SUPREME COURT OF NOVA SCOTIA

Citation: *Rudderham-Gaudet v. Nova Scotia (Health and Wellness)*, 2020 NSSC 20

Date: 20200122
Docket: Hfx No. 487278
Registry: Halifax

Between:

Ellen Rudderham-Gaudet

Appellant

v.

Her Majesty the Queen in Right of the Province of Nova Scotia
(Represented by the Minister of Health and Wellness)

Respondent

FOIPOP APPEAL

Judge:	The Honourable Justice M. Heather Robertson
Heard:	November 4, 2019, in Halifax, Nova Scotia
Decision:	January 22, 2020
Counsel:	Ellen Rudderham-Gaudet, self-represented appellant Jeffrey David C. Waugh, for the respondent

Robertson, J.:

[1] This is an appeal under the *Freedom of Information and Protection of Privacy Act*, SNS 1993, c. 5, ("*FOIPOP Act*") for the release of personal information of third party individuals involved in an inquiry into elder abuse allegations made by the appellant, Ms. Ellen Rudderham-Gaudet, during the period of time her parents were residents in St. Vincent's Guest House, a nursing care facility for seniors, in Halifax.

[2] Ms. Rudderham-Gaudet resides in Bedford, Nova Scotia. She is a self-employed management consultant with a PhD in Management. At various times in her life, she as also been a teacher, an adult trainer and a university lecturer. She is the mother of three sons and three stepsons.

[3] She is an active volunteer and during her elderly parents' residency in St. Vincent's, she took on the role of volunteer and advocate for her parents and other residents in the facility.

[4] Ms. Rudderham-Gaudet states in her written brief that she has "attended several conferences on Alzheimer's and Elder Abuse" and learned that she had a duty to report abuse according to the *Protection of Persons in Care Act*, s. 5(1) ("*PPCA*") and also learned what constitutes elder abuse in all its forms.

[5] Over the course of her parents' stay at St. Vincent's from April 2013 to February 2016, Ms. Rudderham-Gaudet made five reports commencing on August 15, 2015, when she said she found her mother suddenly in a "zombie" state, having been prescribed what she described as a high dose of hydromorphone (3mg-dilaudid).

[6] Ms. Rudderham-Gaudet's family were also involved in her parents' care. Her brother, John Rudderham, a businessman in Toronto was her father's guardian pursuant to a Guardianship Order and held Power of Attorney for her mother. Ms. Rudderham-Gaudet says that when busy or away vacationing John Rudderham designated her a substitute decision maker for her parents while in St. Vincent's. Her sister, Cathy, a registered nurse, also took a keen interest in their parents' care.

[7] The details of the five complaints about the level of care given to her parents are outlined in Ms. Rudderham-Gaudet's brief from paras. 9-76.

[8] I do not propose to repeat the details of these allegations as they were the details upon which the complaints to the Department of Health and Wellness ("DHW") were made under the *PPCA.* I will say that the complaints referenced serious allegations of over medication, isolation, failure to get her mother out of bed, rough language directed toward her parents and finally an allegation of "being roughed up" or "rough handling." This last complaint Ms. Rudderham-Gaudet says was confirmed by an email dated March 6, 2016 from a staff member who states what she allegedly observed as conduct of another staff member. This email is objected to by the respondent as being hearsay. Indeed, the respondent urges the court to consider only the Record and not the submissions of the appellant of her version of the events.

[9] I agree with that submission. The supplemental background "facts" in the appellant's brief are not evidence and contain hearsay.

[10] Ms. Rudderham-Gaudet's real issue is that she believes her complaints made pursuant to the *PPCA* resulted in only a superficial inquiry into the allegations. She attributes this primarily to the reporting of various staff members and the Director of Care, Mr. Ken Rehman, in minimizing the seriousness of the events she complained of.

[11] She also attributes an attack on her credibility which she learned of in the disclosed non-redacted portions of the FOIPOP Review Report 19-02 (Tab 8, p. 12 of The Record) wherein it was stated that X (name redacted) said "the facility has concerns about the mental stability of the complainant and X will be calling a meeting with the Administrator and legal to have her banned from the facility." The PPCA report dated August 14, 2015, concluded on August 21, 2015: "The decision was made that the allegation does not meet the definition of abuse as per section 3(1)(b) of the *PPCA* Regs. The file will be closed at inquiry."

[12] Ms. Rudderham-Gaudet's subsequent complaints pursuant to *PPCA* were also dismissed at the inquiry stage by reports dated November 26, 2015 and January 6, 2016, also found at Tab 8 of the Record.

[13] Through the *FOIPOP* process Ms. Rudderham-Gaudet hoped she would learn of the names of St. Vincent's staff members so she could further advance a complaint with the College of Registered Nurses of Nova Scotia ("College of Nurses"). She also sought the name of the physician who had prescribed dilaudid to her mother so she could pursue a complaint to the Medical Society. Without the unredacted version of the third parties' names in question Ms. Rudderham-Gaudet

says she is unable to register complaints to these individual professional governing bodies from which she sought redress and accountability, having received none, in her opinion, from the *PPCA* process. She feels that, had the *PPCA* investigation ensued past the inquiry stage, those individuals' professional misconduct would have then come to light. It is that alleged professional misconduct on which she seeks to base her complaints to these professional bodies.

[14] The respondent, the Minister of Health and Wellness, resists the disclosure of the names of certain individuals (as well as initials and pronouns) that were redacted from the file materials on the basis that a release of their personal information would be an unreasonable invasion of privacy. Also redacted from the disclosure was a description of an incident between third parties at St. Vincent's which had been disclosed to the investigation; again, information about that they say would be an unreasonable invasion under ss. 14 and 20 of the *FOIPOP Act*.

[15] The respondent argues that Ms. Rudderham-Gaudet's real complaint is with the *PPCA* investigation process and its decision not to investigate beyond the inquiry stage. They say Ms. Rudderham-Gaudet's option at the time was to seek a judicial review of the decisions of the Manager Investigations and Compliance, Robert Lafferty, who supervised and approved of the reports and decisions taken not to further investigate by his various assistants Heather Avery and Jennifer Tough.

[16] Pursuant to the provisions of the *FOIPOP Act*, my task is not to further investigate or reinvestigate the complaints made to the *PPCA* or to reconsider the decisions taken in this process.

[17] My role is to examine the *FOIPOP* release of materials sent to Ms. Rudderham-Gaudet pursuant to her *FOIPOP* request and determine if the redactions are required pursuant to the *Act*.

[18] A 33-page document was released to the appellant on April 19, 2017. Some information was removed pursuant to s. 5(2) of the *FOIPOP Act*:

> (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 the right of access to the remainder of the record.

[19] The redacted information was withheld under the authority of s. 14 as information supplied by witnesses that constituted advice by a public body and by

s. 20 on the grounds that the names of witnesses were not to be released due to unreasonable invasion of personal privacy. The materials released were the PPC Intake Forms and the file notes from the preliminary investigation of the applicant's four complaints which included the investigators' notes. The redactions are found at pp. 5, 6, 7, 13, 22, 23, and 32 of the materials (Tab 8 of the Record).

[20] The redactions now in dispute are those made under s. 20 removing the names of individuals working at St. Vincent's who participated in the investigation, as well as the name of the doctor who prescribed the medication to Elizabeth Rudderham, the appellant's mother. The redactions made pursuant to s. 14 were ultimately unredacted and provided to the appellant.

[21] Having received the Privacy Review Officer's report and redacted materials, the appellant made a request to review the decision on June 9, 2017, seeking the unredacted version of the documents.

[22] I note the appellant has subsequently filed another *FOIPOP* application (file #2017-04287 HEA) not the subject of this appeal and not contained in this Record. This relates to the appellant's fifth complaint made in 2016 through the *PPCA* investigative process and is outside the scope of this appeal.

[23] The appellant's grounds of appeal were briefly summarized by the respondent:

a. The Appellant could not substantiate her arguments about the importance of the identities without the redacted information.

b. The Appellant questioned whether the Privacy Commissioner read the unredacted reports.

c. The responses provided were unprofessional and misleading.

d. There was retaliatory treatment by "possibly" the same individual that made the unprofessional comment.

e. There was no weight given to protecting those who report complaints.

f. The identities are required in order to make a complaint to the College of Nurses.

g. There is a conflict of interest with the Department deciding upon what information to disclose, because they had an interest in protecting the outcome of their preliminary inquiry.

[24] The respondent points out that the grounds of appeal are framed as though this is an appeal from the report of the Privacy Commissioner.

[25] The notice was amended as a result of the motion for date and directions, but the grounds of appeal were not amended. The respondent has thus focussed on the applicable tests of withholding third party information under s. 20 of the *FOIPOP Act* and whether the department's decision to redact satisfies that test.

[26] The appellant has stated four issues in her brief:

> **Issues**
>
> **Issue 1. The providing and collection of information and professional opinions and concerns about my mental health.**
>
> 94. Do I have a right to know the identities of those who spoke on behalf of St. V.'s in a professional capacity; in particular, can I know the identity of the person who raised concerns about my mental health as relevant information to my reports about possible abuse?
>
> 95. Is it an "unreasonable" invasion of privacy to know who tainted my credibility as a witness?
>
> 96. Was it appropriate for PPC to collect / record information about my mental health in concerning reports about potential abuse? Can I have this personal information about me removed from the record?
>
> 97. What was the relevance of my mental health to the inquiry or determination that my file would be closed at inquiry without further investigation about alleged abuse?
>
> 98. With regards to the importance of protecting personal privacy, what about my personal privacy, reputation, and credibility that was violated?
>
> 99. Interesting to note that the ED and DOC administrative identities were disclosed often throughout the reports, but the administrative identity of the person who spoke on behalf of St. V's about my mental stability redacted?
>
> 100. How can I make a complaint about professional misconduct to the appropriate professional body without knowing the person's identity?
>
> **Issue 2. To know the identity of prescribing Doctor.**
>
> 101. Was it appropriate for St. V's to conceal the identify of the Doctor who prescribed the high dose of hydromorphone to an immediate family member, or to the SDM?
>
> 102. Do I have a right now to know the identity of that person as per the referencing done in the PPC-FOIPOP reports?

Issue 3. Fair treatment" Fair determination to not investigate?

103. Was I, or my parents, treated fairly by St. V's or PPC through the process of providing feedback and reporting incidents of possible abuse?

104. In preparing this brief with help from others, I am beginning to understand the legal concept and find myself asking the question, was there a breach of "Procedural Fairness"?

Issue 4. Is this pleading a matter of public interest?

105. Is there much point in doing a FOIPOP request and discovering what you believe to be professional misconduct (or worse), if you can not know the identity of the person (or persons) to file a complaint?

106. How can there be accountability with the public service that PPC and St. V's provide without more transparency?

[27] I agree with the respondent that the overarching issue in this appeal is whether the DHW was required to redact the personal information of third parties under s. 20 of the *FOIPOP Act* on the basis that disclosure of the information sought would result in an unreasonable invasion of personal privacy.

FOIPOP Act

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.

[28] Thus, a primary concern of the *Act* is the full accountability of the government to the public for what information it retains or discloses.

[29] The public can access public records. Further, individuals are permitted to see what personal information the government retains about them. They are entitled to this information and have the right to correct it.

[30] The *FOIPOP Act* provides for oversight respecting the information collected. It also places reasonable limits on accessibility to information collected by government.

[31] One important limit with respect to third party information being disclosed is where the release of the information would be an unreasonable invasion of the privacy of individuals on whom the information has been collected. Although the *Act* favours broad disclosure it does provide for these limited exceptions.

[32] Section 20(1) and (2) of the *Act* address these concerns:

> Personal information
>
> 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.
>
> (2) In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;
>
> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;
>
> (c) the personal information is relevant to a fair determination of the applicant's rights;
>
> (d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;

> (e) the third party will be exposed unfairly to financial or other harm;
>
> (f) the personal information has been supplied in confidence;
>
> (g) the personal information is likely to be inaccurate or unreliable; and
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

[33] Section 20(3) provides several presumptions on an unreasonable breach of personal privacy. In particular, s. 20(3):

> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
>
> . . .
>
> (d) the personal information relates to employment or educational history;
>
> . . .
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;

[34] Section 20(4)(b) exceptions must be considered as health and safety is a ground of Ms. Rudderham-Gaudet's appeal.

[35] The test respecting disclosure of third party information as an unreasonable invasion of privacy is set out in *Dickie v. Nova Scotia (Department of Health)*, [1999] N.S.J. No. 116 (NSCA) and *House (Re)*, [2000] N.S.J. No. 473 (NSSC).

[36] This is a four-step procedure as follows:

> 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

[37] 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.

Step 1 – Is the information requested personal information?

[38] Personal information is defined in s. 3(1)(i) of the *Act* as "recorded information about an identifiable individual which includes:

> (i) the individual's name, address or telephone number,
>
> (iv) an identifying number, symbol or other particular assigned to the individual,
>
> (vii) information about the individual's educational, financial, criminal or employment history,
>
> (viii) anyone else's opinions about the individual,

[39] At p. 6 of the DHW report, Catherine Tully, the Information and Privacy Commissioner, outline the two types of information withheld in paras. 20-23.

> Is the requested information "personal information"?

> [20] To qualify as personal information, the withheld information must be recorded information about an *identifiable* individual. The Department withheld two types of information under this exemption.
>
> [21] *Names, initials, pronouns*: Some of the withheld information consists of names and initials. I find that this constitutes personal information. The applicant was sufficiently familiar with the employees of the home that the applicant would very likely be able to identify individuals based on their initials, particularly in the context of the records here.
>
> [22] Some of the withheld information is simply pronouns. The care home website lists 24 employees by name, 3 of whom are male and 21 are female. In this context, a male pronoun could result in identifying an individual and a female pronoun would certainly at least exclude the three male employees. Further, the individual likely to be speaking to the investigator would narrow down the potential scope of individuals and so a pronoun could potentially serve to identify the witness. On that basis, I conclude that in this limited context, pronouns qualify as information about an identifiable individual.
>
> [23] *Incident:* The Department withheld four lines of text under s. 20 that relates to an incident involving staff members. The withheld information includes a brief description of certain events as well as information that discloses opinions about third parties. The law is clear that anyone else's opinions about an individual is that individual's personal information. With respect to the brief description of certain events, that information is about the actions of two third parties and, in the context, reveals information about identifiable individuals. I agree that the information in context qualifies as personal information about third parties within the meaning of *FOIPOP*.

[40] I have reviewed the unredacted record and agree with these exclusions, which do meet the s. 3 criteria of personal information.

Step 2 – Are the conditions of s. 20(4) satisfied?

[41] The only provision of s. 20(4) that could apply in this inquiry is s. 20(4)(b) where there are compelling circumstances affecting anyone's health and safety.

[42] This section of the *FOIPOP Act* was considered in *Sutherland v. Nova Scotia (Community Services)*, 2013 NSSC 1. Justice Pickup stated at paras. 32-34:

> [32] I am satisfied that the phrase "compelling circumstances" means something less than "life or death" circumstances, circumstances that are beyond what is considered normal, and must demand a particular course of action because of some existing exigency. Likewise, there must be an internal weighing of the different interests at stake when contemplating whether a set of circumstances stands out enough to be "compelling", because if "compelling circumstances"

> exist, the result is that a disclosure will be made and the privacy rights of third parties will be overridden. "Compelling circumstances" must be those where disclosure would so clearly benefit an individual that any consequential harm to a third party would be justified. I am also satisfied that there must be a rational connection between the disclosure and the health condition or safety concern sought to be remedied. In simplest terms, this would mean that there will not be compelling circumstances if someone has a health condition but disclosure will do little to alleviate the condition.
>
> [33] In summary, in order to constitute "compelling circumstances", the following elements must be present:
>
> > i. the circumstances must be grave and serious enough that a failure to disclose would lead to direct, imminent or irreparable harm to the person seeking the third party information;
> >
> > ii. the circumstances must be of such weight as to override the third party's privacy rights in their own personal information; and
> >
> > iii. the circumstances must show a rational connection between the alleged health or safety concerns and the relief the disclosure would provide.
>
> [34] Whether or not a set a circumstances is sufficiently compelling for the purposes of s. 20(4)(b) must be assessed on a case-by-case basis. Although the interpretation of "compelling" is a question of law, the determination of whether the set of circumstances meets that interpretation will be a question of fact. On the facts of this case, I am not satisfied that Ms. Sutherland's mental health concerns are grave enough to pass the threshold and qualify as "compelling circumstances" under the working definition as I have defined it. . . .

[43] In this case, the appellant seeks the information to advance complaints to professional governing bodies of the individuals whose names have been redacted.

[44] I do not find this meets the test of compelling circumstances relating to health and safety concerns either in the sense of imminence, or seriousness or the alleviation of a health condition.

Step 3. Would the disclosure of personal information be presumed an unreasonable invasion of privacy under s. 20(3)?

[45] The presumption in s. 20(3)(b)(d) and (g) apply in the circumstances of this case.

[46] Section 20 (3)(b) contemplates that disclosure of personal information might be necessary where DHW found any violation of the law, with respect to the appellant's complaint under the PPCA. Indeed, the nursing home has a

responsibility to ensure the safety of its residents and to ensure there are no violation of the law.

[47] In this case, DHW has a two-stage process: that of initial inquiry into any complaint and then an extensive investigation, if any evidence of abuse or misconduct is uncovered at the initial inquiry state. In this case, there was a decision that the complaint did not merit a full investigation and the file was closed. The presumption under s. 20(3)(b) has been met.

[48] Further as the information redacted, the names and initials of employees, relates to workplace incidents, the exception under s. 20(3)(d) is triggered. And the exception under s. 20(3)(g) is also triggered as the information relates to workplace conduct and thus evaluation.

[49] This appeal under *FOIPOP* is not about the validity of the DHW decision not to conduct a full investigation under the PPCA process. That decision could have been challenged at the time by a judicial review.

Step 4 – Does the balancing of all the relevant circumstances lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?

[50] One must weigh all the factors in s. 20(2) and all other relevant factors in this balancing exercise.

[51] The following does apply. The information was supplied in confidence. The information gleaned as a result of the PPCA inquiry is contemplated to be held as confidential information. This would of course not have been the case had the preliminary inquiry found evidence of abuse and had concerns of violations of the law, even leading to criminal prosecution.

[52] There is a public interest in maintaining confidentiality of the *PPCA* inquiry process to ensure workplace reporting without fear of reprisal. Otherwise a lack of confidentiality would have a chilling effect and result in a lack of cooperation of witnesses who would not wish to be involved in any workplace investigation.

[53] As the decision was taken not to investigate further all four complaints made there was an expectation that the information would remain confidential. Again, Ms. Rudderham-Gaudet's unhappiness with the decision that there were no

grounds to initiate a full-scale investigation, does not affect the privacy considerations required by the *FOIPOP Act*.

[54] Further, the third party information, if disclosed, might unfairly damage the reputation of a person referred to in the record. Fairness is a compelling requirement through the *PPCA* process and the *FOIPOP* process.

[55] The commissioner pointed out that the notes taken in the inquiry are the result of a fair and unbiased investigation of allegations, with findings that were linked to facts and evidence produced in good faith. It follows that any exposure to reputational harm would result in unfairness. The DHW did not find conduct that suggested any violation of the law or even professional duties.

[56] This must weigh in the balancing exercise of s. 20(2) in determining whether the disclosure would constitute an unreasonable invasion of privacy or not.

[57] The respondent relies on *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, to establish that the standard required to be met to show "harm that could reasonably be expected to result from disclosure" is a standard somewhere between "possibility" and "probability." *Merck Frosst, supra*, paras. 200 – 204.

[58] I agree it is likely probable that harm would ensue if the information were made available and result in unfairness, particularly in light of the findings that there was no misconduct in the treatment of the appellant's parent while resident at St. Vincent's.

[59] It is true that the appellant does have the right to make complaints to the nursing association or the medical association about those who had a duty to care for her parents.

[60] It is also true that the non-disclosure of names frustrates her ability to make these complaints.

[61] However, in considering all of the relevant factors in favour of withholding or of disclosing the personal information, the balance weighs heavily in favour of withholding the sought-after information.

The information is personal information presumptively withheld under s. 20(3) of the *FOIPOP Act*.

[62] The appeal is accordingly dismissed.

M. Heather Robertson