



REVIEW REPORT 130-2019

Ministry of Corrections and Policing

February 12, 2020

Summary:

The Applicant submitted an access to information request to the Ministry of Corrections and Policing (the Ministry). The Ministry provided the Applicant with some of the records but withheld other portions of the records. The Ministry cited section 21 and subsection 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP) as its reasons for withholding portions. The Applicant appealed to the Commissioner. The Commissioner found that the Ministry appropriately applied subsection 29(1) of FOIP, but that the Ministry has not demonstrated that section 21 of FOIP applies. The Commissioner also found that the Ministry made a reasonable search for records. The Commissioner recommended that the Ministry release the portions it withheld under section 21 of FOIP but continue to withhold the portions it applied subsection 29(1) of FOIP.

I BACKGROUND

[1] On October 25, 2019, the Ministry of Corrections and Policing (the Ministry) received the following access to information request:

Admitting, Medical & Program.
August 2018 to present.

Please send copies of all files relating to me. Include documents created elsewhere or disclose creator's identity. Provide a reason for omission.

[2] In a letter dated November 26, 2019, the Ministry responded to the Applicant's access request. It provided the Applicant some records, but withheld others. The Ministry cited subsections 3(1)(b), 15(1)(m), and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP) as its reasons for withholding records.

- [3] In a letter dated April 1, 2019 to my office, the Applicant requested a review of the Ministry's refusal to provide access to some of the records. Furthermore, the Applicant requested that my office review the Ministry's efforts to search for records responsive to their request.
- [4] In emails dated May 10, 2019, my office notified both the Ministry and the Applicant that my office would be undertaking a review.
- [5] In its submission, the Ministry notified my office that it was no longer relying on subsections 3(1)(b) and 15(1)(m) of FOIP. In a letter dated August 16, 2019, the Ministry provided to the Applicant records that it was previously withholding on the basis of subsections 3(1)(b) and 15(1)(m) of FOIP. However, it indicated that it was relying on section 21 of FOIP to deny access to a portion of records and that it would continue to rely on subsection 29(1) to deny access to portions of records.

II RECORDS AT ISSUE

- [6] There are 209 pages of responsive records, of which the Applicant received the majority. The Ministry applied subsection 29(1) of FOIP to parts of pages 16, 22, 25, 26, 46, 164 and 188. The Ministry also applied section 21 of FOIP to parts of pages 34, 35, 58, 190, 191 and 196.

III DISCUSSION OF THE ISSUES

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

- [7] The Ministry qualifies as a "government institution" as defined by subsection 2(1)(d)(i) of FOIP. Therefore, FOIP applies and I have jurisdiction to review this matter.

2. Did the Ministry properly apply subsection 29(1) of FOIP?

[8] The Ministry applied subsection 29(1) of FOIP to portions of pages 16, 22, 25, 26, 46, 164 and 188 of the records. Subsection 29(1) of FOIP provides as follows:

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.

[9] In order to rely on subsection 29(1) of FOIP to withhold records, the government institution must determine if the information qualifies as “personal information” as defined by subsection 24(1) of FOIP. A part of the determination involves assessing if the information has both of the following:

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

[10] Subsection 24(1) of FOIP defines “personal information” as follows:

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.

[11] It should be noted that the list of personal information set out in subsection 24(1) of FOIP is not an exhaustive list. Information that is personal in nature about an identifiable individual can be considered personal information under subsection 24(1) of FOIP. If the information is about an individual other than the Applicant, then the information should be withheld under subsection 29(1) of FOIP.

[12] Where the name and/or information about another individual appeared in the records, the Ministry redacted the name and/or information about the other individual pursuant to subsection 29(1) of FOIP. I find that redacted information qualifies as personal

information as defined by subsection 24(1)(k) of FOIP. I find that the Ministry appropriately applied subsection 29(1) of FOIP.

3. Did the Ministry properly apply section 21 of FOIP?

[13] The Ministry applied section 21 of FOIP to portions of pages 34, 35, 58, 190, 191 and 196 where certain individuals provided their views or opinions about the Applicant. The Ministry's position is that disclosure of the information could threaten the safety or the physical or mental health of the Applicant and other individuals.

[14] Section 21 of FOIP provides as follows:

21 A head may refuse to give access to a record if the disclosure could threaten the safety or the physical or mental health of an individual.

[15] In the past, my office has used the following test to determine if section 21 of FOIP applies:

1. Is there a reasonable expectation of probable harm?
2. Does the harm constitute damage or detriment and not mere inconvenience?
3. Is there a causal connection between disclosure and the anticipated harm?

[16] The Ministry raised that the test my office relied on for section 21 of FOIP had a higher threshold than what the provision actually required. In its submission to my office, the Ministry asserted a different standard should be applied and provided supporting case law.

[17] Prior to this review, my office had been in the process of reviewing all of its tests and the test for section 21 was in the process of being amended to address the threshold. When the Ministry provided its arguments to my office, the test had not yet been updated on my office's former IPC Guide to Exemptions. The updated test is now available in Chapter 4 of the IPC Guide to *The Freedom of Information and Protection of Privacy Act* (updated December 10, 2019) at section 21. The amended test is as follows:

1. What is the harm identified?

2. Does the harm constitute damage or detriment and not mere inconvenience?
3. Is there a connection between disclosure and the anticipated harm?

[18] In Review Report LA-2007-001 at [149], a former Commissioner communicated that where an exemption requires that the release of records “could” have a specified result, that the expectation for that specified result should not be fanciful or exceedingly remote:

In Report 92/008, a former Commissioner noted that unlike sections 14 and 17 of FOIP, where the exemption requires that the release of records “could reasonably be expected” to have a particular result, in section 15 of FOIP the requirement is simply that the release of information “could” have the specified result. This Report supports the proposition that to invoke section 14(1)(d) [of LA FOIP] the threshold test is somewhat lower than a ‘reasonable expectation’. Nonetheless, there would still have to be some kind of basis to found such an expectation. If it is fanciful or exceedingly remote, section 14(1)(d) [of LA FOIP] could not be successfully invoked.

[19] It is not enough to assert that there is a possibility. My office still requires evidence that the harm might occur in order to determine that section 21 of FOIP applies. There would still have to be a basis for asserting the harm could occur. The harm should be not fanciful or exceedingly remote.

[20] As mentioned earlier, the Ministry redacted portions of pages 34, 35, 58, 190, 191 and 196 where certain individuals provided their views or opinions about the Applicant. The Ministry is withholding the identity of these individuals and their views or opinions about the Applicant. At paragraphs 20, 21, and 23 of the Ministry’s submission, the Ministry provided the following arguments as to why section 21 of FOIP applies:

In this instance, section 21 has been applied to portions of the record where the [identification of individuals] have provided their views or opinions about the Applicant. While the Ministry recognizes that the views or opinions of the Applicant is the Applicant’s personal information pursuant to clause 24(1)(h) of FOIP, the Ministry believes such disclosure could threaten the safety or the physical or mental health of the Applicant, [identification of individuals].

At various portions of the responsive record, it states that the Applicant suffers from [name of mental health condition]. If the portions of the record were released to the Applicant where [identification of individuals] provide their views and opinions about the Applicant, there is a reasonable expectation of probable harm to the Applicant’s

mental health. It is reasonable to assume that the disclosure of such information will only exacerbate his mental health condition,

...

The Ministry submits there is a possibility that the disclosure of the information that is withheld pursuant to section 21 could threaten the safety oo [sic] the mental and physical health of the [identification of individuals] who expressed their views and opinions. The Applicant is [name of mental health condition] who could threaten both the mental or physical health of [identification of individuals] if [they] learns that they had been talking with officials about [them].

[21] Then, in paragraph 22 of the Ministry's submission, the Ministry asserted it met a higher standard than what is required by section 21 of FOIP.

[22] Citing a person's "mental health condition" is not enough to conclude that harm could come to the Applicant and to others as a result of the disclosure of the redacted information. On January 9, 2020, my office sought additional information from the Ministry regarding its application of this exemption, but my office did not receive a response. After receiving the draft version of this Report, the Ministry disagreed with my office's position that evidence that a harm might occur (as described at paragraph [18]) is required for my office to find that section 21 of FOIP applies. However, the Ministry identified portions of pages 35 and 58 of the record, which were released to the Applicant, to support its position. It should be noted that these portions were released to the Applicant. The Ministry said in response to the draft report:

The Ministry did not simply site [sic] the Applicant's mental health concern as sufficient information to conclude that the test in section 21 of FOIP was met. The Ministry submits it provided enough information for the IPC to determine that the harm is merely possible. Further, the Ministry does not agree that it requires evidence to meet this standard. However, there was information contained in the records that supported the Ministry's position and it was near the information that was withheld, the Ministry will refer to the information therein below.

On page 35, the medical notes indicate that the patient (Applicant) was placed on medical watch because there was a concern for his safety and for the safety of others.

On Page 58, the medical notes state that the patient has unexplained anger, emotional disconnectedness, anxiety and agitation, argumentative behavior, delusions of grandeur and thinks everyone is out to get him, including his family.

Given the Applicant's diagnosis, the medical notes that discuss his anger, agitation and belief that everyone is out to get him, including his family and the concerns for the Applicant's safety and that of other inmates, the Ministry met the test that the concerns for the safety of the individuals whose names had been withheld based on section 21 is possible.

[23] The inconvenience, upset or unpleasantness of dealing with difficult or unreasonable people is not sufficient to trigger section 21 of FOIP. A person's behavior in one instance does not mean that the person exhibits such behavior all the time. For example, the portion from page 35 was recorded on September 7, 2018 by staff at the Saskatoon Correctional Centre, which indicates that the Applicant was placed on medical observation. However, on pages 33, 98, and 105 of the records, which were also released to the Applicant, the Applicant was cleared from medical observation on September 26, 2018. The Ministry is relying on some portions of the records and not others. This suggests that the Ministry is speculating that there will be harm, but it is not establishing that there is a possibility of harm that might occur from the release of the redacted portions of the records. The Ministry has not met its obligation under section 61 of FOIP, which provides:

61 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[24] I find that the Ministry has not demonstrated that section 21 of FOIP applies to the redacted portions of the record. I recommend that the Ministry release the redacted portions of pages 34, 35, 58, 190, 191, and 196.

4. Did the Ministry conduct a reasonable search for records?

[25] FOIP does not require a government institution to provide with absolute certainty that records responsive to an access to information request do not exist. It must, however, demonstrate that it has conducted a reasonable search to locate them.

[26] A reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the request. A reasonable effort is the level of effort you would expect of any fair, sensible person

searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances.

[27] When conducting a review of a government institution's search efforts, details are requested that help my office understand the level of effort made to locate the records. The submission to my office should outline the search strategy, which can include:

- For personal information requests – explain how the individual is involved with the public body (i.e. client, employee, former employee etc.) and why certain departments/divisions/branches were included in the search.
- For general requests - tie the subject matter of the request to the departments/divisions/branches included in the search. In other words, explain why certain areas were searched and not others.
- Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
- Explain how the records management system is organized (both paper & electronic) in the departments/divisions/branches included in the search:
 - Describe how records are classified within the records management system. For example, are the records classified by:
 - alphabet
 - year
 - function
 - subject
 - Consider providing a copy of your organizations record schedule and screen shots of the electronic directory (folders & subfolders). If the record has been destroyed, provide copies of record schedules and/or destruction certificates
 - Explain how you have considered records stored off-site.
 - Explain how records that may be in the possession of a third party but in the public body's control have been searched such as a contractor or information service provider.
 - Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).

- Which folders within the records management system were searched and explain how these folders link back to the subject matter requested?
 - For electronic folders – indicate what key terms were used to search if applicable.
- On what dates did each employee search?
- How long did the search take for each employee?
- What were the results of each employee’s search?
 - Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided. For more on this, see the IPC resource, Using Affidavits in a Review with the IPC available on our website.

[28] The above list is meant to be a guide. Each case will require different search strategies and details depending on the records requested.

[29] In its submission, the Ministry explained that it had a Programs Clerk and a Medical Administrative Clerk conduct the search. Since the Applicant was not incarcerated at the time of the access request, the Admitting and Program file would have been on-site and in their “Records Room”. They searched the files in the Records Room as well as the medical file in the Medical Clinic. Furthermore, they searched the Criminal Justice Information Management System (CJIMS) and printed the incident reports.

[30] In a letter dated April 1, 2019 to my office, the Applicant described why they believed additional records exist. First, the Applicant asserted that the records provided to them did not include a copy of the two requests for information, both dated “October 21st”. Second, the Applicant asserted that they did not receive any audio or video records, even though they did not provide any details of the audio and/or video they sought. Their letter read as follows:

The records didn't include a copy of 2 October 21st requests for information. I don't have a copy of the requests because I was in custody, they restrict paper and I believed they're obligated to keep a copy. I didn't write the October 25th request they quoted in their response and it's different than what I wrote 4 days earlier. My request included

a notice of their error and a written record of their willful refusal to update my proven legal name causing known emotional suffering. The requests are useful evidence for the purpose of civil litigation.

The records didn't include any audio or video and the response didn't deny the existence of audio and/or video. I have reason to believe both exist. I can provide details of the times and locations but I prefer a blanket request because I know trustees omit a record if they believe I don't know it exists. My understanding is their audiovisual records are flagged for retention and indexed by name of subjects involved and they are able to find all audiovisual records relating to me. Their response cited FOIP s.15(1)(m) and my interpretation of it is that the location of cameras/mics isn't sufficiently revealing. SCC posts signs that audio may be recorded anywhere and cameras are visible. SCC employees also verbally commented to me on the existence of microphones and withdrew to areas without mics to have intimidating "fucking" tough guy conversations. As such SCC doesn't protect the location or existence of audiovisual recorders.

Audio recordings of multiple discipline panel hearings weren't included and it's unknown what grounds justify omission.

- [31] To address the Applicant's first reason for believing not all records were provided, I note that pages 179 to 182 contains two 2-page letters by the Applicant requesting information to the Director of the Saskatoon Correctional Centre. These pages were released to the Applicant in their entirety.
- [32] To address the Applicant's second reason for believing not all records were provided, the Ministry indicated that since the access request specified "Admitting, Medical & Program", that is where it searched for records. The Ministry also indicated to my office that the Applicant's understanding of audio and/or visual records being indexed by subjects involved is not accurate. Audio and/or visual records are indexed by date, time, and unit. The Ministry also asserted that the Applicant has submitted previous access requests to it where they had specified date, approximate time, and the unit of the audio/visual records they sought. My office's expectation is that government institutions make reasonable, not heroic, efforts to search for records. Without providing any date and/or time of the audio and/or visual records sought, then it is unreasonable to expect the Ministry to search through all its audio and/or visual records to determine if any audio/visual records are responsive to the Applicant's access request.

[33] I find that the Ministry has made a reasonable search for records to respond to the Applicant's access request. If the Applicant wishes to request access to audio and/or visual records, then the Applicant should submit another access to information request. The access request should provide details of the audio and/or visual records, especially since they state in their April 1, 2019 letter that they can provide details of the time and location of the audio and/or visual records they seek.

IV FINDINGS

[34] I find that FOIP applies and I have jurisdiction to review this matter.

[35] I find that the Ministry appropriately applied subsection 29(1) of FOIP.

[36] I find that the Ministry has not demonstrated that section 21 of FOIP applies.

[37] I find that the Ministry has made a reasonable search for records to respond to the Applicant's access request.

V RECOMMENDATION

[38] I recommend that the Ministry continue to withhold the redacted portions of pages 34, 35, 58, 190, 191, and 196 that it withheld under subsection 29(1) of FOIP.

[39] I recommend that the Ministry release the redacted portions of pages 34, 35, 58, 190, 191, and 196 that it had withheld under section 21 of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 12th day of February, 2020.

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