

REPORT OF THE INTEGRITY COMMISSIONER'S FINDINGS
Right to Information and Protection of Privacy Act

Complaint Matter: 2017-3913-AP-2129

Date: January 16, 2018

INTRODUCTION and BACKGROUND

1. On May 25th, 2017 the Applicant requested the following information from the Department of Justice and Public Safety (the Department) pursuant to s. 7 of the *Right to Information and Protection of Privacy Act, S.N.B. CR-10.6* (the Act):

“A list and photos if any exist, of items considered contraband found/collected at the Southeast Regional Correctional Centre from Jan.1, 2016 to Jan.1 2017”.

2. On June 8, 2017 the Department responded by disclosing the number of contraband incidents during the relevant period but refused to disclose any photos of the contraband items seized or what was depicted in the photos, relying on s. 28(1)(c) of the Act, which provides that disclosure can be refused if “disclosure could reasonably be expected to threaten public safety.”
3. Not being satisfied with the Department’s response, the Applicant filed a complaint with our Office on June 15th, 2017 pursuant to s. 67 of the Act.

OUR INVESTIGATION

4. As required by ss. 67 and 68 of the Act, steps were then taken to investigate the complaint or try to resolve it informally by our Office’s legal counsel and investigator. During the informal resolution process, the withheld records were reviewed by legal counsel and her preliminary findings were to the effect that the Department had not properly refused access to some of the requested information.
5. Further to meetings in an attempt to better understand the Department’s position our Office took the position that the Department should disclose a list of the actual contraband seized and some of the photographs. However, our Office agreed with the Department that two photographs depicting handmade weapons could be withheld on the basis of s. 29(1)(e) and (j) of the Act which allowed the Department to withhold their release on the basis that it “could reasonably be expected to endanger the life or safety of a law enforcement officer or any other person” or “facilitate the commission of an unlawful act or interfere with the control of crime”.
6. It should be noted at this point that one set of photographs depicted an assortment of contraband drugs seized either from bodily cavities of certain individuals or smuggled in

by other means inside the jail, while the other set of photographs depicted the images of handmade weapons.

7. Despite legal counsel's preliminary findings during the informal resolution process, the Department still refused to disclose any of the contraband drug photographs; however, it was amenable to disclosing a list of all contraband items seized during the relevant period. As a result of the failure to resolve the entire complaint matter during the informal resolution process, the unresolved portion of the complaint was referred to me for a review of the Department's position and the preparation of a report pursuant to s. 73 of the Act.
8. As a result, this Report will address the only issue to be resolved, namely, whether the Department ought to release the photographs referred to earlier. Of course, my review and recommendations need not be in agreement with the preliminary findings of our Office's legal counsel who has the delegated authority to investigate and try to resolve the issues through the informal resolution process. When it becomes obvious that the issues cannot be resolved in their entirety, the unresolved issues are referred to me for my findings and recommendations as provided in s. 68(3) of the Act.

Department's position with respect to both categories of photographs

9. The Department relied on ss. 28(1)(c) and 29(1)(e) and (j) of the Act, which reads as follows:

28(1) The head of a public body may refuse to disclose to an applicant information, including personal information about that person, if disclosure could reasonably be expected to

(c) threaten public safety

29(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to

(e) endanger the life or safety of a law enforcement officer or any other person

[...]

(j) facilitate the commission of an unlawful act or interfere with the control of crime.

10. It should be noted here that pursuant to s. 84(1) of Act, the Department bears the burden of establishing that the Applicant had no right of access to the records requested. It is in that context that the refusal to provide access must be analyzed.

11. At this point, a brief summary of the applicable principles pertaining to the standard of proof imposed on the Department would be useful. As pointed out by the Supreme Court in *Ontario (CSCS) v. Ontario (IPC)*¹ in para. 52:

“this formulation simply captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the mere possible or speculative but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.” (underlying is mine)

12. As well, the Court stated that it is this formulation that should be used wherever “could reasonably be expected to” language is used in access to information statutes (para. 54)
13. In our case, the words used in the relevant sections of the *Act* relied upon by the Department deal with a “reasonable expectation” of harm (i.e. threatening public safety or endangering the life of a person or to facilitate the commission of an unlawful act). Therefore, we find that the burden of proof the Department must meet in the matter before us is based on the formulation expressed by the Supreme Court of Canada, above: *would disclosure of the photographs result in a risk of harm that is well beyond the mere possible or speculative?*

The Department’s position re: photographs of the contraband drugs

14. Although this section of our report deals with the photographs of the seized drugs, the Department raised the same arguments with respect to the photos of the handmade weapons. We will deal with the main arguments with respect to photos of the handmade weapons separately later.
15. The Department’s submission to justify its refusal to disclose photos of the contraband drugs can be summarized as follows:

The disclosure of images of the contraband drugs would provide the public (including those intent of committing crimes to gain access inside correctional facilities while smuggling drugs inside their bodily cavities in order to fulfill the high demand and lucrative market for drugs inside correctional facilities) with knowledge as to how to smuggle drugs inside correctional facilities, thereby creating a risk to the safety of the staff, the prisoners and the public at large. Specifically, the Department argued that “public safety” could be threatened by

¹ [2014] 1 S.C.R. 674

disclosing images of the seized drugs on the basis that some inmates could become ill by hiding drugs inside bodily cavities or could cause harm to other inmates by allowing them to consume such drugs.

Our findings with respect to the photographs of the contraband drugs

16. While we understand the concerns raised by the Department, we are not convinced that disclosure of the images of the drugs would result in the risk of harm envisaged by the legislation, namely a threat to public safety. In fact, we fail to see how images of the seized drugs can realistically provide anyone with the knowledge of how these drugs were smuggled inside the correctional facility or how their disclosure could threaten “public safety” (i.e. the safety of the general public).
17. It could be argued that the Department was entitled to use its discretionary power to refuse disclosure as ss. 28 and 29 of the *Act* are “discretionary exemptions” to the general obligation to disclose under the *Act*. However, as pointed in para. 45 of the *Ontario* case previously referred to, the Department’s discretionary power to disclose or not to disclose cannot be engaged unless the exemption is found to apply. As we have found that the exemption relating to the “threat to public safety” did not apply, the Department in fact had no discretion to exercise under s. 28(1)(c).
18. The Department’s arguments with respect to s. 29(1)(e) or (j) are no more persuasive. We reject the arguments advanced that the disclosure of images of the drugs could reasonably be expected to create a risk of harm envisaged by these sections, namely, endangering someone’s life or well-being or safety, or to facilitate the commission of crimes. As the exemptions do not apply, the Department was not in a position to exercise its discretion not to disclose for the reasons explained earlier.
19. In our respectful view, all the photographs of the contraband drugs must be disclosed.

Department’s refusal to provide access to the photographs of the handmade weapons

20. The Department’s position is that the weapons depicted in the photographs were handmade from materials obtained from certain premises inside the correctional facility and that inmates could easily identify how the weapons were fabricated by simply looking at the photographs. The evidence is also clear that the handmade weapons could undoubtedly be used to injure staff or other inmates.

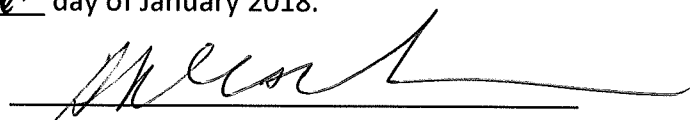
Our findings with respect to the refusal to disclose photographs of handmade weapons

21. Applying the same principles previously alluded to, we are convinced that disclosure of the photographs of the handmade weapons "*will result in a risk of harm that is well beyond the mere possible or speculative.*" This is because the materials used to create the weapons were taken from the correctional facility itself, and therefore, we find that there exists a risk of harm that is well beyond the mere possible and speculative that disclosure of the photographs could educate others on how to use materials on hand at the correctional facility to create these weapons and possibly use them to harm individuals.
22. Therefore, we find that the exemption envisaged by s. 29(1)(e) of the *Act* does apply to allow the Department to use its discretion not to disclose these photographs.
23. We are satisfied that the use of the discretionary power by the Department is prompted by its historical practice of not disclosing similar photographs, by the interests sought to be protected by the exemption and by the nature of the information to be released. In our view, the Department's discretion was founded upon relevant factors and was exercised for proper purposes.
24. Having found that the Department is justified in refusing to provide access to the handmade weapons, it is not necessary to report on whether the same photographs were properly withheld pursuant to s. 29(1)(j).

RECOMMENDATIONS

25. In light of the above findings and pursuant to s. 73(1)(a)(i) of the *Act*, I recommend that the Department of Justice and Public Safety:
 - a) To continue to protect from disclosure the photographs depicting weapons under s. 29(1)(e), and
 - b) To grant access to the drug contraband photographs to the Applicant.

Issued in Fredericton, New Brunswick this 16th day of January 2018.



Hon. Alexandre Deschênes, Q.C.
Integrity Commissioner