

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 088/2014

Financial and Consumer Affairs Authority

Summary:

In April 2014, an Applicant submitted an access to information request to the Financial and Consumer Affairs Authority (FCAA). The FCAA advised the Applicant that it was withholding the records in full pursuant to subsections 15(1)(b)(i), (c), (k), 17(1)(b)(i), 19(1)(b), (c), 23(3)(m) and section 29 of *The Freedom of Information and Protection of Privacy Act* (FOIP). The FCAA later replaced reliance on 23(3)(m) of FOIP with subsection 23(3)(l). The Applicant proceeded to request a review by the Office of the Information and Privacy Commissioner (OIPC). Upon review, the Commissioner found that section 61 of *The Mortgage Brokerages and Mortgage Administrators Act* prevailed over Part II of FOIP and therefore FOIP did not apply to the records subject to the review. Further, given this finding, there was no need to consider the remaining exemptions relied on by the FCAA. As FOIP was found not to apply to the records, no recommendations were made.

I BACKGROUND

- [1] On April 30, 2014, Financial and Consumer Affairs Authority (FCAA) received an access to information request from the Applicant requesting the following:

Auditors report on Mortgage Associate Broker

- [2] The FCAA advised the Applicant by a letter dated May 22, 2014, that access to the records were denied in full pursuant to subsections 15(1)(b)(i), (c), (k), 17(1)(b)(i), 19(1)(b), (c), 23(3)(m) and 29 of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [3] On August 26, 2014, my office received a Request for Review from the Applicant.
- [4] In a letter dated September 12, 2014, my office notified both parties of our intention to conduct a review. My office requested the FCAA provide a copy of the record, Index of Records (Index) and submission in support of the above exemptions.
- [5] On October 15, 2014, my office received a copy of the record and an Index from the FCAA. Its submission was received November 7, 2014. In the FCAA's submission, it clarified that the proper subsection it was relying on was 23(3)(l) of FOIP and not 23(3)(m) as the legislation being referenced was an Act and not a Regulation. On October 24, 2014, my office received a submission from the Applicant.

II RECORDS AT ISSUE

- [6] The records at issue are 4 documents consisting of 22 pages.

III DISCUSSION OF THE ISSUES

- [7] The FCAA is a "government institution" pursuant to subsection 2(1)(d)(ii) of FOIP.

1. Does subsection 23(3)(l) of FOIP apply?

- [8] Subsections 23(1) and 23(3)(l) of FOIP provide:

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.

...

(3) Subsection (1) does not apply to:

...

(l) any prescribed Act or prescribed provisions of an Act;

and the provisions mentioned in clauses (a) to (m) shall prevail.

[9] The purpose of subsection 23(1) of FOIP is to ensure that FOIP would prevail over other statutory provisions unless the records or information fall within the enumerated list of exclusions in subsection 23(3) of FOIP.

[10] The FCAA applied subsection 23(3)(l) of FOIP to all 22 pages of the documents.

[11] In its submission, the FCAA referred to subsection 12(1) of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations) in support of the application of subsection 23(3)(l) of FOIP. Subsection 12(1) of the FOIP Regulations provides:

12 For the purposes of clause 23(3)(l) of the Act, the following provisions are prescribed as provisions to which subsection 23(1) of the Act does not apply:

...

(l) section 61 of *The Mortgage Brokerages and Mortgage Administrators Act*;

[12] In its submission, the FCAA referenced subsections 61(1) and 61(2) of *The Mortgage Brokerages and Mortgage Administrators Act* (MBMA)

[13] Current case law indicates that even where one piece of legislation is clearly paramount, unless there is express conflict, both Acts can apply concurrently. Therefore, in order for subsections 61(1) and 61(2) of the MBMA to override FOIP, I must find that there is an express conflict between the two acts. Further, the FCAA must demonstrate that the subsections of the MBMA apply to the documents in question and by complying with one act; it cannot comply with the other.

[14] There are three tests used to determine whether two laws can coexist or are inconsistent or in conflict. The test is as follows:

- i. Does compliance with one law involve the breach of the other?
- ii. Does one law supplement the other?
- iii. Does one law duplicate the other?

[15] In the event there is a clear conflict between FOIP and subsections 61(1) and 61(2) of the MBMA, such that to comply with one would violate the other, then the usual rule that FOIP is paramount would not apply. The specific provision in the MBMA would prevail.

i. Does compliance with one law involve the breach of the other?

[16] Section 61 of the MBMA provides:

61(1) Any information submitted or provided to the superintendent or obtained by the superintendent as a result of an inspection or investigation pursuant to this Act is not open to inspection or available for access except by:

(a) those members of the public service of Saskatchewan employed in the office of the superintendent whose responsibilities require them to inspect or allow them to have access to the information; and

(b) those persons who are authorized in writing by the superintendent to inspect or to have access to the information.

(2) Unless authorized by this Act or by any other law or with the consent of the person to whom any information relates, no member of the public service of Saskatchewan employed in the office of the superintendent and no person authorized by the superintendent to inspect or have access to the information shall:

(a) communicate or allow to be communicated any information obtained pursuant to this Act to any person who is not legally entitled to the information; or

(b) allow any person who is not legally entitled to the information obtained pursuant to this Act to inspect or have access to it.

(3) Notwithstanding subsections (1) and (2), the superintendent may authorize the release of, inspection of or access to the information mentioned in those subsections to or by any person employed by a government, regulatory authority, law enforcement agency or investigative body inside or outside Canada if:

(a) the information will be used solely for the purpose of administering or enforcing an Act or law of Saskatchewan or Canada or of another jurisdiction inside or outside Canada;

(b) the release, inspection or access is pursuant to an agreement made pursuant to section 62; or

(c) the superintendent believes that it is in the public interest to allow the release, inspection or access.

(4) No person to whom information is provided pursuant to this section is compellable to give evidence concerning that information unless:

(a) the person to whom the information relates consents; or

(b) a court orders the evidence to be given.

(5) Notwithstanding subsections (1) and (2), the superintendent may authorize the publication of, or make available to the public, the following information:

(a) all information appearing on a licence;

(b) the address of the place of business and mailing address and address for service of a licensee;

(c) the name of the principal broker designated by a mortgage brokerage licensed pursuant to this Act;

(d) any other information mentioned in subsection (1) if, in the opinion of the superintendent, it is in the public interest to do so.

(6) On an application for an order pursuant to clause (4)(b):

(a) the superintendent and the person to whom the information relates are entitled to appear before the court and to make submissions; and

(b) the person seeking the order compelling the evidence has the onus of showing why it is in the public interest that the order be made.

[17] The FCAA asserted in its submission that subsection 61(1) of the MBMA states that information submitted to, or obtained by, the superintendent as a result of an inspection or investigation is not available for access or inspection except by those persons employed by the superintendent or to whom the superintendent has granted express permission. Further, that section 61 sets out limited circumstances under which the superintendent may allow access or inspection of such information, but the default premise is that the information is to be kept confidential. Finally, the FCAA asserted that none of the exceptions to the default premise of confidentiality set out in section 61 are applicable to the Applicant's access request.

[18] The information requested by the Applicant in the access request appears to be the kind of information referred to in subsections 61(1) and 61(2) of the MBMA. The FCAA conducted an inspection/investigation and the records form part of that inspection/investigation.

[19] Subsections 61(1) and 61(2) of the MBMA forbid the release of any information obtained pursuant to the MBMA except under limited circumstances. Parts II and III of FOIP provide the right of access to records in the possession and/or control of a government institution subject to limited exemptions in Part III of FOIP. However, the circumstances under which access can be denied are different in the two Acts. Therefore, I find that there is a conflict between the two acts and the first part of the test has been met.

ii. Does one law supplement the other?

[20] In its submission, the FCAA asserted that section 61 of the MBMA is a stand-alone code for access to information. It appears the MBMA is explicit in its confidentiality provision above. FOIP allows for access under certain circumstances. Subsection 61(1) of the MBMA provides authority to the staff of the superintendent to access the information but only where duties require such access. Further, only the superintendent can determine if access to the information will be granted to anyone else under specific circumstances.

[21] It appears there is a separate stand-alone access provision within the MBMA to address access to records. Therefore, FOIP and the MBMA do not supplement one another and the second part of the test has been met.

iii. Does one law duplicate the other?

[22] In its submission, the FCAA asserted that as a result of the separate code of disclosure and different considerations in the MBMA, the MBMA does not duplicate FOIP. Further, that section 61 of the MBMA is intended to operate as a separate code for dealing with records that would otherwise be subject to FOIP disclosure requirements.

[23] The MBMA creates its own scheme of disclosure that is distinct and different from that outlined in Parts II and III of FOIP. To comply with Parts II and III of FOIP would conflict with section 61 of the MBMA. Parts II and III of FOIP require a different set of considerations not consistent with the MBMA.

[24] Therefore, I find that FOIP and the MBMA do not duplicate each other. Therefore, the third part of the test has been met.

[25] In conclusion, section 61 of the MBMA is paramount to Parts II and III of FOIP. As such, FOIP would not apply to the records subject to this review. Given this finding, there is no need to consider the remaining sections relied on by the FCAA.

IV FINDINGS

[26] I find that section 61 of the MBMA is paramount to Parts II and III of FOIP and FOIP would not apply to the records subject to this review.

V RECOMMENDATIONS

[27] As *The Freedom of Information and Protection of Privacy Act* (FOIP) does not apply to the records, there are no recommendations.

Dated at Regina, in the Province of Saskatchewan, this 17th day of November, 2014.

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