Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Catherine Tully

REVIEW REPORT 16-03

April 7, 2016

Department of Community Services

Summary: A public body may disclose personal information if the disclosure is not an unreasonable invasion of a third party's personal privacy. In this case an applicant, a former foster child, sought the name of his father contained in the Department of Community Service's file. The Commissioner recommends that the name be disclosed because disclosing that information would not be an unreasonable invasion of privacy given the likelihood that the applicant's father died more than 30 years ago, the change in attitudes regarding the birth of a child out of wedlock and the fact that the information is 85 years old.

Statutes Considered: *Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c A-1.2, s. 71; *Archives Act*, SNB 1977, c A-11.1, s. 10; *Freedom of Information and Protection of Privacy Act*, CCSM c F175, ss. 17, 48; *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, ss.17, 43; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s. 36; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s. 2; *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, ss. 14, 15; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 2, 3, 7, 20, 27, 30, 45; *Privacy Act*, RSC 1985, c P-21, s. 3; *Privacy Act Regulations*, SOR/83-508, s. 6; *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6, s. 21.

Authorities Considered: **Alberta:** Order 98-007, 1998 CanLII 18636 (AB OIPC); **British Columbia:** Orders 200-1997, 1997 CanLII 719 (BC IPC); 01-37, 2001 CanLII 21591 (BC IPC); F05-20, 2005 CanLII 24736 (BC IPC); **Nova Scotia:** Review Reports FI-05-47, 2005 CanLII 36147 (NS FOIPOP); FI-08-107, 2010 CanLII 47110 (NS FOIPOP); FI-09-29(M), 2012 CanLII 44742 (NS FOIPOP); FI-09-52, 2012 CanLII 1095 (NS FOIPOP); FI-10-95, 2015 CanLII 79097 (NS FOIPOP); FI-11-71, 2015 CanLII 79099 (NS FOIPOP); FI-16-02, 2016 NSOIPC 2 (CanLII); **Ontario:** Orders PO-2240, 2004 CanLII 56358 (ON IPC); PO-2623, 2007 CanLII 54655 (ON IPC).

Cases Considered: *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 SCR 66, 2003 SCC 8 (CanLII); *House (Re)*, 2000 CanLII 20401 (NS SC); *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate*, 2015 NSCA 38 (CanLII); *Sutherland v. Dept. of Community Services*, 2013 NSSC 1 (Can LII).

Other Sources Considered: Robert Plotnick, "Seven Decades of Non Marital Childbearing in the United States" (Feb 2004) http://www.npc.umich.edu/news/events/others/SevenDecades.pdf; Raghubar D. Sharma, "Pre-Marital and Ex-Nuptial Fertility (Illegitimacy) in Canada (1921-1972)" (1982) 9 *Canadian Studies in Population*, pp. 1-5: http://www.canpopsoc.ca/CanPopSoc/assets/File/publications/journal/CSPv9p1.pdf; Jordon Weisman, "For Millennials Out of Wedlock Birth is the Norm" *Slate.com* (June 2014): http://www.slate.com/articles/business/moneybox/2014/06/for_millennials_out_of_wedlock_childbirth_is_the_norm_now_what.html; *Canadian Oxford Dictionary*, (Toronto: Oxford University Press, 1991), "unreasonable"; Centre for Disease Control and Prevention – National Centre for Health Statistics: Unmarried Childbearing (Feb 2016) http://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm; Centre for Disease Control and Prevention - National Centre for Health Statistics: Life Tables http://www.cdc.gov/nchs/products/life_tables.htm; Selected Statistics on Canadian Families and Family Law (2nd Edition), Canadian Department of Justice http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/stat2000/p1.html; Statistics Canada: Life expectancy at birth, by sex, by province http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/health26-eng.htm.

INTRODUCTION:

[1] In November, 2015 I issued two Review Reports[1] in relation to requests for access to personal information by former foster children. I noted in these reports that at the time, my office had a total of 11 outstanding appeals by former foster children. Following receipt of the first two Review Reports the Department of Community Services ("Department") agreed to revisit its approach to the remaining nine appeal files. This is one of those files. Upon review, the Department agreed to disclose the applicant's mother's name, date of birth and address at the time of his birth (85 years ago) and further information regarding the living circumstances of the applicant during his time in care. All of these disclosures were consistent with the analysis and recommendations I made in Review Reports FI-10-95 and FI-11-71.

[2] The applicant objects only to the failure to disclose the name of the individual identified as his father in the records. The Department cited s. 20 of the *Freedom of Information and Protection of Privacy Act* ("*FOIPOP"*) - unreasonable invasion of a third party's personal privacy - as the basis for continuing to withhold that information.

ISSUE:

[3] Is the Department required to refuse access to information under s. 20 of *FOIPOP* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

[1] NS Review Reports FI-10-95 and FI-11-71.

DISCUSSION:

Background

[4] The applicant, with assistance from his daughter, sought access to any information the Department had regarding him and the time he spent in foster care. The applicant supplied the names of his foster parents, where he grew up and the approximate date he was placed in care.

[5] In its initial response to the applicant, the Department withheld the name of his mother and father, dates of birth, locations, information about his foster family, identities of the author of some of the documents, opinions about the applicant and his foster parents and medical information about his foster parents. However, as noted above, following the release of two public Review Reports that dealt with records of former foster children, the Department revisited its approach to these records. On January 22, 2016 and on March 14, 2016 the Department released further information to the applicant including information regarding the circumstances of his care by his foster family, his mother's name, date (month and year) of birth and place of birth. The Department continued to withhold the name of the individual identified in two places as his father.

[6] According to the records from the Department, the applicant was born in October, 1930 and placed into care in May, 1931 by his mother and grandmother. His parents were not married and his mother was 18 years old when he was born. The records do not contain any information regarding his father other than a name – no date or place of birth. Only two records contain the name of the person identified as the applicant's father. The first is entitled, "Record of Children" and was completed by a Sister belonging to the religious institute where the applicant was placed. The document identifies the Sister as the author and is dated May, 1931. The second document that contains the name of the person identified as the applicant's father is entitled "Family History". It is not dated and appears to be authored by a different individual given the fairly significant differences in handwriting between the two documents. The same person is identified on both documents as the applicant's father but the source of this information is not identified. It seems likely that it was either the applicant's mother or the applicant's grandmother who supplied the name since the record states that both brought the applicant to the institution.

[7] The Department determined that disclosure of the applicant's father's name would be an unreasonable invasion of a third party's personal privacy within the meaning of s. 20.

[8] Section 20 of *FOIPOP* provides in part:[2]

> 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] A complete copy of the *Freedom of Information and Protection of Privacy Act* is available online at: http://foipop.ns.ca/ .

Burden of proof

[9] Usually it is the Department who bears the burden of proving that the applicant has no right of access to a record. However, where the information being withheld is the personal information of people other than the applicant (s. 20), the applicant bears the 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,
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> (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
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> (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.

General approach to s. 20

[10] In Review Report FI-10-95 I described the general approach to s. 20, particularly in the case of information in relation to requests by former foster children:

> [12] It is well established that Nova Scotia's *FOIPOP* requires public bodies to be fully accountable. It provides that any limitations on full disclosure must be limited and specific. Section 20 is therefore a limited and specific exemption.[3] One reason for *FOIPOP* is making sure that the government remains open and accountable to the public.
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> [13] Accountability takes on special meaning when public servants have made decisions that have a direct and lasting impact at an individual level. When decisions are made based on highly sensitive personal information, as is often the case in child protection matters, the public body is faced with the difficult challenge of providing enough information to satisfy the needs of the affected individual, while still preserving the dignity of those whose personal information is found in the records.
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> [14] In short, s. 20 is designed to balance the information rights of the applicant against the privacy rights of others. It contemplates that in some cases, third party personal information may be disclosed, even if disclosure may be an invasion of third party

[3] The Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 SCR 66, 2003 SCC 8 (CanLII) at para. 21 discussed the balance between the privacy rights set out in the federal *Privacy Act* and access rights provided for in the *Access to Information Act*. The Court states, "The statement in s. 2 of the *Access Act* that exceptions to access should be "limited and specific" does not create a presumption in favour of access. Section 2 provides simply that the exceptions to access are limited and that it is incumbent on the federal institution to establish that the information falls within one of the exceptions". This is the approach I take here.

personal privacy. What it prohibits, is disclosure that would result in an "unreasonable invasion of personal privacy".[4]

[11] As I have noted in other decisions, the fact that the applicant bears the burden of proving that the disclosure of information would not be an unreasonable invasion of a third party's personal privacy does not relieve the public body from its responsibility to properly apply *FOIPOP* and to provide reasons for the exemptions it has chosen.[5]

[12] The question here is whether disclosing the identity of an individual identified as the father of a child born out of wedlock 85 years ago would be an unreasonable invasion of that individual's personal privacy.

[13] In order to determine whether or not a disclosure would result in an unreasonable invasion of personal privacy, public bodies must take a four step approach to their analysis:[6]

1. Is the requested information "personal information" within s. 3(1)(i)? If not, that is the end. Otherwise, the public body must go on.
2. Are any of the conditions of s. 20(4) satisfied? If so, that is the end.
3. Would the disclosure of the personal information be a presumed 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 applicant 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?

Analysis

1. Is the requested information personal information?

[14] The information at issue is a name plus the fact that he is identified in the record as being the "putative father" on one document and "father" on another. "Personal information" is defined in s. 3(1)(i) of *FOIPOP* and means recorded information about an identifiable individual including the individual's name and family status. Clearly the information at issue here is "personal information" within the meaning of *FOIPOP*.

[4] The authority to disclose personal information is set out in s. 27 of *FOIPOP* which provides in s. 27(a) that a public body may disclose personal information only in accordance with this *Act* or as provided pursuant to any other enactment. Based on s. 27(a) public bodies are authorized to disclose third party personal information in response to access to information requests as set out in s. 20 of *FOIPOP*.

[5] NS Review Report 16-02 at para. 42 examines this point and notes that section 7(2)(a)(ii) of *FOIPOP* requires that public bodies provide reasons for any refusal and state the provision upon which the refusal is based. Further, the courts have consistently applied a four step analysis to the application of s. 20 and it is only in the last step that the burden on the applicant is considered.

[6] See for example *House (Re)*, 2000 CanLII 20401 (NS SC) [*House*], and *Sutherland v. Dept. of Community Services*, 2013 NSSC 1 (CanLII). This approach has been consistently followed by former Review Officers. See for examples: NS Review Reports FI-08-107 and FI-09-29(M).

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

[15] Section 20(4) of *FOIPOP* sets out the circumstances in which a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. There was no evidence or argument in this case that any provision in s. 20(4) might apply.

3. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?

[16] There was no evidence or argument from either party that any presumption set out in s. 20(3) applied to the information at issue here. I find that none of the presumptions in s. 20(3) of *FOIPOP* apply to withheld information in this case.

4. In light of the burden upon the applicant 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?

[17] Section 20(2) directs the public body to consider "all relevant circumstances". It lists a number of potential factors but leaves room for other possible considerations.

[18] Section 20(2) provides in part:

> (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 pubic body shall consider all the relevant circumstances, including whether
> (c) 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.

[19] The applicant highlighted the following considerations:

- The applicant's foster father died in 1947 and his foster mother died in 1968.
- The applicant has known his mother's name for over 60 years but has never received any information about his father.
- On his behalf, his daughter has made significant efforts to obtain more information about his parents. The applicant's daughter contacted the regional health authority, Vital Statistics, a number of local churches and a local diocese. As a result of these efforts she was able to locate a short form baptismal certificate and obtained confirmation of the applicant's mother's name.
- The applicant's daughter also hired a genealogist in an effort to gather more information about the applicant's parents. That effort did not result in any further information being discovered.
- The applicant's mother's name is very common and so it was only through DNA testing that he was able to identify his mother's granddaughter (his niece).
- The applicant has made contact with his niece. This niece confirmed that his mother married and had three children. She also confirmed that the applicant's mother died in 1961.

- No living relative that the applicant has contacted through his niece is able to identify who his father might be.
- DNA testing suggests that his father was fully Jewish.
- The only source of information identifying the applicant's father is the Department's records.
- The applicant was placed into care in May 1931 – 85 years ago. He believes it is highly unlikely that a third party or anyone related to his birth would even be alive. Given the age of this information he is of the view that disclosing it would not result in an unreasonable invasion of privacy.

[20] In its submissions the Department stated that in deciding whether or not to release the name of the applicant's father, the Department considered the relevant circumstances laid out in s. 20(2). It specifically considered whether the personal information was likely to be inaccurate or unreliable (s. 20(2)(g)) and whether disclosure may unfairly damage the reputation of any person referred to in the requested record (s. 20(2)(h)).

[21] After citing these two provisions, the Department lists three considerations:

- The records contain only the father's name, no other identifying information is provided.
- There is nothing documented in the file indicating that the person identified as the biological father was aware that he was named as the father of the applicant.
- While it is likely, based on the age of the file, that the biological father is deceased, they may still have family living who were never aware of this child being born.

[22] Based on these three considerations, the Department determined that the disclosure of the applicant's father's name would be an unreasonable invasion of a third party's personal privacy.

[23] My analysis will begin with the relevant considerations listed in s. 20(2) of *FOIPOP* and then I will address any additional considerations.

Supplied in confidence – s. 20(2)(f)

[24] Section 20(2)(f) provides that whether the information was supplied in confidence is a relevant factor. There was no evidence submitted that the applicant's father's name was supplied in confidence. As I noted above, it is likely that his name was supplied by the applicant's mother or possibly by the applicant's grandmother. The applicant's mother is the one person most likely to know who his father was. The information was provided in May, 1931 when there was a level of social stigma and embarrassment surrounding the birth of an illegitimate child.[7] As a consequence it is likely, in my opinion, that the identity of the birth father was provided in confidence.[8] I would also add that given the social stigma in 1931 it is also likely that the birth

[7] In Order 98-007 the Alberta Information and Privacy Commissioner likewise noted that the birth of an illegitimate child in 1931 "*would have been subject to social stigma and censor (sic) as a consequence of these events*".

[8] I note that other Information and Privacy Commissioners have likewise concluded that the circumstances surrounding the supply of parents' names at the time a child is given over to child welfare authorities suggest that the information was supplied in confidence. See for example Alberta Order 98-007 at para. 42, BC Order 200-1997 at page 3.

parents did not share the fact of the birth of their son with family members. This consideration weighs against disclosure.

Information likely to be inaccurate – s. 20(2)(g)

[25] The applicant's father's name is listed in two places in the records. It is unclear who exactly provided the information and there is no other information that might support an analysis of its accuracy. Further, there is no indication that the putative father was ever advised that he had been identified as the applicant's father and so it is possible he was (and possibly is) unaware of the applicant's existence. Uncertainty with respect to the accuracy of this type of information has, in other cases, weighed against disclosure.[9]

[26] The Department argues that the information is likely to be inaccurate, pointing out that there is no information other than the putative father's name – no date of birth, occupation or religion supplied. They also note that there is no indication on the file as to whether or not the person identified was aware that he had been named as the father.

[27] If the applicant's mother believed she was supplying the information in confidence this would, I think, improve the chances that she was telling the truth about his identity. However, according to the records she was quite young (still a teenager) and was likely in the presence of her mother when she was asked the identity of the applicant's father. This may have increased the chances that she might not accurately identify the father if she had concerns about her mother's reaction to the information. I note that if this was the birth mother's intention it is as likely that she used a fictitious name because any real name would have been known to her mother.

[28] The applicant and his daughter have proved to be very determined investigators of the applicant's history. Included in their investigation was a DNA test which has helped to establish at least one detail about the applicant's father – he was Jewish. In my opinion, the fact that the information contained in the record may be inaccurate is of less consequence given that the applicant already has DNA information about himself that could be easily compared against the DNA of any willing descendent of the individual identified as his father in the Department's records.

[29] However, as noted above, there is some chance that the individual identified is not the applicant's father. Overall I find that this factor weighs only slightly against disclosure.

Unfair damage to reputation of any person – s. 20(2)(h)

[30] The Department argues that the disclosure of the identity of the applicant's putative father may unfairly damage his reputation. The Department does not elaborate on why his reputation might be damaged. The Department acknowledges that he has likely died but states that it is concerned that living relatives may be unaware that he fathered a child in 1930. Given that the putative father was likely born in about 1912 or earlier, it is likely that no siblings, if they ever

[9] In BC Order 200-1997 the fact that the information was likely accurate weighed in favour of disclosure (at p. 4). In BC Order 01-37, at para. 40, the Commissioner noted that the public body's evidence was that the information in their files regarding the birth father could be inaccurate and that this would add to the mental distress of that individual.

existed, are living. Therefore, any living relative is likely at least one generation younger than the applicant's birth father. If he had any children they would likely have been born in the 1930s and possibly 1940s.

Third party exposed unfairly to harm – s. 20(2)(e)

[31] While the Department did not cite s. 20(2)(e) (unfair exposure to harm), the arguments it makes with respect to harm could also fit within the meaning of s. 20(2)(e) and so I have also considered the requirements of that provision.

[32] Other jurisdictions have considered whether or not disclosure of a biological father's name would constitute an "unreasonable invasion of personal privacy" within the meaning of their access to information legislation.[10] These cases are of limited assistance because they relate to applications by individuals who were adopted. In each case, a regime outside of the respective provincial access legislation existed for access to adoption related information but the applicants were seeking access to individual records not subject to the specific adoption disclosure regime. In at least two of the cases, the fact that another regime existed for accessing adoption related information significantly influenced the outcome of the *FOIPOP* application.[11] In addition, there is no agreement as to whether or not the fact that an individual fathered a child out of wedlock could harm reputation. In one case harm to reputation was considered likely and in another it was not.[12] In two of the cases the fact that the identity of the parents was likely supplied in confidence was a relevant factor weighing against disclosure.[13] In one case the key factor was the harm that could arise from a potential reunion.[14]

[33] As I noted above, I agree that in 1930 there was some level of social stigma and embarrassment surrounding the birth of an illegitimate child. In 1930, 3% of Canadian children[15] and 5% of American children were born out of wedlock.[16] However, the social stigma of illegitimacy has decreased significantly since the 1930s. In fact, recent studies have shown that giving birth out of wedlock is now the norm. According to a Canadian Department of

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[10] Alberta Order 98-007, British Columbia Orders 200-1997, 01-37 and F05-20.

[11] In British Columbia Order F05-20 the adjudicator notes that adoption disclosures are based on consent. The adjudicator notes that the *Adoption Act* has a comprehensive code for disclosure of adoption related information constructed on allowing individuals control and choice over contact. Since the applicant's father was not contacted, the adjudicator was concerned that she did not have the benefit of the birth father's views nor any knowledge of what, if anything, he may have told relatives. She notes that this "weighs heavily against disclosure" in para. 37. In British Columbia Order 01-37 the Commissioner notes that the applicant had already taken advantage of provisions in the *Adoption Act* and so his claim that the information was necessary for the fair determination of his rights was not supported by the facts – at paras. 30 – 33.

[12] In BC Order 01-37 the Commissioner states that arguments of unfair damage to reputation are speculative because attitudes have changed towards fathering children outside of marriage (para. 43). In Alberta Order 98-007 the Commissioner notes the social stigma of illegitimacy and concludes that even if the birth parents are no longer living, "this information could conceivably still be harmful to them in the sense that it could damage their reputations" (at para. 35).

[13] Alberta Order 98-007 at para. 42, British Columbia Orders 200-1997 at p. 3, and F05-20.

[14] British Columbia Order 01-37 at para. 42.

[15] Raghubar D. Sharma, "Pre-Marital and Ex-Nuptial Fertility (Illegitimacy) in Canada (1921-1972)" (1982) 9 *Canadian Studies in Population* pp. 1-5: http://www.canpopsoc.ca/CanPopSoc/assets/File/publications/journal/CSPv9p1.pdf.

[16] Robert Plotnick, "Seven Decades of Non Marital Childbearing in the United States" (Feb 2004) http://www.npc.umich.edu/news/events/others/SevenDecades.pdf.

Justice study that examined statistics from the 1993 – 1994 National Longitudinal Survey of Children and Youth, barely one-half of all births in those years were to married parents and 43% were to common-law couples. The proportion of out of wedlock births reached 50% if one takes into consideration children born to lone mothers.[17] Johns Hopkins University Hospital conducted a study in 2013 that determined that 64% of all mothers gave birth at least once out of wedlock.[18] The Centre for Disease Control and Prevention reports that 40% of American children were born out of wedlock in 2014.[19] This significant change in norms supports the conclusion that while there may once have been a stigma associated with out of wedlock birth, that stigma is virtually non-existent in today's society.

[34] I would add, the birth occurred 85 years ago when the putative father was likely a young man. It is likely that not only is the applicant's father deceased, all of his siblings are also deceased. Therefore, any relatives left alive to react to the news of a child born out of wedlock and given into foster care 85 years ago would be step siblings or cousins of the applicant, if any are still living. Otherwise, the relations would be even more distant. It seems possible that the reactions of relatives would more likely be surprise and happiness at finding a long lost relative than it would be any sort of concern that a young man, likely a distant relation, fathered a child out of wedlock 85 years ago.

[35] One source of potential harm to a third party relates to potential children of the man identified as the applicant's father. If the applicant's father had other children and never revealed the applicant's existence they may be upset to learn of his existence. Any children of the applicant's father would likely now be in their 70s or 80s. In my view, the emotional upheaval of learning this type of information qualifies as a "harm" within the meaning of s. 20(2)(e).

[36] Given the change in social norms, I find that the applicant's father's reputation would not be harmed by the knowledge that he had fathered a child out of wedlock 85 years ago. However, I am satisfied that his reputation might be harmed if he knew he had a son, if he kept this information from his children, and if his children are still living.

[37] Because there is no clear evidence that the applicant's father has died (he would be more than 100 years old if still living) and no evidence at all as to the extent, if any, of his immediate family, there remains significant uncertainty as to who, if anyone, might be affected by the news of the applicant's existence. I find on that basis that the considerations set out in s. 20(2)(e) and (h) weigh slightly against disclosure.

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[17] Selected Statistics on Canadian Families and Family Law (2nd Edition), Canadian Department of Justice http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/stat2000/p1.html.

[18] Jordon Weisman, "For Millennials Out of Wedlock Birth is the Norm" *Slate.com* (June 2014) http://www.slate.com/articles/business/moneybox/2014/06/for_millennials_out_of_wedlock_childbirth_is_the_norm_now_what.html.

[19] Centre for Disease Control and Prevention – National Centre for Health Statistics: Unmarried Childbearing http://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm.

Other considerations

[38] Section 20(2) is not an exhaustive list. It requires that in deciding whether the disclosure of information would be an unreasonable invasion of a third party's personal privacy, the Department consider all of the relevant factors, including those listed. Below I have considered four other relevant considerations:

(i) best interests of the child
(ii) purposes of the *Act*
(iii) passage of time and likely death of the third party
(iv) sensitivity of information

(i) Best interests of the child

[39] In Review Reports FI-11-71 and FI-10-95 I discussed the significance of the best interests of the child in terms of the role and mandate of the Minister and her obligations to children in care.[20] The same reasoning applies in this case and weighs in favour of disclosure of the name of the applicant's putative birth father.

(ii) Purposes of the Act

[40] Section 20 is a limited and specific exemption that must be interpreted in light of the purposes of the *Act*. One of those purposes is the right of individuals to have access to information about themselves.[21] The applicant's daughter provided an exhaustive list of sources she has scoured in an attempt to determine the identity of the applicant's father. That effort suggests that there is only one possible source for this information – the records the Department has withheld.

[41] The fact that the records contain the personal information of the applicant and the fact that there is no other source from which the applicant could obtain this information weighs in favour of disclosure.

(iii) Passage of time and likely death of the third party

[42] The date of birth of the individual listed as the applicant's father is not provided in the records. His mother's year of birth was 1912 and the applicant was born in 1930. Therefore, in all likelihood his father was born in about 1912 or earlier. There is no information regarding when he died or alternatively if he is still living.

[43] Statistics Canada lists life expectancies by year of birth. The earliest reported life expectancy on the list is for those born in 1920.[22] For men born in 1920, their life expectancy was 59 years; for women, 61. The United States Centre for Disease Control completed extensive life expectancy studies and reported that for males born in 1911 the life expectancy was 50 years and for females it was 52 years.[23] Based on this standard, if the applicant's father

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[20] NS Review Reports FI-11-71 at paras. 43-46 and F1-10-95 at paras. 54-57.
[21] *FOIPOP* s. 2(a)(ii).
[22] Statistics Canada: Life expectancy at birth, by sex, by province http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/health26-eng.htm.
[23] Centre for Disease Control and Prevention - National Centre for Health Statistics: Life Tables http://www.cdc.gov/nchs/products/life_tables.htm.

lived an average life span, he died in about 1962. This means he has likely been dead for 54 years. It is possible he lived a particularly long life but even if he exceeded the average expected lifespan by 30 years, he would still have died about 25 years ago.

[44] I note that the life expectancy statistics proved fairly accurate for the applicant's mother who died in 1961 at 49 years of age compared to a life expectancy of 52 years noted above.

[45] Nova Scotia's *FOIPOP* does not include any rule specific to whether or not privacy rights end with death and, if they do not, how long they last. However, s. 20 does require that any disclosure of personal information be an "unreasonable" invasion of a third party's personal privacy. Some invasion of privacy then is permitted. The *Concise Oxford English Dictionary* defines "unreasonable" as not guided by or based on good sense; beyond the limits of acceptability. This suggests that I may also look to what is acceptable and what good sense might suggest. Sources for this type of information, in my view, can come from the practices of other provinces.

[46] Most Canadian access to information statutes include a date following death when the legislature has determined that personal information may be disclosed. Generally such a disclosure may occur for one of two reasons: either the definition of personal information excludes information about an individual a specified length of time after death[24] or disclosure of the information is no longer considered to be an unreasonable invasion of personal privacy.[25] Length of time after death before these rules apply ranges between 10 and 30 years.

[47] Provincial laws also include special provisions for the disclosure of personal information by provincial archives. Interestingly, these provisions measure time in one of three ways: from date of birth (ranging between 100 – 110 years after birth),[26] from the date of death (ranging between 20 – 30 years after death)[27] or based on the age of the record (ranging between 25 – 100 years after creation of the record).[28] In summary then, there are three maximum timelines in these statutory provisions after which the unreasonable invasion of personal privacy test does not apply at all:

- 30 years after death,
- 110 years after birth, or
- records in existence for 100 years or more.

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[24] The definition of "personal information" in the *Privacy Act* s. 3(m) and *FIPPA* Ontario s. 2(2) excludes information about an individual who has been dead for more than 20 years federally or 30 years in Ontario.
[25] *FIPPA* Alberta s. 17(2)(i) (after 25 years); *FIPPA* Manitoba s. 17(4)(h) (after 10 years), *Right to Information and Protection of Privacy Act* New Brunswick s. 21(3)(i) (after 20 years); *FIPPA* PEI s. 15(2)(i) (after 25 years).
[26] *Privacy Act Regulations* SOR/83-508 s. 6 permit disclosures 110 years after birth; New Brunswick's *Archives Act* SNB 1977, c. A-11.1, s. 10(4)(a) permits disclosure 100 years following birth.
[27] Nova Scotia's *FOIPOP* s. 30(c) permits disclosure where the information is about someone who has been dead for 20 years or more; BC's *FOIPOP* s. 36(1)(c) and Newfoundland's *Access to Information and Protection of Privacy Act* s. 71(c) permit disclosure where the person has been dead for 20 years or more.
[28] Manitoba's *FIPPA* s. 48 and BC's *FOIPOP* s. 36(1)(d) permit disclosure of a record that is more than 100 years old; PEI's *FIPPA* s. 14(3)(d) and Newfoundland's *Access to Information and Protection of Privacy Act* s. 71(d) permit disclosure of records in existence for 50 years or more; Alberta's *FIPPA* s. 43(a)(ii) permits disclosure of records in existence for 75 years or more.

[48] Nova Scotia's law has some indication of this diminished right to privacy following death. Section 30 of *FOIPOP* authorizes disclosure of personal information by the Nova Scotia Public Archives if the information is about someone who has been dead for 20 years or more.

[49] Previous Review Officers have determined that deceased persons do have privacy rights but that they diminish over time.[29] Other jurisdictions take a similar approach.[30] I agree with my predecessors that privacy rights survive death but that those rights diminish over time. In my opinion, there cannot be a hard and fast rule in Nova Scotia given the lack of a statutory provision on this issue.

[50] In this case, it is likely, but not certain, the applicant's father died more than 30 years ago. The applicant's father was likely born in 1912 or earlier – 104 years ago. The record in question was created in 1931, 85 years ago. On all maximum timelines described above the records at issue are near or past the final timeline set out in those standards. This is obviously not determinative but is indicative of the extent to which the privacy rights have likely diminished with respect to these two records.

[51] The passage of time favours disclosure of the records, particularly given that the applicant was born and the record was created more than 85 years ago.

(iv) Sensitivity of the information

[52] The information in question here is the name of an individual identified as the applicant's father on documents created when he was placed into the care of a child care institute in 1931. The information is sensitive in that it identifies the man as the father of an illegitimate child. It may be that this individual was never advised he had fathered the child. In the alternative, he was advised and may have kept it secret from his immediate family. Overall I find that this factor weighs against disclosure of the information.

Balancing of considerations

[53] In summary, the factors that weigh for and against disclosure of the identity of the applicant's putative father are:

[54] Against disclosure:

- the information was likely supplied in confidence,
- the disclosure could expose third parties to harm (children of the father if they exist),
- the disclosure could cause some harm to the reputation of the applicant's father,
- the sensitivity of the information.

[55] For disclosure:

- best interests of the applicant,
- purposes of the *Act*,
- passage of time and likely death of the third party.

[29] See NS Review Report FI-09-52(M) at p. 19 and NS Review Report FI-05-47 at pp. 11-12.
[30] See for example, Ontario Orders PO-2240 and PO-2623.

[56] A decision in this matter is quite challenging mainly because of the lack of information about the circumstances of the individual identified as the applicant's father. Is he alive? Did he have any other children and are they still alive? These are the individuals who would be most affected by any attempted reunion following disclosure of the information to this applicant.

[57] The determination here is whether the disclosure would be an "unreasonable" invasion of personal privacy of the third party. On balance I find that the disclosure would not be an unreasonable invasion of personal privacy. The best interests of the child and the purposes of the *Act* are best served by disclosure. A key factor in favour of disclosure is the age of the records and the change in societal views regarding children born out of wedlock. As a result I recommend that the Department disclose the name of the individual identified as the applicant's father in the records.

FINDINGS & RECOMMENDATIONS:

[58] I find that:

1. The withheld information is the personal information of a third party.
2. Neither s. 20(4) nor s. 20(3) apply to the withheld information.
3. Based on all of the relevant circumstances, the disclosure of the identity of the individual identified as the applicant's father would not result in an unreasonable invasion of a third party's personal privacy.

[59] I recommend disclosure of the withheld information.

April 7, 2016

Catherine Tully
Information and Privacy Commissioner for Nova Scotia