Office of the Access to Information and Privacy Commissioner
New Brunswick

Commissariat à l'accès à l'information et à la protection de la vie privée
Nouveau-Brunswick

July 20, 2017

Mr. Steve Palmer, Chief
Kennebecasis Regional Police Force
126 Millennium drive
Quispamsis, NB E2E 6E6

Dear Chief:

Re: Complaint under the *Right to Information and Protection of Privacy Act*
Applicant: CBC News (Donkin, Karissa)

This letter serves as our findings regarding the above-noted complaint filed with us on June 27, 2016. In summary, we find that the Kennebecasis Regional Police Force properly withheld access to the requested information in this case. We explain our findings below.

BACKGROUND and CONTEXT

On April 21, 2016, the Applicant filed with Request with the Kennebecasis Regional Police Force:

> Records that discuss the contents of video footage captured from a body-worn camera worn by officers involved in a fatal shooting at 27 Shipyard Rd. in Rothesay on Feb. 28, 2014. Please provide a copy of the video footage and any transcripts of the footage that exist.

The Police Force responded on April 28, 2016, refusing access on the basis that the contents of video footage captured from the body-worn camera worn by officers involved in a fatal shooting was private information (relying on section 46(1)(a) of the *Act* and section 44. The Applicant filed a Complaint on June 27, 2016 not being satisfied with that Response. The Applicant considered that the information to be part of official duties when police responded to a domestic dispute at a residence and shot an individual who died as a result. When the incident occurred, the Police Force released few details, apart from stating that a member had fatally shot a third party after responding to a call and that the RCMP was going to conduct an independent investigation to determine whether reasonable force had been used.

Then, it was reported that the RCMP conducted an internal investigation and concluded that the Police Force's members had used reasonable force when trying to subdue the individual in question. Both the RCMP and the Police Force issued press releases that the police had used reasonable force during the incident and details of the events leading to the incident were described in those press releases.

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The details we know are, when responding to a domestic dispute, one of the Police Force members was wearing body-worn camera and the camera captured the events that unfolded. The camera shows the search of the individual at the residence, locating him and having a discussion with him, at which point the individual began to injure himself and a Taser was deployed on him. The camera then shows the individual lunging at that Police Force member with two knives. The body-worn camera then recorded the shooting, twice at the individual and Police Force members attending to the individual on the ground thereafter.

In the press releases from the Police Force and that of the RCMP, the public was informed of the following:

- Shooting at a residence on Feb. 28, 2014
- Arrived on scene to find 26 year old man agitated armed with two knives
- After attempts made by the Police Force officers to reason with the individual (McCaffrey) were unsuccessful, McCaffrey began to injure himself
- This prompted one officer to deploy an energy weapon, which was ineffective in that it did not make contact with McCaffrey's skin.
- McCaffrey then lunged at officers with knives in hand
- Fearing for safety, one police officer discharged his firearm twice.

INVESTIGATION of the ACCESS COMPLAINT

We investigated this matter with officials of the Kennebecasis Regional Police Force ("Police Force") in full, and to determine how the decision was made to refuse access to the information in this case, i.e., whether the Applicant was entitled to the requested information in accordance with the rules found in Part 2 of the *Act*.

Requests are processed under Part 2, not Part 3 – Protection of Privacy

We found that the Police Force relied on sections 44 and 46 of the *Act* to determine the Applicant's right of access. Those sections, however, are found in **Part 3** of the *Act,* which deals with day-to-day handling of personal information that finds itself in police records and police investigation files. Part 3 is not intended to be used to process and respond to access to information requests, and we point out that requests are filed under sections 7 and 8 of the *Act*.

As a result, we find the Police Force relied on the incorrect rules in this case, and we reviewed the relevant information to provide our findings to the Police Force with a view to show which information should have been provided to the Applicant, in accordance with the rules set out in Part 2. More on this below.

Relevant records

The Police Force identified several records pertaining to the events of February 28, 2014. We reviewed all of them and found that only a few records or parts thereof were relevant to the Applicant's Request, i.e., that a few concerned the recording of the body-worn camera on the day in question, along with two reports authored by the RCMP that contain a description of the video footage in question. The first RCMP report is entitled *Use of Force Report* and is dated August 7, 2014 (Report 1). Report 1 contains the chronology of events that led to the shooting, a description of the shooting as captured by video footage, and four screen shots of the video footage. The relevant portions of Report 1 for our purposes are found at pages 6, 7, and 11 to 17. The RCMP then wrote an *Investigative Report* on March 19, 2015 (Report 2) which is broken down into several sections and the relevant portions of Report 2 relating to the description of the video footage are found at pages 2 and 3.

Meaningfulness of Response

In issuing its Response, the Police Force did not explain to the Applicant that, although it had a copy of the body-worn camera footage, the Police Force did not have an official transcript of the footage. And, the Police Force had copies of the RCMP's reports (Report 1 and Report 2 above), and that each of these reports contained in a summary of the footage that was relevant to the Applicant's Request. Although some explanations were provided to the Applicant, we believe more could have been added to take the above into account and to be made clearer that the Police Force was protecting the information based on the private interest of the deceased individual to enable the Applicant to better understand the basis why the Police Force was refusing access to that relevant information.

LAW and ANALYSIS

The Applicant seeks access to the video footage information from the perspective that it is in the public interest for it to be disclosed. The Police Force refuses based on the privacy interests of the third party deceased individual.

In this case, the individual who is deceased and the police officers involved and shown in the Reports and video are *third parties*. In both Reports 1 and 2, the individual's name and extracts of his conversation with the Police Force members is indicated. In the video footage, his name, his face, and his conversations with Police Force members are shown or heard. That information identifies the third party individual and is his personal information.

The deceased individual's personal information captured on the body-worn camera was compiled as part of an investigation into a possible violation of a law, i.e., the Police Force's response to an alleged domestic dispute. The predominant question, however, is whether that same information can nevertheless be disclosed pursuant the codified public interest override.

Subsection 28(2) of the *Act* is a general override provision that obligates information to be made public when there is a risk of significant harm to the environment, or to the health or safety of the public or a group of people. This override trumps the guarding of information that is otherwise protected, due to the circumstances that call for the public to be informed of what is happening.

We point out that this override provision applies even where there is no request for the information and it operates despite any other section in the *Act*. In other words, the public interest override exception to the exceptions means that where requested information may be lawfully protected from disclosure in accordance with sections 17 to 28(1) disclosure provisions, subsection 28(2) can trump those rules if circumstances exist for it to be applicable.

Does the public interest override have any application to the present case?

We reflected on whether subsection 28(1) applied to favor the release of the requested body-worn camera footage showing the events that led to the fatal shooting of a member of the public, along with the requested excerpts from the two RCMP Reports that summarized the footage.

First, we find that the video camera footage is a record such as any other record under the custody of the Police Force and, for that reason the video is subject to the same rules regarding the public's access to government information. This means that the rules that govern access to the video footage are the same as those for access to any other Police Force's official record.

This brings us to look at the nature of the record and the type of information that it contains.

The record is a video that forms part of police work that in normal circumstances would be kept on file for an appropriate retention period unless the footage was intended to be used for further investigation, where it would become part of a police investigation file. We have had the opportunity to rule on how access can be decided when the public requests access to the contents of a police investigation file.

The video in this case was used as part of a police investigation file for the reason that it was reviewed by the RCMP to determine whether the police officer who discharged his gun should be charged under the criminal law (where the video footage would then be remitted to a crown prosecutor). The RCMP

relied on the video and other evidence to arrive at findings whether the officer in question had used the necessary force, given the circumstances in which he found himself that day when he shot the individual.

The resulting Reports 1 and Reports 2 found he had. Such reports are often referred to in the industry as "Use of Force" reports. We recognize that during the RCMP's investigation of the case to determine the use of force by the officer in question, releasing the video footage might prove problematic as it was part of an on-going investigation, and no one had yet determined whether criminal charges would be laid. Releasing the video beforehand could harm the officer's right to a fair trial.

After "use of force" reports were completed and made public along with a finding that charges will not be laid, however, that consideration no longer existed. Releasing the video to the public would not harm the officer's right to a fair trial. The question then became why should the video not be released?

When we delved further into the events of this case, we found that the Police Force and the RCMP had in fact disclosed to the public most of the information derived from the video footage. The Police Force and the RCMP did so, in our view, in respect of the public's right to know and to allay any concerns at that time as to what had taken place.

We recall that at the time of incident in February 2014, the Police Force immediately informed the public through the media that a shooting had taken place and that the RCMP was brought in to investigate the shooting independently. A few months later in August, the Police Force, with the RCMP, issued a press release informing the public of the findings regarding the police officer's use of force during the incident.

It is entirely reasonable for the Police Force to believe at the time of the incident in February that there existed a significant risk of harm to public safety given the facts, namely that :

- a call had been made for police to attend a private residence about a domestic dispute
- the police attended the private residence in question
- the individual who involved in the dispute was shot dead by police soon after police arrived

It is entirely reasonable for the Police Force to have recognized that the public would not expect that an individual would end up being shot dead by police responding to a domestic dispute and be seriously concerned for their safety given these facts. We therefore find that the Police Force viewed the incident as a public safety issue to the degree that it had to rely on the principle of the public interest being paramount to release the relevant information, notwithstanding the privacy consideration for the deceased individual or those around him on that day. The Police Force had to inform the public without delay as to what had taken place, in step with the application of the public interest override set out

under section 28(2), given the risk of significant harm to the public's safety and even where the Police Force had not been requested to disclose that very information.

The Police did not release the video footage at that time, only a full description of its contents.

In April of 2016, the Police Force received the Applicant's request for the video footage but the Police Force refused to provide it on the basis of privacy.

We have not had the opportunity to focus specifically on release of body worn camera footage or police videos and for that reason, and given the importance of this precedent complaint case, we asked both the Police Force and the Applicant to provide us with their written representations and why they believed the disclosure of the requested information should or should not be released and whether it would be in the public interest to do so.

Representations regarding release of the video footage

Police Force's Submission

The Police Force argued that the public interest override applies only where a situation poses an "immediate" risk to the environment or to the health or safety of the public or a group of people, adding that at the time of the incident, the public was informed as to what occurred and therefore made aware there was no further threat to the public.

The Police Force added that it has adopted a practice to not include police worn body camera footage for an immediate threat choosing instead to provide the public with the information through a press release.

Finally, the Police Force indicated that time has passed since the incident and there is no current threat to the public and releasing the police-worn body camera footage at this time would serve no other purpose than to threaten or harm the mental health of the parties involved in the footage.

Applicant's Submission

The Applicant argued that the *Act* does not offer specific guidance on how body-worn camera footage should be treated in relation to right to know legislation, adding that several Canadian Police Forces, such as the Fredericton Police Force, have said that body camera footage would be treated like any other record for access to information purposes.

In the United States, at least 20 states have passed laws about public access to body-worn camera footage.

As such, the Applicant believes that it is in the public interest for these records be shared in some way with the public, with stringent privacy considerations to protect, for example, bystanders of a crime.

The Applicant believes it is crucial for public trust, accountability, and safety for the public to see this recorded information in some way, especially given recent high-profile police-involved shooting deaths in New Brunswick and other parts of Canada.

The Applicant added that the footage shows how a publicly-sworn peace officer performs his or her duty and while a video, the footage should not be treated any differently than another record that offers insight into how public officials make decisions while performing their official functions.

Our research

Dashcam video footage of shootings or police body worn camera footage is being released as a matter of course or policy in the United States in very recent years. In some cases, they are released to the public right after the incident has taken place. In others, after the trial regarding the police conduct in the fatality has been concluded.

In the very well-known shooting that took place in Minnesota in July of 2016, Philando Castile's car was stopped for a traffic violation. Officer J. Yanez attended to the car and while the initial conversation was calm, the situation escalated quickly and the Officer shot Castile to death while he sat in the driver's seat, with his girlfriend by his side in the front and their young daughter was in the back seat. Castile and his family are black and the Officer, white. The New York Times reported on the release of the police video that took place after the Officer was acquitted of criminal charges, citing the immense public interest in the case. The release of the dashcam video footage shed light on how the vehicle was first stopped, and how the Officer engaged with Castile before drawing his gun and firing seven times. The video showed images from that perspective, but not all audio. The police officer was not wearing a body worn camera that would have shown images inside the vehicle when Castile informed the officer that he had a firearm and a permit to carry it and making a move towards the dash of the car and while the Officer yelled "Don't pull it out". The point of the release of that video was to give to the public the information the jury had seen and heard thereby informing the public debate about the outcome of the trial.

Many other cases have police forces release the videos right after the incident, and even before the matter goes to trial, such as in the recent case of the police's release of the video of Tiger Woods's arrest for drinking while driving.

In other jurisdictions, police release videos within days to support the narrative that police officers were at risk and were required to act. The City of Chicago does not have legislation regarding the public's right to this information but it set a policy after public concerns over police use of force. The City came under fire when it delayed the release of a video, contrary to its own policy, thereby continuing to fuel the debate over the public's right to know about these cases.

There are countless examples in the United States, and elsewhere, including a case in Australia in 2016 where the family of a deceased indigenous woman pushed for the release of CCTV footage that showed how she had been maltreated when dragged from the police cell and taken to hospital where she died.

There are few, if any, such examples in Canada.

Breaking down the true meaning of subsection 28(2) public interest override

When we look at the specific wording and intent of this public interest override provision in our right-to-information legislation, we are struck with the simplicity of the words and the clear construct of the message.

To be certain, we looked to legal definitions of the important elements of this override provision. In Black's Law Dictionary, we found that *risk* is defined as the uncertainty of a result, happening, or the chance of injury or loss. Risk includes the existence of the possibility of harm.

The expression *social harm* is considered an adverse effect on any social interest that is protected by the criminal law, while *harm* is given a broad meaning to include an injury, loss, damage, or a material or tangible detriment.

We start to comprehend why the legislators grouped together these notions.

We also examined the legal definition of public interest and we found that it means the general welfare of the public that warrants recognition and protection, and more specifically:

> *Something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation.*

The Black's Law Dictionary also develops a meaning for what is referred to in law as the public interest exception:

> *In a case that involves a question of considerable public importance; the question is likely to arise in the future*

Public interest law and public law round up these concepts as reflective of laws that advance social justice or other causes for the public good, such as environmental protection or those that deal with the relationship between private individuals and the government.

Again, we are struck with the simplicity of these words and their broad, impactful meanings. In applying all of these definitions, we find that the public interest override exception can be broken down and applied in this manner:

Facts must exist that point to, or raise the notion that there exists:

- a risk (uncertainty of a result, happening, or the chance of injury or loss)
- about harm (personal loss, or a detriment) to
  - safety of the public, or
  - safety of a group of people
- that is significant
  - meaning a reasonable person believes the information should be made public because it is clearly the right thing to do in the circumstances (clearly in the public interest to inform about what happened).

With that in mind, we apply the rule to the present case and ask whether there was a public safety issue in a death that took place at a private residence, within minutes of the police arriving sufficient? The circumstances of this case raise concern for the public who is in large part unaware of what truly happened and those facts are sufficient to call for the application of the public interest override to disclose to the public, the body worn camera footage of the police officers attending at the residence and showing images of actions that resulted in the death of a private individual.

Despite there being personal information of third party individual and others on the video, we find that a fatal police shooting, that rarely occurs in New Brunswick, would lead a reasonable person to believe that a risk (chance of injury) about harm (loss or detriment) to one's safety was of such significance as to be in the best interest of all concerned and the right thing to do to in releasing the video footage, and to prevail over privacy rights of the third parties in such instance.

CONCLUSION AND RECOMMENDATION

Based on all of the above, the Commissioner therefore recommends pursuant to subparagraph 73(1)(a)(i) of the *Act* that the Kennebecasis Regional Police Force release to the Applicant a copy of the requested police body-worn camera video footage regarding a fatal shooting that occurred at 27 Shipyard Road, Town of Rothesay, on February 28, 2014.

Section 74 governs the Police Force in its decision regarding this recommendation and that the Police Force has 15 days to communicate such decision.

This concludes our work on this complaint investigation and we will inform the Applicant by forwarding a copy of this letter with findings and recommendation.

Thank you for your cooperation throughout.

Yours sincerely,

Anne E. Bertrand, Q.C.
Access to Information and Privacy Commissioner
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c. The Applicant