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

REVIEW REPORT 16-04

June 1, 2016

Department of Community Services

Summary: The applicant, a former foster child, sought the names of her mother and father. The Department refused to disclose the names stating that the disclosure would be an unreasonable invasion of her parents' personal privacy. The Commissioner notes that, in the *Adoption Information Act*, children who are adopted have a mechanism for gaining access to their birth parents' names. Foster children are similarly provided with a mechanism to gain access to their parents' identities through the *Freedom of Information and Protection of Privacy Act* if the disclosure is not an unreasonable invasion of privacy. In weighing the facts of this particular case, the Commissioner finds that disclosure of the parents' names would not be an unreasonable invasion of their privacy. The best interests of the child (the applicant), the passage of time and the fact that the information sought is also the personal information of the applicant all support the applicant's right to have access. The Commissioner concludes that disclosure of the applicant's parents' names would not be an unreasonable invasion of their personal privacy in the circumstances and recommends that the names be disclosed.

Statutes Considered: *Adoption Information Act*, SNS 1996, c 3; *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; *Children's Protection Act*, SNS 1923 c.166, ss. 22-25; *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: **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(M), 2012 CanLII 1095 (NS FOIPOP); FI-10-19, 2015 CanLII 54095 (NS FOIPOP); FI-10-95, 2015 CanLII 79097 (NS FOIPOP); FI-11-71, 2015 CanLII 79099 (NS FOIPOP); 16-02, 2016 NS OIPC 2 (CanLII); 16-03, 2016 NSOIPC 3 (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); *Sutherland v. Dept. of Community Services,* 2013 NSSC 1 (Can LII).

Other Sources Considered: *Concise Oxford English Dictionary*, (New York: Oxford University Press, 2011), "unfair"; Encyclopedia.com: "Interracial Marriage" http://www.encyclopedia.com/topic/Interracial_Marriage.aspx; Gullickson, Aaron, "Black/White Interracial Marriage Trends, 1850–2000" *Journal of Family History* (July 2006) http://pages.uoregon.edu/aarong/papers/gullick_intermarhist.pdf, Statistics Canada: Mixed Unions in Canada https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011003_3-eng.cfm; 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] This is the fourth Review Report relating to an access request made by a former foster child. In this case the Department of Community Services ("Department") revisited its approach to the records following receipt of my recommendations in Review Reports FI-10-95 and FI-11-71. The Department released all of the withheld information except for the names of the applicant's parents and a number of third parties.

[2] The applicant objects only to the failure to disclose the names of her mother and father. 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?

DISCUSSION:

Background

[4] The applicant was six months old when she was taken into care by the Children's Aid Society in May, 1948. She remained in care until she married in 1966. The applicant sought access to records held by the Department that described why she was taken into care and that identified her parents. In its initial response the Department withheld the applicant's family history and many of the details regarding the events that lead to the seizure of the applicant by the Children's Aid Society. However, as noted above, the Department agreed to revisit its approach following the release of two Review Reports by this office. The new approach disclosed all of the previously withheld information except for the names of the applicant's parents and the names of other individuals involved at the time.

[5] Because the applicant was not adopted, her right to access information about herself held by the Department is set out in *FOIPOP*. Had she been adopted, her right to access information would have been governed by Nova Scotia's *Adoption Information Act.*[1] This *Act* creates a specific mechanism for gaining access to birth parent names. However the *Adoption Information Act* does not apply to children who are taken in care and are not adopted – as occurred with this applicant.

[6] Under *FOIPOP* an applicant can obtain the identity of his or her parents if the disclosure of the information is not an unreasonable invasion of a third party's personal privacy. In my opinion, *FOIPOP* is well-suited to the task of determining whether or not an individual in the applicant's position should be granted access to her birth parents' names. This test requires a balancing of considerations which I will discuss below.

Burden of proof

[7] 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
> > (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

[8] 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.[2] One reason for *FOIPOP* is making sure that the government remains open and accountable to the public.

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[1] *Adoption Information Act*, SNS 1996, c 3.

[2] 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

> [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 personal privacy. What it prohibits, is disclosure that would result in an "<u>unreasonable</u> invasion of personal privacy".[3]

[9] 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.[4]

[10] The question here is whether disclosing the identity of the applicant's parents would be an unreasonable invasion of a third party's personal privacy.

[11] 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:[5]

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? Is 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

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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".

[3] 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*.

[4] 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. See for example *Sutherland v. Dept. of Community Services,* 2013 NSSC 1 (Can LII) [*Sutherland*].

[5] See for example *House (Re),* 2000 CanLII 20401 (NS SC) [*House*], and *Sutherland*. This approach has been consistently followed by former Review Officers. See for examples: NS Reports FI-08-107 and FI-09-29(M).

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?

[12] The information at issue are the names of the applicant's mother and father. The names are listed on three documents:

- Order for Delivery to Children's Aid Society – mother's name in three places.
- The Children's Protection Act Report – this is a form that requires the "name of mother" and "putative father". The applicant's parents' names are listed and are repeated in the text that follows.
- Report of Medical Examiner – the applicant's parents' names each appear once more in this document.

[13] As noted above, in its updated disclosure to the applicant on February 1, 2016, the Department disclosed details regarding the applicant's parents' history and circumstances at the time she was taken into care. Therefore, a disclosure of the names of her parents would identify them as her parents and would also allow her to associate the pieces of information she has already received with these two particular individuals.

[14] "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*.

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
> (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:

- She has a child with whom she wishes to share her birth record information.
- She believes her parents are dead (given their dates of birth).
- She believes she knows the name of her mother and father and is merely seeking confirmation of that information.
- Given the passage of time she does not believe that there would be an unreasonable invasion of a third party's personal privacy.

[20] In its submissions, the Department states that it specifically considered that the information was likely to be inaccurate or unreliable (s. 20(2)(g)) and that the disclosure might unfairly damage the reputation of any person referred to in the record (s. 20(2)(h)). The Department did not provide any evidence or further argument in support of its position and did not argue that the information had been supplied in confidence.

[21] My analysis will begin with the s. 20(2) considerations submitted by the Department and then I will address any additional considerations.

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

[22] The information at issue here is the names of the applicant's parents as set out in three documents. The first document is an Order for Delivery to the Children's Aid Society which is signed by a judge under the provisions of the *Children's Protection Act.*[6] Only the applicant's mother is identified in this document as having been served with notice of the proceedings and having given evidence at the proceedings. The Department offered no evidence to suggest that the Court in 1948 had somehow been misled as to the identity of the applicant's mother. The document itself supports the accuracy of the information in that it records that the applicant's mother was present and gave evidence before the judge who signed the document. Further, the name of the applicant's mother is repeated in the other documents and so I find that there is no indication that this information is likely to be inaccurate.

[23] With respect to the identity of the applicant's father, his name appears numerous times in the Social History of Neglected Children Report and once in the Report of the Medical Examiner. The content of the Social History Report itself suggests that the individual identified

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[6] *Children's Protection Act* SNS 1923 c.166.

as the father knew he was identified as her father and accepted that as being true. I make this observation based on a number of facts contained in the Social History Report:

- The record indicates that the applicant's father was present during interviews conducted by the Children's Aid Society on April 27, 1948. His statement is partly recorded in the History of Neglected Child Report.
- In the presence of the Children's Aid Society agent, the individual identified as the applicant's father referred to the applicant's mother as "hon" suggesting an acknowledged personal relationship. Further, the record indicates that that the Children's Aid Society agent believed that the relationship between the applicant's parents should be broken up.
- While the applicant's mother was married at the time of the applicant's birth the record indicates that the applicant was born out of wedlock. The record further reveals that the individual identified as the applicant's father had been living with the applicant's mother for more than two years and that the applicant was just six month's old when Children's Aid intervened.

[24] I conclude based on the content of the records that the individual identified as the applicant's father more likely than not knew he had been identified as the father and nothing in the record indicates that he objected to this characterization. I conclude that the evidence does not support a finding that the information was likely to be inaccurate.

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

[25] The Department submits that the disclosure of the identity of the applicant's parents may unfairly damage their reputations. The Department does not elaborate on why their reputations might be unfairly damaged by the disclosure of their identities. As with my previous decisions on matters relating to disclosure of personal information relating to foster children, I assume that the argument relates to the social stigma and embarrassment associated with the birth of a child out of wedlock. In addition, in this case, the portion of the record already disclosed to the applicant indicates a number of shortcomings in the applicant's mother's parenting skills and her behaviour at the time the applicant was taken into care. It may be that the Department is also concerned that disclosing the applicant's mother's name in this context may also damage her reputation.

[26] Several factors in this case suggest that neither the applicant's mother nor her father were particularly concerned with social stigma at the time of her birth. First, they were a mixed race couple at a time when such associations were unusual and individuals in such relationships were the subject of social ostracization.[7] In fact, at the time interracial marriages were illegal in many American States.[8]

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[7] Of marriages between 1940 and 1960, 0.4% were interracial in the United States: Gullickson, Aaron "Black/White Interracial Marriage Trends, 1850–2000" *Journal of Family History* (July 2006): http://pages.uoregon.edu/aarong/papers/gullick_intermarhist.pdf at 301. By 2011, 5% of marriages in Canada were interracial: https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011003_3-eng.cfm .

[8] Between 1942 and 1967, fourteen states repealed these laws through legislative action. In 1967 the Supreme Court of the United States (*Loving v. Virginia*) declared anti-miscegenation laws unconstitutional. However, due to the

[27] Second, the applicant's mother was married to another man and was using her married name while living with the applicant's father. Therefore it was likely that at least friends and family knew that her child was born out of wedlock. Certainly the neighbours knew she was not using the name of the man with whom she was living at the time.

[28] With respect to the information already disclosed about the applicant's mother's parenting skills and behaviour at the time the applicant was taken into care, the question is whether disclosing her mother's name would unfairly damage her reputation. The information disclosed in this case is limited and specific to the issue of why the applicant was taken into care. The damage to reputation contemplated by s. 20(2)(h) is "unfair" damage. The Concise Oxford English Dictionary[9] defines "unfair" as "not based on or showing fairness; unjust, contrary to the rules of a game".

[29] In this case, the information already disclosed to the applicant that reveals shortcomings of the applicant's mother's behaviour is information directly related to the reasons why the applicant was taken into care. The applicant's mother's behaviour and parenting created sufficient risk for the applicant that the Court determined she was a neglected child within the meaning of the *Children's Protection Act*. For that reason, I am of the view that disclosure of the applicant's mother's name would not unfairly damage her reputation. It might damage her reputation but if so, it would be for reasons that directly affected the applicant's life and for this reason are not "unfair".

[30] I conclude that the evidence does not support a finding that the disclosure would unfairly damage the reputation of any person.

Information supplied in confidence – s. 20(2)(f)

[31] The Department did not argue that the information had been supplied in confidence. However, the very nature of child protection suggests that, in general, the information gathered was likely intended to remain confidential. Unlike the circumstance in Review Report 16-03,[10] this is not a case of an individual disclosing another's name without their knowledge. In Review Report 16-03 the applicant sought his father's name. That name was contained in the Department's records only because someone, likely his mother, had disclosed it to the Department. The applicant's father in that case, was not present.

[32] In this case the records reveal that both the applicant's mother and father were present when the Department's agent came to inspect their home. It is clear from the content of the record that both were interviewed and were aware that they had been identified as the parents of the applicant.

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stigma associated with these unions, the Court's decision resulted in little increase in the numbers of interracial marriages: http://www.encyclopedia.com/topic/Interracial_Marriage.aspx.

[9] *Concise Oxford English Dictionary*, (New York: Oxford University Press, 2011).

[10] Review Report 16-03.

[33] A second consideration is that the applicants' parents appear to have been the subject of an investigation or intervention by the Children's Aid Society. They did not voluntarily and confidentially supply information to the Society or seek them out for assistance. As such, the information they supplied was done so likely on the understanding that they were required by law to supply the information. Compulsory supply of personal information will not ordinarily be confidential unless there is some indication in the legislation relevant to the compulsory supply that establish confidentiality.[11]

[34] Given the lack of evidence and argument on this point and the particular circumstances of this case I am not satisfied that the identity of the applicant's parents was supplied in confidence within the meaning of s. 20(2)(f). I find that this factor does not weigh either for or against disclosure.

Other considerations

[35] 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 parties, and
(iv) sensitivity of information.

(i) Best interests of the child

[36] 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.[12] The same reasoning applies in this case and weighs in favour of disclosure of the names of the applicant's parents.

(ii) Purposes of the Act

[37] 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.[13] For most children, knowing the names of their parents is a given. Adoptive children know the names and family histories of their adoptive parents but foster children taken into care as infants may have no family history. No adoptive family history and no birth family history. The purposes of the *Act* speak directly to this circumstance:

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[11] For a discussion of the "supplied in confidence" requirement see, for example, paras. 38 – 44 of NS Review Report FI-10-19. Sections 22 to 25 of the *Children's Protection Act Act* SNS 1923 c.166 in effect at the time the applicant was removed from her parents gave the Children's Aid Society power to apprehend a child in neglect and the Court the ability to investigate and adjudicate these cases of neglect. No provision in the *Act* provided any assurance of confidentiality regarding information provided by parents.

[12] NS Review Reports FI-11-71 at paras. 43-46 and F1-10-95 at paras. 54-57.

[13] *FOIPOP* s. 2(a)(ii).

The purpose of this Act is to ensure that public bodies are fully accountable to the public by giving individuals a right of access to, and a right to correction of personal information about themselves.

[38] The applicant indicates that she has some information about her parents – she has two potential maiden names for her mother and a last name for her father. She did not specify where this information came from. What is clear is that the Department has the information; it is contained in its records. Disclosing the information would be consistent with the purposes of the *Act*.

[39] The fact that the records contain the personal information of the applicant weighs in favour of disclosure.

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

[40] The records indicate that the applicant's mother was born in 1922 and her father was born in 1926.

[41] Statistics Canada lists life expectancies by year of birth. Women born in the 1920s had a life expectancy of 61 years and men during the same time period had a life expectancy of 59 years.[14] Based on these standards, if the applicant's parents lived an average life span, her mother died in 1983 and her father died in 1985. The applicant believes her parents must have died given their dates of birth but she was unable to provide any evidence on this point.

[42] If the applicant's parents lived average life expectancies then they died more than 30 years ago. However, it is within the realm of possibility that they lived longer than expected. If they are still living, they would be 94 and 90 years old. According to Statistics Canada, in 2015 only 0.8% of the population was 90 or older.[15] Unlike several of the previous requests from former foster children, in this case there is no evidence that either of the applicant's parents is deceased. Therefore, in this case, there is greater uncertainty as to the status of her parents.

[43] In Review Report 16-03[16] I examined in some detail the effect of death and passage of time as follows:

> [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

[14] Statistics Canada: Life expectancy at birth, by sex, by province: http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/health26-eng.htm.
[15] Statistics Canada: Population by sex and age group: http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo10a-eng.htm.
[16] NS Review Report 16-03.

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[17] or disclosure of the information is no longer considered to be an unreasonable invasion of personal privacy.[18] 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),[19] from the date of death (ranging between 20 – 30 years after death)[20] or based on the age of the record (ranging between 25 – 100 years after creation of the record).[21] 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.

[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.[22] Other jurisdictions take a similar approach.[23] I agree with my predecessors that privacy rights survive death but that those rights

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[17] 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.

[18] *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).

[19] *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.

[20] 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.

[21] 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.

[22] See NS Review Report FI-09-52(M) at p. 19 and NS Review Report FI-05-47 at pp. 11-12.

[23] See for example, Ontario Orders PO-2240 and PO-2623.

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.

[44] In this case, it is likely, but not certain, the applicant's parents died more than 30 years ago. The applicant's father was born in 1926 – 90 years ago and her mother was born in 1922 – 94 years ago. The records in question were created in 1948 – 68 years ago. On all maximum timelines described above the records at issue are near but not 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 records.

[45] The passage of time favours disclosure of the records. However, there is a lack of evidence as to whether or not the applicant's parents are still living. I find that there is too much uncertainty to say that likely death of third parties is a relevant consideration.

Sensitivity of the information

[46] The information in question here is the name of individuals identified as the applicant's father and mother on documents created when she was taken into care in 1948. The information is sensitive in that it identifies them as parents of an illegitimate child. As I noted above, given that her parents were in a mixed race relationship in the 1940s and that they lived together for more than a year prior to her birth, it is highly unlikely that family and friends were unaware of the relationship or of the existence of the applicant. Therefore I find that this factor does not weigh for or against disclosure of the information.

Balancing of considerations

[47] In summary, I considered a number of factors that I determined did not weigh either for or against disclosure. These included:

- information supplied in confidence,
- information likely to be inaccurate,
- unfair damage to reputation,
- sensitivity of the information, and
- likely death of third parties.

[48] The following factors weigh in favour of disclosure:

- best interests of the child,
- purposes of the *Act*, and
- passage of time.

[49] Undertaking this methodical approach to the factors for and against disclosure can yield some interesting results. In this case, I have been unable to identify any factors against disclosure and several factors in favour of disclosure.

[50] I find, therefore, that the disclosure of the applicant's parents' names would not be an unreasonable invasion of personal privacy. I recommend that the names of the applicant's mother and father be disclosed to her.

FINDINGS & RECOMMENDATIONS:

[51] I find that:

1. The withheld information is the personal information of two third parties.
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 applicant's parents would not result in an unreasonable invasion of a third party's personal privacy.

[52] I recommend disclosure of the withheld information.

June 1, 2016

Catherine Tully
Information and Privacy Commissioner for Nova Scotia