



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **REVIEW REPORT 150-2018**

### **Ministry of Social Services**

**February 24, 2020**

#### **Summary**

The Ministry of Social Services (Social Services) received an access to information request from the Applicant for childhood placements in care and court orders from 1954 to 1970. Social Services responded to the Applicant advising that the information had been destroyed. The Applicant requested a review by the Commissioner. Upon review, Social Services asserted the Commissioner did not have jurisdiction to conduct the review and that the request submitted by the Applicant was not a request under *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that requests submitted to Social Services on its *Child and Family Programs Access to Information Request* forms qualify as access requests pursuant to subsection 6(1) of FOIP. Further, the Commissioner found that the Commissioner had jurisdiction to conduct a review of Social Services' search efforts pursuant to subsections 49(1)(a) and 50(1) of FOIP. Finally, the Commissioner found that because no details were provided by Social Services, its search was not reasonable or adequate for purposes of FOIP. The Commissioner recommended Social Services conduct its search again and provide details of its search efforts to the Applicant including how it arrived at the conclusion the Applicant's records were destroyed. The Commissioner also recommended Social Services amend its process to only use the prescribed *Form A* in *The Freedom of Information and Protection of Privacy Regulations* and change its response letters so applicants are always informed of the right to request a review by the Commissioner. Lastly, the Commissioner recommended that Social Services work with the Ministry of Justice and the Commissioner's office to amend FOIP and repeal subsection 23(3)(c) of FOIP.

## I BACKGROUND

[1] On May 28, 2018, the Ministry of Social Services (Social Services) received the following access to information request from the Applicant:

[Child & Family Services] Court Orders

[Child & Family Services] Placements

Nov. 1954 – Dec. 31 1970

[2] By letter dated June 14, 2018, Social Services provided a response to the Applicant. The letter advised that an extensive search for records had been completed and Social Services was unable to locate any paper files in the Applicant's name. Further, that its computer system indicated that while a file did exist at one time, from October 1968 to December 1972 in Regina, it has since been destroyed. In addition, it added, that the record management practices changed significantly in the 1980's; records prior to that were not kept according to extended retention schedules. The response also included notice that the Applicant could exercise the right to request a review by my office pursuant to subsection 49(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On July 28, 2018, my office received a request for review from the Applicant. The request indicated that records did not exist or could not be found and that the Applicant wanted a review of that decision.

[4] On August 13, 2018, my office notified Social Services and the Applicant of my office's intent to undertake a review. My office requested that Social Services explain how it searched for the requested records. Further, my office raised the issue that the access to information request was completed on a form other than the one prescribed in *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). My office requested that Social Services explain the purpose of the form and how it complied with FOIP. Finally, my office asked that Social Services explain how it processes requests for information that are deemed to fall under section 74 of *The Child and Family Services Act* (CFSA).

- [5] On September 12, 2018, my office received a submission from Social Services. In the submission, Social Services challenged my office's jurisdiction to conduct the review. Its position, it explained, was based on its view that the access to information request was not made in accordance with Part II of FOIP, but rather a request made outside of the terms of FOIP.
- [6] On August 6, 2019, I issued Review Report 149-2017. That report involved Social Services and a review of a similar jurisdictional issue. Social Services asserted that a request for information submitted by an applicant was not a formal access to information request under FOIP and that I did not have jurisdiction to review records that fell under section 74 of the CFSA. Upon review, I found that the request for information had all the elements to make it a formal request under FOIP. Further, that my office had the authority to conduct a review of records that may be subject to section 74 of the CFSA.
- [7] On October 8, 2019, my office contacted Social Services and inquired if its position had changed in terms of this review in lieu of the above report. On October 10, 2019, Social Services advised it was preparing a submission for my office.
- [8] On January 29, 2020, I issued Review Report 254-2017. The report involved Social Services and was a continuation of Review Report 149-2017. I considered whether section 74 of the CFSA applied to the records at issue and whether section 74 precluded my office from reviewing the records. I found that Social Services failed to demonstrate that section 74 of the CFSA applied to the records. I also found that Social Services was not cooperating with my office.
- [9] On February 5, 2020, my office again contacted Social Services to see if an amended submission was coming. My office advised that if nothing was coming, my office would proceed under the understanding that Social Services had not changed its position despite Review Reports 149-2017 and 254-2017.

[10] On February 7, 2020, Social Services responded with a supplementary submission indicating that its position had not changed.

## II RECORDS AT ISSUE

[11] There are no records at issue in this review. Social Services has asserted the records were destroyed.

[12] In similar situations, my office would conduct a review of the government institution's search efforts that led it to its conclusion that no records existed. However, Social Services is asserting FOIP does not apply.

[13] Therefore, this review will examine two issues. One, whether the written request submitted by the Applicant to Social Services constituted an access request under FOIP and, two, if my office has jurisdiction to conduct a review of Social Services' search efforts.

## III DISCUSSION OF THE ISSUES

### 1. Are access requests submitted to Social Services on its own form still access requests under FOIP?

[14] In the early stages of requesting access, the Applicant called Social Services to find out how to make the request. According to the Applicant, Social Services emailed a form to the Applicant to complete. It was not the prescribed *Form A* found under Part II of the FOIP Regulations. Rather, it was a form created by Social Services titled, *Child and Family Programs Access to Information Request*.

[15] Social Services created the form and a secondary process outside of FOIP for access requests deemed to involve Child and Family Program records. In its submission to my office, Social Services stated:

The Ministry takes the position that the May 28, 2018 application was not an application made in accordance with Part II of [FOIP], but rather a request made outside of the terms of FOI. As these types of requests are outside of FOI, the Ministry has developed a request form specific to Child and Family Program (CFP) access requests...

[16] As noted earlier, I addressed the issue of non-prescribed forms in Review Reports 149-2017 and 254-2017. I will reproduce some of the key points from that analysis.

[17] Subsection 6(1) of FOIP outlines what is required of an applicant when making an access to information request to a government institution:

**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.

[18] The prescribed form mentioned in subsection 6(1)(a) of FOIP is *Form A* in the FOIP Regulations. The particulars required on *Form A* 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 the applicant.

[19] Subsection 2-26 of *The Legislation Act*, SS 2019, c L-10.2 provides that it is not mandatory for an individual to use a prescribed form provided certain criteria are met. Subsection 2-26 provides:

**2-26** If an enactment requires the use of a specified form, deviations from the form do not invalidate a 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.

[20] By creating a separate form, Social Services has not removed these access requests from the scope of FOIP. Regardless of what form is submitted by an applicant, FOIP is engaged when the request includes the elements of *Form A* and is recognized as a request for access to information. By creating its own separate process and form, Social Services is deciding in advance, independently, when FOIP applies and when it does not and is attempting to remove an applicant's right to have that decision reviewed by the Commissioner. This is especially concerning given that applicants are not aware of FOIP and the rights and obligations contained within it.

[21] It is clear that the form developed by Social Services requires the same elements as *Form A*. In its submission to my office, Social Services appears to agree as it states, "the personal information collected on this form is substantively similar to the information collected" on *Form A*.

[22] Therefore, I find that all access requests submitted to Social Services on its *Child and Family Programs Access to Information Request* forms qualify as access requests pursuant subsection 6(1) of FOIP. As such, FOIP is engaged on matters related to these access requests. Specific obligations on Social Services are triggered when FOIP is engaged. For example, section 7 notice requirements, the duty to assist under section 5.1, privacy obligations under Part IV and the burden of proof under section 61 of FOIP.

[23] A specific obligation on Social Services can be found at subsection 7(3) of FOIP. This provision requires Social Services to provide notice to applicants that they have a right to have the government institution's (or head's) decision reviewed by the Commissioner. 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.

[24] The response provided by Social Services to the Applicant dated June 14, 2018, included this required notice. In its submission to my office, Social Services indicated that it was mistakenly included. I do not think this was a mistake but rather, the correct position.

[25] When the Applicant received the response and read the notice of the right to review, inquiries were made to Social Services about who my office was and what my office's role could be. According to the Applicant, Social Services said there was no need to contact my office. I imagine this would be incredibly confusing for any applicant. FOIP is engaged, FOIP is not engaged, my office has a role, and my office does not have a role. As I stated in Review Report 149-2017, the overarching purpose of FOIP is ensuring open, transparent and accountable government. The separate process Social Services has created is confusing for applicants and threatens the rights and obligations enshrined in FOIP and its overarching purpose.

[26] I tried to address this concern in Review Report 149-2017 by recommending that Social Services amend its process and only use the prescribed *Form A* in the FOIP Regulations. Further, I recommended that Social Services change its response letters so they always include the notice that applicants have the right to request a review by the Commissioner.

[27] In its section 56 response to my report, Social Services refused to comply with these recommendations. Regardless, I make the same recommendations again. Social Services should not be diverting applicants away from FOIP, not informing them of their rights and skirting its obligations under FOIP.

[28] In conclusion, all access requests submitted to Social Services on the *Child and Family Programs Access to Information Request* forms are access requests pursuant to subsection 6(1) of FOIP. Therefore, the Applicant's access request received by Social Services on May 28, 2019, was an access request under FOIP.

**3. Does my office have jurisdiction to conduct a review of Social Services' search efforts?**

[29] FOIP applies to "government institutions as defined at subsection 2(1) of FOIP. Social Services fits the definition of a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP. Subsection 49(1)(a) of FOIP provides that where an applicant is not satisfied with the decision of a head of a government institution pursuant to section 7 of FOIP, the applicant can request a review by the Commissioner. Subsection 50(1) of FOIP provides that the Commissioner shall conduct a review of any matter set out in section 49, including subsection 49(1)(a) of FOIP, where there are reasonable grounds.

[30] In its submission to my office, Social Services asserted that by virtue of subsection 23(3)(c) of FOIP, information and documents covered by section 74 of the CFSA are confidential and cannot be accessed under FOIP, nor can my office review Social Services' application of that section. Further, Social Services asserted that there was an express conflict between section 74 of the CFSA and FOIP such that both Acts cannot apply concurrently. Finally, it broke down the three-part test my office has previously recommended for determining whether there is a conflict between two laws.

[31] In past reports where subsection 23(3) of FOIP was raised and my office had to determine if two laws could coexist or were in conflict, my office proposed the following three-part test:

1. Does compliance with one law involve the breach of another?
2. Does one law supplement the other?
3. Does one law duplicate the other?

(See Review Reports 088-2014 at [8] to [27] and F-2014-001 at [86] to [114])



[32] The access to information request was for Child and Family Services court orders and placements involving the Applicant between November 1954 and December 31, 1970. Social Services has indicated that all responsive records were destroyed. In other words, it is claiming the records do not exist.

[33] When applicants request a review of a response that indicates records do not exist, the focus is on the efforts undertaken by the government institution to search for responsive records. Details of the search efforts are needed by an applicant and my office to assess whether the search was reasonable and adequate for purposes of FOIP. The type of details that are needed include for example how the records management system is organized, who conducted the search and what locations were considered and searched. In addition, if there is a claim that records were destroyed, the government institution should be able to prove it by providing information such as where, when and how the records were destroyed. Providing a copy of a certificate of destruction is one way to demonstrate this. Nothing has been offered in this case.

[34] The three-part conflict test is only a consideration if we are dealing with the application of section 74 of the CFSA to actual records. That is not the case here. I am reviewing Social Services' efforts to search for records it claims do not exist, which is a procedural matter and has nothing to do with preserving confidentiality pursuant to section 74 of the CFSA.

[35] In its supplementary submission to my office dated February 7, 2020, Social Services addressed this by stating:

Respectfully, we do not agree that the procedural issue can be separated from the type of records that are at the heart of the review. Records pertaining to any involvement with Child and Family Programs, are subject to the CFSA by virtue of the nature of the involvement. The confidentiality requirements in section 74 of the CFSA prevent us from providing information related to a specific file. Disclosing whether or not an individual even has any child and family services records or involvement can also be a breach of confidentiality.

- [36] The Applicant requested my office review the search efforts of Social Services. The Applicant was confused and concerned when told there were no records because a sibling was able to obtain similar records dating back to the 1970s. The Applicant expressed to my office that accessing childhood records is of great importance in this case. The Applicant is a registered class action plaintiff of the Sixties Scoop Settlement. In order to claim a portion of compensation that the Supreme Court of Canada has approved for First Nations, Métis and Inuit children that were wrongfully removed from their families and their communities by child welfare services, registered plaintiffs must demonstrate they were adopted or made permanent wards. The records Social Services claimed it destroyed would demonstrate the Applicant was a permanent ward.
- [37] Although Social Services cites section 74 of the CFSA as its justification for not cooperating with my office, it is unclear why it is engaging a confidentiality provision in this case. Whose confidentiality is it maintaining? There are no records being provided to anyone and any records that once existed, involve the Applicant who is asking for this review. What is required from Social Services are details of how it searched for the records and how it arrived at the conclusion that the records were destroyed. It seems Social Services is taking section 74 of the CFSA as authority to completely remove FOIP, all of its rights and obligations, from the scope of records involved in the Child and Family Program. By taking this approach, it is shielding itself from any accountability under FOIP.
- [38] This position is disappointing for my office and for clients of Social Services that are impacted by it. From the perspective of applicants, the experience of requesting records, not receiving them, then being denied the right of a review must appear as though not much has changed with a ministry that has work to do in terms of rebuilding trust. I encourage Social Services to reconsider how it has chosen to interpret subsection 23(3)(c) of FOIP.
- [39] In conclusion, I find that my office has jurisdiction to conduct a review of Social Services' search efforts pursuant to subsections 49(1)(a) and 50(1) of FOIP.
- [40] Further, I find that Social Services has not provided sufficient details of its efforts to search for the records requested by the Applicant. In addition, it did not provide any details about

how it arrived at the conclusion the records were destroyed. Although some details were provided in its submission to my office, the details were general and not specific to the specific search conducted for the Applicant's records. Because of the lack of specifics, I find that the search conducted was not reasonable or adequate for purposes of FOIP. If specific details had been provided, I might have had a different finding.

[41] I recommend Social Services conduct the search again and provide details of its search to the Applicant. The details should include how it arrived at the conclusion the records were destroyed.

[42] This is the third report where Social Services has challenged my office's jurisdiction to conduct a review pursuant to subsection 23(3)(c) of FOIP. We are at an impasse. In Review Report 254-2017, I recommended that Social Services work with the Ministry of Justice and my office to amend FOIP in order to repeal subsection 23(3)(c) of FOIP. I make that recommendation again in this Report.

#### **IV FINDINGS**

[43] I find that all requests submitted to Social Services on the *Child and Family Programs Access to Information Request* forms qualify as access requests pursuant to subsection 6(1) of FOIP.

[44] I find that the Applicant's access request received by Social Services on May 28, 2019, was an access request under FOIP.

[45] I find my office has jurisdiction to conduct a review of Social Services' search efforts pursuant to subsections 49(1)(a) and 50(1) of FOIP.

[46] I find the search conducted by Social Services was not reasonable and adequate for purposes of FOIP.

**V RECOMMENDATIONS**

- [47] I recommend Social Services amend its process to only use the prescribed *Form A* in the FOIP Regulations and change its response letters so they always include the notice that applicants have the right to request a review by the Commissioner.
- [48] I recommend Social Services conduct the search again and provide details of its search efforts to the Applicant. This should include information about how it arrived at the conclusion the records were destroyed.
- [49] I recommend Social Services work with the Ministry of Justice and my office to amend FOIP in order to repeal subsection 23(3)(c) of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 24<sup>th</sup> day of February 2020.

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