OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-025

September 23, 2019

Department of Justice and Public Safety

Summary: The Department of Justice and Public Safety received a request for information relating to the number of transgender women housed in women's correctional facilities for the period January 1, 2019 to June 12, 2019. The Department invoked section 17(2) of *Access to Information and Protection of Privacy Act, 2015* and refused to confirm or deny whether records responsive to the request existed. The Commissioner determined that given the small population of incarcerated females for the requested period, and the accessibility of other publicly available information, release of such statistical information would be an unreasonable invasion of an individual's privacy. However, the Commissioner further found that there was no basis to conclude that the acknowledgment of whether records exist would in itself be an unreasonable invasion of an individual's privacy or likely to lead to other harm, and therefore section 17(2) did not apply. The Commissioner recommended that the Department advise the Complainant whether responsive records exist, and if so, to release such records after severing any information necessary to protect the privacy of individuals.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, sections 17(2) and 40.

Authorities Relied On: Ontario Order PO-2811 and Order MO-3320; BC Order F15-01; Newfoundland Report A-2013-010; Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner) (ON CA).

I BACKGROUND

[1] The Department of Justice and Public Safety (the Department) received a request under *Access to Information and Protection of Privacy Act, 2015* (*ATIPPA, 2015*) as follows:

> *I would like to know how many biological male* inmates are, or have been, housed in women's correctional facilities between January 1, 2019 and June 12, 2019.*
>
> **By biological male I mean male human being (XY) regardless of gender identity.*

[2] On June 18, 2019, the Department responded to the Applicant and advised that pursuant to section 17(2) of *ATIPPA, 2015*, it had refused to confirm or deny the existence of responsive records. The Applicant subsequently filed a complaint with this Office.

II PUBLIC BODY'S POSITION

[3] The Department submits that it has properly applied section 17(2) based on several factors: the small size of the female prison population in Newfoundland and Labrador; public access to information about convicted individuals through the open court process; the narrow time frame of the Complainant's request; and concerns about the safety of transgender individuals.

[4] The Department advised that the NL Correctional Centre for Women in Clarenville is the only dedicated correctional facility for female inmates in this Province. It has the capacity to house 26 inmates. There is in addition an overflow division at Her Majesty's Penitentiary with the capacity to house another 26 inmates, but usually holds no more than 12. As such, the Department submitted that "[g]iven the small population of female prisoners, relating statistical data about a potentially smaller subgroup (i.e. transgender women) could be identifiable". The Department noted that the potential for identifying members of this small population is compounded by the narrow timeframe of the request. The Department further cited the open court principle and general accessibility of court records which further increases the potential for an inmate to be identified. Finally, the Department expressed

concerns that transgender individuals face discrimination and violence and that disclosure of the information, or acknowledgement of whether records exist, could pose a risk of harm.

III COMPLAINANT'S POSITION

[5] The Complainant highlighted numerous concerns for the safety and privacy of women when transgender women are incarcerated in women's correctional facilities. The Complainant's submissions further propose that there is a public interest in understanding the Department's policies on prisons and to know whether transgender women have been placed in women's correctional facilities in this Province, as they have been in other countries and by Correctional Services Canada.

IV DECISION

[6] The Department has refused to confirm or deny the existence of records responsive to the Complainant's request. Section 17(2) of *ATIPPA, 2015* states:

> *17(2) Notwithstanding paragraph (1)(c), the head of a public body may in a final response refuse to confirm or deny the existence of*
>
> *(a) a record containing information described in section 31;*
> *(b) a record containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of a third party's personal privacy under section 40; or*
> *(c) a record that could threaten the health and safety of an individual.*

[7] This Office previously addressed the equivalent to section 17(2) under the former *ATIPPA* legislation in Report A-2013-010. In that Report, my predecessor drew on Ontario Order PO-1810, which in turn cited Order P-339, which noted:

> *A requester in a section 21(5) situation is in a very different position from other requesters who have been denied access under the Act. By invoking section 21(5), the Commission is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.*

[8] That Order (upheld on appeal by the Ontario Court of Appeal in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*,

enunciated a two-part test for the application of such provisions in access to information and protection of privacy legislation, which this Office has also adopted:

> [15] *An institution relying on this section must do more than merely indicate that the disclosure of the record would constitute an unjustified invasion of personal privacy. It must provide sufficient evidence to demonstrate that disclosure of the mere existence of the requested records would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy (Orders P-339 and [page326] P-808 (upheld on judicial review in Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.)).*
>
> *Therefore, in order to substantiate a section 21(5) claim, the Ministry must provide sufficient evidence to establish that:*
>
> *1. Disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy; and*
>
> *2. Disclosure of the fact that records exist (or do not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.*

[9] Order F15-01 from the Office of the British Columbia Information and Privacy Commissioner, concerning the BC Coroners Service, is illustrative of the two-part test and the analysis of harm that may result from acknowledging the existence of a record. In that matter, an applicant had sought copies of a toxicology report performed following the death of a named individual. The contents of such a report would clearly contain personal information and would be required to be withheld under the equivalent of our section 40. However, the public body went further, refusing to confirm or deny whether a toxicology report existed, on the grounds that the existence (or non-existence) of such a record would itself disclose personal information about the deceased individual and the nature of their death. Accordingly, the Commissioner found that confirming or denying whether the records exist would convey information.

[10] Under *ATIPPA, 2015*, in addition to the question of whether disclosure would constitute an unjustified invasion of personal privacy, we must also consider the other two enumerated harms: that the record contains information described in section 31 (Disclosure harmful to

law enforcement) or that the record could threaten the health and safety of an individual. Under section 31, the Department has identified section 31(1)(f): disclosure could reasonably be expected to "endanger the life or physical safety of a law enforcement officer or another person". The test, however, remains the same: it is not enough that a public body is able to establish that the record contains information that falls under sections 17(2)(a), (b) or (c), but that knowledge that the record exists (or does not exist) would lead to one of the specified harms.

Part 1 – Whether Disclosure of Information Would Lead to Harm

[11] The first part of the test under section 17 is to assess whether the information could be withheld for any of the listed harms. Here, the Complainant sought statistical information about inmates of women's correctional facilities. On its face, statistical information is typically not personal information, nor is it likely to convey information described in section 31 or pose a risk of harm to an individual. For information to be "personal information", it must be about an "identifiable individual". However, where it may be possible that such statistical information could be used to identify an individual, it may qualify for protection under section 40.

[12] The Department submitted that the female prison population in this Province is small, and noted an overall capacity to house between 38 and 52 inmates at any given time. However, when prompted for further details of total admissions over the period requested by the Complainant, the Department indicated that the total population of women who had been held in a correctional facility during the time period covered by the request was 72. In any case, a total population pool of only 72 is still quite small and gives rise to concerns about the mosaic effect (the potential to draw on other publicly available information to identify an individual) and small cell counts (where the total population is small enough that one could potentially identify the individual to whom the statistical information refers).

[13] In assessing a "small cell count" issue such as this, reference is made to the total population pool, in this case, the 72 female inmates over the entire period of the access

request. Other Commissioners have addressed this topic before, two useful examples from Ontario being Order PO-2811 and Order MO-3320.

[14] In Order PO-2811, the request was for the number of registered sex offenders by the first three digits of their postal code (forward sortation area). This information was denied by the Ontario Ministry of Community Safety and Correctional Services on the grounds that some forward sortation areas contained 5 or fewer such registered sex offenders and, in the Ministry's view, this constitutes a small cell count and ought to be suppressed. The Commissioner disagreed, and commented that:

> *The Ministry submits that there are five or fewer registered sex offenders residing in 45% of Ontario's FSAs. The Ministry submits that this comprises a "small cell" count. The term "small cell" count refers to a situation where the pool of possible choices to identify a particular individual is so small that it becomes possible to guess who the individual might be, and the number that would qualify as a "small cell" count varies depending on the situation. The Ministry has misapplied the concept of "small cell" count here. If, as the Ministry argues, 5 individuals is a "small cell" count, this would mean a person was looking for one individual in a pool of 5. By contrast, the evidence in this case indicates that one would be looking for 5 individuals in a pool of anywhere from 396 to 113,918. This is not a "small cell" count.*

[15] In MO-3320, the request was for the number of students expelled by school within the Durham District School Board. The Board similarly rejected the request on the basis that in some schools the number of such students were 5 or fewer. The Commissioner found again that in making a small cell count argument, the relevant statistic is the total population:

> [30] *In the record before me, I am not convinced that a "small cell" count exists. The fact that a named high school may have expelled less than five students does not, on its own, constitute a "small cell" count. For example, if a high school only had 10 students enrolled in total and expelled one student in a particular year, this would arguably constitute a "small cell" count, because one would be attempting to identify a single expelled student amongst a pool of only 10 enrolled students. In such circumstances, it might be reasonable to expect, based on this "small cell" count, that the expelled student may be identified.*
>
> [31] *However, the reality is that the board's high schools do not have only 10 enrolled students. The board did not include any enrollment statistics in its representations but such figures are publically available on its website. A majority of the board's high schools has over 1,000 students each, one high*

> *school has more than 2,000 students, and several high schools have hundreds of students. The lowest enrolment at a high school is 299 students.*

[16] In the present matter, 72 is much larger than the threshold of 5 discussed in the above orders, or even the threshold of 10 referenced in the Durham School District Report. However, we must also consider the size of the population along with the availability of other available information – the mosaic effect. Here, the Department has raised the open court principle. While a court may in some instances institute a publication ban or seal court records, the general principle is that court proceedings are held in open court and records of proceedings are accessible by the public. The Department submits that there is a significant amount of publicly available information about individuals who have been convicted of an offence and incarcerated in this Province, and we agree. When this information is combined with the small female prison population for the requested period, there is a very real possibility that releasing statistical information could disclose personal information about an identifiable individual.

[17] Given the above factors, being a population of only 72 inmates for the requested period and the general availability of information about incarcerated individuals, we are satisfied that in this instance disclosure of statistical information would be an unreasonable invasion of a third party's personal privacy. Accordingly, the Department must sever such statistical information in accordance with section 40.

[18] Having found that the requested information would be an unreasonable invasion of the personal privacy of a third party, it is not necessary at this point, for the purposes of satisfying the first part of the section 17 test, to consider whether it would also qualify as information described in section 31 or a record that could threaten the health and safety of an individual.

Step 2 – Whether Disclosure of Fact Record Exists Would Lead to Harm

[19] As noted above, we are satisfied that the Department has met the first part of the test in providing sufficient evidence that disclosure of the requested information in relation to such a small population would be an unreasonable invasion of a third party's personal privacy under section 40. The second part of the test requires the Department to establish that simply acknowledging the existence of the record would also cause the harm. At this point, we will

consider the potential for all three heads of harm in section 17(2); that is: whether acknowledging records could be an unreasonable invasion of a third party's personal privacy; could threaten the health and safety of an individual; or, be reasonably expected to endanger the life or physical safety of a person.

[20] However, before addressing the second part of the test, we must note that part of the Department's rationale for applying section 17(2) was that this provision was necessary to avoid a situation where it would be permitted to redact figures when there are transgender women inmates but would be expected to disclose records where the count is zero. If in some cases records are released disclosing a count of zero, then when an applicant received a redacted response, the Department submitted, the applicant could infer that the number is one or more, which would defeat the purpose of redacting the information.

[21] We have reached our conclusion that the information would be redacted based not on the size of the transgender woman population, but on the fact that the total population of 72 is sufficiently small to pose a risk of re-identifying any statistical information about any individual. As such, the Department would be permitted, under section 40, to suppress statistical information about this population, whether the count is zero or greater than zero.

[22] Further, in the event that responsive records do not exist at this time, but do in the future, the Department is concerned that an inference could be drawn that the keeping of such statistics coincides with the presence of one or more transgender women in a women's correctional facility. A response that records do not exist merely indicates that the Department has not tracked this statistic, not necessarily that it has not placed a transgender woman in a women's correctional facility. Likewise, a response that records do exist does not preclude the count from being zero.

[23] In conclusion, I am satisfied that acknowledging records exist, or do not exist, does not allow one to make a reliable inference as to the presence of transgender women in the Department's correctional facilities.

[24] The three harms enumerated at section 17(2) all rely, to some degree, on the potential for the existence of records to identify an individual. Like section 17(2)(b), the harms in section 17(2)(a) and (c) rely on identification with the added step of such identification putting the individual at a heightened risk of harm. As discussed above, at most, one can only draw inferences from whether information has been severed (the severed information may not necessarily be a non-zero number) or even whether records exist (statistics about transgender inmates may be maintained, but with a count of zero; or they could not be kept with a count of zero or more). For the acknowledgement of whether records exist to pose a risk of harm, one would need to first be able to make an accurate inference that the existence (or non-existence) of the record implies something about the presence of a transgender woman in a women's correctional facility and be able to use this inference to identify an individual.

[25] For sections 17(2)(a) and (c), there is the further step that the acknowledgement of existence of records in itself could also place the identified individual at risk of harm. I can only conclude that such a risk of harm is highly speculative, and that if the Department does believe that these harms are possible through the disclosure of the requested information, the various exceptions available within *ATIPPA, 2015* would be sufficient to sever such information without the necessity of refusing to confirm or deny the existence of records.

[26] I am satisfied that simply stating that the Department either does not have responsive records or, that it does have responsive records (and redacting them accordingly) would not lead to the above enumerated harms. As already addressed, there are limited inferences that could be drawn from the mere existence of records responsive to this request, which is for statistical information. As such, while the Department was correct to identify this information, in the present circumstances, as posing an unreasonable invasion of the privacy of a third party, it was not necessary to go further and refuse to confirm or deny that the records exist.

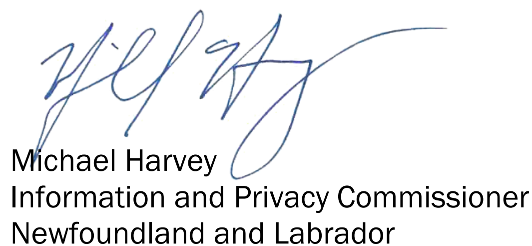
[27] That is not to say, however, that the Department cannot consider the application of section 17(2) in the future, as we cannot say at this time what kind of records may exist in response to a future request.

V RECOMMENDATIONS

[28] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Department of Justice and Public Safety advise the Complainant of whether responsive records exist and, in the event that they do exist, to release the records subject to any necessary redactions under section 40 to protect personal information.

[29] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Justice and Public Safety must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[30] Dated at St. John's, in the Province of Newfoundland and Labrador, this 23rd day of September 2019.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador