SUPREME COURT OF NOVA SCOTIA

Citation: *Stewart v. Nova Scotia (Community Services)*, 2023 NSSC 231

Date: 20230719
Docket: SPH No. 523949
Registry: Port Hawkesbury

Between:

Julissa Stewart

Appellant

v.

The Minister of the Department of Community Services

Respondent

Appeal Decision

Freedom of Information and Protection of Privacy Act

Judge:	The Honourable Justice Robin C. Gogan
Heard:	July 10, 202, in Port Hawkesbury, Nova Scotia
Counsel:	Julissa Stewart, Appellant, in person Agnes E. MacNeil for the Respondent

By the Court:

Introduction

[1] Julissa Stewart brings this appeal from a decision of the Department of Community Services ("**DCS**") dated May 16, 2023.

[2] On February 21, 2023, Stewart requested copies of all personal information collected about herself and her daughter from the DCS. She received 1,334 pages of information, much of which was completely or partially redacted. Stewart says that she is entitled to more than she received. DCS says the redacted information is either: (1) privileged; or (2) relates to third parties. In either case, it is of the view that Stewart is not entitled to any further information.

[3] This is a case that involves balancing the competing objectives under the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c.5 ("**FOIPOP**" or "**the Act**"). It requires a determination as to whether disclosure of the information is in keeping with the overriding purpose of the legislation or whether non-disclosure is necessary for the protection of third-party privacy interests or the protection of privileged communications.

[4] The appeal hearing took place on July 10, 2023. For the reasons that follow, I dismiss the appeal.

Background and Decision under Appeal

[5] This is an appeal of a decision of the Minister of the DCS dated May 16, 2023.

[6] This matter began with an email request by Stewart to DCS on February 21, 2023:

> Please provide a copy of all case recording notes, interviews, records, recordings, any/all information collected about myself or related to me, and every other document/record on file pertaining to myself … and my daughter … pursuant to the Freedom of Information and Protection of Privacy Act.

[7] On February 22, 2023, Stewart received a letter from DCS advising her to expect a response by March 23, 2023, unless an extension was required. No information was provided to Stewart before the date set by DCS. Instead, she was advised by DCS on March 17, 2023, that it was extending the time to respond to April 24, 2023.

[8] Stewart then contacted the Office of the Information and Privacy Commissioner ("**OPIC**"). She asked for a review of the DCS decision to grant

itself an extension under s. 9(1) of the *Act*. OPIC determined on April 24, 2023, that the time extension taken by DCS was not authorized by the *Act*. The only remedy was to request that DCS immediately respond to Stewart's request for records.

[9] The DCS responded on May 16, 2023, informing Stewart of the outcome of her request under the *Act*:

> You are entitled to part of the records requested. However, we removed some of the information from this record according to subsection 5(2) of the *Act*. The severed information is exempt from disclosure under the *Act* for the following reasons:
>
> > Section 16: information subject to solicitor-client privilege. 16, The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege.
> >
> > Section 20: unreasonable invasion of personal privacy. 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.
>
> It has come to our attention that there may be additional supporting documents relevant to your request, however, we have been unable to locate any other records. Should other records relevant to your request be located we will contact you immediately.
>
> The remainder of the records are enclosed.

[10] The records provided to Stewart were very heavily redacted. A copy of the records provided to Stewart (the "**Disclosed Copy**") was part of the record reviewed on this appeal.

Issue

[11] The issue on this appeal is whether the DCS has complied with the requirements of the *Act* and provided Stewart with the records she is entitled to receive.

Positions of the Parties

The Appellant

[12] Stewart appeals the DCS decision to produce heavily redacted records. She maintains that she only wants records relating to herself and her daughter. She does not dispute the need to redact third party and privileged information. But she believes that the redaction is excessive and sloppy and needs to be reviewed to ensure compliance with the *Act*.

[13] Out of 1,314 pages of records identified as existing, Stewart only received 503 pages of redacted information. On this basis, she believes that the records have been over redacted and are incomplete.

[14] Stewart argues that the lack of DCS compliance with the timelines for production supports her argument that it is not committed to the requirements of the *Act*. As does the production of third-party information without consent.

[15] Finally, Stewart submits that she has knowledge that the DCS records contain specific information about her, but no information of that kind is contained in the records produced. She describes this information in her written submission at various points:

> 7. I am particularly seeking access to all records that will inform me of the designs of […] with my child and how this department is characterizing me in accordance with the […] criteria.
>
> …
>
> 15. The majority of the records that were provided to me in relation to the 700+ pages of record pertaining to […] files held by the Department of Community Services were redacted page by page.
>
> 16. There is indication in the records that were provided to me that there is a developing rational that alludes to future interference with my life and the life of my child.
>
> 17. As a consequence of that, I am seeking the redacted sections about myself and my child to provide me with insight to this rationale.
>
> 18. The blanketed-out sections are harming me, and I want to understand the rationale behind this.
>
> …
>
> 52. On February 15th, 2023, a representative from the Agency filed evidence in that proceeding that I am not a party to, including a case plan that alluded to me being at risk of emotional harm/abuse to children in the proceeding.
>
> …
>
> 53. I filed my FOIPOP request on February 21, 2023, after I was informed that this information about me was filed within a Court matter that I am not a party of (*sic*).
>
> …

> 56. This rationale being developed about myself may have negative interference and implications on my life and the life of my life of my biological child.
>
> …
>
> 62. The Department of Community Services failed to provide the case plan that was filed in the […] proceeding that alludes to me being a risk of emotional abuse/harm to children, without supportive evidence to confirm this to be true.
>
> 63. A portion of the case plan is referenced on page 145 of the Record.

[16] Stewart repeated this motivation in her oral submissions. She is focused on determining if the information she describes exists in the records of DCS. If it does, she argues that it is her personal information, and she is entitled to have it.

The Department of Community Services

[17] The Minister of the Department of Community Services seeks dismissal of the appeal.

[18] The Minister submits that there is no file, proceeding or record that belongs to Stewart or her child. The only proceeding referencing her is one involving third parties. That record contains personal information about multiple people and all third-party information has been redacted, resulting in extensive redactions from the disclosure provided to Stewart.

[19] The Minister says that the appeal must be dismissed on the basis that the information redacted was not Stewart's personal information or that of her daughter. It was either: (1) solicitor-client privileged information; or (2) third-party information that Stewart confirmed she was not seeking on this appeal.

[20] The Minister submits that the *Act* provides for judicial review of the redacted information. This mechanism is part of the statutory scheme, and its purpose is to allow independent review of the redacted material to ensure that the public body is compliant with its obligations under the *Act*.

[21] In keeping with this mechanism, the Minister provided three copies of the record: (1) the version provided to Stewart (the "**disclosed copy**"); (2) a version that is unredacted (the "**unredacted copy**"); and (3) a version with the disclosed information highlighted (the "**highlighted copy**"). These three versions of the record assists in the process of judicial review of the redactions.

Analysis

Standard of Review

[22] This appeal is governed by ss. 41 and 42 of *FOIPOP*. Section 42(1)(a) provides the power to have the appeal heard *de novo*. Although no submission was

made on this point, I note that the standard of review has been considered in many cases.

[23] The scope of the authority was considered in ***Keating v. Nova Scotia (Attorney General)***, 2001 NSSC 85, at paras. 35-38; ***A.B. v. Griffiths***, 2009 NSCA 48 at para. 5; ***Fitzgerald v. Nova Scotia (Public Prosecution Service)***, 2014 NSSC 183, at paras. 45-46, appeal allowed on other grounds, 2015 NSCA 38, at para. 10; and ***Monkman v. Serious Incident Response Team***, 2015 NSSC 325, at paras. 30-32.

[24] The scope of the review in this case was not a contentious item. The parties agreed to the content of the record. The appeal proceeded on the basis that the matter would be given *de novo* consideration consistent with s. 42(1)(a) and the existing caselaw.

[25] It bears repeating at this point that what is being reviewed on this appeal is the decision made by the Minister to redact third party personal information and privileged information from the records disclosed to Stewart. The request for disclosure of Stewart's personal information is now given fresh consideration. The parties both asked the Court to exercise the power granted in ss. 42(1)(b) and 42(2) to conduct an examination of the record.

The Legislation - FOIPOP

[26] The *FOIPOP* legislation governs the collection and disclosure of personal information by the provincial government. Section 5 of the *Act* provides that a person has a right of access to any record in the custody and control of a public body subject to exempted information:

> **Right of Access**
>
> 5(1) A person has a right of access to any record in the custody or under the control of a public body upon complying with Section 6.
>
> (2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Act, but if that information can reasonably be severed from the record an applicant has a right of access to the remainder of the record.

[27] Section 16 of the *Act* provides authority for the refusal to disclose information that is the subject of solicitor-client privilege.

[28] The purpose of the *Act* is an important consideration:

> **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.

[29] The purpose of the *Act* is central to its interpretation. It has three objectives: (1) public accountability, (2) full disclosure, and (3) protection of individual privacy. The challenge is to reconcile what are at times conflicting objectives.

[30] The purpose of the *Act* has been the subject of judicial commentary. In ***O'Connor v. Nova Scotia***, 2001 NSCA 132, Saunders, J.A. provided a concise and oft-cited interpretation:

> [40] Thus, it seems clear to me that the Legislature has imposed a positive obligation upon public bodies to accommodate the public's right of access and, subject to limited exception, to disclose all government information so that public participation in the workings of government will be informed, that government decision making will be fair, and that divergent views will be heard.

> [41] The *FOIPOP* Act ought to be interpreted liberally so as to give clear expression to the Legislature's intention that such positive obligations would enure to the benefit of good government and its citizens.
>
> …
>
> [55] In summary, not only is the Nova Scotia legislation unique in Canada as being the only Act that defines its purpose as an obligation to ensure that public bodies are fully accountable to the public; so too does it stand apart in that in no other province is there anything like s. 2(b). As noted earlier, 2(b) gives further expression to the purpose of the Nova Scotia statute that being:
>
> 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;
>
> [56] Thus the *FOIPOP* Act in Nova Scotia is the only statute in Canada declaring as its purpose an obligation both to ensure that public bodies are fully accountable and to provide for the disclosure of all government information subject only to "necessary exemptions that are limited and specific".
>
> [57] I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada. Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation; ensure fairness in government decision making; and permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives.

[31] The foregoing excerpt is a guidepost for decisions requiring the Court to balance competing interests under the *Act.* The purpose of the *Act* is robust and compels a liberal interpretation of the rights and protections it affords and narrow construction for any of its exemptions. I proceed on that basis.

The Law – The Analytical Approach

[32] Stewart seeks disclosure of her personal information (and that of her daughter) from the DCS. Personal information is non-exhaustively defined in s. 3(1)(i) of the *Act*:

> **Interpretation**
>
> 3 (1) In this Act,
>
> …
>
> (i) "personal information" means recorded information about an identifiable individual, including
>
> (i) the individual's name, address or telephone number,
>
> (ii) the individual's race, national or ethnic origin, color, or religious beliefs or associations,
>
> (iii) the individuals age, sex, sexual orientation, marital status or family status,
>
> (iv) an identifying number, symbol or other particular assigned to the individual,
>
> (v) the individual's fingerprints, blood type or inheritable characteristics,
>
> (vi) information about the individual's health care history, including a physical or mental disability,
>
> (vii) information about the individual's educational, financial, criminal or employment history.

> (viii) anyone else's opinions about the individual, and
>
> (ix) the individual's personal views or opinions, except if they are about someone else;
>
> (Emphasis added)

[33] As noted, the term "personal information" includes opinions in the record about an individual. If the record contains this type of information about Stewart, it is her personal information and should be disclosed, unless disclosure offends other sections of the *Act*.

[34] This appeal engages both ss. 16 and 20 of the *Act*. Disclosure of privileged information may be refused. Disclosure of third-party personal information must be refused if it would be an unreasonable invasion of a third party's personal privacy.

[35] The application of s. 20 has been judicially considered (see the reasons of Justice Moir in ***Re House***, a decision which distilled the reasons of Cromwell, J.A. in ***Nova Scotia (Health) v. Dickie***, 1999 NSCA 62, at paras. 16-17, as well as the more recent decision in ***Fitzgerald***, in which our Court of Appeal confirmed that ***Re House*** and ***Dickie*** continue to represent the correct analytical approach).

[36] As distilled by Justice Moir in ***Re House,*** the correct approach under s. 20 is as follows:

> (1) Is the requested information "personal information" within s 3(1)? If so, 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 the disclosure would constitute an unreasonable invasion of privacy or not?

[37] I reiterate Stewart's position that she is not seeking disclosure of third-party personal information. However, the nature of the records mean that the information sought is intermingled with information not sought, or which would clearly offend s. 20 of the *Act* if disclosed. I am mindful that the burden is on DCS to prove that Stewart has no right of access to more of the record than has already been disclosed (s. 45(1)).

[38] The foregoing principles guide a fresh review of the record under ss. 42(1)(b) and 42(2) of the *Act*. On this review, particular attention was paid to the search for the kind of personal information sought by Stewart on this appeal.

[39] The Court had the benefit of reviewing the disclosed record and comparing what was provided to Stewart with an unredacted record. A highlighted record

was also available to assist the review. The review of the record in multiple formats supports several conclusions. First, the record contains many duplications, meaning that the same documents are found in multiple locations. Second, there are documents which are clearly exempt from disclosure as a result of containing solicitor-client privileged information or communication. Third, and perhaps most significant, is that the documents are largely, if almost exclusively, unrelated to Stewart.

[40] Stewart's request for access to personal information in the custody and control of the DCS is motivated by a belief that the records contain opinions about her. In her submissions, she provided page references as to where this category of information may be found. She also provided a date range. With this context, the records were reviewed to determine whether any of the redactions contained personal information consistent with s. 3(1)(i)(viii) of the *Act*. No personal information of this kind was found in the redacted portions of the record.

[41] To be clear, the entire record was reviewed to assess whether Stewart had been given access to her personal information to the extent possible under the *FOIPOP* scheme. Based on the review, I am satisfied that the DCS has provided

Stewart with the personal information that can reasonably be severed from the remainder of the record.

Conclusion

[42] The appeal is dismissed. Stewart has no right of access to any part of the record beyond what has already been disclosed by the DCS.

[43] All versions of the record, both paper and digital versions, shall remain under seal until otherwise ordered by a court of competent jurisdiction.

[44] Order accordingly.

Gogan, J.