



REPORT
**Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-09-63**

- Report Release Date:** January 24, 2013
- Public Body:** Department of Community Services
- Record at Issue:** To be identified by Community Services in response to the Review Report Recommendations.
- Issues:**
1. Has Community Services followed best practices and met its statutory duty to assist in accordance with s. 7 of the *Freedom of Information and Protection of Privacy Act* [“Act”]?
 2. Was the FOIPOP Administrator’s response to the Review Officer in accordance with the *Act*?
 3. Was Community Services’ interpretation of the scope of the Application for Access to a Record [“access request”] reasonable?
 4. Does the *Act* permit Community Services to refuse to confirm or deny the existence of a responsive Record to an applicant and to the Review Officer?
 5. If the answer to Issue #4 is no, what is a reasonable interpretation of the access request and what may constitute the responsive Record?
 6. Do the differences in the access to information regimes distinguish between members of the public based on a prohibited analogous ground of discrimination contrary to s. 15 of the *Canadian Charter of Rights and Freedoms*?
- Key Words:** adoption, analogous ground, best practices, birth family, birth parent, comparator, confirm or deny, Crown Ward, delay, discrimination, discriminatory, equal access, family status, foster child, proactive disclosure policy, Record, scope, statutory duty to assist.
- Statutes Considered:** *Freedom of Information and Protection of Privacy Act, Stats NS 1993, c. 5, ss. 7, 7(2)(c), 15, 20, 22, 38(2); Freedom of Information and Protection of Privacy Regulation, Regulation. 22; Canadian Charter of Rights and Freedoms, s. 15; Adoption Information Act SNS 1996, c. 3.*

Cases Cited:

FI-12-70; FI-02-41; FI-07-27; O'Connor v. Nova Scotia, 2001 NSSC 6; R. v. Fuller, 2003 NSSC 58; McLaughlin v. Halifax-Dartmouth Bridge Commission, (1993) S.H. No. 85235.

Other Cited:

Nova Scotia Department of Community Services Statement of Mandate 2012-2013.

REVIEW REPORT FI-09-63

Introduction:

There has been inordinate delay associated with processing this Application for Access to a Record [“access request”] and the Request for Review of this matter. It is over three years since the Applicant made an access request. After reaching an impasse during the investigation, my staff sought directions from me on December 10, 2012. I exercised my discretion and moved the matter directly to formal Review on January 3, 2013.

I am issuing this Review Report and inviting the Department of Community Services [“Community Services”] to revisit its initial decision with respect to the original access request. If the Recommendations are accepted, Community Services will make a new decision in accordance with the *Freedom of Information and Protection of Privacy Act* [“Act”]. The Recommendations include: Community Services basing the new decision on an accurate reading of the access request, identifying the complete responsive Record, providing a complete copy of the Record to the Review Officer and all or part of the Record to the Applicant to which s/he is entitled under the *Act*.

On January 21, 2013, I confirmed with the Applicant that s/he continues to want access to the information despite the prolonged delay.

The problems identified in this Review Report were not isolated to this case, but were indicative of an approach and attitude towards the *Act* in general, and the Review Office in particular. I am confident, given the recent changes and enhancements at Community Services’ Freedom of Information and Protection of Privacy [FOIPOP] area, its response to the last Review Report [*Refer to FI-12-70*] and its improved commitment to client oriented service delivery system that these problems will be receive serious attention and consideration, consistent with its most recent Statement of Mandate:

*We will begin to build a client oriented service delivery system which enables easy access to information, knowledgeable staff, and timely decisions. Strengthening restorative practices, shifting the focus from working **for** people to working **with** them, will be a key component of our delivery approach.*

[Emphasis added]

[Community Services Statement of Mandate 2012-2013]

Like **all public bodies**, the head of Community Services will need to remain cognizant of the fact that their delegated authorities under the *Act* possess wide latitude to process access requests and to respond to Requests for Review. Delegated authorities under the *Act* need to be given guidance, advice, support, training and supervision because how they conduct themselves under the *Act* will reflect on the whole department.

Background:

By letter dated April 30, 2009 [received May 12, 2009], the Applicant made an Application for Access to a Record under the custody and control of Community Services. The access request reads:

I am writing to you on the recommendation of [Named Employee] of the Nova Scotia Adoption Disclosure Services Program. I contacted [Named Employee] a few months ago to enquire regarding the whereabouts of my [Child] – [Full name and Birthdate] – who was removed from my care on [Date] by Judge [Named Judge] and placed in the care of the Nova Scotia Children's Aid Society. [Named Employee] has informed me that my [Child] was never adopted and instead grew up as a ward of the Children's Aid. S/he advised me to contact you for further information on [Child's] progress and whereabouts.

You can contact me through [Named Representative] - at the address listed below. I have enclosed a photocopy of my (p)assport as a means of confirming my identity. Thank you for your consideration in this matter. [Emphasis added]

By letter dated June 23, 2009 [42 days after the access request was received], Community Services released the following decision:

I am writing regarding your letter requesting access to information which was sent to the Halifax District Office of the Department of Community Services (the former office of the [Named County] Children's Aid Society). Your letter was forwarded to this office for response. Your request has been processed under the Freedom of Information and Protection of Privacy (FOIPOP) Act.

Specifically your request reads as follows:

"Enquire regarding the whereabouts of my [biological child] – [full name and date of birth]"

The Department shall only disclose personal information in response to a request for access to information about a third party if it meets the provisions of the legislation that it is not an unreasonable invasion of the third party's personal privacy. It states in S. 20(1)(4) of the legislation that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if: (. . .) [ss. 20(1)(4)(a) to (i) is reproduced in full].

*In reviewing your request, we have determined that it would be an unreasonable invasion of a third party's privacy to disclose personal information about a third party to you. Your request to access information regarding a third party is denied under S 20(1) of the FOIPOP Act. **The***

***Department can neither confirm nor deny if it has any information that would be responsive to your request.
[Emphasis added]***

On July 10, 2009, the Applicant filed a Form 7 Request for Review under covering letter [received July 17, 2009]. The Form 7 was signed by the Applicant. The covering letter was written by the Applicant's agent. A signed consent form was enclosed allowing the agent to communicate on the Applicant's behalf. The covering letter read as follows:

*I am writing on behalf of my client, [the Applicant], in response to a letter received from [a Named Administrator] dated June 23, 2009 regarding - **Application for access to record – File # Com-09-100.***

I am writing to respectfully request that you review your decision regarding [the Applicant's] request for information about [his/her] [named child]. [The Applicant] is [#] years old. From infancy, [the Applicant] was a ward of the [the agency]. [The Applicant] spent several years institutionalized in the [named institution], as well as residing in a series of foster homes. [The Applicant] suffered (. . .) at the hands of several (. . .) foster parents. [The Applicant's] time at the [named institution] was equally distressing. Reviewing [the Applicant's] records, (. . .) I am struck by how today we would instantly recognize [this Applicant] as suffering [as a result of these experiences]. Instead, [the Applicant] was [mis]diagnosed (. . .) and, as a result, the Applicant was denied access to an education and [SIC child] was taken into care (. . .). [The Applicant] has gone on to successfully raise [other children], one of whom is preparing to attend college (. . .) on scholarship.

I question whether the decision to remove [named child] from [the Applicant's] care would have been made today. When we began our search, all that [the Applicant] wished for [the child] was to know that [the child] had had the benefit of growing up in a loving family. It was devastating for [the Applicant] to hear that [the Applicant's child] had shared [the Applicant's] fate and was made to endure a childhood of institutionalization.

Considering the tragic nature of this story, I wonder if you would reconsider your decision to deny [the Applicant] access to information regarding [the child]. This information would go some way to reduce [the Applicant's] distress. [The Applicant] is not asking for full disclosure. [The Applicant] simply wants to know how and where [the Applicant's child] grew up, whether [the child] reached maturity and any information regarding [the child's] whereabouts at the time that [the child's] wardship expired.

If [this child] had been adopted, [the Applicant] would have access to services that would help [the Applicant] reunite with [the Applicant's Child]. The fact that the [named child] grew up in care makes the existence of a [parent and siblings] who are interested in [this child's] welfare potentially even more vital to [this child]. However, unlike adopted children, [this child]

was denied the opportunity to grow up in a loving home and now [this child] is being denied the opportunity to reunite with [his/her] family.

*Please find enclosed the Request for Review form, as well as a disclosure of information form signed by [the Applicant] that allows me to communicate on [their] behalf. Should you have any further questions please do not hesitate to contact me. Thank you for your attention to this matter. I look forward to hearing from you soon. [**Emphasis in the original**]*

On July 17, 2009, the Review Office responded to the Applicant advising in response to his/her request for the decision to be reconsidered, which provided in part as follows:

Your letter requests that the Review Officer, Dulcie McCallum review her decision regarding your Application for Access to a Record. Please note that the Review Officer does not make decisions in response to Applications for Access to a Record. The Review [Officer] reviews decisions made by public bodies, in this case Community Services.

The letter acknowledged receipt of the Form 7 from the Applicant appealing the decision of Community Services.

The Review Office notified Community Services of the Request for Review by letter dated July 17, 2009. Among other things, the Review Office requested, “(. . .) a complete copy of the records responsive to the application.”

Community Services responded by letter dated July 21, 2009. It read:

In response to your letter received in this office on July 20, 2009, enclosed is the following documentation relating to the above noted request:

- 1 Applicant's Application to the Department*
- 2 Letter of Decision to Applicant*

There are no additional documents or an index to provide to you as there were no records responsive to the request. [Emphasis added]

The Review Officer sought clarification from Community Services with respect to its claim there was no responsive Record. In addition, despite numerous requests on our part, and demands for extensions on their part, Community Services did not provide the Review Officer with Representations to explain any of the positions taken with respect to this Review. Moreover, the former FOIPOP Administrator refused to provide a copy of the responsive Record to the Review Officer.

The Applicant's consent was renewed on October 21, 2011 when a new agent was appointed. On November 24, 2011, the Applicant was invited to submit Representations. On January 30, 2012, the Applicant provided further Representations. With the consent of the Applicant, all his/her Representations were shared with Community Services. Thereafter, Community Services was invited to respond and given a time extension to do so but no response was provided.

Record:

The Record has not been identified by the Review Officer as no Record has been provided by Community Services. The responsive Record is to be identified by Community Services in response to the Recommendations in this Review Report. A few comments in that regard, however, may prove helpful.

Community Services and the Applicant did not share the same interpretation of the access request. I have highlighted portions of the original access request [dated April 30, 2009] and the interpretation in the decision letter [dated June 23, 2009] to demonstrate the disparity in interpretation [See page 4 of this Review].

Community Services gave a narrow interpretation to the access request focussing on why it thought the Applicant wanted the Record – to locate the third party. On this narrow interpretation, Community Services decided that no responsive Record existed. The Applicant, on the other hand, has made his/her position clear that the access request was intended to encompass any available information concerning the progress and whereabouts of the named third party, the Applicant's child. If the Applicant's interpretation is accepted, and the information from the Adoption Disclosure representative is accepted, there would be an entire child in care file [Crown Ward] for the named third party. There may also be portions of the Applicant's own Crown Ward file responsive to the access request.

Despite numerous requests, the then FOIPOP Administrator at Community Services flatly refused to provide the Review Officer with any Record that would be responsive to the Applicant's intended scope.

At no time throughout the access or Review process did Community Services contact the Applicant even after it became apparent that the public body had misinterpreted the intended scope of the original access request.

Issues:

1. Has Community Services followed best practices and met its statutory duty to assist in accordance with s. 7 of the *Freedom of Information and Protection of Privacy Act* ["Act"]?
2. Was the FOIPOP Administrator's response to the Review Officer in accordance with the *Act*?
3. Was Community Services' interpretation of the scope of the Application for Access to a Record ["access request"] reasonable?
4. Does the *Act* permit Community Services to refuse to confirm or deny the existence of a responsive Record to an applicant and to the Review Officer?
5. If the answer to Issue #4 is no, what is a reasonable interpretation of the access request and what may constitute the responsive Record?
6. Do the differences in the access to information regimes distinguish between members of the public based on a prohibited analogous ground of discrimination contrary to s. 15 of the *Canadian Charter of Rights and Freedoms*?

Findings:

Issue #1: Has Community Services followed best practices and met its statutory duty to assist in accordance with s. 7 of the Act?

1. Community Services' FOIPOP Administrator refused to contact the Applicant to clarify the scope of access request because s/he considered it unnecessary. Even after Community Services was given a copy of two Representation letters from the Applicant's agent that provided more details about the access request, the FOIPOP Administrator continued to refuse to contact the Applicant or his/her agent. In addition, the access request involved third party information but the FOIPOP Administrator refused to seek the Applicant's consent to identify him/her to the third party, refused to contact the third party to seek his/her consent to release of the Record and took the position she need not comply with the Review Officer's demand for the Record because she had already decided the Record would not be released **regardless of the outcome of the Review**. The entire exercise was rejected as a "waste of time." And, according to the former FOIPOP Administrator, seeking consent of the Applicant and third parties, under these circumstances, is not part of the job because they are not social workers.

I find Community Services failed to comply with the timeline requirements imposed by the Review Officer [*Refer to s. 38(2) and Regulation 22*], failed to follow best practices, failed to fulfill its statutory duty to assist under s. 7 of the Act [*Refer to FI-02-41; FI-07-27*] and failed to understand the basic principles of independent statutory oversight.

Issue #2: Was the FOIPOP Administrator's response to the Review Officer in accordance with the Act?

2. Contrary to the purpose of the Act, the statutory duty to assist and best practices, the FOIPOP Administrator failed to interpret the access request liberally. In fact, the interpretation given to it by the then FOIPOP Administrator did not follow a plain language reading of the access request. Community Services' interpreted the access request based on what the FOIPOP Administrator presumed was the Applicant's intent – to locate his/her child.

I find the former FOIPOP Administrator's interpretation of the scope of the access request to be unreasonable for two reasons: first because the access request was read too narrowly given the Act is to be given liberal interpretation [*Refer to O'Connor v. Nova Scotia, 2001 NSSC 6; R. v. Fuller, 2003 NSSC 58; McLaughlin v. Halifax-Dartmouth Bridge Commission, (1993) S.H. No 85235*] and second because Community Services considered the reason behind the access request, which is irrelevant and should not have been the basis for unilaterally narrowing the scope access request.

Issue #3: Was Community Services' interpretation of the scope of the Application for Access to a Record ["access request"] reasonable?

3. Despite repeated requests from the Review Office, the former FOIPOP Administrator at Community Services failed to provide Representations to justify her authority to refuse to confirm or deny the existence of a Record or how her decision letter was in keeping with the *Act*. The former FOIPOP Administrator's refusal to provide Representations to the Review Officer left serious questions unanswered and caused inordinate delay. In addition, the FOIPOP Administrator consistently refused to abide by timelines imposed by the Review Officer during the investigation, refused to reconsider the original decision because she indicated its office was transitioning to new Director, stated she had numerous other files and needed more time to respond; deferred to a matter that was before Supreme Court, which, according to her, was determinative. Despite demanding an additional two months to provide Representations, she made no submissions. The last contact from that FOIPOP Administrator at Community Services on this Review was May 30, 2012.

I find the approach taken by the former FOIPOP Administrator at Community Services over the past three years caused unnecessary and unfortunate delay. I find the delays in this case are particularly disturbing given the Applicant's circumstances and the nature of his/her access request. This amounted to a flagrant disregard bordering on contempt, not just for process of the Review Officer but even more importantly for the purposes and intent of the legislation as clearly laid out by the House of Assembly in the *Act*.

Issue #4: Does the *Act* permit Community Services to refuse to confirm or deny the existence of a responsive Record to an applicant and to the Review Officer?

4. Community Services made a decision under the *Act* by applying an exemption under s. 20 of the *Act* to refuse access based on third party personal information and then went on in the same decision to refuse to confirm or deny the existence of the Record. Pursuant to s. 7(2)(c) of the *Act*, a public body is authorized to refuse to confirm or deny the existence of a Record if it contains information exempted under s. 15 of the *Act* [law enforcement]. Section 7 does not have an equivalent provision with respect to s. 20 of the *Act*. The *Act*, therefore, does not provide any authority for a public body to refuse to confirm or deny the existence of a record that contains information that would be exempted under s. 20.

I find that Community Services had no statutory authority to refuse to confirm or deny the existence of a record as it did here.

Issue #5: If the answer to Issue #4 is no, what is a reasonable interpretation of the access request and what may constitute the responsive Record?

5. On the recommendation of the Adoption Disclosure Services Program, the Applicant contacted Community Services. The adoption department had told the Applicant that his/her child had not been adopted but had remained in foster care.

I find that it is reasonable to conclude that there is a child welfare file for this child that would be responsive to this access request. Furthermore, I find that it is reasonable to conclude that there may be a part of the Applicant's child welfare file would contain information about the child of the Applicant. In addition, I find Community Services erred when it refused to provide the Review Officer with the responsive Record as required, in accordance with s. 38 the *Act*.

Issue #6: Do the differences in the access to information regimes distinguish between members of the public based on a prohibited analogous ground of discrimination contrary to s. 15 of the *Canadian Charter of Rights and Freedoms*?

6. The Applicant has provided two comprehensive Representations to the Review Officer, a portion of which argued that the denial of equal access to information to non-adopted former Crown Wards [foster children] and their biological parents/families is discriminatory. The *Nova Scotia Adoption Information Act* creates a comprehensive legislative scheme aimed at providing access to information to facilitate uniting families of children taken into care and subsequently adopted. The Applicant submits in effect this excludes an entire class of comparator children – children taken into care but who are **not adopted**. Though given ample opportunity, Community Services failed to respond to this Representation and failed to avail itself of the consent provisions in s. 22 of the *Act*. Section 22, if properly applied, enables Community Services to ensure all former Crown Wards [not adopted] and their families receive equal access to information under the law.

I find former foster children and their biological families have been denied the equal benefit under the adoption information legislation based on family status, an analogous category, contrary to s. 15 of the *Canadian Charter of Rights and Freedoms*. On this basis, I find that Community Services ought to have utilized s. 22 of the *Act* to deliver a comparable level of service to all former Crown Wards [not adopted] and their birth families.

Recommendations:

I make the following Recommendations to Community Services:

1. Conduct a new search based on an appropriate interpretation of the Applicant's original access request;
2. Prior to deciding which exemptions may apply, seek the consent of the Applicant to provide the following information to the third party: the Applicant's name, status as a birth parent, and contact information. Contact the third party and offer to provide the information the Applicant has consented to share. Seek the third party's consent for the release of his/her personal information in the Record to the Applicant including his/her contact information. In the alternative, seek consent of the third party as to what personal information s/he is willing to have disclosed [for example, s/he may consent to disclosure of current whereabouts, as opposed to information from the Child Ward file];
3. Therefore, in accordance with s. 7 of the *Act*, review the Record and apply any exemptions that are appropriate and make a new decision within 30 days. Ordinarily part of this stage of processing the access request, a fee estimate would also be provided. Given the considerable delay in this matter, waive all fees in their entirety, and pursuant to s. 8 of the *Act*, provide the Applicant with a new decision and the Record, in whole or in part. Any extensions required after 30 days are to be taken in accordance with s. 9 of the *Act*;
4. In accordance with s. 38 of the *Act*, provide a complete [unsevered] copy of the responsive Record to the Review Officer *and* a copy of what was sent to the Applicant;
5. If Community Services agrees to follow the above Recommendations, the following will take place:
 - a. The existing Review file will remain open but on-hold until a new decision to the access request has been made;
 - b. If the Applicant is satisfied with the new decision, that is the end of the matter and our Review file will be closed;
 - c. If the Applicant wishes to appeal Community Services' new decision, s/he will be offered 30 days to amend his/her Form 7. This will ensure the Request for Review is based on the all decisions made by Community Services in response to the access request.
 - d. If the Applicant makes the choice to continue with the Request for Review, the Review Officer will reactivate and expedite the Review;
6. Short of the Legislature amending the *Adoption Information Act* or enacting equivalent legislation for former non-adopted foster children and their birth families, I recommend that Community Services:

- a. Give consideration to refining its proactive disclosure policy [bypassing the necessity to make an Application for Access to a Record under the *Act*] to provide equal access to information for all children who are former Crown Wards and their birth families;
- b. As an immediate solution, process all Applications for Access to a Record it receives, or has received [including any that may be at the Review Office] from former foster children who have not been adopted and/or their birth families in a manner consistent with this Review Report. That means, where appropriate, seek the consent of an applicant make his/her personal information [identity, status as a birth parent, contact information] known to the third party, seek the consent of the third party to disclose all or part of his/her personal information contained in a record to an applicant, identify and prepare a complete record, release the whole or the part of a record to which an applicant is entitled under the *Act*.

Respectfully submitted,

Dulcie McCallum, LLB

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