



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

REVIEW REPORT 17-04

April 27, 2017

Department of Community Services

Summary: The applicant is a former foster child who was placed into care as an infant and returned to his parents at the age of five. He thrived in foster care and seeks information that would help him to understand why the Department of Community Services (Department) decided to return him to his parents' care. The Commissioner recommends the disclosure of information directly related to the reasons why the applicant was returned to his parents. The Commissioner further determines that disclosure of the names of individuals who served as the applicant's foster parents more than 50 years ago would not constitute an unreasonable invasion of their personal privacy. The Commissioner agrees with the Department that information focussed solely on the identity or activities of the applicant's siblings should continue to be withheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [SNS 1993, c 5](#), ss. 2, 3, 7, 20, 45.

Authorities Considered: Nova Scotia: Review Reports FI-10-95, [2015 CanLII 79097 \(NS FOIPOP\)](#); FI-11-71, [2015 CanLII 79099 \(NS FOIPOP\)](#); 16-02, [2016 NSOIPC 2 \(CanLII\)](#); 16-03, [2016 NSOIPC 3 \(CanLII\)](#); 16-04, [2016 NSOIPC 4 \(CanLII\)](#).

Cases Considered: *Sutherland v. Dept. of Community Services*, [2013 NSSC 1 \(CanLII\)](#).

INTRODUCTION:

[1] The applicant is a former foster child seeking information in relation to what he characterized as the "missing years" of his early life. He wants to know the names of the foster parents he lived with and he is seeking further information in relation to why he was eventually returned to his birth parents. The Department takes the position that disclosure of this particular information would result in the unreasonable invasion of third parties' personal privacy.

ISSUE:

[2] Is the Department required to refuse access to information under s. 20 of the *Freedom of Information and Protection of Privacy Act (FOIPOP)* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

DISCUSSION:

Background

[3] Shortly after the applicant was born he was placed into foster care. His five siblings were also placed into care in different homes. He remained in care for four years, from 1965 until 1969. Given his age, he has few memories of that time, but he believes he thrived in foster care. His return to his parents was not a happy one from his perspective. His upbringing by his parents was at times chaotic and violent. As a result, he is curious to know why he was originally taken from his parents and perhaps even more so, why he was returned, given the outcome. He believes that we are shaped by our past and when the past is a mystery we are left with unanswered questions.

[4] As a result, in June 2012, the applicant sought information from the Department in relation to what he described as "the missing years" of his early life. The Department responded in July 2012 with a package of information. The information was partially withheld. For the most part, the Department withheld family history and the identities of the foster parents involved in the applicant's care. The Department simply stated that disclosure of this information would result in an unreasonable invasion of a third party's personal privacy and cited s. 20 of *FOIPOP*.

[5] The applicant then filed a request for review with this office. He believed that more information must be available and he objected to the severing. Between 2012 and 2016 both parties actively participated in the informal resolution process with this office. As a result of that participation, the Department conducted further records searches and eventually produced three further disclosures of information. It disclosed extensive information in relation to the reasons why the applicant was first placed into care and why, in 1969, he was returned to his parents. The Department continued to protect information that related to the individual situations of each of the applicant's siblings.

[6] What remains at issue is the identity of the foster parents who cared for the applicant and a small amount of personal information found on five pages of case notes.

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.¹

[8] 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

¹ *FOIPOP* s. 45.

public body from its responsibility to properly apply *FOIPOP* and to provide reasons for the exemptions it has chosen.²

[9] The Department did not provide any submissions in response to the Notice of Formal Review. The Department's response letters to the applicant provide no detail whatsoever in relation to the rationale for why s. 20 was applied to the records or to any particular type of withheld information. The letters simply recite the s. 20 exemption. This is always a concern for two reasons. First, public bodies have duty under *FOIPOP* to respond "openly, accurately and completely" to applicants. Further, the law requires that public bodies respond in writing and provide "the reasons for the refusal and the provision of this Act on which the refusal is based" (emphasis added).³ The Department has only provided the provision of the Act. It has never provided reasons for the refusal. Whenever this occurs, the public body has failed to respond completely as required under the law.

[10] To be clear, the Department actively participated in the informal resolution process which resulted in significant further disclosure to this applicant. But when it decided to maintain severing on a portion of the record, thus forcing the matter into the formal review process, it presumably had reasons for maintaining its position. I don't know what those reasons are. In failing to provide reasons for the refusal and to provide submissions in response to this formal review it has failed in its duty to the applicant. Such an approach also does a disservice to third parties as without evidence or argument I am left with only the information supplied by the applicant in my attempt to properly analyze the application of s. 20 of *FOIPOP* to the withheld information.

General approach to s. 20

[11] In four previous review reports⁴ I examined the application of s. 20 of *FOIPOP* to records typically found in files relating to foster children. I adopt that approach here which is in summary that 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.

[12] 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 unreasonable invasion of personal privacy.⁵

² I have made this point on a number of previous occasions including NS Review Reports 16-04 at para 9 and 16-02 at para 42.

³ *FOIPOP* s. 7(2)(a)(ii).

⁴ NS Review Reports FI-10-95, FI-11-71, 16-03 and 16-04.

⁵ I made the same point in NS Review Report 16-04 at paras 8-11.

[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:

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 disclosure would constitute an unreasonable invasion of privacy or not?

Analysis

[14] During the course of the informal resolution process the applicant provided various submissions in support of the disclosure of third party personal information. I will discuss those below.

1. Is the requested information third party personal information?

[15] The names of the foster parents are clearly the personal information of third parties within the meaning of *FOIPOP*.

[16] The information withheld in some of the case notes consists generally of observations by social workers relating to the behaviour of the applicant’s siblings and parents during the time when the Department was contemplating returning the children to their parents. Mixed in with the observations are opinions of the social workers in relation to the emotional state of the children or parents and/or value judgements in relation to the behaviour of the parents in particular.

[17] Two pages of case notes relate to a sibling during a time period long after the applicant was returned to his parents. The withheld information includes the identity of the sibling and observations and opinions about the sibling’s behaviour.

[18] Anyone else’s opinion about an individual is that individual’s personal information. In other words, the opinions of the social workers about the applicant’s parents is the applicant’s parents’ personal information, not the social worker’s. This is made clear in s. 3(1)(i) of *FOIPOP* which provides:

3(1) In this Act,

- (i) “personal information” means recorded information about an identifiable individual, including
 - (viii) anyone else’s opinions about the individual

[19] Therefore, the names and opinions about the applicant’s siblings and parents all qualify as third party personal information.

[20] But as I have noted on previous occasions, the personal information of family members can also be the personal information of the applicant. For example, information about family members is also information about the applicant – who his parents and siblings were, why he was taken from his parents and why he was returned to them. The lives of the family members were intertwined, and the decisions about the applicant were clearly based on information gathered in relation to other family members. This is why that information is contained in a file intended to document decisions made about the applicant.⁶

2. Are any of the conditions of s. 20(4) satisfied? Is so, that is the end.

[21] None of the conditions in s. 20(4) apply to the information at issue here.⁷

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

[22] I have no evidence or argument before me that any of the presumptions in s. 20(3) apply in this case. In other foster child file cases I have determined that presumptions apply to medical and religious information sometimes found in these files. No such information remains at issue here.

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?

[23] 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. In my view, there are two factors listed in s. 20(2) that may be relevant in this case.

[24] 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 public body shall consider all the relevant circumstances, including whether
- (e) the third party will be exposed unfairly to financial or other harm;
- (f) the personal information has been supplied in confidence;

Third party exposed unfairly to other harm (20(2)(e))

[25] The Nova Scotia Supreme Court in *Sutherland v. Nova Scotia (Community Services)* 2013⁸ examined in some detail information relating to foster parents. In considering whether or not to

⁶ I made a similar observation in NS Review Report FI-10-95 at para 18.

⁷ I note that the Nova Scotia Supreme Court considered the question of whether or not the identity of foster parents fell within s. 20(4)(e) (information about a third party’s position, functions or remuneration as an officer or employee of a public body) and concluded that it did not: *Sutherland v. Dept. of Community Services*, [2013 NSSC 1 \(CanLII\)](#) [*Sutherland*] at para 60.

⁸ *Sutherland v. Dept. of Community Services*, [2013 NSSC 1 \(CanLII\)](#) [*Sutherland*].

disclose detailed information in relation to foster parents the Court considered whether or not s. 20(2)(e) was a relevant circumstance. The Court had before it affidavit evidence about the various circumstances of foster parents. Some had lasting positive relationships with their former foster children, others did not and preferred not to have any further contact with these individuals. Based on the information supplied by the Department, the Court was satisfied that “other harm” could occur if information in relation to foster parents were released in that case.

[26] There are three significant differences between the *Sutherland* case and this case. First, the Court in *Sutherland* had evidence before it to support a finding that some “other harm” might result from the disclosure of the requested information. I have neither argument nor evidence before me in this case to support such a finding.

[27] Second, the information in question in *Sutherland* included significantly more detailed information. The evidence in *Sutherland* was that the requested record included foster parent questionnaires:

The content of the questionnaire is very personal. It includes their own personal history as they grew up, their experiences as a child, a teen and a young adult, their relationships with their parents and siblings, their relationship with their partner, their lifestyle and family values, parenting styles, and issues related to their health, among other things. They also reveal whether they were victims of abuse or assault, and whether they have any addictions or substance abuse issues in their own past.⁹

[28] The third significant difference is that in this case, the applicant was an infant when he lived with the foster families. He has no recollection of his time with them although his general feeling was that he thrived in foster care. There is no chance that the applicant would revisit old conflicts with foster parents, he was a baby and he has no memory of any events. He is simply trying to reconstruct his own history and gain a better understanding for why the Department made the decisions it made that altered his life so dramatically.

[29] I conclude that there is no evidence to find that there is a risk of a third party being unfairly exposed to harm.

Supplied in confidence (s. 20(2)(f))

[30] In *Sutherland*, the Court also considered whether or not foster parent information had been supplied in confidence. The Court had before it evidence directly from foster parents regarding their expectation of privacy and the potential harms that might arise from the disclosure of the information at issue. Based on the evidence and the nature of the record, the Court determined that information provided by foster parents in that case was supplied in confidence.¹⁰

[31] In this case, the only foster parent information in the records consists solely of the names of two sets of foster parents. The information simply identifies these individuals as foster

⁹ *Sutherland* at para 75.

¹⁰ I made similar observations in NS Review Report FI-11-71 at paras 37-38.

parents. This information would have been clear to all of the children in their care old enough to recall the information; likely to neighbours, friends, teachers and health care providers as well.

[32] The applicant's evidence is that a woman who identified herself as a foster parent who provided care to him in the 1960's introduced herself to him a number of years ago. He provided the name of that individual to the Department. If the Department's records confirm that this individual was indeed one of the identified foster parents in the record,¹¹ this evidence further supports the conclusion that the identities of the foster parents were not confidential.

[33] There is no evidence before me to suggest that the identity of individuals simply as foster parents was supplied in confidence. I find, given the non-sensitive nature of this specific piece of information and the likelihood that it was commonly known in the community, it was not information "supplied in confidence" within the meaning of s. 20(2)(f).

Other considerations

[34] 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 five 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,
- (iv) sensitivity of information, and
- (v) withheld information adversely affected the applicant.

(i) Best interests of the child

[35] In Review Reports FI-11-71, FI-10-95 and 16-04 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 foster parents and any additional information that was relevant to the decision to return him to the care of his birth parents.

(ii) Purposes of the Act

[36] 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. For most children, knowing the names of their parents and the circumstances of their upbringing 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.

[37] The applicant in this case has little history for the first four years of his life. The purposes of the Act speak directly to this circumstance. Section 2 provides that the purpose of the Act is

¹¹ In order to avoid disclosing the content of the withheld information, I cannot confirm whether or not the name supplied by the applicant appears anywhere in the record.

¹² NS Review Reports FI-11-71 at paras 43-46, F1-10-95 at paras 54-57 and 16-04 at para 36.

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.

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

[38] The applicant's evidence is that his father died in 1975. He says that he met a foster mother who introduced herself to him a number of years ago and that that individual is now deceased. I have no confirming evidence that the foster parents listed in the withheld information are now deceased. However, the records relate to the period of 1964-1969. Fifty years have now passed. In my view, the passage of time alone slightly favours the disclosure of the withheld information.

(iv) Sensitivity of the information

[39] Sensitivity of the information is also relevant to information relating to the applicant's siblings. In this case, all of the children were taken into care. It may or may not be that the siblings have disclosed their own history to immediate family. The sensitivity of this information favours withholding the information particularly where it is specific only to the circumstances of an individual sibling. These adult children have the right to control what information is known about the private aspects of their childhood.¹³ In addition, two pages of records at issue relate only to one sibling during a time period long after the decision was taken to return the children to their parents. I see no information in that record that has anything to do with the applicant.

[40] Information about foster parents in this case is strictly limited to their identities. The Department previously released one general comment about one foster parent. Disclosing the name will associate this one general comment to an identifiable individual. The comment was that the foster parents were "warm accepting foster parents" and that the children in the home were receiving "excellent care". Both comments are in the narrative in relation to the placement of the applicant. They are not any type of formal review nor are any details or other observations provided to support the comments.

[41] The factual and focussed nature of the information results in it being of only moderate sensitivity compared to other files of this nature which can contain far more detailed personal information of foster parents that is not always directly related to the applicant's personal history. In this case, the factual and focussed nature of the information favours disclosure.¹⁴

(v) Withheld information adversely affected the applicant

[42] The applicant's submission is, in essence, the decision to return him to his parents was not in his best interest. His life took a significant turn for the worse in their care. Therefore, from the applicant's perspective, information that the Department used to support its decision to return him to the care of his parents is information that adversely affected him.

¹³ I made a similar finding in relation to the identity of siblings in NS Review Report FI-10-95 at para 69.

¹⁴ This is consistent with a similar finding I made in relation to another foster child file in NS Review Report FI-11-71 at paras 59-60.

[43] In Review Report FI-10-95 I considered this factor as being relevant and favours disclosure.¹⁵ The same is true in this case.

Balancing the considerations

[44] I have set out below the factors that weigh in favour disclosure, against disclosure or are neutral. Not all factors weigh equally and each case is different both in terms of relevant factors and the weight to be ascribed to those factors.

[45] In summary, the factor that weighs against disclosure:

- Sensitivity of the information – particularly true in relation to the identity of his siblings and any information specific to their individual circumstances.

[46] In summary, the factors that weigh in favour of disclosure:

- Information relevant to why the applicant was returned to the care of his parents:
 - withheld information adversely affected the applicant,
 - passage of time,
 - purposes of the Act, and
 - best interests of the child.
- Foster parent identity:
 - the non-sensitive, factual and focussed nature of the information, and
 - passage of time.

[47] Factors that weigh neither for nor against disclosure:

- Evidence does not support that foster parent identity was supplied in confidence.
- Evidence does not support that any harm would arise from the disclosure of foster parent identity.

[48] Balancing all of the relevant considerations, I find that the disclosure of the identity of the applicant's foster parents would not result in an unreasonable invasion of any third party's personal privacy.

[49] I find that disclosure of information specific to the applicant's siblings would result in an unreasonable invasion of their personal privacy.

[50] I find that the disclosure of information directly related to why the applicant was returned to the care of his parents would not result in an unreasonable invasion of any third party's personal privacy.

[51] I note that on pages 18-19, the applicant's parents' names have been incorrectly withheld as foster parent names. This appears to simply be an oversight on the part of the Department since the applicant's parents' names are otherwise disclosed throughout the document.

¹⁵ NS Review Report FI-10-95 at para 61.

FINDINGS & RECOMMENDATIONS:

[52] I find that:

1. The disclosure of the identity of the applicant's foster parents would not result in an unreasonable invasion of any third party's personal privacy.
2. The disclosure of information specific to the applicant's siblings would result in an unreasonable invasion of their personal privacy.
3. The disclosure of information directly related to why the applicant was returned to the care of his parents would not result in an unreasonable invasion of any third party's personal privacy.

[53] I recommend that the Department:

1. Disclose the identity of the foster parents on pages 4, 5, 6, 17, 18, 19, 20, 23 and 31.
2. Disclose the applicant's parents' names on pages 18 and 19.
3. Disclose a portion of the withheld information on pages 43, 44, and 45 that relates specifically to the success of the visits while continuing to protect the identity of the children. (Recommended severing provided to the Department).
4. Make no change to the application of s. 20 to pages 88 and 89.

April 27, 2017

Catherine Tully
Information and Privacy Commissioner for Nova Scotia