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

REVIEW REPORT 16-08

July 18, 2016

Department of Justice

Summary: A grieving mother sought access to copies of photographs of her son taken by the medical examiner at the time of her son's death. The Department refused to disclose the photographs because it said the disclosure of the photographs would be an unreasonable invasion of the deceased's personal privacy. The Commissioner agrees that the deceased has privacy rights but determines that compassionate considerations outweigh the presumed unreasonable invasion of the deceased's privacy rights in this case. She recommends disclosure of the photographs to the applicant.

Statutes Considered: *Fatality Investigations Act*, SNS 2001, c 31, s. 23; *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, ss. 17, 40; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 3, 20, 45; *Hospitals Act*, RSNS 1989, c 208, s. 71; *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, s. 14; *Personal Health Information Act*, SNS 2010, c 41, s. 113.

Authorities Considered: Alberta: Orders F2005-001, 2005 CanLII 78632 (AB OIPC); F2012-24, 2012 CanLII 70616 (AB OIPC); **British Columbia:** Orders 02-44, 2002 CanLII 42478 (BC IPC); F14-09, 2014 BCIPC 11 (CanLII); F15-14, 2015 BCIPC 14 (CanLII); **Newfoundland:** Report A-2013-011, 2013 CanLII 43367 (NL IPC); **Nova Scotia:** Review Reports FI-01-59, 2001 CanLII 8514 (NS FOIPOP); FI-10-95, 2015 CanLII 79097 (NS FOIPOP); FI-11-71, 2015 CanLII 79099 (NS FOIPOP); 16-03, 2016 NSOIPC 3 (CanLII); 16-04, 2016 NSOIPC 4 (CanLII); **Ontario:** Orders M-249, 1994 CanLII 6897 (ON IPC); Order M-718, 1996 CanLII 7626 (ON IPC); Order MO-1410, 2001 CanLII 26302 (ON IPC); Order MO-2015, 2006 CanLII 50668 (ON IPC); Order MO-2237; Order MO-2245, 2007 CanLII 82541 (ON IPC); Order MO-2404, 2009 CanLII 15435 (ON IPC); Order MO-3260, 2015 CanLII 72310 (ON IPC).

Cases Considered: *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate*, 2015 NSCA 38 (CanLII); *House, Re*, 2000 CanLII 20401 (NS SC).

Other Sources Considered: *Concise Oxford English Dictionary*, (New York: Oxford University Press, 2011) "including"; Ruth Sullivan, *Statutory Interpretation*, 2d ed (Toronto, Ont: Irwin Law, 2007).

INTRODUCTION:

[1] The applicant is a grieving mother. Her son died in June, 2010 and in her quest to fully understand the circumstances of his death, she sought copies of records held by the Department of Justice (Department). The Department disclosed some information in relation to the applicant's son's death but refused to provide copies of photographs taken of her son at the time of his death stating that the disclosure of the photographs would be an unreasonable invasion of his personal privacy under the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). The applicant filed a request for review with this office seeking full disclosure of the photographs.

ISSUE:

[2] 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

[3] On the day of the applicant's son's death, police attended the scene. Eleven photographs were taken. According to the Department, the photographs were taken by the medical examiner. When the applicant made her access to information request in the fall of 2012, the Department had copies of the photographs in its custody. The Department refused to disclose the photographs citing s. 20 of *FOIPOP* as authority for withholding them.

[4] The applicant has been searching for information surrounding the circumstances of her son's death since 2010. She has gathered medical information and information directly from the Medical Examiner's Office. The Department provided her with a copy of the police report and the autopsy report. She also spoke to the investigating officers and at least one witness who was present at or near the time of her son's death. But she remains unsatisfied with the information she has received so far and so requested a review of the Department's decision to deny her access to the photographs of her son.

Burden of Proof

[5] 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.[1]

[6] Section 20(1) of *FOIPOP* states in part:

> 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.

[1] Section 45(2)(a) of *FOIPOP*.

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?

Approach to s. 20 analysis

[7] The proper approach to the s. 20 analysis in Nova Scotia is well established. I have discussed the four step approach to the s. 20 analysis in four recent review reports and so will not repeat that analysis here.[2] In summary, the four steps are:

1. Is the requested information "personal information" within the meaning of 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 the disclosure would constitute an unreasonable invasion of privacy or not?

Analysis

1. Is the requested information personal information?

[8] The information in question is eleven photographs. Nine of the photographs are of a deceased individual, and two photographs are photographs of two documents that appear to have belonged to the deceased.

[9] "Personal information" is defined in s. 3(i) of *FOIPOP* and means recorded information about an identifiable individual including race, sex, age and health care history.[3]

[10] The applicant's son is identifiable in the photographs. In addition, information is clearly available relating to his approximate age, race, sex and medical status. Disclosing the photographs would reveal personal information of the applicant's son. I find that all of the photographs qualify as personal information within the meaning of *FOIPOP*.

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

[11] The Department submits that none of the considerations set out in s. 20(4) of *FOIPOP* apply to the withheld information. I agree. I find that s. 20(4) does not apply to the records at issue in this case.

[2] NS Review Reports FI-10-95, FI-11-71, 16-03 and 16-04 which are based on the Nova Scotia Supreme Court decision in *House, Re*, 2000 CanLII 20401 (NS SC) [*House*] at p. 3.

[3] Section 3(1)(i)(ii), s. 3(1)(i)(iii) and s. 3(i)(vi) include these factors in the list of information that qualifies as personal information within the meaning of *FOIPOP*.

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

[12] The third step in the analytical process is to determine whether a rebuttable presumption[4] in s. 20(3) applies.

[13] The Department submits that there is a presumed unreasonable invasion of personal privacy in disclosing the photographs in that they qualify as part of the medical and legal determination of the cause of death and therefore relate to a medical record under section 20(3)(a) of *FOIPOP* which states:

> 20(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
> (a) the personal information relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation.

[14] It is not uncommon for grieving family members to make access to information requests for information gathered at the time of the death of their relatives. In British Columbia, adjudicators have found that these types of records, gathered or prepared by the coroner or medical examiner at time of death, including photographs, do qualify as personal information that relates to health care history, treatment or evaluation in provisions equivalent to Nova Scotia's s. 20(3)(a).[5]

[15] Adjudicators in Ontario and British Columbia have also determined that photographs taken at the scene of an unexplained death that requires the attendance of police, coroner or medical examiner qualify as part of an investigation into a possible violation of the law within the meaning of the equivalent to s. 20(3)(b) which provides:[6]

> 20(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

[16] In essence, the argument supplied in those cases is that every death outside of a supervised environment (such as a hospital) must be investigated to ensure there has not been a violation of law.

[17] In this case, the photographs at issue were taken in the course of an investigation conducted by the medical examiner into the cause of death. As noted above, several of the

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[4] Courts in Nova Scotia have clearly established that the presumptions set out in s. 20(3) are rebuttable by considerations described in s. 20(2). See for example, *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate*, 2015 NSCA 38 (CanLII) [*Fitzgerald*] at p. 57.
[5] BC Order F15-14 at paras. 57 and 58.
[6] See for example BC Order F15-14 at para. 61; Ontario IPC Order MO-1410 at p. 2, which also makes reference to Orders M-249 and M-718 on the same point. There is an important distinction between the Ontario law and Nova Scotia law with respect to third party personal information discussed below.

photographs relate to the medical condition of the deceased. Therefore, I find that the presumptions set out in s. 20(3)(a) and 20(3)(b) apply to the records.

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 the disclosure would constitute an unreasonable invasion of privacy or not?

[18] The final step in this analysis is the most important. Taking into account any presumptions and the burden of proof on the applicant, decision makers must then balance all relevant circumstances including those listed in s. 20(2) to answer the ultimate question: would disclosure of the requested information constitute an unreasonable invasion of personal privacy?

[19] The Department appeared to believe that s. 20(2) of *FOIPOP* constitutes an exhaustive list of considerations. Nova Scotian courts have been clear that this is not the case.[7] Section 20(2) states, "*the head of the public body shall consider <u>all</u> the relevant circumstances <u>including</u>*…" Non-exhaustive definitions are usually introduced with the word "includes" or "including".[8] The point of such a list is not to fix the meaning but to ensure that the application of the provision includes, but is not limited to, the list provided. Such an approach is, of course, consistent with the ordinary meaning of "including": *containing as <u>part</u> of the whole being considered* [emphasis added].[9]

[20] A methodical approach to this provision is to first evaluate whether any of the considerations set out in s. 20(2) of *FOIPOP* apply to the case at hand. After that, other relevant considerations raised by other parties or that are apparent on the facts can be considered and weighed. In this case, the Department argues that none of the factors listed in s. 20(2) applied to mitigate the unreasonable invasion of privacy that would result from the disclosure of the records.

[21] In my view there are three provisions of s. 20(2) of *FOIPOP* that require consideration in this case, and three other relevant considerations each of which I will discuss below.

Third party will be exposed unfairly to financial or other harm- s. 20(2)(e)
The disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant – s. 20(2)(h)

[22] Would some harm arise to the deceased if the photographs of him after death were disclosed? Such photographs are not commonly seen or indeed taken with some notable exceptions. While I have some concern that some harm could potentially arise from the disclosure of this type of photograph generally, there is no evidence before me of "unfair" harm or damage to reputation. Further, the applicant in this case is the deceased's parent whose

[7] See for example, *House* at p. 3 where the Court characterizes the final question as, "*Does the balancing of all the relevant circumstances, including those listed in s. 20(2), favour disclosure?*" And later in the decision, a review of the factors the Court actually considers in conducting the balancing reveals that it considered factors not included in the s. 20(2) list: possible uses or misuses of the information sought, obligations of the public body to disclose personal information in some circumstances and reasonable expectation of privacy on the part of unidentified third parties are all examples of these types of considerations outside of the s. 20(2) list (at p. 8).
[8] Ruth Sullivan, *Statutory Interpretation*, 2d ed (Toronto, Ont: Irwin Law, 2007) at p. 69.
[9] *Concise Oxford English Dictionary*, (New York: Oxford University Press, 2011).

motivation is clearly related to fully understanding the circumstances of the deceased's death and not for any purpose that raises concerns regarding harm. Finally, I note that the applicant has already been provided with similar information about her son in the form of the autopsy report. There was no evidence or argument that the disclosure of this information resulted in any harm to the third party. I find that s. 20(2)(e) and (h) do not apply to the photographs at issue.

The personal information has been supplied in confidence – s. 20(2)(f)

[23] The Department did not argue that the records were generated and inherently supplied in confidence by the medical examiner in the course of his or her normal duties. In British Columbia and Alberta, adjudicators have determined that records created by police or a coroner, including photographs, were inherently supplied in confidence.[10] It may be that the Department did not raise this as a factor because the medical examiner advised that, in practice, he or she would allow next of kin to view photographs, but he or she would not provide copies of the photographs. Given the lack of evidence on this point in this case I find that s. 20(2)(f) does not apply.

Other considerations

[24] As I noted above, s. 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 the relevant factors.

[25] The applicant believes that she should be entitled to copies of the photographs for a number of reasons:

- She qualifies as a substitute decision maker on her son's behalf and as such should be entitled to the photographs. In addition, as a result of that designation, as evidenced by a copy of her "Declaration of Substitute Decision Maker", she received medical reports in relation to medical treatment her son received shortly before his death.[11]
- She was actively involved in health care decisions made by her son in the months immediately prior to his death. As evidence of that she provided a consent to investigation, treatment or operative procedure she signed in January, 2010 on behalf of her son.
- She believes that there were inconsistencies in the records and in what police and witnesses said about the circumstances on the day of her son's death. As a result, she is concerned that her son's death was preventable and so she needs all of the information to determine if it was.
- She needs all of the information in relation to her son's death to fully understand what happened. She believes she would be betraying her son if she did not get to the truth of what happened on the day of his death.

[10] BC Order F15-14 at para. 69, Alberta Order F2005-001 at paras. 52-57.

[11] The form provided by the applicant references section 71 of the *Hospitals Act* which is no longer in force having been repealed by s. 113 of the *Personal Health Information Act* in 2013. However, at the time of the applicant's access to information request, s. 71 was in force and the Capital Health Authority (as it then was) accepted the applicant as a substitute decision maker on behalf of her deceased son. As such, the applicant states she was granted access to her son's medical records.

[26] Below I have considered three additional relevant factors:

(i) sensitivity of the information,
(ii) passage of time and death of the third party, and
(iii) compassion for family members.

(i) Sensitivity of the information

[27] A photograph of an individual after death is, in my view, sensitive personal information. The fact that there are nine photographs showing various aspects of the deceased's body increases the sensitivity as it provides even greater detail of the medical status of the individual at the time. Two of the photographs do not contain any sensitive personal information. I find that this factor weighs against disclosure of the information in the nine photographs of the deceased.

(ii) Passage of time & death of the third party

[28] I have, in previous decisions, discussed the effect of passage of time and death of a third party.[12] I agree that the dead do have privacy rights and that such rights may diminish over time. The applicant's original request for copies of the photographs was made 2 ½ years after her son's death. A further 3 ½ years have now passed. In this case, given the relatively short period of time since the death of the third party and in light of the sensitivity of the records at issues, I find that passage of time has not diminished the deceased's right to privacy. I find that this factor does not favour disclosure in this case.

(iii) Compassion for family members

[29] In general, an applicant's motives are not relevant in the sense that applicants do not generally have to explain or justify their reasons for seeking information. However, that is not to say that motives cannot be relied on to support a request.[13] Section 20(2) has several examples of factors where motive is relevant: subjecting government to scrutiny, promoting public health or a desire to obtain a fair determination of one's rights are all factors that take motive into account. Considering motive in the context of this case recognizes the fact that a deceased person cannot consent to disclosure.[14] There are numerous decisions across Canadian jurisdictions that consider access requests made by bereaved family members. Most of these cases consider motive and/or compassion as a relevant factor.[15]

[30] Many of the points raised by the applicant are in essence arguments that there are compassionate grounds in favour of disclosure.

[31] There have been at least eight cases in the past ten years in other jurisdictions that have dealt with requests specifically for photos or videos relating to deceased individuals.[16] In three

[12] See for example, NS Review Report 16-03 at paras. 42 – 51.
[13] Alberta Order F2012-24 at para. 48.
[14] British Columbia Order F14-09 at para. 36.
[15] See for example, Alberta Order F2012-24, British Columbia Orders F14-09 and Order 02-44, Ontario Orders MO-2245 and MO 3260.
[16] There was one Nova Scotia decision more than 10 years ago by Review Officer Fardy in which he determined that death photographs should not be disclosed to grieving family members because to do so would be an unreasonable

cases access was granted and in all of these cases access was granted under a unique feature of the Ontario law.[17] In the remaining five cases, three involved legislation that did not permit a weighing of relevant factors.[18]

[32] Only two cases – one from Alberta and one from British Columbia – attempted to weigh relevant considerations against a presumed unreasonable invasion of personal privacy. In the Alberta case, the adjudicator only considered factors listed in the Alberta equivalent to s. 20(2) and did not specifically consider compassion as a factor.[19] In British Columbia, the applicant was not a family member and so again, compassion was not a factor in the decision.[20]

[33] In Ontario, a unique feature of the access law is that if a presumption applies to a record it cannot be rebutted. As a result, prior to an amendment in 2007, grieving parents were not able to gain access to information about their deceased children that had been created at the time of their children's death by police, coroners or medical examiners because presumptions equivalent to s. 20(2)(a) and 20(2)(b) of Nova Scotia's law were found to apply. Since Ontario law did not then permit a weighing of relevant factors where a presumption applies, there was no way to rebut the presumption in these cases. In response to criticisms from the privacy commissioner regarding the inflexibility of the law in relation to these types of requests,[21] the Ontario government amended the equivalent to s. 20(4) of Nova Scotia's law creating a new category of record, the disclosure of which is not seen to be an unreasonable invasion of personal privacy. Ontario's *Municipal Freedom of Information and Protection of Privacy Act* now states:

> 14(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
> (c) discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

[34] If s. 14(4)(c) is found to apply in Ontario, then that ends the matter and the information cannot be withheld as an unreasonable invasion of personal privacy. The three cases that granted grieving parents access to photos of deceased children were all decisions under this unique Ontario provision.

[35] The Department argues that since Nova Scotia has chosen not to enact a similar provision with the accompanying framework of related definitions, compassion should not be a relevant consideration under Nova Scotia's *FOIPOP*. However, this argument fails to take into account the differences noted above between the Ontario and Nova Scotia access laws. Ontario drafted

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invasion of the deceased's personal privacy. The report does not go into a detailed examination of the relevant factors: See NS Review Report FI-01-59 at p. 7.

[17] The decisions were based on the application of s. 14(4)(c) of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) discussed below: Ontario decisions MO-2245, MO-3260 and MO2237.

[18] Two Ontario decisions that pre-dated the amendment that added s. 14(4)(c): MO-1410 and MO-2015 and a decision from Newfoundland that was based on an earlier version of its access to information law that did not allow for a weighing of relevant factors: A2013-011.

[19] Alberta OIPC F2005-001.

[20] British Columbia Order OIPC F15-14.

[21] See the discussion in Order MO-1410 at p. 6 and MO-2015 at p. 13.

section 14(4)(c) of *MFIPPA* because the law in Ontario does not permit a rebutting of presumptions. Nova Scotia's law is not so constrained. Section 20(2) clearly contemplates the fourth and final step in the s. 20 analysis involves assessing whether or not a presumption has been rebutted by relevant considerations.

[36] So is compassion a relevant consideration within the meaning of s. 20(2)? And if it is, what factors should I consider in assessing the scope and weight of such a factor?

[37] In a recent Alberta case,[22] two parents made an application for a copy of the police file concerning the investigation into the death of their daughter. The Alberta privacy law is similar to Nova Scotia in that it includes rebuttable presumptions and a provision virtually identical to s. 20(2) of *FOIPOP*.[23] In Alberta Order F2012-24, the Director of Adjudication determines that compassion is a relevant factor and further that the consideration of compassion is not meant merely to serve in substitution for what the deceased person may themselves have disclosed; rather, it weighs in favour of giving as much information as possible to help meet the needs of families.[24]

[38] I agree that compassion is a relevant consideration under s. 20(2) and further that this factor has two core considerations: are there any indications of what the deceased would have wanted and what are the needs of the grieving relatives?

[39] With respect to indications of what the deceased may have wanted, it is relevant to consider the nature of the relationship between the applicant and the deceased and to also consider the knowledge of the applicant with respect to the deceased's personal information. Awareness of information is a factor that has been considered in a number of cases involving requests for information of deceased relatives. A lack of awareness weighs against disclosure[25] while existing knowledge of the requested information weighs in favour of disclosure.[26]

[40] The Department argues that we only know the applicant's version of her relationship with the deceased. The Department states that not all family relationships are positive ones and there is no way to know what the nature of the relationship was between the applicant and deceased. Failing some evidence in support of a positive relationship between the applicant and the deceased, the Department states that "releasing information based on the nature of the relationship alone is not enough to determine if compassionate reasons exist."

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[22] OIPC Alberta Order F2012-24.
[23] Section 17(5) of the Alberta *Freedom of Information and Protection of Privacy Act* mirrors Nova Scotia's s. 20(2). I note that s. 40(1)(cc) of the Alberta *Freedom of Information and Protection of Privacy Act* is a provision outside of the access to information request regime that permits disclosure of third party personal information to a relative of a deceased if the disclosure is not an unreasonable invasion of the deceased's personal privacy. This provision is noted and discussed in this decision.
[24] Alberta Order F2012-24 at para. 63.
[25] See for example British Columbia OIPC Order 02-44 at paras. 55 and 57.
[26] See for example British Columbia OIPC Order F14-09 at para. 47.

[41] In evaluating whether compassionate grounds apply under the Ontario legislation, an adjudicator took an opposite view finding that compassionate grounds exist where there was no evidence that the appellant was estranged from the family.[27]

[42] In this case, there is evidence that supports the applicant's description of her relationship with her son. First, the applicant's son was living with his parents at the time of his death as evidenced by records supplied by the Department to the applicant. Second, the applicant provided this office with a copy of a medical release she signed on behalf of her son, consenting to medical treatment several months before his death. This indicates that she was actively involved in his care and that she was privy to her son's sensitive medical information during his life. There is no evidence to contradict that applicant's description of her relationship with her son.

[43] I find that the nature of the applicant's relationship with her son is a factor that weighs in favour of disclosure.

[44] With respect to the applicant's knowledge in this case, the Department provided her with a complete copy of the police report and the autopsy report. Information contained in the autopsy report includes a description of her son's body. The photographs provide similar information in picture format. In addition, the autopsy report states the cause of death and the photographs would obviously have some information in relation to that issue as well. Finally the autopsy report includes graphic detail of the steps taken in conducting the autopsy. In other words, similar information that was of an equally sensitive nature as the information in the photographs has already been disclosed to the applicant.

[45] The applicant has gathered as much information as she can regarding her son's death but she believes she needs to see the photographs taken of her son by the medical examiner. There is no doubt she is capable of understanding the sensitivity of these photographs and she clearly understands the nature of the information that will be revealed by them after having read the police report and the autopsy report. She has steadfastly pursued access to this information as part of her grieving process.

[46] The Department's explanation for disclosing the autopsy report but not the photographs was that under the *Fatality Investigations Act* s. 23,[28] the chief medical examiner has authority to disclose the report to relatives. But if what the chief medical examiner does is a basis for determining that the disclosure of the autopsy report was not an unreasonable invasion of a third party's personal privacy then the same should be true of the photographs. The Department advised that the chief medical examiner would also permit the applicant to view the photographs but would not normally provide a copy of photographs to relatives. The inconsistency between approaches for these two similar types of records is not explained by the Department aside from an assertion that the Department views the photographs as more sensitive than the autopsy report.

[27] Ontario Order MO-2237 at p. 20.
[28] *Fatality Investigations Act*, SNS 2001, c 31, s. 23.

[47] While I agree that the photographs contain sensitive personal information, as did the autopsy report, I also agree that the family of the deceased has experienced the tragic loss of a loved one and I am satisfied that obtaining as much information as possible regarding the circumstances surrounding the deceased's death can be a vital part of the family's grieving process. Clearly, the deceased's family is in the best position to determine the therapeutic value of any personal information received.[29]

[48] In any event, how the chief medical examiner treats these records may be relevant in terms of what the applicant already knows as a result of accessing records through these processes. But the test the Department must apply is of course the s. 20 test in *FOIPOP*, not the s. 23 test in the *Fatality Investigations Act*. I find that the applicant's knowledge of some of the information revealed by the photographs is a factor in favour of disclosure.

[49] With respect to the needs of the applicant as a grieving relative, research conducted in Ontario indicates that for bereaved adults and children alike, understanding the full details and circumstances surrounding a loved one's death is an integral part of the grief process.[30] Based on that research, adjudicators in Ontario have concluded that greater knowledge of the circumstances of a loved one's death is, by its very nature, compassionate.[31]

[50] In this case, the applicant has raised a number of relevant compassionate considerations including the need for clarity and closure and in her own words – that she would be betraying her son if she did not get to the bottom of what happened on the day of his death.

[51] I find that compassion is a relevant consideration and that it strongly favours disclosure of the requested records in this case.

Balancing of considerations

[52] In summary, the considerations that are neutral or that weigh for and against the disclosure of the photographs of the applicant's deceased son are summarized below.

[53] Factors that are neutral; weighing neither for nor against disclosure:

- Potential harm to the third party (s. 20(2)(e) and s. 20(2)(f)).
- Information supplied in confidence (s. 20(2)(a)).
- Passage of time and death of the third party.

[54] Against disclosure:

- Sensitivity of the information.

[55] For disclosure:

- Compassion for applicant including the knowledge of the applicant, her relationship with the deceased and her needs as a grieving mother.

[29] Ontario Order MO-2404 at para. 48.
[30] Ontario Order MO-2245 at p. 6.
[31] Ontario Order MO-2245 at p. 7, citing Order 2237.

[56] The question then boils down to whether the factors in favour of disclosure outweigh the presumed unreasonable invasion of personal privacy that would result from the disclosure of the photographs.

[57] In *Public Prosecution v. Fitzgerald*, the Nova Scotia Court of Appeal discussed the correct approach to conducting the balancing exercise between the presumptions in s. 20(3) and the relevant circumstances within the meaning of s. 20(2). The Court states that s. 20(3) is a "fulcrum" for the legislature's balance of freedom of information against protections of privacy.[32] In reference in particular to information in relation to a prosecution (at issue in that case), the Court determines that *FOIPOP* contemplates that, after the criminal investigation and prosecution ends, the third party is entitled presumptively to the comfort that public access to his or her personal information is over.

[58] Applying that approach in this case means that an individual is entitled presumptively to the comfort of knowing that access to his or her person information compiled as part of an investigation, and particularly where it includes information in relation to medical conditions, treatment or evaluation, will be limited to the purpose for which it was collected. In this case, the purpose was for an investigation by officials into the cause of death.

[59] The Court in *Fitzgerald* goes on to note that "it is an error of law to treat the absence of evidence as satisfying a burden of proof to overcome a statutory presumption."[33] The problem in the *Fitzgerald* case, according to the Court of Appeal, was that the trial level judge determined that the burden was met based on criterion to which the judge expressly declined to ascribe meaningful weight.

[60] In this case, the applicant has provided evidence in support of her claim that compassionate reasons exist. This evidence establishes that she had an ongoing relationship with her son, he lived with her and she was actively involved in his medical care, she was privy to her son's sensitive medical information while he was alive, and she is aware of at least some of the information at issue here. It is also significant that she has already viewed highly sensitive personal information of her son in relation to his death. In light of this knowledge she remains certain that she needs to see the requested photographs to fully understand the circumstances of her son's death. In my opinion the compassionate circumstances weigh heavily in favour of disclosure.

[61] I find that the applicant has met her burden of proof by establishing that compassionate factors outweigh the presumed unreasonable invasion of personal privacy. I recommend disclosure of the withheld information.

FINDINGS & RECOMMENDATIONS:

[62] I find that:

1. The withheld information is the personal information of a third party.

[32] *Fitzgerald* at para. 90.
[33] *Fitzgerald* at para. 92.

2. Section 20(4) does not apply.
3. The presumptions set out in s. 20(3)(a) and 20(3)(b) apply to the records.
4. Based on all of the relevant circumstances, the disclosure of the requested photographs would not result in an unreasonable invasion of a third party's personal privacy.

[63] I recommend disclosure of the withheld information.

July 18, 2016

Catherine Tully
Information and Privacy Commissioner for Nova Scotia