Office of the
Saskatchewan Information
and Privacy Commissioner

# REVIEW REPORT 057-2019

## Ministry of Corrections and Policing

**July 28, 2020**

**Summary:** The Applicant requested data contained in the Ministry of Corrections and Policing's (Ministry) database. The Ministry withheld the information from the Applicant stating that it was not required to create a record pursuant to subsection 7(2)(e) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that the Ministry did not properly apply subsection 7(2)(e) of FOIP, that it was premature to analyze if a manner of access issue exists, and that the Ministry did not meet its duty to assist the Applicant. The Commissioner recommended that the Ministry release the data in the database, that the Ministry address the manner of access when determining how access to the data will be provided, and that the Ministry request that the Ministry of Justice amend FOIP and *The Local Authority Freedom of Information and Protection of Privacy Act* and regulations to include provisions respecting datasets.

## I BACKGROUND

[1] On December 20, 2018, the Ministry of Corrections and Policing (the Ministry), received the following access to information request:

> Please provide a machine-readable itemized database, spreadsheet or dump/export (i.e. Microsoft Excel, Access, SQL or CSV file format, not .PDF) of the Criminal Justice Information Management System (CJIMS) database (or, if I'm mistaken about that name, your correctional offender management system database) in a format similar to that used for the federal open data "Offender Profiles." Data should be a full historical record of warrant of committal admissions going back to 2000. If an ongoing record of all correctional warrant of committal admissions is not possible, monthly snapshots will suffice. The data should be record-level and include the following fields:

- Demographic information, including: gender, religion, race, race grouping, date of birth, age;
- Institutional information, including: major/most serious offence group, in custody/community, supervision type, institutional security level, offender security level, dynamic/need, static/risk, reintegration potential, motivation, hold status (remand, sentence, deferral, immigration, other), risk assessment levels and/or scores;
- Name of sentencing judge;
- Name of Crown prosecutor;
- Name of the referring court house;
- Type of Controlled Drugs and Substances Act schedule (i.e. 1, 2, 3, etc.) where applicable;

Do not include names, addresses or other personally-identifiable information. I realize this is a complex request, so please call me immediately if you need any clarification.

[2] In a letter dated January 7, 2019, the Ministry responded indicating that the records the Applicant is requesting would unreasonably interfere with the operations of the Ministry in accordance with section 10 of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] In emails dated January 16, 2019 and January 18, 2019, the Applicant sought clarification from the Ministry on this matter. In an email dated February 4, 2019 to the Applicant, the Ministry clarified that it was denying the Applicant access to the records pursuant to subsection 10(2) of FOIP.

[4] On February 8, 2019, my office received a request for review from the Applicant. On February 21, 2019, my office notified the Ministry and the Applicant that it would be undertaking a review.

[5] In a letter to the Applicant dated March 15, 2019, the Ministry advised the Applicant that in addition to relying on section 10 of FOIP, that it was also denying access to the records pursuant to subsection 7(2)(e) of FOIP. On April 23, 2019, the Applicant asked my office to also review the Ministry's reliance on subsection 7(2)(e) of FOIP.

## II RECORDS AT ISSUE

[6] The record at issue is the data in the Ministry's database(s).

## III DISCUSSION OF THE ISSUES

### 1. Does FOIP apply and do I have jurisdiction to conduct this review?

[7] The Ministry qualifies as a government institution pursuant to subsection 2(1)(d)(i) of FOIP; therefore, I have jurisdiction to conduct this review.

### 2. Did the Ministry properly apply subsection 7(2)(e) of FOIP?

[8] In its submission, the Ministry stated that, "the Applicant is requesting records that do not exist", adding that, "[t]hese are questions that may be better raised in other jurisdictions that have a duty to assist that requires government institutions to create records in certain instances…". The Ministry denied the Applicant's request pursuant to subsection 7(2)(e) of FOIP, which provides:

> **7**(2) The head shall give written notice to the applicant within 30 days after the application is made:
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> …
>
> (e) stating that access is refused for the reason that the record does not exist;

[9] In Review Report 038-2018, my office considered a matter whereby an applicant requested from a public body information that was contained within a database (or databases). At issue was whether or not the public body was required to "create" a record that would be responsive to the applicant's request. The public body outlined the steps it would take to do this, and my office concluded that the public body would not be required to take these steps. This aligned with an approach my office took in Review Report 313-2016 in which my office stated that FOIP does not include an obligation for public bodies, as a general rule, to create records.

[10] In Review Report 038-2018, however, I added that if public bodies have records that contain the raw information that is sought by an applicant that can be produced, then those records would be responsive to the applicant's request. A "record" is defined by subsection 2(1)(i) of FOIP as follows:

> **2**(1) In this Act:
> …
> (i) **"record"** means a record of **information in any form** and includes information that is written, photographed, recorded or **stored in any manner**, but does not include computer programs or other mechanisms that produce records;
>
> [Emphasis added]

[11] According to the definition, a record includes a record of information in any form stored in any manner. The manner in which a database stores information is within the database. The means of producing this information is through the use of computer programs or other mechanisms, which government institutions do not need to provide to an applicant.

[12] Further to this, the Information and Privacy Commissioner of Alberta, in Order F2017-11 stated that "data in a database is recorded information" and that "data in a database is a record". Various reports by the Privacy Commissioner of Canada appear to take the same approach. In PIPEDA Report of Findings #2019-006, the federal Commissioner discussed a company that produces and markets annual print directories, and "also maintains a series of equivalent electronic databases". In PIPEDA Report of Findings #2016-003, the federal Commissioner discusses "email records" contained in a database managed by Compu-Finder, and that "fourteen lists [of email addresses] collated over this period were recorded in the [Compu-Finder] database…" Certainly, other Commissioners appear to be of the view that, as the FOIP definition provides at paragraph [10], a "record" includes a record of information, personal or otherwise, stored (or recorded) in any manner, including in a database.

[13] In their request, the Applicant stated they were accepting of a "spreadsheet or dump/export (i.e. Microsoft Excel, Access, SQL or CSV file format, not .PDF) of the Criminal Justice Information Management System (CJIMS) database…" What the Applicant requested was

the raw information contained within CJIMS, or any other database that holds the data requested, that the Ministry could produce (taking into consideration manner of access) using its normal computer hardware, software and technical expertise.

[14] While I agree that the Ministry would not have a duty to create a record that would be responsive to the Applicant's request pursuant to subsection 7(2)(e) of FOIP, the Applicant does not appear to be asking the Ministry to create a record. Rather, the Applicant is asking the Ministry to produce information that already exists within the Ministry's database, CJIMS (or any other database that contains the data requested by the Applicant), in electronic form. I find, therefore, subsection 7(2)(e) of FOIP has not been properly applied, and that the data contained within CJIMS (or any other database that contains the data requested by the Applicant), is the record that the Applicant is requesting. I recommend that the Ministry release data in the database to the Applicant after considering whether any exemptions apply and severing identifiable personal information.

[15] I understand millions of taxpayer's dollars were used to create CJIMS, and that it is a large database containing a lot of data. I would find it disappointing to think that such a system would not have functionality that allows for the extraction of subsets of information. In our society today, we cannot use as a reason for denying access that the information is in a large database and that providing access to it will impact operations. If citizens cannot access information held in databases, whatever the size, then our access world is taking a major step backwards. As well, we cannot use a reason for denying access that doing something on our computer such as querying would create another record. If something is stored electronically and a citizen requests some information, of course the public body will need to take some steps to reproduce that information. This existed in the paper world - if you ask for a paper record, a photocopy would have to be made. As we switch from a paper world to a digital world, government at all levels, is storing more information in databases. I ask the Ministry and all Ministries to approach this issue creatively because such access to information requests will recur.

[16] Further, if there is confusion in the legislation, then I recommend that we attempt to clarify that legislation so it acknowledges that we now operate in a digital world. To this end, I

recommend that the Ministry request that the Ministry of Justice amend FOIP and *The Local Authority Freedom of Information and Protection of Privacy Act* by including in these Acts or regulations a provision respecting datasets that is similar to subsection 20(3) of Newfoundland's *Access to Information and Protection of Privacy Act, 2015*, which provides:

> **20**(3) Where the requested information is information in electronic form that is, or forms part of, a dataset in the custody or under the control of a public body, the head of the public body shall produce the information for the applicant in an electronic form that is capable of re-use where
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> (a) it can be produced using the normal computer hardware and software and technical expertise of the public body;
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> (b) producing it would not interfere unreasonably with the operations of the public body; and
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> (c) it is reasonably practicable to do so.

**3. Is there a manner of access issue pursuant to subsection 10(2) of FOIP?**

[17] In its section 7 response, the Ministry initially denied the Applicant access to the records pursuant to section 10 of FOIP. It stated, "[p]lease be advised that the records you are requesting would unreasonably interfere with the operations of the Ministry of Corrections and policing in accordance with section 10 of FOIP". The Ministry later notified the Applicant that it was denying access based on subsection 7(2)(e) of FOIP – that records do not exist. It seems to me claiming that providing access to records would interfere with the operations of the Ministry, but also that the records do not exist, is contradictory. Thus, I accept the Ministries first position that the record does exist. Once it is admitted that a record exists, there is a manner of access issue for my office to consider.

[18] Section 10 of FOIP deals with how access to a record will be given to applicants once a record is identified. Depending on the type of record, the manner of access can include providing paper copies, providing electronic copies, or allowing applicants to view a record. Section 10 of FOIP guides government institutions on the manner of access to

records. A manner of access issue, however, is not an exemption that may be relied on by the Ministry to refuse access.

[19] It appears that the Ministry was referring to subsection 10(2)(b) of FOIP, but this subsection is intended to be read together with subsections 10(2)(a) and 10(2)(c) of FOIP. Subsection 10(2) of FOIP provides:

> **10**(2) Subject to subsection (3), if a record is in electronic form, a head shall give access to the record in electronic form if:
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> (a) it can be produced using the normal computer hardware and software and technical expertise of the government institution;
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> (b) producing it would not interfere unreasonably with the operations of the government institution; and
>
> (c) it is reasonably practicable to do so.

[20] Subsection 10(2) of FOIP provides that if the records requested are in electronic format, government institutions must provide access in that form if all three of the following are met: 1) it can be produced using the normal computer hardware and software and technical expertise of the government institution; 2) producing it would not interfere unreasonably with the operations of the government institution; and 3) it is reasonably practicable to do so.

[21] In order for a public body to be able to provide access to a record, a record must exist. At paragraph [13], I found that the data contained within CJIMS is the record that the Applicant has requested; therefore, a record exists. Now established, the Ministry needs to turn its attention towards the manner in which it provides the Applicant with access to the record pursuant to subsection 10(2) of FOIP. Because the Ministry has not yet established how access will be granted, I find that it is premature to analyze whether or not a manner of access issue exists. I recommend the Ministry address this when determining how access to the database will be provided.

**4. Did the Ministry meet its duty to assist?**

[22] In the matter before me, I need to consider if the Ministry met its duty to assist the Applicant pursuant to subsection 5.1(1) of FOIP, which provides:

> **5.1**(1) Subject to this Act and the regulations, a government institution shall respond to a written request for access openly, accurately and completely.

[23] This means that government institutions should make reasonable efforts to not only identify and seek out records responsive to an applicant's access to information request, but also to explain the steps in the process and seek any necessary clarification on the nature or scope of the request within the legislated timeframe. In this context, *reasonable effort* means what a fair and rational person would expect to be done or would find acceptable or helpful in the circumstances (Office of the Nova Scotia Information and Privacy Commissioner (NS IPC), Resource, *What is the Duty to Assist*, at p. 1.).

[24] I expand on this in my office's resource, *Understanding the Duty to Assist* (January, 2018), with the following:

> If the access to information request received seems overly broad, it may be because the individual does not have a sophisticated understanding of the public body's mandate and record holdings. Communicating with the applicant at an early stage and throughout the process, will not only help to clarify the request, but also hopefully streamline the search and preparation of records for release. Most importantly, meeting the duty to assist may result in a more satisfactory experience for all involved and perhaps, result in fewer complaints to this office.

[25] With respect to this matter, the Applicant provided my office with an excerpt from an email exchange (that was internal to the Ministry) that the Applicant obtained from the Ministry through a separate access to information request. The access request regarded the same matter. The email exchange stated the following:

> I spoke to [name of individual] today in relation to this request. And I have some VERY rough notes re: our conversation.
>
> He spoke with [name of individual] this morning to get a sense of whether a response to this request is feasible. It is a huge data set being requested and as such [name of individual] determined the cost, if we can do it all in-house (if all fields are intact/open

> government (as with Fed data)/run report/clean it up/cost of in house staff hourly wage against number of staff assigned to this project) would run approximately $10,000.
>
> If the fields are not intact and we require customized extracts from ISM the cost will be closer to $50,000.

[26] It appears to me that the Ministry had considered how it could satisfy the Applicant's request (e.g. costs, resources, etc.), but does not appear to have pursued options with the Applicant that would satisfy the request if costs, resources, etc., were an issue for the Ministry. The Applicant, in correspondence with our office, stated, "[i]n my experience, government agencies will try to work with me to get me at least some of what I've requested. At the very least, they try to communicate why what I've asked for isn't possible. Neither occurred in this case: I heard nothing from the ministry between filing my request and the denial, and it took me almost a month to get clarification on the denial itself".

[27] The Applicant further noted that they had made the same access request to the Federal Government and all provinces/territories. Of those, the Applicant advised that they received "data of some sort" from nine of the jurisdictions, and added that most jurisdictions understood they were flexible or open to taking what data could be provided. The Applicant even provided my office with a copy of a response another jurisdiction provided them, and I note that although the extract from that jurisdiction did not contain all the data fields the Applicant had requested, it contained enough to apparently satisfy the Applicant. This leads me to question why the Ministry could not have done the same in this instance in order to meet its duty to assist and to satisfy the Applicant. Because the Ministry did not attempt to clarify, narrow or seek options with the Applicant that would satisfy their access request, I find that the Ministry did not meet its duty to assist.

## IV FINDINGS

[28] I find that subsection 7(2)(e) of FOIP has not been properly applied, and that the information contained within CJIMS (or any other database that contains the data requested by the Applicant), is the record.

[29] I find that it is premature to analyze whether or not a manner of access issue exists.

[30] I find that the Ministry did not meet its duty to assist.

## V RECOMMENDATIONS

[31] I recommend that the Ministry release the data in the database(s) to the Applicant after considering if any exemptions apply and severing identifiable personal information.

[32] I recommend that the Ministry address manner of access when determining how access to the data in the database(s) will be provided.

[33] I recommend that the Ministry request that the Ministry of Justice amend FOIP and *The Local Authority Freedom of Information and Protection of Privacy Act* by including in these Acts or regulations a provision respecting datasets that is similar to subsection 20(4) of Newfoundland's *Access to Information and Protection of Privacy Act, 2015.*

Dated at Regina, in the Province of Saskatchewan, this 28th day of July, 2020.

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