REPORT
Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum FI-08-107

Report Release Date: July 14, 2010

Public Body: Department of Community Services

Issues: Whether the Department of Community Services ["Community Services"] properly withheld portions of the Record in accordance with the *Freedom of Information and Protection of Privacy Act* ["*Act*"], and in particular:

1. Whether the Record contain third parties' personal information.
2. Whether disclosure of this information would be an unreasonable invasion of a third party's personal information.
3. Whether the withheld information in the Record meets the criteria of solicitor-client privilege.
4. Whether Community Services has properly exercised its discretion to withhold the portion of the Record under s. 16 of the *Act*.

Record at Issue: Pursuant to s. 38 of the *Act*, Community Services has provided the Freedom of Information and Protection of Privacy ["FOIPOP"] Review Office with a copy of the complete Record, including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or my delegated staff. The Record consists of the Applicant's file for the time spent in foster care, in the care of Community Services, for the period from 1988 to 1991. The original Application for Access to a Record was for the period 1971 to 1991. The Applicant is a former child in care in the care of a child welfare agency prior to 1988 and those records do not form part of this Review. The Record, therefore, is for the period of 1988 to

1992 when the Applicant was in foster care as a child in care with Community Services.

Summary: An Applicant requested a Review of Community Services' decision to sever part of the Record based on the solicitor-client privilege and third party personal information. The Record sought is the complete file related to the Applicant while in foster care.

Findings: The Review Officer made the following Findings:

1. 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 *Act.*
2. The best interests 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.
3. The *Children in Care and Custody Manual* read together with s. 5(3) of the *Act* could have disposed of this request for the bulk of information sought by the Applicant. For the remainder of the Record, the personal information of foster parents, the Applicant would file an Application for Access to a Record and Community Services would have given notice to the third party foster parents and sought their consent to release some or all of their personal information. Community Services seeking consent of the

third parties would have been the most expeditious and respectful way to proceed. It is not appropriate to ask the former foster child to obtain the consent of his/her biological or former foster parents.

4. In the future, if Community Services believes a foster parent may object, I find that its remedy is to provide him/her with timely notice in accordance with s. 22 of the *Act* of its intention to release his/her personal information and seek consent and if consent is not forthcoming the former foster parent can file a Third Party Request for Review.
5. Section 20 of the *Act* provides that it is not an unreasonable invasion of a third party's personal privacy if there are compelling circumstances affecting anyone's health or safety. I find that the need for the Applicant to know about his/her family medical health history and for his/her own opportunity to heal based on a medical Representation are compelling circumstances sufficient to meet the presumption is s. 20(4)(b) of the *Act.*
6. Reading sections of the *CFSA* as a whole establishes for the purpose of this Review that foster parents are delegates of the Minister. I find that while they do not fall within the definition of salaried employees or agencies, foster parents are a child care facility under *CFSA* and a member of the Minister's staff under s. 20(4)(e) of the *Act.* I find that foster parents are a child care facility and a delegate of the Minister in his/her role as substitute parent and fall under s. 20(4)(e) of the *Act* and, therefore, the presumption that release of personal information is not an unreasonable invasion of personal privacy applies.
7. Personal information is defined in the *Act* in a non-exhaustive list of factors including name, address, telephone number, race, national or ethnic origin, family status, inheritable characteristics, health history and anyone else's opinion about the individual. In the case of the Applicant, some of his/her personal information overlaps in those categories of personal information with his/her biological parents. One of the purposes of the *Act* is to give individuals access to personal information about themselves. Former foster children are in a unique position, which Community Services should acknowledge and make every effort to provide them with as much information as possible. Based on the definition of personal information as discussed above, because the statutory definition is not exhaustive, and based on the actual information subject to this Review, I find that all of the information about the Applicant's biological family

falls within the definition of his/her personal information, access to which s/he is entitled.

8. The Representations by the Applicant, the former foster parent, and the community organizations that provided support letters constitute the evidence in favour of disclosure based on public interest. In this case, I find that it is in the public interest to provide this former foster child with the maximum amount of information about the time s/he was in care including personal information about the foster parents.
9. Community Services is not able to rely on the s. 16 solicitor-client exemption to refuse the Applicant access for two reasons. First, there is nothing in the text of the letter that constitutes advice, which is one of the essential elements for a document to be withheld under the s. 16 exemption of the *Act*. Second, I find that because the Applicant was, at the material time, a child in care about whom the letter was written the lawyer was acting for both the child and for Community Services. The solicitor-client privilege belongs to both clients – Community Services and the former foster child who is entitled as one of the clients involved to access to this document. The other instructive fact is that the letter, which contains no advice, refers to another portion of the Record to which the Applicant was given unabridged access. Community Services appears to apply the solicitor-client exemption contained in s. 16 of the *Act* as if it were a mandatory one. I find that this kind of blanket application of an exemption to correspondence from a lawyer is not in keeping with how a discretionary exemption should be applied.
10. Section 38 of the *Act* is to be given broad and liberal interpretation. It clearly gives the Review Officer authority to request any record and impose any requirement as I see fit. While some of the key documents were provided, I find that Community Services failed to respond to some of the Review Office's requests for information.
11. The question is not what the Applicant remembers, but what the Applicant is entitled to by custom and under the *Act*.

Recommendations: The Review Officer made the following Recommendations:

1. That Community Services release the complete child in care file to the Applicant including all personal information about biological parents, biological siblings, foster parents and the letter inappropriately withheld under s. 16 of the *Act.*
2. That Community Services revise the wording of the *Foster Care Services Statement of Understanding Between Agency and Foster Parents* to include reference to the *Act* so that foster parents are on notice that any representations of confidentiality made to them by Community Services are not paramount to the *Act*.

Key Words: biological family, child in care, confidentiality, Crown Ward, custom, delegate, discretion, expedited, family, foster care, foster child, foster parents, manual, parents, personal information, public interest, record, solicitor-client privilege, third parties, video.

Statutes Considered: *Nova Scotia Freedom of Information and Protection of Privacy Act, ss. 3(1)(i), 5(3), 6, 16, 20, 21(4), 22, 27(b), 31, 38, 45; United Nations Convention on the Rights of the Child, Articles 7.1, 8.1, 12 and 13; Nova Scotia Children and Family Services Act.*

Case Authorities Cited: *Nova Scotia Review Reports FI-02-20, FI-02-23, FI-05-08; Re House, [2000] N.S.J. No. 473 S.C.; Dickie v. Nova Scotia (Department of Health), S.H. No. 124275; Grant v. Torstar Corp., 2009 SCC 61; O'Connor v. Nova Scotia, 2001 NSSC 6; R. v. Fuller, 2003 NSSC 58; Ontario Order P-1115; McLaughlin v. Halifax-Dartmouth Bridge Commission, (1993) S.H. No. 85235.*

Other Cited: *Foster Care Services Statement of Understanding Between Agency and Foster Parents; Department of Community Services' Children in Care and Custody Manual, Section 9; Foster Care Services online videos "Through the Children's Eyes"; "What Makes a Good Foster Parent"; "The Parent's Experience"; and "Foster Families Include Everyone"; Children and Family Services Act Regulations; Nova Scotia Freedom of Information and Protection of Privacy Act Regulations, Form 3.*

REVIEW REPORT FI-08-107

BACKGROUND

On July 25, 2008, the Applicant made an Application for Access to a Record to the Department of Community Services ["Community Services"] requesting:

> *file 1971-1991. complete file – all documentation. Crown Ward.*

On July 31, 2008, Community Services transferred part of the request [for the period from 1971 up to 1988] to the Children's Aid Society of Pictou County ["the Society"] pursuant to s. 10(1)(c) of the *Freedom of Information and Protection of Privacy Act* ["*Act*"]. This transfer came as a result of the fact that the Applicant only became a child in care of Community Services as of 1988 and had prior to that date been in the care of the Society.

On September 17, 2008, Community Services issued the following decision to the Applicant:

> *In response to this request, access to the information has been partially granted. Our records show that on January 27, 1995 you reviewed your file and were provided with an abridged copy.*
>
> *Information is being withheld pursuant to Section 16 of the Act as it relates to solicitor-client privilege. The information is subject to solicitor-client privilege between this department and its solicitor. Information pertaining to third parties has been severed under Section 20(1) of the Act as it is unreasonable invasion of a third party's personal privacy. Where information or pages have been severed it is noted.*
>
> *Copies of records relating to court proceedings were located in your file. Information in these documents pertaining to yourself is being provided. Information pertaining to third parties has been severed under Section 20(1) of the Act. If you wish to access court records you may want to make an application to the courts.*

Community Services indicates, and the Applicant confirms, that the initial package of the Record was returned as undeliverable but s/he subsequently received it on October 16, 2008.

The Applicant filed a Request for Review dated December 3, 2008, which was received by the Freedom of Information and Protection of Privacy ["FOIPOP"] Review Office on December 9, 2008, and which read as follows:

The applicant requests that the review officer recommend that the head of the public body give access to the record as requested in the Application for Access to a Record.

Included with his/her Form 7 Request for Review, the Applicant submitted a Representation to the Review Officer, details of which will be discussed below.

In his/her initial contact with the Review Office, the Applicant represented that his/her health and well-being was jeopardized by the lack of complete disclosure. The Applicant also included a letter written by a medical professional, dated November 26, 2008, urging release of the complete file in order to assist the Applicant to heal and to move forward with his/her life. This Representation will be considered below.

On December 9, 2008, the Review Office requested all documentation and the Record from Community Services. In addition, the Review Office notified Community Services that the Applicant had identified search as an issue, particularly with respect to placement history, medical history and educational reports for the period of 1982 to 1985 inclusive.

On February 6, 2009, the Federation of Foster Families of Nova Scotia and on February 9, 2009, the Nova Scotia Council for the Family submitted letters in support of the Applicant's claims for greater access to information, details of which will be discussed below.

On February 27, 2009, the Review Office requested Community Services to provide a copy of the *Foster Care Services Statement of Understanding Between Agency and Foster Parents* ["*Statement of Understanding*"], which was provided on March 4, 2009.

On March 19, 2009, Community Services responded to a query about the search conducted for the Record and indicated an intention to ascertain whether or not an audio-tape of an interview with the Applicant still existed. Community Services indicated that in the case of audio-tapes, it is practice that once the contents of the tape have been transcribed, the tape is destroyed. On March 30, 2009, the Review Office advised Community Services that the Applicant no longer wished to pursue the audio-tape. Search was, therefore, no longer an issue in this Review.

On March 30, 2009 the Review Office issued the Investigation Summary to the parties that set out the issues, facts, statutory references, definitions and precedents.

On April 20, 2009, the Applicant provided the Review Office with information about his/her original approach to get his/her foster child file from Community Services under the its *Children in Care and Custody Manual* ["*Manual*"]. The relevant portions of the *Manual* will be discussed in the Applicant's Representations below.

Mediation was attempted but on September 28, 2009, the parties were advised that a mediated resolution was not possible.

On October 16, 2009, Community Services submitted its Representations to the Review Office for the formal Review. Included in those Representations was an offer to release further portions of the Record to the Applicant. The offer came on the condition that the Review Officer not address the information initially withheld and now proposed to be released. Although the proposed release had been previously explored unsuccessfully, the release was later facilitated by me during the formal Review in keeping with the principle to always allow a public body every opportunity to voluntarily provide maximum access to information to applicants.

On October 20, 2009, the Applicant requested an extension of time in which to provide his/her Representations, which was granted. S/he indicated time was required in order to consult with his/her lawyer. Despite requesting additional time to prepare Representations, on November 3, 2009 the Applicant indicated s/he would not be providing any additional Representations. The next day, the Applicant wrote to say that s/he would be in contact with his/her lawyer, and required more time to prepare Representations.

On November 9, 2009, the Applicant forwarded an email s/he sent to one of his/her former foster parents to the Review Office. The contents of that response will be discussed below.

By correspondence dated November 10 and 12, 2009, the Review Office sought clarification from the Community Services on a number of matters and requested copies of several documents.

On November 16, 2009, the Applicant again indicated s/he would not be providing any further Representations.

On November 19, 2009, the Review Office received Community Services' response to the questions sent November 10 and 12, 2009 with explanations about a planned additional release of the Record and a copy of a letter dated October 27, 2008 to the Applicant which had not been previously provided to the Review Office. Community Services provided a completed table in which questions about particular documents had been asked. In addition, Community Services refused to provide some of the documentation requested by the Review Office. The references from the documentation were in its Representations but Community Services refused to provide a complete copy of the letters: one from the Provincial Coordinator of Foster Care and the second from the Chair of the Board of Directors for the Federation of Foster Families of Nova Scotia. The issue of a public body refusing to comply with a request for documents will be canvassed in the Discussion section below.

On November 26, 2009, I requested a copy of a document, a consent form referred to in the October 27, 2008 correspondence, as it had not been included with the copy sent to the Review Office. On the same day, Community Services provided a copy of the consent form. The form is called the Consent to Disclosure of Information [Form 3] pursuant to s. 21(4) and s. 27(b) of the *Act.*

By correspondence dated November 27 and December 3, 2009, I asked Community Services a number of questions arising during the formal Review. Community Services responded to those questions in a Representation dated December 18, 2009. Those responses will be discussed in the Public Body's Representations below.

On December 30, 2009, I forwarded a summary of Community Services' December 18, 2009 Representation to the Applicant, requesting that s/he respond by January 15, 2010 to Community Services' willingness to release portions of the Record previously withheld. The Applicant responded on January 11, 2010, that s/he would be unable to respond until a later date. On January 13, 2010, I advised Community Services the Review was being placed on hold at the Applicant's request.

On January 28, 2010, the Applicant responded my December 30, 2009 correspondence. The Review Office followed up this reply requesting further clarification from the Applicant on February 15, 2010.

On March 4, 2010, the Applicant wrote to the Review Office clarifying his/her January 28, 2010 correspondence, indicating a willingness to proceed with the Review on the basis of Community Services' proposed revised disclosure decision. The Applicant requested that the new decision be sent to him/her on or about March 26, 2010, at which time s/he would be available to resume participation in the Review. The Review Office confirmed this understanding of the revised parameters of the Review with the Applicant on March 6, 2010.

On March 8, 2010, the Review Office advised Community Services to proceed with its new disclosure decision, as originally proposed to the Review Officer on October 16, 2009.

On March 26, 2010 Community Services provided the Applicant with its new decision and a new release of a portion of the Record. The Applicant was given ten working days to respond regarding the release. On April 13, 2010, the Applicant requested an extension of time to provide his/her Representations. This request was granted and the Applicant responded on April 22, 2010 indicating s/he was not completely satisfied with the release as certain information continued to be withheld, and in his/her opinion, it should be released. The focus of the Review was identified as personal information of third parties severed from two documents; one letter severed as solicitor-client privilege and foster parents' names being severed throughout the Record. Along with this the Applicant posed a number of new questions. The file was returned to the Mediator/Investigator for further research resulting from the Applicant's questions, and the Applicant provided an oral Representation on April 29, 2010. This Representation will be outlined below.

On April 29, 2010, the Applicant again requested the opportunity to provide additional Representations to the Review Office. This related to the fact that the Applicant believed s/he had already obtained the personal information about third parties when s/he was given the opportunity years ago to read the file without being given a copy and wanted to outline that for the formal Review to argue that Community Services

should not be able to withhold information s/he already knew. The Applicant was given one week to provide that Representation.

On May 5, 2010, the Applicant provided a Representation that outlined the details of the third parties' personal information that s/he claims to already know.

On May 6, 2010, the Review Office sent Community Services a list of questions regarding the information that the Applicant claims is on the Record and therefore should not be withheld because the Applicant claims to already know the information. The narrowed focus was also confirmed with Community Services at this time. The response to those questions was received on May 12, 2010, and is detailed in the Public Body's Representations below.

In those final Representations, Community Services referred to a video series about foster care on its website. It claimed it was relying on something that was said in that video to demonstrate that the knowledge of what applicants say they know is on a record is not always accurate. On May 19, 2010, I challenged Community Services on this point as to whether it was correct as to its assumption about what this Applicant may already know and inquired if it wanted to see the third party personal information that has been supplied by the Applicant to the Review Office and reconsider its decision to withhold information.

On May 25, 2010, Community Services indicated an appreciation for clarifying the misunderstanding and indicated that it was prepared to see what the Applicant had shared with the Review Office to determine if what the Applicant knew changes its position with respect to releasing third parties' personal information.

On May 25, 2010, I shared the text of the information given to the Review Office by the Applicant with Community Services requesting it to decide if what the Applicant claimed to know changed its position as to what information s/he was entitled under the *Act*.

On June 9, 2010, Community Services responded advising that its position had not changed with respect to the information to which the Applicant was entitled under the *Act.*

RECORD AT ISSUE

Pursuant to s. 38 of the *Act*, Community Services has provided the Freedom of Information and Protection of Privacy Review Office with a copy of the complete Record, including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or my delegated staff.

The Record consists of the Applicant's file for the time spent in foster care, in the care of Community Services, for the period from 1988 to 1991. The original Application for Access to a Record was for the period 1971 to 1991. The Applicant is a former child in care in the care of the Society prior to 1988 and those records do not form part of this

Review. The Record at issue in this Review is from the period of 1988 to 1991 when the Applicant was in foster care as a child in care with Community Services. There are many Community Services documents found to be responsive to the Applicant's request by that date from 1971 to 1988. As such, those documents do form part of this Review. The Application for Access to a Record that was processed by the Society does not form part of this Review.

During the formal Review, the Applicant narrowed the scope to: third party personal information severed from two documents; one letter severed as solicitor-client privilege and foster parents' names being severed throughout the Record.

The specific types of personal information that are under Review are:

- Names of the Applicant's foster parents
- Medical diagnoses of the Applicant's biological parent
- Names of Applicant's biological siblings
- Information about a deceased biological sibling
- Names and information of grandparents and uncles and aunts
- Family history

APPLICANT'S REPRESENTATIONS

On December 3, 2008, the Applicant submitted a Representation to the Review Office, which is summarized as follows:

1. The Applicant indicates his/her healing is being hampered by: the lack of information on the history of his/her life as a child in care; the death of his/her foster parent; subsequent placements in multiple foster homes; separation from and early death of his/her biological sibling. Thus the Applicant argues that his/her request falls under s. 20(4)(b) of the *Act*. [This section presumes that the release of third party personal information is not an unreasonable invasion if there are "compelling circumstances affecting anyone's health or safety"].
2. The Applicant submits that the information s/he is seeking falls under s. 20(2)(c) of the *Act* in that the information is relevant to a fair determination of his/her right to be able to reconstruct his/her life. The information being withheld further magnifies the loss of self that occurs when removed from a biological family and placed with a foster family. What has been provided to date gives patchy and often inconsistent information and, for the period of 1982 to 1985, there is no information about placement, medical history or education and there is no explanation for this gap.
3. While s. 20(3)(a) of the *Act* may apply to the information about medical and health care more generally, all of this information may relate to concerns that are hereditary and s/he wants to know for his/her own sake or that of any of his/her children in the future.
4. The fact that there is a process for adopted children to gain access to their information while there is no similar process for foster care children seems

discriminatory. Children in care should have a process in order to obtain information they require related to family history, etc.

On April 20, 2009, the Applicant provided information to the Review Office with respect to his/her original approach to get his/her foster child file from Community Services under the *Children in Care and Custody Manual* that was prepared and produced by Community Services dated effective August 1, 2004. When s/he asked for the information pursuant to the past practice reflected in the *Manual*, the Applicant was advised that s/he had to make an Application for Access to a Record under the *Act* and was sent a Form 1 by Community Services.

On April 22, 2010, the Applicant represented that the new release provided valuable insight into family history that had previously been unknown to him/her.

In an oral Representation on April 29, 2010, and a final written Representation on May 5, 2010, the Applicant argued that the "absurd result" principle applied, and that release of third party identities could not be considered an unreasonable invasion of privacy because the Applicant claims to already be aware of this information. S/he requested additional time to provide a Representation detailing the individuals and information already known to him/her, access to which had been denied under section 20.

The Applicant provided, as his/her final Representation on May 5, 2010, a list of names that s/he believed had been severed from the Record, as well as a summary of what s/he claimed to have remembered about his/her family history from having reviewed the file in 1995.

PUBLIC BODY'S REPRESENTATIONS

Included with its Representation dated October 16, 2009, Community Services provided a portion of *Section 9, Access and Information Sharing,* of the *Child Welfare Manual* and an Index of Records. Community Services' Representations can be summarized as follows:

1. Community Services reviewed the history of this Application for Access to a Record, efforts made to work with the Applicant and made reference to the opportunity the Applicant had in 1995 to have access to his/her file.
2. Disclosure of information in the child welfare field is an area where program, policy and the FOIPOP [Administrator's] office work closely to bring consistency to past practice as well as to provide those formerly in care with as much information as possible to ensure they have as complete a history as possible.
3. Community Services states that the Applicant seems to be very focused in obtaining the names and addresses of the foster parents where [s/he] was placed while a child in care. Community Services' decision to deny this information was based on the expectations of those who become foster parents and the firm belief that information about foster parents is third party information and meets the test as set out in many Reviews. What is stated in s. 9 "Access and Information Sharing" in the Child Welfare Policy Manual was also considered.

4. Community Services believes that the information already given to the Applicant should assist him/her in fully understanding his/her life history during his/her time as a child in care.
5. The Applicant had been advised in writing that s/he could seek consent of the third parties through a social worker. Community Services represented that Applicant indicated that s/he felt that the third parties would not consent. A former social worker of the Applicant was assigned to assist and was told by the Applicant that the biological parent would not consent to disclosing his/her information and felt what was in the past should be left in the past.
6. Community Services indicates that one of the factors considered in denying the information is the fact that the Applicant indicated his/her biological parent would not provide consent and it wanted to honour the parent's wishes.
7. Community Services indicates that it offered the Applicant the opportunity for a social worker to contact the foster parents, if that was possible, to determine if they wished to be contacted or to ask for their consent [to allow their personal information to be disclosed to an applicant]. Community Services indicates that the Applicant did not take this opportunity.
8. On March 4, 2009, Community Services received a request from the Review Office to obtain a copy of the *Statement of Understanding*. Community Services indicated that the reason for the Review Office's request was to better understand the relationship between the foster parent and Community Services.
9. On March 9, 2009, Community Services received inquiries from the Review Office regarding a search issue relating to an audio-tape, the transcript of which was included in the Record. Community Services detailed its search efforts, and noted that it considered the transcribed record to be the Record.
10. Community Services summarized what it considers to be information that forms the Review after that disclosure.
11. Community Services indicates how important the Review is to it and offers to provide any additional information or to make an oral representation.
12. Community Services indicated during the Review process that it is prepared to disclose additional information to the Applicant and goes on to provide details of that disclosure and a revised Index of Records.
13. Community Services requests that what is disclosed as a result of the new decision not be considered part of the Review. [As this offer came at the time the Representations in the formal Review were due, the Mediator/Investigator did not want to interfere with the process and requested Community Services to wait to perform the disclosure, which it agreed to do.]
14. Community Services represents that it received input from the Provincial Coordinator of Foster Care who stated in support of Community Services' position:

    Foster parents provide a critical service for the child welfare system in Nova Scotia. More than 70% (1160) of our children in care are currently placed in foster homes. Our foster parents participate in a rigorous pre-service and evaluation process, and after approval are offered extensive training and ongoing support.

While foster parents are encouraged in training to think of themselves as members of a professional team, and often have input in the development of a child's plan of care, our foster parents are essentially volunteers. Foster parents are provided with funds to cover the expenses related to the child's care . . . but are not paid for their time.

Foster parents have an incredible tolerance for invasive questions, demanding social workers and, in many instances, destructive, attachment-disordered children who make all sorts of accusations about them. By fostering, they give up a significant degree of privacy and expose themselves to scrutiny and criticism. In return, foster parents are assured that the information collected and held by child welfare for the purpose of ongoing assessment and support, is kept safe and confidential. They need to know that neither their former foster children, nor their family members have access to personal information (including name and address) that could potentially put them or their own children at risk. Confidentially [sic.] *is a strongly held, core value among foster parents.*

The reference from the Provincial Coordinator goes on to indicate that there is already a shortage of new foster homes and that if new and existing foster parents could not be assured their information would remain confidential, it would have an immediate and devastating effect on the entire child welfare system.

15. Community Services indicates that the Applicant contacted the Federation of Foster Families of Nova Scotia and as a result the Chair wrote the Deputy Minister of Community Services. Community Services represents that the Chair wrote that "I can understand the reason why the provision of this information may be seen as an invasion of privacy" while noting that this letter goes on to say that "In supporting youth in care to develop lasting relationships, I am left questioning how this could be done when the youth are not provided with access to this information".
16. Community Services included a copy of its response to the Chair on behalf of the Deputy Minister as part of its Representations. That letter provided as follows:

I cannot comment on any specific application, without the written consent of the applicant. I can indicate that we are working with the Review Office to examine the records and make sure that as much information as possible is disclosed without breaching the privacy of third parties.

The Freedom of Information and Protection of Privacy Act protects every individual's information equally. When it comes to protection of personal information, the Act gives very limited discretion to disclose personal information about third parties, regardless of the individual's past.

I agree that youth in care and former youth in care should have knowledge about their biological family history and any history, including their relationships with foster families. Ideally, the social worker who supports and monitors the development of the youth while in the care of the Minister is able to keep that youth informed.

Community Services then makes an offer to meet with the Chair and the Board of the Federation of Foster Families to look for a venue to facilitate as much disclosure as possible.

17. Community Services believes that unless there is an imminent risk or a health and safety issue, regardless of whether or not someone is a blood relative, each person is entitled to equality in the eyes of the law and therefore entitled to have his/her right to privacy respected.
18. With respect to solicitor-client privilege, Community Services believes the information severed meets the test as it was advice given to Community Services by its solicitor. As part of the disclosure offer during the formal Review, Community Services released a part of the Record, the letterhead and signature, to assist the Applicant to more fully understand the reliance on s. 16 of the *Act*.

In response to a number of questions during the formal Review, Community Services made a Representation on December 18, 2009. That Representation is summarized as follows:

1. In response to the Review Office's question regarding whose consent was requested, Community Services explains that the Applicant [before requesting this Review] had expressed concerns about the information severed from the records. It was explained that third parties have a right to privacy even if deceased. The Applicant asked what options were open to him/her and was advised s/he could file a Request for Review. The consent forms were provided to the Applicant on the understanding that s/he could seek consent from family members for disclosure of their information.
2. Community Services was asked if the process for disclosure of information described in section 9 of the *Manual* was current. It replied that disclosure of personal information and history of former children in care precedes the *FOIPOP Act.* Currently social workers have some latitude to determine whether to apply the process under the *Manual* or refer the access to information request to the FOIPOP office. The mandate of child welfare is to support the wellbeing of children. Even when those children have turned into adults, disclosure of information made through and with the assistance of a social worker as opposed to under FOIPOP can have a significant impact on the individual. Community Services' FOIPOP Office is often called to consult with social workers on disclosure decisions, regardless of the access to information process. Community Services regularly participates in social work documentation training, either by its FOIPOP Office, or by child protection lawyers from the Department of Justice, to ensure that everyone is working in the best interest of the child. Information is recorded from the outset so it will meet court standards and will later facilitate disclosure should a future request for information be received. This approach has been strengthened in the last three to four years and is working quite well. [The responsive Record precedes this documentation approach.]
3. Community Services represents that the advantage of the FOIPOP process is its provision for the Applicant to have an avenue of appeal to the Review Office if, as in this case, s/he is dissatisfied with the documentation received.

The process under the *Manual* is used more when clients, or former clients, request specific and limited types of information.

4. Community Services acknowledged that it remained prepared to disclose additional information as proposed on October 16, 2009.
5. A social worker who was responsible for processing the disclosure under the *Manual* to the Applicant in the 1990's had offered to contact the foster parents on his/her behalf to seek their consent to the release of their personal information. Community Services confirms its willingness to still take that step at this point in the Review process.

The Representation concludes with a summary of only that information which Community Services is not willing to disclose: information regarding foster parents and other children in the foster homes; information about biological siblings; a biological parent's health information as well as information that is subject to solicitor/client privilege.

On May 12, 2010, Community Services responded to a number of follow-up questions that arose during the formal Review process. Those Representations are summarized below:

1. This Applicant, in 1995, had received an abridged copy of his/her file. At that time the disclosure was made as per practice in the child welfare program, not under the FOIPOP process. Community Services' understanding from conversations with the social worker assigned to the case and from documented facts is that a lot of the information pertaining to the Applicant – including medical reports – was not disclosed at that time. The processing of his/her request under FOIPOP and Community Services' efforts to assist in disclosing as much information as it could without infringing others' rights are evident throughout the process.
2. Specifically with regard to whether or not Community Services asked the Applicant what s/he knew in the file, it represents that it did not solicit specific information, but did clarify and asked some questions. The Applicant hardly offered any information. Only in a conversational fashion would Community Services be made aware of certain very specific pieces of information "known to the applicant" i.e. my parent is [medical diagnosis].
3. Through some conversations Community Services was made aware that the Applicant knew some "specifics", particularly about a biological parent. In the process of reviewing the information, Community Services did consider the accuracy of the Applicant's knowledge and determined whether the information s/he knew matched what was documented. This resulted in disclosure of information about the Applicant's biological parents, i.e. transcript of the interview tape.
4. Throughout the processing of the Application for Access to a Record, Community Services had very few conversations with the Applicant. Conversations were mostly at the time of application to clarify it and get details for locating files or after the disclosure when the Applicant expressed disagreement with the disclosed information.

5. Community Services represents that it always takes into consideration all of the available information and circumstances on a case-by-case basis. Experience has shown that some applicants claim to know information but that may not necessarily be the case. These claims may not be made maliciously; however the claimed knowledge may not match the information on the records. The Applicant did not appear eager to negotiate or share all s/he knew. Instead s/he demanded that s/he had the right to information.
6. On the topic of information known to applicants, Community Services referred the Review Office to the very recent educational foster care videos posted on the Community Services' website, http://www.gov.ns.ca/coms/families/fostercare/FosterCareVideos.html, in celebration of Foster Family Recruitment Week. Community Services represents that the foster care video "Through the Children's Eyes" shows examples of what may be known to applicants.
7. Community Services reiterates its willingness to work with all involved throughout the process, but it declined to receive further information at this stage in the Review process. Instead, the Community Services' position was that a Review Report needed to be issued in the best interest of all.
8. With respect to disclosure of foster parents' names the offer to find a way to get consent from foster parents was not accepted by the Applicant. Community Services believes that legislation, policy and options offered support its decision.
9. With regard to the privacy rights of a sibling who died over 20 years ago, Community Services represents that it understands that over time some rights may diminish, and that it considered this and also the content of the file. Community Services represents that it also considered that other family members are still alive. The sentiment of the biological parent about of *leaving the past in the past* was also taken into consideration. This sentiment was shared with Community Services by the Applicant and it feels that cannot be ignored.

As mentioned above, included with the May 12, 2010 correspondence Community Services referred the Review Office to a link to several foster care videos about foster parents and children. The foster care videos viewed included: *Through the Children's Eyes*, *What Makes a Good Foster Parent*, *The Parent's Experience* and *Foster Families Include Everyone*. Those videos were also instructive to the Review Office regarding the role of foster parents and the rights of foster children. I have considered the content of those videos to be relevant and to form part of Community Services' Representations. The videos support that fostering is a means to provide a child who is unable to live with his/her biological family with a family, represented as one of the most important things a foster family can do. Fostering is about providing a safe, nurturing, compassionate home and giving the child the opportunity to be part of a family.

On May 25, 2010, Community Services responded to the Review Office that it was prepared to see what the Applicant stated s/he knew *vis a vis* third parties to reconsider if this changed its position with respect to the information to which the Applicant was entitled. On June 9, 2010, Community Services responded and advised its position regarding its obligations under s. 20 of the *Act* had not changed.

OTHER REPRESENTATIONS

I have considered four other Representations in the course of the formal Review. I consider these submissions to be highly relevant to the issues in this Review. I will discuss the one from a medical professional first, then two from civil society and finally one from a former foster parent of the Applicant.

Enclosed with his/her Request for Review, the Applicant submitted a letter from a medical professional dated November 26, 2008. The opinion of the professional was that the Applicant required access to all information about his/her life as a child in order for him/her to heal and be able to prosper in adulthood. This letter provides evidence of the connection between the health of the Applicant and his/her access to information about his/her childhood.

On February 9, 2009, the Applicant forwarded copies of letters from the Nova Scotia Council for the Family and the Federation of Foster Families of Nova Scotia in support of his/her Application for greater access to information.

The Nova Scotia Council for the Family indicates on its website that "much of its work is carried out by volunteer committees made up of individuals from member agencies and the community at large. The committees include . . . foster care." Its letter of support, written to the Review Officer, indicated that children and youth who received corporate care services should have ready access to developmental information relating to birth family and substitute care-givers and provided in part as follows:

> *An exploration into the application of "unreasonable invasion of privacy" when applied to birth family and substitute care giving is also required at this juncture.*
>
> *Notably, in Nova Scotia, there is an absence of after-care services available to youth who leave the care system and wish to engage in a knowledge transfer process about their life history. This committee believes that discharge and after-care for former youth in care should accommodate requests for personal history information. We challenge that [the Applicant]'s request for information regarding [the Applicant's] own family history be considered "third party" since it relates directly to [the Applicant's] life. Similarly we challenge the notion that [the Applicant's] request is an unreasonable invasion of privacy on the same grounds.*

After being contacted by the Applicant for support regarding his/her access to information request, the Chair of the Federation of Foster Families' letter was sent Deputy Minister of Community Services. The letter indicated that while the information may be presumed an invasion of privacy, former youth in care should have access to the knowledge about their biological family history and the history about where they spent time while in care as these relationships between youth and the foster family play a very important role in the youth's growth and development into adulthood.

On November 10, 2009, one of the Applicant's former foster parents e-mailed the Review Office at the Applicant's request. The e-mail read as follows:

> *I am a foster parent and have recently found out that if a foster child who has graduated from the system wishes to contact his or her foster parents [s/he] is unable to do so. It seems that the foster parents' names and contact information has been deleted from the files of the foster child. I would like to be asked if my name should or should not be deleted from the files. Personally, if contact with the child had been lost, I would appreciate meeting up again. I am certain that the vast majority of foster parents would feel the same way.*

ISSUES

At the final stage of the formal Review the questions remaining are whether Community Services has properly withheld portions of the Record in accordance with the *Act* and, in particular:

1. Whether the Record contain third parties' personal information.
2. If yes, whether disclosure of this information would be an unreasonable invasion of a third party's personal information.
3. Whether the withheld information in the Record meets the criteria of solicitor-client privilege.
4. Whether Community Services has properly exercised its discretion to withhold the portion of the Record under s. 16 of the *Act*.

DISCUSSION

CHILDREN IN CARE AND CUSTODY MANUAL

Before reviewing whether or not Community Services has applied the exemptions appropriately under the *Act,* I want to discuss how Community Services' disclosure practice that preceded the enactment of access to information legislation reconciles with s. 5 of the *Act*.

Community Services has produced a manual, *Children in Care and Custody Manual* which was effective August 1, 2004 that contains a section relating to Access and Information Sharing [Section 9] for children in care and for adults formerly in foster care. The *Manual* confirms that there was an existing custom or practice that allowed children who were formerly in care to obtain personal information about their family members. The belief being:

> • *A request for background information is part of normal adult development.*
> • *The more 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 text of s. 5(3) of the *Act,* and provides 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]

Section 9.1.2 addresses the types of information that can be shared with children still in care. In other words, while a foster child, the Applicant was entitled to the following types of information and, therefore, is obviously still entitled to:

*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)
[Emphasis in Original]

Section 9.1.3 provides for the procedure for adults who were formerly in care seeking information, which provides 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*

The *Manual* additionally notes that adults formerly in care are also entitled to any psychiatric, psychological or therapists reports, though it includes the caveat that, "due to the sensitive nature of the information in the . . . reports, it may be more appropriate to share [them] via their therapist/psychiatrist or for the applicant to get the author's consent to release."

The *Manual* makes it clear the information will be disclosed only after the removal of identifying information of any third parties such as foster parents by stating:

> ***The above material is restricted by the right of third party confidentiality. Identifying information concerning third parties should be removed prior to disclosure.***
> ***[Emphasis in Original]***

Subsection 5(3) of the *Act*, which the *Manual* incorporates, reads as follows:

> *5(3)* ***Nothing in this Act*** *restricts access to information provided by custom or practice prior to this Act coming into force.*
> ***[Emphasis added]***

This section of the *Act* preserves how people accessed information prior to the access legislation being enacted and confirms that nothing in the *Act* restricts those customs or practices. I read s. 5(3) to mean that none of the exemptions in the *Act* can be relied on to withhold information that was previously available by custom or practice.

The Applicant advised, and Community Services confirmed, that in the 1990s the Applicant asked to see his/her foster child care file. At that time, the social worker obliged and the Applicant read the entire file and was provided with an abridged copy. When s/he approached Community Services in 2008, the Applicant was told s/he had to make an Application for Access to a Record under the *Act* and was provided with a Form 1. Community Services indicates that the reason for directing the Applicant to the FOIPOP process was to give him/her the right to appeal by way of a filing a Request for Review with this Office.

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 the entire Record. In addition, I find that former foster children by virtue of the provisions of the *Manual* are entitled in an access to

information request to everything listed that they could have received while still a child in addition to the non-exhaustive list for people who are no longer in care. Even though the Applicant narrowed the scope during the formal Review, all information found in the responsive Record that would be subject to the provisions of the *Manual* should be considered relevant to this Finding.

INTERNATIONAL RIGHTS OF CHILDREN TO FAMILY, CHILDREN AND FAMILY SERVICES ACT AND FOSTER CARE VIDEOS

The principles in relation to a child's right to have his/her best interests as the paramount consideration and his/her rights *vis a vis* a family are enshrined in the *United Nations Convention on the Rights of the Child*, which Canada has signed and ratified.

> *Article 7.1:*
> *The child shall be registered immediately after birth and shall have the right from birth to a name . . . and as far as possible, the right to know and be cared for by his or her parents.*
>
> *Article 8.1:*
> *States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations . . .*
>
> *Article 12*
> *1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
> *2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*
>
> *Article 13*
> *1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.*
> *[United Nations Convention on the Rights of the Child]*

This internationally recognized right of children to know their family is reflected in the preamble to the Nova Scotia child protection legislation, which reads in part as follows:

> *WHEREAS the family exists as the basic unit of society, and its well-being is inseparable from the common well-being;*
>
> *AND WHEREAS children are entitled to protection from abuse and neglect;*

AND WHEREAS the rights of children are enjoyed either personally or with their family;

AND WHEREAS children have basic rights and fundamental freedoms no less than those of adults and a right to special safeguards and assistance in the preservation of those rights and freedoms;

AND WHEREAS children are entitled, to the extent they are capable of understanding, to be informed of their rights and freedoms, to be heard in the course of and to participate in the processes that lead to decisions that affect them;

AND WHEREAS the basic rights and fundamental freedoms of children and their families include a right to the least invasion of privacy and interference with freedom that is compatible with their own interests and of society's interest in protecting children from abuse and neglect;

AND WHEREAS parents or guardians have responsibility for the care and supervision of their children and children should only be removed from that supervision, either partly or entirely, when all other measures are inappropriate;

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.
[Children and Family Services Act (CFSA)]
[Emphasis added]

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.***
[CFSA]
[Emphasis added]

There is a clear indication that Community Services intends to provide children at risk with an alternative family when it places them in foster care. The governing statute, the policy manuals and the educational foster care videos all point to the conclusion that in fulfilling its obligation to do what is in a child's best interests, it places children in foster care with a view to simulating a home-like environment. Simultaneously Community Services has an obligation, wherever appropriate and feasible, to maintain relational ties with the child's biological family including parents and siblings. This is reflected in the *Manual* and is consistent with international obligations with respect to children and their right to know their parents.

The custom in place prior to the *Act* makes sense. It is in keeping with the internationally-recognized rights of all children, which are clearly contemplated by the provincial child welfare statute. The custom acknowledges that foster children need information about their biological and foster families as part of normal adult development. They are entitled, like all children, to be part of a family, know their history and to be prepared for such matters as genetic or family health issues. Forcing former foster children to apply under the *Act* moves their right to information from one user-friendly forum to one that is often a more complicated environment. The *Manual* clearly adopts a policy of transparency and full information, which is consistent with best interests of the child that is the paramount principle in child protection.

Community Services says it referred the Applicant to the Review process so s/he would have the right to file a Request for Review. Community Services had good intentions but I would suggest that following its own customary practice in most cases would likely satisfy many former foster children and is a practice that is consistent with routine access, transparency and openness in the first instance. The *Manual* refers to the fact that ***more*** information may be available about children in care than may be available if the provisions of the *Act* are strictly applied.

I find that s. 5(3) of the *Act* could have largely disposed of this Applicant's request for information. The custom to release files to former foster children is a customary practice preceding the *Act* that cannot be diminished or eliminated by the passing of the *Act.* And nothing in the *Act* including exemptions to withhold can be used to restrict access otherwise available by custom. Community Services did not refer to s. 5(3) of the *Act* or indicate that it took it into account. This despite that it acknowledges the custom is still in place, which is reflected in the *Manual*, and that the Applicant had taken advantage of it in the past. As a result, I find that the Applicant could have been given a copy of his/her complete child in care file save and except for some personal information of foster parents. In similar situations in the future, I encourage Community Services to enable front line social workers to follow the customary practice and, if after releasing what is in line with the *Manual* a former foster child wishes more information, s/he can be directed to the FOIPOP process. At that stage, I find that Community Services should give notice to the third party foster parents and seek their consent to the release of some or all of their personal information. As the former foster parent stated in the Applicant's Representations, *"I would like to be asked if my name should or should not be deleted from the files. Personally, if contact with the child had been lost, I would appreciate meeting up again. I am certain that the vast majority of foster parents would feel the same way."*

By the time this Review was ready for release as a public Report, very little information in the Record was being withheld by Community Services. The exemptions claimed with respect to that portion of the Record raise some important issues and, therefore, I will proceed to discuss these exemptions and how they were applied. In addition, the question of the release of the foster parent's personal information remains to be answered as the customary practice still provides that information is to be withheld.

SECTION 20 UNREASONABLE INVASION OF PERSONAL PRIVACY EXEMPTION

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.])*

First, the public body must establish that the information is personal information, which is defined in the *Act.* The interpretation section of the *Act* provides an illustrative, non-exhaustive list of what is considered personal information.

3(1)(i) "personal information" means recorded information about an identifiable individual, including

> *(i) the individual's name, address or telephone number,*
> *(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
> *(iii) the individual's age, sex, sexual orientation, marital status or family status,*
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
> *(v) the individual's fingerprints, blood type or inheritable characteristics,*
> *(vi) information about the individual's health-care history, including a physical or mental disability,*
> *(vii) information about the individual's educational, financial, criminal or employment history,*
> *(viii) anyone else's opinions about the individual, and*
> *(ix) the individual's personal views or opinions, except if they are about someone else;*

I find in this case that Community Services has met its burden to establish that the information it was withholding at the formal Review stage fell within the definition of third party personal information.

With respect to the foster parent information, s. 20 of the *Act* provides the test for when a public body is under a duty to refuse access to third party personal information – when disclosure of third party personal information would constitute an unreasonable invasion of his/her personal privacy.

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 . . .

(2)In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether

> *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;*
> *(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;*
> *(c) the personal information is relevant to a fair determination of the applicant's rights;*
> *(d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;*
> *(e) the third party will be exposed unfairly to financial or other harm;*
> *(f) the personal information has been supplied in confidence;*
> *(g) the personal information is likely to be inaccurate or unreliable; and*

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(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; . . .

(4)A disclosure of personal information ***is not an unreasonable invasion*** *of a third party's personal privacy if*

(a) the third party has, in writing, consented to or requested the disclosure;
(b) there are compelling circumstances affecting anyone's health or safety; . . .
(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff
[Emphasis added]

Invasion of a third party's personal information is permitted under the *Act* where to do so would not be unreasonable. Three factors under s. 20(4) apply in this case. First, it is presumed not to be an unreasonable invasion where the third party consents. A public body can release information if it obtains the third party's consent. In this case, Community Services told the Applicant to obtain the consent of the third parties and offered to assist him/her in doing so. It is not clear why Community Services did not send the third parties notice pursuant to s. 22 of the *Act* to obtain the consent. Asking for consent to facilitate access is, in my opinion, the most expeditious and respectful way to proceed, for all parties concerned.

Second, it is also presumed not to be an unreasonable invasion where there are compelling circumstances affecting anyone's health. Family history of disease or disability that could affect the Applicant's health and the health of any of his/her future family constitutes such a compelling circumstance. In addition, I find that the Representation from the independent medical professional established proof that the refusal to provide all information to the Applicant could have an adverse affect on his/her opportunity to heal and that also constituted a compelling circumstance.

Third, if the information is about a third party's position or function as an employee or a member of a public body or member of a minister's staff, the disclosure of the personal information is presumed not to be an unreasonable invasion. Foster parents are remunerated but not paid a salary and are, therefore, not considered public body employees. But several sections of the *Children and Family Services Act* ["*CFSA*"] establish that for the purpose of s. 20 of the *Act,* foster families are delegates of the Minister in his or her role as parent of foster children. The following are some of the provisions of the *CFSA* are reproduced here:

Children and Family Services Act
3(1)(h) "child-caring facility" means

> *(i) a foster home, . . .*

5 (1) The Minister may designate, in writing, a person to have, perform and exercise any of the powers, privileges, duties and functions of the Minister pursuant to this Act and shall, when so designating, specify the powers, privileges, duties and functions to be had, performed and exercised by the person so designated.

6(1) There may be appointed by the Minister, in accordance with the Civil Service Act, such persons as the Minister may designate to carry out duties in accordance with this Act and the regulations.

7 The Minister may make payments in respect of child-care services, child-caring facilities and child-placing agencies in such amounts as are appropriated annually for those purposes.

15(1) The Minister may approve or license child-caring facilities and child-care services for the purpose of this Act, and a foster home approved by an agency is deemed to have been approved by the Minister.

16(1) The Minister may maintain and conduct

> (g) *such child-caring facilities and child-care services as the Minister approves for the purpose of this Act.*

Children and Family Services Act Regulations
7(1)In order to receive or to continue to receive any funding that may be paid pursuant to Section 7 of the Act, a child-care service, child-caring facility, a child-placing agency or agency shall provide the services and meet and maintain the conditions and standards prescribed in the Act and these regulations and shall provide to the Minister such information concerning the service, facility or agency in such form and at such times as the Minister may reasonably require.

Reading these sections of the *CFSA* as a whole establishes for the purpose of this Review that foster parents are delegates of the Minister. I find that while they do not fall within the definition of salaried employees or agencies, foster parents are a child care facility and a delegate of the Minister and, therefore, fall under s. 20(4)(e) of the *Act*.

If the presumption under s. 20(4) applies, then there is no unreasonable invasion of a third party's privacy. In this case, I find that s. 20(4) applies to information about foster parents as delegates of the Minister. Community Services submits that foster parents already give up some of their personal privacy in the process of fostering children. Community Services represents to them that in the *Children in Care and Custody Manual* that all personal information about foster parents will be removed prior to disclosing information to foster or former foster children. What is stated or

represented to foster parents in the *Manual* cannot, however, override the information to which the Applicant is entitled under the *Act.*

In addition to the *Manual,* the terms of the agreement between foster parents and Community Services are relevant. At the request of the Review Office, on March 4, 2009, Community Services provided a copy of that agreement, the *Statement of Understanding*. Community Services was correct in its understanding that the reason the Review Office wanted the *Statement of Understanding* was to better understand the relationship between the foster parent and Community Services. In particular, the Review Office wanted to determine the nature of the relationship between foster parents and Community Services and whether there was any reference in the agreement regarding confidentiality. Clearly foster parents are not employees of Community Services as they are referred to as volunteers but they are reimbursed for expenses and paid on a per diem basis. There is no reference in the *Statement of Understanding* that Community Services will keep the identity of any particular foster parent confidential especially in relation to the foster children for whom they have provided care. In fact, there is no representation of any kind with respect to confidentiality in the *Statement of Understanding.*

In the *Statement of Understanding,* foster parents agree to maintain records relevant to the foster child's development. That *Statement of Understanding* provides as follows:

> *Maintain records or Life Books of the things that are important in the child's growth, e.g.*
>
> *a. school: pictures, records of teachers, report cards and important papers*
> *b. medical records*
>
> *1. parents: name, address, etc.*
> *2. child's history including placements*
> *3. special occasions*
> *4. pictures*

While there is no mention of confidentiality in the *Statement of Understanding* but Community Services indicates that foster parents are told verbally their personal information will be kept confidential. It remains unclear how this is conveyed to foster parents and whether or not it is a general statement regarding their personal information or specifically in relation to sharing personal information with foster or former foster children.

The Representations received from the Nova Scotia Council for the Family and the Federation of Foster Parents and from a former foster parent support the principle that foster and former foster children should have access to information about their biological and foster families.

In fact, the portion of the Representations from Community Services authored on behalf of the Deputy Minister in response to the Federation of Foster Families supports the principle that former youth in care should have knowledge about their families. The

complete record of the information from that source relied upon by Community Services was not shared with the Review Office even though requested to do so. Thus it is impossible to ascertain if there is anything further.

For the portion of the information in the Record about foster parents, since a condition in s. 20(4) of the *Act* is satisfied, in keeping with *Re House,* that is the end.

For the remaining portion of the withheld Record where the presumption applicable to delegates of the Minister does not apply, I turn to consider s. 20(3). I find that the information about health and employment of third parties falls within the presumption of an unreasonable invasion of privacy. That being the case, at this point the onus shifts to the Applicant in accordance with s. 45(2) of the *Act* to attempt to rebut the presumption.

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.

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.

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.

Personal information is defined in the *Act* to include name, address, telephone number, race, national or ethnic origin, family status, inheritable characteristics, health

history, and anyone else's opinion about the individual. In the case of the Applicant, some of his/her personal information overlaps in those categories of personal information with his/her biological parents. One of the purposes of the *Act* is to give individuals access to personal information about themselves. Former foster children are in a unique position, which Community Services should acknowledge and make every effort to provide them with as much information as possible. Best interests of children are served by access to information about their complete family history. To do otherwise would result in another strike against the child who has had to be placed in care, who is now an adult, and has the optics of shielding Community Services from scrutiny as the arm of government responsible for the care of foster children.

The statutory definition of personal information is not exhaustive *[Refer to Dickie v. Nova Scotia (Department of Health)]*. Based on the definition of personal information as discussed above and because the statutory definition is not exhaustive, in this case upon review of the actual information severed from in this Record, I find that all of the information about the Applicant's biological family falls within the definition of his/her personal information, access to which s/he is entitled.

It is incumbent on public bodies to do the kind of analysis outlined in *Re House* at the time of receiving the original Application for Access to a Record [Form 1] prior to making their decisions. Taking into account all relevant considerations will require a discussion with an applicant to ascertain which presumptions apply and to determine the relevant circumstances.

I find that both the Nova Scotia Council for the Family and the Federation of Foster Families of Nova Scotia are professional independent not-for-profit organizations whose mandates include the promotion of the wellbeing of children and families. Both organizations support the release of the information to the Applicant as a former foster child and I agree.

Foster parents appreciate that their role has already made their personal information available to their foster children. While the Community Services states it makes a verbal representation to foster parents that their information will be remain confidential, the exact nature of that representation is not known. The foster parent who made a Representation made no reference to it. If Community Services believes it has represented to foster parents that the confidentiality promise is one to keep information from former foster children that should be made clear and put in writing in the *Statement of Understanding* to the effect that nothing would be released without their consent, while noting at the same time that all information in the custody or control of Community Services is subject to the *Act*. In the future, if Community Services believes foster parents may have issues related to the release of some of their personal information, Community Services should opt to give notice to the foster parents as third parties seeking their consent pursuant to s. 22 of the *Act.* Verbal, or written, assurances of confidentiality cannot be paramount to the provisions of the *Act*.

PUBLIC INTEREST

There is no indication that Community Services turned its attention to whether there was a public interest issue raised by this Review notwithstanding it received a letter of support for the release of the information from a not-for-profit organization that advocates for children and families. The Representations by the Applicant, the former foster parent and the community organizations that provided support letters constitute the evidence in favour of disclosure based on public interest.

> *31 (1) Whether or not a request for access is made, the head of a public body may disclose to the public, to an affected group of people or* ***to an applicant information . . .***
>
> > ***(b) the disclosure of which is, for any other reason, clearly in the public interest.***
>
> *(2) Before disclosing information pursuant to subsection (1), the head of a public body shall, if practicable, notify any third party to whom the information relates.*
>
> *(3) Where it is not practicable to comply with subsection (2), the head of the public body shall mail a notice of disclosure in the prescribed form to the last known address of the third party.*
>
> ***(4) This Section applies notwithstanding any other provision of this Act. [Emphasis added]***

Public interest is not defined in the interpretation section of the *Act.*

> *"Public interest" is not defined in the Act. I agree with the Information and Privacy Commissioner of British Columbia who believes that "(a)ny attempt to define exhaustively or finally what is meant by the term 'public interest' is doomed to failure" (Order # 332-1999).*
> *[FI-02-20]*

The Supreme Court of Canada in a recent case agreed in principle that public interest is not synonymous with what interests the public but rather an issue which the public may have substantial concern with, when it stated:

> *[102]How is "public interest" in the subject matter established? First, and most fundamentally, the public interest is not synonymous with what interests the public. The public's appetite for information on a given subject — say, the private lives of well-known people — is not on its own sufficient to render an essentially private matter public for the purposes of defamation law. An individual's reasonable expectation of privacy must be respected in this determination. Conversely, the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public*

interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject.

[103]The authorities offer no single "test" for public interest, nor a static list of topics falling within the public interest (see, e.g. Gatley on Libel and Slander (11th ed. 2008), at p. 530). Guidance, however, may be found in the cases on fair comment and s. 2(b) of the Charter.

[104]In London Artists, Ltd. v. Littler, [1969] 2 All E.R. 193 (C.A.), speaking of the defence of fair comment, Lord Denning M.R. described public interest broadly in terms of matters that may legitimately concern or interest people:

> *There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the judge and not for the jury. I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment. [p. 198]*

[Grant v. Torstar Corp., 2009 SCC 61 (CanLII)]

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 *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.

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.

The only gap is with respect to personal information of foster parents. This information may be more appropriately the subject matter of an Application for Access to a Record under the *Act* to give the public body a statutory base from which to provide notice and seek third party consent. In this case, Community Services did not seek consent but put the onus on the Applicant to do so, albeit with their assistance. That was, in my opinion, not appropriate. In this case, in addition to the reasons provided above, I find that it is in the public interest to provide this former foster child with the maximum amount of information about the time s/he was in care including personal information about the foster parents.

SECTION 16 SOLICITOR-CLIENT EXEMPTION

Community Services' decisions relied on the solicitor-client exemption under the *Act*, when it exercised its discretion to refuse access to a letter prepared by a solicitor. That exemption reads as follows:

> *16 The head of a public body **may refuse** to disclose to an applicant information that is subject to solicitor-client privilege.*
> ***[Emphasis added]***

Community Services states that the portion of the Record withheld under s. 16 of the *Act* is information subject to the privilege because it is a communication between Community Services and its solicitor.

There are three issues to consider in this case with respect to the letter and the applicability of s. 16. The first issue is whether or not the s. 16 exemption applies to this document. The Review Office has already laid out what is required in order for something to be considered as solicitor-client privileged.

> *With respect to s.16, in earlier reviews I have cited an opinion of the British Columbia Information and Privacy Commissioner. The Commissioner wrote that "a public body may withhold information that consists of, or would reveal, a confidential communication between a lawyer and his or her client directly related to the giving or receiving of legal advice." He added that a further four conditions must be established:*
>
> 1. *There must be a communication, whether oral or written;*
> 2. *The communications must be of a confidential nature;*
> 3. *The communication must be between a client (or her/his agent) and a legal adviser;*
> 4. ***The communication must be directly related to the seeking, formulating or giving of legal advice.***
>
> ***[Emphasis added]***
> *[FI-05-08]*

The letter in the Record is a written communication between a lawyer and a client. Correspondence between clients and lawyers will not automatically be privileged by virtue of the respective roles of the author and recipient alone. On a review of the contents of the letter in this case, it is clear that there is no advice sought or given. The letter concerns obtaining an expert medical opinion from an outside [non-legal] professional, a copy of whose report was released in full to the Applicant. I find that the fourth requirement to seek, formulate or give legal advice has not been met and thus the exemption does not apply. *[See O'Connor v. Nova Scotia, 2001 NSSC 6, at para. 25]*

The Supreme Court of Canada has said:

[35]However, only to the extent that a document reveals that legal advice was sought or given, from the named legal counsel, will that document be found to be privileged under s. 16 of the FOIPOP Act. Solicitor client privilege at common law as defined in Mitsui, supra, and for the purposes of s. 16 of the FOIPOP Act, includes the privilege that attaches to confidential communications between solicitor and client for the purpose of obtaining and giving legal advice.
[36]As noted above, because legal advice privilege protects the relationship between solicitor and client, the key question to consider is whether the communications is made for the purpose of seeking or providing legal advice, opinion or analysis. Legal advice type privilege arises only where a solicitor is acting as a lawyer, and giving legal advice to a client. ***Therefore, in each instance where such privilege is claimed herein, the question should be "was the named government lawyer acting as a lawyer and providing legal advice when he/she received, commented on or initiated a document or correspondence?"***
[37]In R. v. Campbell, [1999] 1 S.C.R. 565 the Supreme Court of Canada at para 50 commented:

> *"it is, of course, not everything done by a government (or other) lawyer that attracts solicitor client privilege."*

[38]The Court went on to state:

> ***Whether or not solicitor client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.***

[R. v. Fuller, 2003 NSSC 58, (2003), 213 N.S.R. (2d) 316]
[Emphasis added]

Although there is no need to continue as I have found that the exemption does not apply, I will in order to highlight a factor that would need to be considered if the exemption did fit. The second issue is in regards to who is owed the privilege. In a child welfare context, the lawyer often acts both in the Departmental interest as well as that of the child *[See ON Order P-1115]*. The privilege belongs to the client or clients and is there to protect the advice given to the client by the lawyer from others. Therefore the Applicant is also the client in this case and if advice was sought or given and the exemption fit, the Applicant would be party to that privilege.

Again, although it is not necessary, it is important to note that if there was privilege attached to this document, the third issue to consider is that section 5(3) of the *Act* reinforces the practice under the *Manual* that allows the Applicant full access to his/her child in care file. It prevents any of the exemptions in the *Act* – particularly a discretionary exemption – from being relied upon to withhold information that was previously available by custom or practice. This includes the s. 16 solicitor-client discretionary exemption.

I find in all of these circumstances – where it is a foster child seeking access to his/her record as a child in care – the lawyer acting on behalf of the Department was also

acting as counsel to the Applicant by promoting what was in his/her best interests. The portion of the Record withheld under s. 16 is a letter written about a third party opinion about the child. The professional opinion that accompanied the lawyer's letter was released in full to the Applicant. The letter itself contains no legal advice suggesting a course of action to be taken. I find that the portion of the Record has been improperly withheld under s. 16 of the *Act* and Community Services ought to have exercised its discretion to release that portion of the Record. It appears that this redaction of the Record has been done simply because it was correspondence between Community Services and its lawyer at the time without considering the content, which kind of blanket approach to the application of a discretionary exemption is not in accordance with the *Act*.

INTERPRETATION OF SECTION 38 OF THE *ACT*

In its November 17, 2009, response to the Review Office, Community Services responded with explanations about the additional release of the Record and included a copy of its letter dated October 27, 2008 to the Applicant which had not been copied to the Review Office. In the same letter, Community Services refused to provide another document requested by the Review Office.

Community Services stated that it was opposed to providing supporting documentation for its Representations – a letter from the Deputy Minister to the community organization and information provided by the Provincial Coordinator of Foster Care Resources – questioning their relevance. Community Services interprets s. 38 of the *Act* to limit the authority of the Review Officer to request documents or enter premises. Community Services reads down s. 38 as having to be within the parameters of s. 6 of the *Act* and thus the Review Officer must show relevance. Section 38 reads as follows:

> *38(1) Notwithstanding any other Act or any privilege that is available at law, the Review Officer may, in a review,*
>
> > *(a) require to be produced and examine **any record** that is in the custody or under the control of the public body named in the request made pursuant to subsection (1) of Section 6; and*
> > *(b) enter and inspect any premises occupied by the public body.*
>
> *(2) A public body shall comply with a requirement imposed by the Review Officer pursuant to clause (a) of subsection (1) within such time as is prescribed by the regulations.*
>
> *(3) Where a public body does not comply with a requirement imposed by the Review Officer pursuant to clause (a) of subsection (1) within the time limited for so doing by subsection (2), a judge of the Supreme Court of Nova Scotia may, on the application of the Review Officer, order the public body to do so.*
> ***[Emphasis added]***

With respect, I find Community Services' interpretation to be overly prescriptive. The reference to s. 6 in s. 38 of the *Act* is defining who the public body is – the public body that is named in the Application for Access to a Record under s. 6. The reference to ***any record*** that is required to be produced or examined by that public body is not restricted in any way by the subsequent language that is specifically defining which public body is required to respond. In addition, there is no requirement under s. 38(1) of the *Act* for the Review Officer to prove or demonstrate relevance at the time of the requirement to produce ***any record.*** In addition, s. 38(2) places a duty on public bodies to comply with any requirement imposed by the Review Officer in a demand to produce and examine any record, pursuant to s. 38(1)(a). To read s. 38(1) of the *Act* as Community Services proposes would be restrictive in a statute that is intended to be given broad and liberal interpretation.

> *The Nova Scotia Courts expect public bodies to adopt a liberal interpretation of the purpose of this Act. The Nova Scotia Court of Appeals has concluded that this Act "should be construed liberally in light of its stated purpose" and that "doubt ought to be resolved in favour of disclosure". [McLaughlin v. Halifax-Dartmouth Bridge Commission, (1993) 125 N.S.R. (2d) 288 at pp 292-293]*
> *[FI-02-23]*

As the Review Officer, I, or my delegates, can request any record considered relevant and, during the course of the formal Review, I will make a determination as to any record's relevance and the weight to be given to it in a Review Report's Findings. It would be inconsistent with how administrative quasi-judicial bodies conduct their proceedings to have to justify a request for information considered potentially relevant. Community Services took the position that the Review Office had to restrict itself by way of evidence to the Record as defined by the Application for Access to a Record and had to give reasons as to why any other information was relevant to the Review. Having unfettered access to information considered relevant in a Review is a foundational aspect of the Review mandate of this independent oversight body.

Some of the time Community Services complied with the Review Office requests for additional information. A prime example of the need for this broad interpretation occurred in this Review. Community Services provided a copy of the *Statement of Understanding* upon request. This agreement between Community Services and a foster parent is in the discussion of s. 20 above. Clearly, this document was relevant evidence that the Review Office required to fully understand the relationship between Community Services and foster parents. All information requested under s. 38 of the *Act* should be provided to the Review Officer or my delegates.

FINDINGS

I make the following Findings with respect to this Request for a Review:

1. 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 *Act.*

2. The best interests 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.
3. The *Children in Care and Custody Manual* read together with s. 5(3) of the *Act* could have disposed of this request for the bulk of information sought by the Applicant. For the remainder of the Record, the personal information of foster parents, the Applicant would file an Application for Access to a Record and Community Services would have given notice to the third party foster parents and sought their consent to release some or all of their personal information. Community Services seeking consent of the third parties would have been the most expeditious and respectful way to proceed. It is not appropriate to ask the former foster child to obtain the consent of his/her biological or former foster parents.
4. In the future, if Community Services believes a foster parent may object, I find that its remedy is to provide him/her with timely notice in accordance with s. 22 of the *Act* of its intention to release his/her personal information and seek consent and if consent is not forthcoming the former foster parent can file a Third Party Request for Review.
5. Section 20 of the *Act* provides that it is not an unreasonable invasion of a third party's personal privacy if there are compelling circumstances affecting anyone's health or safety. I find that the need for the Applicant to know about his/her family medical health history and for his/her own opportunity to heal based on a medical Representation are compelling circumstances sufficient to meet the presumption is s. 20(4)(b) of the *Act.*
6. Reading sections of the *CFSA* as a whole establishes for the purpose of this Review that foster parents are delegates of the Minister. I find that while they do not fall within the definition of salaried employees or agencies, foster parents are a child care facility under *CFSA* and a member of the Minister's staff under s. 20(4)(e) of the *Act.* I find that foster parents are a child care facility and a delegate of the Minister in his/her role as substitute parent and fall under s. 20(4)(e) of the *Act* and, therefore, the presumption that release of personal information is not an unreasonable invasion of personal privacy applies.
7. Personal information is defined in the *Act* in a non-exhaustive list of factors including name, address, telephone number, race, national or ethnic origin, family status, inheritable characteristics, health history and anyone else's opinion about

the individual. In the case of the Applicant, some of his/her personal information overlaps in those categories of personal information with his/her biological parents. One of the purposes of the *Act* is to give individuals access to personal information about themselves. Former foster children are in a unique position, which Community Services should acknowledge and make every effort to provide them with as much information as possible. Based on the definition of personal information as discussed above, because the statutory definition is not exhaustive, and based on the actual information subject to this Review, I find that all of the information about the Applicant's biological family falls within the definition of his/her personal information, access to which s/he is entitled.

8. The Representations by the Applicant, the former foster parent, and the community organizations that provided support letters constitute the evidence in favour of disclosure based on public interest. In this case, I find that it is in the public interest to provide this former foster child with the maximum amount of information about the time s/he was in care including personal information about the foster parents.
9. Community Services is not able to rely on the s. 16 solicitor-client exemption to refuse the Applicant access for two reasons. First, there is nothing in the text of the letter that constitutes advice, which is one of the essential elements for a document to be withheld under the s. 16 exemption of the *Act*. Second, I find that because the Applicant was, at the material time, a child in care about whom the letter was written the lawyer was acting for both the child and for Community Services. The solicitor-client privilege belongs to both clients – Community Services and the former foster child who is entitled as one of the clients involved to access to this document. The other instructive fact is that the letter, which contains no advice, refers to another portion of the Record to which the Applicant was given unabridged access. Community Services appears to apply the solicitor-client exemption contained in s. 16 of the *Act* as if it were a mandatory one. I find that this kind of blanket application of an exemption to correspondence from a lawyer is not in keeping with how a discretionary exemption should be applied.
10. Section 38 of the *Act* is to be given broad and liberal interpretation. It clearly gives the Review Officer authority to request any record and impose any requirement as I see fit. While some of the key documents were provided, I find that Community Services failed to respond to some of the Review Office's requests for information.
11. The question is not what the Applicant remembers, but what the Applicant is entitled to by custom and under the *Act*.

RECOMMENDATIONS

1. That Community Services release the complete child in care file to the Applicant including all personal information about biological parents, biological siblings, foster parents and the letter inappropriately withheld under s. 16 of the *Act.*
2. That Community Services revise the wording of the *Foster Care Services Statement of Understanding Between Agency and Foster Parents* to include reference to the *Act* so that foster parents are on notice that any representations of confidentiality made to them by Community Services are not paramount to the *Act*.

Respectfully,

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