

Office of the
INTEGRITY
COMMISSIONER



Bureau du
COMMISSAIRE
À L'INTÉGRITÉ

REPORT OF FINDINGS

Right to Information and Protection of Privacy Act

Matter: 2018-4575-AP-2474

December 20, 2018

I INTRODUCTION

1. My investigation as Integrity Commissioner is established in conformity with s. 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c. R-10.6 (“the Act”). This Report of Findings is in conclusion of a complaint filed by the Applicant asking the Commissioner to investigate the matter pursuant to s. 67(1)(a)(i) of the Act.
2. On May 13, 2018, the Applicant submitted an access to information request to the Department of Social Development (“the Department”), seeking access to the Applicant’s “complete adoption file in its entirety dating back to [the Applicant’s date of birth] to the present.” The Applicant submitted this request in light of recent legislative amendments to the *Family Services Act* that came into force on April 1, 2018 allowing individuals to receive previously protected information about adoptions in which they were involved.
3. The Department replied on May 23, 2018, stating that the Department was aware that the Applicant had recently received information through its Post-Adoption Disclosure Services, including the original statement of birth and a copy of the adoption order.
4. The Department also explained that the recent changes to the *Family Services Act* respecting adoption information (Bill 39, *An Act Respecting the Opening of Sealed Adoption Records*) permit the release of the original registration of birth and a copy of the adoption order, and that it was unable to release any additional identifying information as it would be an unreasonable invasion of another person’s privacy (s. 21(1) of the *Right to Information and Protection of Privacy Act*) and that this information falls within the confidentiality provisions found in ss. 11(1) and 11(2) of the *Family Services Act*. The response also references s. 5 of the *Right to Information and Protection of Privacy Act*, but does not provide explanations as to why this provision applied in this case.
5. The Applicant was not satisfied with the Department’s response and filed a complaint with this Office. In making this complaint, the Applicant questioned why the full adoption file was being withheld in light of the recent changes to the *Family Services Act* about open adoption records. While the Applicant understood that these changes clearly refer to individuals now being able to receive an original statement of birth and a copy of the adoption order, the Applicant did not see where the law states that this is the only information that adoptees are now entitled to receive. As there was no disclosure veto filed with the Department, the Applicant was of the view that the whole adoption file should no longer be considered confidential.

6. As with all complaints filed with this Office, this complaint was initially assigned to an investigator to undertake the informal resolution process. During the informal resolution process, the investigator assigned to the file held discussions with Department officials, reviewed the relevant records, reviewed the applicable legislative provisions, and communicated with the Applicant and the Department with the intent of finding a common ground on what information can now be disclosed to individuals under the new provisions; however, this did not occur. As the complaint was not informally resolved, it was referred to me for my review and final disposition.
7. I decided to launch a formal investigation in this case, given that this case raised a question of interpretation about what exact information the recent legislative amendments to adoption records would now be made available to those involved in adoptions. This is a question that is of importance to many individuals with ties to the Province and I wanted to take this opportunity to publicly report on this question. For this reason, I am concluding this investigation with the issuance of this Report of Findings under s. 73 of the *Right to Information and Protection of Privacy Act*.

II BACKGROUND

8. Adoptions finalized in the Province of New Brunswick are governed by the *Family Services Act* and the sharing of information about adoptions is coordinated by the Department's Post-Adoption Disclosure Services branch. This was the case before the recent amendments to open up some adoption information and continues to be the case since the amendments came into effect on April 1, 2018.
9. Prior to April 1, 2018, identifying information about the parties to an adoption could only be disclosed to those involved with an adoption by mutual consent of the parties to the adoption. Otherwise, the identifying information of the parties, as found in original birth records and the Department's adoption files, was confidential and could not be disclosed under the then provisions of the *Family Services Act*. Parties to an adoption (including the adoptee, birth parents, and adopting parents) could and continue to have the right to apply to the Minister for non-identifying information relating to an adoption in which they were involved.
10. The closed adoption records approach had been in place for decades and was based on societal attitudes tending towards secrecy and keeping information of this nature private.

Beginning with British Columbia in the late 1990s, other Provinces in Canada began amending their respective adoption legislation to open up identifying information to the parties involved in an adoption, in recognition that societal attitudes towards adoptions had shifted over the decades and that many adoptees were seeking contact with birth families to obtain medical history information.

11. The Province of New Brunswick began looking at this question a few years ago, and in April 2014, published a discussion paper on the Opening of Sealed Adoption Records to begin its public consultation efforts.
12. After receiving and reviewing public feedback as a result of this process, Bill 39 - *An Act Respecting the Opening of Sealed Adoption Records* was introduced in the Legislative Assembly in February 2017. Bill 39 was based on precedents from other Canadian provinces that had previously made such amendments, and incorporated the option for parties who did not want their identifying information to be disclosed to file a disclosure veto to prevent its release or a contact preference, which would limit or provide direction on how they wished to be contacted if their identifying information were to be released.
13. Bill 39 received royal assent on May 5, 2017, following which the Department engaged in a public awareness campaign to inform those who would be affected by the changes of their right to file either a disclosure veto or contact preference in advance of the changes coming into effect on April 1, 2018.
14. On April 1, 2018, the amendments came into effect and, for adoptions that were finalized prior to that date, an adopted person who is at least 19 years of age or a birth parent can now apply to the Minister for identifying information about the other party, so long as the other party has not filed a disclosure veto with the Minister.
15. In this case, the Applicant applied to the Minister for identifying information under the new process and subsequently received a full copy of the original registration of birth and adoption order issued by the court, as no disclosure veto was on file with the Minister so as to prevent disclosure in this case.
16. Not being fully satisfied with this outcome, the Applicant then submitted an access request under the *Right to Information and Protection of Privacy Act* for a copy of the entire adoption file, believing that the recent amendments should have opened up all adoption records, not just the original birth registration and the adoption order.

III ISSUE

17. The sole issue in this case is the question of access to the Applicant's entire adoption file, in light of the legislative amendments that came into force on April 1, 2018.

IV ANALYSIS

18. As part of the formal investigation process, I invited and received written representations from the Department on the recent legislative amendments and the Department's views on what this means for access rights. The similar schemes in other Canadian jurisdictions that had previously opened up adoption information were also reviewed to see what information is now available to the parties to an adoption under their respective legislation.
19. The Department's view is that the *Family Services Act* creates a separate scheme for those involved in adoptions to access certain limited identifying information relating to an adoption. The main change is that the Minister is now authorized to disclose identifying information relating to an adoption to certain individuals without prior notice or seeking consent. For adoptions that were finalized prior to April 1, 2018, an adopted person who is at least 19 years of age or a birth parent may apply to the Minister for the disclosure of identifying information about the other person (s. 94.07 of the *Family Services Act*). For adoptions finalized since April 1, 2018, the Minister may disclose identifying information relating to an adoption to not just an adult adoptee or a birth parent, but also to adoptees under the age of 19 if they have the consent of at least one adopting parent, adopting parents, and any other person that the Minister finds has an interest in the matter (s. 94.05 of the *Family Services Act*).
20. The Department is of the view that the remaining information in adoption files is protected from disclosure and cannot be released, with the exception of non-identifying information that it discloses in summary format, in keeping with s. 94.04 of the *Family Services Act*.
21. In its submissions during this investigation, the Department noted that some adoption files contain more documentation and information that can be disclosed to those seeking answers, while others, particularly for older adoption cases, may simply not have much information at all, which can leave people with more questions than answers:

In many case there is no other information in the adoptee's file. In addition, birth fathers are not always identified. Further the file may be several decades old with the adoption occurring at a time when little information was provided by the birth mother or collected from the agency.

22. There is no question that the Department wants to provide those seeking information about adoptions in which they were involved with helpful and meaningful information where it can; however, it is also cognizant of the confidentiality provisions surrounding adoption records and wants to ensure that it is meeting its obligations in this respect.

Which statute applies to access rights with respect to adoption files?

23. As the recent amendments to the *Family Services Act* create a unique right of access for parties to an adoption, the first question to be addressed is whether access rights in these situations are governed by the *Family Services Act* or the *Right to Information and Protection of Privacy Act*. As a general rule, the *Right to Information and Protection of Privacy Act* is meant to be the overarching statute that governs access rights for all public bodies; however, it recognizes that another Provincial statute may prevail in certain limited circumstances, as set out in s. 5:

5 If a provision of this Act is inconsistent with or in conflict with a provision of another Act of the Legislature, the provision of this Act prevails unless the other Act of the Legislature expressly provides that it, or a provision of it, prevails despite this Act.

24. In short, the *Right to Information and Protection of Privacy Act*, and by extension, the access rights afforded under it, are intended to prevail over all other Provincial statutes unless there is a conflict or inconsistency between one of its provisions and another Provincial statute, and that other statute includes an express declaration that it prevails.
25. Assessing whether another statute prevails over the *Right to Information and Protection of Privacy Act* involves a two-step analysis: First, is there a conflict or inconsistency between the *Right to Information and Protection of Privacy Act* and the other statute? If there is no conflict or inconsistency, then the *Right to Information and Protection of Privacy Act* prevails and there is no need to further consider the application of the other statute. If there is a conflict or inconsistency, the *Right to Information and Protection of Privacy Act* will still prevail unless the other statute expressly states that it is intended to prevail instead.

26. In this case, the first step is to determine whether there is a conflict or inconsistency between the access rights afforded under the *Right to Information and Protection of Privacy Act* and the access rights afforded to parties to an adoption under the *Family Services Act*.
27. Adoption files largely consist of the personal information of those involved in the adoption: the birth parent(s), the adopted person, as well as the adoptive family. There is no question that information of this nature is considered to be highly sensitive in nature, and it follows that the *Act* would only permit disclosure of such information where it would not be an unreasonable invasion of privacy of those involved in the adoption to do so, in keeping with s. 21(1) of the *Right to Information and Protection of Privacy Act*. It goes without saying that someone who was not involved in a particular adoption would have no right of access to any such information, as disclosure of such information would be an unreasonable invasion of privacy.
28. As to the question of access rights for those involved in an adoption, the *Right to Information and Protection of Privacy Act* presumes a right of access to one's own personal information under s. 7(2):
- 7(1) Subject to this Act, every person is entitled to request and receive information relating to the public business of a public body, including, without restricting the generality of the foregoing, any activity or function carried on or performed by any public body to which this Act applies.
- 7(2) Without limiting subsection (1), every individual is entitled to request and receive information about himself or herself.
29. Under s. 7(2), individuals would generally be able to receive their own personal information held in an adoption file, unless it was otherwise protected from disclosure under one of the exception provisions found in ss. 17 to 33 of the *Right to Information and Protection of Privacy Act*.
30. As for the right of access to personal information about the other party or parties to an adoption, there is no presumed right of access under the *Right to Information and Protection of Privacy Act*, but is based on whether the disclosure would be an unreasonable invasion of another person's privacy under s. 21(1).
31. The *Family Services Act*, specifically Part V.1 (Confidentiality, Disclosure and the Post-Adoption Register), sets out specific access rights to certain kinds of information in relation to an adoption for the parties to an adoption, including adopted people, adopting parents,

and birth parents. As a general rule, the *Family Services Act* deems all information in relation to an adoption to be confidential, and subject to disclosure only under the limited circumstances set out in Part V.1:

94.02(4) Subject to this Part, all records and documents in the possession of the Minister relating to the adoption of any person are confidential.

32. Part V.1 goes on to set out the limited access rights afforded to the parties involved in an adoption and the process that the parties can follow to obtain this information (i.e., by applying to the Minister).
33. Parties to an adoption, including adoptees, birth parents, and adopting parents, have the right to request and receive “non-identifying information” relating to an adoption. “Non-identifying information” is defined in s. 94.01 of the *Family Services Act* as “information that does not reveal the identity of a person such as year of birth, ethnic origin, physical description, education level, religion and health history.” Non-identifying information was also previously available to parties to an adoption under the previous adoption provisions of the *Family Services Act*, thus access rights with respect to non-identifying information did not change with the recent amendments.
34. Certain parties to an adoption now, as a result of the recent amendments, also have the right to apply to the Minister for “identifying information” relating to an adoption. “Identifying information” is defined in s. 94.01 of the *Family Services Act* as “information that reveals the identity of a person.” In its submissions to this Office, the Department indicated that identifying information “includes the adoptee’s original name at birth and the names and address of the birth parents if indicated on the birth record”.
35. Having reviewed the access provisions to information of this nature under both the *Right to Information and Protection of Privacy Act* and the recent amendments to Part V.1 of the *Family Services Act* that govern the disclosure of adoption information, I accept and agree with the Department’s position that Part V.1 of the *Family Services Act* sets out a separate access scheme for the parties to an adoption. The question of access rights is not determined on the basis of an applicant having a presumed right of access to his or her own information, nor is the question of disclosure of personal information of the other party (or parties, as the case may be), to an adoption based on an analysis of whether disclosure would be an unreasonable invasion of another person’s privacy.

36. I am of the view that there is a conflict or inconsistency between the access rights afforded under the *Right to Information and Protection of Privacy Act* and Part V.1 of the *Family Services Act*. Thus, the next step in this analysis is whether the *Family Services Act* has an express prevailing clause so as to establish its paramountcy in the event of a conflict or inconsistency. Section 11.3 of the *Family Services Act* states:

11.3 If a provision of this Act is inconsistent with or in conflict with a provision of the *Right to Information and Protection of Privacy Act*, this Act prevails.

37. I find that this is a sufficient prevailing clause and, as I have also found a conflict or inconsistency with the *Right to Information and Protection of Privacy Act*, the disclosure of adoption information is governed solely by Part V.1 of the *Family Services Act*

38. I also note that this result is in keeping with some other Canadian jurisdictions' respective adoption legislation, which also prevails over their respective access legislation.

39. For example, s. 64 of the Newfoundland and Labrador *Adoption Act, 2013* states:

64. Notwithstanding the *Access to Information and Protection of Privacy Act, 2015* and the *Privacy Act (Canada)*, the use of, disclosure of and access to information in records pertaining to adoptions, regardless of where the information or records are located, shall be governed by this Act.

40. Similarly, s. 227(4) of the Ontario *Child, Youth and Family Services Act, 2017* provides:

227(4) The *Freedom of Information and Protection of Privacy Act* does not apply to information that relates to an adoption.

41. While not directly relevant to the question of access rights raised in this case, I also note that Part V.1 also delineates the specific circumstances in which information about an adoption can lawfully be disclosed. It also sets out offence provisions for disclosure of such information that is not in compliance with Part V.1. In my view, Part V.1 not only sets out separate access rights, but also is the sole legislative authority on the question of disclosure of adoption information in all cases.

42. With the above in mind, the next question to be determined is what information is available to the parties to an adoption, including adult adoptees like the Applicant, under Part V.1 of the *Family Services Act*. As parties to an adoption are entitled to receive "non-identifying

information" and "identifying information" (in the absence of a disclosure veto) relating to an adoption, the question before me is whether this opens up a right of access to the entire adoption file.

What information is available to the parties to an adoption under Part V.1 of the *Family Services Act*?

43. During this investigation, the Department explained that adoption information can be found in three places: in court records, with Vital Statistics, and in the adoption files held by the Department.
44. As for the records held by the court and Vital Statistics, Part V.1 of the *Family Services Act* deems these records to be confidential, subject only to the limited disclosure provisions under this Part:
- 94.02(1) Subject to this Part, all records and documents relating to the adoption of any person on file with the court and with the Registrar General of Vital Statistics are confidential.
45. Under this provision, court records relating to an adoption are sealed and remain sealed. The same applies for records held by Vital Statistics, with the exception of statements of original registrations of birth and copies of orders, judgments and decrees kept on the special register under the *Vital Statistics Act*, which can be disclosed to an adopted person or a birth parent under s. 94.1 of the *Family Services Act*.
46. As for the records in an adoption file held by the Department, these will include all other information on file about an adoption, which can include details about the birth family, details about the adopting family, home study records such as assessments of the potential adoptive parents, references for adopting parents, progress reports after the adoption, and the like. The Department indicated that the right to apply to the Minister for "identifying information" and "non-identifying information" as defined in s. 94.01 of the *Family Services Act* is for information contained in adoption files held by the Department.
47. As indicated above, identifying information is defined as "information that reveals the identity of a person" (s. 94.01 of the *Family Services Act*). For adoptions that were finalized before April 1, 2018, s. 94.07(1) allows either an adopted person (who is at least 19 years of age) or a birth parent to apply to the Minister for the disclosure of identifying information about the other person.

48. As for non-identifying information, which is defined as “information that does not reveal the identity of a person...”, in my view, this would include all information in the Department’s adoption file that does not reveal a person’s identity.
49. The Department’s practice for disclosing non-identifying information involves “extracting” the non-identifying information from the records held in adoption files by the Department and disclosing it in summary format in a letter to the person who requested it. This appears to be the same practice that the Department has followed for some time, as this was how the Applicant had received non-identifying information from the Department by letter several years prior.
50. In its submissions, the Department stated that “non-identifying information could be available through third party records. Therefore, copies of actual records cannot be released...” The Department is of the view that information about an adoption that was provided by third parties, such as home study information, would be largely comprised of third party information and thus cannot be released under either Part V.1 of the *Family Services Act* or the *Right to Information and Protection of Privacy Act*.
51. As indicated above, it is my view that access rights to information in adoption files are governed solely by Part V.1 of the *Family Services Act*, and not the *Right to Information and Protection of Privacy Act*. This means that the Department cannot rely on the exceptions to disclosure found in the *Right to Information and Protection of Privacy Act*, including the exceptions that protect certain kinds of third party information under ss. 21 (unreasonable invasion of third party privacy) and s. 22 (third party business interests). These records are protected as confidential under s. 94.02(4) of the *Family Services Act* and can only be disclosed in keeping with Part V.1.
52. While there is no wording in Part V.1 of the *Family Services Act* that directs or requires the Department to provide non-identifying information in a summary format, instead of granting access to the original records;, I do note that an argument could be made that s. 94.02(4) clearly states that “all records and documents in the possession of the Minister relating to the adoption of any person are confidential” and the access rights under Part V.1 are limited to “information” (either identifying or non-identifying, as the case may be), not the records and documents themselves. This position may well be bolstered by the fact that s. 94.1(1) grants adopted persons and birth parents the right to apply to the Minister for a statement

of the original birth registration and a copy of an order, judgment or decree kept on the special register under the *Vital Statistics Act*, which grants a specific right to access these records to the specified individuals, and not just the information that they contain.

53. In light of this, I find that there is nothing inherently wrong with the Department's current practice with respect to disclosing non-identifying information by extracting it from the records in adoption files, so long as the Department is thorough in its review of the information contained in an adoption file and it provides all of the non-identifying information that it can under the circumstances to the person who has requested it.

54. In light of the above, I now turn to the question of the Applicant's access rights in this case.

Application to this case

55. As indicated above, the Applicant's access rights in this case, as an adult adoptee seeking information in the adoption file held by the Department, are governed by Part V.1 of the *Family Services Act*, and the Applicant has the right to receive both identifying and non-identifying information in keeping with this Part, keeping in mind that the adoption in question was finalized before April 1, 2018.

56. As for the identifying information in this case, as noted above, the Applicant had previously received a full and unredacted copy of the statement of original birth registration and the adoption order. On this point, I am satisfied that the Applicant has received all of the identifying information about the birth family in relation to this matter that the Department is permitted to disclose under Part V.1 of the *Family Services Act* at this time.

57. As for non-identifying information, the Department indicated both in its response to the Applicant and to this Office during the investigation that it had previously provided all of the non-identifying information that the Applicant was entitled to receive through the Applicant's previous interactions with the Department's Post-Adoptive Disclosure Services branch. In particular, the Department referenced a letter that had been sent to the Applicant in February 1992 by a social worker with the Post-Adoptive Disclosure branch that described certain details about the birth family as well as a brief summary of other records in the adoption file. Given this prior disclosure, the Department was of the view that there is no additional non-identifying information that can be released to the Applicant.

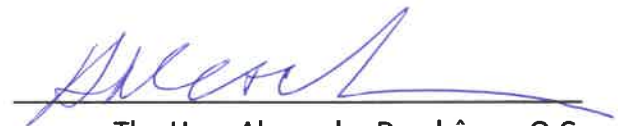
58. While I cannot speak to specifics in this Report of Findings given the sensitive nature of the information contained in the adoption file, having reviewed these records, I am satisfied that the Department provided the available non-identifying information about the birth family in the letter that was sent to the Applicant upon the initial request for this information dating back several years and that there is no further available information about the birth family in the adoption file in question.
59. As to the remaining records in the adoption file, I note that most all of these records were generally described in the letter sent to the Applicant by the Department several years ago and can confirm that none of them contain any further information, identifying or non-identifying, about the birth family. As such, there is no further such information for me to recommend be disclosed to the Applicant in this case.
60. For the reasons described above, I am not prepared to make a recommendation for further disclosure in this case; however, I encourage the Department to review its practice in disclosing non-identifying information under Part V.1 of the *Family Services Act*, with a view to determine whether it can disclose redacted versions of original records found in an adoption file to provide individuals with non-identifying information, or in the alternative, to ensure that it provides individuals with as helpful explanations as possible to help them understand the general nature of the records in which the non-identifying information is found and that it has provided all of the non-identifying information that it can to the person seeking it.

V CONCLUSION

61. To summarize, while I understand and empathize with the Applicant's reasons in bringing this complaint, I find that the recent amendments to the *Family Services Act* open up a limited amount of information only for adoptions finalized prior to April 1, 2018, that being identifying information about either the adoptee or the birth parent, depending on which party requests this. In these cases, the identifying information about the other party can be disclosed if there is no disclosure veto on file so as to prevent it being disclosed.
62. These amendments do not open up a right of access to the entire adoption file, which is in keeping with other Canadian jurisdictions that have made similar legislative amendments with respect to adoption information. I can appreciate that the Applicant may feel disappointed by this outcome, given that Bill 39 was entitled *An Act Respecting the Opening of Sealed Adoption Records*, when the effect of these amendments was to open up identifying

information contained in official adoption records, such as original birth registrations and court documents (orders, judgments or decrees) in relation to an adoption, but not the entire adoption file held by the Department.

63. Recognizing that the Department's practice of extracting non-identifying information from records contained in adoption files and then disclosing this information in this format is long-standing, I encourage the Department to reconsider this practice in light of the above findings.
64. In light of the above and pursuant to s. 73(1)(ii)(A), I confirm the Department's decision to refuse access to any additional information, other than what it had previously provided to the Applicant through other communications, as further disclosure is not permitted at this time under Part V.1 of the *Family Services Act*.
65. This Report issued in Fredericton, New Brunswick this 20th day of December 2018.



The Hon. Alexandre Deschênes, Q.C.
Integrity Commissioner of New Brunswick