



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **REVIEW REPORT 149-2017**

### **Ministry of Social Services**

**August 6, 2019**

#### **Summary:**

The Ministry of Social Services asserted that a May 5, 2017 request for information submitted by a lawyer on behalf of his client was not a formal Access to Information request pursuant to *The Freedom of Information and Protection of Privacy Act* (FOIP) and that the Commissioner does not have jurisdiction to review records that fall under section 74 of *The Child and Family Services Act* (CFSA). The Commissioner found that the May 5, 2017 letter had all the elements to make it a formal request under FOIP. Further, the Commissioner found he has the authority to conduct a review of records that may be subject to section 74 of the CFSA as provided for in subsection 23(3)(c) of FOIP. Finally, the Commissioner found that Social Service's September 25, 2017 response did not meet the mandatory requirements under section 7 of FOIP. The Commissioner recommended that Social Services amend its process to only use the prescribed form in FOIP and amend its response letters for requests for records that may fall under section 74 of the CFSA to include language provided by the Commissioner in this report.

#### **I BACKGROUND**

[1] A lawyer submitted a written request for information on behalf of his client (Applicant) by letter dated May 5, 2017, to the Ministry of Social Services (Social Services). The letter was requesting access to all information in the possession of Social Services related to the Applicant's deceased child (child).

[2] By letter dated May 11, 2017, a lawyer representing Social Services responded to the request noting, in part:

...First, please know that the circumstances of [child]'s death are already the subject of a Claim brought by your client, [Applicant] and his mother....

Related to the above, any exchange of information must now take part within the context of the existing Claim....

[3] I note the May 11, 2017 letter did not advise the Applicant of the right to Request a Review by my office.

[4] On July 11, 2017, the Applicant requested a review of Social Services' November 26, 2014 response to a different access to information request. Through conversations with an Early Resolution Officer in my office, the Applicant was informed that this office cannot review matters more than a year old. The Applicant advised my office that the request for review package included an access to information request made in May of 2017.

[5] My office suggested that the Applicant submit a Request for Review related to the information requested from Social Services on May 5, 2017. In response, the Applicant emailed my office stating, in part:

Also if your office could look at my latest attempt at getting information from the Ministry of Social Services made by my lawyer [Applicant] to ensure once again that they followed the rules regarding the freedom of information [sic] that I am entitled to as the biological [parent/Applicant] of [child]....

[6] On July 27, 2017, my office notified the Applicant, the lawyer and Social Services of our intention to undertake a review of this matter pursuant to Part VII of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[7] On September 25, 2017, Social Services provided the Applicant with some information, withholding a portion of the records pursuant to subsection 74(1) of *The Child and Family Services Act* (CFSA).

## II RECORDS AT ISSUE

[8] There are no records at issue in this review. My office will be looking at the issue of whether the written request should have been processed as a formal Access to Information Request under FOIP, if this office has the authority to conduct a review of records that may be subject to section 74 of the CFSA as provided for in subsection 23(3)(c) of FOIP, and if Social Services provided an appropriate section 7 response under FOIP.

## III DISCUSSION OF THE ISSUES

### 1. Do I have jurisdiction?

[9] Social Services is a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Thus, I have authority to conduct this review.

### 2. Was this a formal access to information request pursuant to section 5 of FOIP?

[10] Section 5 of FOIP provides:

**5** Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the possession or under the control of a government institution.

[11] Subsection 6(1) of FOIP outlines what is required of an Applicant when making a formal access to information request. Subsection 6(1) of FOIP provides:

**6(1)** An applicant shall:

(a) make the application in the prescribed form to the government institution in which the record containing the information is kept; and

(b) specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject-matter to identify the record.

[12] The prescribed form is *Form A* found in Part II of the FOIP Regulations. The particulars found in the Access to Information Request Form include:

- first and last name,
- name of organization or company (if applicable),
- mailing address,
- phone number,
- email address,
- the type of information being requested (personal or general),
- the government institution the request is being made to,
- the records being requested,
- the time period of the request, and
- signature of applicant.

[13] In Review Report 223-2018 (Rural Municipality of Blaine Lake #434), I commented on this issue:

[7] Form A in Part III of the LA FOIP [*The Local Authority Freedom of Information and Protection of Privacy Regulations*] Regulations is the prescribed form to be used by applicants in accordance with subsection 6(1). Form A requires that an applicant provide specific information about himself or herself and about the record(s) they are requesting from a local authority.

[8] In determining whether applicants can deviate from using Form A, it is necessary to consider the provisions contained in *The Interpretation Act, 1995*. This Act establishes general rules that govern the interpretation of all statutory instruments in the province of Saskatchewan. It defines words commonly used in legislation. Of particular interest in this case is the interpretation provided regarding prescribed forms:

**26(1)** When a form is prescribed by or pursuant to an enactment, deviations from it that do not affect the substance and are not calculated to mislead do not invalidate the form used.

[9] The Saskatchewan Government has tabled Bill 155, *An Act respecting Statutes and Regulations and making consequential amendments to certain Acts*, which if passed, will replace *The Interpretation Act, 1995*. However, like *The Interpretation Act, 1995*, Bill 155 will continue to provide an interpretation for what constitutes deviations from required forms:

**Deviation from required form**

**2-26** In an enactment required the use of a specified form, deviations from the form do not invalidate the form used if:

- (a) the deviations do not affect the substance;
- (b) the deviations are not likely to mislead; and
- (c) the form used is organized in the same way or substantially the same way as the form the use of which is required.

[10] Subsection 26(1) of *The Interpretation Act, 1995*, and subsection 2-26 of Bill 155 which will come into force later, clearly provide that it is not mandatory for an individual to use the prescribed form in Part III of LA FOIP Regulations to make an application for access to information to a local authority. As long as the substance or intent of a written request is clear and it contains the information that would otherwise be provided via the prescribed form, such a request would be considered an *application* pursuant to subsection 6(1) of LA FOIP.

[11] Matters related to whether or not an individual must use a prescribed form have been previously examined. For example, in the federal court decision *Mitchell v. Canada* (2003), an individual submitted a letter to the Canada Revenue Agency (CRA) to seek a reassessment in accordance with the *Income Tax Act*, rather than use the prescribed form.

[12] The judge in *Mitchell v. Canada* (2003), drawing on section 23 of the *Interpretation Act*, R.S.C. 1985, C-I-21, concluded that the CRA is obliged to treat any document, including a letter, sent to their organization in the place of the prescribed form provided it contains the necessary information.

[14] It should be noted that Bill 155 received royal assent and came into force on May 15, 2019.

[15] In this case, the request for information was sent to Social Services by letter dated May 5, 2017, and was addressed to two officials – one of which works in the branch of Social Services that processes formal access to information requests and requests for information under the CFSA. The letter was from the Applicant’s lawyer. Some of the language from the May 5, 2017 letter included:

...[Applicant] has indicated to me that he sent a Request for Information with respect to his [child], who was a minor at the time of his passing, and was not provided with the information that he had requested.

We are requesting to be provided with any and all documentation in the Ministry’s possession in relation to [child], if any of this documentation is comingled with other party’s information, we request the comingled information be vetted, and the totality of the information be released to our office. If there is a fee for the documents being

vetted, please provide us with an estimate before you undertake and complete the work....

[16] In its submission, Social Services stated:

On September 2, 2016 a claim was brought in the Court of Queen's Bench Judicial Centre of [City] by [law firm 1] on behalf of [Applicant and Applicant's mother] against the Government of Saskatchewan in relation to the death of [Applicant]'s son, [child].

On May 5, 2017 [lawyer] of [law firm 2] wrote to the Ministry of Social Services requesting: "any and all information documentation in the Ministry's possession in relation to [child]" and specifically "information providing the exact dates that contact was made with your office with respect to [child], or his biological mother, [mother], inclusive of any home visits, notes from visits, copies of any reports made by investigators, the total amount of phone calls received by the public or third parties with respect to [mother] ability to care for the deceased, and any all relevant documentation." The letter includes an authorization made by [Applicant] to release information "to be utilized to assist in establishing entitlement to compensation by way of litigation process."

On May 11, 2017 [name], Senior Crown Counsel on behalf of the Government of Saskatchewan responded to [law firm 2] informing [law firm 2] that the circumstances of [child]'s death are already the subject of a claim initially brought by [law firm 1] and suggested that to avoid the potential for a multiplicity of proceedings that [law firm 2] discuss with his client either discontinuing the existing claim, making an appropriate change of solicitor or working through the existing solicitor as the **exchange of information between counsel must take place within the context of the existing claim**. The letter further indicates that a similar request was made in 2014 and [applicant] was provided with information pursuant to section 74 of *The Child and Family Services Act*.

[Emphasis added]

[17] Social Services further asserts in its submission:

The Applicant requested CFSA information from MSS [Social Services] and was provided with CFSA information pursuant to s. 74 [of the CFSA] in 2014. Subsequent to this, and represented by [law firm 1], the Applicant commenced litigation against the Government of Saskatchewan. The litigation is on the same CFSA matter for which he requested information. While this matter was under active litigation, a lawyer from a different law firm ([law firm 2]) made the request for CFSA records that is the subject of the...Report, although the Applicant continued to retain the first lawyer. The Government filed a Statement of Defense and served it on [law firm 1] in July 2017. By letter dated September 25, 2017, MSS provided [law firm 2] with a copy of all the

records it could provide pursuant to s. 74 of the CFSA. In January 2018, the Applicant replaced [law firm 1] with a third lawyer. Although the FOIP process is distinct from the litigation process, there were no FOIP records (no non-CFSA records) requested in either of the two requests under s. 74. This context is important because, if the Applicant was not satisfied with the CFSA information or records provided pursuant to s. 74, the discovery and disclosure provisions of *The Queen's Bench Rules* are also available to him.

[18] I will be addressing whether my office has the jurisdiction to review an access to information request that include records that may fall under section 74 of the CFSA in the next part of this Report.

[19] Although there has been a Statement of Claim issued against Social Services, the Statement of Claim is a separate process from FOIP. The right of access under FOIP is not hindered because there may be a court proceeding in place. In Review Report 223-2015 and 224-2015, I noted:

[19] Discovery and disclosure provisions of the *Rules of the Court of Queen's Bench* of Saskatchewan operated independent of any process under LA FOIP [*The Local Authority Freedom of Information and Protection of Privacy Act*]....

[20] The Court discovery and disclosure process can include conditions that prevent the documents from being shared outside of the solicitor-client relationship. These conditions can prevent individuals from retaining copies of the information or disseminating the information. That may be the reason an individual who is in a court process chooses to also use the FOIP process to obtain as much of the record as possible. FOIP places no limits on what individuals do with a record once they receive it.

[21] From a review of the May 5, 2017 letter, the language included in the letter and who the letter was addressed to, Social Services should have, at the very least contacted the lawyer to clarify his intentions with the request and whether or not he intended for it to be treated as a formal request under FOIP. It did not and instead forwarded it to the Justice lawyer who is part of the litigation process.

[22] I do note that Social Services has asserted that the May 5, 2017 letter included an authorization made by [Applicant] to release information “to be utilized to assist in establishing entitlement to compensation by way of litigation process.” However, the Applicant clearly thought that the request was a formal access to information request under FOIP as he exercised his right to request a review by my office. At that point, Social Services could have remedied the situation and clarified the Applicant’s confusion about the two processes by processing it as a formal request under FOIP. However, it did not.

[23] In addition, any confusion Social Services may have had arising from the letter – for example who is representing the Applicant in the statement of claim - should have been treated as a separate issue.

[24] I would also like to note that by letter dated September 25, 2017, once this review commenced, Social Services responded to the Applicant with some records. This response letter, in part, noted:

...Please find attached records responsive to your request. Please note that, some of the information contained in the attached records has been severed pursuant to section 74(1) of The Child and Family Services Act....

[25] Of important note is when an individual makes a formal access to information request, a series of rights are triggered in relation to the access request. Section 7 of FOIP outlines the response requirements by a public body when responding to an access to information request. Subsection 7(3) of FOIP provides:

**7(3)** A notice given pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

[26] Should an applicant exercise their right to a review by my office, once a report of the Commissioner has been issued and the head of the public body provides a decision regarding the report, an applicant has 30 days to appeal the decision to the Court of Queen’s Bench. Subsection 57(1) of FOIP provides:

**57(1)** Within 30 days after receiving a decision of the head pursuant to section 56 an applicant or individual or a third party may appeal that decision to the court.



- [27] In its submission, Social Services maintains that the Applicant was already in litigation, so has access to court processes for gaining access to documents that are the subject of litigation, in addition to any documents he could access under section 74 of the CFSA. The Ministry also notes that the Applicant had the option of making an application for judicial review of the exercise of discretion by Social Services.
- [28] The Applicant appears to have many court processes available to him. However, the Court process under FOIP is completely and distinctly separate from the other Court processes which he is already engaged in. Further, there is no reason that at any given time an individual cannot be involved in multiple court processes. Proceeding with one does not take away an individual's right to proceed with another.
- [29] Finally, through the course of this review, I became aware of forms that Social Services provides its clients to access information under the CFSA as the Applicant initially made the request on an internal Social Services form - the *Child & Family Service Information Request Form* (CFSA Information Request Form). I reviewed the forms that are prescribed in the CFSA Regulations, and this form is not prescribed. However, it is significantly similar to Form A (Access to Information Request Form) that is a prescribed form in the FOIP Regulations. The two forms share similarity in their appearance and in the information each form requires.
- [30] The CFSA Information Request Form does not reference the right to access records under FOIP. Therefore, this raises more concerns that citizens are not aware of their rights afforded under FOIP because they are being ushered into a separate process under the CFSA. The underlying purpose of FOIP legislation is open, transparent and accountable government, however Social Services has created a separate, and in my opinion, confusing process.
- [31] My office met with Social Services on November 14, 2018, to learn more about its internal access processes and to see if it could modify those processes to advise applicants of their rights under FOIP. Unfortunately, in response to that meeting, Social Services advised my office that it has decided not to change its current processes.

[32] Social Services' decision is disappointing and goes against the underlying purpose of FOIP.

[33] Because of this, I would encourage individuals wishing to access records from Social Services to complete the formal Access to Information Request Form that is prescribed in the FOIP Regulations and submit it to Social Services. Then, if Social Services does not respond under FOIP, the Applicant can request a review by my office. Both the Access to Information Request Form and the Request for Review Form can be found on the IPC website: [www.oipc.sk.ca](http://www.oipc.sk.ca).

[34] If Social Services continues to provide the CFSA Information Request Form, I will treat such a form as an access request under FOIP and when a request for review occurs I will analyze the form under FOIP. But frankly, I would like to see Social Services do one of the following as it relates to the CFSA Form:

- 1) cease using it;
- 2) amend it so individuals are aware of the right to request a review by my office; and/or
- 3) amend it so individuals using it are made aware of the FOIP process so they can be fully informed and make their own choice as to which form and process they use.

[35] Social Services deals with the most vulnerable sector of individuals in this province – individuals who may not be fully aware of all the legislative rights afforded to them. It is Social Services responsibility to make these individuals aware of these rights.

[36] I find that the May 5, 2017 letter had all the elements to make it a formal request under FOIP.

**3. Does my office have jurisdiction to conduct a review of records that may be subject to section 74 of the CFSA as provided for in subsection 23(3)(c) of FOIP?**

[37] I will now determine if my office can conduct a review of records that may be subject to section 74 of the CFSA as provided for in subsection 23(3)(c) of FOIP.

[38] In its submission, Social Services asserts there is not a provision in FOIP that would allow my office to review CFSA records.

[39] The purpose of this provision is to ensure that FOIP prevails over other statutory provisions unless the records or information fall within the enumerated list of exclusions in subsection 23(3) of FOIP and section 12 of the FOIP Regulations. Subsections 23(1) and 23(3)(c) 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 it shall prevail.

...

(3) Subsection (1) does not apply to the following provisions, and those provisions prevail:

...

(c) section 74 of *The Child and Family Services Act*

[Emphasis added]

[40] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC), the Supreme Court of Canada (SCC) noted:

...The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament....

[41] This is a fundamental principle of statutory interpretation. A useful starting point therefore is to consider the general purpose of FOIP and the specific wording of section 23 of FOIP.

[42] In *General Motors Acceptance Corp. of Canada v Saskatchewan Government Insurance*, 1993 CanLII 9128 (SK CA), the Saskatchewan Court of Appeal described the overarching objects of FOIP as follows:

[11] The *Act's* basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. That is not to say that the statutory exemptions are of little or no significance. We recognize that they are intended to have a meaningful reach and application. The *Act* provides for specific exemptions to take care of potential abuses. There are legitimate privacy interests that could be harmed by release of certain types of information. Accordingly, specific exemptions have been delineated to achieve a workable balance between the competing interests. The *Act's* broad provisions for disclosure, coupled with specific exemptions, prescribe the "balance" struck between an individual's right to privacy and the basic policy of opening agency records and action to public scrutiny.

[43] Consistent with this overarching legislative purpose, subsection 23(1) of FOIP provides that "[where] a provision of any other Act...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 [FOIP]...the provisions of [FOIP]...shall prevail." Subsection 23(2) of FOIP entrenches this rule even further by providing that subsection 23(1) of FOIP applies notwithstanding any provision in the other Act that states the provision of that Act is to apply notwithstanding any other Act or law.

[44] Therefore, to the extent that there is a conflict, subsections 23(1) and (2) of FOIP are clearly intended to create a legislative hierarchy such that the provisions of FOIP *prevail* over the provisions of the other conflicting Act. In short, the legislature has drafted section 23 of FOIP to in a way that is described simply in *Sullivan on the Construction of Statutes* (Sullivan), 6<sup>th</sup> Edition (Toronto: LexisNexis Canada, 2014) at §11.42 "in cases where section x come into conflict with section y, section x prevails."

[45] Subsection 23(2) of FOIP states that this hierarchy is subject to subsection (3) of FOIP. Subsection 23(3) of FOIP provides that "[subsection] (1) does not apply to the following

provisions, and those provisions prevail...” and goes on to list section 74 of the CFSA among other specific provisions.

[46] By reason of subsection 23(2) subjecting itself to subsection (3), and subsection (3) referring back to subsection (1), these provisions are grouped together. As noted by Sullivan:

**§14.55 *Grouping of Provisions under headings.*** When provisions are grouped together under a heading it is presumed that they are related to one another in some particular way, that there is a shared subject or object or a common feature to the provisions. Conversely, the placement of provisions elsewhere, under a different heading, suggests the absence of such a relationship.

[47] Given the interrelation of these three clauses within the same provision, subsection 23(3) is clearly intended to have the effect of reversing the hierarchy established under subsections (1) and (2), but only in respect of certain specifically-listed provisions of other Acts (including section 74 of the CFSA). Only these listed provisions are exceptionally intended to *prevail* over any conflicting provision in FOIP and not the other way around as subsections (1) and (2) would otherwise have it.

[48] Subsections 23(1) and (3) of FOIP both refer to the term “prevail.” As noted by Sullivan at §8.32, “It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meanings....”

[49] In fact, the SCC has consistently applied this “presumption of consistent expression” in its interpretation of statutes. For examples, see *R v Zeolkowski* [1989] 1 SCR at para 19 and *Thomson v Canada (Deputy Minister of Agriculture)*, [1992] 1 SCR 385 at paras 26-28.

[50] As outlined in Sullivan at §8.35, where the same phrase is used in close proximity (in this case, within the same provision), the presumption is particularly strong. A plain reading of section 23 of FOIP supports the provision that “prevail” clearly means a provision of one Act having priority over a conflicting provision in another Act.

[51] It is evident on the face of the provision itself that subsection 23(3) of FOIP must be read together with the other subsections to infer clear meaning, “Subsection (1) does not apply to the following provisions, and those provisions prevail.” *Prevail* being a relative term, it is not otherwise possible to infer what the specific provisions listed in subsection 23(3) of FOIP are intended to prevail over without referring back to the hierarchy set up in subsection 23(1) of FOIP between conflicting provisions. As noted in Sullivan at §11.2:

**§11.2 Governing Principle:** It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contribute something toward accomplishing the intended goal.

[52] Taking the provisions in their entire context, there is no reason why – where a conflict does not exist – the provisions in these other Acts could not, and should not, co-exist with FOIP wherever both can be given meaningful effect in accordance with the legislature’s purposes. Such an interpretation of the harmonious interaction between section 23 of FOIP and section 74 of the CFSA also adhere to the principle of coherence between statutes. As stated by the SCC in *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 S.C.R. 591, 2007 SCC 14:

47 The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable. The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:

According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.

(P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)

[53] In contrast, the Ministry takes the position that subsection 23(3) of FOIP “is not made subject to subsection (1)” of the same provision, that “[they] are separate subsections”, that “s. 74 of the CFSA prevails regardless of whether there is conflict”, and that FOIP and s. 74 of the CFSA cannot both apply to CFSA records even “to the extent they can operate together”, ignores the fundamental principles of statutory interpretation as outlined above.

- [54] In *Ontario (Ministry of Community Safety & Correctional Services) v. Ontario (Information & Privacy Commissioner)*, 2014 SCC 31, the SCC was tasked with interpreting section 67 of the Ontario’s *Freedom of Information and Protection of Privacy Act* (Ontario’s FOIP), which is structured similarly to section 23 of FOIP. The SCC referred to section 67 of Ontario’s FOIP as “the mechanism the legislature chose to resolve any conflict.” The Court held that subsection 67(1) of Ontario’s FOIP sets out the general priority of it over other confidentiality provisions found in other legislation.
- [55] Accordingly, a government institution cannot refuse to disclose a record requested under Ontario’s FOIP on the basis that its governing legislation mandates that the information contained in the record be kept confidential, unless this other legislation specifically provides otherwise. Section 67(2) of Ontario’s FOIP, like subsection 23(3) of FOIP, then goes on to list specific confidentiality provisions found in other legislation which reverse the general priority rule and do prevail over Ontario’s FOIP.
- [56] The Ministry’s submissions state that section 74 of the CFSA “contains a complete code for the use and dissemination...of documents and information that have come into existence through anything done pursuant to the CFSA” and that this precludes the Commissioner from exercising his jurisdiction over CFSA records.
- [57] As outlined in Sullivan at §11.7 and §11.11, in order for a provision to be interpreted as exhaustive, it is not enough to show that the provision specifically addresses a particular matter. Rather, evidence that the provision is intended to be an exhaustive statement of the law concerning a matter is required.

**§11.7 Presumption of overlap.** When two provisions are applicable without conflict to the same facts, it is presumed that each is meant to operate fully according to its terms. So long as overlapping provisions *can* apply, it is presumed that they are meant to apply. The only issue for the court is whether the presumption is rebutted by evidence that one of the provisions was intended to apply exhaustively to facts of the sort in question.

...

**§11.11** Generally, a specific provision applies to the exclusion of a general one only if there is conflict between the two provisions or there is cogent evidence that the

legislature intended the more specific provision to be exhaustive. The fact that one provision is more general than another is not in itself evidence that the specific provision was intended to exclude the more general.

[58] In *Perron-Melefant v. Malenfant (Trustee of)*, [1999] 3 SCR 375 (at paragraphs 27 and 35), the SCC confirmed the following two-step analytic framework for determining intention in respect of exhaustive provisions:

- (i) review the legislative history and historical context of the provisions, paying particular attention to the legislative debates; and
- (ii) the provisions themselves are to be reviewed in the context of the legislation as a whole.

[59] Further, Sullivan at §11.20 outlines that the courts are to inquire whether the legislature turned its mind to every aspect of the matter and intended the provisions to be a comprehensive and exhaustive set of rules governing the matter.

[60] Section 3 of the CFSA outlines its general purpose and provides:

**3** The purpose of this Act is to promote the well-being of children in need of protection by offering, wherever appropriate, services that are designed to maintain, support and preserve the family in the least disruptive manner.

[61] Section 74 of the CFSA is found in Part IX, which deals with general matters and the provision itself has been broadly described as recognizing the confidentiality of children's records. In *Re W (E)*, 2012 SKCA 75, the Saskatchewan Court of Appeal stated that section 74 of the CFSA "imposes a general duty of confidentiality on the Government-side actors in the child protection system, but then goes on (by way of exception) to authorize particular individuals to divulge information in specified circumstances" and "[section] 74, as a whole, contemplates that otherwise confidential information may be divulged by difference actors pursuant to distinct authorities."

[62] As for the governance mechanisms and information-sharing agreements required to protect confidential records and the required processes to enable restricted access and disclosure, these are not contained, or even referenced within section 74 of the CFSA, but rather, are



prescribed elsewhere by way of regulation pursuant to section 80 of the CFSA. Had the legislature intended for these other governance and process-related provisions to also prevail over FOIP, *to the extent of any conflict*, it could have easily included section 80 of the CFSA among the enumerated “trumping” provisions in subsection 23(3) of FOIP.

[63] That the legislature chose not to do so undermines Social Services’ position that section 74 of the CFSA is a complete code with the effect of entirely ousting my office’s jurisdiction in relation to the CFSA.

[64] Part VII of FOIP establishes the broad jurisdiction of my office to review decisions of a head of a government institution pursuant to section 50 of FOIP. In conducting a review, my office may among other things, pursuant to section 54, require the production of records in the possession or control of a government institution and summon and enforce the appearance of a person and compel them to give oral or written evidence.

[65] My office may exercise its full jurisdiction in respect of matters over which there is no conflict between FOIP and section 74 of the CFSA. For example, section 74 of the CFSA does not conflict with subsection 7(2)(d) of FOIP, which requires the head of the Ministry to give written notice to the applicant within 30 days after the application is made stating that access is refused, setting out the reasons for the refusal, and identifying the specific provisions of FOIP on which the refusal is based. Similarly, there is no conflict between section 74 of the CFSA and subsection 7(3) of FOIP that requires the applicant to be notified of their right to request a review by the Commissioner within one year.

[66] In these cases, in the notification to the Applicant, the head of Social Service should advise that access is denied, citing subsection 23(3)(c) of FOIP and explain how these records fall under the confidentiality provisions of section 74 of the CFSA. Further, as required by subsection 7(3) of FOIP, the head must advise the Applicant of the right to review by my office.

[67] I may also recommend, pursuant to section 55 of FOIP, that Social Services disclose records that are outside the scope of section 74 of the CFSA in full or by way of severance.

For such purpose, I can interpret the CFSA as an external statute for the sole and narrow purpose of determining whether the records in question fall within or outside the bounds of section 74 and their resulting relationship *vis a vis* FOIP.

[68] This is entirely consistent with jurisprudence interpreting similar conflict-related provisions in other access to information and protection of privacy statutes. For example, the SCC held that it was not only reasonable, but required, for the Information and Privacy Commissioner of Ontario (Ontario OIPC) to interpret the provisions of an external statute (in this case, *Christopher's Law*) for the purpose of determining the interplay between it and her enabling statute (Ontario's FOIP). In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, [2014] 1 S.C.R. 674, the SCC notes:

[27] The Commissioner was required to interpret *Christopher's Law* in the course of applying FIPPA [Ontario's FOIP]. She had to interpret *Christopher's Law* for the narrow purpose of determining whether, as set out in s. 67 of FIPPA, it contained a "confidentiality provision" that "specifically provides" that it prevails over FIPPA. **This task was intimately connected to her core functions under FIPPA** relating to access to information and privacy and involved interpreting provisions in *Christopher's Law* "closely connected" to her functions.

[Emphasis added]

[69] Moreover, the SCC found that the Commissioner's conclusion was owed deference in this regard and was reviewable on a standard of reasonableness.

[70] In *Ontario (Minister of Health) v. Holly Big Canoe*, 1995 CanLII 512 (ON CA) (*Big Canoe*), the Ontario Court of Appeal held that records claimed to be excluded from the purview of Ontario's FOIP are nonetheless subject to the jurisdiction of the OIPC for the purpose of determining preliminary jurisdictional issues. The Ontario Court of Appeal wrote:

It is common ground (1) that the Commissioner is empowered under the *Freedom of Information and Protection of Privacy Act* to entertain the appeal of the requestor in this case and commence the inquiry to review the decision of the head of the institution as provided for in s. 52(1) under Part IV of the Act; and (2) that the Commissioner is authorized to determine, as a preliminary issue going to the Commissioner's jurisdiction

to continue the inquiry, whether the records sought by the requester fall within the scope of s.65(2) of the Act. It is also acknowledged that the Commissioner's determination of this preliminary jurisdictional issue is subject to judicial review on a standard of correctness.

[71] The Ontario Court of Appeal went further by affirming that the Commissioner is not precluded from requiring production of the relevant records in question for the purpose of determining this preliminary jurisdictional issue.

[72] In response to my draft report, Social Services cites *British Columbia (Information and Privacy Commission v British Columbia (Police Complaint Commissioner)*, 2015 BCSC 1538 (*BC Case*) which Social Services contends is now indicative that the courts are moving away from the reasoning in *Big Canoe*.

[73] I would like to note that the *BC Case* is a lower court decision. *Big Canoe* is an Ontario Court of Appeal decision and no appellate court has reversed *Big Canoe*.

[74] Several important factors distinguish the *BC Case* from the present situation. One of the main distinctions is in terms of statutory differences, as the provision under study in that case (section 182 of the *Police Act*) was an all-out exclusion from BC's *Freedom of Information and Protection of Privacy Act (BC FIPPA)*; it was not a hierarchy-establishing provision which designates which law should prevail in the event of conflict.

[75] If we also look at this issue through the lens of FOIP's protection of privacy provisions, there are several situations, for instance, where additional privacy safeguards available under FOIP would not at all conflict with the provisions of section 74 of the CFSA. In fact, they could very logically co-exist and help complement the confidentiality protections afforded to records under section 74 of the CFSA.

[76] For example, Social Services' duty to protect personal information pursuant to section 24.1 can help further the privacy and confidentiality of section 74 of the CFSA records. Section 24.1 of FOIP provides:

**24.1** Subject to the regulations, a government institution shall establish policies and procedures to maintain administrative, technical and physical safeguards that:

(a) protect the integrity, accuracy and confidentiality of the personal information in its possession or under its control;

(b) protect against any reasonably anticipated:

(i) threat or hazard to the security or integrity of the personal information in its possession or under its control;

(ii) loss of the personal information in its possession or under its control; or

(iii) unauthorized access to or use, disclosure or modification of the personal information in its possession or under its control; and

(c) otherwise ensure compliance with this Act by its employees.

[77] Likewise, Social Service's obligation to limit the collection of personal information under section 25 of FOIP and to collect personal information directly from the individual wherever reasonably practical as provided for in section 26 of FOIP can also co-exist and help support the intention to protect the confidentiality of section 74 of the CFSA records.

[78] Further, section 29.1 of FOIP requires a public body to notify an individual of a breach of privacy where, "...it is reasonable in the circumstances to believe that the incident creates a real risk of significant harm to the individual." There is no reason why section 29.1 of FOIP and section 74 of the CFSA cannot work harmoniously. In fact, a breach notification obligation would enhance the privacy protection of individuals potentially affected by the unauthorized disclosure of section 74 of the CFSA records by allowing them to take the necessary mitigating steps to reduce harm and/or seek timely restitution for damages resulting from the breach.

[79] The contention that all of these privacy-enhancing provisions of FOIP should be ousted and find no application in safeguarding section 74 child protection records when in fact no statutory conflict arises would respectfully be absurd. Instead of strengthening Social Service's privacy obligations with respect to these highly sensitive records, the statutory interpretation being put forward by removing these records from FOIP altogether (even in

the absence of conflict) would actually lessen Social Services obligations relative to other government institutions.

[80] Do the province's most sensitive records not deserve the same protection of privacy measures as other records containing personal information? One would be remiss to answer that question in the negative. I am of the opinion that these records deserve all of the protection that FOIP can offer.

[81] The above case law supports my office can review access to information requests of records that may fall under subsection 23(3)(c) of FOIP.

[82] In these instances, my office will request a submission from Social Services that demonstrates how the records fall under section 74 of the CFSA and how section 74 of the CFSA prevails in the particular circumstance. In the case of a review, Social Services should satisfactorily demonstrate how section 74 of the CFSA applies to the records in question and provide sufficient detail to my office in its submission to show that the records are subject to provisions under section 74 of the CFSA.

[83] During these reviews, I will exercise my statutory power in a fair and reasonable manner, requiring the production of records on a necessary and incremental basis for the sole purpose of determining whether the records fall within the scope of section 74 of the CFSA.

[84] In cases where it is evident on its face that section 74 of the CFSA does fully apply to the records in question, I would refrain from compelling the production of the contested records provided the evidence put forward by Social Services establishes on a *prima facie* case, that the records fall within section 74 of the CFSA.

[85] I would like to note that in circumstances that Social Services successfully demonstrates to my office that section 74 of the CFSA applies to the records in question, it is outside of my jurisdiction to review the section 74 discretionary powers of the Minister of Social Services or a director when administering the CFSA. My role is only to determine if the records do fall under the confidentiality provisions outlined in the CFSA. In cases where Social

Service's has not successfully demonstrated that section 74 of the CFSA applies to the records, I would consider if it is necessary to use my powers to compel records as provided for in section 54 of FOIP.

[86] However, assuming that Social Services cooperates in this process, I am hopeful this would be the exception and not the rule.

[87] For clarity to individuals requesting any information, I recommend Social Services amend its process to only use the prescribed form in FOIP. Further that applicants are made aware of their right to request a review by my office.

[88] I find I have the authority to conduct a review of records that may be subject to section 74 of the CFSA as provided for in subsection 23(3)(c) of FOIP.

#### **4. Did Social Services provide an appropriate section 7 response to the Applicant?**

[89] Social Services responded to the Applicant's request on September 25, 2017, once my office commenced the review. It provided the Applicant with access to a portion of the records.

[90] Subsections 7(2) and (3) of FOIP provide:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

(a) stating that access to the record or part of it will be given on payment of the prescribed fee and setting out the place where, or manner in which, access will be available;

(b) if the record requested is published, referring the applicant to the publication;

(c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;

(d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;

(e) stating that access is refused for the reason that the record does not exist;

(f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4); or

(g) stating that the request has been disregarded pursuant to section 45.1, and setting out the reason for which the request was disregarded.

(3) A notice given pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

[91] Social Services provided partial access to the records requested after the review commenced.

It stated, in part:

...some of the information contained in the attached records has been severed pursuant to section 74(1) of The Child and Family Services Act (CFSA)....

[92] In its response, Social Services did not make reference to subsection 23(3)(c) of FOIP. Therefore, the Applicant was not able to see the linkage between subsection 23(3)(c) of FOIP and section 74 of the CFSA.

[93] In addition, Social Service's response did not advise the Applicant of the right to request a review by my office. This is a mandatory requirement of all of subsection 7(2) of FOIP responses.

[94] Going forward, I recommend Social Services amend its responses to access to information requests for records that may fall under section 74 of the CFSA, to include language such as this:

**Sample wording**

Subsection 23(1) of FOIP outlines that FOIP prevails over other statutes when there is a conflict in regards to accessing information. However, subsection 23(3) of FOIP outlines the exceptions to that rule. Specifically, subsection 23(3)(c) of FOIP provides that the confidentiality provisions found in section 74 of the CFSA prevails and you have requested records that fall under the confidentiality provisions found within section 74 of the CFSA. Therefore, access to the records are governed pursuant to section 74 of the CFSA.

This notice has been provided to you pursuant to section 7 of FOIP.

If you would like to request a review of this decision, you may file a request for review with the Office of the Information and Privacy Commissioner within one year from the date of this letter....

[95] I find that Social Service's September 25, 2017 response did not meet the mandatory requirements under section 7 of FOIP.

[96] Throughout this review, Social Services has made submissions that my office does not have jurisdiction to review this matter. I have been given oversight of FOIP by the Legislative Assembly and am of the opinion that my office has jurisdiction. I accept that my conclusion in this Report may have to be tested in court in due course. It would appear that my office and Social Services have reach a fundamental disagreement which may only be resolved by a higher authority.

[97] As such, I would refer to paragraphs [65] and [69] of *Stebner v Canadian Broadcasting Corporation*, 2019 SKQB 91 (CanLII).

[65] Also see *Ontario (Minister of Health and Long-Term Care) v Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 OR (3d) 321 at para 28 (Ont. CA). That case was decided in the context of a disclosure issue. The conclusion was that the Ontario Privacy Commissioner should enjoy significant deference.

[28]...**One of the principles the Act is expressly founded on is that disclosure decisions should be reviewed independently of government.** It creates the office of the Commissioner to deliver on that principle and gives to the Commissioner broad and unique powers of inquiry to review those decisions. It constitutes the Commissioner as a specialized decision maker. **In my view, this implies that the legislature sees the Commissioner as the appropriate reviewer of disclosure decisions by government. The very structuring of the office and the specialized tools given to it to discharge one of the Acts' explicit objectives suggests that the courts should exercise deference in relation to the Commissioner's decisions.**

[Emphasis in original]

...

[69] No. Judges, arbitrators, tribunal members and independent Crown officers such as the Commissioner must decide matters based on legal principles applied to the facts before them. That a decision might be unpopular (whether on a singular or widespread basis) is entirely beside the point. From my review, one of the hallmarks of



Saskatchewan's Commissioner has been his steadfast independence and freedom from influence. He calls them as he sees them. This must continue.

[98] I am hopeful that Social Services will take Justice Danyliuk's comments in this decision into consideration now that I have found that my office can review files where records may fall under subsection 23(3)(c) of FOIP and section 74 of the CFSA.

[99] As such, I will move forward with the Applicant's review of the records at issue in OIPC file 254-2017. My office will send Social Services an updated notification outlining what we require to conduct the review. I trust Social Services will fully cooperate as I move forward.

#### **IV FINDINGS**

[100] I find that the May 5, 2017 letter had all the elements to make it a formal request under FOIP.

[101] I find I have the authority to conduct a review of records that may be subject to section 74 of the CFSA as provided for subsection 23(3)(c) of FOIP.

[102] I find that Social Service's September 25, 2017 response did not meet the mandatory requirements under section 7 of FOIP.

#### **V RECOMMENDATIONS**

[103] I recommend that Social Services amend its process to only use the prescribed form in FOIP.

[104] I recommend Social Services amend its response letters for request for records that may fall under section 74 of the CFSA to include language outlined in paragraph [94].

Dated at Regina, in the Province of Saskatchewan, this 6th day of August, 2019.

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