid and forthcoming thereby being able to use honesty and openness as means to a resolution. That is why information shared during a mediation is done on a *without prejudice* basis, protecting the parties from unwanted exposure to positions they would not otherwise take or want made public. The FOIPOP Procedures Manual acknowledges the basis for information shared during mediation when it states:

> *All conversations with the mediator are in confidence and considered to be on a "without prejudice" basis. If the mediation is unsuccessful, any notes taken by the mediator and all possible remedies discussed during the mediation process are set aside from the file in a sealed envelope before the file is forwarded to the Review Officer.* ***Suggested options or solutions that were not agreed upon during the mediation cannot be forwarded to the Review Officer.***
> *[Procedures Manual - FOIPOP (2005), c. 7]*
> ***[Emphasis in the original text]***

Parties to access and privacy disputes will have different opinions, goals and aspirations but may be prepared to step back from their first choice to avoid going to a formal Review (the results of which will be made public) and to accommodate the needs of the other party, once they are better understood. If parties think that what has been said, proposed or even agreed to in the context of mediation will be exposed during a formal Review or at any later time, they will be far less forthcoming and will be reluctant to negotiate in good faith and with full intent. In the Review Office, the rule is that the mediation portion of the file is sealed and is not considered by the Review Officer in the course of a formal Review, unless the parties consent or the scope of the original application for a record has been reduced or clarified. While in this case, the Applicant also made reference to mediation, it is a given that public bodies will have a greater appreciation for the importance of confidentiality in the mediation process than the average citizen.

Once one or more of the parties refers to a matter arising out of the mediation as part of its submission to the Review Officer, however, that matter becomes an issue. In this case, Justice referred to the four suggestions for consideration laid out during mediation and referred specifically to a transcript of the audio portion of Videotape #1, part of the Record in this case. As a result, the Review Officer requested a copy of the transcript from Justice. The Review also revealed that the Applicant had been unhappy about the first transcript provided, alleging that it was incorrect. During the Review, Justice was asked to provide a copy of all versions of the transcript provided to the Applicant. Upon comparison of both transcripts to each other and to the audio portion of

Videotape #1, serious discrepancies were noted. Justice had indicated that the first version contained errors that were simply a mistake in transcription. Unfortunately the missing information was about how many times the Record showed the Applicant had been tasered, events that were at the core of the personal information contained on the Record to which the Applicant wanted access. Understandably the Applicant was extremely upset with the first version of the transcript that was provided to him, which appears to have led him to also make reference to the transcript in his submission to the Review Officer. This error also led to the Applicant withdrawing from the voluntary mediation process.

In its final submission to the Review Office, Justice provided a copy of the original transcript along with an explanation about the policy with respect to the use of tasers as being a response of last resort and an explanation as to the number of times the Applicant was actually tasered, in Justice's opinion. I find this information does not decide the question of whether or not the Record should be released to the Applicant and only provides an explanation as to whether Justice's policy was followed and why two versions of the transcript were necessary. These are not questions for the Review Officer to answer. This last submission does, however, demonstrate the ongoing debate as to what actually transpired that is documented on the Record and supports, in principle, the Applicant's right to be able to access the Record containing his personal information.

ISSUE #3 – EXERCISE OF DISCRETION

In its response to the Applicant, Justice relied on one discretionary exemption and in subsequent submissions relied upon a number of other discretionary exemptions. Unfortunately, there is no evidence as to what factors Justice considered in exercising its discretion or even whether it did exercise its discretion under any of the exemptions.

In fact, by its own admission, Justice has appeared to have admitted to not exercising its discretion because it has a blanket policy of never releasing videotapes. The fact that Justice approached this request for access to personal information with a blanket policy of never releasing videotapes, contrary to how a discretionary exemption is to be applied, is reinforced by the fact that the identical exemptions are claimed in the same manner for the two subsequently discovered videotapes .

A recent decision from an adjudicator from the Office of the British Columbia Commissioner is of some assistance:

> *It is, however, essential that the Ministry exercise its discretion in each case and that it do so taking into account relevant factors. It is well established in orders under FIPPA that public bodies should consider a variety of factors when exercising their discretion in deciding whether or not to apply the discretionary exceptions set out in FIPPA…*
>
> *Relevant factors which the Ministry should consider in determining whether to exercise its discretion to refuse access under s. 13(1) include: the age of the record, its past practice in releasing similar records, the nature and sensitivity of the record, the purpose of the legislation and the applicant's right to have access*

to his own personal information. In this particular case, an especially relevant factor regarding the July 19, 2005 email is the evidence of the Ministry that the contents of the email have already been discussed with the applicant in the meeting between the applicant and his supervisor on or about August 12, 2005. Also relevant is the applicant's assertion that the course of action that was the subject of the advice was completed at the time of the access request.

The Ministry's submissions do not explain how or if it took any of these factors into account in the exercise of its discretion. ***The Ministry does not, in fact, indicate that its head or the head's delegate actually exercised that discretion. Rather, the Ministry appears to have treated s. 13(1) as a blanket exception,*** *such that as long as the material fell within the scope of s. 13(1) and was not included in ss. 13(2) or 13(3), the Ministry was entitled to refuse access. This is similar to what occurred in Order 04-37. In the absence of any evidence that the Ministry exercised discretion under s. 13(1), much less on what grounds it was exercised, it is appropriate for me to order it to re-consider its decision to refuse to disclose information covered by s. 13(1).*
[Order F07-17 Ministry of Forests and Range, July 31, 2007, at para 41, 43-44]
[Emphasis added]

Justice erred in its interpretation of the *Act* when it sought to rely on statutory exemptions that are discretionary and then failed to exercise that discretion. A discretionary provision cannot be used to justify withholding a particular type of record when the public body's policy is one of absolute non-disclosure. This is especially the case when s. 8 of the *Act* clearly contemplates the release of personal information contained on a videotape, in certain circumstances.

When a public body fails to exercise discretion by operating under a policy that makes no provision for release under any circumstances, it fails to make a determination under the *Act*. A public body cannot, on the one hand, rely on a discretionary exception to the rule of access to withhold information while, at the same time, failing to exercise its discretion at all. Such a failure to exercise its statutory discretion means it has fettered its discretion. The result is the decision to withhold is unreasonable, unsupportable, arbitrary and not consistent with the purpose or wording of the *Act*.

In a Review issued by this Review Office, FI-02-56, the issue of the exercise of discretion is discussed as follows:

The Government of Alberta's manual on Freedom of Information and Protection of Privacy addresses the issue of "use of discretion". In the manual the following is highlighted:

> ***"A public body must not replace the exercise of discretion with a blanket policy that certain types of information will not be released. However, public bodies can develop guidelines to help guide the exercise of discretion, providing they are not interpreted as binding rules."*** *(Pg. 87, Freedom of Information and Protection of Privacy, Guidelines and Practices, Alberta, March 2002).*

[FI-02-56; Nova Scotia (Executive Council) (Re), 2002 CanLII 22727 (NS F.O.I.P.O.P.)]
[Emphasis in the original text]

In determining how to exercise its discretion, reference to a recent Review issued by this Review Office, FI-06-77, with respect to the exercise of discretion bears repeating:

Any public body in exercising its discretion under one of the statutory exemptions listed in the statute beginning at s. 12 should be mindful of the following factors:

1. *The purposes of the Act including that* ***individuals have a right to access their own personal information;***
2. *Exemptions from the right to access* ***should be limited and specific*** *in order to*
3. *Honour the broad purposes of the Act; and*
4. *Privacy of individuals should be protected.*
[Emphasis added]

BC Information and Privacy Commissioner's Order No. 325-1999 outlined a non-exhaustive list of factors for a public body to consider:

In inquiries that involve discretionary exceptions, public bodies must be prepared to demonstrate that they have exercised their discretion. That is, they must establish that they have considered, in all the circumstances, whether information should be released even though it is technically covered by the discretionary exception....

In exercising discretion, the head considers all relevant factors affecting the particular case, including

- *the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;*
- *the wording of the discretionary exception and the interests which the section attempts to balance;*
- *whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;*
- *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 [or Review Officer] have ruled 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.*

In conclusion, Justice must be aware of the importance for it to actually exercise its discretion when an exemption is discretionary and do so in accordance with the *Act* and jurisprudence.

Some questions Justice should consider in determining whether or not to release this Record [or a record of a similar kind], in other words, factors relevant to its exercise of discretion are as follows:

1. Is the request for access to ***personal information*** (one of the fundamental purposes behind the *Act*) about the Applicant?
2. Is the record involved one falling under s. 8 of the *Act*, which details how to deal with ***records that are videotapes*?** Has Justice considered which of the options contemplated by s. 8 may be appropriate in the particular case?
3. Is the historical practice of Justice ***to never release a particular kind of record*** inconsistent with the spirit and letter of the *Act*?
4. Do other similarly situated public bodies such as the police allow access to similar records routinely?
5. Is the refusal to allow access consistent with the following statement regarding Justice's commitment to accountability as posted on its website?

   We are accountable to the citizens of Nova Scotia. We will strive to inform the public of our activities through a policy of openness and accessibility.

6. Whether or not the request for access by the Applicant involves the paramount interest underlying the purpose of s. 15(1)(k); the ***protection of property*** including buildings, vehicles and communication systems?
7. When the ***personal information is highly sensitive*** as in this case should Justice err on the side of access?
8. Will the record be sensitive to those working for the public body who are also visible on the videotape?
9. Does the record contain personal information about employees as third parties but only in the ***course of their employment***?
10. Has Justice considered earlier decisions from the Review Office that supported public bodies who allowed access to videotapes through viewing and eventually provision of a copy? [See for example: FI-99-49]
11. Are there particular circumstances that the public body should consider as being unique to the case?

Justice had the discretion under s. 8 of the *Act* to provide access to the Record when it consists of videotape recordings, which reads:

8(2) The head of a public body may give access to a record that is a microfilm, film, sound recording, or information stored by electronic or other technological means by
(a) permitting the applicant to examine a transcript of the record;
(b) providing the applicant with a copy of the transcript of the record;
(c) permitting, in the case of a record produced for visual or aural reception, the applicant to view or hear the record or providing the applicant with a copy of it; or
(d) permitting, in the case of a record stored by electronic or other technological means, the applicant to access the record or providing the applicant a copy of it.

The transcripts of the Record can be produced in-house in accordance with s. 8(3) of the *Act* which provides:

8(3) The head of a public body shall create a record for an applicant if
(a) the record can be created from a machine-readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise; and
(b) creating the record would not unreasonably interfere with the operations of the public body.

Section 8 of the *Act* clearly contemplates public bodies exercising their discretion to provide a transcript as an appropriate response to a request for access to information. Justice offered a transcript of Videotape #1 in the course of mediation. But for the error in the transcription, Justice's efforts to provide access in an alternate format are considered appropriate and consistent with the *Act.*

FINDINGS:

1. All three videotapes making up the Record fit within the Applicant's request for access to information as being "video and audio leading up to as well as the video of the March 21/06 incident."
2. The Videotapes #1 and #2 are a record for the purpose of the *Act* and contain personal information within the definition of the *Act,* recorded information about an identifiable individual, the Applicant.
3. Videotape #3, which captures a restricted view of the paper-covered surveillance camera, does not contain any personal information of the Applicant.
4. The transcript of Videotape #1 did not accurately reflect the audio on the tape. In this case, because of the history between the parties with respect to the transcript, notwithstanding s. 8 of the *Act*, it is impossible for Justice to propose a transcript as an alternative format sufficient to satisfy this Applicant's access to personal information request.
5. Even after the Applicant had elected to proceed to formal Review, Justice attempted to resolve the request for access by providing a second corrected transcript. The apology provided by Justice on their own initiative was very appropriate in the circumstances.
6. Because of the balaclavas and positioning of the officers in the videotape, the majority of employees are not identifiable and would not be known to the

Applicant. Some numbers are identifiable on uniforms but could be blocked out, though they would appear to be meaningless to the Applicant. It is important to note that the Applicant has made it clear that he is not seeking access to this Record of personal information to identify the correctional staff and the Review Officer is satisfied this is the case.

7. While the Correctional Workers are third parties under the *Act,* release of personal information about them while working as employees or officers is not an unreasonable invasion of their privacy.
8. Justice provided the Applicant with a transcript of the audio portion of the Videotape #1 and should have made every effort to ensure that it was transcribed accurately and professionally if it was attempting to provide access to personal information through that alternate format.
9. In this case, as both parties referred to aspects of what transpired in mediation, reference has been made to those points. Caution should be exercised, particularly by public bodies, in disclosing the contents of mediation proceedings in their submissions to the Review Officer unless all parties have already consented in advance of submissions being made.
10. Justice did not provide the Applicant with a copy of the Record that contained his personal information, or the Record in an accurate alternate format pursuant to s. 8 of the *Act.*
11. Justice failed to exercise its discretion appropriately under s. 15(1)(k) and 18(1)(a) by having a blanket “no release” policy.
12. Section 15(1)(d) is an exemption about confidential source of law enforcement and is not applicable is this case.
13. Section 18(1)(a) has no applicability to Videotape #3 as it is a restricted view captured by the paper-covered surveillance camera.
14. When the original version of the transcript of the audio portion of the videotape was sent, Justice expanded the exemptions claimed to include s. 15(1)(d) and18(a) in the cover letter to the Applicant dated February 8, 2007. These exemptions were made known to the Applicant approximately three months after his request for access, beyond the 15 day period stipulated in the policy.
15. Justice did not provide an explanation as to the reasons why two of the exemptions had to be claimed late.
16. Two new videotapes were discovered and provided with a letter dated August 16, 2007 claiming the same exemptions. The Late Exemption Policy does not apply to the new videotapes as this part of the Record had just been discovered. Correctional staff provided an explanation for the late discovery of two additional videotapes, which was clear and acceptable for the purpose of this Review.

RECOMMENDATIONS:

1. Grant the Applicant access to his personal information using the following options:
    a. Even though two transcripts have already been produced, provide the Applicant with a professionally prepared transcript of the audio portion of Videotape #1. By providing a professional outsourced transcript, the Applicant can be satisfied that it was done free of errors. No transcript is necessary for the two subsequent videotapes that are included in the Record as there is no audio. The Applicant should be given a copy of the transcript to retain;
    b. Facilitate an opportunity for the Applicant to view the Record [Videotapes #1, #2 and #3] at the earliest possible date once the transcript has been produced for the Videotape #1. In granting access to personal information, a viewing of the Record and a new transcript are the minimum recommendations; OR
    c. As an alternative to Recommendations a and b, Justice may elect to give the Applicant a copy of Videotapes #1, #2 and #3 to retain, without the necessity of providing him with a professionally produced transcript.

2. Justice, in cooperation with Corrections, develop a written policy around the use of video surveillance and release of/access to a videotape as a Record in compliance with s. 8 of the *Act,* and, in particular, the duty to assist contained in s. 7 of the *Act*. As part of this policy development, Corrections may include giving attention to how videotapes are stored, including cross-referencing.

3. Justice, in cooperation with Corrections, review procedures with respect to the duty to assist; first in how to respond to an access to information request accurately and completely in the first instance avoiding having to do a subsequent search for a record. Second, in how to assist applicants by citing all exemptions the public body considers applicable at the earliest possible date.

4. In circumstances where late exemptions are claimed beyond 15 days, the Review Officer should be provided with an explanation as to the reasons for the delay as part of its submission during the formal Review.

Dulcie McCallum
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