



July 11, 2014

Carmen Stuart  
Acting Freedom of Information and Protection of Privacy Officer  
Nova Scotia Freedom of Information & Protection of Privacy  
Review Office  
PO Box 181  
Halifax, NS B3J 2M4

Dear Ms. Stuart:

**RE: Access to Information Request – Review File FI-13-67**

I acknowledge receipt of your letter of June 12, 2014 enclosing your Review Report in relation to the above noted matter.

Please accept this letter as my response, as Director of the Serious Incident Response Team.

In your letter you list the issues under consideration as follows:

1. Whether SiRT is authorized to withhold information under section 15(1)(a) of the Act because disclosure could reasonably be expected to harm law enforcement; and
2. Whether SiRT is authorized to withhold information under section 15(1)(f) of the Act because disclosure could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion.

I agree that section 15(1)(f) of the Act does not apply to the material which I decided not to disclose to the applicant.

I will therefore only respond to the first issue involving information withheld under section 15(1)(a). Any information excluded under section 15(1)(f) was also withheld under this section.

In your discussion of the issue, you ask: **Will disclosure harm law enforcement?**

You then break that question into three parts:

1. **What specific law enforcement matter is affected?**
2. **What is the expected harm?**

### 3. How will the disclosure of this information in this record cause the harm?

Before discussing those questions, I wish to review the context of this matter, what SiRT is, and how our operations are conducted.

SiRT is an independent investigative agency, created under the *Police Act*, tasked with the investigation of serious incidents involving police in Nova Scotia. “Serious incidents” include death, serious injury and sexual assault. These are criminal investigations, and the SiRT has the same powers as police in Nova Scotia. Our mission statement reads:

**“To ensure Nova Scotians have the utmost trust and confidence in the investigation of serious incidents involving police.”**

SiRT’s primary goal is to protect the public interest. As part of our processes, our legislation requires, and our practice ensures, that we are transparent about all of our investigations and conclusions. Thus, unless to do so would compromise the integrity of an investigation or be otherwise contrary to the public interest, we announce publically the commencement of all of our investigations.

In addition, at a matter’s conclusion, I release a public report outlining whether or not I consider that charges against any police officer are warranted. In cases where no charge is laid, that report contains detailed facts and explanations to allow the public to see the basis for the decision made. In cases where charges are laid, only brief facts are included to protect the fair trial interests of the accused. I am able to file a supplemental report at the conclusion of the court proceedings.

All of our releases and reports are published on our website, [sirt.novascotia.ca](http://sirt.novascotia.ca), to ensure the public has complete access to both.

SiRT takes its role to be accountable to the public very seriously. A high level of transparency regarding our decisions is critical to that goal.

In this application for information, SiRT was requested to disclose the internal investigator’s report. That was done, only excluding a small percentage of the information contained within the report. Some of that information was capable of identifying individuals required to be excluded under the Act. Those exclusions were not contested by the applicant.

I also excluded some paragraphs of the investigator’s report that contained his personal opinions of the facts and individuals involved in the matter. Opinions do not represent fact, but only that person’s conclusions or commentary about the facts.

It is critical to the decision making process whether to lay a criminal charge that the Director be able to benefit from the experience and opinions of SiRT investigators. They must be able to share their thoughts frankly and openly, and document those opinions in their reports. A

complete and thorough sharing of ideas promotes the best decisions. This is critical to the public interest.

When making decisions to refuse disclosure of materials because it may harm law enforcement, as the Director of SiRT, I am required to apply my knowledge of both SiRT and the criminal justice system. In so doing, I was convinced in this case that if an investigator knows their frank comments could become public, this would have the effect of limiting the candour that is such a critical part of the difficult decision making process.

For example, there may be a matter where a Director may be uncertain if criminal charges against an officer are warranted. An investigator may think charges are appropriate. However, knowing their opinion would be public if an application was made, they may be reluctant to document their views. That would deny the Director an opinion that was very critical to the public's best interests and the administration of justice. I believe this would have a serious negative impact on the process and law enforcement, and must be avoided if at all possible.

Therefore, limiting the candour of SiRT investigators **would be a serious impediment to ensuring that the public of Nova Scotia can have the utmost trust and confidence in the investigations we conduct and the quality of decisions I must make based on those investigations.**

It is critical to note that this does not deny the public from being aware of what the critical opinions were. The Police Act provides that the Director is solely responsible for making decisions regarding charges. My reports to the public, particularly when charges are not laid, contain a complete account of my opinions about whether charges were warranted, in addition to all of the relevant facts that relate to those opinions.

I will now respond to each of the above three issues you raise regarding the question of whether the disclosure will harm law enforcement:

### **1. What specific law enforcement matter is affected?**

In your Review Report you concluded: "I find that because no law enforcement matter has been identified, this part of the test has not been met and the exemption cannot apply."

I suggest this finding is not supported by the current law or definition of law enforcement.

"Law enforcement" is defined in s. 3(1) of the Act:

(e) "law enforcement" means

- (i) policing, including criminal-intelligence operations,
- (ii) investigations that lead or could lead to a penalty or sanction being imposed, and
- (iii) proceedings that lead or could lead to a penalty or sanction being imposed;

SiRT clearly meets the definition of law enforcement. As noted, Section 26G of the Police Act specifically provides that the Director, and each of the SiRT Investigators, are peace officers with the same powers, authority, privileges and immunities of police officers in Nova Scotia.

The Police Act gives SiRT sole jurisdiction to investigate any matter that the Director finds to be a serious incident, with the Director being the only person who can decide on whether criminal charges should be laid against the officer or officers being investigated. SiRT investigates these matters as would any police agency, except that SiRT is independent of police. Our investigations are criminal in nature, and our mandate is to determine if charges are warranted. Several charges have been laid following our investigations.

Put in simple terms, SiRT is responsible for the policing of all serious incidents involving police.

Thus SiRT squarely fits the definition within section 3(e)(i).

In your report, you also note that it is necessary for a public body to provide evidence of an ongoing investigation. While the investigator's report is prepared at the conclusion of an investigation, this makes it no less a part of our law enforcement role. Any law enforcement agency, including SiRT, continues to have many responsibilities following the completion of an investigation. Whether it is arrest of an accused, preparation and service of subpoenas, attending court, and, perhaps most importantly, making decisions regarding the laying of charges.

In addition, section 15(3) of the Act speaks to this point directly. It makes it very clear that even after an investigation is completed, I am permitted to continue to refuse to disclose information:

“(3) After a police investigation is completed, the head of the public body shall not refuse to disclose to an applicant pursuant to this Section the reasons for a decision not to prosecute if the applicant is aware of the police investigation, **but nothing in this subsection requires disclosure of information mentioned in subsections (1) or (2).**”

The Act specifically states that section 15(1), which I relied on, continues to apply after an investigation is complete. Previous Review Officer decisions support this position (FI-99-75; FI-02-37)

Thus as head of a public body, the Director has the discretion to not disclose information under Section 15(1) either before or after an investigation is concluded.

## **2. What is the expected harm? AND**

## **3. How will the disclosure of this information in this record cause the harm?**

I address both of these issues together.

I first note that SiRT is a unique public body, dealing with a very specific aspect of the criminal justice system: to assure the independence of investigations against police. Its Director is best positioned to understand the nuances and requirements of the team. For this reason it is our suggestion that the Director's decision on the type of information that may cause harm to law enforcement should be given considerable weight.

In your report, you cited cases dealing with the "harm test", and that it must be applied on a record-by-record basis. I agree, and in each case I assess each record individually. You note that there must be a reasonable expectation of harm, and that the evidence must demonstrate the probability of harm from disclosure.

You reviewed my explanations about why it was important to exclude the information in question. You effectively stated that limiting the candour of my investigators, which thereby impacts the quality of their advice to me and impedes the public's trust and confidence, does not fit into the category of possible damage to law enforcement.

Given that the primary purpose of SiRT is to enhance public trust and confidence, it seems clear that any impediment of that trust and confidence would negate the very purpose of SiRT. I suggest that is a clear example of harm to law enforcement.

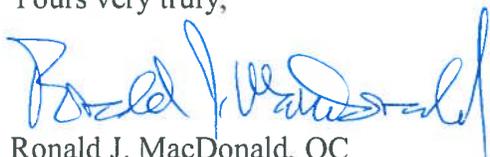
**Closing Comment:**

SiRT is anxious to explain to the public of Nova Scotia that we work hard to ensure that our investigations are as transparent as possible. We believe that Nova Scotians understand that during a criminal investigation the investigative team must be able to consider, discuss, and opine on an investigation in frank and open ways, in an environment that is conducive to such discussion. In other words, Nova Scotians can understand why they may not get to see everything that is considered during an investigation.

However, the critical point is what happens at the end of the investigation. Nova Scotians can be assured that at the conclusion of a matter, in the Director's report to the public, they will see all of the final facts, opinions and decisions that are relevant to the that final outcome.

For the reasons noted, I am unable to accept all of the recommendations of the Acting Review Officer. SiRT will not be releasing the information to the Applicant that was withheld under Section 15(1)(a).

Yours very truly,



Ronald J. MacDonald, QC  
Director