



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

REVIEW REPORT FI-13-52

- Report Release Date:** January 30, 2014
- Public Body:** Department of Community Services
- Record at Issue:** Pursuant to s. 38 of the *Freedom of Information and Protection of Privacy Act* [“*FOIPOP Act*”], the Department of Community Services [“Community Services”] provided the Freedom of Information and Protection of Privacy Review Officer with a copy of the Record, a portion of which was withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant or his/her agent by the Review Officer or her delegated staff.
- Neither the Record nor any severing of the information from the Record is at issue in this Review.
- Issue:** The issue the Review Officer must decide is the following:
Whether Community Services has met its statutory duty to assist in the way that complied with the Third Party Notice provisions under s. 22 of the *FOIPOP Act*.
- Recommendation:** The Review Officer recommends Community Services begin the Third Party Notice process again as follows:
- Community Services collect all current personal contact information of the Third Party from at least two public bodies including Service Nova Scotia and Municipal Relations and Department of Health and Wellness. This step is to be taken promptly, in accordance with s. 22 of the *FOIPOP Act*, upon acceptance of this Recommendation.
 - If Community Services is unsuccessful in collecting current personal contact information for the Third Party, that is the end of the matter. To expect Community Services to go to the lengths suggested by the Applicant would be unreasonable, under the *FOIPOP Act* regime.

- If successful and the Third Party's personal contact information is located, Community Services will provide Notice to the Third Party, Specifically, the Third Party Notice should:
 - a. provide all the information that the Applicant has previously consented to share with the Third Party including his/her personal contact information; and
 - b. seek the Third Party's consent for the disclosure of his/her personal information that has been severed from the Record.
- If consent of the Third Party is not forthcoming, Community Services will advise the Applicant accordingly and that is the end of the matter.
- If consent of the Third Party is provided, Community Services will disclose the parts of the Record containing the Third Party's personal information, which were previously severed, to the Applicant.

Key Words Considered:

activity, African Nova Scotian, biological parent, child, collect, disclose, fair, feasible, information sharing agreement, mandate, operating program, personal information, practical, reasonably located, Third Party Notice.

Statutes Considered:

Freedom of Information and Protection of Privacy Act, s. 20, 22, 22(1A), 24, 27; Freedom of Information and Protection of Privacy Regulations, Regulation 13; Adoption Information Act SNS 1996, c. 3.

Case Authorities Cited:

NS Report FI-09-63

Others Cited:

Nova Scotia Freedom of Information and Protection of Privacy Review Officer's 2011 Annual Report; STAR 6.0 5200-30

REVIEW REPORT FI-13-52

Introduction:

Department of Community Services [“Community Services “] has a large mandate serving many disadvantaged and vulnerable people in Nova Scotia. Rightfully, it takes privacy very seriously. It can be a challenge to find the appropriate balance between the right of access and the right to personal privacy. This Review is about Community Services finding that balance: fulfilling its statutory duty to assist the Applicant in exercising his/her right to access and complying with the statutory Third Party Notice in a way which respects personal privacy. The focus must be to comply with the statute as part of its mandate as a public body and respect applicants’ and third parties’ by providing them the opportunity to make a choice: to consent or not to consent.

The Applicant is the biological parent of a child who was apprehended shortly after birth and placed into foster care by the province many years ago. The Applicant lost all contact with his/her child. The Applicant seeks re-unification with his/her child.

Believing that his/her child had been adopted, the Applicant advises that s/he approached the Adoption Division of Community Services for information about his/her child. At that point, the Applicant says s/he was advised that the child had not been adopted and, therefore, if s/he wanted any information s/he would have to make an access request under the *Freedom of Information and Protection of Privacy Act* [“*FOIPOP Act*”]. The Applicant understood that this was his/her only way of gathering the necessary information that would enable him/her to attempt reunification with the child with whom s/he has lost all contact. Upon receiving this information, the Applicant made an Application for Access [“access request”].

Re-unification is not within the mandate of the Review Officer under the *FOIPOP Act*. In the Applicant’s previous Review Report *FI-09-63*, I touched on this point to the extent possible: the disparity between what is available to biological parents under the *Adoption Information Act* and the *FOIPOP Act*.

The Applicant continues to suffer greatly because of his/her inability to reconnect with his/her child. S/he is an aging African Nova Scotian who despite having gone on to have another family with two now grown children, continues to live with the trauma of separation all those years ago. The memory of Community Services apprehending his/her child has left a permanent scar that continues to be an emotional and psychological challenge for him/her today. The Applicant stated in his/her Representations that s/he suffered physical and sexual abuse after s/he was apprehended as a child and forced to live in care of the province.

This is three generation. My mother, me, and my [child]. The same judge that took me away from my mother is the same judge that took me away from my [child] and told me, “[S/he]’ll get over it. [S/he]’ll have other kids.” I’m [number] years of age. I’ve been carrying this burden for a long time. And, I feel that I am very tired that I can’t get the answers that I asked for. I feel that it’s my right to find out where my child is. I gave [him/her] life. You took him from me, but I gave [him/her] life.

The Applicant submits that s/he continues to have many unanswered questions. Was my child adopted? If not, was s/he safe in a foster care home? Was my child healthy and happy? Was my child brought up knowing and understanding his/her African Nova Scotian culture and history? Is s/he doing alright as an adult?

Background

The Applicant's original access request was dated April 30, 2009. Community Services made a decision, which the Applicant appealed to the Review Office. On January 24, 2013 I issued Review Report *FI-09-63*, which considered a number of issues related to the original processing of the access request: statutory duty to assist, scope of the request, response to the request, refusal by Community Services to confirm the existence of a responsive Record, and the *Canadian Charter of Rights and Freedoms*.

One of my Recommendations related to Community Services seeking the Applicant's consent as part of giving Third Party Notice that the responsive Record contains their personal information, read as follows:

Prior to deciding which exemptions may apply, seek the consent of the Applicant to provide the following information to the third party: the Applicant's name, status as a birth parent, and contact information. Contact the third party and offer to provide the information the Applicant has consented to share. See the third party's consent for the release of his/her personal information in the Record to the Applicant including his/her contact information. In the alternative, seek consent of the third party as to what personal information s/he is willing to have disclosed [for example, s/he may consent to disclosure of current whereabouts, as opposed to information from the Child Ward file]; [NS Report FI-09-63]

I recommended Community Services ask the Applicant for his/her consent to disclose his/her identity, contact information, and relationship to the Third Party, as is permitted by s. 22(4)(b) of the *FOIPOP Act*. This personal information was then to be provided along with Third Party Notice of the Applicant's access request to the Third Party in order to solicit his/her consent to release some, or all, of his/her personal information to the Applicant. Community Services made a decision to accept, in part, my Recommendation stating:

Community Services, as part of the processing of the Applicant's original request, will process the request in keeping with the provisions of FOIPOP Act. Third party notice will be conducted in a manner consistent with Section 22 of the Act.

The Applicant provided Community Services with his/her consent. Subsequently, on March 26, 2013, Community Services issued a Third Party Notice, which read, in part, as follows:

The Nova Scotia Department of Community Services has received an application under the Freedom of Information and Protection of Privacy Act for access to information pertaining to you. Specifically, the records being requested pertain to your time spent in care of the province. Disclosure of records relevant to the applicant may result in an invasion of your privacy.

The individual requesting the information has consented to having their identity made known to you. The applicant is [Applicant's full name]; [s/he] has been identified as your birth [mother/father].

Community Services sent a letter to the Third Party but it was returned, unopened. The returned envelope was marked, "Vacant, Moved/Unknown".

Community Services completed processing the access request and issued a new decision on April 17, 2013. The decision read, in part, as follows:

[. . .] As per our letter to you dated March 26, 2013, we have attempted to contact a third party to ask whether or not the third party consents or objects to the disclosure of their information relative to the exemption of Section 20 of the Act dealing with personal information. The third party had 14 days to respond to our letter. To date we have not received a response from the third party with respect to this matter. Therefore we have decided to process your request without the consent of the third party. [. . .]

Enclosed are copies of the records responsive to your request. Access to the information in the records is being granted in part. The personal information of any third parties found in the records is being withheld pursuant to S. 20(1) of the FOIPOP Act. This section prohibits the disclosure of personal information to an applicant if that disclosure would result in an unreasonable invasion of a third party's personal privacy.

Should the third party contact us at a later date, requesting your contact information, we will contact you to confirm that you still wish to have this information shared.

Community Services followed up with a second letter to the Third Party, to provide its decision to him/her, using the same address, on April 17, 2013. As before, the letter was returned unopened. The envelope was again marked, "Vacant, Moved/Unknown".

On June 18, 2013, the Applicant filed a Form 7 Request for Review with the Review Officer with respect to the April 17, 2013 decision, which read as follows:

What steps did Community Services take when attempting to contact a third party to ask whether or not the third party consents or objects to the disclosure of their information?

Subsequent to receiving the Applicant's Form 7, a real effort was made by the Review Office to resolve this file informally between the parties and as part of those discussions, Community Services agreed to contact the Applicant with an explanation of the steps it took to contact the Third Party. On August 14, 2013, Community Services provided the following explanation to the Applicant:

This letter is in response to your request via the FOIPOP Review Office for an explanation with respect to the steps Community Services took in attempting to contact the third party as part of the processing of you request for information under the FOIPOP Act.

*Community Services sent a letter to the third party on March 26, 2013. **We searched for and obtaining [sic] a mailing address for the third party.** The third party was advised that they had 14 days to respond to the letter advising whether or not they consented to the disclosure of the information being requested. We did not receive a response from the third party. Once the decision on disclosure has been made, we sent a second letter to the third party to advise them of this decision. A short time later, we received back from Canada Post, both letters that had been sent to the third party. The letters were returned to us unopened as "moved/unknown". **No other address for the third party could be located.**
[Emphasis added]*

On August 19, 2013, the Review Office asked Community Services to provide more detailed Representations on the Third Party Notice process that it had followed, specifically, to respond to the following questions:

- 1. What internal resources are available to Community Services staff to assist with locating individuals? Of the available resources, which were accessed in this case?*
- 2. Does Community Services collect information from other government departments or agencies to assist them when they need to locate an individual? If so, are these requests made on a case-by-case basis, or does Community Services rely on information-sharing arrangements? If Community Services relies on formalized arrangements to collect contact information, are these arrangements or agreements program-specific?*
- 3. Are there any program-specific information sharing arrangements in place to assist Community Services with locating Third Parties for the purposes of providing Third Party Notice in accordance with s. 22 of the FOIPOP Act? If not, why not?*
- 4. In light of all the relevant circumstances, and the FOIPOP Act and Regulations, explain how Community Services met its obligation to provide Third Party Notice in this case.*

Representations from Community Services were received on September 6, 2013 and read as follows:

*(...) Community Services **conducted a search of an internal database to attempt to locate contact information for the identified third party.** We did locate an address which appeared to match the information pertaining to the third party as provided by the applicant. We cannot disclose the details with respect to how/where this information was located without revealing personal information of a third party.*

A notice was prepared and sent to the third party containing the information provided by, and consented to by the applicant. The notice included a statement indicating that the third party had fourteen days after the notice is given that they may, in writing, consent to the disclosure or may make written representation to the public body explaining why the information should not be disclosed. When no response was received within the required timeframe, Community Services made the disclosure decision. On April 17, 2013, both letter sent to the third party were returned to sender, address unknown/moved. We advised the applicant of this in our letter dated August 14, 2013. A copy of this letter was provided to the Review Office.

*With regards to your questions pertaining to what information Community Services collects from other government departments, I can advise that this is done based on specific program requirements, and the information is not shared or made available outside these programs. Information sharing agreements exist between specific divisions and other government departments. The Information Services & FOIPOP division does [sic] not have any information sharing agreements in place with other government departments, and therefore any personal information which may pertain to third parties collected/used by other divisions within Community Services is not available for us to search/use. **While no current information sharing agreements exist, Community Services is willing to explore the possibility of entering into information sharing agreement with other government departments where appropriate.***

***Community Services staff took practicable steps to contact the third party, using all available information.** While it is unfortunate that we were unable to contact the third party, we do believe we meet our obligation to provide Third Party Notice in this case.
[Emphasis added]*

On October 8, 2013, Community Services' Representations were sent to the Applicant with a request for him/her to provide Representations if s/he was not satisfied with the explanation contained in the Representations from Community Services. The Applicant was not satisfied and in turn provided comprehensive audio and written Representations.

Record at Issue:

Neither the Record nor any severing of the information from the Record is at issue in this Review.

Discussion:

The statutory duty to assist requires public bodies to take all reasonable and relevant circumstances into consideration when deciding what is appropriate to meet its duty. Section 7 of the *FOIPOP Act* reads, in part, as follows:

*the head of the public body to which the request is made shall
(a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely;
[Emphasis added]*

In the *Nova Scotia Freedom of Information and Protection of Privacy Review Officer's 2011 Annual Report*, I stated the following:

A public body must determine what is appropriate to meet the duty to assist based on the circumstances of each case.

Not all applicants will need the same level of assistance, so it is best practice for a public body to contact an applicant to assess what is appropriate, unless it is absolutely clear from the wording of the Application for Access to a Record.

Furthermore:

*The obligation to assist begins with receipt of the access to information request and continues throughout the entire request process.
Public bodies need to recognize that most applicants are not in a position to understand the details about a public body's practices and will not necessarily be familiar with the types of records they are trying to access. Applicants may need some assistance and it is up to a public body to provide it.*

Issue:

Whether Community Services has met its statutory duty to assist in the way that complied with the Third Party Notice provisions under s. 22 of the *FOIPOP Act*.

What follows is my analysis of Third Party Notice in order to provide guidance to Community Services with a step-by-step process in order for Community Services to meet its statutory duty to assist.

The first question is “Was Community Services required to give Third Party Notice in this case?” I find the answer is yes.

- If an access request contains personal information of someone other than the Applicant and where s. 20 of the *FOIPOP Act* must be applied to the information in a Record, then the Third Party Notice provision in s. 22 of the *FOIPOP Act* is activated.
- Where s. 22 of the *FOIPOP Act* is activated, the next step for Community Services is to conduct an assessment as follows:
 - Community Services must examine the Record and the views or interests of the Third Party respecting the disclosure request.
 - If Community Services is confident that s. 20 of the *FOIPOP Act* applies and it intends to refuse to disclose the Record or it is not practical to give Notice then the matter is dispensed with pursuant to s. 22(1A) of the *FOIPOP Act*.
 - If Community Services is confident that s. 20 of the *FOIPOP Act* applies but the views or interests are not known or where it is possible the Third Party will consent to disclosure, s. 22(1) of the *FOIPOP Act* applies.
- Section 22(1) of the *FOIPOP Act* imposes a duty (reads “shall”) and thus requires Community Services to give Notice to the Third Party promptly:
 - The only exception to giving Third Party Notice is if it is not practicable.
 - What is practicable? Practicable means “capable of being done” or “feasible”.
 - Similar language is used in *FOIPOP Regulation 13*, which provides that “practicable” is if the Third Party can reasonably be located.
 - What is reasonable? Reasonable means not excessive or extreme but feasible, practical and fair.

The second question is “Can Community Services collect current personal contact information [personal information] for the purposes of giving Third Party Notice under s. 22 of the *FOIPOP Act*?” I find the answer is yes.

- Where it has up-to-date personal contact information from its own departmental database, Community Services can use this to provide Third Party Notice.
- If current personal contact information is not available to Community Services, it must go on to consider collecting current personal contact information from other sources.
- Section 24 of the *FOIPOP Act* prohibits the collection of personal information. There are three exceptions where collection of personal information is permissible, one of which is as follows:

- Section 24(1)(c) allows for the collection if the information collected relates directly to and is necessary for an operating program or activity of the public body.
 - What is “an operating program”? An operating program is defined as a series of functions designed to carry out all or part of a public body’s mandate.
 - What is “a mandate”? A mandate is an authoritative command or instruction and defines all the work of a public body.
 - What is “an activity”? An activity is the steps taken to carry out that operating program.
 - Section 7 *FOIPOP Act* imposes a statutory duty on all public bodies including Community Services to respond to all access requests it receives. Because this is a statutory duty that applies to all public bodies that fall under the *FOIPOP Act*, access to information forms part of their mandate.
 - In an access request that activates s. 22(1), the public body is under a duty to give Third Party Notice. Giving Third Party Notice is part of the public body’s operating program in order to achieve part of its mandate.
 - The logistics or practicalities of how to achieve giving Third Party Notice is an activity required to fulfill its operating program.
 - Community Services has the legal authority to collect information in order to fulfill its obligations under the *FOIPOP Act*. It is not necessary to have an information sharing agreement in place because the law permits collection in these circumstances. Community Services represented it was open to considering an information sharing agreement with other departments, which is good and would make the details of the activity clearer and more transparent. But the absence of an information sharing agreement does not preclude Community Services from collecting personal contact information to further its statutory duties.

The third question is “Given it can collect personal contact information, can Community Services’ obligation to give Third Party Notice be achieved in a manner that is feasible, practical and fair?” I find the answer is yes.

- If the accuracy or currency of the personal contact information held by Community Services is questionable or stale or unreliable, what steps must be taken to find the most recent personal contact information of the Third Party in order to meet the test of, feasible, practical and fair?
- Clearly in order to give Third Party Notice, personal contact information is required. Recent personal contact information makes giving Third Party Notice more practical.
- What sources of personal contact information are available within government? Two examples of departments authorized to collect personal contact information that is up to date are Service Nova Scotia and Municipal Relations [“SNSMR”] and

Department of Health and Wellness [“Health and Wellness”]. The law requires drivers to notify the Registry of Motor Vehicles under SNSMR of any change of address. Likewise, the Medical Services Insurance Program under Health and Wellness requires cardholders to notify it of any change of address.

- It is entirely feasible for Community Services to contact one of these public bodies to collect the personal contact information. By Community Services doing what is feasible and practical, it has a fair result.
- Community Services must be aware of the following with respect to the collection of personal contact information to be used in providing Third Party Notice:
 - The collection is for a limited purpose – collected solely in order to provide Third Party Notice under the *FOIPOP Act*;
 - The collection should be of the minimum amount of personal contact information that enables Community Service to provide the Third Party Notice;
 - The personal contact information collected becomes part of a the Standard for Administrative Records [“STAR”] at Community Services and must be retained in accordance to *STAR 6.0 5200-30*; and
 - In order to respect the privacy interests of the Third Party, Community Services’ use of the personal contact information is restricted by s. 26 of the *FOIPOP Act*: the limited purpose for which it was collected.

The fourth and final question in the analysis with respect to Third Party Notice is the “flip” side of the collection: “Are other public bodies *authorized to disclose the personal contact information to Community Services?*” I find the answer is yes.

- Section 27 of the *FOIPOP Act* restricts the disclosure of information: a public body may disclose personal information only in specific circumstances. These are listed in s. 27 of the *FOIPOP Act* and there are twenty exceptions.
 - One of the exceptions is contained in s. 27(d) of the *FOIPOP Act*, which allows for the disclosure of personal information *for the purpose of complying with an enactment*.
 - Section 7 of the *FOIPOP Act* imposes a statutory duty on Community Services [and all other public bodies] to process access requests: *Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made shall . . . respond . . .*
 - In order to comply with the duty to process an access request, where it involves personal information of a Third Party, the public body is under a statutory duty to give Third Party Notice pursuant to s. 22(1) of the *FOIPOP Act*. If the most recent available personal contact information is not made available to Community Services, the Third Party Notice requirement would not be possible and would, therefore, hold little meaning.

- The *FOIPOP Act* imposes two statutory obligations on Community Services: to respond to an access request and give Third Party Notice where appropriate. Both of these are activities Community Services must undertake.
- The public bodies from which Community Services seeks to collect personal contact information are authorized to disclose personal information, pursuant to s. 27(d) of the *FOIPOP Act*. In other words, the other public body can disclose the personal contact information to enable Community Services *to comply with an enactment: the FOIPOP Act*.
- Referring back to a previous point I made above in order to make it clear, an information sharing agreement would make this more transparent and “clean” and I encourage Community Services to put this in place. It is not, however, necessary and the absence of such an agreement does not preclude the disclosure of personal contact information by other public bodies to Community Services.

In conclusion

1. I find Community Services has failed to demonstrate that the Third Party could not be “reasonably located” pursuant to s. 22(1) of the *FOIPOP Act* and *FOIPOP Regulation 13*.
2. I find that Community Services failed to meet its statutory duty to assist the Applicant by failing to comply with the Third Party Notice in a manner that is feasible, practical and fair.

Recommendation

I recommend Community Services begin the Third Party Notice process again and proceed as follows:

- Community Services collect all current personal contact information of the Third Party from at least two public bodies including SNSMR and Health and Wellness. This step is to be taken promptly in accordance with s. 22 of the *FOIPOP Act*, upon acceptance of this Recommendation.
- If Community Services is unsuccessful in collecting current personal contact information for the Third Party, that is the end of the matter. To expect Community Services to go to the lengths suggested by the Applicant would be unreasonable, under the *FOIPOP Act* regime.
- If successful and the Third Party’s personal contact information is located, Community Services will provide Notice to the Third Party, Specifically, the Third Party Notice should:

- a. provide all the information that the Applicant has previously consented to share with the Third Party including his/her personal contact information; and
 - b. seek the Third Party's consent for the disclosure of his/her personal information that has been severed from the Record.
- If consent of the Third Party is not forthcoming, Community Services will advise the Applicant accordingly and that is the end of the matter.
 - If consent of the Third Party is provided, Community Services will disclose the parts of the Record containing the Third Party's personal information, which were previously severed, to the Applicant.

Respectfully submitted,

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