

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 056/2014

Ministry of Justice

Summary:

In April 2014, an Applicant submitted an access to information request to the Ministry of Justice (Justice). Justice advised the Applicant that it did not have any records responsive to the access to information request in its possession or control and therefore denied access pursuant to subsection 7(2)(e) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant proceeded to request a review by the Office of the Information and Privacy Commissioner (OIPC). Upon review, the Commissioner found that Justice did not have responsive records within its possession or control and that the Office of the Chief Coroner (OCC) was not a government institution pursuant to subsection 2(d) of FOIP. The Commissioner recommended that Justice take steps to amend *The Freedom of Information and Protection of Privacy Regulations* to include the OCC as a prescribed government institution.

I BACKGROUND

[1] On April 15, 2014, the Ministry of Justice (Justice) received an access to information request from the Applicant for the following information:

Information on suicides that have occurred in any publicly funded health facility over the past 10 years. I would like these numbers broken down by the year of death, type of health facility, name of health facility, city or town in province.

[2] Justice responded to the Applicant by a letter dated April 30, 2014. Justice advised the Applicant that it did not have any records responsive to the access request in its possession or control and therefore denied access pursuant to subsection 7(2)(e) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On May 27, 2014, my office received a Request for Review from the Applicant.

[4] My office notified Justice and the Applicant of its intention to undertake a review via letter dated July 11, 2014. A submission was received from Justice on September 18, 2014.

II RECORDS AT ISSUE

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

III DISCUSSION OF THE ISSUES

[6] Justice is a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP.

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

[7] During the course of processing the Applicant's access to information request, Justice determined that the Office of the Chief Coroner (OCC) may have records responsive to the access request. In its submission to our office, Justice asserted that the OCC was not part of Justice and therefore, any responsive records were not in the possession and/or control of Justice. Justice also asserted that the OCC was not a government institution subject to FOIP.

[8] 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.

[9] 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 Justice have “possession” of the records?

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

[11] It would appear that Justice does not have physical possession of the responsive records. In its submission, Justice argued that records held by the OCC for the purposes set out in *The Coroners Act, 1999* (CA) would not be records in the possession of Justice. Justice acknowledged that its argument did not apply to all records in the possession of the OCC. For example, records relating to the budget of the OCC, its day to day operations such as rent, equipment purchases and such would not be held for the purposes of the OCC. If an access to information request was made for these types of records, Justice asserted that it would be obliged to obtain and review them.

ii. Does Justice have a measure of “control” of 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] Justice asserted in its submission that any records responsive to the access to information request would be records that were created or obtained by a coroner in the course of fulfilling the functions set out in the CA and fall under the administrative control of the Chief Coroner. In addition, any responsive records would relate to the core business of the OCC and it is the Chief Coroner who has the right of possession and the authority to regulate the record's use and disposition and not the permanent head of Justice. The content of the records requested relate to the OCC's mandate as noted in sections 3 and 4 of the CA. Subsection 3(e) of the CA emphasizes that the OCC's mandate is to maintain such records. Further, the OCC is an independent office. Subsections 3(a), (e), 4(1) and 4(3) of the CA provide:

3 The purpose of this Act is to facilitate a coroner system that:

(a) provides for independent and impartial investigations into, and public inquests respecting, the circumstances surrounding unexpected, unnatural or unexplained deaths;

...

(e) publicizes, and maintains records of and the circumstances surrounding, causes of death.

4(1) The Lieutenant Governor in Council may appoint a Chief Coroner for Saskatchewan who is responsible for the administration of this Act and the regulations.

...

(3) The chief coroner has all of the powers of a coroner and, in addition, has the power to:

(a) administer this Act and the regulations;

(b) supervise, direct and control all coroners in the performance of their duties;

(c) assign the responsibility to investigate a death or a category of deaths to a coroner;

(d) establish and conduct programs for the instruction of coroners in their duties;

(e) prepare, publish and distribute a code of ethics for coroners;

(f) assist coroners in obtaining medical and other experts where necessary;

(g) determine the qualifications for pathologists for the purposes of this Act;

(h) bring the findings and recommendations of coroners and juries to the attention of the appropriate ministers, persons, agencies or departments of government;

(i) issue public reports;

(j) suspend coroners where they are unable to act or for cause; and

(k) perform any other duties that may be prescribed in the regulations.

[15] The Chief Coroner administers the CA and has the power to supervise, direct and control all coroners in the performance of their duties. Subsection 3(e) of the CA indicates that one of the purposes of the CA is to facilitate a coroner system that includes maintaining records of and circumstances surrounding causes of death in the province.

[16] *Walmsley v. Ontario (Attorney General)* considered whether there was an agency relationship in the context of access to information between a public body and the Judicial Appointments Advisory Committee (Committee). In that case, the Court concluded that an agency relationship did not exist: “The Ministry had no statutory or contractual right to dictate to the committee or its individual members what documents they could create, use or maintain or what use to make of the documents they did possess.” (*Walmsley v. Ontario (Attorney General)* 34 O.R. (3d) 611)

[17] It appears the OCC was created to operate at arms-length from Justice. The Chief Coroner has certain powers conferred on him/her by the CA. Given these powers, it could not be said that Justice would have the authority to manage records of the OCC including restricting, regulating and administering a records use, disclosure or disposition. The right to demand possession of a record or to authorize or forbid access to it is an indicator of control. It does not appear this ability exists for Justice when it comes to the records of the OCC given the powers noted in the CA, in particular section 62 of the CA which provides:

62 Where the chief coroner receives a request from any person for a copy of any document mentioned in clauses (a) to (d) and considers it appropriate and in the public interest to do so, he or she may provide a copy of the document to that person on any terms he or she considers appropriate:

(a) a report prepared pursuant to clause 17(a);

(b) the finding or recommendations of a jury at an inquest;

(c) a post-mortem report prepared pursuant to this Act;

(d) a report signed by a duly qualified medical practitioner or the chief coroner as to the cause of death of a person.

[18] The Applicant had also submitted an access to information request to the OCC for the same records and received a response from the OCC citing section 62 of the CA.

[19] I have considered the 15 criteria relevant to these circumstances and find that Justice does not have possession or a measure of control over the responsive records.

[20] On the matter of whether the OCC is a government institution, I note the OCC is not prescribed in the FOIP Regulations. In addition, it also has its own enabling legislation. From a cross jurisdictional scan of similar OCC offices across the country, it appears for purposes of access to information, most are either prescribed as stand-alone government institutions or are treated as agencies captured within a larger government institution. Either way, the records of similar OCC offices are captured under access and privacy legislation in most jurisdictions across the country.

[21] In Saskatchewan, the OCC has records that have been found to not be in the possession or under the control of Justice. Further, the OCC does not appear to be a government institution as defined by subsection 2(d) of FOIP. Therefore, applicants are unable to access records of the OCC through FOIP. As a result, during the review of this matter, my office recommended to Justice that it take steps to amend Appendix [Section 3], in particular, Part I, of *The Freedom of Information and Protection of Privacy Regulations* to include the Office of the Chief Coroner as a prescribed government institution.

[22] On December 2, 2014, Justice advised my office that it would take the matter under immediate consideration and would consult with the Office of the Chief Coroner and appropriate stakeholders and would advise me once a decision was reached. I was satisfied with this response and proceeded to issue this Review Report.

IV FINDINGS

[23] I find that the responsive record is not within the possession or control of Justice.

[24] I find that the OCC is not a government institution pursuant to subsection 2(1)(d) of FOIP.

V RECOMMENDATIONS

[25] As the responsive record is not within the possession or control of Justice, I have no recommendations regarding access.

[26] I recommend that Justice take steps to amend Appendix [*Section 3*], in particular, Part I, of *The Freedom of Information and Protection of Privacy Regulations* to include the Office of the Chief Coroner as a prescribed government institution.

Dated at Regina, in the Province of Saskatchewan, this 4th day of December, 2014.

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