SUPREME COURT OF NOVA SCOTIA

Citation: *Russell v. Nova Scotia (Health and Wellness)*, 2020 NSSC 19

Date: 20200121
Docket: Hfx No. 483038
Registry: Halifax

Between:

William Russell

Appellant

v.

Nova Scotia Department of Health and Wellness

Respondent

In the Matter of an Appeal Pursuant to Section 41 of the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, C. 5

Judge:	The Honourable Justice M. Heather Robertson
Heard:	October 30, 2019, in Halifax, Nova Scotia
Decision:	January 21, 2020
Counsel:	Matt McEwen and William Russell, for the appellant Agnes E. MacNeil and Adam Norton, for the respondent

Robertson, J.:

[1] This matter arises on appeal of a decision made by the Nova Scotia Department of Health and Wellness (hereinafter referred to as "DHW"), to deny access to information and/or records related to the allocation of government healthcare funds for long term care facilities. The information was requested under the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, C. 5 (the "*FOIPOP Act*"). The information requested by the appellant, William Russell, was first requested on September 8, 2015. The information was requested for all licensed nursing homes and residential care facilities in Nova Scotia, including base funded salaries for each title position, in each facility.

[2] The terms used to describe this funding is the full time equivalent ("FTE") (1760 hours for a person year) – also referred to as a base funded salary. This applies to the non-unionized positions or jobs by category in these facilities. Union jobs such as nursing positions are the subject of collective agreements and information about those jobs is already available public information.

[3] Partial access to much of the information was given to Mr. Russell by DHW, including FTEs and base funded salary amounts for every position for each facility that described a position related to more than five employee positions in the facility.

[4] The reason the information was withheld relating to five or fewer positions was the Minister's concern, particularly relating to smaller and rural communities, that an individual's "salary information" could easily be revealed by the release of the information and that it constituted personal information under s. 20 (3)(j) of the *FOIPOP Act*.

[5] In 2016 Mr. Russell filed a request for review of the department's denial of access with the Office of the Information and Privacy Commissioner of Nova Scotia. On October 7, 2018, the commissioner released a report recommending the release of the information sought. While some additional disclosure was forthcoming, DHW did not follow this recommendation, where the information related to five or fewer FTE base salary figures for a given position.

[6] Under s. 42(1) of the *FOIPOP Act*, this appeal is to be heard as an appeal *de novo*.

[7] The issues before the court are:

a. Is the requested information personal information under s. 20(3)(f) of the *FOIPOP Act*; and,

b. Does the information fall within confidential business information under s. 21(1) of the *FOIPOP Act*?

The *FOIPOP Act*

[8] The purpose of the *Act* is set out in s. 2:

> Purpose of Act
>
> 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 of personal information by public bodies, and
>
> (v) providing for an independent review of decisions made pursuant to this Act; and
>
> (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to
>
> (i) facilitate informed public participation in policy formulation,
>
> (ii) ensure fairness in government decision-making,
>
> (iii) permit the airing and reconciliation of divergent views;
>
> (c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information. 1993, c. 5, s. 2.

[9] Thus, a primary concern of the *Act* is the full accountability to the public for public expenditures with necessary limited exceptions.

[10] Personal Information is defined by s. 3(1)(i) (vii) of the *Act*:

> **3 (1)** In this Act,
>
> (a) "background information" means
>
> (i) any factual material,

(ii) a public opinion poll,

(iii) a statistical survey,

(iv) an appraisal,

(v) an economic forecast,

(vi) an environmental-impact statement or similar information,

(vii) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,

[11] The appellant argues that the information being sought is not personal information pursuant to s. 20(3)(f) of the *Act*.

[12] They say it is not personal information of an identifiable individual, nor could its release invade the privacy of any identifiable individual, relying on *House (Re)*, [2000] N.S.J. No. 473.

[13] The test set out by Moir, J. in *House (Re)* was fourfold:

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?

Burden of Proof

[14] Section 45(1) (2) and (3):

Burden of proof

45 (1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.

(2) Where the record or part that the applicant is refused access to contains personal information about a third party, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

> (3) At a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party,
>
> (a) in the case of personal information, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and
>
> (b) in any other case, the burden is on the third party to prove that the applicant has no right of access to the record or part.1993, c. 5, s. 45.

Analysis of what constitutes personal information and the presumption of unreasonable invasion of privacy, as per *House Re: supra.*

1. Is the requested information "personal information" within s. 3(1)(ii)?

[15] The appellant argues that the information is not about identifiable individuals. To some extent DHW agrees in that funded salaries relate to particular positions but say listing the positions might easily reveal the individual holding the position.

[16] Interestingly, some facilities do not actually have the positions referred to in the FTE or choose to split the positions between more than one worker.

[17] Each FTE references a position and then is accompanied by the base salary information for that FTE.

[18] The department acknowledges the service providers are not required by DHW to actually maintain the position or pay the funded amount (base salary information) for such positions, except if required by the *Homes for Special Care Act.* This *Act* dictates the formula for the number of nursing positions required for facilities with more than a specific number of beds. Nor do the service providers, i.e. the facilities, have to report the salaries they do pay for each FTE position. Nor are they required to pay even the base salary amount allocated to the FTE position.

[19] The base salary funding for each position is in fact part of a historic formula that has evolved over the last 20 plus years. Ms. Paula Langille's affidavit on behalf of the respondent DHW, outlined the development of FTE and base salary figures to meet salary requests, as the base funded salaries are inadequate to attract employees.

[20] Mr. James Balcom in his affidavit in support of the appellant stated that it is commonplace for employees to be paid above the amount funded by the department for FTEs.

[21] The appellant says at best the FTE base salary information could be considered part of the salary range, not personal financial information of individuals, while the department argues that in small towns and rural communities the individuals are easily identifiable by position and that the base salary information constitutes a "reasonable approximation of their salaries" in most cases and is personal financial information about their salaries.

2. The parties agree that s. 20(4) of the *FOIPOP Act* does not apply to these circumstances.

3. The presumption of unreasonable invasion.

[22] I do accept that the base salary amounts for FTE positions could constitute personal information, in that, in very limited circumstances, in small towns or rural communities, the positions held by individuals in long term care homes or nursing facilities are well known.

[23] Therefore, it is necessary to complete the remainder of the *House* analysis.

4. 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?

[24] The respondent relies on *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *Imperial Oil Ltd. v. Calgary (City)*, 2014 ABCA 231; and *Chesal v. Nova Scotia (Attorney General)*, 2003 NSCA 124, which outlined at para. 72, seven factors to aid in determining whether the information was received in confidence.

[25] The respondent says the information is confidential personal information supplied in confidence which does outweigh the need for public scrutiny and transparency.

[26] The appellant however points out that if information could be deemed to be confidential how is it that the department was willing to disclose confidential information so long as there were more than five FTEs involved? This is significant in my view.

[27] Indeed, DHW has not led evidence on the confidential nature of this information. The service providers, the nursing homes and care facilities have not elected to bring any evidence of confidentiality before the court. No such affidavits have been filed.

[28] This fact, together with the disclosed information relating to five positions or more, diminishes any argument or weight as to the confidential nature of the information.

[29] I also note that some of the financial data upon which base salaries may have been based are derived from so-called "Hay Assessments" of positions and the individuals at the time filling the positions, relative to their experience, education, time in the position, etc. However, not all of the third-party information in support of a Hay Assessment, was ever passed onto DHW.

[30] This distinguishes the Alberta case of *Imperial Oil, supra*, where the province was in direct possession of the third-party record.

[31] Indeed the origin of some of this "historic" information may be from many sources or based on unknown calculations so as to raise the notion Justice Kelly advanced in *Atlantic Highways Corp. (Re)*, [1997] N.S.J. No. 238, that the information sought to be protected was so intermingled with government input, standards and proposals that it clouded anyone's ability to determine, as distinct and severable, any confidential information that was supplied by Atlantic Highways.

[32] With respect to the balancing of all of the relevant circumstances including those listed in s. 20(2), I could conclude that the disclosure of the requested information could not be considered unreasonable invasion of privacy.

[33] I understand the Minister's caution in not wanting to disclose any information that might be construed as personal salary information of those very few individuals in small communities of rural settings who might possibly be named and linked with FTE positions, but these concerns are unwarranted in my view.

[34] All that can be said is that at best these numbers are a discoverable salary range for an individual position or funding subsidies by position. (*Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403.)

[35] The overarching consideration here is that, in keeping with the purpose of the *Act*, public bodies must be accountable for the expenditure of public funds in an era where healthcare expenditures are escalating due to aging demographics and the expenditures are very significant. There were over 1500 funded positions totalling nearly $377,000,000 in payments in 2015, a sum that is increasing yearly.

[36] In my view, the remaining information about DHW funding to third parties should now be disclosed. The release of this information will not harm any third party's competitive position, cause financial loss or do any harm.

[37] Accordingly, the appeal is allowed. DHW must release the full unredacted record immediately. The appellant is awarded his costs.

[38] In the absence of agreement between the parties as to costs, I will receive submissions in writing.

Justice M. Heather Robertson