Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Tricia Ralph

REVIEW REPORT 20-05

September 18, 2020

Department of Community Services

Summary: The applicant requested access to records about a youth she believed died while under the care of the Department of Community Services (Department). The Department refused to confirm or deny the existence of records responsive to the request, claiming that to do so would be an unreasonable invasion of a third party's personal privacy pursuant to s. 20 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*).

The Commissioner found that neither s. 7(2)(c) nor s. 20 authorized the Department to refuse to confirm or deny the existence of the records. If records exist, the Commissioner recommended that the Department release the records to the applicant subject to limited and specific exemptions in accordance with *FOIPOP*.

Statutes Considered: *Children and Family Services Act*, SNS 1990, c 5, s. 94; *Child and Family Services Act*, RSO 1990, c C.11, s. 45; *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sch 1, s. 87; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s. 8; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 3, 4, 7, 15, 20, 45.

Authorities Considered: British Columbia: Order No. 27-1994, 1994 CanLII 1265 (BC IPC); Nova Scotia: Review Reports FI-07-72, 2008 CanLII 69114 (NS FOIPOP); FI-09-63, 2013 CanLII 4656 (NS FOIPOP); Prince Edward Island: Order No. 17-014, 2017 CanLII 88668 (PE IPC).

Cases Considered: *Children's Aid Society of Hamilton-Wentworth v. L. (T.)*, 1997 CanLII 24491 (ON SC); *House (Re)*, 2000 CanLII 20401 (NS SC); *Sutherland v. NS Community Services*, 2013 NSSC 1 (CanLII).

Other Sources Considered: Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis, 2008).

INTRODUCTION

[1] The applicant filed a request for records held by the Department of Community Services (Department). She sought access to all records held by the Department in relation to a youth she believed had died while under its care. The applicant sought the records because she wanted to know what actions, or non-actions, the Department may have taken in response to this tragedy. She thought it was important for the public to know what the Department may have done to prevent a similar incident from happening in the future. In response, the Department refused to confirm or deny the existence of any records. The applicant filed a request for review to this office.

[2] This file raised competing public accountability and privacy interests. There is a delicate balance to be struck between these interests, particularly in an environment of heightened public interest and where the information involved is often deeply personal.

ISSUES:

[3] There was one issue under review:

1. Is the Department permitted to refuse to confirm or deny the existence of records under s. 20 of *FOIPOP* because confirming or denying the existence of records would disclose personal information about a third party and the disclosure would be an unreasonable invasion of that third party's privacy?

DISCUSSION

Background:

[4] On July 14, 2016, the applicant requested records related to a named individual who she believed died while under the care of the Department.

[5] On August 16, 2016, the Department refused the applicant's request for records, taking the position that confirming or denying the existence of records would be an unreasonable invasion of a third party's privacy under s. 20 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*).

[6] On September 6, 2016, the applicant submitted a request for review of the Department's decision to the Office of the Information and Privacy Commissioner for Nova Scotia (OIPC).

[7] On August 13, 2019, this file was assigned to an investigator from my office.

[8] On September 10, 2019, the Department declined to revise the scope of the access request as part of an attempt at informal resolution.

[9] On September 24, 2019, the Department provided the applicant with an amended decision letter, stating that the information was withheld in full under s. 20.

[10] On January 17, 2020, the applicant amended her access request to specify that she was not requesting the personal information of the named youth. Rather, she sought access to only the Department records that outlined its actions or non-actions in relation to the named individual.

[11] Despite this, informal resolution of all issues was not possible. As such, this file was referred to me for formal review.

[12] Before I move on, I do wish to address the relevance of s. 7(2)(c) of *FOIPOP*. Section 7(2)(c) of *FOIPOP* provides a mechanism to public bodies that allows them to refuse to confirm or deny the existence of records in only one circumstance. Section 7(2)(c) states:

> (2) The head of the public body shall respond in writing to the applicant within thirty days after the application is received and the applicant has met the requirements of clauses (b) and (c) of subsection (1) of Section 6, stating
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> > (c) where the record would contain information exempted pursuant to Section 15 if the record were in the custody or control of the public body, that confirmation or denial of the existence of the record is refused,

[13] In this case, the Department accepted that the original decision was not supported by s. 7(2)(c) as an authority to refuse to confirm or deny the existence of records. Thus whether s. 7(2)(c) applied did not form one of the issues in this report. Nevertheless, as it is the only section of *FOIPOP* that speaks explicitly to this type of response to an access to information request, I will canvass it here.

[14] Section 7(2)(c) says that where the record would contain information exempted pursuant to s. 15 if the record were in the custody or control of the public body, that one of the public body's three possible responses includes refusing to confirm or deny the existence of the record. What is critical here is that s. 7(2)(c) limits this authority to refuse to confirm or deny to records only to those that could be exempted pursuant to s. 15, which is the provision that deals with law enforcement.

[15] Section 7(2)(c) makes no reference to this authority in relation to other sections of *FOIPOP*, such as s. 20. Other jurisdictions, such as British Columbia, have included in their statutes a provision that would allow a public body to refuse to confirm or deny existence of a record if confirmation of the existence of the information would itself be an unreasonable invasion of a third party's personal privacy.[1] That is not the case with Nova Scotia's legislation. Had the Legislative Assembly intended to convey this authority to confirm or deny records in relation to s. 20, it would have done so in *FOIPOP*. Because it did not do so, a statutory authority to refuse to confirm or deny the existence of records where the record would contain information exempted pursuant to s. 20 does not exist.

[16] Because s. 7(2)(c) does not allow a public body to refuse to confirm or deny the existence of records on the basis that doing so would be an unreasonable invasion of a third party's privacy pursuant to s. 20, the Department does not have the authority to do so. It cannot sidestep this issue by claiming that confirming or denying the existence of records would be an unreasonable

[1] See s. 8(2) of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165.

invasion of a third party's privacy under s. 20. Without the authority in s. 7(2)(c), that avenue is simply not available to them. This finding is consistent with former Review Officer McCallum's decision in 2013, where it was found that the Department did not have the authority to refuse to confirm or deny the existence of records based on s. 20.[2]

Burden of Proof

[17] According to s. 45(3)(a) of *FOIPOP*, where the information being withheld relates to personal information (s. 20), it is the applicant who bears the burden of proof; however, the public body must first establish that s. 20 applies to the disputed information.

1. Is the Department permitted to refuse to confirm or deny the existence of records under s. 20 of *FOIPOP* because confirming or denying the existence of records would disclose personal information about a third party and the disclosure would be an unreasonable invasion of that third party's privacy?

[18] Although I have already determined that the Department cannot refuse to confirm or deny the existence of records under s.7(2)(c) because it is not relying on s.15 of *FOIPOP* as an exemption, I will also address the Department's argument that, as a practical matter, it cannot confirm or deny the existence of records in relation to this access request because doing so would be an unreasonable invasion of a third party's privacy. In simple terms, the Department's argument is that if it were to confirm or deny the existence of responsive records, it would effectively confirm the status of the individual named in the request as being a youth who was in the care of the Department, or not. The Department is of the view that if it were to confirm that there are responsive records, then that itself is an unreasonable invasion of the named individual's privacy.

[19] It is well established in Nova Scotia that the proper application of the third party personal privacy exemption requires the following four-step analysis:[3]

1. Is the requested information "personal information" within the meaning of s. 3(1)(i)? If not, that is the end. Otherwise I must go on.
2. Are any of the conditions of s. 20(4) satisfied? If so, that is the end.
3. Is the personal information presumed to be an 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?

Position of the Department

[20] The Department did not provide representations on how confirming or denying whether or not there are responsive records was "personal information" within the meaning of s. 3(1)(i).

[21] Section 20(4) sets out situations when a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. With regard to whether any of the

[2] See Nova Scotia Review Report FI-09-63.
[3] *House (Re)*, 2000 CanLII 20401 (NS SC), at para. 14.

conditions of s. 20(4) were met, the Department noted that the applicant provided no consent or other authority that would allow it to access the personal information of the named individual.

[22] Section 20(3) sets out situations where a disclosure of personal information is presumed to be an invasion of a third party's personal privacy. The Department said that confirming or denying the existence of responsive records would have the effect of disclosing whether or not the named individual had involvement with the Department. It argued that this status, involvement with Department or not, would fall within a number of classes of information listed in s. 20(3). The Department said that confirming the existence of records in response to a *FOIPOP* request that seeks access to a named individual's involvement with the Department would disclose personal information about the individual's eligibility to access the Department's programs and services (e.g. income assistance or social-service benefits). It said that therefore, to confirm or deny the existence of responsive records would be presumed to be an unreasonable invasion of a third party's personal privacy.

[23] The Department then went through the factors listed in s. 20(2) and concluded that none of the factors listed in s. 20(2) applied to mitigate the presumed unreasonable invasion of privacy that confirming or denying the existence of responsive records would have. It claimed that there was no activity of the Government of Nova Scotia at issue. It said the disclosure of any responsive records, if they exist, would not promote public health and safety or protect the environment. It noted that there was no evidence provided by the applicant that the information was relevant to a fair determination of her rights.

[24] The Department also claimed that confirming whether there are responsive records would be a violation of s. 94 of the *Children and Family Services Act* (*CFSA*).[4] It said that s. 94 of the *CFSA* acted as a "weighing factor" in favour of refusing to confirm or deny the existence of records under s. 20 of *FOIPOP*. The Department's position was that it does not disclose to the public the name(s) of individuals who have any involvement with the Department. The Department said that it was prohibited by s. 94(1) of the *CFSA* to publish or make public information that has the effect of identifying a child who was a witness at or a participant in a hearing, or the subject of a proceeding pursuant to the *CFSA*. The Department argued that because the language in the legislation states, "No person shall…", this provision would extend to parties external to the Department. Its view was that if the named individual were an individual described in s. 94(1) of the *CFSA*, then confirmation of the existence of records may be considered to be a violation of s. 94(1) of the *CFSA*.

Position of the Applicant

[25] While the applicant initially requested information about a named individual, in the investigation process she clarified that she was not looking for personal information about the individual. Rather, her interest was in the documents that outlined what actions were taken by the Department following the death of a child in its care. She argued that there is significant public interest in analyzing the decisions and actions of the Department. In her view, there was no other way for the public to get this accountability unless she received the documents requested. The applicant also submitted that the public has no way of knowing whether the Department has made any changes to the way it provides services as a result of a child dying while under its care.

[4] *Children and Family Services Act*, SNS 1990, c 5.

[26] The applicant pointed out that Nova Scotia is one of the only jurisdictions in the country that does not a have a Child and Youth Advocate. She noted that until a new law passed in 2019, the deaths of children in the Department's care were not automatically investigated.[5] The applicant said that the Minister has no obligation to tell the public what happened and what is being done to change it. The applicant argued that this puts every other child and troubled youth in the social services system at risk.

Analysis

[27] Before getting into the s. 20 *House* test, I wish to first address the Department's argument that s. 94 of the *CFSA* prevented it, or anyone else, including myself, from confirming or denying if there are any responsive records.

> 94 (1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

[28] In *Children's Aid Society of Hamilton-Wentworth v. L(T),*[6] a newspaper obtained information from an affidavit from a Children's Aid Society worker's affidavit in support of several children being temporarily apprehended under the Ontario *Child and Family Services Act*.[7] The newspaper reported some of the circumstances relating to the particular case without naming the child in question. A motion was brought requesting an order prohibiting the newspaper from further publishing any information related to the proceeding, including any information as to the identity of the children or the parties. The Ontario legislation has almost identical wording as s. 94 of the *CFSA* in s. 45(8) but I will repeat it here for ease of reference:

> 45 (8) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.[8]

[29] The court declined to grant the motion, stating at paragraph 11 that the newspaper "…has every right to publish such information if the newspaper does not, itself, contravene s. 45(8)." The court went on to say in paragraph 23 that:

> It is legitimate for a newspaper to attract the attention of readers and spotlight an issue of public concern, such as child abuse, by reporting the case of an individual child so long as the newspaper exercises proper restraint in the details reported. The Hamilton

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[5] Note that I believe the applicant is referring to the passage of *Bill 180: An Act to Amend Chapter 31 of the Acts of 2001, the Fatality Investigations Act*. At the time of writing this report, these amendments had not yet come into force.

[6] *Children's Aid Society of Hamilton-Wentworth v. L(T)* 1997 CanLII 24491 (ON SC).

[7] R.S.O. 1990, c C.11.

[8] Note that the Ontario *Child and Family Services Act* has since been repealed and replaced with the *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sch 1. The same wording as what was in s. 45(8) is in s. 87(8) of the new legislation.

> Spectator has not breached s.45(8). It has refrained from publishing not just the names, but also many other particulars within its knowledge.

[30] In my opinion, the Department has taken an overly broad interpretation of s. 94 of the *CFSA*. That section does not say that the Department is restricted from confirming whether it has records that respond to an access to information request. What it says is that a person is prohibited from *publishing or making public* information that has the effect of identifying the child who is described in s. 94 of the *CFSA*. Acknowledging that records responsive to an access to information request exist about a named individual does not meet the threshold of publishing or making public. It is only if someone were to take that acknowledgment and publicize in some fashion that this particular child had been in care would it possibly engage s. 94.

[31] In addition to the wording of s. 94 of the *CFSA*, the provisions, or lack thereof, in *FOIPOP* also support that s. 94 does not mean that the Department is prohibited from confirming or denying that records exist.

[32] *FOIPOP* provides that where there is a conflict with it and another enactment that restricts or prohibits access to a record, *FOIPOP* prevails unless that enactment is listed in s. 4A(2) or the other enactment states that it prevails over *FOIPOP*.[9] The *CFSA* is not listed in s. 4A(2) of *FOIPOP*. The *CFSA* does not state that it prevails over *FOIPOP*. As former Review Officer McCallum said in 2008:

> If the Legislative Assembly had intended it to be absolute that child protection files be unavailable under the *Act*, a section of the *Child and Family Services Act* would have been included in ss. 4A(2), the subsection that lists which enactments prevail over the *Act*. No part of the *Children and Family Services Act* is paramount to the *Freedom of Information and Protection of Privacy Act*.[10]

[33] In conclusion, I find that s. 94 of the *CFSA* does not act as a blanket prohibition authorizing the Department to refuse to confirm or deny the existence of records about a named individual in response to an access to information request.

[34] Moving on to the *House* test, I note first that s. 20 of *FOIPOP* is a mandatory exemption, such that a public body is not permitted to disclose personal information of a third party if the disclosure would be an unreasonable invasion of the third party's personal privacy. In order to determine whether this is the case here, I must apply the four steps of the *House* test outlined above.

Step 1: Is it personal information?

[35] The definition of "personal information" in s. 3(1)(i) requires that the information be about an identifiable individual and then lists what would include personal information. The list includes "family status" in the definition of personal information. I am satisfied that if the Department were to confirm or deny the existence of records about a named individual that it would reveal some limited personal information about the individual's circumstances. Because

[9] See s. 4A of *FOIPOP*.
[10] Nova Scotia Review Report FI-07-72, December 17, 2008, at page 19.

of how the applicant articulated the request, the mere confirmation of the existence of responsive records would have the effect of confirming the named individual's status with the Department. Thus, if the information is identifiable and is about a named individual, it meets the definition of personal information.

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

[36] As set out in the *House* test, if any of the circumstances in s. 20(4) of *FOIPOP* are met, then that is the end of the analysis, as s. 20(4) sets out when a disclosure is not an unreasonable invasion of a third party's personal privacy. In the present case, the relevant subsection is (b), as the applicant submitted that she believed there were compelling circumstances affecting the health and safety of children and youth in the care of the Department.

[37] Section 20(4)(b) of *FOIPOP* states:

> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
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> (b) there are compelling circumstances affecting anyone's health or safety;

[38] The issue of whether or not "compelling circumstances" exists was discussed by Justice Pickup in *Sutherland v. Nova Scotia*:

> [29] The precise meaning of the phrase "compelling circumstances" has not yet been judicially defined in the context of privacy law in Nova Scotia. After citing dictionary definitions of the term "compel", Ms. Sutherland submits that the circumstances affecting anyone's health or safety must "evoke attention" or create "overwhelming pressure" in order to satisfy s. 20(4)(b).
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> [30] The respondent submits that the statutory construction of "compelling circumstances" requires the court to consider what the ordinary meaning is in the context in which the words appear (Ruth Sullivan, *Sullivan on the Construction of Statutes,* 5th ed. (LexisNexis, 2008), at 25 - 26).
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> [31] According to DCS, "compelling circumstances" elevate the meaning of "compelling" to the position where failing to adopt the inevitable result of the reasoning put forward will constitute direct irreparable harm or injury.
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> [32] I am satisfied that the phrase "compelling circumstances" means something less than "life or death" circumstances, circumstances that are beyond what is considered normal, and must demand a particular course of action because of some existing exigency. Likewise, there must be an internal weighing of the different interests at stake when contemplating whether a set of circumstances stands out enough to be "compelling", because if "compelling circumstances" exist, the result is that a disclosure will be made and the privacy rights of third parties will be overridden. **"Compelling circumstances" must be those where disclosure would so clearly benefit an individual that any consequential harm to a third party would be justified. I am also satisfied that there must be a rational connection between the disclosure and**

the health condition or safety concern sought to be remedied. In simplest terms, this would mean that there will not be compelling circumstances if someone has a health condition but disclosure will do little to alleviate the condition. [emphasis added]

[33] In summary, in order to constitute "compelling circumstances", the following elements must be present:

i. the circumstances must be grave and serious enough that a failure to disclose would lead to direct, imminent or irreparable harm to the person seeking the third party information;
ii. the circumstances must be of such weight as to override the third party's privacy rights in their own personal information; and
iii. the circumstances must show a rational connection between the alleged health or safety concerns and the relief the disclosure would provide.

[34] Whether or not a set a circumstances is sufficiently compelling for the purposes of s. 20(4)(b) must be assessed on a case-by-case basis. Although the interpretation of "compelling" is a question of law, the determination of whether the set of circumstances meets that interpretation will be a question of fact...[11]

[39] Based on the facts of this case, the requirement in s. 20(4)(b) that there must compelling circumstances affecting anyone's health or safety is not quite met. This is not a situation where failure to disclose would lead to direct, imminent or irreparable harm to the applicant. There is not an identified individual who could be harmed if the Department fails to confirm or deny the existence of records. Assertions of general overall harm to future children in care does not meet the threshold of direct or imminent harm.

[40] As none of the conditions of s. 20(4) of *FOIPOP* are satisfied, I must continue with the *House* test.

Step 3: Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s. 20(3)?

[41] The next step of the *House* test is to determine whether confirming or denying the existence of records is presumed to be an unreasonable invasion of a third party's personal privacy pursuant to s. 20(3) of *FOIPOP*. One of the eight presumptions set out in s. 20(3) of *FOIPOP* is applicable here:

(c) the personal information relates to the eligibility for income assistance or social-service benefits or to the determination of benefit levels;

[42] I agree with the Department that whether or not one receives services from it falls under the category of social-service benefits within the meaning of s. 20(3)(c). However, the existence of this presumption is not the end of the discussion as there is the final step of the *House* test to consider.

[11] *Sutherland v. NS Community Services*, 2013 NSSC 1.

Step 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?

[43] The final step of the *House* test is to balance all the relevant circumstances, including those listed in s. 20(2). The first factor set out in s. 20(2) is relevant here. This section of *FOIPOP* reads as follows:

> (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
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;

[44] For this analysis, it is important to go back to the substance of the applicant's request. Although the applicant first named the child in her original access request, through the course of the investigation, she clarified that she did not wish to receive the personal information of the named individual but rather sought only records that detailed the Department's actions following the death of a child who may have been in care. The applicant based her request on her own investigation of a matter that garnered some public attention. Through the course of this office's investigation, she clarified that she did not want the Department file that outlined the Department's possible interventions in the child's life before passing away, medical records or other records that otherwise may have contained personal information about the child. She was open to receiving the records, if they exist, in a form that redacted the child's name. If the applicant was right and records exist, the records may legitimately subject the activities of the Department to public scrutiny. This is therefore a relevant consideration when determining whether confirming or denying the existence of records would constitute an unreasonable invasion of the named individual's privacy. The very heart of this matter arises from the applicant testing whether there are records relating to a known death, and if there are, whether anything in the records sheds light on related government activity or non-activity.

[45] In addition to *Nova Scotia Review Report FI-09-63*, where former Review Officer McCallum found that the Department could not refuse or deny the existence of the records on the basis that confirming or denying would be an unreasonable invasion of a third party's privacy, I was also able to find a case where the public body acknowledged that records existed about a child who died while in the care of the Ministry of Health. In *Order No. 27-1994*,[12] the British Columbia Information and Privacy Commissioner found that a reporter applicant was entitled to information about government's actions with respect to a child who committed suicide while in the care of the Ministry of Health. The Commissioner ordered the release of much of the Ministry's documentation of the death, as he found that disclosure was desirable for the purpose of subjecting the activities of the Government of British Columbia to public scrutiny. The Commissioner noted that the release of more factual information about the conditions and events surrounding the stay of the child in departmental care might shed additional light on her suicide, and on the general problem of suicide among adolescents. He said that suicide is a matter of public concern and the print media has an ongoing contribution to make to public education and

[12] *Order No. 27-1994*, Office of the Information and Privacy Commissioner of British Columbia, at page 7.

public debate on the matter. The Commissioner did not find that all information held by the Ministry should be released. For example, the Commissioner found that the child's diary should not be released to the applicant, as releasing the information contained in it was not helpful in subjecting the activities of the public body to public scrutiny. In terms of what should not be disclosed, he said the following:

> In my opinion, this core zone of privacy consists of the details of her behaviour, her feelings, her therapy sessions, her medical diagnosis, and her innermost thoughts that may be revealed through her diaries and other records. These details do not assist the public in scrutinizing the Ministry's actions. Similarly, Patient's X's family retains its full rights to privacy in the wake of Patient X's death; information about them does not assist in the public's scrutiny of the public body.[13]

[46] More recently in *Order No. FI-17-014*,[14] an applicant requested an incident report and an investigation report from Health PEI related to a patient's death by suicide at a hospital. In that case, Commissioner Rose found that circumstances, including goals of public scrutiny and public health and safety, rebutted the presumption of unreasonable invasion of privacy for some of the information in the investigation report. In finding that more of the information than was already voluntarily released by the public body should be disclosed, Commissioner Rose noted that although the disclosure did reveal something about the circumstances of the deceased's death, the need for public scrutiny favoured release of more of it. The Commissioner found that the full response of the public body to the incident could not be scrutinized without that information.[15] Citing *Order No. 27-1994*, the Commissioner found that the objective of public scrutiny does not apply to the deceased's diagnosis, medical record number, the name of the family/proxy/guardian of the deceased, particulars of the deceased's admission to hospital and some of the details of the circumstances of her death.[16]

[47] I find the arguments in the above two cases persuasive. In my view, the privacy interest being protected by the Department's refusal to confirm or deny the existence of records is limited and is outweighed by the public interest in subjecting the Department's activities to public scrutiny if records exist. If records do not exist, very limited and non-specific information about the named individual would be disclosed. If records do exist, limited family status information about the named individual will be confirmed and the Department will be required to disclose the responsive records subject only to the specific and limited exemptions allowed within *FOIPOP*. As a general proposition, if the records exist, the disclosure of them is desirable for the purpose of subjecting the activities of the Department to public scrutiny, as contemplated by s. 20(2)(a) of *FOIPOP*.

[48] In conclusion, I find that confirming or denying whether a named individual was in the care of the Department discloses some limited personal information which in some circumstances might be an unreasonable invasion of privacy. In the context of this request, the applicant has supplied sufficient evidence that if the records exist, their disclosure is desirable for

[13] *Order No. 27-1994*, Office of the Information and Privacy Commissioner of British Columbia, at page 10.
[14] *Order No. FI-17-014*, Office of the Information and Privacy Commissioner for Prince Edward Island.
[15] *Order No. FI-17-014*, Office of the Information and Privacy Commissioner for Prince Edward Island, at para. 24.
[16] *Order No. FI-17-014*, Office of the Information and Privacy Commissioner for Prince Edward Island, at para. 27.

the purpose of subjecting the Department to public scrutiny. I find that it is not an unreasonable invasion of the named individual's privacy for the Department to confirm or deny the existence of records responsive to the applicant's request.

FINDINGS & RECOMMENDATIONS:

[49] I find that:

1. Section 94 of the *CFSA* does not permit the Department to respond to an access to information request with a refusal to confirm or deny the existence of responsive records.
2. Confirming or denying the existence of records that are responsive to this applicant's request does have the effect of confirming some limited personal information contained in the request, but in the context of this access request it would not be an unreasonable invasion of the third party's personal privacy because it is desirable for the purpose of subjecting the activities of the Department to public scrutiny.

[50] I recommend that:

1. The Department provide the applicant with a response to her request that complies with s.7(2) of *FOIPOP*. If the records exist, I recommend that the Department release the records to the applicant with any appropriate exemptions applied within 30 days of acceptance of this recommendation.[17]

September 18, 2020

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File: 16-00241

[17] Please note that if the Department complies with this recommendation and the applicant subsequently requests a review of the Department's decision, the review request will be addressed by my office on a priority basis rather than being placed in the chronological queue.