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

REVIEW REPORT 24-12

June 24, 2024

Department of Community Services

Summary: When the applicant was a young child, there were reports of abuse in their home. As a result, the Department of Community Services (public body) became involved in the applicant's life. More than 30 years later, the applicant asked the public body for all the records it had relating to the period the public body was involved in their life. The public body released some information in the responsive records but withheld significant portions on the basis that disclosing those portions would be an unreasonable invasion of multiple third parties' personal privacy under s. 20 (personal information) of the *Freedom of Information and Protection of Privacy Act*. The Commissioner finds that disclosure of the withheld information would not be an unreasonable invasion of the third parties' personal privacy and so recommends the records be released in full to the applicant.

INTRODUCTION:

[1] As a young child, the applicant says she suffered physical abuse by a family member.[1] The Department of Community Services (public body) became involved with the applicant and their family around this time because as part of its role, the public body is responsible for child protection matters.

[2] More than 30 years later, the applicant asked the public body for the records it held about its involvement in the applicant's childhood. In response, the public body located 51 pages of responsive records that contained things like child protection case notes, intake sheets and correspondence relating to its involvement in the applicant's life. The public body withheld large swathes of information within the responsive records as it believed was required pursuant to s. 20 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). Section 20 requires public bodies to withhold information if its disclosure would be an unreasonable invasion of a third party's personal privacy.

[3] The applicant has undergone years of counselling to help heal from the trauma of the abuse they say they suffered. But given they were so young, they are missing pieces of the puzzle they

[1] Despite the information that the applicant already has in their possession, this review report will refer to suspected abuse and/or the applicant's view that child abuse occurred.

believe might be in the responsive records and may assist in their healing process. They want the withheld information as they want to understand why the public body made the decisions it did about them in response to the suspected abuse.

[4] Following the informal resolution process with the Office of the Information and Privacy Commissioner (OIPC), the public body agreed to disclose a small amount of additional information to the applicant but continued to maintain that it was required to withhold the rest. This file proceeded to this public review report as the applicant is seeking full disclosure of the records without any severing applied to them.

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.[2] 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 withhold 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 in 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 the withheld information would not be an unreasonable invasion of multiple 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.

[9] Before I begin the analysis, I remind the public body that as explained in many Nova Scotia review reports,[3] s. 20 requires a balancing of the information rights of the applicant against the

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[2] *FOIPOP*, s. 45.

[3] See, for example, *NS Review Report 23-10*, *Nova Scotia (Department of Community Services) (Re)*, 2023 NSOIPC 11 (CanLII), at para. 10; *NS Review Report 17-04, Nova Scotia (Community Services) (Re),* 2017 NSOIPC 4 (CanLII), at para. 11; and *NS Review Report FI-10-95, Nova Scotia (Community Services) (Re)*, 2015 CanLII 79097 (NS FOIPOP), at para. 13.

privacy rights of others. 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 be an ***unreasonable*** invasion of a third party's personal privacy.

[10] This balancing act is particularly challenging in child protection related matters because the public body is faced with the difficult task of providing enough information to satisfy the needs of the applicant, while still preserving the privacy rights of those whose personal information is found in the records. The public body must consider that one of the purposes of *FOIPOP* is to ensure public bodies are fully accountable to the public. Accountability takes on special meaning when public servants have made decisions that have a direct and lasting impact at an individual level. In this case, the public body failed to balance its responsibilities of being transparent and protecting personal information.

[11] It is well established in Nova Scotia that a four-step approach is required when evaluating whether s. 20 requires a public body to refuse access to personal information, often referred to as the *House* test.[4] 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?

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 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.

[13] The type of information withheld about third parties in the responsive records in this case includes:

- names, addresses, and dates of birth of family members;
- medical information of family members;
- employment information of family members;
- information about the living arrangements and general circumstances of the applicant's family around the time of the suspected child abuse; and

[4] 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.

- observations and commentary made by public body staff (and other public officials) about third parties in relation to the applicant.

[14] The applicant said that the above information is not just the third parties' personal information but the applicant's personal information as well. The applicant said that since the responsive records contain information about the suspected abuse, the information is also a part of their history.

[15] The public body said that the withheld information is not directly about the applicant and so its release would be an unreasonable invasion of multiple third parties' personal privacy.

[16] The withheld information does qualify as the personal information of multiple third parties. However, the only reason the public body has this personal information about the applicant and third parties is because of its statutory duty to protect children. The records were created for the purpose of documenting whether the applicant was a child in need of protection and to record decisions made about them. The subject of the public body's decisions, and the person directly affected by the decisions, was and remains, the applicant.

[17] The third parties' personal information in the records also reveals the personal information of the applicant, and the reasons for the public body's involvement in the applicant's life at that time. For example, information about the living arrangements and circumstances of the applicant's parents is also information about the applicant's living arrangements and circumstances. There is no question that this information is also the personal information of third parties. However, where personal information is shared by several people, the question of balancing access and privacy is not resolved by deciding that certain personal information is 'more about one person than another'.[5]

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.

[18] Neither party argued 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)?

[19] 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.

[20] The public body asserted that disclosure of the severed information would be presumed to be an unreasonable invasion of a third party's personal privacy further to the following provisions in s. 20(3):

(a) the personal information relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation;

[5] *NS Review Report FI-10-95, Nova Scotia (Community Services) (Re)*, 2015 CanLII 79097 (NS FOIPOP), at para. 22.

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
(d) the personal information relates to employment or educational history; and
(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations.

[21] Although public body did not identify to which portions of the records it believes these presumptions apply, it went on to state that the information severed in the records:

> includes some health care information, including a mental health assessment, employment information, and personal evaluations of people, for people other than the applicant. The severed personal information also relates to an investigation into a possible violation of law. The records in the package pertain to an investigation carried out by DCS concerning child abuse, which resulted in information being added to the Child Abuse Registry [*sic*].

[22] I find that the above s. 20(3) provisions do apply to this matter, but that is not the end of the test.

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?

[23] 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.

[24] The public body stated that "none of the factors listed in Section 20(2) applied to mitigate the presumed unreasonable invasion of privacy." The applicant disagrees. So do I.

[25] My analysis will begin with those considerations listed in s. 20(2) of *FOIPOP* that may be relevant to this case. I will then address other relevant considerations.

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

[26] Section 20(2)(a) of *FOIPOP* 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.

[27] The public body said, "There is no activity of the Government of Nova Scotia at issue."

[28] Children are arguably society's most vulnerable individuals. People who suspect children of being abused have a duty to report the situation and can do so anonymously. As a child protection agency, the public body is required to review these reports and decide whether an investigation must take place. When a child is not able to be safely cared for by their parent(s),

intervention by the public body is warranted. The effects of the intervention may be that the child is kept in the home, placed in foster care or adopted. The impacts of such decisions are significant and would be felt by all family members. Such decisions need to be carefully made to ensure the protection and welfare of the child. This is an important task. I have no doubt that the public body understands the importance and significance of its role in protecting children and that any decisions it makes are not taken lightly. However, the public body's argument that its actions do not deserve public scrutiny is concerning. Past Nova Scotia review reports[6] 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 ensuring that children receive the care essential for their wellbeing. The public body's continued reliance on its submission that public scrutiny is a not a factor to consider in relation to child protection cases disregards settled law and is illogical given the profound significance of keeping a child in their home or removing them from it. I strongly urge the public body in future representations to acknowledge that when it has made a decision to take a child from their home or to keep them in it, the very action of doing so is deserving of public scrutiny. This factor clearly weighs in favour of disclosure.

Supplied in confidence—s. 20(2)(f)

[29] Section 20(2)(f) of *FOIPOP* provides that whether the personal information was supplied in confidence is a relevant factor.

[30] The information in the records was collected and recorded by public body employees. It is safe to presume that the people who provided information to the public body employees did not do so voluntarily. As I said in *NS Review Report 23-10*, compulsory supply of personal information will not ordinarily be confidential unless there are some indications in the legislation relevant to the compulsory supply that establish confidentiality.[7]

[31] Given the lack of argument and evidence provided regarding this factor, I am not convinced the information was "supplied in confidence" within the meaning of s. 20(2)(f) and this weighs in favour of disclosure.

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

[32] Some of the withheld information reveals shortcomings of the applicant's home life which necessitated the child protection investigation. It also reveals factors that the public body likely took into consideration when deciding not to take the applicant into care. I am of the view that disclosure of any such information about the applicant's home life and the information related to the suspected abuse would not unfairly damage anyone's reputation. It might damage the reputation of the person the applicant says was their abuser but if so, it would be for reasons that directly affected the applicant's life and for this reason would not be "unfair". This weighs in favour of disclosure.

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

[7] *NS Review Report 23-10*, *Nova Scotia (Department of Community Services) (Re)*, 2023 NSOIPC 11 (CanLII), at para. 32.

Other considerations

[33] Section 20(2) of *FOIPOP* is not an exhaustive list dictating the only factors that can be considered. Rather, it leaves the door open 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.

Knowledge of the applicant

[34] The applicant provided a substantial amount of information that demonstrates they are aware of the name of the person they say abused them and the names of other third parties discussed in the responsive records. The applicant provided copies of their own medical records of the incidents that precipitated the child protection investigation.

[35] When it provided the first disclosure package to the applicant, the public body redacted information contained in the medical records that the applicant had provided to the public body when they made their access request. To quote the applicant, "…some of the documents sent to me, redacted, were copies of documents I sent with my original application, so to send those back redacted is a bit absurd." I agree. It is clear from the applicant's representations that they have knowledge of individuals, addresses, dates and certain events that led to the child protection investigation. The applicant also has knowledge of the current general whereabouts of the person who they say was their abuser and stated that nothing in the withheld material would disclose where that person is. The applicant said that it does not matter to them where the person they said abused them is currently located.

[36] The applicant has knowledge of these events, of the third parties involved in them and was in fact the person at the centre of the child protection investigation. These factors weigh in favour of disclosure.

Best interests of child

[37] Several past Nova Scotia review reports go into detail about the significance of the best interests of the child in terms of child protection cases and knowing their family history.[8] The same reasoning applies in this review and weighs strongly in favour of disclosure of any information about why the applicant was the subject of a child protection investigation and the ultimate decision to have them remain in the family home.

Withheld information adversely affected the applicant

[38] The applicant stated they have been going to counselling for many years to help heal the traumas of their abuse. The applicant wants to understand why the public body made the decision to keep them in their home. The applicant also says there was subsequent abuse and wants to know why the person they say abused them was not charged for that.

[39] In response, the public body stated that it does not charge individuals. It said this is done by prosecutors or the police. As such, the public body believes that releasing the information would not provide clarity to the applicant concerning why the person was not charged, and

[8] See, for example, *NS Review Report F1-11-71, Department of Community Services (Re)*, 2015 CanLII 79099 (NS FOIPOP), at paras. 43-46; and *NS Review Report FI-10-95, Nova Scotia (Community Services) (Re)*, 2015 CanLII 79097 (NS FOIPOP), at paras. 54-57.

therefore, should not be a mitigating factor under s. 20(2) in determining if the information should be released.

[40] While it may be true that prosecutors determine whether to bring a charge to court, the public body in this case did determine that a child protection investigation was required, and that the child would not be permanently removed from their home. These determinations are important to the applicant and not having this information could negatively impact the progress they will be able to make in counselling. This weighs in favour of disclosure.

Passage of time

[41] The information in the records relates to events that occurred more than 30 years ago. Sensitivity of the information (discussed below) will have an effect on how important the passage of time may be. The privacy interests in non-sensitive information in particular decreases over time. For example, a 30-year-old address, identifying the town where a person lived, or jobs a person had 30 years ago would all fall into this category. However, the privacy interests in more sensitive information may decrease less over time. I would include in this category the disclosure of information relating to medical diagnoses or treatment or information that might harm an individual's reputation or embarrass them. Generally, passage of time favours disclosure.

Sensitivity of the information

[42] The sensitivity of the information is another relevant consideration in determining whether disclosure of the information would be an unreasonable invasion of a third party's personal privacy.

[43] Some of the information withheld relates to education and employment history of third parties. As former Commissioner Tully said, "It is the kind of information most children learn about their parents as they grow up. The information is not sensitive and relates to events now at least 40 years in the past. Both factors favour disclosure."[9] Where the withheld information is factual in nature and relates to family history, like names and occupational history, this information is only of moderate sensitivity and favours disclosure.[10]

[44] There is some medical information in the records regarding a third party, as well as evaluations about third parties. Generally, this type of information is considered more sensitive.[11] In this case, however, the information of this nature is not extensive or overly descriptive. There is no description of any medical symptoms or specifics about medical treatment, and it directly relates to why the public body initiated a child protection investigation and decided not to permanently remove the child from their home. This weighs in favour of disclosure.

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[9] *NS Review Report FI-10-95, Nova Scotia (Community Services) (Re)*, 2015 CanLII 79097 (NS FOIPOP), at para. 68.

[10] *NS Review Report 23-10*, *Nova Scotia (Department of Community Services) (Re)*, 2023 NSOIPC 11 (CanLII), at para. 45.

[11] See, for example, *NS Review Report FI-10-95, Nova Scotia (Community Services) (Re)*, 2015 CanLII 79097 (NS FOIPOP), at para. 70; and *NS Review Report 23-10*, *Nova Scotia (Department of Community Services) (Re)*, 2023 NSOIPC 11 (CanLII), at para. 46.

Balancing the considerations

[45] Obtaining complete and unredacted information from the child protection investigation is in the best interests of the applicant. Withholding the redacted information leaves the applicant with missing pieces of a puzzle about their childhood that could possibly assist them in their healing process. The applicant has memories, knowledge and documentation related to much of the withheld information.

[46] In many cases, the public body withheld observations and commentary made by public body staff about the applicant's family. However, this information is in 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 public body's role in the applicant's childhood. The information was collected by the public body to rationalize why the applicant's home life was investigated and why the decision was made to not permanently remove the applicant from their home. This decision appears to have had a profound impact on the applicant and is one for which the applicant is seeking treatment.

[47] In terms of medical and employment history, the descriptions are not overly specific, and the information is relative to the child protection investigation because it could speak to why the public body made certain decisions. It is information that, had the applicant been older at the time, the applicant could have been aware of just by virtue of living in the family home with the third parties.

[48] The balancing of factors strongly weighs in favour of releasing the remaining withheld information because it is shared personal information that would allow the applicant to have a more comprehensive understanding of their suspected childhood abuse and the reasons the public body decided not to remove them from their home. It would also ensure the public body is abiding by its duty to be fully accountable to the public by giving individuals a right of access to information about themselves. As such, I recommend it be released in full to the applicant.

Duty to give notice

[49] When a public body determines that the information must be withheld under s. 20, s. 22(1) mandates notification to a third party unless s. 22(1A) applies. In this case, the public body did not provide notice to any third party mentioned in the records. It also did not appear that the public body had examined the views or interests of the third parties, which would have triggered s. 22(1A). Instead, the public body inserted its own views for those of the third parties. This improperly removed the possibility that a third party would have consented to the release of the requested information, which could have resolved this matter many years ago. Particularly given the facts of this file, some third parties may have consented to the release of their personal information for sympathetic or compassionate reasons. Section 22 of *FOIPOP* required the public body to have consulted with all third parties. This was not an optional action; it was a statutorily required one.

FINDINGS & RECOMMENDATION:

[50] I find that:

1. The withheld information contains the personal information of multiple third parties.
2. Disclosure of the withheld information would not result in an unreasonable invasion of the third parties' personal privacy.

[51] I recommend that the public body disclose all of the withheld information to the applicant within 45 days of the date of this review report.

June 24, 2024

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia