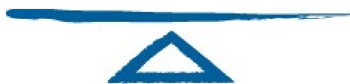

Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner
Catherine Tully

REVIEW REPORT 19-02

March 1, 2019

Department of Health and Wellness

Summary: In Nova Scotia there is a growing public concern about the quality of care our elderly are receiving in long-term care facilities. This is a case in point. The applicant's two elderly parents were living in a Halifax nursing home in 2015. The applicant began raising concerns about the quality of care they were receiving. Eventually she filed four complaints under the *Protection for Persons in Care Act* and then sought access to the investigator's notes in relation to her complaints. While the Department of Health and Wellness disclosed most of the information in the records, it withheld a small portion including the identity of individuals in the records. The Commissioner determines that information supplied by witnesses to an investigation does not qualify as "advice or recommendations". Witness statements are evidence forming the factual background to the investigation. As such, the information cannot be withheld under the policy advice exemption. With respect to the identity of witnesses, the Commissioner agrees that disclosing this information would result in an unreasonable invasion of the witnesses' personal privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* SNS 1993, c 5, ss. 3, 14, 20, 45*; Freedom of Information and Protection of Privacy Regulations,* s. 24, NS Reg 105/94 s. 24; *Protection for Persons in Care Act,* SNS 2004, c 33 ss. 4, 8, 11, 12, 17.

Authorities Considered: Nova Scotia: Review Reports FI-10-19, 2015 CanLII 54095 (NS FOIPOP); 16-02, 2016 NSOIPC 2 (CanLII).

Cases Considered: *Canadian Council of Christian Charities v. Canada (Minister of Finance), [1999] 4 FC 245, 1999 CanLII 8293 (FC); House (Re)*, 2000 CanLII 20401 (NS SC); *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36 (CanLII).

Other Sources Considered: *Concise Oxford English Dictionary*, (New York: Oxford University Press, 2011); Department of Health and Wellness, "Protection for Persons in Care Act: Policy Manual" (online:https://novascotia.ca/dhw/ppcact/PPC_Administrative_Manual.pdf); Department of Health and Wellness, "Minister's Expert Advisory Panel on Long Term Care: Recommendations December 21, 2018" (online: https://novascotia.ca/dhw/publications/Minister-Expert-Advisory-Panel-on-Long-Term-Care.pdf).

INTRODUCTION:

[1] One of the core purposes of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*) is to ensure fairness in government decision making. In this case, an applicant sought records relating to complaints she made to the Department of Health and Wellness (Department). The complaints related to the quality of care her parents were receiving in a nursing home licensed by the Province of Nova Scotia. In response to her request, the Department disclosed a portion of the records, withholding the names of individuals and portions of the records the Department says reflects advice or recommendations. The applicant requested a review, claiming that the information was essential to her understanding the adequacy of the Department's investigation and further, to facilitate her ability to make complaints to professional colleges about the conduct of individuals identified in the report.

ISSUES:

[2] There are two issues under review:

1. Is the Department authorized to refuse access to information under s. 14 of *FOIPOP* because disclosure of the information would reveal advice or recommendations?
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] The applicant in this case had two parents living in a nursing home in Halifax. In the summer of 2015 she had concerns regarding the quality of care her parents were receiving. As a result, she filed four complaints to the Department of Health and Wellness under the *Protection for Persons in Care Act.*[1]

[4] In due course, the applicant was advised by the Department that none of her complaints would be further investigated. In order to better understand what had been done with her complaints to the Department, the applicant filed an access to information request. In response, the Department provided copies of the records but withheld a portion of the information citing unreasonable invasion of a third party's personal privacy and the advice and recommendations exemptions under the *Freedom of Information and Protection of Privacy Act*.

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.[2]

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[1] *Protection for Persons in Care Act*, SNS 2004, c 33. [*PPCA*].
[2] *FOIPOP*, s. 45(4).

Is the Department authorized to refuse access to information under s. 14 of *FOIPOP* because disclosure of the information would reveal advice or recommendations?

[6] The process for determining whether s. 14(1) applies involves three steps:

1. It is first necessary to establish whether disclosing the information "would reveal advice or recommendations developed by or for a public body or a minister."
2. If so, it is then necessary to consider whether the information at issue is excluded from s. 14(1) because it falls within any of the categories of information listed in s. 14(2)-(4).
3. If s. 14(1) is found to apply, the final step is to determine whether the head of the public body has exercised his or her discretion lawfully.

[7] In its submissions, the Department states that the severed information, in the context of the documents, is "opinion/advice that would inform the making of a decision as to whether a matter should be investigated".

[8] It is important first to understand that the records consist of notes written by employees of the Department tasked with inquiring into complaints under the *Protection for Persons in Care Act* (*PPCA*). According to that Act, upon receipt of a complaint, the minister "shall inquire into the matter and shall consider whether a more extensive investigation is warranted."[3]

[9] What is apparent from the records at issue here is that when Department staff "inquire into the matter" they speak first with the complainant and then they speak with someone from the care home. The purpose of the conversations is to "inquire". According to the *Concise Oxford English Dictionary,* "inquire" means to ask for information; "inquire into" means to investigate.[4]

[10] According to the *Protection for Persons in Care Act*, the purpose of the inquiry is to consider whether a more extensive investigation is warranted. The Act provides that, "Where, after inquiry, the Minister finds there are reasonable grounds to believe that a patient or resident is being abused or is likely to be abused, the Minister shall appoint an investigator to carry out a more extensive investigation."[5]

[11] Therefore, the purpose of the interviews that Department staff conduct during their initial inquiries is to gather information to determine whether there are reasonable grounds to believe that abuse is occurring and if so, whether a more extensive investigation is warranted.

[12] In this statutory context, can it be said that a witness from a care home being investigated is providing advice to the Department?

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[3] *PPCA*, s. 8(1).
[4] *Concise Oxford English Dictionary*, (New York: Oxford University Press, 2011); "enquire" at p. 474. [*Oxford*].
[5] *PPCA,* s. 8(2).

[13] It is important to revisit the purpose of the policy advice exemption as stated by the Supreme Court of Canada. The Court provides the following explanation of the rationale for the exemption for advice given by public servants as follows:

> To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies.
>
> It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness.[6]

[14] Are notes of interviews with witnesses "advice"? Surely not. Because if they are, this was not an inquiry as required under the *Protection for Persons in Care Act*. The purpose of the phone call to the care home was supposed to be as set out under s. 8 of that Act which requires Department investigators to make an assessment following the initial inquiry. The Protection for Persons in Care Policy Manual makes clear that the inquiry stage is indeed an evidence gathering phase. The manual states that the assigned investigator is tasked with evaluating the evidence gathered to determine if there is enough evidence at inquiry to substantiate that there are reasonable grounds to move to an investigation.[7] Further, the policy manual requires that investigators act without bias, ensuring that any findings are linked to facts and evidence and are made in good faith.[8] The information supplied in the initial inquiry process requires an impartial and probing assessment to determine whether or not the standards set out under s. 8 of the *Protection for Persons in Care Act* have been met.[9]

[15] Applying s. 14 of *FOIPOP* to any information supplied by a witness could not (and should not) in any way reveal advice or recommendations within the meaning of s. 14. Witness

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[6] *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36 (CanLII), at para 44 quoting with approval stated by Evans J in *Canadian Council of Christian Charities v. Canada (Minister of Finance),* [1999] 4 FC 245, 1999 CanLII 8293 (FC), at para 31.

[7] Department of Health and Wellness, *Protection for Persons in Care Act: Policy Manual* (online: https://novascotia.ca/dhw/ppcact/PPC_Administrative_Manual.pdf), at p. 17. [Policy Manual].

[8] Policy Manual, "1.5 Administrative Fairness", at p. 9.

[9] In January 2019, a Minister's Expert Advisory Panel published a report on long-term care in Nova Scotia: Department of Health and Wellness, "Minister's Expert Advisory Panel on Long Term Care: Recommendations December 21, 2018" (online: https://novascotia.ca/dhw/publications/Minister-Expert-Advisory-Panel-on-Long-Term-Care.pdf). [Long Term Care Report]. The importance of independence in the monitoring of long-term care facilities in Nova Scotia was emphasized in the long-term care report. After pointing out the various roles played by the Nova Scotia Health Authority and the Department (including its role under the *PPCA*), the Panel recommends that an arms length entity from government monitor the long-term care system. The reason for having an arms length entity, according to the Panel, is "to improve accountability and enhance the public's confidence." (Long Term Care Report, at pp. 16-17).

statements are simply that, information supplied to the Department to be used as evidence in its inquiry. For this reason, I find that the information withheld under s. 14 does not qualify as advice or recommendations within the meaning of s. 14.

[16] Alternatively, even if the witness statement information could qualify as advice or recommendations, s. 14(2) provides that a public body cannot withhold information as advice or recommendations if it constitutes background information. Background information means "any factual material".[10] "Factual material" means a coherent body of facts, separate and distinct from interpretations of, reactions to or advice and recommendations in respect of facts.[11] Witness interview notes are the facts upon which the investigator based her decision. There is no reaction to the information supplied by the witnesses nor any advice or recommendations contained in the interview notes.

[17] The information withheld under s. 14 on pages 5, 7, 13 and 22[12] is all information supplied to the Department in the context of an investigation. The role of the care home in this situation was not to provide advice. Rather, the care home was being impartially investigated to ensure that residents remained safe.

[18] I find that the information withheld under s. 14 is not advice or recommendations within the meaning of s. 14.

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?

[19] In order for s. 20 to apply, the public body must determine that the disclosure of third party personal information would be an unreasonable invasion of third party personal privacy. The law makes clear that this is a four-step process:

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?[13]

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[10] *FOIPOP*, s. 3(1)(a)(i).
[11] *FOIPOP Regulations*, NS Reg 105/94, s. 24(1).
[12] I note that the information withheld under s. 14 on p. 22 was, in any event, disclosed on p. 23.
[13] This is the standard test for applying s. 20 as set out by the Nova Scotia Supreme Court in *House (Re)*, 2000 CanLII 20401 (NS SC).

Is the requested information "personal information"?
[20] To qualify as personal information, the withheld information must be recorded information about an *identifiable* individual. The Department withheld two types of information under this exemption.

[21] *Names, initials, pronouns*: Some of the withheld information consists of names and initials. I find that this constitutes personal information. The applicant was sufficiently familiar with the employees of the home that the applicant would very likely be able to identify individuals based on their initials, particularly in the context of the records here.

[22] Some of the withheld information is simply pronouns. The care home website lists 24 employees by name, 3 of whom are male and 21 are female. In this context, a male pronoun could result in identifying an individual and a female pronoun would certainly at least exclude the three male employees. Further, the individual likely to be speaking to the investigator would narrow down the potential scope of individuals and so a pronoun could potentially serve to identify the witness. On that basis, I conclude that in this limited context, pronouns qualify as information about an identifiable individual.

[23] *Incident:* The Department withheld four lines of text under s. 20 that relate to an incident involving staff members. The withheld information includes a brief description of certain events as well as information that discloses opinions about third parties. The law is clear that anyone else's opinion about an individual is that individual's personal information.[14] With respect to the brief description of certain events, that information is about the actions of two third parties and, in the context, reveals information about identifiable individuals. I agree that the information in context qualifies as personal information about third parties within the meaning of *FOIPOP*.

Are any of the conditions of s. 20(4) satisfied? If so, that is the end.
[24] I agree with the Department that s. 20(4) does not apply to the withheld information.

Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?
[25] The Department submits that information withheld on one page regarding a workplace incident qualifies as employment history within the meaning of s. 20(3)(d). That section provides that where information relates to employment history, disclosure of the information is a presumed unreasonable invasion of an individual's personal privacy.

[26] The Department also submits that portions of the information withheld regarding the workplace incident constitute personal recommendations or evaluations, character references or personnel evaluations within the meaning of s. 20(3)(g).

[27] In Review Report 16-02, I found that information on an incident reporting form identified an individual who was the focus of a complaint and included comments about that person including what could be characterized as an evaluation.[15] In this case, while the information isn't on an incident reporting form, it is of a very similar nature.

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[14] Definition of "personal information", *FOIPOP* s. 3(1)(i)(viii) and 3(1)(i)(ix).
[15] NS Review Report 16-02, 2016 NSOIPC 2 (CanLII), at paras 61-62.

[28] I find that s. 20(3)(d) and 20(3)(g) apply to the information withheld on page 32.

[29] With respect to the identity of individuals withheld on other pages of the records (names, initials and pronouns), the Department submits that s. 20(3)(d) also applies to this information because the identities of witnesses to an investigation qualify as employment history. The Department argues that withheld names are part of a highly sensitive inquiry under the *PPCA*. This, says the Department, imparts a personal dimension because it deals with named individuals in the context of an allegation of abuse in a long-term care facility. The Department points out that the applicant is seeking the identities of the individuals interviewed as part of the *PPCA* inquiry for the express purpose of submitting complaints about them to professional colleges. This makes the information about the employees' employment history.

[30] Part of the problem with this argument is that at least one of the individuals identified in the records was interviewed in accordance with the policy directive that when conducting an inquiry investigators must, "contact the administrator or designate of the health facility."[16] And so, in fact at least one individual was contacted strictly in a business capacity. He or she was contacted as a representative of the organization under investigation, not because he or she was necessarily a witness to any of the alleged incidents. However, some of the individuals identified in the records are identified in the context of the alleged workplace incidents. In those cases, I agree that the presumption in s. 20(3)(d) applies.

[31] The Department also submits that the withheld personal information was compiled and is identifiable as part of an investigation into a possible violation of law. As such, the Department argues that all of the withheld information falls within the presumption set out in s. 20(3)(b). If this is so, disclosing the withheld personal information would be a presumed unreasonable invasion of personal privacy.

[32] The records at issue here are notes taken by an investigator tasked with conducting an inquiry under the *Protection for Persons in Care Act*. Does this constitute "an investigation into a possible violation of law"? The *PPCA* places a duty on the administrator of a health facility to protect patients or residents of the facility from abuse.[17] On receiving a report of abuse, the minister (or his delegate) must inquire into the matter. The possible consequences of such an inquiry include no further action being taken or a further investigation that could lead to a variety of consequences including:

- The minister may issue directives to the administrator of the health facility requiring operational and other measures necessary to protect all patients from abuse;[18]
- Where the minister believes on reasonable grounds that a person has abused a patient or resident or has failed to comply with the duty to report, the minister may refer the matter to the body or person that governs the person's professional status;[19]

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[16] Policy Manual, "s. 2.1 Inquiry", 2.1.2(2), at p. 16.
[17] *PPCA,* s. 4(1).
[18] *PPCA,* s. 11(1).
[19] *PPCA,* s. 12(1).

- At any point during an inquiry or investigation, investigators may refer the matter to the police;[20] and
- There is a potential that a person who contravenes the Act could be prosecuted under the offences section of the *PPCA*.[21]

[33] I am satisfied that the records at issue here were compiled and are identifiable as part of an investigation into a possible violation of law. I find that s. 20(3)(b) applies to all of the withheld personal information.

Does the balancing of all relevant circumstances lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?

[34] I have determined that all of the information withheld under s. 20 is subject to the presumption set out in s. 20(3). This, of course, does not end the inquiry. The question remains, would disclosure of this personal information constitute an unreasonable invasion of personal privacy?

[35] The next step in the process is to review the factors listed in s. 20(2) and any other relevant factors to determine if the disclosure of the withheld information would result in an unreasonable invasion of personal privacy. There are six factors relevant to this question:

i. Personal information has been supplied in confidence.
ii. Third party would be exposed unfairly to financial or other harm.
iii. Disclosure may unfairly damage the reputation of any person referred to in the records.
iv. The personal information is relevant to a fair determination of the applicant's rights.
v. Policy requirement.
vi. Public interest considerations.

<u>*Personal information has been supplied in confidence*</u>

[36] The Department submits that the withheld personal information was supplied in confidence within the meaning of s. 20(2)(f). It points to the *PPCA* policy manual as evidence that investigators are required to keep information confidential during an investigation and as evidence that there are restrictions on who is entitled to receive reports:

> 1.5.1 POLICY
> Investigators must follow the principles of administrative fairness, by demonstrating the following throughout *PPCA* inquiries and investigations:
>
> Fair and Standard Procedures
> 3. Provide a final investigation report with the findings, a summary of the evidence (including additional evidence brought forward in response to the preliminary investigation report); and directives from the Minister to the health facility (if applicable). The report is distributed to the implicated person, affected patient or resident, and/or his or her substitute decision maker (see Policy 1.8) and the administrator

[20] Policy Manual, "s. 3.6 Reporting Requirements to Police", 3.6.1, at p. 29.
[21] *PPCA,* s. 17.

5. Keep all information confidential and share and store documents according to the relevant legislation and Government of Nova Scotia and Department of Health and Wellness policies;

[37] So, while the policy does indeed limit the distribution of information by the investigator, the substitute decision maker is one of the persons entitled to the information. The applicant in this case received the records because she had consent from her parents' substitute decision maker. The policy indicates that the substitute decision maker, among others, is entitled to a "summary of the evidence". The records in this case are not a summary, but rather, they are the entire notes taken by the investigator. Further, the policy provides that investigators must "keep all information confidential" and share only in accordance with the legislation and policies. Both factors support a finding that the information was treated as confidential.

[38] However, there is no evidence provided by the Department that witnesses were assured of confidentiality when the *PPCA* investigator called. In fact, it is doubtful that the investigator could make such an assurance since two of the potential outcomes of the investigation are that the matter is referred to a professional college and/or the matter is referred to the police. In both cases, the Department would, at the very least, need to identify the implicated individual.

[39] With respect to the *PPCA* itself, the only explicit provision requiring that the information be kept confidential is s. 11(2)(b) which provides that the minister, on receiving the investigator's report, may issue directives and shall give a copy of the directive to any person the minister considers should be notified, "having regard to the nature of the abuse reported and the need to protect the patient's or resident's privacy."

[40] Overall, the nature of the investigation and its potential for significantly affecting the reputation of individuals named in the documents is such that on balance, I am satisfied that there was an expectation that the information was supplied in confidence, except to the extent the law specifically permits or requires further disclosure. This factor weighs against disclosure of the requested information.

<u>Third party would be exposed unfairly to financial or other harm</u>
<u>Disclosure may unfairly damage the reputation of any person referred to in the records</u>
[41] The Department also submits that disclosure of the withheld information would either expose the third parties unfairly to other harm or may unfairly damage their reputations within the meaning of s. 20(2)(e) and 20(2)(h).

[42] The Department points out that once disclosed to the applicant, she can do what she chooses with the information including providing it to the media or other third parties. This in turn could result in exposing the third parties to harm including reputational harm. The problem with the Department's argument is that the harm anticipated in s. 20(2)(e) and 20(2)(h) must be "unfair". The Concise Oxford English Dictionary defines "unfair" as "not based on or showing fairness; unjust, contrary to the rules of a game."[22] In this case, the records at issue are the notes

[22] *Oxford*, "unfair" at p. 1576.

of an investigator tasked with undertaking a fair and unbiased investigation with findings that are linked to facts and evidence and that are made in good faith.[23]

[43] The withheld information is the notes of the investigator – notes of conversations with witnesses. It is of course possible that witnesses could lie about identified third parties and so in this context, disclosure of the identities of third parties might unfairly harm their reputation. Certainly, the notes themselves are likely an accurate reflection of the information supplied to the investigator, given the role of the investigator and the standards set by the policy with respect to the investigations.

[44] On balance, I am satisfied that there exists the potential that a third party could be exposed unfairly to a harm such as damage to reputation should the personal information be disclosed. This factor weighs against disclosure of the requested information.

The personal information is relevant to a fair determination of the applicant's rights

[45] The applicant in this case is concerned with obtaining the identity of individuals named in the investigator's notes because she wants to be able to file a complaint to the professional college to which the individual or individuals belong. This consideration is set out in s. 20(2)(c) of *FOIPOP*.

[46] Registered nurses may be subject to professional misconduct complaints to the College of Registered Nurses of Nova Scotia (College of Nurses). The applicant states that in her discussions with the College of Nurses she was advised that in order to make a complaint, she would need to provide the name of the individual. She claims then that she requires the names from the requested records in order to file a professional misconduct complaint. Clearly, she believes that the withheld personal information will identify a nurse or nurses, as opposed to some other professional or non-professional employees.

[47] In Review Report FI-10-19 I listed the four facts that must be established in order for s. 20(2)(c) to apply:[24]

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. The right must be related to a proceeding which is either underway or is contemplated, not a proceeding that has already been completed;
3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.

[23] Policy Manual, "1.5 Administrative Fairness", at p. 9.
[24] NS Review Report FI-10-19, 2015 CanLII 54095 (NS FOIPOP), at para 36.

[48] In the case of registered nurses, the *Registered Nurses Act* S. N. 2006 c. 21, s. 35(1)(d) provides that any person may initiate a complaint. This appears to satisfy the first requirement of s. 20(2)(c). The applicant has not yet filed a complaint as she is awaiting disclosure of the requested information. This appears to satisfy the second requirement.

[49] The College of Nurse's website confirms that it asks for the name of the nurse along with various other details including details of the incident. This appears to satisfy the third and fourth requirements of s. 20(2)(c). On that basis, I find that s. 20(2)(c) is a relevant consideration and weighs in favour of disclosure of the withheld personal information.

Policy requirement

[50] The Department's policy with respect to inquiries under the *Protection for Persons in Care Act* sets out the procedure to be followed by investigators when conducting an inquiry. They must, among other things, contact the administrator or designate of the health facility.[25] Based on the policy then, the public already knows that during an inquiry, the individual contacted by the Department is either the administrator or designate. It also means that these individuals are contacted in their capacity as a representative of the health facility, not necessarily as a witness to or person of interest in the events complained of. This factor weighs in favour of disclosure of this personal information.

Public interest considerations

[51] The Department submits that there is a public interest in continuing to protect the identifying information contained in the records. It says that disclosing the information would harm the Department's ability to effectively carry out investigations under the *PPCA*. According to the Department, it is critical that all parties and witnesses in a *PPCA* investigation provide information and opinions freely to *PPCA* investigators. Witnesses must have confidence that the Department will reasonably protect their identities from disclosure to third parties so that they are not subject to subsequent reprisal from third parties. Failing to do so would result in a "chilling" effect where witnesses would be less forthcoming. In other words, disclosing identities could harm the investigation system and there is a public interest in ensuring that it is effective.

[52] The concerns raised by the applicant in this case mirror many of the comments found in the recently released report from the Minister's Expert Advisory Panel on Long Term Care.[26] That report identified three systemic themes that the committee heard throughout its engagement: complexity, culture and fragmentation. Of particular interest to this case is the issue of fragmentation which the committee described as, "Accountability structures are disconnected, leaving a high degree of variability across the system."[27] The authors described a need for trust built from consistency and transparency[28] and they acknowledged that, "public confidence in the quality of care provided to LTC residents may be declining."[29]

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[25] Policy Manual, "s. 2.1 Inquiry", 2.1.2, at p. 16.
[26] Long Term Care Report.
[27] Long Term Care Report at p. 3.
[28] Long Term Care Report at p. 6.
[29] Long Term Care Report at p. 16.

[53] This case is an example of declining confidence in the system. We have an applicant seeking as much information as possible about the care received by her elderly parents in a home licensed by the Department. None of her four complaints made under the *Protection for Persons in Care Act* resulted in a full investigation. She remains convinced that professionals working in the home at the time she raised her concerns engaged in activity that violated the standards set out in the *Protection for Persons in Care Act* and violated professional conduct standards.

[54] I find that there is evidence of a public interest in protecting the information and a public interest in more transparency in the process and so, overall, this factor is neutral in terms of weight.

Balancing of Considerations

[55] In summary then, there are three factors that weigh against disclosure of the personal information:

- Personal information has been supplied in confidence.
- Third parties would be exposed unfairly to financial or other harm.
- Disclosure may unfairly damage the reputation of any person referred to in the records.

[56] There are two factors that weigh in favour of disclosure of the personal information:

- The personal information is relevant to a fair determination of the applicant's rights.
- Policy requirement.

[57] There is one factor that, on balance, is neutral in this assessment:

- Public interest considerations.

[58] Where a public body has established that s. 20 applies to withheld information, it is the applicant who bears the burden of proving that the disclosure would not be an unreasonable invasion of a third party's personal privacy. In this case, I have determined that disclosure of the requested information would result in a presumed unreasonable invasion of personal privacy.

[59] Generally, when balancing factors, not all factors are equal. In this case, while I agree that disclosing the information is relevant to a fair determination of the applicant's rights overall, the relevant factors against disclosure are at least equal in weight. Since there is a presumed unreasonable invasion of personal privacy by virtue of s. 20(3)(b) and the applicant bears the burden of proof, I find that disclosure of the withheld personal information would result in an unreasonable invasion of a third party's personal privacy.

FINDINGS & RECOMMENDATIONS:

[60] I find that:

1. The information withheld under s. 14 is not advice or recommendations within the meaning of s. 14.
2. The disclosure of the withheld personal information would result in an unreasonable invasion of a third party's personal privacy.

[61] I recommend that:

1. The Department disclose the information withheld under s. 14 on pages 5, 7, 13 and 22.
2. The Department continue to withhold information withheld under s. 20.

March 1, 2019

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

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