

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 024/2015

Financial and Consumer Affairs Authority

Summary: The Applicant requested records from Financial and Consumer Affairs Authority (FCAA) which the FCAA indicated were not in its possession or control but rather in the possession and/or control of the Insurance Councils of Saskatchewan. The Commissioner found that the records requested were not in the possession or control of the FCAA. As a result of this finding, no recommendations were made.

I BACKGROUND

[1] On November 24, 2014, the Financial and Consumer Affairs Authority (FCAA) received an access to information request from the Applicant for:

From January 2009 up to and including the date of this request all electronic and written correspondence, memoranda, opinions, reports, discussion papers, communications, minutes, agenda, resolutions or records of any meeting and any other document related to:

2. any modifications proposed by CISRO to the existing Life Licence Qualification Program licensing regime created for internal use, or provided to or received from CISRO or any of CISRO's provincial regulatory body members...
3. the Autorité des marchés financiers' involvement in the proposed licensing regime...
4. any analyses or studies of the Autorité des marchés financiers exam currently in use, including information in respect of its design, cost structure, costs associated with administering or maintaining the exam, and any impact the exam has or had on the number of licensed agents or life insurance licenses issued in Quebec;

5. the source of authority of CISRO or any of CISRO's provincial regulatory body members, to implement any changes proposed by CISRO to the Life Licence Qualification Program licensing regime; and
6. Insurance Councils of Saskatchewan's role with respect to the changes proposed by CISRO to the Life Licence Qualification Program licensing regime...

[2] The FCAA responded to the Applicant by a letter dated December 30, 2014. The FCAA advised the Applicant that it could not fulfill the request as the request was for information in the possession of the Insurance Councils of Saskatchewan (ICS), an entity that was separate from the FCAA and not subject to *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On February 3, 2015, my office received a Request for Review from the Applicant.

[4] My office notified the FCAA and the Applicant of our intention to undertake a review on February 10, 2015. A submission was received from the FCAA on April 27, 2015. A submission was received from the Applicant on February 3, 2015.

II RECORDS AT ISSUE

[5] There are no records involved in this review. The review is focused on whether the FCAA has possession and/or control of records responsive to the Applicant's access to information request.

III DISCUSSION OF THE ISSUES

[6] The FCAA is a "government institution" pursuant to subsection 2(1)(d)(ii) of FOIP.

1. Is the responsive record within the possession and/or control of the FCAA pursuant to section 5 of FOIP?

[7] Section 5 of FOIP provides the right of access as follows:

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.

[8] Section 5 is clear that access can be granted provided the records are in the possession or under the control of the government institution. Therefore, in this case, making this determination is the focus.

i. Does the FCAA have “possession” of the records?

[9] *Possession* means having physical possession of a record plus a measure of control over it.

[10] From the submission received from the FCAA it was not clear how the FCAA arrived at the conclusion that it did not have possession of records responsive to the access request. Therefore, my office requested further details from the FCAA on this point. On May 25, 2015, the FCAA provided additional arguments to support how it arrived at this decision. It asserted that these types of records would not normally be records that the FCAA would receive from the Canadian Insurance Services Regulatory Organizations (CISRO) or Autorité des marchés financiers (AMF) as it has no direct connection with these organizations. Further, if it had received such records it would have been from ICS. A search of the files related to the ICS revealed no records responsive to the access request. Details of its search efforts were provided. The FCAA also explained that these would not be the types of records the FCAA would normally have in its possession.

[11] It would appear that the FCAA does not have physical possession of any records responsive to the access request.

ii. Does the FCAA have a measure of “control” over the records?

[12] A record is under the control of a public body when the public body has the authority to manage the record, including restricting, regulating and administering its use, disclosure or disposition.

[13] 15 criteria can be considered for determining control which are as follows:

1. The record was created by a staff member, an officer, or a member of the public body in the course of his or her duties performed for the public body;
2. The record was created by an outside consultant for the public body;
3. The public body possesses the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory or statutory or employment requirement;
4. An employee of the public body possesses the record for the purposes of his or her duties performed for the public body;
5. The record is specified in a contract as being under the control of a public body and there is no understanding or agreement that the records are not to be disclosed;
6. The content of the record relates to the public body's mandate and core, central or basic functions;
7. The public body has a right of possession of the record;
8. The public body has the authority to regulate the record's use and disposition;
9. The public body paid for the creation of the records;
10. The public body has relied upon the record to a substantial extent;
11. The record is closely integrated with other records held by the public body;
12. The contract permits the public body to inspect, review, possess, copy records produced, received or acquired by the contractor as a result of the contract;
13. The public body's customary practice in relation to possession or control of records of this nature in similar circumstances;
14. The customary practice of other bodies in a similar trade, calling or profession in relation to possession or control of records of this nature in similar circumstances; and
15. The owner of the records.

[14] The FCAA, which includes the Superintendent of Insurance, is an agent of the Crown. The Superintendent of Insurance is appointed by Order in Council pursuant to subsection 3(1) of *The Saskatchewan Insurance Act* (SIA). This position is generally held by the

Chair of the FCAA. The FCAA asserted that the Superintendent of Insurance is responsible for the general supervision of the insurance industry in Saskatchewan.

[15] The Applicant asserted that ICS operates under an authority delegated by the Superintendent of Insurance to license and regulate insurance agents, brokers, adjusters and agencies in the province of Saskatchewan. This authority is a delegated authority only and the Superintendent of Insurance ultimately remains responsible for the acts and omissions of the ICS. Further, the ICS is under the control of the Superintendent.

[16] The SIA provides:

3(1) There may be appointed an officer to be called the Superintendent of Insurance, who shall have general supervision of the business of insurance within Saskatchewan and shall see that the laws relating to the conduct thereof are enforced and obeyed and shall examine and report to the minister from time to time upon all matters connected with insurance.

[17] The FCAA asserted that the SIA provides for the establishment of an Insurance Council or councils to carry out any functions, powers and duties prescribed by regulation (subsection 466.1(2) and (3)) or delegated to it by the Superintendent (subsection 466.1(4)(a)). A council established under subsection 466.1(2) of the SIA is a corporation (subsection 466.1(2.1)) but not a crown corporation and exercises the powers granted to it by the Act and Regulations in its own right and not as an agent of the Crown (SIA section 466.1(2.2)).

[18] In addition, *The Saskatchewan Insurance Council Regulations* (SIC Regulations) establishes three separate entities: the Life Insurance Council, the General Insurance Council and the Hail Insurance Council. While each of these Councils is a separate entity, they operate in a partnership like manner under the name ICS.

[19] Further, the FCAA asserted that the records requested would have been created as a part of the development of a new life insurance agent education program for licensing life insurance agents. The records requested would have been developed by or provided to the ICS by other provincial agent licensing bodies either directly or through CISRO. The

Superintendent of Insurance is not involved in this process as the legislative mandate for licensing insurance agents is granted directly to the ICS by regulation.

[20] The FCAA asserted that the mere right to compel records from the ICS does not give the Superintendent of Insurance control over the records. The Superintendent of Insurance has the ability to compel records from the ICS, however, this power is related to the general review power that the Superintendent of Insurance has over the ICS – the power to hear appeals, the power to investigate complaints, and the power to approve bylaws. The FCAA points out that taken to extremes, the Superintendent of Insurance’s broad powers to compel the production of records could apply even to private licensees. It would be an untenable exaggeration to extrapolate control over the records of all private licensees by virtue of the Superintendent of Insurance’s supervisory role and power to compel records. The FCAA argues that the ICS is an independent agency exercising powers granted to it by statute independent of those delegated by the Superintendent of Insurance.

[21] Finally, in its submission, the FCAA relies on my office’s Review Report F-2008-002. In that case, an applicant applied to the Ministry of Justice requesting the minutes of all of the meetings of the Funeral and Cremation Services Council (the FCSC). Former Commissioner, Gary Dickson Q.C. found that *The Funeral and Cremation Services Act* (the FCSA) established the FCSC and that it was not an agent of the Crown. Further, the FCSA appointed a Superintendent of Funeral and Cremation Services to supervise the administration of the FCSA, including the work of the FCSC. In its supervisory role, the Superintendent of Funeral and Cremation Services had a right to:

- require any information or material from the FCSC respecting any activity;
- review every decision of the FCSC; and
- direct the FCSC to take any action.

[22] The FCAA asserted that the relationship considered in Review Report F-2008-002 and that of the Superintendent of Insurance and ICS is the same. The ICS operates at arms-length from the FCAA and is neither an agent nor department of the FCAA.

[23] I agree with the FCAA on this point. The relationship of the Superintendent of Insurance and the ICS is similar to that of the FCSC and the Superintendent of Funeral and Cremation Services.

[24] It should be further noted that the SIA does not require the Superintendent of Insurance to keep the kinds of records described in the Applicant's access request. Subsection 8(1) of the SIA provides:

8(1) The superintendent shall keep the following records:

(a) a record of all licences issued to insurers pursuant to this Act, in which shall appear the name of the insurer, the address of the head office, the address of the principal office in Canada, the name and address of the chief office or general agent in Saskatchewan, the number of the licence issued, particulars of the classes of insurance for which the insurer is licensed, and such other information as the superintendent deems necessary;

(b) Repealed. 2003, c.38, s.5.

(c) a record of all licences issued pursuant to this Act.

(2) The records required by this section to be kept shall be open to inspection in the office of the superintendent by any person upon payment of the prescribed fee.

[25] The Applicant asserted that ICS is in the control of the Superintendent in numerous ways. The Applicant argued that section 16 of SIC Regulations specifically gives control of the books and records of the ICS to the Superintendent. Section 16 of the SIC Regulations provides:

16 Every council shall at all reasonable times allow the superintendent free and full access to the records, documents, books, papers, correspondence and any other information held by the council that relates to the exercise of powers, functions and responsibilities delegated to the council or prescribed by these regulations, and shall permit the superintendent to take possession of such materials and to retain them for any period that he considers necessary.

[26] The FCAA asserted that while it is responsible for the general oversight of the insurance industry, the ICS is responsible for the licensing of insurance agents. The SIA grants the responsibility for licensing insurance agents directly to the ICS, and unless undertaking

an investigation of the ICS, the Superintendent of Insurance would not intervene in the program development process. The FCAA asserted that the Superintendent of Insurance does not handle or manage ICS's records nor does it dictate how the records should be managed or handled. Neither the SIA nor the Superintendent of Insurance requires the ICS to create the records that have been requested. The ICS is free to set its own policy regarding what types of records are to be created when developing an educational policy, and how to use, retain and destroy those records without consulting or obtaining permission from the Superintendent of Insurance.

[27] After considering the 15 criteria and the submissions provided by both parties, I find that the FCAA does not have possession or control of the records responsive to the access request.

IV FINDINGS

[28] I find that the responsive records are not within the possession or control of the FCAA.

V RECOMMENDATIONS

[29] As the responsive record is not within the possession or control of the FCAA, I have no recommendations for the FCAA in this circumstance.

Dated at Regina, in the Province of Saskatchewan, this 17th day of June, 2015.

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