



## **REVIEW REPORT 042-2019**

### **Ministry of Corrections and Policing**

**May 10, 2019**

#### **Summary:**

The Ministry of Corrections and Policing received an application for access to records on November 5, 2018 from Pro Bono Law Saskatchewan (the Applicant). The request was for copies of various policies, directives and other records used in decision-making processes that affect offenders. The Applicant requested a waiver of processing fees however, the Ministry denied their request. The Applicant eventually paid half the fee estimate in protest and the Ministry provide the Applicant with the requested records. The Applicant requested a review by my office of the Ministry's decision not to waive the fees. Upon review, the Commissioner found that the Applicant did not qualify for a waiver of fees pursuant to *The Freedom of Information and Protection of Privacy Act* (FOIP) and FOIP Regulations. However, the Commissioner also found that given the types of records requested, and the context surrounding those records, the requirements imposed on the Ministry by subsection 65(1) of FOIP supersede the issue related to fees. The Commissioner recommended that the Ministry ensure records used in a decision-making process that affects the public are provided in accordance with subsection 65(1) of FOIP, and without charging any fees. The Commissioner also recommended that the Ministry reimburse the Applicant the fees they paid.

#### **I BACKGROUND**

[1] On November 5, 2018, the Ministry of Corrections and Policing (the Ministry) received an application for access to records pursuant to *The Freedom of Information and Protection of Privacy Act* (FOIP), for:

1. All provincial-level policies and directives governing adult correctional facilities in Saskatchewan;

2. Divisional Directives at the Regina Provincial Correctional Centre involving the following topics:

- a. Misconduct by inmates, including Director's Rules, disciplinary proceedings, discipline sentencing guidelines, and informal resolution of discipline charges;
- b. Medical care, including access to medication, healthcare providers, specialists, psychiatric care, emergency care, and policies regarding misuse or reduction of medication;
- c. Inmate transfer and transfer requests;
- d. Inmate searches, including cell searches, strip searches, and reasonable grounds;
- e. Inmate communications by mail and telephone, including changes to such rights based on misconduct;
- f. Security designations;
- g. The use of restraints;
- h. The use of force against inmates;
- i. The use and application of inmate segregation.

3. ...Inmate Orientation Manual currently in force, in its final and applicable version.

[2] The Applicant, who is Pro Bono Law Saskatchewan, has provided their consent to be named in this report, also requested a waiver of processing fees. The Applicant provided information to the Ministry on December 5, 2018 and December 10, 2018 to explain why they were requesting that the fees be waived.

[3] In line with subsections 6(1) and 6(2) of the FOIP Regulations, the Ministry responded to the Applicant and provided the Applicant with a fee estimate of \$731.75 on November 28, 2018. The Ministry again provided the same fee estimate on January 16, 2019, after considering the information provided by the Applicant on December 5, 2018 and December 10, 2018. Both of the Ministry's fee estimates requested that the Applicant pay a deposit of one-half of the fee estimate before continuing to process the Applicant's request.

- [4] On January 21, 2019, the Applicant paid half the fee estimate of \$365.88 to the Ministry by cheque. The Ministry received the Applicant's cheque and letter on January 24, 2019. The Applicant's letter indicated that the fees were being paid under protest as the Applicant was of the view the request was eligible for a fee waiver under the provisions of FOIP.
- [5] Approximately two months later, the Applicant received a letter from the Ministry on March 28, 2019. The Ministry's letter confirmed they had received the payment of \$365.88 and that copies of some of the records requested were provided to the Applicant on February 28, 2019, March 1, 2019 and March 4, 2019. The letter also confirmed that the remainder of the documents requested were enclosed on a USB drive. Finally, the Ministry's letter confirmed that the remainder of the costs had been waived so the Applicant did not need to pay the balance of the fees.
- [6] On January 29, 2019, the Applicant requested a review by my office of the Ministry's decision not to waive the fees. On January 31, 2019, my office provided notifications to both the Ministry and the Applicant of my intention to undertake a review pursuant to *Part VII Review and Appeal* of FOIP.

## **II RECORDS AT ISSUE**

- [7] This review pertains to the Ministry's decision not to waive the fees; therefore, there are no records at issue.

## **III DISCUSSION OF THE ISSUES**

### **1. Does my office have jurisdiction in this matter?**

- [8] The Ministry qualifies as a government institution pursuant to subsection 2(d)(i) of FOIP. Therefore, my office has jurisdiction to undertake this review.

### **2. Do the prescribed circumstances exist that would qualify this access request for a fee waiver?**

[9] Subsection 9(5) of FOIP provides:

9(5) Where a prescribed circumstance exists, the head may waive payment of all or any part of the prescribed fee.

[10] The prescribed circumstances related to subsection 9(5) of FOIP are found in the FOIP Regulations as follows:

**Waiver of fees**

9(1) For the purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:

(a) if payment of the prescribed fees will cause a substantial financial hardship for the applicant and, in the opinion of the head, giving access to the record is in the public interest;

(b) if the application involves the personal information of the applicant;

(c) if the prescribed fee or actual cost for the service is \$100 or less.

(2) For the purposes of clause 9(1)(a), substantial financial hardship includes circumstances in which the applicant:

(a) is receiving assistance pursuant to The Saskatchewan Assistance Act as an individual or as part of a family unit;

(b) is receiving assistance pursuant to The Training Allowance Regulations; or

(c) is receiving legal assistance or representation from any of the following organizations, including any of the same organizations operating from time to time under another name:

(i) The Saskatchewan Legal Aid Commission;

(ii) Pro Bono Law Saskatchewan;

(iii) Community Legal Assistance Services for Saskatoon Inner City Inc. (CLASSIC).

[11] In regards to the applicability of subsection 9(1)(a) of the FOIP Regulations, the Applicant provided the following explanation in their letter to the Ministry, which was also provided as part of the Applicant's submission of April 4, 2019:

As laid out in our correspondence with the Ministry, we seek those documents because our office is contacted by dozens of inmates every month who want to defend against discipline charges, assess the legality of their placement in solitary confinement, request a transfer, visit with their families, or otherwise challenge restrictions on their liberty. In most cases, action is required within a week, and often within two days of the issue arising. This does not give us the opportunity to make a Freedom of Information Request in their name....It is impossible for us to make this Freedom of Information Request in one specific inmate's name...it is our view that inmates have not received the information to which they are entitled...We submit that the Ministry's decision to deny our request for fee waiver ignores the language and purpose of the *Regulations*...The language of the legislation is to the effect that the applicant will be deemed to show "substantial financial hardship" where he or she is receiving legal assistance or representation from Pro Bono Law Saskatchewan...Our clients in prison cannot wait over a month for access to these documents...Inmates rely on PBLS to have access to these documents, whose federal equivalents are posted online. The Ministry's ruling that our organization, a charity listed specifically in the *Regulations*, should bear the financial burden of this request is offensive to the notion of access to justice...

- [12] My office received a submission from the Ministry on April 25, 2019, which reiterated previous explanations provided to Applicant:

Section 9 of [the FOIP Regulations] sets out the prescribed circumstances when a head may waive the payment of fees. In the Applicant's representations to the Ministry, the Applicant relied on subclause 9(2)(c)(ii) of the FOIP Regulations. The issue with relying on this provision is that the Applicant (Pro Bono Saskatchewan) was requesting the information and this does not fit the prescribed circumstances set out in subclause 9(2)(c)(ii) of the FOIP Regulations...These circumstances did not exist in the current application and therefore the Ministry could not rely on subclause 9(2)(c)(ii) of the FOIP Regulations to waive the fees in this instance. While some of the arguments set out in the Applicant's representation could be said to apply to the circumstances set out in clause 9(1)(a) of the FOIP Regulations, the Applicant did not rely on this provision. While reliance on this provision may not have been fatal if the representations were written by an individual who is not a lawyer, it cannot be overlooked that the December 5, 2018 letter was authored by a lawyer. It is reasonable to expect that legal counsel should be able to identify the correct provision on which it is relying when it is representing an organization and requesting the waiver of fees. Even though the Applicant did not identify the correct provision, the Ministry took steps to both reduce the fee estimate provided to the Applicant and to eventually waive the amount owing.

- [13] The Ministry also explained in their letter to the Applicant of January 16, 2019 that subsections 9(1)(b) and 9(1)(c) of the FOIP Regulations do not apply in this case because the records requested do not pertain to the personal information of the Applicant and fees

to be charged would be more than \$100. I agree with the Ministry and find that subsections 9(1)(b) and 9(1)(c) of the FOIP Regulations do not apply.

[14] In regards to the applicability of subsection 9(1)(a) of the FOIP Regulations, I agree with the Ministry that both criteria of this subsection must be met in order for fees to be waived. The Applicant must demonstrate substantial financial hardship, which can include circumstances where the Applicant may be receiving legal assistance from any of the organizations listed at subsection 9(2)(c) of the FOIP Regulations. In this case, although the Applicant is one of the organizations listed at subsection 9(2)(c) of the FOIP Regulations, the Applicant can still attempt to demonstrate that paying the fees would cause them substantial financial hardship. The Applicant did not present any arguments to the Ministry, nor to my office, in this regard. In fact, the Applicant paid half of the fee estimate on January 21, 2019. Because the Applicant has not demonstrate that paying the fees would cause them substantial financial hardship, the first criteria of subsection 9(1)(a) of the FOIP Regulations cannot be met, so I find that this subsection does not apply.

[15] That said, the Applicant has raised some relevant and important arguments regarding offenders and the overall correctional system that I must consider. As the Applicant noted, offenders must often rely on services provided by organizations like Pro Bono Law Saskatchewan because of their social economic status and rely on such organizations to assist them in challenging restrictions on their liberties within the context of the correctional system. Given the nature of the correctional system, offenders sometimes cannot wait for the processing of records under FOIP to conclude, to obtain records in support of challenges brought forward on their behalf.

[16] The Ministry is one of many institutions in the province that plays a role in the overall justice system in Saskatchewan. The Ministry also administers *The Correctional Services Act, 2012*, which outlines the requirements related to offenders within the correctional system, such as management of inmates, inmate discipline, inmate health examinations and treatment, search and seizure, among other requirements. These are all requirements for which the Ministry has developed and implemented written manuals, policies and other supporting records, and that the Applicant has requested access to in accordance with FOIP.

[17] I note that the guiding principles of *The Correctional Services Act, 2012*, provide:

**Principles**

**3** This Act and the regulations made pursuant to this Act must be interpreted and administered in accordance with the following guiding principles:

...

(d) that offenders are required to comply with correctional facility rules and community supervision conditions and will be subject to the least restrictive measures consistent with the protection of the public, staff members and other offenders;

(e) that offenders are entitled to fair treatment and to have access to a timely and efficient complaint procedure;

(f) that correctional policies, practices, programs and services be respectful of gender, ethnic, cultural and linguistic differences and be responsive to the particular needs of women, as well as to the needs of other groups of offenders with special requirements;

...

(h) that the ministry provide opportunities for the public, organizations and other governments to participate in the development and delivery of correctional services and programs.

[18] With these principles in mind, offenders – or those defending them or acting on their behalf – should have access to records that outline the rules and conditions imposed within the correctional system and facilities. This would serve to ensure fair treatment of offenders and promote openness and transparency within the correctional system in this province, as well as allow the public, organizations and other governments to actively participate in the development and delivery of correctional services and programs. Pro Bono Law Saskatchewan is only one of many other organizations that would benefit from having access to written policies and records developed for the administration of *The Correctional Services Act, 2012*.

[19] I note that *The Correctional Services Act, 2012*, does not require that correctional manuals, policies, practices and other records be made publicly available. However, subsection

65(1) of FOIP deals with the release of records that are used in the decision-making process that affects the public by government institutions as follows:

**Access to manuals**

**65(1)** Every government institution shall take reasonable steps to:

- (a) make available on its website all manuals, policies, guidelines or procedures that are used in decision-making processes that affect the public by employees of the government institution in administering or carrying out programs or activities of the government institution; or
- (b) provide those documents when requested in electronic or paper form.

[20] Subsection 65(1) of FOIP is especially relevant in situations such as these, where it would be essential for all individuals in the province – not just those who are already serving sentences within a correctional facility or those actively defending inmates’ rights – to know and understand how decisions that affect them are made in the context of the justice system.

[21] I reviewed a sampling of the records released to the Applicant by the Ministry. These records were copies of policies and procedures taken from various manuals based on the numbering and references in the headers and footnotes of these records. These records are meant to be used in decision-making processes that affect offenders. As noted by the Applicant, other jurisdictions have already made similar records publicly available. For instance, Correctional Service Canada, a federal government institution, has published on their website various documents and information related to the various stages of the correctional process, from inmate intake to release. The Correctional Services of Nova Scotia has made their adult offender handbook available online and it contains a lot of the same information that is in the handbook used in Saskatchewan and which was released to the Applicant. Finally, the British Columbia Ministry of Justice has also released their *Adult Custody* policy online.

[22] I note that in the Ministry’s letter to the Applicant of November 5, 2018, the Ministry stated that some of the records requested would require redactions to be applied to protect



information that if released, could pose security threats to vehicles, buildings, systems and other assets, as well as expose the methods used to prevent such threats. Subsection 65(2) of FOIP allows government institutions who make information publicly available in line with subsection 65(1) of FOIP to refuse to give access to information that would otherwise be exempt from disclosure in accordance with FOIP and the FOIP Regulations. Subsection 65(2) of FOIP provides:

**65(2)** Any information in a record that a head would be authorized to refuse to give access to pursuant to this Act or the regulations may be excluded from manuals, policies, guidelines or procedures that are made available or provided pursuant to subsection (1).

[23] The Applicant initiated this review because the Ministry refused to waive the fees related to their request for records. I note that the Ministry already provided the records requested to the Applicant and in processing the Applicant's request, the Ministry took steps to reduce the fees and waive the remainder of the fees owing after accepting the Applicant's payment of \$365.88.

[24] However, given the types of records requested by the Applicant and the context surrounding the types of records requested – which I have discussed in the preceding paragraphs – I find that the requirements imposed on the Ministry by subsection 65(1) of FOIP supersedes the issue related to fees. I find that the Ministry should have made the records requested by the Applicant available in accordance with subsection 65(1) of FOIP. Furthermore, as the ability of a government institution to charge fees in accordance with FOIP and the FOIP Regulations do not apply to records made available pursuant to subsection 65(1) of FOIP, I find that the Ministry should not have charged the Applicant any fees.

[25] Therefore, I recommend that the Ministry reimburse the Applicant the \$365.88 payment they made on January 21, 2019. I also recommend that the Ministry make the documents already released to the Applicant publicly available on their website pursuant to subsection 65(1) of FOIP so that other individuals may also access these records.

- [26] Furthermore, I recommend that any other manuals, policies, guidelines or procedures that are used in a decision-making process that affects the public, and that are in the possession and control of the Ministry, also be made publicly available pursuant to subsection 65(1) of FOIP. Finally, I recommend that until these records are available on the Ministry's website, the Ministry should provide access to these records in electronic or paper form to anyone who requests them without charging any fees, as per subsection 65(1) of FOIP.
- [27] Upon reviewing the draft report, the Ministry informed my office that they have already started the process of issuing a refund to the Applicant and have advised him of this. The Ministry also informed my office that they are in the process of taking reasonable steps to make the Ministry's provincial policy manual publicly available. The Ministry noted that local procedural directives governing operations at provincial correctional facilities are fluid, so the Ministry cannot guarantee the directives will be available at all times.

#### **IV FINDINGS**

- [28] I agree with the Ministry and find that subsections 9(1)(b) and 9(1)(c) of the FOIP Regulations do not apply.
- [29] Because the Applicant has not demonstrate that paying the fees would cause them substantial financial hardship, the first criteria of subsection 9(1)(a) of the FOIP Regulations cannot be met, so I find that this subsection does not apply.
- [30] Given the types of records requested by the Applicant and the context surrounding the types of records requested, I find that the requirements imposed on the Ministry by subsection 65(1) of FOIP supersedes the issue related to fees.
- [31] I find that the Ministry should have made the records requested by the Applicant available in accordance with subsection 65(1) of FOIP.

[32] As the ability of a government institution to charge fees in accordance with FOIP and the FOIP Regulations do not apply to records made available pursuant to subsection 65(1) of FOIP, I find that the Ministry should not have charged the Applicant any fees.

## **V RECOMMENDATIONS**

[33] I recommend that the Ministry reimburse the Applicant the \$365.88 payment they made on January 21, 2019.

[34] I recommend that the Ministry make the documents already released to the Applicant publicly available on their website pursuant to subsection 65(1) of FOIP so that other individuals may also access these records.

[35] I recommend that any other manuals, policies, guidelines or procedures that are used in a decision-making process that affects the public, and that are in the possession and control of the Ministry, also be made publicly available pursuant to subsection 65(1) of FOIP.

[36] I recommend that until other manuals, policies, guidelines or procedures are available on the Ministry's website, the Ministry should provide access to these records in electronic or paper form to anyone who requests them without charging any fees, as per subsection 65(1) of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 10<sup>th</sup> day of May, 2019.

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