Nova Scotia Freedom of Information and Protection of Privacy
Report of Review Officer
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LIFE STORY: THE RIGHT OF FOSTER CHILDREN TO INFORMATION

A SPECIAL REVIEW REPORT

January 21, 2014

Introduction

Children are the most important resource of any community. Nova Scotia is a province that has struggled and continues to struggle with resources and economic development. Part of that struggle is to educate, nurture and retain our youth. One of the critical messages we can send to the children of Nova Scotia is that we value and respect them. For the most vulnerable children, those apprehended and taken into foster care, one of the ways we can show respect to them is to give them information about their childhood. They are entitled to know we value them, to know that being removed from their biological families was not their fault and to know they are entitled to have access to their *Life Story*.

Knowing about one's past helps to set straight the path for the future; enabling each and every one of us to know we are valued and respected as full participating citizens. The reality is that if we value those children amongst us who are the most vulnerable, then all children will feel valued.

Foster children who went on to be adopted have the right to information about the time while they were in foster care under the *Adoption Information Act*. While on the other hand, foster children who were never adopted are being forced to use the access to information legislation with poor results.

This is unusual because prior to the access to information legislation there was a custom and practice in place for what information is to be provided to present and former foster children. This custom has been codified in the *Children in Care and Custody Manual* [*"Manual"*]. The *Freedom of Information and Protection of Privacy Act* [*"FOIPOP Act"*] makes provision to preserve the access to information rights provided by custom or practice laid out in the *Manual*.

Nova Scotia is a kind and loving province. When there is a crisis, personal tragedy or incident, people across the province, rural and urban, proactively rise to the occasion, opening their hearts and their homes. People do whatever needs to be done often placing themselves in harm's way in an effort to save the situation from disaster for others. This is one of the signatures of Nova Scotians. This exact same proactive compassion needs to be brought to this issue. Our

government needs to behave in a manner that reflects who we are as Nova Scotians.

Most of what goes on in the foster care system is in the shadows. Private agencies, now part of government, known as Children's Aid Societies operating under delegated authority from Community Services, were responsible for the apprehension of children. These agencies are now part of Community Services. It is mere speculation on my part, but it may be that these former agencies did follow the customary practice in the *Manual.* Now that these agencies have been taken over by Community Services, this might explain the recent increase in Requests for Review from former foster children.

This Special Review Report is about a foster child's entitlement to know their *Life Story*. Currently the Review Office has five Review files that are the trigger for this Special Review Report. Those applicants', whose stories are captured in part in this Report, have been refused the information [to which they were entitled under the *Manual*] – leaving them exhausted, sad, frustrated, and, in some cases, family-less. This attitude of government to deny access to information cannot continue.

Government has had a custom and practice in place for a long time that was preserved with the enactment of access to information legislation but which government seems to have chosen to now ignore. The very government entrusted to step in as the designated legal parent under the apprehension law now refuses to share with its former foster children his or her *Life Story.* No good parent would do this because after all it is the child's information and it is in their best interests to know their *Life Story*. What is in a child's best interest is reflected in the *Manual.* Government should not be allowed to use the access to information law as a barrier leaving these adult former foster children information-less. In the end, it is about all present and former foster children having the right to their *Life Story* and the right of Nova Scotians to know Community Services is being held to account on behalf of our children.

Background

This Special Review Report is intended to alert the public and members of the House of Assembly to the need for an immediate paradigm shift in how access to information is done in Nova Scotia. This may come as a surprise to many but the overall default of many government departments is to withhold information. The purpose of the statutes is the exact opposite. The *FOIPOP Act* clearly spells out that people have a right to access information and where access is denied, information can only be withheld based on limited and specific exemptions. Making access to information available in an open and transparent manner is one clear sign that a government is accountable.

This Special Review Report is specifically about Community Services and information regarding children who have been placed in foster care but it is only one example. All of the issues discussed in this Report have been identified in previous Review Reports. Unfortunately Community Services continues to process requests from former foster children in the same manner giving no regard to the previous Findings and Recommendations. This Report will highlight five files presently being investigated. By looking at them through the lens of a systemic report rather than review-specific, the hope is the files cited will be informally resolved

and the applicants will not have to endure a lengthy investigation only to be faced with a decision by Community Services to ignore my Recommendations. It also provides a benefit to Community Services by giving it an option to proactively informally resolve all five individual files.

This problem of not providing full disclosure to former foster children appears to be a recent phenomenon. The statistics for Reviews involving Community Services indicate that the number of Review Requests involving former foster children is on the rise. I suspect that may be because of a change in policy or practice – failing to process these requests under the custom or practice incorporated into the *Manual* and instead processing them under the *FOIPOP Act.* This is a mistake and is not consistent with the law.

Foster children are being treated as if they have no past essentially a person without any *Life Story* prior to adulthood. As applicants, they are being forced to fight for information about their childhood, which is not in the spirit of the past custom or access to information legislation. Regardless of why they were unable to be raised by their biological parents, foster children had no choice about being apprehended – it was not their fault. The department responsible for removing them from their biological homes and taking them into care and custody of the state is the same department that is now refusing them information in response to the many questions they have surrounding being apprehended and being raised as a foster child.

> *The Applicant was placed into care as an infant and remained a ward until aging out. It is alleged that the Case Worker shared that both parents were killed in a traffic accident, that the Applicant was born out of province, and provided the mother's name. A similar story of the mother's fate was allegedly shared by staff at Vital Statistics. The Applicant has since learned independently that the mother did not die in a car accident but moved on and began a new family. The Applicant originally sought, "all details about my parents and relatives", then later, confirmation of the mother's name, his/her birthplace and whether the mother remains alive. The Applicant is now interested in seeing that the disclosure practices of Community Services are examined.*
> *[Summary of ongoing Investigation]*

Community Services needs to be held accountable for its decisions to remove a child and disclose the maximum information to the innocent party – the former foster child. Some of these applicants blame themselves for what happened and harbour anxiety and guilt for what happened. They are entitled to as much information as possible to fully understand what happened – "What is my childhood *Life Story*?"

> *The Applicants are siblings. They are applying together for access to their child in care records for the 1 ½ year period where they were Wards. They want to know why they were placed into care and what transpired during this time period. The Applicants are looking for answers that will help them,* ***"move on from the traumatic events of our childhood".*** *They are unable to obtain the desired information independently.*
> *[Summary of ongoing Investigation]*

There are two goals under the *FOIPOP Act* – promotion of access to information and protection of privacy. The default position of Community Services is to automatically refuse information citing privacy rights of biological and foster family members, over the access rights of the Applicants. This is a misconceived use of the statute to use privacy as a blanket shield to block the right to access.

> *It is in the public interest, in most cases, to maximize the amount of information made available to foster and former foster children, children who have more often than not already been through significant challenges in their lives. Community Services has intervened in the child's life by placing him/her in foster care, albeit a move that is in the child's best interests. Having disrupted the original family and often having to relocate the child into a number of foster homes, it would work a double jeopardy to then refuse information about those situations to the person most affected – the adult former foster child.*
> *[NS Report FI-08-107]*

A child's *Life Story* is a conglomerate of the former foster child's personal information and the personal information of their family such as their parents. Here is a tangible example to put the impact of a denial to information into perspective:

> *A former foster child wishes to obtain a passport. S/he is advised a long form birth certificate is required. The adult child approaches Vital Statistics to get the required certificate. They are advised they must know the name of their parents to make the application. They are informed they may be able to find out their names through baptismal records at a church. But the church may not have records or may have since closed its doors. If they are lucky enough to find out their parents' names through the church, Vital Statistics may or may not issue a long form certificate. If not able to find out their parents' names, the former foster child goes to the person responsible for the Adoption Information Act. There they are told that because they were not adopted they have to make an application for access to a record under the FOIPOP Act, which they do only to be refused access by Community Services to information about their biological parents including names citing privacy. They are unable to obtain legal identification.*

Issues

1. Whether s. 5(3) of the *FOIPOP Act* preserves the right of present and former foster children to access information in accordance with the *Children in Care and Custody Manual*.
2. When a former foster child makes an Application for Access to a Record, what are the relevant factors Community Services must consider in making access decisions under the *FOIPOP Act*?
    a. Whether Community Services is misinterpreting and restricting the definition of personal information of an applicant when it severs "shared information"; information that may be personal information of another person, such as a parent, but which also falls within the definition of personal information of the applicant.

b. Whether Community Services should seek the consent of Third Parties such as former foster parents and biological parents/family members when processing an Application for Access to a Record and whether Community Services should seek consent of the applicant to disclose to the Third Party who is making the request.

c. Whether best interests should be the paramount consideration in guaranteeing present and former foster children access to their complete foster and biological family history.

d. Whether the practice of withholding certain information, known to or provided by an Applicant by Community Services has an absurd result.

Discussion: Issue #1 – The Custom and Practice of Giving Access

Whether s. 5(3) of the *FOIPOP Act* preserves the right of present and former foster children to access information in accordance with the *Children in Care and Custody Manual.*

The reality for children who are separated from their biological families during their childhood because the province has taken them into care is there are only three choices: get adopted or remain a foster child or be returned to their family. Every foster child's experience is different. It may involve being placed in one loving long term foster family. But it may also involve being moved to many different homes resulting in a life that is disruptive and disjointed and sometimes abusive. It may mean an unfortunate time in foster care prior to being returned to biological family. All of these situations raise questions, which the summaries and quotes of the cases cited in this Special Review Report demonstrate. What all of the cases share is a desire on the part of a former foster child to have *access to the information that constitutes their Life Story.*

> *My dream was to meet my mother alive but I was twenty years too late…I think it is my human right to know if not legal-right to know my own biological-medical-cultural heritage, to have access to valid legal identification, my only regret I shouldn't have listened to vital statistic when they lied to me 37 years ago. I should have continued looking for her and maybe we would have met.*
> *[Quote from Applicant]*

How access to information requests from former foster children and biological parents inquiring about their children put into foster care are processed by Community Services is a systemic problem. In many cases, the adult child seeking the information goes to the adoption services department who specifically refers them to get their information by making an application for access to information under the *FOIPOP Act.* Biological parents are similarly instructed. This usually amounts to a hollow remedy by virtue of the fact that after filing an Application for Access to a Record a large part of their Record is withheld citing privacy of Third Parties such as foster parents and biological family members. There is no other means in place for those who have spent time in foster care to allow for the reunification with family members or to have questions answered such as,"Why was I removed from my family?", "Where did I come from?", "Does my family have a history of health issues I should know about?" or "Who am I?" This

problem seems to have been exacerbated by the recent judgment in the Nova Scotia Supreme Court that appears to have bolstered Community Services confidence to continue to deny access.

The inequity of this situation is compounded by the fact that not all children taken into care are denied access to information later in life. In Nova Scotia the children that have been taken into care and are subsequently adopted and later seek information about their life prior to adoption have a statutory right to information under the *Adoption Information Act.* This statute does not apply to foster children who have never been adopted and there is no equivalent legislation, resulting in former foster children being told they have to rely on the *FOIPOP Act*.

In addition to the five active files to which this Special Review Report relates, there have been few files of a similar genre before the Review Officer over the history of the Office. One recently resulted in a Review Report with Recommendations which Community Services refused to follow. In the case of *FI-08-107* Community Services' response did not provide reasons and simply stated it would not be following either of the Recommendations of the Review Officer. This resulted in the Applicant being forced to appeal to the Supreme Court of Nova Scotia. The Judge chose to hear the matter *de novo,* as is permitted under the *FOIPOP Act,* resulting in a decision that failed to address the majority of issues relating to access to information for a former foster child and chose to rely solely on whether there were compelling circumstances to release information to the particular applicant [Refer to *Sutherland v. Nova Scotia (Community Services),* 2013 NSSC 1].

The intention of this Special Review Report is to achieve three goals: to adjudicate in the most efficient and cost effective way possible; to cluster the issues to enable Community Services to address them comprehensively and consistently; and to attempt to resolve these Review files without the necessity of further investigation or Reports. The issues in these types of files are the same and repeat themselves over and over again. This is not an effective use of anyone's time particularly the Applicants who put in maximum time and effort with minimal benefit. The remedy becomes even more hollow if Community Services continues its practice of disregarding the Review Officer's Recommendations and the Applicants are forced to go to Court where the process and result can be devastating [Refer to *Sutherland*].

This Special Review Report will focus solely on the issues as they relate to one or more of the existing Review files. The Report will only make Preliminary Recommendations. If Community Services accepts the Preliminary Recommendations, it is expected that thereafter all five Review files will be closed as informally resolved based on Community Services' acceptance of the Preliminary Recommendations.

> *The Applicant and his/her siblings were removed from their parents' care by a decision of the Court. It is alleged that the Applicant suffered abuse at the hands of his/her foster families and no action was taken when this was disclosed to the Case Worker. The Applicant has been negatively affected by these experiences. His/her own recollection of the home situation does not appear to justify removal. In light of experience as a foster child, s/he has the need to understand why s/he was removed from his/her parents' care. The Applicant also seeks their family's medical history along with the identity of Godparents.*

[Summary of ongoing Investigation]

Community Services had a custom and practice with respect to providing information to foster children prior to the *FOIPOP Act* becoming law. That custom is outlined in the *Manual,* which makes provision for access to information for present and past foster children – while in care and after aging out. The *Manual*, effective August 1, 2004, states:

- *A request for background information is part of normal adult development.*
- *The most comprehensive the information, the more satisfied the individual will be.*
- *Such a service is part of the ongoing child welfare responsibility.*

The introduction to Section 9 of the *Manual* refers to the *FOIPOP Act* and explains how the custom or practice relates to the legislation. It states as follows:

> ***If the provisions of the Act are strictly applied, much relevant personal information about children in care and their family members can not be released to them.*** *Fortunately, this Act contains a provision that states, "Nothing in this Act restricts access to information provided by custom or practice prior to this Act coming into force."* ***The Department of Community Services has determined that prior to the Freedom of Information and Protection of Privacy Act coming into force, there was an existing custom or practice that allowed children who are in care or formerly in care to obtain personal information about their family members. The policy and procedures that follow set out the information that can be released to children in care or formerly in care, and it is believed to be consistent with prior custom and practice with respect to release of information.***
> ***[Emphasis added]***

This statement in the *Manual* is very important because it concedes that a person may be entitled to less information under the *FOIPOP Act.* This may, in part, explain why applicants are directed to file an Application for Access to a Record rather than be processed by Community Services under the *Manual,* because as stated at the outset of the Report, many public bodies err on the side of withholding rather than releasing information.

It may also be explained, in part, on the basis told to applicants by Community Services that there is no appeal under the *Manual* while there is under the *FOIPOP Act.* That is true but not a reason to ignore the robust access entitlements for foster children under the *Manual* especially given that when an Applicant appeals under the *FOIPOP Act*, Community Services may ignore the Review Officer's Recommendations for disclosure. Using the appeal as justification for requiring an access request under the *FOIPOP Act*, Community Services is giving false assurance as the appeal, in these cases, provides a hollow remedy.

Applicants are savvy enough to know if they remain dissatisfied after having their complete foster child file shared with them [except for the personal information of foster parents specifically referenced in the *Manual*] and there is some information they are still seeking, they can move on to a second phase in which they can apply under the *FOIPOP Act.*

The *FOIPOP Act* is very clear. In s. 5(3), it states:

> ***Nothing in this Act restricts access to information provided by custom or practice prior to this Act coming into force.***
> ***[Emphasis added]***

This statutory provision renders the right to information for present and past foster children established by custom and practice that is encoded in the *Manual* paramount to the *FOIPOP Act.* The details of what information foster children are entitled to are laid out in detail in s. 9.1.2 of the *Manual*, as follows:

> *…Both positive and negative information is to be shared with the child; the level of detail is a matter of casework decision. The child will be provided with the date of admission to care and the reason for same, the number of placements and the reason for the changes, if contained in the record. The following information regarding the child's parents, siblings (unless legally adopted), and extended family will be shared if contained in the record.*
>
> - *full names*
> - *ages, birth place, and religion*
> - *cultural and racial background*
> - *appearance, personality, interests*
> - *medical history*
> - *education and occupation*
> - *childhood history (if available)*
> - *attitude and feelings expressed upon placement of child into care*
> - *present situation (if known)*
>
> *Other information contained in the file should be released as appropriate.* ***Important events in a child's life are shared with details for the purpose of providing insight into their personality development.*** *Appropriate photographs will be given to the child if available. Insight into the long range comprehensive plan of care as well as full disclosure of rights, given developmental considerations, will be provided to the child for their consideration when the child is over 12 (see Section 2: Planning for Children in Care).*
>
> *If the child requests, a written summary of the material shared will be given to them upon discharge from care. A copy should be maintained on the file.*
> ***[Emphasis added]***

The custom documented in the *Manual* is to release all of the above information, **with no exceptions**, to any child in foster care. This is regardless of whether the information is positive or negative. It is intended that the information be provided to all foster children. It includes one piece of information that has been identified as very important to former foster children: **the reason why the child was admitted into care**. It incorporates information about biological parents, siblings and other extended family members.

Once the child ages out and is no longer in foster care, the adult former foster child is entitled, upon request, to more information provided for in s, 9.1.3 of the *Manual* as follows:

> *Information will be provided to adults formerly in care and custody upon receipt of a written request. The assigned social worker will prepare a summary of the case time frames, case plan, general trends and intervention services, being mindful of third party confidentiality . . .* ***The applicant may be provided with a copy of but not limited to the:***
>
> - *order for care and custody*
> - *order of termination*
> - *medicals*
> - *pictures*
> - *short-form birth certificate*
> - *school reports*
> - *baptismal certificate (if available)*
> - *list of placements*
> - *social history*
> - *annual review*
> - *case recording*
>
> . . .
>
> ***[Emphasis added]***

For our Applicants who are adult former foster children seeking their information, they are entitled to have sections 9.1.2 and 9.1.3 read conjunctively – meaning as adults they are to have access and copies of the information listed in both sections. This is exactly the same information that is being denied to them under the *FOIPOP Act.*

In order to understand what is meant by the information listed in the *Manual*, the words should be given their ordinary meaning in a child welfare context. For examples:

- "list of placements" would include a list of foster parents and their location where the child was placed while in foster care
- "medical history" would include personal health information that would include information about parents and extended family.

Children who come into care are often vulnerable because of the life circumstances in their biological families as measured by Community Services resulting in their apprehension. Their vulnerability, including as adults, may be exacerbated by not having an understanding of what transpired during their childhood.

In the last Review Report regarding a former foster child, I found the procedure encoded in the *Manual* to be appropriate and fair:

> *The right of a former foster child to obtain information about their family history raises a matter of public interest. I find the procedure for disclosure enshrined in custom and codified in the Manual is appropriate and fair. The Manual specifically refers to s. 5(3) of the Act and the fact that a child may be able to get more information under the customary process than under the [FOIPOP] Act. The provincial access legislation ought not to be used as a shield to deny access to adults who want information about their childhood and their families, biological and foster.*
> *[NS Report FI-08-107]*

It is clear that the *FOIPOP Act* intended to respect any custom and practice of facilitating the provision of information to children while in foster care and after they reached adulthood including personal information of parents, siblings and extended family. Community Services appears to be treating the *FOIPOP Act* provisions as paramount to the former custom and practice and thereby is essentially ignoring s. 5(3) of the *FOIPOP Act*.

Section 5(3) preserves the custom and practice entrenched in the *Manual* under the law. By choosing to process the information requests under the *FOIPOP Act* instead of pursuant to the *Manual*, Community Services is denying rights to which former foster children are entitled that are detailed in the *Manual* and that are preserved under the law by s. 5(3) of the *FOIPOP Act.* The present practice of Community Services fails to respect the rule of the law, which is not optional.

> *Equally important is the need for Justice to exercise good judgment by recognizing when it has erred, acknowledge its error and take the necessary steps to correct it. Respect for the rule of law is not optional.*
> *[NS Report FI-12-10]*

In Review Report *FI-08-107*, I made the following Finding with respect to former foster children still getting customary access to their child welfare file:

> *Section 5(3) of the Act preserves the custom at Community Services to give foster and former foster children access to their children in care files. Based on Community Services' custom to give access to former children in care and relying on s. 5(3) of the Act, I find the Applicant is entitled to everything s/he was given in the 1990s – liberal access to his/her entire child in care file. In future, Community Services should continue with that custom as it is consistent with openness, transparency and accountability to former children in care. If an individual remains dissatisfied after that customary procedure is completed, s/he can make a choice thereafter to formalize the request by filing an Application for Access to a Record under the Act with the public body and thereafter if unsatisfied, a Request for Review with the Review Officer. I find that it would result in a disservice to former foster children if the customary procedure is replaced by the formalized process under the [FOIPOP] Act.*
> *[NS Report FI-08-107]*

The Findings and Recommendations in the Review Report that was appealed to the Supreme Court of Nova Scotia [*Sutherland*] did not form any part of the Court proceedings [other than the

Court defining "compelling circumstances" and coming to a different finding of fact with respect to the Applicant]. The decision of the Judge who heard the matter *de novo* did not consider or adjudicate on s. 5(3) of the *FOIPOP Act* or the custom and practice incorporated into the *Manual* and thus my Findings and Recommendations remain undisturbed.

I make the following Preliminary Recommendations regarding the Custom and Practice under the *Manual*:

- That Community Services respect the rule of law and comply with s. 5(3) of the *FOIPOP Act*. That means that the custom and practice embodied in the *Manual* be respected and followed for all present and former foster children. The right to information guaranteed by custom under the *Manual* is to be treated as paramount in accordance with s. 5(3) of the *FOIPOP Act.*
- That Community Services process all requests for information from present and former foster children in accordance with the *Manual.* This means that applicants would not be directed to apply for their information under the *FOIPOP Act* but rather would have the information made available in accordance with the custom and practice stipulated by the *Manual.*
- For any additional information not referred to in the *Manual,* which, however, is not an exhaustive list, Community Services would advise applicants that they are free to make an application under the *FOIPOP Act* for any supplemental information they seek. Where an access request follows a disclosure decision made under the *Manual,* Community Services should take an equally open and accountable approach as allowed for in the *Manual* and, therefore, Community Services will process those requests in accordance with the Recommendations below.

Discussion: Issue #2 – Relevant Factors under the *FOIPOP Act*

When a former foster child makes an Application for Access to a Record, what are the relevant factors Community Services must consider in making access decisions under the *FOIPOP* Act?

Introduction:

Here is a breakdown of a sample of the kinds of information that have been severed from the copy of the Records provided to the five Applicants.

- Name of biological parents: name of father, name of mother, both parents' address
- Biological parents medical history and diagnosis including mental health
- Date of birth of biological parents
- Education level of biological parents
- Grandparents' names
- Siblings names and dates of birth
- Living conditions of the family home
- Details of circumstances when the child was removed
- Biological parents' attitude to the apprehension of their child/children

- Reason for move of foster child from one foster home to another
- Name of foster parents.

It is noteworthy that all of the examples listed above are information that Community Services is required to provide under the *Manual* but has withheld under the *FOIPOP Act*. This is exactly why the *Manual* prefaces its outline of the custom with *if the provisions of the Act are strictly applied, much relevant personal information about children in care and their family members can not be released to them.* In other words, the fact is that less information is usually made available under access legislation that under the past custom or practice. This is evidence that Community Services is using the *FOIPOP Act* as a barrier to information to which former foster children are entitled. This makes it patently clear as to why requests for information from former foster children should always be processed under the *Manual* first before forcing them to make a formal Application for Access to a Record pursuant to the *FOIPOP Act.*

Now let's turn to the kinds of information that may be relevant under the *FOIPOP Act* that have also been severed from the Records in these Reviews. There are other kinds of information that Community Services has severed that would not ordinarily be provided under the *Manual* and may be the types of information that may appropriately be the subject of an Application for Access to a Record under the *FOIPOP Act* post disclosure under the *Manual.* Again this is a sample only taken from the Records in the cited Review Reports:

- Professional opinions from others about the parents
- Relationship details about the parents
- Parents' doctor's name
- Other views and opinions from others about the parents
- Parents' attitude about the Department of Child and Family Services
- How parents interacted with the social worker during visits
- Date of marriage or marital status of parents
- Name of Third Party
- Phone number of Foster Parent
- Name of Foster Parent's child
- Details about another foster child in the same home
- Name of the siblings of the Foster Parents.

Relevant Factors:

Issue #2(a): Shared Information

Whether Community Services is misinterpreting and restricting the definition of personal information of an applicant when it severs "shared information"; information that may be personal information of another person, such as a parent, but which also falls within the definition of personal information of the applicant.

Personal information in the case of children will include personal information of other people. These could include the child's parents, siblings (unless legally adopted), and

extended family, referred to under the *FOIPOP Act* as Third Parties. Such information will be personal to each individual but is also information shared by others such as the parents. This includes birth place, cultural and racial background, religion, education and occupation of parents, and medical history.

For the purpose of this Special Review Report, medical history will be used as the example. Community Services has a form entitled "Medical History – Coming into Care" that is completed when the child comes into care. The following list provides insight into the details of what constitutes a person's "medical history", as it is referred to in the *Manual.* The medical form collects the following personal information:

- Date of birth
- Place of Birth
- Address
- Age of the Natural Father and Natural Mother
- Perinatal history including: attending physician, gestation, birth weight, type of delivery, APGAR, blood group, discharge weight, congenital deformities.
- Checklist of conditions which the Natural Father and/or Natural Mother including: mental illness, intellectual impairment, epilepsy, bleeding disease, drug ingestion, VD, diabetes, eczema, asthma, hay fever, congenital heart disease and other
- Developmental milestones
- Behavior patterns
- Previous hospitalization and serious illness
- For adolescents is the child sexually active, on birth control, previous abortions, drug abuse
- Immunization history
- Ongoing medical history.

[Manual, Section 3, Appendix 1 – "Medical Form-Coming into Care"]

One can see on reading the list how the personal information of a biological parent is also the personal information of the child – in other words, shared. Another example, the religion of the parent [personal information of the parent] is the religion of the child [personal information of the child]. This is what is meant by "shared" information, which is personal for both the child and the parent and when exchanged cannot constitute an unreasonable invasion of privacy.

The definition of personal health information in Nova Scotia's new *Personal Health Information Act* [also referred to as "PHIA"] incorporates the concept of shared information for individuals and their families. The interpretation section [s. 3] reads in part as follows:

> *(r) "personal health information" means identifying information about an individual, whether living or deceased, and in both recorded and unrecorded forms, if the information*
>
> > ***(i) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,***

The concept of shared information can seem confusing as it seems to merge the personal information of one person with that of another. But that is exactly what a person's *Life Story* is all about. It is what the concept of family is all about. Sharing information about individuals who make up a family may at first glance appear to be an invasion of their personal privacy, but we as a community have agreed that in the case of children and their families, except in extraordinary circumstances involving harm, the parties have implicitly agreed that such an invasion of their personal privacy is not unreasonable. It is expected and part of what it means to be a family.

I make the following Preliminary Recommendation regarding Shared Information:

- That Community Services disclose all information that falls within the meaning of personal information that is shared between the Applicants and a Third Party such as a biological parent, sibling or extended family.

Issue #2(b): Seeking Consent from Foster and Biological Parents as Third Parties

Whether Community Services should seek the consent of Third Parties such as former foster parents and biological parents/family members when processing an Application for Access to a Record and whether Community Services should seek consent of the applicant to disclose to the Third Party who is making the request.

During a past Review regarding a former foster child, I received Representations from the Federation of Foster Families of Nova Scotia and the Nova Scotia Council for the Family filed in support of the former foster child. Both reflected what I believe to be the position of the majority of foster and biological parents of former foster children: they want to remain or be in touch, are willing to share their personal information, and/or consider it appropriate for former foster children to have access to information about their childhood. The Applicant in that Review subsequently appealed because Community Services refused to follow my Recommendations. In the testimony in the *Sutherland* appeal, several foster parents testified. Their evidence was undeniably in support of staying in contact with their foster children who they acknowledged knew their names and where they lived. They testified that the only time they would not consent would be if there was any foreseeable actual harm, which the testimony confirmed would be a highly unusual exception.

The exemption under the *FOIPOP Act* regarding personal information falls under s. 20 and is a mandatory exemption. That is often interpreted by people in and out of government to mean that if there is personal information in a Record, it must always be withheld. This is not correct. Justice Moir of Nova Scotia's Supreme Court has laid out the analysis of how the mandatory exemption in s. 20 of the *FOIPOP Act* should be treated and this test has been followed consistently by my Office, as follows:

> *The onus rests with Community Services to demonstrate the applicability of s. 20 of the Act in the first instance.*

45(1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.

(2) Where the record or part that the applicant is refused access to contains personal information about a third party, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

While s. 45 reads that the burden rests on the Applicant to demonstrate an invasion of privacy is not unreasonable, the Nova Scotia Supreme Court, in Re House, [see also FI-08-12] has established the process public bodies should follow under s. 45 regarding burden and in assessing whether personal information should be released. Moir J. stated, at para. 6:

. . . I propose to consider this appeal in the following way:

1. Is the requested information "personal information" within 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. Otherwise . . .
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 appellant 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?
[Re House, [2000] N.S.J. No. 473 (S.C.)]
[NS Report FI-08-107]

A public body is correct in starting from the initial proposition that personal information of a Third Party should likely be withheld. This is the opposite place than a public body should begin for discretionary exemptions, where, in fact, it should start from the presumption that a person has the right to access information in accordance with the purpose section of the statute. In making its decision, the public body will then decide if it is necessary to sever or withhold under the various discretionary exemptions that *may* apply [cabinet confidences or solicitor-client privilege, financial or economic, law enforcement, health and safety]. In the case of this mandatory exemption , it is reasonable for a public body to begin with the presumption that if it is personal information it likely should be withheld. But that is not the end of the matter.

The public body must go on to examine whether the disclosure of the personal information would be *an **unreasonable** invasion of a Third Party's personal privacy.* Section 20 details in its subsections when disclosure should be presumed to be an

unreasonable invasion [s. 20(3)] and when it is presumed not to be an unreasonable invasion [s. 20(4)]. All relevant factors must be considered, including those found in s. 20(2) and those identified in this Special Review Report.

One of the key components in this situation once again points to the principle of respect. In regards to an Applicant, how could personal information that as a matter of right they are entitled to under the *Manual* be considered an unreasonable invasion if provided under the *FOIPOP Act*? Would the majority of foster parents consider disclosure of some of their personal information [such as their names] to their former foster children really be considered by them to be unreasonable? I think not and the Federation of Foster Families and the Nova Scotia Council for the Family agree with me.

> *The more fundamental question is whether or not the invasion of privacy of biological and foster parents would be unreasonable. I agree with the Applicant that providing him/her access to the personal information about his/her biological family, though defined by the statute as an invasion of privacy, cannot be considered to be an unreasonable one. Some of the severed personal information, particularly in relation to the Applicant's biological family, should be released as it is also the Applicant's personal information. In fact, Community Services' response to the Federation of Foster Parents agrees that former youth in care should have information about their biological and foster families.*
> *[NS Report FI-08-107]*

Regardless, with respect to Third Parties, they are entitled to make their own choices. That is the way to respect them and not have Community Services choosing for them or making assumptions. Foster parents, for example, can choose to share or not to share their personal information particularly if they are told **who** is seeking that information. This is the purpose of the notice provisions of the *FOIPOP Act* – to seek their consent to disclose. Section 20(4) stipulates that a disclosure of personal information is not an unreasonable invasion of a Third Party's personal privacy if *the Third Party has, in writing, consented to or requested the disclosure.* The *FOIPOP Act* seeks to establish a balance between the right to access and the right to privacy. One of the ways in which it achieves this balance is by making provision for people to be self-determining and make the choice to share their personal information.

> *I have no interest in invading the privacy of any 3rd parties, I just would like to piece together the puzzle of my life so far.*
> *[Quote from Applicant]*

The views expressed above are typical of former foster children: they do not want to invade the privacy of third parties. Invading someone's privacy is not necessary. What is necessary is that those involved be asked. If a Third Party consents there is no unreasonable invasion of privacy.

Community Services may consider tracking down Third Parties to seek their consent as being labour intensive. That is an unfortunate position to take and should be rethought.

Applicants do not want to breach anyone's privacy. Community Services can take steps to inform Third Parties who the Applicant is so that Third Parties, knowing who is asking, can make their own decision as to whether or not to consent in writing to the release of some or all of that part of the Record that contains their personal information. Community Services does not routinely seek consent of Third Parties or, at least, not in the Reviews that have come to the the Review Officer regarding former foster children.

I make the following Preliminary Recommendations regarding Consent from Third Parties:

- That Community Services should always begin the Notice process by obtaining the consent of the Applicant to disclose his or her name to the Third Party. This will allow the Third Party to know exactly who it is that is seeking that Third Party's personal information.
- That Community Services always contact the Third Party, advise them who it is that is seeking their personal information where consent has been given and ask the Third Party for his/her written consent to disclose his/her personal information to the Applicant.
- If obtaining and exchanging consents is not possible such as in the case of the death of the Third Party, that Community Services consider all relevant factors, including the provisions under s. 20(4), for the other basis when disclosure is deemed not an unreasonable invasion including:

    - Compelling circumstances affecting a person's health or safety [Refer to the *Re House* and *Sutherland v. Community Services* NSSC decisions for the requisite analysis and definition of compelling circumstances]
    - Another enactment authorizing disclosure.
    - How long the person [third party] has been deceased.

Issue #2(c): Best interests

Whether best interests should be the paramount consideration in guaranteeing present and former foster children access to their complete foster and biological family history.

Community Services in Nova Scotia, like all Canadian jurisdictions, operate on the basis that in child protection matters, the best interests of the child is the paramount consideration. The *Child and Family Services Act* [*"CFSA"*], the provincial child protection legislation, makes it patently clear that the *best interests of the child* is the primary consideration in matters regarding protection of children and promoting the integrity of families.

> *2(1) The purpose of this Act is to protect children from harm, promote the integrity of the family and* ***assure the best interests of children****.*

*(2) In all proceedings and matters pursuant to this Act, **the paramount consideration is the best interests of the child.***
[Emphasis added]

In a previous Review Report, I made the following Finding with respect to *best interests*:

The best interest of the child is the paramount consideration in matters involving child protection, which test is reflected in the United Nations Convention on the Rights of the Child, and the Nova Scotia Community and Family Services Act. Every child has the right to information about family, both foster and biological. The key principle under protection legislation is best interests. I find that in most instances, the best interests of children are served by access to information about their complete family history.
[NS Report FI-08-107]

The ramifications for a child who is removed from his or her biological family can be devastating and long-lasting. Regardless of whether a foster child is fortunate enough to find a loving and safe place within the foster care system, this will not supplant or displace a person's need to know the information that makes up their personal story: information about their parents, siblings and other extended family members including names, ages, birthplace, medical history, religious and cultural background, details regarding the time of placement in foster care and the reason for apprehension. This kind of information forms in large part how we come to view ourselves and what our life is all about: our *Life Story*.

You are definitely shaped by your past… and when that past is a mystery to you through no fault of your own, you are left in an unfortunate position … I have no interest in invading the privacy of any 3rd parties, I just would like to piece together the puzzle of my life so far.
[Quote from Applicant]

Community Services has the custody and control of the Records containing the sought after information. But who has the Record in their possession is only part of the equation. Who has the right to know the information in the Record is the other equally important part.

While the information received last year from Community Services was interesting without a doubt, the material leaves me with more questions than answers. Inclusion of the previously redacted sections might increase my understanding of this "missing period" of MY life. [EMPHASIS in the original]
[Quote from Applicant]

Community Services is the same public body responsible for apprehending the child and placing them into foster care [or its former "sister" children's aid societies]. It is deemed the parent of the child while in the care of the province. The Preamble to the *CFSA*

contains important principles, which according to the *Manual*, are the foundation for the rights of children in care. The Preamble states:

> *AND WHEREAS when it is necessary to remove children from the care and supervision of their parents or guardians, they should be provided for, as nearly as possible,* ***as if they were under the care and protection of wise and conscientious parents; . . .***
>
> *AND WHEREAS the rights of children, families and individuals are guaranteed by the rule of law and intervention into the affairs of individuals and families so as to* ***protect and affirm these rights must be governed by the rule of law****;*
>
> *AND WHEREAS the preservation of a child's cultural, racial and linguistic heritage promotes the healthy development of the child.*
> ***[Emphasis added]***

The *Manual* goes on to state in s. 2.1:

> *Making sure that children who are removed or separated from their families receive highquality substitute care, and, wherever it is safe and reasonably possible,* ***preserving the child's connections to family and community.***
> ***[Emphasis added]***

Like all good parents, Community Services has recognized the importance of its role in sharing as much information as possible particularly to those adults who were forced to live outside the family they were born into by retaining the custom and practice, documenting it in the *Manual* and preserving them in s. 5(3) of the *FOIPOP Act*.

If foster children are not adopted, it often means there may be other issues going on that placed or continue to place additional obstacles in their lives.

> *We are looking for answers that will help us move on from the traumatic events of our childhood. We have no family who can provide us the information we need… We would like to be able to have all our questions answered from when we were children. We feel that having full and complete access to our files would allow us this ... I hope you reconsider the decision made on my file and have the information release to my sister and I so we may get the answers needed to heal and move on with our lives. [Quote from Applicant]*

It is indisputable that for all people having accurate information about their lives provides them with a powerful tool because it provides them with knowledge, security and a sense of belonging while the absence of it can cause anxiety, grief and a sense of disconnect. This can be of even more critical importance to a child disenfranchised from family by becoming part of the foster child system.

If a present or former foster child makes an Application for Access to a Record under the *FOIPOP Act*, Community Services is under a duty to make a decision. The majority of exemptions under the legislation are discretionary, which means it can choose to rely on the exemption to withhold information or not. In making this type of decision, Community Services can only serve the best interests of a child for which it is responsible for by using that as the test in making its decision to release to or withhold information from former foster children.

I make the following Preliminary Recommendation regarding Best Interests:

- That Community Services always take best interests of "its present or former" child as the paramount consideration in exercising its discretion when making a decision under the *FOIPOP Act* in response to all Applications for Access to a Record from a present or former foster child.

Issue #2(d): Absurd Result

Whether the practice of withholding certain information, know to or provided by an Applicant by Community Services has an absurd result

An applicant provides information to Community Services over the course of the time being a foster child. Applicants are privy to personal information of others because they are living or have lived in their home. Community Services discloses information to applicants over the course of the time in foster care. To withhold this kind of information that is known to or provided by the Applicant, by characterizing its disclosure as unreasonable invasion of a Third Party's privacy, leads to an absurd and nonsensical result.

In a previous Review Report I steered clear of dealing with absurd result because it may have led to me inadvertently disclosing the contents of the Record. In that Review, I said.

> *The Applicant argues that the information should be given to him/her because s/he knows it already. In the course of the formal Review, the Applicant shared some of the information s/he claims to know forms part of the Record where it has been redacted. Community Services takes the position that refusing third party information is its obligation under the Act and to refuse information the Applicant already claims s/he knows does not lead to an absurd result. I am wary of addressing the "absurd result" principle in this case because it risks confirming or denying information in the Record. Fortunately, as a result of the reasons set out above regarding the prior custom in effect for accessing child in care records, it has been unnecessary for me to consider the information the Applicant claims to know, and so I make no comment related to the "absurd result" principle.*
> *[FI-08-107]*

In this Special Review Report, there is no specific Record being discussed. This gives me the opportunity to expand as follows:

> *That being said, it is important to note that information directly provided by or to the Applicant, as evidenced by such wording as "I was talking to [the Applicant] and told [him/her] . . . " cannot be severed, even if it names another person. This information was previously disclosed to or by the Applicant, therefore it is not an unreasonable invasion of privacy. This is clearly information known to the Applicant,* ***even if forgotten****. This is consistent with the purpose of the Act to give an individual a right to access and correct personal information. If information that belongs to the Applicant, such as self-generated conversations, is not disclosed, then the right to request a correction to that information is rendered meaningless.*
> ***[Emphasis added]***

Here is a breakdown of a sample of the kinds of information that have been severed from the copy of the Records provided to the five Applicants.

- Statements made by the Applicant
- The name and details provided by the Applicant about a loved one
- Details from the Applicant's job application

These examples are all information that was clearly provided by or known to the Applicants and clearly demonstrate the absurdity of severing this information.

I make the following Preliminary Recommendation regarding Absurd Result:

- That Community Services disclose all information that is already known to or has been provided by the Applicants.

Implementation of Recommendations:

1. That Community Services respect the rule of law and comply with s. 5(3) of the *FOIPOP Act*. That means that the custom and practice embodied in the *Manual* be respected and followed for all present and former foster children. The right to information guaranteed by custom under the *Manual* is to be treated as paramount in accordance with s. 5(3) of the *FOIPOP Act*.
2. That Community Services process all requests for information from present and former foster children in accordance with the *Manual*. This means that applicants would not be directed to apply for their information under the *FOIPOP Act* but rather would have the information made available in accordance with the custom and practice stipulated by the *Manual*.
3. For any additional information not referred to in the *Manual*, which, however, is not an exhaustive list, Community Services would advise applicants that they are free to make an application under the *FOIPOP Act* for any supplemental information they seek. Where an access request follows disclosure decisions made under the *Manual*, Community Services should take an equally open and accountable approach as allowed

for in the *Manual.*

4. That Community Services disclose all information that falls within the meaning of personal information that is shared between the Applicants and a Third Party such as a biological parent, sibling or extended family.

5. That Community Services should always begin the Notice process by obtaining the consent of the Applicant to disclose his or her name to the Third Party. This will allow the Third Party to know exactly who it is that is seeking that Third Party's personal information.

6. That Community Services always contact the Third Party, advise them who it is that is seeking their personal information where consent has been given and ask the Third Party for his/her written consent to disclose his/her personal information to the Applicant.

7. If obtaining and exchanging consents is not possible such as in the case of the death of the Third Party, that Community Services consider all relevant factors, including the provisions under s. 20(4), for the other basis when disclosure is deemed not an unreasonable invasion including:

    a. Compelling circumstances affecting a person's health or safety [Refer to the *Re House* and *Sutherland v. Community Services* NSSC decisions for the requisite analysis and definition of compelling circumstances]
    b. Another enactment authorizing disclosure.
    c. How long the person [third party] has been deceased.

8. That Community Services always take the best interests of "its present or former" child as the paramount consideration in exercising its discretion when making a decision under the *FOIPOP Act* in response to all Applications for Access to a Record from a present or former foster child.

9. That Community Services disclose all information that is already known to or has been provided by the Applicants.

First, pursuant to s. 38(2) of the *FOIPOP Act*, I request a response from Community Services accepting or rejecting the Preliminary Recommendations within 15 days of the receipt of this Special Review Report. Second, if the Preliminary Recommendations are accepted, it is expected that Community Services will re-issue an amended decision taking into account the Recommendations above to each of the five Applicants within 30 days of acceptance, a copy of which is to be provided to the Review Officer.

Respectfully submitted,

Dulcie McCallum, LLB
Freedom of Information and Protection of Privacy Review Officer for Nova Scotia