Office of the Information and Privacy Commissioner
Report of the Commissioner (Review Officer)
Catherine Tully

REVIEW REPORT FI-10-95

November 19, 2015

Department of Community Services

Summary: This is the first of two simultaneously released review reports relating to access requests by former foster children. The applicant is a former child in care of the Department of Community Services ("Department"). She sought access to information that would provide details of her family history, medical history, and the reasons for being taken into care. The Department withheld a portion of the record on the basis that the disclosure would unreasonably invade the privacy of the applicant's mother, father, and siblings.

Access to foster care records poses a unique challenge for the Department because the personal information of third parties is, in this case, also the personal information of the applicant. It is a recording of her family life and the factors that went into the Department's decision to take her into care. The Commissioner examines in detail the factors that weigh for or against disclosure. She finds that disclosure of portions of the information is necessary to meet the purposes of the *Act*, which include the applicant's rights to access personal information about herself. By refusing to disclose to the applicant any information about third parties, the Department falls short of a reasonable balance between its responsibilities to be transparent and to protect personal information.

Statutes Considered: *Access to Documents Held by Public Bodies and the Protection of Personal Information, An Act respecting*, CQLR c A-2.1; *Access to Information Act*, RSC 1985, c A-1; *Access to Information and Protection of Privacy Act,* 2015, SNL 2015, c A-1.2; *Child Welfare Act, RSNS 1967, c. 31; Child and Family Services Act*, SNS 1990, c.5; *Child and Family Services Act*, *The,* CCSM c C80, s. 76(4); *Children and Youth Care and Protection Act,* SNL 2010, c C-12.2, s. 71; *Freedom of Information and Protection of Privacy Act*, CCSM c F175; *Freedom of Information and Protection of Privacy Act,* SNS 1993, c 5, s. 3(1)(i), 20, 27, 45; *Freedom of Information and Protection of Privacy Act,* SS 1990-91, c F-22.01; *Privacy Act*, RSC 1985, c P-21

Authorities Considered: **Alberta:** Order F2011-001, 2011 CanLII 96578 (AB OIPC); F2012-20, 2012 CanLII 70606 (AB OIPC); **British Columbia:** Orders 330-1999, 1999 CanLII 4600 (BC IPC); 01-12, 2001 CanLII 21566 (BC IPC); F08-08, 2008 CanLII 41156 (BC IPC); F08-16, 2008 CanLII 57359 (BC IPC); **Nova Scotia**: Review Reports FI-08-107, 2010 CanLII 47110 (NS FOIPOP); FI-09-29(M), 2012 CanLII 44742 (NS FOIPOP); **Ontario:** Order MO-3215, 2015 CanLII 38835 (ON IPC)

Cases Considered: *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police),* [2003] 1 SCR 66, 2003 SCC 8 (CanLII); *French v. Dalhousie University,* 2003 NSCA 16 (CanLII); *House (Re),* [2000] N.S.J. No. 473; *Keating v. Nova Scotia (Attorney General),* 2001 NSSC 85 (CanLII); *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate,* 2015 NSCA 38 (CanLII); *Sutherland v. Nova Scotia (Community Services),* 2013 NSSC 1 (CanLII)

Other Sources Considered: *Canadian Oxford Dictionary*, (Toronto: Oxford University Press, 1991), "unreasonable"

INTRODUCTION:

[1] On October 18, 2010, the applicant requested access to a child in care file relating to her time as a foster child. The Department of Community Services ("Department") provided three responses to the request and in each, withheld a portion of the information citing the need to protect the personal privacy of third parties under s. 20 of the *Freedom of Information and Protection of Privacy Act* ("*FOIPOP*"). On December 1, 2010, the applicant sought a review of the Department's decision.

ISSUE:

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

DISCUSSION:

Background

[3] At the age of eight, the applicant was committed to the care and custody of the Director of Child Welfare for Nova Scotia. The applicant remained in foster care until she was married at 19. In her application for access to her child in care file the applicant identified her birth surname and the names of her foster parents.

[4] On November 30, 2010, the Department disclosed a total of 76 documents, withholding some of the information under s. 20(1). The applicant sought a review of the Department's decision to withhold portions of the record. As a result of discussions with the Commissioner's Office, on May 6, 2011, the Department disclosed additional information from the Report of a Child in Need of Protection. And again, on May 27, 2013, as a result of discussions with this Office, the Department disclosed additional information from several documents released on November 30, 2010, and also partially disclosed several additional records.

[5] After consultations with the parties, five documents, amounting to seven pages, remain at issue:

- Document 1: Report of Medical Examiner dated February, 1979;
- Document 2: Report on a Child in Need of Protection dated July 11, 1969;
- Document 3: Annual Ward Review dated June, 1977;
- Document 4: Order for Wardship and Notice of Settlement dated May, 1969; and,
- Document 5: Court document dated May 6, 1969.

[6] I will refer to these documents by document number in the discussion below.

[7] All five documents were partially disclosed to the applicant. The applicant has identified that her key issue of concern is: why was she removed from the care of her parents?
[8] In its submission, the Department argues that the withheld information qualifies as personal information within the meaning of s. 3(1)(i) of *FOIPOP* and that the presumptions set out in sections 20(3)(a), (b), (d) and (g) apply to various parts of the records.

[9] Section 20 of *FOIPOP* provides in part:[1]

> 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.

Burden of proof
[10] Usually it is the Department who bears the burden of proving that the applicant has no right of access to a record. However, where the information being withheld is the personal information of people other than the applicant (s. 20), the applicant bears the burden of proof.

> 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.
> (3) At a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party,
>> (a) in the case of personal information, 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; and
>> (b) in any other case, the burden is on the third party to prove that the applicant has no right of access to the record or part.

[1] A complete copy of the *Freedom of Information and Protection of Privacy Act* is available online at: http://foipop.ns.ca/ .

[11] The Nova Scotia Court of Appeal recently considered the burden of proof when s. 20(3) of *FOIPOP* applies to personal information.[2] In *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate* [*Fitzgerald Estate*],[3] the Court notes that s. 45(3)(a) places the burden of proof on the person seeking the personal information and further, that when a presumption applies under s. 20(3) it is an error of law to treat the absence of evidence as satisfying a burden of proof to overcome a statutory presumption.[4] In other words, when information falls within s. 20(3), the law assumes this information to be deserving of protection. This means that the applicant must be able to demonstrate that there would be no unreasonable invasion of privacy *in this case.* If the applicant cannot do this, the information must be protected from disclosure.

General approach to s. 20

[12] It is well established that Nova Scotia's *FOIPOP* requires public bodies to be fully accountable. It provides that any limitations on full disclosure must be limited and specific. Section 20 is therefore a limited and specific exemption.[5] One reason for *FOIPOP* is making sure that the government remains open and accountable to the public.

[13] Accountability takes on special meaning when public servants have made decisions that have a direct and lasting impact at an individual level. When decisions are made based on highly sensitive personal information, as is often the case in child protections matters, the public body is faced with the difficult challenge of providing enough information to satisfy the needs of the affected individual, while still preserving the dignity of those whose personal information is found in the records.

[14] In short, s. 20 is designed to balance the information rights of the applicant against the privacy rights of others. It contemplates that in some cases, third party personal information may be disclosed, even if disclosure may be an invasion of third party personal privacy. What it prohibits, is disclosure that would result in an "<u>unreasonable</u> invasion of personal privacy".[6]

---

[2] The application of s. 20(3) to the information at issue here is discussed beginning at para. 25.

[3] *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate,* 2015 NSCA 38 [*Fitzgerald Estate*].

[4] *Fitzgerald Estate*, at para. 92.

[5] The Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)* 2003 SCC 8 at para. 21 discussed the balance between the privacy rights set out in the federal *Privacy Act* and access rights provided for in the *Access to Information Act*. The Court states, "The statement in s. 2 of the *Access Act* that exceptions to access should be "limited and specific" does not create a presumption in favour of access. Section 2 provides simply that the exceptions to access are limited and that it is incumbent on the federal institution to establish that the information falls within one of the exceptions". This is the approach I take here.

[6] The authority to disclose personal information is set out in s. 27 of *FOIPOP* which provides in s. 27(a) that a public body may disclose personal information only in accordance with this *Act* or as provided pursuant to any other enactment. Based on s. 27(a) public bodies are authorized to disclose third party personal information in response to access to information requests as set out in s. 20 of *FOIPOP*.

[15] In order to determine whether or not a disclosure would result in an unreasonable invasion of personal privacy, public bodies must take a four step approach to their analysis:[7]

1. Is the requested information "personal information" within s. 3(1)(i)? If not, that is the end. Otherwise, the public body must go on.
2. Are any of the conditions of s. 20(4) satisfied? Is so, that is the end.
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?

Analysis

1. Is the requested information personal information?

[16] I find first that the information withheld qualifies as personal information. The type of information withheld falls into five broad categories:

- medical information of applicant's family,
- applicant's parents' names and addresses,
- family history of the applicant's parents – such as where they lived and worked,
- information about the living arrangements and general circumstances of the applicant's parents around the time she was taken into care, and
- names and dates of birth of the applicant's siblings.

[17] "Personal information" is a term defined in *FOIPOP* in s. 3(i) and it includes names, addresses, religious beliefs, information about an individual's health care, education and employment history, and opinions about the individual.

[18] Most of the withheld information also qualifies as the personal information of the applicant in that it includes information about her. For example, information about family members is also information about the applicant – who her parents and siblings were, what they did for a living – this is the family history of the applicant. Information relating to the living arrangements and circumstances of the applicant's parents is also information about the applicant's living arrangements and circumstances provided she was living with her parents at the time. I am supported in this conclusion by the fact that, in this case, the withheld information is contained in records created for the purposes of documenting decisions made about the applicant. The records were intended to describe the applicant's "family history" and "case history" – as indicated by the subheadings used in the Report of a Child in Need of Protection. In so doing, the records inevitably included information about third parties, including the applicant's family.

---

[7] See for example *House (Re),* [2000] N.S.J. No. 473 [*House*], and *Sutherland v. Dept. of Community Services,* 2013 NSSC 1. This approach has been consistently followed by former Review Officers. See for examples: NS Reports FI-08-107 and FI-09-29(M).

[19] This point was clearly made in *Fitzgerald Estate*[8] where the Court of Appeal determined that information in a public record may engage the privacy and access rights of several people. For example, imagine that my parents' address was: 123 Main Street, Anytown. My address when I was growing up was also: 123 Main Street, Anytown. In both cases, the same address falls within s. 3(1)(i), as "personal information". The question becomes, is it an unreasonable invasion of my parent's privacy for the state to disclose our family's address to me?

[20] In this case, the information in the records was collected to determine whether the applicant was a child in need of protection. The authority to collect this information and make such decisions was found in the *Child Welfare Act,*[9] the precursor to today's *Children and Family Services Act.* The subject of the decision, and the person directly affected by the decisions, was and remains, the applicant.

[21] The decision can be found in an 'Order for Wardship and Notice of Settlement' made pursuant to sections 33(1)(b) and s. 37 of the *Child Welfare Act* in effect in May, 1969. The court document dated May 6, 1969 and listed as document 5 above, details the evidence relied on by the Court in support of the Order. Document 5 was created by virtue of a statutory requirement set out in s. 37(2) of the *Child Welfare Act* which required the judge to provide the Director of Child Welfare with a copy of the evidence upon which his finding was made. What is clear from these provisions is that the entire purpose of the hearing was to determine whether the applicant was a child in need of protection within the meaning of s. 1(h) of the *Child Welfare Act*.

[22] As such, the information contained in these records also reveals the personal information of the applicant – her parents, her siblings, her living circumstances at the time the decision was made, and the reasons for the state's involvement in her life at that time.[10] There is no question that this information was also the personal information of her family. However, it has been made plain by *Fitzgerald Estate,* where personal information is shared by several people, the question of balancing access and privacy is not to be resolved by deciding that certain personal information is 'more about one person than another'.[11]

[23] The Court's decision had a profound effect on the applicant. It altered the course of her life, removing her from her biological family and placing her with foster parents until she married. The information relating to why this decision was made is very much also the personal information of the applicant.

2. Are any of the conditions in s. 20(4) satisfied?

[24] I do not find that any of the considerations set out in s. 20(4) of *FOIPOP* apply to the withheld information. Neither party made any submissions on this issue.

---

[8] *Fitzgerald Estate*, at para. 65 and para. 89.

[9] *Child Welfare Act, RSNS 1967, c. 31 as amended.*

[10] Or as the Adjudicator in Alberta Order F2011-001 stated, "…information about the Applicant's [family] in the records is recorded for the purpose of defining their relationship to her and establishing her personal history" at para. 13.

[11] *Fitzgerald Estate* at para. 67.

3. Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s. 20(3)?

[25] The Department argues that four of the presumptions set out in s. 20(3) apply to the withheld information - sections 20(3)(a), (b), (d) and (g) which state:

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

[26] It is important to recognize that unlike s. 20(4), s. 20(3) lists <u>rebuttable</u> presumptions. That is apparent from the opening words of s. 20(2) which provide that the head of the public body shall consider all relevant circumstances in determining pursuant to subsections (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of privacy.[12]

[27] I find that only three of the presumptions apply: subsections 20(3)(a), (d) and (g). Subsection 20(3)(b) does not apply. I will discuss each below.

Health care history – s. 20(3)(a)

[28] The presumption in s. 20(3)(a) is engaged when personal information relates to the health care history of a third party. The record contains information that describes medical conditions, and in some cases, medical treatment of family members. There is information about family members' health care history in document 1 and a portion of it in documents 2 and 4. This information was withheld by the Department. While the Department did not argue that this presumption applies to documents 3 and 5, I find that these documents also contained health care history of family members. *FOIPOP* therefore requires that this health care information be presumed to result in an unreasonable invasion of privacy if disclosed.

Part of an investigation into possible violation of law – s. 20(3)(b)

[29] Section 20(3)(b) provides that it is a presumed unreasonable invasion of personal privacy to disclose personal information that was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent the disclosure is necessary to prosecute the violation or to continue the investigation. The Department argues that the presumption in s. 20(3)(b) applies to three documents (# 2, 4 and 5). The Department provided no information or argument as to what the possible violation of law at issue was.

[30] What is a "violation of law" for the purposes of s. 20(3)(b)? The section suggests that it must be a violation involving a prosecution because the section provides that disclosure of the

---

[12] *Fitzgerald Estate* at para. 57.

information is permitted to the extent necessary to prosecute the violation. Other jurisdictions have considered the application of this section and concluded that it does not apply to workplace disciplinary investigations,[13] it does apply to charitable gaming license compliance reviews[14] and it does apply to self-governing regulatory bodies who administer a statutory regulatory scheme with disciplinary offences.[15]

[31] Consistent with these findings and the wording of section 20(3)(b) I conclude that "law" in this subsection refers to a statute or regulation enacted by or under the statutory authority of the Legislature, Parliament or another Legislature where a penalty or sanction could be imposed for violation of that law.[16]

[32] The Department says that s. 20(3)(b) applies to information in the Report of a Child in Need of Protection, the Order for Wardship and Notice of Settlement and the summary of evidence. The Order for Wardship indicates that the matter was in relation to s. 33(1)(b) and s. 37 of the *Child Welfare Act* that was in effect in 1969. However, there is no evidence that the proceeding could have led to a prosecution or penalty of any kind. The purpose of the proceeding was not to determine if there had been any violation of the law but rather to determine whether or not the applicant qualified as a child in need of protection within the meaning of s. 1(h) of this same *Act*. Taking a child into care is not done to penalize a parent but rather, as a measure of last resort designed to protect that child.

[33] The information was compiled for the purposes of deciding if the applicant was to be made a ward of the state. There is no evidence that this process also included an investigation into a possible violation of law, and even if it did, it is not identifiable as such. Therefore I find that the presumption in s. 20(3)(b) does not apply to any portion of the withheld information.

Employment or education history – s. 20(3)(d)

[34] The Department states that two of the five documents contain employment and/or education history of third parties. I agree that the Report of a Child in Need of Protection – document 2 above, contains information about employment and education history of family members in the family history. However, document 4, the Order for Wardship, does not contain employment or education history. There is a place to record the occupation of parents but this information was not recorded according to the unsevered version of the document we received from the Department. Therefore, I find that the presumption in s. 20(3)(d) applies to a portion of the Report of a Child in Need of Protection but not to the Order for Wardship.

Personal recommendations or evaluations – s. 20(3)(g)

[35] The Department says that the presumption in s. 20(3)(g) applies to the Report of a Child in Need of Protection and to the Order for Wardship. However, the Department did not identify what portion of these records it believes s. 20(3)(g) applies to.

---

[13] See BC Order 330-1999 at para. 18.
[14] See BC Order 01-12.
[15] BC Order 08-16 at para. 22.
[16] Former Commissioner Loukidelis made a similar finding with respect to BC's equivalent provision (s. 22(3)(b)) in Order 01-12 at para. 17. See also ON Order MO-3215 at para. 36 that determined that the presumption requires that there be an investigation into a possible violation of law including a violation of a by-law.

[36] This provision states that it is a presumed unreasonable invasion of personal privacy to disclose personal information of a third party that consists of personal recommendations or evaluations, character references or personnel evaluations.

[37] I have carefully reviewed each document. I find that there are four instances in the Report of a Child in Need of Protection where there is a personal evaluation of a third party. However, I found nothing in the Order for Wardship that could qualify as a personal recommendation, evaluation or character reference within the meaning of s. 20(3)(g).

[38] In summary then I have determined that a portion of each of the records is subject to a presumption in s. 20(3) as follows:

a) Document 1 – medical history of third parties [s. 20(3)(a];
b) Document 2 – medical history, employment and educational history, personal recommendations or evaluations of third parties [s. 20(3)(a), (d), (g)];
c) Document 3 – medical history of third parties [s. 20(3)(a)];
d) Document 4 – medical history of a third party [s. 20(3)(a)]; and,
e) Document 5 – medical history of third parties [s. 20(3)(a)].

[39] The remaining withheld information in each record is not subject to any presumption. It consists, for the most part, of family history including names, relationships and information regarding the applicant's family's living circumstances at the time the documents were created.

4. 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?

[40] The essential final step required in the analysis for information subject to the presumption in s. 20(3) and for the information not subject to any presumption is to answer the question – would disclosure of the information result in an unreasonable invasion of a third party's personal privacy?

[41] Section 20(2) directs the public body to consider "all relevant circumstances". It lists a number of potential factors but leaves room for other possible considerations.

[42] The Department made no submissions regarding the application of the test in s. 20(2).

[43] The applicant highlighted the following considerations:

- It is important to her and her family as to why she was taken away from her parents and placed in foster care. Her placement into foster care was deeply traumatizing and had a significant and negative impact on her life and the lives of her siblings. She feels she has a right to know why she was placed in foster care; and,
- Her parents' medical history is important to her and her son; if there are medical conditions that would impact upon her family's health, she believes she has a right to this information.

[44] My analysis will begin with those considerations listed at s. 20(2) of *FOIPOP* that may be relevant to the circumstances in this case. I will then address any additional considerations.

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

[45] Section 20(2)(a) states that a relevant circumstance is whether the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny.

[46] In this case, the applicant was made a ward of the Director of Child Welfare in 1969. At that time, the *Child Welfare Act* provided that the Director to whom the care and custody of a child is committed shall be the legal guardian of the child and as such shall have all the rights and powers of a parent and of a guardian appointed under any Act.[17]

[47] There is a significant public interest in how the Director carries out this role. The public has an abiding interest in issues relating to harm caused to children while in foster care and general concerns regarding the decisions made by the province and by those working in provincially monitored facilities.[18]

[48] In making an application for an order to place the applicant into care, the Director gathered and presented evidence that the applicant was "a child in need of protection". The basis for the application would, to some extent, reveal how the Director carried out his statutory mandate at the time. In this case, the person most affected by the Director's application is the applicant. She has a direct and lasting interest in knowing how and why this decision was made. Should she one day choose to do so, the information can be used to subject the activities of government to public scrutiny and to hold it accountable. This factor favours disclosure.

Supplied in confidence – s. 20(2)(f)

[49] Section 20(2)(f) provides that whether the personal information was supplied in confidence is a relevant factor. There was no evidence submitted that any of the information was supplied in confidence.

[50] Nova Scotia Courts have determined that the following factors are relevant in assessing whether or not information was supplied in confidence for the purposes of s. 20(2)(f) of *FOIPOP*:[19]

1. What is the nature of the information? Would a reasonable person regard it as confidential?
2. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
3. Was the record in question explicitly stated to be provided in confidence?
4. Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential.

---

[17] *Child Welfare Act RSNS 1967, c. 31 as amended, s. 33(3).*

[18] The restorative inquiry into abuse at the Nova Scotia Home for Coloured Children is a recent example of public interest in this matter.

[19] *Keating v. Nova Scotia (Attorney General),* 2001 NSSC 85 (CanLII) at para. 56.

5. Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?
6. Do the actions of the public body and the supplier of the record – including after the supply – provide objective evidence of an expectation of or concern for confidentiality?
7. What is the past practice of the recipient public body respecting the confidentiality of similar types of information?

[51] The records here contain various pieces of third party personal information and, in particular, opinions about third parties that are reputational and potentially distressing. In this case it is unclear whether the third parties believed that they were under an obligation to provide their own personal information. While the Department provided no evidence on this point, it does appear that generally the Department treats information contained in foster care files as confidential. On balance it appears likely that the third parties may have had some expectation that the information they supplied was supplied in confidence. Where the information is sensitive, it is fair to assume that the individuals supplied the information with the expectation that it would be kept in confidence and used only for the purpose of determining the best interests of the child. This consideration weighs against disclosure.

Inaccuracy and harm to reputation – s. 20(2)(g) & s. 20(2)(h)

[52] A small portion of the information relates to one third party and could, in my opinion, unfairly damage that person's reputation. The information appears on the second page of the Report of Child in Need of Protection and the second page of the court document dated May 6, 1969. There is only one source for the information and so this, in my view, increases the chances that the information could be inaccurate. Therefore I find that the factors in s. 20(2)(g) and s. 20(2)(h) weigh against disclosure of this one piece of information.

Other considerations

[53] Section 20(2) is not an exhaustive list. It uses the word "includes". This means that the legislature intended for decision-makers to turn their minds to other, relevant considerations. Below I will consider seven other relevant factors:

i. best interests of the child,
ii. purposes of the *Act,*
iii. withheld information adversely affected the applicant,
iv. knowledge of the applicant,
v. passage of time,
vi. sensitivity of the information, and
vii. experience in other jurisdictions.

(i) Best interests of the child

[54] The *Child Welfare Act*, 1967 eventually became the *Child and Family Services Act.*[20] This *Act* reflects our present day view of the appropriate role of the Minister and his or her obligations to children in care. According to this *Act*, "the paramount consideration is the best interests of

[20] *Child Welfare Act RSNS 1967, c. 31 as amended* and *Child and Family Services Act SNS 1990, c. 5.*

the child".[21] The importance of taking into account the best interests of the child is repeated throughout the *Act* and best interests is defined as including the need to maintain regular contact between the child and the parent".[22] The Department's paramount consideration is the child.[23]

[55] The importance of children remaining in contact with their family and having knowledge of their family history is also recognized in the policy the Department has of creating Life Books.[24] In that policy, the Department identifies a number of documents that should be included in Life Books such as birth and baptismal certificates.

[56] Best interests of children includes the need to know their family history. I am supported in this view by the Department itself. In the policy that described the Department's approach to disclosure prior to the decision to apply *FOIPOP* to these requests,[25] the Department specifically recognized the importance of children knowing their family history based on the belief that:

- 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.

[57] While the above-noted three beliefs on the part of the Department are expressed in its former Access and Information Sharing Policy, these three beliefs continue to be true. It also continues to be true that best interests of the child includes the need to know his or her family history. The importance of children knowing their family history is a relevant circumstance within the meaning of s. 20(2) of *FOIPOP*. This factor weighs in favour of disclosure of information to former foster children.

(ii) Purposes of the Act

[58] I noted earlier that s. 20 is a limited and specific exemption that must be interpreted in light of the purposes of the *Act* – one of which is the right of individuals to have access to information about themselves.[26] The intended use of the information is always a relevant circumstance under s. 20(2) and where that use directly serves an element of the complex purpose of the *Act*, that circumstance would favour disclosure.[27]

[59] In this case the personal information of third party family members is, in many places, also the personal information of the applicant. The fact that personal information may belong to more than one person is specifically recognized in Nova Scotia's *Personal Health Information Act* where the definition of "personal health information" includes the health history of the individual's family. Disclosing the personal information of third parties including some family health history would serve the important purpose of granting the applicant access to her own personal information. Another element of ensuring that purposes of the *Act* are satisfied is the

---

[21] *Child and Family Services Act*, *SNS* 1990, c.5, s. 2.
[22] *Child and Family Services Act, SNS 1990, c.5,* s. 20(a), s. 39(a), (b), 44(3)(a),(b).
[23] *Child and Family Services Act*, *SNS* 1990, c.5, s. 2(2).
[24] Children in Care and Custody Manual, Chapter 3.2
http://novascotia.ca/coms/families/documents/Children_in_Care_Manual/CareandCustodyManual.html
[25] Manual of Standards, Policies and Procedures for Children in Care and Custody, para. 9.1
https://www.novascotia.ca/coms/families/documents/Children_in_Care_Manual/Index_000.pdf
[26] *Freedom of Information and Protection of Privacy Act*, s. 2(a)(ii).
[27] *House* at p. 13.

fact that information, particularly about why an application was made to take the applicant into care, is not available from any other source. This was a decision of the Department and it is the source of the records.

[60] The fact that records contain the personal information of the applicant and the fact that there is no other source from which the applicant could obtain some of the information weighs heavily in favour of disclosure.[28]

(iii) Withheld information adversely affected the applicant

[61] The applicant alleges that the decision to place her and her siblings in care had a devastating effect on her personally and on her family. Where there is evidence that the withheld information was used to make a decision that caused harm to an applicant or adversely affected the reputation of the applicant, this would favour disclosure[29].

[62] Here, the decision to apply to the Court to have the applicant removed from her parents care had a profound effect on the applicant's life. She was permanently separated from her parents and six siblings. To this applicant, the significance of the decision is compounded by the quality of care she received as a ward of the state. She describes her time in foster care as "deeply traumatic". Her evidence that this was the case is compelling. That the decision at issue had a significant impact upon her life weighs in favour of disclosure.

[63] I find, therefore, that the information particularly with respect to why she was placed in care is information that adversely affected the applicant. This is a factor that favours disclosure.

(iv) Knowledge of the applicant

[64] The evidence of the applicant and the records themselves establish the following:

- The applicant was 8 years old when she was taken into care. She kept her birth name until she was married. The documents at issue here indicate that in 1977 she had continuing contact with an aunt, uncle, father and grandparents. By 1977 the applicant was 16 years old.
- The location of her parents' home at the time of the applicant's placement into care is noted as a town and county on the documents, not a specific street address. Her parents' home was of course also her home and known to her.
- The applicant was 8 years old when she was taken into care, the third eldest of her siblings. As such it is very likely she knew both the name and age of all of her siblings at that time. Her correspondence with this Office indicates that she remained in contact with several of her siblings.
- The applicant knows the names of her parents.

[65] These facts all favour disclosure.

---

[28] See also Alberta Order F2011-001 at para. 35 where the fact that the applicant's mother's medical history was also the applicant's family medical history weighed heavily in favour of disclosure. In Alberta Order F2010-002 at para. 35 the Commissioner determined that the fact that information is the personal information of an applicant even though it is also the personal information of another third party is a factor that weighs in favour of disclosure.

[29] *French v. Dalhousie University*, 2003 NSCA 16 (CanLII) at para. 19.

(v) Passage of time
[66] The information relates to events that occurred more than 40 years ago. Any privacy interests in a person's address would certainly diminish after 40 years, after having moved elsewhere. There is other information, however, that may be so stigmatizing that it may warrant ongoing protection. Certain secrets are so personal that the public may find comfort knowing that the state will protect this information even after they are long gone. It remains the case that the mere fact that a citizen's information makes its way into a public record does not mean that there is a public interest in disclosure. Passage of time generally favours disclosure.

(vi) Sensitivity of the information
[67] The sensitivity of the information is another relevant consideration in determining whether or not disclosure of the information would be an unreasonable invasion of a third party's personal privacy.

[68] Education and work history of the applicant's birth parents is contained in the record. This information appears in a section of a document intended to describe the applicant's family history. The information itself is a straightforward recitation of the highest level of education achieved by her parents and their various occupations and employers for a brief period of time 40 years ago. It is the kind of information most children learn about their parents as they grow up. The information is not sensitive and relates to events now at least 40 years in the past. Both factors favour disclosure.

[69] Sensitivity of the information is also relevant to information relating to the applicant's siblings. In this case, all of the children were taken into care. It may or may not be that the siblings have disclosed their own history to immediate family. Some of the children may have been adopted. The sensitivity of this information favours withholding the information. These adult children have the right to control what information is known about the private aspects of their childhood.

[70] The medical information of third parties in this case is more than simply a brief recitation of the medical condition. There is information detailing the extent of the treatment of a medical condition and some description of symptoms. The sensitivity of this information weighs against disclosure.

[71] A third class of sensitive information contained in the records consists of information I discussed earlier as being potentially inaccurate and as likely to cause harm to a third party's reputation. I find that this same information is also sensitive and that this factor weighs against disclosure of this type of information.

(vii) Experience in other jurisdictions
[72] The *Concise Oxford English Dictionary* defines "unreasonable" as not guided by or based on good sense; beyond the limits of acceptability. This suggests that I may also look to what is acceptable and what good sense might suggest. Sources for this type of information, in my view, can come from the practices of other provinces. Certainly to the extent there is agreement across jurisdictions about what information may be disclosed to foster children, this may be some indication of what is acceptable.

[73] This Office currently has 11 appeals before us from former foster children. All seek further disclosure of information from files held by the Department and relating to the time each applicant was in foster care. In contrast, no other provincial Information and Privacy Commissioner has had any appeals on this issue.[30] A survey of these offices found that only one other Commissioner has ever heard a similar appeal.[31] Interestingly, three of those jurisdictions have laws that provide former foster children with the right to be given access to his or her own child in care record.[32]

[74] This Office initially attempted to address this issue through a Special Review Report issued by the former Review Officer in January 2014. At the time she was attempting to address five outstanding appeals on this issue. In that report the former Review Officer made nine preliminary recommendations. While the Department partially accepted these recommendations, that partial acceptance did not result in any further disclosure to the applicant in this case.

[75] The contrast between the high number of appeals in Nova Scotia versus the lack of appeals in other jurisdictions suggests that the Nova Scotia Government has not yet found a reasonable balance between the access rights of former foster children and the privacy rights of third parties. It suggests that the balance should be tipped more in favour of disclosure in order to meet the standard of "acceptability".

Balancing the considerations

[76] I have listed the considerations that weigh in favour of disclosing the withheld information, and those which weigh against disclosure.

[77] In summary, factors that weigh against disclosure were:

- the information was likely supplied in confidence,
- some of the information is particularly sensitive and
- one piece of information may be inaccurate and harm the reputation of a third party.

[78] Factors in favour of disclosure include:

- the need to subject the public body to scrutiny,
- disclosure would serve the purpose of the *Act* by giving the applicant access to her personal information,

---

[30] This information is available by conducting a search of published decisions of each of the Offices of the Information and Privacy Commissioner in each jurisdiction and/or by requesting this information directly from the Commissioners' offices.

[31] Alberta has one case - Order F2011-001 discussed earlier. Four jurisdictions have processes outside of the provincial access to information statutes: Manitoba, Newfoundland & Labrador, Quebec and Saskatchewan. This means that the provincial Information and Privacy Commissioners do not hear these appeals.

[32] Saskatchewan, s. 74(2) *Child and Family Services Act* states that information contained in foster care files may be disclosed to the child to whom the information relates. In addition, s. 74(5.1) provides that information may be disclosed where, in the opinion of the Minister, the benefit of the release of information clearly outweighs any invasion of privacy that could result from the release. Manitoba s. 76(4) of the *Child and Family Services Act* provides that an adult is entitled to access to his or her own record. Newfoundland & Labrador's *Child & Youth Care and Protection Act* s. 71 provides that a person over 12 years of age is entitled to information relating to himself or herself including reasons for removal and information relating to birth family and former foster parents.

- these records are the only source of information particularly with respect to why the applicant was taken into care,
- the withheld information was used in a manner that adversely affected the applicant,
- some of the information is known by the applicant,
- the passage of time, and
- the lack of sensitivity of some information.

[79] Balancing these factors, I find that the evidence does not support disclosure of the names and birthdates of siblings and the one piece of information I determined was likely to harm reputations and was also likely inaccurate.[33]

[80] With respect to the remainder of the personal information that I found was not subject to any presumption in s. 20(3), I find that the evidence favours disclosure. For clarity, the personal information that can be disclosed includes the names of the applicant's parents, historical address information, details around the living situation and events at the time the applicant was taken into care. Balancing the factors listed above, I find that disclosure of this information in this case would not result in an unreasonable invasion of a third party's personal privacy within the meaning of s. 20(1).

[81] A different standard must be applied to that withheld information that falls within s. 20(3) of *FOIPOP*. This analysis begins with a presumption against disclosure. For ease of reference, the information subject to this presumption is:

a) Document 1 – medical history of third parties [s. 20(3)(a];
b) Document 2 – medical history, employment and educational history, personal recommendations or evaluations of third parties [s. 20(3)(a), (d), (g)];
c) Document 3 – medical history of third parties [s. 20(3)(a)];
d) Document 4 – medical history of third party [s. 20(3)(a)]; and,
e) Document 5 – medical history of third parties [s. 20(3)(a)].

[82] Where a presumption exists, it can be outweighed.[34] In *Fitzgerald Estate,* the Court characterized the presumptions in s. 20(3) as "a fulcrum for the Legislature's balance of freedom of information against protection of privacy".[35] In that case, the presumption was that "after the criminal investigation and prosecution ends, the third party is entitled presumptively to the comfort that public access to his or her personal information is over."

[83] In this case, there is a presumption that where the state collects highly personal information such as medical history, it will only be used for the purpose for which it was intended. It will be afforded a degree of protection commensurate with its sensitivity. As in *Fitzgerald Estate*, the applicant has the burden under s. 45(3)(a), of showing that being given access to this personal

[33] Discussed above with respect to s. 20(2)(g) and 20(2)(h).
[34] For examples of cases in which the presumption in s. 20(3) has been outweighed by other factors, see for example BC Order F08-08 where the public interest in subjecting the public body to scrutiny outweighed the presumption and AB Order F2012-20 where the knowledge of the applicant and the fact that the record at issue was created at the request of the applicant outweighed the presumption.
[35] *Fitzgerald Estate,* at para. 90.

information would not result in an unreasonable invasion of privacy, especially given the presumption of unreasonable invasion of privacy under s. 20(3).

[84] With respect to medical history, I am satisfied that the applicant has met this burden of proof in the following two circumstances:

- Where medical information relates to hereditary conditions or there is research to support an increased likelihood of occurrence of the condition in first degree relatives.
- Where the medical information is directly related to the reasons why the applicant was taken into care.

[85] The evidence establishes that the presumption is counterbalanced for this limited scope of medical information by the need to subject the public body to scrutiny, that fact that disclosure would serve the purpose of the *Act* by giving the applicant access to her personal information, that these records are the only source of information particularly with respect to why the applicant was taken into care, that the withheld information was used in a manner that adversely affected the applicant, that some of the information is known by the applicant, and by the passage of time.

[86] The medical information disclosing potential hereditary conditions and/or relating to reasons the child was taken into care can be severed from more sensitive information regarding the details of the medical information and treatment including exact location of treatments. I find that this information can be disclosed without causing an unreasonable invasion of a third party's personal privacy.

[87] With respect to employment and educational history I am satisfied that the applicant has met the burden of proof because the presumption is counterbalanced by the need to subject the public body to scrutiny, the fact that disclosure would serve the purpose of the *Act* by giving the applicant access to her personal information, the withheld information was used in a manner that adversely affected the applicant, the passage of time, and the lack of sensitivity of this particular information

[88] Finally, with respect to the religious affiliation of the applicant's parents, I find that the disclosure of this information would also not be an unreasonable invasion of any third party's personal privacy because of the presumption noted in the *Child Welfare Act*, 1967, the fact that the applicant's religious affiliation is also the applicant's family history, the passage of time, and the factual and limited nature of the information relating to the religious affiliation of the applicant's parents.

FINDINGS & RECOMMENDATIONS:

[89] I find that:

1. The withheld information contains the personal information of third parties.

2. A portion of the withheld information on each of the five documents is subject to the presumption in s. 20(3) as follows:
   - Document 1 – medical history of third parties (s. 20(3)(a))
   - Document 2 – medical history, employment and educational history, personal recommendations or evaluations of third parties (s. 20(3)(a), (d), (g))
   - Document 3 – medical history of third parties (s. 20(3)(a))
   - Document 4 – medical history of third party (s. 20(3)(a))
   - Document 5 – medical history of third parties (s. 20(3)(a))

3. The presumption against disclosure of third party medical history is outweighed in two circumstances:
   (i) Where the medical information discloses a condition that is hereditary or there is an increased likelihood of occurrence in relatives.
   (ii) Where the medical information is directly related to the reasons why the applicant was taken into care.

4. The presumption against disclosure of third party employment and educational history is outweighed by the age of the record and the limited and factual nature of the information contained in the record.

5. The presumption against disclosure of personal recommendations regarding third parties or evaluations of third parties is not outweighed.

6. With respect to the remainder of the personal information not subject to any presumption disclosure of all of this information would not be an unreasonable invasion of a third party's personal privacy except in two circumstances:
   (i) Disclosure of names and birthdates of siblings would be an unreasonable invasion of a third party's personal privacy, and
   (ii) One piece of information found on two documents is likely to harm reputations and was also likely inaccurate[36] and so its disclosure would be an unreasonable invasion of a third party's personal privacy.

[90] I recommend that:

1. The Department continue to apply s. 20 to the following information:
   - Details of medical treatments and any medical history except to the extent described below,
   - Names and birthdates of siblings, and
   - Information to which s. 20(2)(g) and s. 20(2)(h) applies on the Report of a Child in Need of Protection and the Court document dated May 6, 1969.

[36] Discussed above with respect to s. 20(2)(g) and 20(2)(h).

2. The Department revisit the application of s. 20 to these records and disclose the following information:
    - Names and historical address of applicant's parents,
    - Details around the living situation and events at the time the applicant was taken into care,
    - Medical diagnoses relating to any condition that is hereditary or where there is an increased likelihood of occurrence in relatives,
    - Medical information that is directly related to the reasons why the applicant was taken into care, and
    - Employment and educational history of the applicant's parents.

[91] To aid the Department in its review, I have prepared a recommended approach to the severing of these five documents which is consistent with the recommendations and findings. I will provide a copy of this recommended approach to the Department.

November 19, 2015

Catherine Tully
Information and Privacy Commissioner for Nova Scotia