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

# REVIEW REPORT 23-10

# October 13, 2023

# Department of Community Services

**Summary:** The applicant is a former child in the care of the Department of Community Services (public body). She requested access to all information held by the public body in relation to her time in care including information about the circumstances for her apprehension and the foster homes in which she was placed. The public body provided her with responsive records but withheld portions of them on the basis that disclosing those portions would be an unreasonable invasion of various third parties' personal privacy (s. 20 of the *Freedom of Information and Protection of Privacy Act*). The Commissioner finds that disclosure of a very small amount of the withheld information would be an unreasonable invasion of multiple third parties' personal privacy and so recommends it continue to be withheld. However, she also finds that disclosure of the majority of the withheld information would not be an unreasonable invasion of the third parties' personal privacy and so recommends it be released to the applicant.

## INTRODUCTION:

[1] At a young age, the applicant was apprehended by the Children's Aid Society, which is now a part of the Department of Community Services (public body). The applicant was placed in various foster homes throughout her childhood. As an adult, the applicant made an access to information request (access request) for all records held by the public body regarding her time in care in an effort to piece together her life story. She was seeking information that might help explain why she was placed into foster care, why she was not returned to the custody of her biological parents, information about the various foster care homes she was placed into, and information about her medical history.

[2] In response to her access request, the public body provided the applicant with the file it had on her but redacted some information on the basis that its release would be an unreasonable invasion of multiple third parties' privacy. The public body said that the information must be withheld under s. 20 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*).

[3] The records under review consist of 133 pages of reports, documentation and correspondence from social workers, provincial departments, and public institutions. All of the responsive records pertain to the applicant while she was in foster care. The applicant was

provided with the 133 pages, but the public body redacted almost all references to any personal information of third parties contained within the records.

[4] Following the informal resolution process at the Office of the Information and Privacy Commissioner (OIPC), the public body agreed to disclose the previously redacted names of public sector employees and the names and contact information of the applicant's predominant foster parents. However, it continued to maintain the view that releasing the remainder of the redacted information (including information about other foster parents) would result in the unreasonable invasion of various third parties' personal privacy. This file proceeded to me to issue a public review report as the applicant is seeking full disclosure of the records without any severing.

**ISSUE:**

[5] Was the public body required to refuse access to information under s. 20 of *FOIPOP* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

**DISCUSSION:**

**Burden of proof**

[6] The public body bears the burden of proving that the applicant has no right of access to a record or part of a record.[1] Where the public body has established that s. 20(1) applies, s. 45(2) shifts the burden to the applicant to demonstrate that the disclosure of third party personal information would not result in an unreasonable invasion of personal privacy.

**Was the public body required to refuse access to information under s. 20 of *FOIPOP* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?**

[7] The public body redacted information on the responsive records under s. 20 of *FOIPOP*, which requires public bodies to withhold information if its disclosure would be an unreasonable invasion of a third party's privacy. For the reasons provided below, I find that disclosure of a very small amount of the withheld information would be an unreasonable invasion of multiple third parties' personal privacy. However, disclosure of the majority of the withheld information would not be an unreasonable invasion of the third parties' personal privacy and so should be disclosed to the applicant.

[8] Section 20 of *FOIPOP* provides in part:

> 20(1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[1] *FOIPOP* s. 45.

[9] It is well established in Nova Scotia that a four-step approach is required when evaluating whether s. 20 requires that a public body refuse access to personal information, often referred to as the *House* test.[2] The four steps are:

1. Is the requested information "personal information" within the meaning of s. 3(1)(i)? If not, that is the end. Otherwise, the public body must go on.
2. Are any of the conditions of s. 20(4) satisfied? If so, that is the end. Otherwise, the public body must go on.
3. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?
4. In light of any s. 20(3) presumption, and in light of the burden upon the applicant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?

[10] Before getting into the analysis, it is important to remember that s. 20 requires a balancing of the information rights of the applicant against the privacy of others. As explained in *Nova Scotia Review Report 17-04*, "accountability takes on special meaning when public servants have made decisions that have a direct and lasting impact at an individual level. When decisions are made based on highly sensitive personal information, as is often the case in child protection matters, the public body is faced with the difficult challenge of providing enough information to satisfy the needs of the affected individual, while still preserving the dignity of those whose personal information is found in the records."[3] Section 20 does not require a public body to withhold all personal information of a third party. Rather, s. 20 contemplates that in some cases, third party personal information may be disclosed, even if that disclosure may be an invasion of a third party's personal privacy. What s. 20 prohibits is disclosure that would result in an *unreasonable* invasion of a third party's personal privacy.

[11] As noted in previous reports of this office, the fact that the applicant bears the burden of proving that the disclosure of information would not be an unreasonable invasion of a third party's personal privacy does not relieve the public body from its responsibility to properly apply *FOIPOP* and to provide reasons for the exemptions it has chosen.[4] In my view, the public body has not provided sufficient reasons to me or to the applicant for why it applied s. 20 to these records.

***Step 1: Is the requested information "personal information" within the meaning of s. 3(1)(i)? If not, that is the end. Otherwise, the public body must go on.***

[12] "Personal information" is a term defined in s. 3(1)(i) of *FOIPOP* and includes things like names, addresses, information about an individual's health care history, education, finances, employment history, and anyone's else's opinions about the individual.

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[2] As set out in *House, Re*, 2000 CanLII 20401 (NS SC) and *Sutherland v. Nova Scotia (Community Services)*, 2013 NSSC 1 (CanLII). The OIPC has consistently followed this approach.
[3] *NS Review Report 17-04, Nova Scotia (Community Services) (Re)*, 2017 NSOIPC 4 (CanLII), at para. 11.
[4] *NS Review Report 16-04, Department of Community Services (Re)*, 2016 NSOIPC 4 (CanLII), at para. 9.

[13] For clarity, please note that when I use the terms "birth parents" or "biological parents" in this report, I am referring to both the applicant's biological parents and her stepfather. This is not a comment on what the applicant or any person considers qualifying as family; it is simply for ease of readability of this report.

[14] The type of information withheld about third parties includes:

a. names, addresses, dates of birth and ages;
b. medical information;
c. employment information;
d. information about the living arrangements and general circumstances of the applicant's birth family around the time she was taken into care, as well as while she remained in care;
e. observations and commentary made by public body staff about multiple third parties in relation to the applicant; and
f. views and opinions about the applicant made by third parties.[5]

[15] At times, the public body withheld information describing the personal views or opinions of various third parties about the applicant (item f in the paragraph above). As set out in s. 3(1)(i) of *FOIPOP*, personal information includes an individual's personal views or opinions, *except if they are about someone else*. Whenever the withheld information consists of a third party's personal views or opinions about the applicant, that is her personal information, not that of the third party. It is not necessary to go through the remaining steps of the *House* test when the information consists of a third party's personal views or opinions about the applicant. The applicant is entitled to that information, and it should be disclosed to her.

[16] I find that, aside from any third party's views or opinions about the applicant, the withheld information qualifies as personal information of third parties. However, much of it also qualifies as the personal information of the applicant in that it includes information about her. I will discuss this in more detail under step 4 of this analysis.

***Step 2: Are any of the conditions of s. 20(4) satisfied? If so, that is the end. Otherwise, the public body must go on.***

[17] I do not find that any of the considerations set out in s. 20(4) of *FOIPOP* apply to the withheld information.

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

[18] Section 20(3) of *FOIPOP* lists circumstances where disclosure is presumed to be an unreasonable invasion of privacy. However, unlike s. 20(4), s. 20(3) lists rebuttable presumptions.

[5] In many but not all cases, the public body disclosed to the applicant various pieces of information, redacting only the name. A disclosure now of the name would identify who the information was about. For purposes of ease of reading this report, when I refer to withheld information, I include those circumstances where revealing the name would connect the already disclosed information with the third party it is about.

[19] The public body's representations on s. 20(3) were:

> Publicly confirming whether an individual had involvement with the Department would fall within a number of classes of information listed at Section 20(3). Specifically, 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). Therefore, to respond with any records to this request would confirm whether the Department has records about the person and would be presumed to be an unreasonable invasion of a third party's personal privacy.

[20] The public body had already disclosed a redacted version of the records to the applicant by the time it wrote its representations. Given that the applicant was apprehended, it is already clear that her biological parents were accessing social-services benefits. Finally, this office has previously made findings that *FOIPOP* does not contemplate a refusal to confirm or deny the existence of records based on s. 20.[6]

[21] There are two presumptions in s. 20(3) that are relevant here:

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

[22] I find that the following information within the responsive records is subject to a s. 20(3) presumption:

- medical information about third parties (20(3)(a)); and
- employment and educational history of third parties (20(3)(d)).

[23] In contrast, the remaining withheld third party personal information is not subject to any presumed unreasonable invasion of personal privacy listed in s. 20(3). This includes such information as:

- names, addresses, ages, and dates of birth;
- reasons why the applicant was placed into care;
- information about the living arrangements and general circumstances of the applicant's birth family around the time she was taken into care, as well as while she remained in care; and
- observations and commentary made by public body staff about multiple third parties in relation to the applicant.

[6] NS Review Report 20-05, Department of Community Services (Re), 2020 NSOIPC 5 (CanLII), at para. 16.

***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?***

[24] The final step is to assess whether disclosure of the information would result in an unreasonable invasion of a third party's personal privacy. Section 20(2) of *FOIPOP* directs the public body to consider all relevant circumstances. It lists several potential circumstances but also leaves room for other possible considerations.

[25] The public body was of the view that none of the circumstances listed in s. 20(2) apply in this case. In my view, there are some circumstances in s. 20(2) that are relevant. My analysis will begin with those considerations listed in s. 20(2) of *FOIPOP* that may be relevant to the circumstances in this case. I will then address other relevant considerations.

[26] I will note here that the information on the records already disclosed to the applicant makes clear that the applicant knew and continued to have contact with her birth mother and stepfather throughout her time in foster care. The applicant explained that she already knows the names and addresses of her birth parents, foster parents, birth siblings and acquaintances. She said she is aware of health challenges that run in her biological family. She said her birth and foster parents are now deceased.

*Subjecting the activities of the government or the public body to public scrutiny – s. 20(2)(a)*

[27] Section 20(2)(a) states that a relevant circumstance is whether the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny. The public body said that "none of the factors listed in section 20(2) applied to mitigate the presumed unreasonable invasion of privacy that confirming whether an individual had involvement with the public body would have." Past reviews of previous Commissioners[7] have detailed how and why there is significant public interest in how the public body (which is a part of the Government of Nova Scotia) carries out its role of apprehending children and removing them from the care of their birth parent(s). The public body does not appear to realize this despite the numerous past reviews and particularly given its role and mandate. Removing children from the care of their parents is a necessary function but it is also clearly an activity that warrants public scrutiny.

*Unfair damage to reputation of any person – s. 20(2)(h)*

[28] Some of the withheld information speaks to applicant's biological mother's parenting skills and behaviour at the time the applicant was taken into care, as well as her biological parents' behaviours during their continued involvement with the applicant throughout her time in care.

[29] The withheld information at times reveals shortcomings of the applicant's biological parents' behaviours but that information is directly related to the reasons why the applicant was taken into care or kept in care. The applicant was apprehended and put into foster care, meaning

[7] See, for example, *NS Review Report F1-11-71, Department of Community Services (Re)*, 2015 NSOIPC, at paras. 29-31; *NS Review Report FI-10-95, Nova Scotia (Community Services) (Re)*, 2015 CanLII 79097 (NS FOIPOP), at para. 47.

there was some cause why her biological parents could not provide the applicant with sufficient care. I am of the view that disclosure of any such information about the applicant's biological parents would not unfairly damage their reputation. It might damage their reputation but if so, it would be for reasons that directly affected the applicant's life and for this reason is not "unfair".

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

[30] Section 20(2)(f) of *FOIPOP* provides that whether or not the personal information was supplied in confidence is a relevant factor.

[31] The public body did not argue that the information had been supplied in confidence, saying only that none of the factors in s. 20(2) applied.

[32] With respect to information about the applicant's birth parents, all of it was collected and recorded by public body employees, mostly at home visits. It is safe to presume that they did not do so voluntarily and must have done so on the understanding that they were required to do so. Compulsory supply of personal information will not ordinarily be confidential unless there is some indications in the legislation relevant to the compulsory supply that establish confidentiality.[8]

[33] The Supreme Court of Nova Scotia in *Sutherland v. Nova Scotia (Community Services)*[9] examined in some detail information relating to foster families. In *Sutherland*, according to the Court, the record at issue included detailed personal information supplied by foster parents to the Department. In addition, the Court had before it evidence, directly from foster parents, regarding their expectation of privacy and the potential harms that might arise from the disclosure of the information at issue. Based on the evidence and the nature of the record, the Court determined that information provided by foster parents in that case was supplied in confidence.

[34] In this case, detailed personal information supplied by foster parents is not at issue. Furthermore, some of the foster family, birth relative, and acquaintance information in the records consists solely of names and contact information. This information would have been clear to the applicant and likely to neighbours, friends, teachers and health care providers as well. I find, given the non-sensitive nature of this information and the likelihood that it was commonly known in the community, it was not information "supplied in confidence" within the meaning of s. 20(2)(f).

[35] In some cases, the foster family, birth relative, and acquaintance information on the records is more sensitive in that it includes observations and opinions made by public body employees about them. However, this information was collected by the public body in relation to the applicant being kept in care. Given the lack of evidence and argument on this point and the particular circumstances of this case, I am not convinced this information was supplied in confidence within the meaning of s. 20(2)(f).

[8] *Keating v. Nova Scotia (Attorney General)*, 2001 NSSC 85 (CanLII), at para. 56.
[9] *Sutherland v. Nova Scotia (Community Services)*, 2013 NSSC 1 (CanLII).

*Other considerations*

[36] Section 20(2) of *FOIPOP* is not an exhaustive list dictating the only factors that can be considered. Rather, it leaves open the door to consider other relevant circumstances in deciding whether disclosure would be an unreasonable invasion of a third party's personal privacy. As such, I have considered other relevant considerations.

i. Best interests of the child

[37] Several past review reports issued from this office go into detail about the significance of the best interests of the child in terms of knowing their family history and why they were placed into care.[10] The same reasoning applies in this review and weighs in favour of disclosure of any information about why the applicant was placed into care and never returned to the care of a birth parent.

ii. Purposes of the Act

[38] Section 20 of *FOIPOP* is a limited and specific exemption that must be interpreted in light of the purposes of the Act. One of those purposes is the right of individuals to have access to information about themselves. For most children, knowing the names of their parents and the circumstances of their upbringing is a given. Adopted children know the names and family histories of their adoptive parents, but foster children taken into care may have no such history.

[39] Section 2 of *FOIPOP* provides that one of the purposes of the Act is to ensure that public bodies are fully accountable to the public by giving individuals a right of access to and a right to correction of personal information about themselves. The intended use of the information is a relevant circumstance under s. 20(2) and where that use directly serves an element of the complex purposes of the Act, that circumstance would favour disclosure.[11]

[40] The records at issue are the documents used by the public body to record and rationalize why it took and kept the applicant in care. Third party personal information was only collected because it was relevant to these decisions made about the applicant. For example, information about birth family members like who they were and where they lived also makes up the family history of the applicant. The information about third parties withheld from the applicant is contained on records created for the purpose of documenting decisions made about her. The records inevitably include information about third parties, including the applicant's biological parents, birth relatives, foster parents, caregivers, and acquaintances. There is no question that this information constitutes the third parties' personal information. However, it is important to remember that this information was recorded for the purpose of making decisions that profoundly and predominantly affected the applicant. It describes why she was taken into and kept in the care of the public body. In this way, the personal information of biological family members is, in many places, also the personal information of the applicant. The fact that personal information may relate to more than one person is contemplated in s. 3 of Nova Scotia's *Personal Health Information Act* where the definition of "personal health information" includes the health history of the individual's family.

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[10] See *NS Review Report F1-11-71, Department of Community Services (Re)*, 2015 NSOIPC, at paras. 43-46; *NS Review Report FI-10-95, Nova Scotia (Community Services) (Re)*, 2015 CanLII 79097 (NS FOIPOP), at paras. 54-57.

[11] *House, Re*, 2000 CanLII 20401 (NS SC), at p. 12.

[41] Disclosing the personal information of third parties, including some biological parent and relative health history, would serve the important purpose of granting the applicant access to her own personal information. Another element of ensuring that the purposes of the Act are satisfied is the fact that information, particularly about why an application was made to take the applicant into care, is not available from any other official source. This was a decision of the public body, and it is the source of the information.

[42] The fact that the disclosure of the withheld information would serve an important purpose of the Act by providing the applicant with her own personal information and the fact that there is no other source from which the applicant could obtain some of the information weighs heavily in favour of disclosure.

iii. Passage of time and likely death of some third parties

[43] The applicant's evidence is that her birth parents and foster parents are deceased. Deceased persons do have privacy rights, but those rights diminish over time. The records focus on the 1980's with the most recent date being the late 1980's. At least 30 years have now passed. In my view, the passage of time favours disclosure of the withheld information.

iv. Sensitivity of the information

[44] The sensitivity of the withheld information is another relevant consideration in determining whether disclosure of the information would be an unreasonable invasion of the third parties' personal privacy.

[45] Some of the withheld information is very sensitive while some of it is not. Where the withheld information is factual in nature and relates to biological family history, like listing names and occupation history, this information is only of moderate sensitivity and favours disclosure.[12]

[46] On the other hand, at times the withheld information is more sensitive. For example, the withheld information includes observations made by public body staff about the behaviour of various third parties. In some cases, the information mixed in with those observations includes opinions made by public body staff about various third parties. That being said, the observations and opinions are in the narrative in relation to the placement and home circumstances of the applicant. The sensitive nature of this type of information weighs against disclosure.

[47] Also, a small portion of the withheld information speaks to personal information of foster parents that is not always directly related to the applicant's personal history. The sensitivity of this information weighs against disclosure.

[12] In *NS Review Report 17-04, Nova Scotia (Community Services) (Re*), 2017 NSOIPC 4 (CanLII), a recommendation was made that names of biological siblings not be released when the applicant was separated from siblings as a young child. However, in this case, the evidence demonstrates that the applicant maintained contact with her biological siblings while in foster care.

*Balancing the considerations*

[48] Obtaining complete and unredacted information from her foster care records is in the interests of the applicant. Withholding the redacted information leaves the applicant questioning many details about her childhood that could possibly assist her in flushing out her life story. The applicant knows, or knew, her biological parents, many of her foster parents, biological relatives, and acquaintances. Much of the withheld information is already known by the applicant. According to the applicant, her birth and foster parents have died. Furthermore, much of the withheld information is not sensitive and a significant amount of time has passed since the information was collected.

[49] In many cases, the public body withheld observations and commentary made by public body staff about the applicant's biological and foster families, as well as some acquaintances. However, this information is on the records because it makes up the public body's appraisal of the applicant's home situation – a home in which the applicant was also a part. The comments are narrative in relation to the placement of the applicant. The information was collected by the public body to rationalize why the applicant was taken into and kept in care and used to make decisions that profoundly impacted her.

[50] In terms of medical information about the applicant's biological relatives, the balancing of factors weighs in favour of disclosing potential hereditary conditions and/or medical information relating to the reasons the applicant was taken into and kept in care. This medical information forms an important part of the applicant's family history. The disclosure of this information would serve the purposes of the Act by giving the applicant access to her personal medical history. This information can be disclosed to the applicant without causing an unreasonable invasion of the third parties' personal privacy.

[51] In contrast, there is a small amount of the withheld information that, after balancing the relevant circumstances, I find would result in an unreasonable invasion of third parties' privacy. At times the withheld information speaks to third party medical information that is not relevant to why the applicant was taken into and kept in care, or medical information about biological relatives unrelated to potential hereditary conditions. The evidence in this case does not support disclosure of such information. The same is true for any employment and educational history of third parties, other than the applicant's birth parents, that is contained within the records, but is not related to why the applicant was taken into and kept in care. The balancing of factors does not weigh in favour of releasing this information.

**FINDINGS & RECOMMENDATIONS:**

[52] I find that:

1. Third parties' personal views or opinions about the applicant are the applicant's personal information, not that of the third parties.
2. The remainder of the withheld information (aside from third parties' personal views or opinions about the applicant) is the personal information of multiple third parties.

3. Disclosure of medical information about foster families, acquaintances and birth relatives (including birth parents) that is not related to the reasons why the applicant was taken into and kept in care would result in an unreasonable invasion of their personal privacy.
4. Disclosure of medical information about biological relatives (including birth parents) related to any hereditary condition would not result in an unreasonable invasion of their personal privacy.
5. Disclosure of employment and educational history about foster families, acquaintances, and any biological relatives that are not the applicant's birth parents would result in an unreasonable invasion of their personal privacy.
6. Disclosure of all other information about the applicant's birth parents would not result in an unreasonable invasion of their personal privacy.

[53] I recommend that the public body:

1. Disclose all third parties' views or opinions about the applicant, as they are the applicant's personal information, not that of the third parties.
2. Continue to withhold the personal information listed below pursuant to s. 20 of *FOIPOP* because the presumption that its disclosure would be an unreasonable invasion of third parties' personal privacy has not been outweighed:
    a. All medical information about foster families and acquaintances that is not related to the reasons why the applicant was taken into and kept in care;
    b. All medical information about biological relatives that is not related to the reasons why the applicant was taken into and kept in care, or is not related to a hereditary condition; and
    c. Employment and educational history of any third parties that are not the applicant's birth parents.
3. Disclose the remainder of the withheld information within 45 days of the date of this review report. Based on the balancing of all the relevant circumstances, disclosure of the remainder of the withheld information would not result in an unreasonable invasion of any third party's personal privacy.

October 13, 2023

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia