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

REVIEW REPORT F1-11-71

November 19, 2015

Department of Community Services

Summary: This is the second 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"). He sought access to information that would provide details of his 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 be an unreasonable invasion of the privacy of the applicant's mother and father, and his foster parents.

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 his family life and the factors that went into the Department's decision to take him into care. The Commissioner examines in detail the factors that weigh for or against disclosure. She finds that disclosure of the records in full is necessary to meet the purposes of the *Act*, which include the applicant's rights to access personal information about himself. The age of the record, the basic and factual nature of the record, and the fact that a third party has been deceased for more than 20 years diminish the third party's privacy rights. 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: *Child Welfare Act*, SNS 1950, c. 2*; Child and Family Services Act*, SNS 1990, c. 5 ss. 2, 20, 30, 39, 44; *Child and Family Services Act, The*, C.C.S.M. c. C80 s. 76(4); *Child and Family Services Act, The*, SS 1989-90, c C-7.2 s. 74(2)*; Child & Youth Care and Protection Act*, SNL 2010, c C-12.2 s. 71; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c.5 ss. 3, 20, 27, 45; *Personal Health Information Act*, SNS 2010, c 41 s. 3.

Authorities Considered: Alberta: Orders F2010-002, 2010 CanLII 98604 (AB OIPC); F2011-001, 2011 CanLII 96578 (AB OIPC); F2012-20, 2012 CanLII 70606 (AB OIPC); **British Colombia:** Order F08-08, 2008 CanLII 21700 (BC IPC); **Nova Scotia:** Review Reports FI-05-47, 2005 CanLII 36147 (NS FOIPOP); FI-08-107, 2010 CanLII 47110 (NS FOIPOP); FI-09-29(M), 2012 CanLII 44742 (NS FOIPOP); FI-09-52(M), 2012 CanLII 1095 (NS FOIPOP); FI-10-95; **Ontario:** Ontario (Public Guardian and Trustee) (Re), 2004 CanLII 56358 (ON IPC); Ontario (Attorney General) (Re), 2007 CanLII 54655 (ON IPC).

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

Other Sources Considered: Children in Care and Custody Manual, Chapter 3.2 http://novascotia.ca/coms/families/documents/Children_in_Care_Manual/CareandCustodyManual.html;
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; *Concise Oxford English Dictionary*, (New York: Oxford University Press, 2011), "putative," "unreasonable"

INTRODUCTION:

[1] In 1951 the applicant, an infant at the time, was ordered committed into the care and custody of the Director of Child Welfare for the Province of Nova Scotia. He remained in care throughout his childhood. This review relates to a request the applicant made for information about himself and his family held by the Department of Community Services ("Department").

ISSUE:

[2] Is the Department required to refuse access to information under s. 20 of the *Freedom of Information and Protection of Privacy Act* ("*FOIPOP")* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

DISCUSSION:

Background

[3] The applicant originally filed a request for access to information about his parents and relatives. At the time he did not have any family names. The applicant checked the boxes on the access application form indicating that he was seeking his own personal information and other information. In response, the Department denied access saying that since he was requesting information about third parties, *FOIPOP* prohibited disclosure.

[4] This initial decision is concerning because it suggests that the Department failed to recognize that information contained in its files about the applicant's family was also the personal information of the applicant. Indeed, the only reason the Department has a collection of personal information about a foster child's family is because of the Department's duty to protect children, in this case, the applicant.

[5] As a result of intervention by this Office in 2011, the Department agreed to process his request as a request for his own personal information and partially disclosed the 30 documents it had originally withheld. The Department withheld a portion of the record pursuant to s. 20(1) of

FOIPOP. The applicant filed a request for review of the Department's decision. He seeks full disclosure of the records.

[6] 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

[7] As I have noted in a number of previous reports, where the information being withheld is the personal information of individuals other than the applicant, the applicant bears the burden of proof.[2] In addition, where information falls within s. 20(3), the law assumes this information to be deserving of protection. This means 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.[3]

General approach to s. 20

[8] 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.[4] One purpose for *FOIPOP* is making sure that the government remains open and accountable to the public.

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

[10] 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

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

[2] Section 45 of *FOIPOP* and NS Review Reports FI-10-95 at para. 10 and FI-10-76 at para. 8.

[3] *Nova Scotia (Public Prosecution Service) v. FitzGerald Estate,* 2015 NSCA 38 at para. 92 discusses the burden of proof when a presumption applies [*Fitzgerald Estate*]. For a more detailed discussion of this issue see, for example, NS Review Report FI-10-95 at para. 11.

[4] 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.

be disclosed, even if disclosure may be an invasion of third party personal privacy. What it prohibits is disclosure that would result in an "unreasonable invasion of personal privacy".[5]

[11] 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:[6]

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?

[12] I find that the information withheld qualifies as the personal information of third parties. The type of information withheld includes:

- family names, addresses, dates of birth, ages,
- family religion, employment history, education and medical history,
- physical description of parents,
- general circumstances and events that occurred involving identifiable individuals at or around the time of the court hearing that involved the applicant's family,
- the opinions, plans, hopes and concerns of the applicant's mother, and
- foster parent names and mailing addresses – although the city in which they lived is disclosed.

[13] The term "personal information" is defined in s. 3(1)(i) of *FOIPOP*. "Personal information" means recorded information about an identifiable individual including such things as name, address, race, religious belief and medical history. I am satisfied that the information withheld by the Department qualifies as "personal information" of a third party. I would also note, that much of the same information also qualifies as the personal information of the applicant. I will discuss that in more detail below under step 4 of the analysis.

[5] 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*.

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

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

[14] 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.

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

[15] The Department did not provide any submission in response to the Notice of Formal Review. According to the Department's response letter to the applicant and notations on the records themselves, the Department was of the view that three presumptions set out in s. 20(3) apply to the withheld information: subsections 20(3)(a) – health care history, s. 20(3)(d) – employment and education history, and 20(3)(h) – religious beliefs.

[16] Section 20(3) states in part:

> (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;
> >
> > (h) the personal information indicates the third party's racial or ethnic origins, sexual orientation or religious or political beliefs or associations.

[17] It is important to recognize that unlike s. 20(4), s. 20(3) lists rebuttable 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.[7]

[18] In Review Report FI-10-95 I examined in detail the rebuttable presumptions in s. 20(3)(a) and (d).[8] I will not repeat the analysis here but have relied on it to make my findings described below.

[19] I find that these three presumptions do apply. However, a careful review of the records discloses that only a very small portion of the withheld information is actually subject to these presumptions. The majority of the withheld information contains third party personal information not subject to any presumption.

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

- Report of Neglected Child (p. 3) – six lines contain some third party medical and employment history (20(3)(a) and (d)).
- Juvenile Court Evidence Summary (pp. 5-7) – nine lines contain some third party medical and employment history (20(3)(a) and (d)).
- Order for Wardship and Notice of Settlement (p. 8) – two lines indicate the religion and occupation of the applicant's mother (20(3)(h) and (d)).

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

[8] NS Review Report FI-10-95 at para. 26.

- Social Worker Report (p.22) – thirteen lines contain some third party medical, employment and educational history and religious affiliation (20(3)(a), (d) and (h)).
- Social Worker Report (p. 24) – one line contains third party medical history (20(3)(a))
- Home of the Guardian Angel Report Form 2C (p. 25) – withheld information identifies the religion of both parents (20(3)(h)).
- Home of the Guardian Angel Report Form 2(M) (p. 27) – withheld information identifies applicant's mother's religion, school record and occupation (20(3)(d) and (h)).
- Home of Guardian Angel Report (p. 29) – two lines contain information relating to religion of applicant's mother and her occupation at the time (20(3)(d) and (h)).

[21] Most of the withheld third party personal information is not subject to any presumed unreasonable invasion of personal privacy. This includes such information as:

- names of the applicant's parents and other family members,
- reasons why the applicant was placed into care,
- general circumstances of the applicant's mother – where she lived, what her concerns were regarding the applicant,
- physical description of the applicant's parents,
- family history such as the identity of extended family members, where they lived, how many children they had at the time,
- general information about the applicant's father, and
- names and mailing address of foster parents.

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?

[22] 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?

[23] 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.

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

[25] In his submission, the applicant states that he made the request for information because he wants to know who he is and where he comes from. He has a son who knows nothing about his father's family but has extensive knowledge of his mother's. Further, he is concerned that there may be hereditary medical conditions that he and his son should be aware of.

[26] He says, "As a human I feel it is disgraceful that I am made to beg for my own identity." Later he states, "Why punish the child who did not ask to be born. The parents made a choice to lie down they should be made to face the consequences of their actions as we all have to do if you do a crime of any sort you are held responsible for other choices in life. But I am at a loss as to why children are placed below the Parent who has the ability to choose such a path for themselves."

[27] The applicant provided copies of his birth certificate and his baptismal certificate. Both documents confirm the name of his mother that he was given by Vital Statistics when he was 17 years old. As a result of this research and as a result of finding an obituary that appeared to belong to a relative (later identified as an uncle), the applicant was able to contact a first cousin of his mother's and through her learned of the existence of several siblings. The applicant also discovered that his mother had died 23 years ago. Given the passage of time since his mother's death the applicant argues that disclosure of the information would not be an invasion of anyone's privacy.

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

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

[29] In August, 1951 the Director of Child Welfare brought an application to the Juvenile Court seeking a court order that the applicant was a "neglected child" within the meaning of the *Child Welfare Act* in 1951.[9] The records at issue are the documents used either by the Director to make a decision as to whether or not it would bring the application forward or by the Court in deciding whether or not the applicant was a "neglected child".

[30] As such, the information is also the personal history of the applicant. It tells the story of who his parents were, what their circumstances were at the time of his birth and why, in the end, he was determined to be a neglected child and committed into the care and custody of the Director of Child Welfare.

[31] In 1951 the law stated that when a child was committed into the care of the Director of Child Welfare, the Director had all of the rights and powers of a parent.[10] As I stated in Review Report FI-10-95, there is a significant public interest in how the Director carries out this role.[11] This factor weighs in favour of disclosure.

Supplied in confidence – s. 20(2)(f)

[32] 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.

[33] Nova Scotia Courts have determined that a number of factors are relevant in assessing whether or not information was supplied in confidence for the purposes of s. 20(2)(f) of *FOIPOP* including such things as the nature of the information, the purpose of the record and whether the information was voluntarily supplied or compelled.[12]

[34] The records here contain various kinds of third party personal information. Any decision to take a child into care is inevitably going to involve the personal information of the child's

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[9] *Child Welfare Act, SNS* 1950, c. 2.
[10] *Child Welfare Act, SNS* 1950, c. 2, s. 29(3).
[11] NS Review Report F10-95 at para. 47.
[12] For a complete list see *Keating v. Nova Scotia (Attorney General),* 2001 NSSC 85 (CanLII) at para. 56. See also NS Review Report FI-10-95 at para. 50.

parents and likely sensitive information regarding their ability or inability to care for a child. It is very likely that parents may be embarrassed or dismayed to have these details disclosed. These files may also contain opinions about third parties that are reputational and potentially distressing.

[35] In this particular case the information is generally a factual narration of events. There are no opinions expressed and the medical information supplied is extremely limited, as is the information in relation to education and work history.

[36] 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.

[37] The Court in *Sutherland v. Nova Scotia (Community Services)*[13] examined in some detail information relating to foster parents. In *Sutherland*, according to the Court, the record at issue included detailed information supplied by foster parents to the Department. In addition, the Court had before it evidence directly from foster parents regarding their expectation of privacy and the potential harms that might arise from the disclosure of the information at issue. Based on the evidence and the nature of the record, the Court determined that information provided by foster parents in that case was supplied in confidence.

[38] In this case, the only foster parent information in the records consists solely of the names and mailing addresses of two sets of foster parents. The information simply identifies these individuals as foster parents. This information would have been clear to all of the children in their care, likely to neighbours, friends, teachers and health care providers as well. As I noted above, the Department supplied no argument and no evidence in response to the Notice of Formal Review. Therefore, there is no evidence before me to suggest that the identity of individuals simply as foster parents is supplied in confidence. I find, given the non-sensitive nature of this specific piece of information and the likelihood that it was commonly known in the community, it was not information "supplied in confidence" within the meaning of s. 20(2)(f).

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

[39] *FOIPOP* provides that it is a relevant consideration that the personal information is likely to be inaccurate or unreliable. The Department provided no evidence or argument on this point.

[40] There may be some concern about the accuracy of the identity of the applicant's father. There is only one apparent source for this information. This may increase the chance that the information is inaccurate. However, the one source was in a position to accurately identify the applicant's father and the information was provided in a timely fashion. The applicant's father's name is spelled two different ways in the records but this error appears to be a recording error.

[13] *Sutherland v. Nova Scotia (Community Services),* 2013 NSSC 1 [*Sutherland*].

Both versions are similar. While most of the records that identify the applicant's father simply refer to him as "Father" one document that appears to be a form lists him as the, "putative father". The word "putative" is defined as: "generally considered or reputed to be".[14] Overall, I conclude that the evidence does not support a finding that the information is "likely to be inaccurate". Therefore this factor is neutral in this case.

[41] My review of the withheld records reveals that they are factual in nature. There are no opinions expressed that might harm someone's reputation; there is very limited information in relation to medical diagnoses, employment and educational history. I could not identify any discrete piece of information that might lead to a harm to reputation of any third party. The only general reputational harm might be that at the time the applicant was born the circumstances of his birth may have been a source of embarrassment to his mother given the prevailing social standards at the time. The same could not be said today. Therefore, I find that harm to reputation is not a significant consideration in this case.

Other considerations

[42] Section 20(2) is not an exhaustive list. It requires that in deciding whether the disclosure of information would be an unreasonable invasion of a third party's personal privacy, the Department consider all relevant factors including those listed. This means that the Legislature intended for decision-makers to turn their minds to other, relevant considerations. Below I consider eight other relevant factors:

i. best interests of the child,
ii. purposes of the *Act*,
iii. knowledge of the applicant,
iv. passage of time,
v. death of third parties,
vi. statutory provision relating to religion,
vii. sensitivity of the information, and
viii. experience in other jurisdictions.

(i) Best interests of the child

[43] The *Child Welfare Act* in 1951 eventually become the *Child and Family Services Act.*[15] 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 the child".[16] 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".[17] The Department's paramount consideration is the child.[18]

[14] Concise Oxford English Dictionary.
[15] *Child Welfare Act, SNS* 1950, c. 2 and *Child and Family Services Act SNS 1990, c. 5.*
[16] *Child and Family Services Act, SNS* 1990, c.5, s. 2.
[17] *Child and Family Services Act, SNS 1990, c.5,* s. 20(a), s. 39(a), (b), 44(3)(a),(b).
[18] *Child and Family Services Act, SNS* 1990, c.5, s. 2(2).

[44] 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.[19] In that policy, the Department identifies a number of documents that should be included in Life Books, such as birth and baptismal certificates.

[45] 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,[20] 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.

[46] 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

[47] 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.[21] 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.[22]

[48] The records at issue are the documents used either by the Director to make a decision as to whether or not it would bring the application forward or by the Court in deciding whether or not the applicant was a "neglected child". Third party personal information was only collected because it was relevant to this decision about the applicant.

[49] As a result, 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 relate 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.[23] In addition, the Court in *Fitzgerald Estate* determined that information in a public record may engage the privacy and access rights of several people.[24]

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[19] Children in Care and Custody Manual, Chapter 3.2
http://novascotia.ca/coms/families/documents/Children_in_Care_Manual/CareandCustodyManual.html
[20] 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
[21] *Freedom of Information and Protection of Privacy Act*, s. 2(a)(ii).
[22] *House* at p. 13.
[23] *Personal Health Information Act,* s. 3.
[24] *Fitzgerald Estate* at paras. 65 and 89.

[50] Disclosing the personal information of third parties, including some family health history, would serve the important purpose of granting the applicant access to his own personal information. Another element of ensuring that purposes of the *Act* are satisfied is the fact that information, particularly about why an application was made to take the applicant into care, is not available from any other source. This was a decision of the Department and it is the source of the records.

[51] The fact that the disclosure of the records would serve an important purpose of the *Act* by providing the applicant with his own personal information and the fact that there is no other source from which the applicant could obtain some of the information weighs heavily in favour of disclosure.[25]

(iii) Knowledge of the applicant

[52] The applicant has been conducting research into his family history for some time. As a result of this research he has obtained, and provided to this Office, copies of his baptismal certificate and his long form birth certificate. Both documents identify his mother and the long form birth certificate also provides his mother's place of birth. His research has also resulted in him identifying and making contact with extended family members.

[53] This factor favours disclosure.

(iv) Passage of time

[54] The information relates to events that occurred more than 60 years ago. Sensitivity of the information (discussed below) will have an effect on how important passage of time may be. The privacy interests in non-sensitive information in particular decreases over time. So, for example, a 60 year old address, or the identification of the town in which a person lived, or jobs a person once had 60 years ago would all fall into this category. However, the privacy interests in more sensitive information may decrease less over time. I would include in this category the disclosure of information relating to medical diagnoses or treatment or information that might harm an individual's reputation or embarrass an individual. Generally, passage of time favours disclosure.

(v) Death of third parties

[55] An additional factor in this case is that the applicant discovered that his mother died 23 years ago. In support of this he provided evidence in the form of a copy of a photograph of his mother's headstone. What is the significance of death in weighing whether or not a disclosure of a deceased person's personal information would be an unreasonable invasion of that person's privacy? Previous Review Officers have determined that deceased persons do have privacy rights but that they diminish over time.[26] Other jurisdictions take a similar approach. In Ontario, for example, decisions of the Information and Privacy Commissioner have repeatedly determined

[25] See also Alberta Order 2011-001 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 2010-002 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.
[26] See NS Review Report FI-09-52(M) at p. 19 and NS Review Report FI-05-47 at pp. 11-12.

that there is a diminished privacy interest after death. The longer an individual has been deceased the more diminished their privacy interests.[27]

[56] In Nova Scotia this makes logical sense given the provisions such as s. 30 of *FOIPOP* which states that disclosure of personal information by the Nova Scotia Public Archives is authorized if the information is about someone who has been dead for twenty or more years. This provision suggests both that the Legislature intended that deceased individuals have some privacy rights and that by 20 years after their death, those privacy rights diminish to the point that information may be disclosed in the specified circumstance.

[57] I agree with my predecessors that privacy rights survive death but that those rights diminish over time. In this case, the applicant's mother died 23 years ago. This factor favours disclosure of her personal information.

(vi) Statutory provision relating to religion

[58] Section 44(2) of the *Child Welfare Act*, 1951[28] stated that a "legitimate" child shall be deemed to be of the same faith as his father and an "illegitimate child" shall be deemed to be same religion as mother. Therefore, the religion of the applicant's parents was collected for the purposes of determining what the applicant's religion would be. In my view, this weighs in favour of disclosure of the religion of both of the applicant's parents.

(vi) Sensitivity of information

[59] The records at issue here are focussed entirely on two subjects: the applicant's family history and the circumstances and reasons why he was committed to the care and custody of the Director of Child Welfare on August 8, 1951. The recitation of family history, including names, dates, occupations and health history is factual in nature. The records do not contain opinions or personal details not directly related to the decision to commit the applicant into care. Information about foster parents is strictly limited to their identity and mailing addresses. There is no comment about the quality or nature of the care provided and no other personal detail or information about the foster parents.

[60] The factual and focussed nature of the information results in it being of only moderate sensitivity compared to other files of this nature which can contain far more detailed personal information of third parties not always directly related to the applicant's personal history. In this case, the factual and focussed nature of the information favours disclosure.

(vii) Experience of other jurisdictions

[61] 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.

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[27] See, for example, Ontario (Attorney General) (Re), 2007 CanLII 54655 (ON IPC) and Ontario (Public Guardian and Trustee) (Re), 2004 CanLII 56358 (ON IPC).

[28] *Child Welfare Act SNS* 1950, c. 2, s.44(2).

[62] 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.[29] A survey of these offices found that only one other Commissioner has ever heard a similar appeal.[30] 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.[31]

[63] 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.

[64] 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

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

[66] In summary, the factor that weighs against disclosure is that:

- the information was likely supplied in confidence.

[67] 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 his personal information,
- these records are the only source of information particularly with respect to why the applicant was taken into care,
- some of the information is known by the applicant,

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[29] 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.

[30] 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.

[31] 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.

- the passage of time,
- the fact that the applicant's mother died 23 years ago, and
- the lack of sensitivity of most of the information given its factual and focussed nature

[68] With respect to the personal information that I found was not subject to any presumption in s. 20(3), I find that the evidence overwhelmingly favours disclosure.

[69] For clarity, the personal information I found not subject to any presumption includes:

- names of the applicant's parents and other family members,
- reasons why the applicant was placed into care,
- general circumstances of the applicant's mother – where she lived, what her concerns were regarding the applicant,
- physical description of the applicant's parents,
- family history such as the identity of extended family members, where they lived, and how many children they had at the time,
- general information about the applicant's father, and
- names and mailing address of foster parents.

[70] 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).

[71] 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. I listed the eight places where information relating to medical history, employment and education history, and religious affiliation of third parties was present at para. 19 above.

[72] Where a presumption exists, it can be rebutted.[32] 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".[33] 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."

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

[32] 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.

[33] *Fitzgerald Estate,* at para. 90.

[74] With respect to family medical history, I am satisfied that the applicant has met this burden of proof for the following reasons:

- The medical information relates to a single disease suffered more than 80 years ago. The disease affected a large number of family members and so forms an important part of the applicant's family history.
- All those affected died more than 80 years ago.
- The medical information is limited to the diagnoses, there is no detail of individual treatments or symptoms.
- The disclosure of this information would serve the purpose of the *Act* by giving the applicant access to his personal medical history.

[75] There is one small piece of medical information in relation to a non-blood relative on page 2 of the Juvenile Court Evidence Summary. The record includes a description of an easily observed medical condition. It is not a diagnoses by a medical professional but simply a factual observation by the applicant's mother. Given the passage of time, the factual and limited nature of the information, the fact that the condition was easily observed and so not sensitive, I am satisfied that the disclosure of this information would also not result in the unreasonable invasion of the personal privacy of a third party.

[76] 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 his family history, the passage of time, and the lack of sensitivity of this particular information.

[77] 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*, 1951, 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:

[78] I find that:

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

2. A portion of the withheld information is subject to the presumption in s. 20(3)(a), (d), and (h).

3. The presumption against the disclosure of third party medical history (s. 20(3)(a)) is outweighed by the age of the records, the very limited and specific nature of the medical information, the fact that the individuals described died more than 80 years ago, and the fact that the medical event had a significant impact on the applicant's family and so forms an important part of his family history.

4. The presumption against the disclosure of third party employment and educational history (s. 20(3)(d)) is outweighed by the fact that disclosure would serve the purposes of the Act by giving the applicant access to his family history, the passage of time, and the lack of sensitivity of the information.

5. The presumption against disclosure of third party religious affiliation information is outweighed by the fact that the religious affiliations of the applicants' parents 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.

6. With respect to the remainder of the withheld information not subject to any s. 20(3) presumption based on all of the relevant circumstances, disclosure of the information would not result in an unreasonable invasion of a third party's personal privacy.

[79] I recommend the full disclosure of the withheld records.

November 19, 2015

Catherine Tully
Information and Privacy Commissioner for Nova Scotia