Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 059-2017

Public Complaints Commission

July 20, 2017

Summary: The Applicant appealed to the Information and Privacy Commissioner (IPC) when he was refused access to information by the Public Complaints Commission (PCC). The IPC found that some, but not all, the exemptions that the PCC relied upon to refuse the Applicant access applied. The IPC made a number of recommendations including the PCC consider using its discretion to release some of the information it withheld pursuant to subsections 15(1)(c) and 15(1)(k) of *The Freedom of Information and Protection of Privacy Act* (FOIP). He also recommended that where PCC has not applied subsection 15(1)(c) or 15(1)(k) of FOIP, that PCC release to the Applicant his own personal information. If PCC uses its discretion to release some of the records it withheld pursuant to subsections 15(1)(c) or 15(1)(k) of FOIP, the IPC recommended that the PCC release to the Applicant his own personal information. The IPC also recommended that PCC withhold the personal health information on pages 205, 219 and 254 pursuant to subsection 27(1) of *The Health Information Protection Act* (HIPA).

I BACKGROUND

[1] On March 13, 2017, the Public Complaints Commission (PCC) received the following access to information request:

> Please provide, to me, all records available, from the Public Complaints Commission. The PCC file is 16-063.

[2] In a letter dated March 14, 2017, PCC responded by indicating it was refusing the Applicant access to the records in their entirety. It cited subsection 15(1)(c) of *The Freedom of Information and Protection of Privacy Act* (FOIP) as its reason.

[3] On March 22, 2017, the Applicant requested a review by my office.

[4] On March 31, 2017, my office notified the Applicant and PCC that it would be undertaking a review.

[5] In a letter dated May 31, 2017, PCC released additional records to the Applicant. However, it redacted portions of the released records pursuant to subsection 29(1) of FOIP. In an email dated June 7, 2017, the Applicant expressed to my office that he was still dissatisfied. Therefore, my office continued with the review.

II RECORDS AT ISSUE

[6] There are 556 pages of records at issue. In PCC's submission, it raised subsections 15(1)(b)(i) and 15(1)(k) of FOIP and subsection 38(1) of *The Health Information Protection Act* (HIPA) in addition to subsection 15(1)(c) and 29(1) of FOIP as its reasons for refusing the Applicant access to records. There are 83 pages that were marked as "non-responsive". These records will be reviewed in my office's Review Report 132-2017.

III DISCUSSION OF THE ISSUES

[7] PCC is a government institution as defined by subsection 2(1)(d)(ii)(A) of FOIP.

1. Did PCC properly apply subsection 15(1)(b)(i) of FOIP?

[8] PCC applied subsection 15(1)(b)(i) of FOIP to pages 1 to 513, 585 to 597, 607, 627 to 628, 630 to 641 and 643. Subsection 15(1)(b)(i) of FOIP provides:

> 15(1) A head may refuse to give access to a record, the release of which could:
> ...
> (b) be injurious to the enforcement of:
> (i) an Act or a regulation;

[9] In order for subsection 15(1)(b)(i) of FOIP to apply, the following three part test must be met:

1. Which Act or regulation is the public body identifying as being engaged?
2. Is this an enforcement matter specific to an Act or regulation?
3. Could release of the record injure enforcement under the identified Act or regulation?

[10] In its submission, PCC argued that my office's test is too narrow because it requires an investigation or enforcement matter to be engaged. It cited my office's Review Report F-2014-001 and suggested that my office relied upon federal *Access to Information Act* (ATIA) to develop its three-part test. It argued that the wording in subsection 16(1)(c) of the ATIA is focused on investigations. Subsection 16(1)(c) of ATIA provides:

> 16(1) The head of a government institution may refuse to disclose any record requested under this Act that contains
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> ...
>
> (c) information the disclosure of which could reasonably be expected to be **injurious to the enforcement of any law of Canada or a province** or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information
>
> (i) relating to the existence or nature of a particular investigation,
>
> (ii) that would reveal the identity of a confidential source of information, or
>
> (iii) that was obtained or prepared in the course of an investigation;
>
> [emphasis added]

[11] I agree with PCC's assertion that the wording in subsection 16(1)(c) of the ATIA is focused on investigations. However, the wording also focuses on the enforcement of any law of Canada or a province. My office cited subsection 16(1)(c) of the ATIA because 1) the wording in subsection 15(1)(b)(i) of FOIP is unique when compared to access to information legislation in other provinces, and 2) the wording in subsection 16(1)(c) of the ATIA is similar, but not identical, to subsection 15(1)(b)(i) of FOIP, 3) the federal

Information Commissioner's *Investigator's Guide to Interpreting the ATIA*, requires that federal government institutions claiming subsection 16(1)(c) of the ATIA needs to be able to cite an Act, Regulation, Orders or Rules in force in any part of Canada under which enforcement is conducted in order to rely on subsection 16(1)(c) of the ATIA. Therefore, my office found that the *Investigator's Guide to Interpreting the ATIA* useful in developing its three-part test for subsection 15(1)(b)(i) of FOIP.

[12] Further, PCC argued in its submission that my office's three-part test is too narrow because it requires an active investigation. Therefore, it suggested that my office's test for subsection 15(1)(b) of FOIP should be as follows:

1. Which Act or regulation is engaged?
2. Is that Act or regulation frustrated by the release of the records pursuant to FOIP?

[13] Contrary to PCC's argument, my office's three-part test at paragraph [9] does not require an investigation to be engaged as PCC suggests. What my office's test does require is the record be about an "enforcement matter" specific to an Act. That is because subsection 15(1)(b)(i) is about an injury to the enforcement of an Act or a regulation. I find that PCC's two-part test to be too broad because it does not speak to the enforcement of an Act or regulation.

[14] I will use my office's three-part test laid out in paragraph [9] to analyze PCC's application of subsection 15(1)(b)(i) of LA FOIP to the records.

Which Act or regulation is the public body identifying as being engaged?

[15] PCC identified the Act being engaged is *The Police Act, 1990*. Specifically, it cited subsections 39(2) to 39(7) of *The Police Act, 1990*.

Is this an enforcement matter specific to an Act or regulation?

[16] My office has defined "enforcement" as the act or process of compelling compliance with a law, mandate, command, decree, or agreement.

[17] The records to which PCC applied subsection 15(1)(b)(i) of FOIP relates to a complaint submitted by the Applicant to PCC pursuant to section 38 of *The Police Act, 1990*. PCC undertook an investigation. It obtained the records at issue using its powers and as part of its duties outlined in section 39 of *The Police Act, 1990*.

[18] I note that section 36 outlines the power and the responsibilities of the members of police services. *The Municipal Police Regulation, 1991* (the Discipline Regulations), Part III, sets out the Discipline Code for members of a municipal police service. If a member is found guilty of an offense through an investigation by PCC, he or she is subject to disciplinary action.

[19] PCC's investigation under *The Police Act, 1990* is for the purpose of enforcing compliance with the Act. I find that the record is related to an enforcement matter specific to an Act.

Could release of the record injure enforcement under the identified Act or regulation?

[20] In its submission, PCC asserted that the release of the records would alter the relationship between PCC and police services. To demonstrate that there is an expectation of confidentiality between the PCC and the police services in Saskatchewan with regard to the PCC's investigations, PCC cited subsections 39(5), (6), and (7) of *The Police Act, 1990*. Subsections 39(5), (6), and (7) of *The Police Act, 1990* provides:

> 39(5) Subject to this Act and the regulations, the PCC shall hold all information obtained pursuant to clause (2)(c) in confidence.
>
> (6) The PCC shall not provide a complainant with any information regarding a complaint which may jeopardize a police investigation.
>
> (7) Subject to subsection (8):
>
> (a) no oral or written statement or record received by, or on behalf of, the PCC, or by any member or police service acting on behalf of the PCC, shall be used or received as evidence in any civil proceeding or in any proceeding pursuant to any other Act; and
>
> (b) the PCC, and any member, police service or investigator or observer acting on behalf of the PCC and any agent or employee of the PCC, is not

> compellable to give testimony or to produce a statement obtained in exercising a power or performing a duty pursuant to this section.

[21] PCC asserted that violating the expectation of confidentiality would undermine the PCC's ability to enforce *The Police Act¸1990* because PCC's investigations depend upon the willing cooperation of the police. However, I note that subsection 39(3) of *The Police Act, 1990* requires that police services "shall" comply with PCC's requests for access to files or other materials. Subsection 39(3) provides as follows:

> 39(3) Where the PCC has requested access to files or other material pursuant to clause (2)(c), the police service shall comply with that request.

[22] PCC cited the Supreme Court of Canada (SCC) case *Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 SCR 773, 2002 SCC 53* (*Lavigne v. Canada*) to support its position that records obtained by the PCC in the course of its investigations is to be kept confidential. In *Lavigne v. Canada*, the Office of the Commissioner of Official Languages (OCOL) conducted an investigation into a complaint by an individual (the complainant) who alleged that his rights in respect of language of work, and employment and promotion opportunities, had been violated. OCOL conducted an investigation into the matter, which included interviewing witnesses. The complainant requested his own personal information from OCOL under the federal *Privacy Act*. His personal information was contained within notes made by investigators who conducted interviews with witnesses. OCOL disclosed some information but not all of his personal information. OCOL cited subsection 22(1)(b) of the *Privacy Act* as its reason, which provides:

> 22 (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)
>
> ...
>
> (b) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information
>
> (i) relating to the existence or nature of a particular investigation,
>
> (ii) that would reveal the identity of a confidential source of information, or

(iii) that was obtained or prepared in the course of an investigation;

[23] The complainant in *Lavigne v. Canada* appealed OCOL's refusal to disclose his own personal information to the Office of the Privacy Commissioner of Canada (OPC). The appeal with the OPC resulted in some, but not all, of the complainant's personal information being released. The OPC ruled that the OCOL had properly exempted some of the records from disclosure pursuant to subsection 22(1)(b) of the *Privacy Act*.

[24] Then, the complainant applied for judicial review. The Federal Court, Trial Division ordered disclosure of his personal information. The Federal Court of Appeal affirmed this decision. Then, the Commissioner of Official Languages (COL) appealed to the SCC. The SCC considered the issue of whether the disclosure of the complainant's personal information could reasonably be expected to be injurious to the conduct of lawful investigations by the COL. The SCC asserted that in order for subsection 22(1)(b) of the *Privacy Act* to apply, there must be a clear and direct connection between the disclosure of specific information and the injury that is alleged. The COL alleged that the disclosure of personal information could reasonably be expected to be injurious to his (the COL's) future investigations. Ultimately, the SCC found that the COL did not provide a reasonable basis for it to conclude that the disclosure of the complainant's personal information could reasonably be expected to be injurious to future investigations.

[25] Further, the SCC found that the promise of confidentiality made to witnesses in an investigation conducted by the COL is not absolute. In fact, the COL's policy was to assure witnesses that the information they disclosed to investigators would be kept confidential within the limits of sections 72, 73, and 74 of the *Official Languages Act*, which provides that information may be disclosed in limited circumstances. After responding to the complaint, the COL had modified this policy to also cite that the OCOL is subject to the *Privacy Act* and that the information collected from witnesses may be exempt from the disclosure requirement where an exception to the disclosure applies.

[26] Based on the above, the outcome of *Lavigne v. Canada*, does not support PCC's argument that disclosure of information would be injurious to the PCC's ability to enforce *The Police Act, 1990*. In fact, *Lavigne v. Canada* suggests that the confidentiality

required by subsection 39(5) of *The Police Act, 1990* is not absolute. PCC is subject to FOIP. It can only refuse the Applicant access where it has demonstrated that the information falls within the criteria of an exemption.

[27] I also note that *Ruby v. Canada (Solicitor General), [2000] 3 FCR 589* provides that personal information cannot be refused pursuant to subsection 22(1)(b) of the *Privacy Act* (which has very similar wording to subsection 16(1) of the ATIA) on the basis that there could be a chilling effect on the enforcement of a law of Canada or a province. PCC is arguing that its relationship with the police services may be "chilled" or that police services may not fully cooperate with the PCC in the future is not sufficient in demonstrating there would be an injury to PCC's ability to enforce *The Police Act, 1990*.

[28] In this case, I find that PCC has not demonstrated how the information within pages 1 to 513, 585 to 597, 607, 627 to 628, 630 to 641 and 643 meets the criteria for subsection 15(1)(b)(i) of FOIP.

2. Did PCC properly apply subsection 15(1)(c) of FOIP?

[29] PCC applied subsection 15(1)(c) of FOIP to refuse access to pages 1 to 513, 585 to 596, 607 to 608, 627 to 628, 630 to 641, 643, and 650. Subsection 15(1)(c) of FOIP provides:

> 15(1) A head may refuse to give access to a record, the release of which could:
> ...
> (c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;

[30] In order for subsection 15(1)(c) of FOIP to apply, the following test must be met:

1. Does the public body's activity qualify as a "lawful investigation"?

2. Does one of the following exist?
   a. The release of information would interfere with a lawful investigation, **or**
   b. The release of information would disclose information with respect to a lawful investigation.

[31] Below is an analysis to determine if the test is met.

Does the public body's activity qualify as a "lawful investigation"?

[32] A lawful investigation is an investigation that is authorized or required and permitted by law. Subsection 45(1) of *The Police Act¸ 1990* provides the PCC with the mandate to cause investigations into complaints against police officers to be conducted. Subsection 45(1) of *The Police Act, 1990* provides:

> 45(1) If a public complaint is a complaint concerning the actions of a member, the PCC, in consultation with the chief, shall cause an investigation into the complaint to be conducted in accordance with this section as soon as is practicable following the receipt of the complaint.

[33] I find that some of the records were created by PCC as part of its investigation pursuant to *The Police Act, 1990*. PCC's activity qualifies as a lawful investigation.

[34] Further, I find that some of these records were created by the Saskatoon Police Service (SPS) as part of its investigation under the *Controlled Drug and Substance Act*. I find that SPS' activity qualifies as a lawful investigation.

Would the release of the information interfere with a lawful investigation or disclose information with respect to a lawful investigation?

[35] All the pages where subsection 15(1)(c) was applied are about a lawful investigation – either the PCC investigation pursuant to *The Police Act, 1990* or the SPS's investigation pursuant to the *Controlled Drug and Substance Act* except for pages 630 to 638, 641, 643, and 650.

[36] Page 630 is an email from the Ministry of Justice to PCC. It is a brief email containing a link to a SCC decision. Pages 631 to 638 are a copy of the SCC decision which is available on the Internet. I find that pages 630 to 638 do not disclose information with respect to PCC's investigation or SPS's investigation.

[37] Page 641 is a letter from SPS to the Applicant. I find that the contents do not disclose information with respect to either PCC's investigation or SPS's investigation.

[38] Page 643 is a letter from the Applicant to SPS. I find that the contents do not disclose information with respect to either PCC's investigation or SPS's investigation.

[39] Page 650 is an email exchange between PCC employees. I find that the contents do not disclose information with respect to either PCC's investigation or SPS's investigation.

[40] The remainder of the pages where PCC applied subsection 15(1)(c) of FOIP is about either PCC's investigation or SPS's investigation. Therefore, I find that subsection 15(1)(c) of FOIP applies to pages 1 to 513, 585 to 596, 607 to 608, and 627 to 628. However, some of the records appear to be unnecessarily withheld from the Applicant. For example, page 511 is the prescribed Public Complaint Form pursuant to section 38 of *The Police Act, 1990* and section 42 of *The Municipal Police Discipline Regulations, 1991* that was filled out by the Applicant himself. Similarly, pages 512 and 513 are SPS Witness Statement forms that was filled out and signed by the Applicant himself. Furthermore, pages 585 to 592 are transcriptions of recorded conversations between SPS and the Applicant. Pages 593 and 594 are transcriptions of the in-car camera recording of the arrest of the Applicant. If the Applicant either supplied the information or was present for the conversations which were recorded, then I question why PCC would want to withhold such records from the Applicant. It would be an absurd result to withhold information from the Applicant that he had either supplied or already has knowledge of what was discussed. I encourage PCC to reconsider the use of this exemption for withholding some of the records from the Applicant. The purpose of FOIP is to facilitate open and accountable government for citizens. This is achieved by providing individuals with access to as much information as it can, especially personal information that is used to make decisions that affect the individual, subject to limited and specific exemptions. I find PCC's overly broad application of subsection 15(1)(c) of FOIP is not in keeping with the purpose of FOIP. Since subsection 15(1)(c) of FOIP is a discretionary exemption, I suggest PCC review all the records upon which it applied subsection 15(1)(c) of FOIP. PCC should reconsider the use of this exemption and use its discretion to release at least some of the records it withheld pursuant to subsection 15(1)(c) of FOIP to the Applicant and to avoid an absurd result.

3. Did PCC properly apply subsection 15(1)(k) of FOIP?

[41] PCC applied subsection 15(1)(k) of FOIP to pages 1 to513, 585 to 596, 607 to 608, 627 to 628, 630 to 641, 643 and 650. Subsection 15(1)(k) of FOIP provides:

> 15(1) A head may refuse to give access to a record, the release of which could:
> ...
> (k) interfere with a law enforcement matter or disclose information respecting a law enforcement matter;

[42] In order for subsection 15(1)(k) of FOIP to apply, the following test must be met:

1. Does the public body's activity qualify as a "law enforcement matter"?

2. Does one of the following exist?
   a. The release of information would interfere with a law enforcement matter, **or**
   b. The release of information would disclose information with respect to a law enforcement matter.

[43] Below is an analysis to determine if the test is met.

Does the public body's activity qualify as a "law enforcement matter"?

[44] Law enforcement includes:

> i) policing, including criminal intelligence operations, or
>
> ii) investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which lead to or could lead to a penalty or sanction being imposed under the enactment.

[45] As already noted earlier, some of the records were created as a result of a PCC investigation. This investigation was for the purpose of enforcing *The Police Act, 1990*, which could lead to a penalty or sanction being imposed under the Discipline Regulations. I find that PCC's investigation qualifies as a law enforcement matter.

[46] Also already noted, some of the records were created as a result of a SPS investigation. This investigation was for the purpose of enforcing the *Controlled Drugs and Substance*

Act, which could lead to a penalty or sanction being imposed under that Act. I find that SPS's investigation qualifies as a law enforcement matter.

Would the release of information interfere with a law enforcement matter, or disclose information with respect to a law enforcement matter?

[47] All the pages upon which subsection 15(1)(k) of FOIP was applied are about a law enforcement matter pursuant to *The Police Act, 1990* or the *Controlled Drugs and Substance Act*, except for pages 630 to 638, 641, 643, and 650.

[48] Page 630 is an email from the Ministry of Justice to PCC. It is a brief email containing a link to a SCC decision. Pages 631 to 638 are a copy of the SCC decision which is available on the Internet. I find that pages 630 to 638 do not disclose information with respect to the law enforcement matters described at paragraphs [45] and [46].

[49] Page 641 is a letter from SPS to the Applicant. I find that the contents do not disclose information with respect to the law enforcement matters described at paragraphs [45] and [46].

[50] Page 643 is a letter from the Applicant to SPS. I find that the contents do not disclose information with respect to the law enforcement matters described at paragraphs [45] and [46].

[51] Page 650 is an email exchange between PCC employees. I find that the contents do not disclose information with respect to the law enforcement matters described at paragraphs [45] and [46].

[52] The remainder of the pages upon which PCC applied subsection 15(1)(k) of FOIP is about the law enforcement matters described at paragraphs [45] and [46]. Therefore, I find that subsection 15(1)(k) of FOIP applies to pages 1 to 513, 585 to 596, 607 to 608, and 627 to 628. However, some of the records appear to be unnecessarily withheld from the Applicant. Similar to my comments at paragraph [40], some of the information within the records was supplied by the Applicant to PCC or to SPS. Further, the Applicant was present for the conversations which were recorded. I question why PCC would want to

withhold such records from the Applicant. It would be an absurd result to withhold information from the Applicant that he had either supplied or already has knowledge of what was discussed. Again, the purpose of FOIP is to facilitate open and accountable government for citizens. This is achieved by providing individuals with access to as much information as it can, especially personal information that is used to make decisions that affect the individual, subject to limited and specific exemptions. I find that PCC's overly broad application of subsection 15(1)(k) of FOIP is not in keeping with the purpose of FOIP. Since subsection 15(1)(k) of FOIP is a discretionary exemption, I suggest that PCC review the records upon which it applied subsection 15(1)(k) of FOIP. PCC should reconsider the use of this exemption and use its discretion to release at least some of the records it withheld pursuant to subsection 15(1)(k) of FOIP to the Applicant and to avoid an absurd result.

3. Did PCC properly apply subsection 29(1) of FOIP?

[53] When dealing with information in a record that appears to be personal information, the first step is to confirm the information indeed qualifies as personal information pursuant to subsection 24(1) of FOIP. Part of that consideration involves assessing if the information has both of the following:

1. Is there an identifiable individual?
2. Is the information personal in nature?

[54] Subsection 24(1) of FOIP provides:

> 24(1) Subject to subsections (1.1) and (2), "personal information" means personal information about an identifiable individual that is recorded in any form, and includes..."

[55] Once identified as personal information, the public body needs to consider subsection 29(1) of FOIP which provides:

> 29 (1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[56] PCC applied subsection 29(1) of FOIP in full to pages 1 to 23, 25 to 71, 73 to 76, 78 to 87, 89 to 90, 92, 94 to 107, 109 to 111, 113 to 115, 117, 119 to 139, 141, 143, 146 to 210, 212 to 217, 219, 220, 223, 225, 227, 228, 230 to 241, 243 to 247, 249, 251, 252, 254, 255, 258, 260 to 286, 289 to 290, 294, 300, 301, 306 to 318, 320, 321, 323 to 346, 348 to 395, 400 to 419, 421 to 423, 425 to 427, 429 to 431, 434 to 466, 469 to 471, 473 to 485, 487, 488, 490, 491, 492 to 499, 501, 503 to 509, 511 to 513, 587, 595, 596, 607, 608, 627, 628 and 630 to 641 and in part to pages 658 and 680.

[57] From a review of the above pages, the information that PCC is withholding under subsection 29(1) of FOIP appears to be about 1) SPS employees, 2) individuals who are not the Applicant, and 3) the Applicant.

[58] PCC's argument is if information in a record is somehow personal information about an identifiable individual, then it satisfies the definition and, unless an exception is provided for in subsection 24(2) of FOIP, the information can only be disclosed in accordance with section 29 or 30.

[59] Below is a further analysis on each group of individual(s) that PCC applied to subsection 29(1) of FOIP.

Employees of organizations that are not PCC, including SPS and the Government of Canada

[60] Information that appears in the records about employees of other organizations (such as SPS and the Government of Canada) includes their names, badge numbers, signatures, and contact information. PCC asserts that the place where a person is employed and the position held by that person both fit the definition of personal information as defined in the lead in portion of subsection 24(1) of FOIP. Further, it provides that FOIP specifically identifies the following as examples of personal information related to employment, in subsections 24(1)(b) and 24(1)(e):

> 24(1)(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
> ...
> 24(1)(e) the home or business address, home or business telephone number or fingerprints of the individual;

[61] It also notes that subsections 24(2)(a) and 24(2)(c) provides what personal information does not include:

> 24(2)(a) the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer or employee of a government institution or a member of the staff of a member of the Executive Council;
> ...
> 24(2)(c) the personal opinions or views of an individual employed by a government institution given in the course of employment, other than personal opinions or views with respect to another individual;

[62] PCC asserts that subsection 24(2)(a) and 24(2)(c) apply to only employees of government institutions and not employees of other employers, such as SPS. It argues that subsection 24(2) does not exempt the contact information of employees of a third party (e.g., SPS) from the definition of personal information pursuant to subsection 24(1) of FOIP. Therefore, its position is that the information about employees of organizations other than PCC qualify as personal information and can only be disclosed in accordance with FOIP. It provides that responding to an access to information request is not a reason provided for in FOIP to disclose personal information. Therefore, it has severed the information about employees of organizations other than PCC.

[63] I must determine if the information about the employees of organizations other than PCC qualify as personal information. As mentioned earlier, the names of non-PCC employees appear with other information including badge numbers, signatures, and business contact information. To determine whether such information qualifies as personal information, I consider subsection 24(1)(k) of FOIP, which provides:

> 24(1) Subject to subsections (1.1) and (2), "personal information" means personal information about an identifiable individual that is recorded in any form, and includes:
> ...

> (k) the name of the individual where:
>
> (i) it appears with other personal information that relates to the individual; or
>
> (ii) the disclosure of the name itself would reveal personal information about the individual.

[64] In Review Report LA-2012-002, my office found that information generated by employees in the course of their professional or employment duties would not qualify as personal information. It found that information "employment history" would be information that would normally be found within an individual's personnel file including performance reviews, disciplinary actions taken, and reasons for leaving a job. My office's findings in that Review Report were upheld by the Court of Queen's Bench of Saskatchewan in *Evenson v. Kelsey Trail Regional Health Authority, [2012] SKQB 382* where Zarzeczny J. said at paragraph [9]:

> The facts, circumstances, analysis and conclusions which the Commissioner reached in his Report are the same as those that I have reached in my review of this matter *de novo*. I am in complete agreement with the Commissioner's Report.

[65] Therefore, I find that the information about employees of organizations other than PCC does not qualify as personal information as defined by subsection 24(1) under FOIP.

Information about individuals other than the Applicant

[66] Information about individuals other than the Applicant appear in the records, including (but not limited to) names, gender, race, date of birth, address, offenses committed, and the charges laid against them.

[67] I find that such information qualifies as personal information as defined by subsection 24(1) of FOIP and can be withheld pursuant to subsection 29(1) of FOIP.

Information about the Applicant

[68] Information about the Applicant appears in the records. The types of information about the Applicant that appears in the records are similar to the types of information described

in paragraph [66] about other individuals. Therefore, I find that such information qualifies as personal information as defined by subsection 24(1) of FOIP.

[69] Subsection 31(1) of FOIP provides that individuals have a right of access to their own personal information. This right is subject to the exemptions in Part III of FOIP and subsection 31(2) of FOIP. The Applicant has a right to access his own information within the records. I recommend that PCC sever the personal information about individuals other than the Applicant as described in paragraph [66]. For the records upon which it has not applied subsections 15(1)(c) and 15(1)(k) of FOIP, I recommend that PCC release to the Applicant his own personal information.

[70] For the records upon which PCC has applied subsections 15(1)(c) and 15(1)(k) of FOIP, I have already recommended earlier that PCC reconsider its broad application of these two exemptions and use its discretion to release additional records to the Applicant. If PCC chooses to comply with my recommendation and uses its discretion to release additional information in records where it initially relied upon subsection 15(1)(c) and 15(1)(k) of FOIP to withhold, then I also recommend that PCC disclose to the Applicant his own personal information that may appear in those records as well.

4. Did PCC properly apply subsection 38(1) of HIPA?

[71] HIPA is engaged when three elements are present: 1) a trustee, 2) personal health information, and 3) the trustee has custody or control of the personal health information.

[72] PCC is a trustee pursuant to subsection 2(t)(i) of HIPA.

[73] PCC has identified that personal health information appears on pages 204, 207, 219, 251 and 254. Subsection 2(m) of HIPA defines personal health information as follows:

> 2 In this Act:
>
> ...
>
> (m) "personal health information" means, with respect to an individual, whether living or deceased:
>
> ...

> (i) information with respect to the physical or mental health of the individual.

[74] Based on the above definition and a review of the five pages that PCC cited as having personal health information, I find that personal health information does not appear on pages 204, 207, or 251 but it appears on small portions of pages 219 and 254. I also find that a small portion of page 205 contains personal health information.

[75] PCC, as the trustee, has custody and control of the personal health information on pages 205, 219, and 254. Therefore, HIPA is engaged.

[76] Sections 12 and 32 of HIPA provides individuals with the right to access his or her own personal health information:

> 12 In accordance with Part V, an individual has the right to request access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.
> ...
> 32 Subject to this Part, on making a written request for access, an individual has the right to obtain access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.

[77] PCC has cited subsection 38(1)(e) of HIPA as its reason for refusing the Applicant access to personal health information, which provides:

> 38(1) Subject to subsection (2), a trustee may refuse to grant an applicant access to his or her personal health information if:
> ...
> (e) the information was collected principally in anticipation of, or for use in, a civil, criminal or quasi-judicial proceeding;

[78] Section 38 of HIPA is a discretionary exemption that the head of a trustee may rely upon to refuse an Applicant access to his or her own personal health information. However, when I review the personal health information on these three pages, the personal health information is not about the Applicant.

[79] I find that it would have been appropriate that PCC withheld the personal health information on pages 205, 219, and 254 pursuant to subsection 27(1) of HIPA, which provides:

> 27(1) A trustee shall not disclose personal health information in the custody or control of the trustee except with the consent of the subject individual or in accordance with this section, section 28 or section 29.

IV FINDINGS

[80] I find that PCC has not demonstrated how the information within pages 1 to513, 585 to 597, 607, 627 to 628, 630 to 641 and 643 meets the criteria for subsection 15(1)(b)(i) of FOIP.

[81] I find that subsection 15(1)(c) of FOIP applies to pages 1 to 513, 585 to 596, 607 to 608, and 627 to 628.

[82] I find PCC's overly broad application of subsection 15(1)(c) of FOIP is not in keeping with the purpose of FOIP.

[83] I find that subsection 15(1)(k) of FOIP applies to pages 1 to 513, 585 to 596, 607 to 608, and 627 to 628.

[84] I find that PCC's overly broad application of subsection 15(1)(k) of FOIP is not in keeping with the purpose of FOIP.

[85] I find that the information about employees of organizations other than PCC does not qualify as personal information as defined by subsection 24(1) under FOIP.

[86] I find that the information about individuals other than the Applicant as described in paragraph [66] qualifies as personal information as defined by subsection 24(1) of FOIP and can be withheld pursuant to subsection 29(1) of FOIP.

[87] I find that some of the records contain the Applicant's personal information.

[88] I find that HIPA is engaged.

[89] I find that personal health information as defined by subsection 2(m) of HIPA appears on pages 205, 219, and 254.

V RECOMMENDATIONS

[90] I recommend that PCC review the records to which it applied subsection 15(1)(c) and consider using its discretion to release some of the records it withheld pursuant to subsection 15(1)(c) of FOIP.

[91] I recommend that PCC review the records to which it applied subsection 15(1)(k) and consider using its discretion to release some of the records it withheld pursuant to subsection 15(1)(k) of FOIP.

[92] I recommend for the records which PCC has not applied subsections 15(1)(c) or 15(1)(k) of FOIP, PCC release to the Applicant his own personal information.

[93] If PCC uses its discretion to release some of the records it withheld pursuant to subsections 15(1)(c) or 15(1)(k) of FOIP, I recommend PCC release to the Applicant his own personal information.

[94] I recommend that PCC withhold the personal health information on pages 205, 219, and 254 pursuant to subsection 27(1) of HIPA.

Dated at Regina, in the Province of Saskatchewan, this 20th day of July 2017.

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