



REVIEW REPORT 054-2020

Ministry of Social Services

October 29, 2021

Summary: The Applicant submitted an access to information request to the Ministry of Social Services (Social Services) on February 20, 2020. Upon receiving Social Services' response, the Applicant requested a review of the decision. The Commissioner found that pursuant to section 23(3)(c) of *The Freedom of Information and Protection of Privacy Act* (FOIP), the confidentiality provisions found in section 74 of *The Child and Family Services Act* (CFSA) prevail and apply to the record. The Commissioner recommended Social Services work with the Minister of Justice and Attorney General and the Commissioner's office to amend FOIP in order to repeal section 23(3)(c) of FOIP, so that section 74 of the CFSA is no longer included in that section.

I BACKGROUND

[1] The Applicant made an access to information request to the Ministry of Social Services (Social Services) on February 20, 2020 requesting access to:

... a file that has previously been closed on behalf of my [Child] that claims [Child] [Step-Parent] hit [Child]...I want to know the details that happened and why I as [Child] [Parent/Applicant] was not advised about this.

[2] Social Services responded to the Applicant's request on the date of receipt advising, in part:

The records you have requested cannot be released pursuant to *The Freedom of Information and Protection of Privacy Act* (FOIPP) as they are subject to *The Child and Family Services Act* (CFSA). Subsection 23(3)(c) of FOIPP provides that the confidentiality provisions found in section 74 of the CFSA prevail over FOIPP. This notice is provided to you pursuant to FOIPP section 7(2)(d).

[3] Social Services' response also advised the Applicant of their right to request a review by my office.

[4] On February 28, 2020, the Applicant requested my office review Social Services' decision. My office notified the Applicant and Social Services of this review and invited both parties to make a submission.

II RECORDS AT ISSUE

[5] My office has been advised by Social Services that, "... the records are in the electronic system. Our review indicates it would be the equivalent of approximately six pages."

[6] This review will determine whether section 74 of *The Child and Family Services Act* (CFSA) fully applies to the record.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[7] Social Services is a "government institution" pursuant to section 2(1)(d)(i) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Therefore, I have jurisdiction to conduct this review.

2. Does section 74 of the CFSA apply to the record?

[8] Social Services has advised the Applicant that the confidentiality provisions found in section 74 of the CFSA prevail over FOIP pursuant to section 23(3)(c) of FOIP.

[9] Section 23(1) of FOIP provides:

23(1) Where a provision of:

(a) any other Act; or

(b) a regulation made pursuant to any other Act;

that restricts or prohibits access by any person to a record or information in the possession or under the control of a government institution conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant to it shall prevail.

- [10] The IPC *Guide to FOIP*, Chapter 1: “Purposes and Scope of FOIP”, updated July 28, 2020, (*Guide to FOIP*, Ch. 1) describes primacy clauses on page 21 as being clauses in a statute that define how a statute is interpreted if its provisions are inconsistent with another statute in the same jurisdiction. Primacy is defined as the state or position of being first in order, importance or authority.
- [11] Section 23(1) of FOIP provides that where there is a conflict between FOIP and any other Act or regulation, FOIP will prevail even where another Act or regulation restricts or prohibits access. “Prevail” means a provision of one Act having priority over a conflicting provision in another Act (*Guide to FOIP*, Ch. 1, p. 21).
- [12] However, section 23(3) of FOIP provides a list of provisions where FOIP does not prevail. The Legislative Assembly of Saskatchewan recognized that FOIP and some other provisions would be in conflict and provides the mechanism for resolving that by expressly stating the provisions listed at section 23(3) of FOIP would prevail over FOIP. This includes section 23(3)(c) of FOIP (*Guide to FOIP*, Ch. 1, p. 24).
- [13] If engaging section 23(3) of FOIP, the government institution should be able to demonstrate that the record or information in question falls within the statutory provision that is not subject to FOIP. It should be noted that section 23 of FOIP only applies to portions of Parts II and III of FOIP, which refer to access to records. All of the other provisions of FOIP would fully apply such as the protection of privacy provisions in Part IV and the review and appeal provisions in Part VII.
- [14] Social Services has specifically raised section 23(3)(c) of FOIP, which provides:

23(3) Subsection (1) does not apply to the following provisions and those provisions prevail:

...
(c) section 74 of *The Child and Family Services Act*;

[15] Section 74 of the CFSA lays out the confidentiality provision for child and family services files. Section 74 of the CFSA provides:

74(1) Notwithstanding section 18 of *The Social Services Administration Act*, members of the board, members of family review panels, mediators, officers and employees of the ministry, members of boards of directors of agencies, officers and employees of agencies, foster parents and all other persons who are employed in or assist with the administration of this Act:

(a) shall preserve confidentiality with respect to:

(i) the name and any other information that may identify a person that comes to their attention pursuant to:

(A) this Act;

(B) *The Family Services Act*, not including Part III; or

(C) *The Child Welfare Act*, not including Part II; and

(ii) any files, documents, papers or other records dealing with the personal history or record of a person that have come into existence through anything done pursuant to:

(A) this Act;

(B) *The Family Services Act*, not including Part III; or

(C) *The Child Welfare Act*, not including Part II; and

(b) shall not disclose or communicate the information mentioned in clause (a) to any other person except as required to carry out the intent of this Act or as otherwise provided in this section or in the regulations.

(2) The minister, a director or an officer may disclose or communicate information mentioned in subsection (1) relating to a child to:

(a) the guardian, parent or foster parent of that child; or

- (b) the child to whom the information relates.
- (3) On the request of a person, the minister or a director may:
 - (a) disclose; or
 - (b) authorize an officer to disclose;

information mentioned in subsection (1) relating to that person in any form that the minister or director considers appropriate.

(4) Notwithstanding subsection (2) or (3), no person shall, except while giving evidence in a protection hearing, disclose to anyone who is not an officer or a peace officer the name of a person who:

- (a) makes a report pursuant to section 12; and
 - (b) requests that his or her name not be disclosed.
- (5) Any information that may be disclosed to the person to whom it relates may, with the written consent of the person to whom it relates, be disclosed to any other person.

(5.01) The minister, the director or an officer may disclose information with respect to a person mentioned in subsection (1) without the written consent of the person to whom the information relates, in accordance with the regulations.

(5.1) Information mentioned in subsection (1) may be disclosed if, in the opinion of the minister, the benefit of the disclosure of information clearly outweighs any invasion of privacy that could result from the disclosure.

(5.2) Any information disclosed pursuant to this section may be disclosed in any form that the minister considers appropriate.

(6) Any disclosure of information pursuant to this section does not constitute a waiver of Crown privilege, solicitor-client privilege or any other privilege recognized in law.

[16] In its submission to my office, Social Services advised, in part:

Section 74 of the CFSA provides that those who are employed in or assist with the administration of the Act “**shall not disclose or communicate**” the “name and any other information that may identify a person that comes to their attention” pursuant to the CFSA, or “any files, documents, papers or other records dealing with the personal history or record of a person that have come into existence through anything done” pursuant to the CFSA, “**to any other person** except as required to carry out the intent of this Act or as otherwise provided in this section or in the regulations”;

...

Not only does s. 74 of the CFSA prohibit disclosure of **records** that have come into existence through anything done pursuant to the CFSA, but it also prohibits disclosure of identifiable **information** that comes to the attention of [Social Services] officials....

[17] Social Services has provided my office with evidence that the confidentiality provisions provided for in section 74 of the CFSA applies fully to the record requested by the Applicant. Therefore, I find pursuant to section 23(3)(c) of FOIP, the confidentiality provisions found in section 74 of the CFSA prevail and apply to the record.

[18] In Review Report 254-2017, I conducted extensive analysis of section 23(3)(c) of FOIP and made the following recommendation:

[59] I recommend Social Services work with the Ministry of Justice and my office to amend FOIP in order to repeal subsection 23(3)(c) of FOIP, so that section 74 of the CFSA is no longer included in that section.

[19] As I understand there has been no progress on this, I will again make that recommendation in this Report.

IV FINDING

[20] I find pursuant to section 23(3)(c) of FOIP, the confidentiality provisions found in section 74 of the CFSA prevail and apply to the record.

V RECOMMENDATION

[21] I recommend Social Services work with the Minister of Justice and Attorney General and my office to amend FOIP in order to repeal section 23(3)(c) of FOIP, so that section 74 of the CFSA is no longer included in that section.

Dated at Regina, in the Province of Saskatchewan, this 29th day of October, 2021.

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