



## REVIEW REPORT 036-2019, 077-2019

### Ministry of Corrections and Policing

February 11, 2020

#### Summary:

The Commissioner reviewed the Ministry of Corrections and Policing's (the Ministry) response to the Applicant's access request. The Commissioner found that: *The Freedom of Information and Protection of Privacy Act* (FOIP) and *The Health Information Protection Act* (HIPA) are engaged; the Ministry had provided reasonable explanations as to why some records do not exist; the Ministry properly applied subsection 27(1) of HIPA and subsection 29(1) of FOIP to the records; and the Ministry did not properly apply section 21 of FOIP to the records. In addition, the Commissioner found that, based on the uncertainty of the facts, he was unable to determine if the Ministry responded in the legislated timeframe. The Commissioner recommended the Ministry: continue to withhold information pursuant to subsection 27(1) of HIPA and subsection 29(1) of FOIP; conduct a further search for records as part of the Applicant's request has not been addressed; and update its written policies and procedures.

#### I BACKGROUND

[1] The Ministry of Corrections and Policing (the "Ministry") received an access to information request dated November 22, 2018, in which the Applicant requested the following:

1. A copy of all manuals, policies, guidelines or procedures relating to showering or shaving at the Saskatoon Correctional Centre, including but not limited to those relating to the Medical and Secure units, those relating to "The hole" and holding cells, those relating to inmates sanctioned with cell confinement, those relating to inmates sanctioned with cell confinement, those relating to Echo-1 unit and a copy of the "No Showering no complaining" sign posted in Admitting.

2. The full name of the Custodial Services Team Correctional Officer that supervised my shave and shower on the morning of September 25<sup>th</sup>, 2018. [Their] first or last name is similar to [XXXXX] and [they are] tall and slim with long black hair.
3. A copy of the audio and video of my interaction with CO Scott “Asshole” Wilkins in admitting on the morning of September 24<sup>th</sup>, 2018, before or after approximately 8am, if it exists and was retained.
4. Records of repair and maintenance work on plumbing and shower facilities in Secure 3/4 unit in the months of September and November 2018.
5. Records relating to Chad Bautz [Correctional Officer] and showering or shaving in the month of September 2018, excluding records included in my request for records relating to me personally.
6. A copy of all manuals, policies, guidelines or procedures relating to retention of audio and video recordings, excluding phone recordings and panel hearing recordings.

[2] On February 6, 2019, the Ministry responded with the following to the Applicant:

1. Request 1 - The Ministry provided the Applicant with a non-redacted copy of the *Saskatoon Provincial Correctional Centre’s Procedural Directive*, along with copies of the rules and regulations for Echo Unit and Secure Unit.
2. Request 2 - The Ministry advised the Applicant it was withholding this information under section 21 of *The Freedom of Information and Protection of Privacy Act* (FOIP).
3. Request 3 - The Ministry advised the Applicant that the video was no longer available (i.e. it had been already overwritten).
4. Request 4 - The Ministry advised the Applicant it had no records responsive to this request.
5. Request 5 – The Ministry advised the Applicant it was attaching records responsive to this request, and that the Ministry had redacted portions pursuant to subsections 29(1) of FOIP.
6. Request 6 – The Ministry advised the Applicant it had no records responsive to this request.

[3] On January 6, 2019, my office received a request from the Applicant to undertake a review of the Ministry’s response of February 6, 2019. The Applicant asked for a “finding with respect to LAFOIP s. 7(2)” [sic].

[4] On March 1, 2019, my office asked the Applicant to clarify the reviewable issues, which the Applicant did on March 2, 2019. On March 14, 2019, my office provided notification to the Applicant and the Ministry that it would conduct a review.

## II RECORDS AT ISSUE

[5] The Ministry’s submission included 54 pages of responsive records. I have indicated only the records or parts of records the Ministry has withheld and the exemptions it applied to them pursuant to *The Freedom of Information and Protection of Privacy Act* (FOIP) and *The Health Information Protection Act* (HIPA). For ease of reference, I have numbered the pages as follows:

Request	Document	Pages	Exemptions Applied
5	<i>Holding/Medical Observation Cells Program Tracking Sheet</i> (dated September 25, 2018)	17	Subsection 27(1) of HIPA and subsection 29(1) of FOIP to parts of the page
5	<i>Daily Inspection Logs Report – Medical and Holding Cells</i> (dated September 19 and 24, 2018)	18-19	Subsection 27(1) of HIPA applied to one part of page 19
5	Completed daily log reports (dated from September 6 – 27, 2018).	20-54	Subsection 27(1) HIPA and subsection 29(1) of FOIP to parts of pages 20, 21, 23, 24-40, 42, 44, 46-54

## III DISCUSSION OF THE ISSUES

### 1. Does my office have jurisdiction?

[6] The Ministry is a government institution pursuant to subsection 2(1)(d)(i) of FOIP, so FOIP is engaged.

[7] As a government institution, the Ministry also qualifies as a trustee pursuant to subsection 2(t)(i) of HIPA, so HIPA is engaged.

[8] I therefore have jurisdiction to undertake this review under FOIP and HIPA.

**2. Did the Ministry respond within the legislated timeframe?**

[9] Subsection 7(2) of FOIP requires a government institution to respond to an Applicant within 30 days. Subsection 7(2) of FOIP provides:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

[10] The Applicant provided their access letter to the Saskatoon Correctional Centre (SCC), which is part of the Ministry, in a letter dated November 22, 2018, which is the date indicated on the copy of the request the Applicant provided to my office. The Applicant did not indicate how they sent the letter (e.g. by registered mail or fax), or on what specific date. Regardless, the Applicant contacted my office on January 22, 2019, because they had not heard back from SCC regarding their access request.

[11] My office followed up with the Ministry on January 22, 2019, to determine if it had received the Applicant's request, to which the Ministry responded it had not. The Ministry stated it had inquired with SCC and confirmed that SCC had not received it either. The Ministry proceeded to open a file on January 24, 2019, and responded to the Applicant approximately two weeks later on February 6, 2019.

[12] In the matter before me, the question of whether or not the Ministry responded within the legislated timeframe depends on when it received the access request. As noted in a previous paragraph, the Applicant did not state how or when they sent their access request to SCC, or if they followed up with SCC since they had not received a response. In this type of situation, there is some onus on an Applicant to follow up with the public body in order to rule out possibilities such as mail getting lost. The Applicant has not provided

evidence to support or confirm if or when they sent the access request to SCC, and there is no evidence to support that the access request was received by SCC. Based on the uncertainty of the facts, I am not able to determine if the Ministry responded within the 30-day timeframe.

**3. Did the Ministry have a reasonable explanation as to why some of the records do not exist?**

[13] Section 5 of FOIP provides that an individual has a right of access to records under the possession or control of a government institution. Section 5 of FOIP provides:

**5** Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the possession or under the control of a government institution.

[14] If no records exist, then a government institution cannot provide access to them as provided by subsection 7(2)(e) of FOIP:

**7(2)** The head shall give written notice to the applicant within 30 days after the application is made:

...

(e) stating that access is refused for the reason that the record does not exist;

[15] A government institution must demonstrate how it conducted a reasonable search, or provide a reasonable explanation as to why it concluded that no responsive records exist. A government institution, however, does not need to prove this with absolute certainty.

[16] In its submission, the Ministry noted it searched log books, division directives, local procedural directives and unit rules as part of the Applicant's request. As noted in the background, the Applicant received 54 pages of records, in whole or in part, but did not receive the following:

- Item 1 - The name of the "Custodial Services Team Correctional Officer that supervised my shave and shower..." (request 2);
- Item 2 - A copy of the "No showering no complaining" sign (request 1);

- Item 3 - Audio and video recordings of their interactions with “CO Wilkins” (request 3); and
- Item 4 - Records of repair and maintenance work on plumbing and showering facilities in secure unit 3/4 for the months of September and November (request 4).

[17] I will review the first item (name of Correctional Officer) from the preceding paragraph in a later section of this Report. With respect to items 2, 3 and 4, the Ministry provided the following as explanations:

- Item 2 - In an email to my office dated November 20, 2019, the Ministry explained it was unable to confirm or deny the existence of the “No showering...” sign, but that at present it does not exist. I note that the Ministry addressed this request only upon follow up by my office and did not provide a response on it to the Applicant’s access request. I further note that the Applicant also requested a copy of this sign as part of another access request to the Ministry, which I have addressed in Review Report 131-2019.
- Item 3 - The Applicant requested a video dated September 24, 2018, but the Applicant’s access request was dated November 22, 2018. According to the Ministry, video recordings are automatically overwritten after 30 days, and if there is no request within that timeframe to save a video, then it is not saved. The video the Applicant has requested would therefore not exist or be available. The Ministry further added that although there is an automatic overwriting process, there is no written policy for video recordings.
- Item 4 - In an effort to locate records related to repair and maintenance work (request 4), the Ministry searched for records using the Ministry of Central Service’s “ARCHIBUS” software. In spite of these efforts, it did not locate records responsive to this request.

[18] Based on the information provided to my office, I find that the Ministry did have reasonable explanations as to why some of the records do not exist. I recommend that in the future, however, the Ministry take care to review and respond to each part of an access request as it initially overlooked the Applicant’s request for the “No showering no complaining” sign. I further recommend that the Ministry establish a written policy and/or procedure for the retention of audio and video recordings to reflect its current practice of overwriting them every 30 days. This is so that individuals are aware of how long audio and video recordings are kept and to request access to them accordingly.

**4. Did the Ministry properly apply subsection 27(1) of HIPA to the records?**

[19] With respect to request number 5, the Ministry applied subsection 27(1) of HIPA to information contained on pages 20, 21, 23, 24-40, 42, 44, 46-54 of the records. The information withheld includes the names of other inmates and the types of medical treatment they received during the specified timeframe and as recorded by facility staff in the log notes.

[20] Subsections 2(m)(ii) and (iv)(A) of HIPA provide:

**2** In this Act:

...

(m) “personal health information” means, with respect to an individual, whether living or deceased:

...

(ii) information with respect to any health service provided to the individual;

...

(iv) information that is collected:

(A) in the course of providing health services to the individual; or

[21] The information recorded by correctional staff in the log notes contains the types of health services these individuals received. Pursuant to subsections 2(m)(ii) and (iv)(A) of HIPA, this information is personal health information. The Ministry should not disclose it without the authority to do so in accordance with subsection 27(1) of HIPA, which provides:

**27(1)** A trustee shall not disclose personal health information in the custody or control of the trustee except with the consent of the subject individual or in accordance with this section, section 28 or section 29.

[22] I do not have evidence suggesting that the individuals named in the logs provided consent for the Ministry to release their personal health information to the Applicant. Thus, I find the Ministry properly applied subsection 27(1) of HIPA to the records and recommend the Ministry continue to withhold this information.

**5. Did the Ministry properly apply section 21 of FOIP to the records?**

[23] For request number 2, the Applicant asked for the name of the Correctional Centre Officer (CCO) that supervised their shave and shower on September 25, 2018. In its section 7 response to the Applicant (dated February 6, 2019), the Ministry stated, “[t]he full name of the Correctional Officer referred to in point two was withheld from release as the material may pose a danger to an individual’s health and safety pursuant to subsection 21 [sic] of FOIP...”

[24] The Ministry, in its submission, noted it had included the response contained in the preceding paragraph to the Applicant. My office, through the notification, asked the Ministry to support its argument for not providing the name of the CCO pursuant to section 21 of FOIP, but the Ministry made no such argument. In response to the draft report, the Ministry stated it, “initially incorrectly denied access based on section 21. However, upon review, the Ministry realized the requested information was not contained in the responsive records”.

[25] Upon review of the records, the name of the CCO does not appear in the records; thus, I find that section 21 of FOIP does not apply to the record. As a result, I recommend that the Ministry conduct a further search for records containing the CCO’s name that may exist (e.g. on shower logs) on the date specified by the Applicant in their access request, September 25<sup>th</sup>, 2018.

**6. Did the Ministry properly apply subsection 29(1) of FOIP to the records?**

[26] With respect to request number 5, the Ministry applied subsection 29(1) of FOIP to information contained on pages 20, 21, 23, 24-40, 42, 44, 46-54 of the records. The information withheld includes the names of other inmates and their activities within the correctional facility as recorded in the log notes by the facility staff.

[27] Subsection 29(1) of FOIP provides:



**29(1)** No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[28] With respect to personal information, subsection 24(1)(b) of FOIP provides:

**24(1)** Subject to subsections (1.1) and (2), “personal information” means personal information about an identifiable individual that is recorded in any form, and includes:

...

(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

[29] As the information withheld includes the names of other inmates and information that relates to their criminal history, I find that the Ministry properly applied subsection 29(1) of FOIP to the records. I recommend the Ministry continue to withhold this information.

#### **IV FINDINGS**

[30] I find that FOIP is engaged.

[31] I find that HIPA is engaged.

[32] I find that, based on the uncertainty of the facts, I am not able to determine if the Ministry responded within the 30-day timeframe.

[33] I find that the Ministry did have reasonable explanations as to why some of the records do not exist.

[34] I find the Ministry properly applied subsection 27(1) of HIPA to the records.

[35] I find that the Ministry did not properly apply section 21 of FOIP to the records.

[36] I find that the Ministry properly applied subsection 29(1) of FOIP to the records.

## **V RECOMMENDATIONS**

[37] I recommend the Ministry continue to withhold information in the records pursuant to subsection 27(1) of HIPA and subsection 29(1) of FOIP.

[38] I recommend that the Ministry conduct a further search for records containing the CCO's name that may exist (e.g. on shower logs) on the date specified by the Applicant in their access request, September 25<sup>th</sup>, 2018.

[39] I recommend that, in the future, the Ministry take care to review and respond to each part of an access request. I further recommend that the Ministry establish a written policy and/or procedure for the retention of audio and video recordings to reflect its current practice of overwriting them every 30 days.

Dated at Regina, in the Province of Saskatchewan, this 11th day of February, 2020.

Ronald J. Kruzeniski, Q.C.  
Saskatchewan Information and Privacy  
Commissioner