SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2004 – 003

SASKATCHEWAN GOVERNMENT INSURANCE

Summary: The Applicant sought information with respect to applications for relapse benefits from the start of no-fault insurance in Saskatchewan in 1995 and the number and details of those who received benefits under the *Automobile Accident Insurance Act*. SGI denied access on the basis that the information sought is not tracked and would entail personal information for other persons. The Commissioner recommended that SGI had responded appropriately and no further action should be required of SGI.

Statutes Cited: *Automobile Accident Insurance Act* [R.S.S. 1978, C. A-35 as am], *Freedom of Information and Protection of Privacy Act* [S.S. 1990-91, c. F-22.01 as am], s. 29; Alberta *Freedom of Information and Protection of Privacy Act* [R.S.A. 2000, c. F-25]; Ontario *Freedom of Information and Protection of Privacy Act* [R.S.O. 1990, c. F.31, as am]; Ontario *Municipal Freedom of Information and Protection of Privacy Act* [R.S.O. 1990, c. M.56 as am]; British Columbia *Freedom of Information and Protection of Privacy Act* [R.S.B.C. 1996, c. 165 as am];

Authorities Cited:

British Columbia IPC Order:	01-31
Alberta IPC Orders:	F2002-005, F2002-017
Ontario IPC Orders:	P-491, Order M-33

Amendt v. Canada Life Assurance Company [1999] S.J. No. 157

General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance [1993] S.J. No. 601

I BACKGROUND

[1] The Applicant requested access as follows:

> "Please provide the numbers and any details of people who have applied for relapse benefits from the start of no-fault in Sask. to current date. Sections 140 & s. 141 of new 2003 legislation and s. 142, s. 143 of AAIA prior to 2003. In addition provide the number and detail of policy holders that have received relapse benefits under the relapse sections of the AAIA for the same time frame."

[2] The government institution, Saskatchewan Government Insurance ("SGI"), responded to the access request as follows:

> "I have reviewed your request with our Head Office Injury Claims Department and was advised that this information is not available, as SGI does not track the information you have requested. I have been further advised that since no-fault was introduced in 1994, there have been approximately 6000 claims filed per year. To answer your inquiry would require the manual review of over 50,000 files. This would be a prohibitively costly and time-consuming undertaking.
>
> In addition, the information you seek with respect to details of those who have applied for relapse benefits and policy holders who have received relapse benefits would constitute personal information under the Act. Section 29 of the Act states that SGI shall not disclose personal information in its possession without the consent of the individual to whom the information relates. As that consent is not available, I could not release the information to you even if it was available.
>
> For these reasons, SGI is unable to provide you with the information you seek."

[3] The *Automobile Accident Insurance Act* [R.S.S. 1978, c. A-35 as am] sets out a comprehensive code for the rules governing claims for compensation arising from automobile accidents. Sections 140 to 142 inclusive address compensation in those cases where an insured suffers a relapse of a bodily injury.

[4] The Commissioner attended at the offices of SGI to discuss the information in question with officials of SGI. The Commissioner learned that SGI does not track relapse claims separately from other claims and has no comprehensive record of relapse claims.

II ISSUES

A. Does a government institution have a duty to assist an applicant on a request for access under *The Freedom of Information and Protection of Privacy Act*?

B. If there is such a duty, has SGI discharged that duty to assist the Applicant on the facts of this case?

C. Did SGI properly invoke section 29 of *The Freedom of Information and Protection of Privacy Act* to deny access?

III DISCUSSION OF THE ISSUES

Issue A: Does a government institution have a duty to assist an applicant on a request for access under the *Freedom of Information and Protection of Privacy Act*?

[5] To answer this question, we need to consider the first principles of the *Freedom of Information and Protection of Privacy Act* ("the Act"). The Act does not include an object clause or purpose clause. Such a feature would be valuable to an oversight body that must interpret and apply the legislation to particular fact situations in attempting to resolve access requests and complaints.

[6] In the absence of an explicit purpose clause in the Act, our office is required to infer the Legislative Assembly's purpose in designing such an instrument. This office has, in the past, been guided by decisions of the Saskatchewan Court of Appeal and the Saskatchewan Court of Queen's Bench.

[7] In *Amendt v. Canada Life Assurance Company* [1999] S.J. No. 157, Goldenberg J. observed as follows:

> "The right of persons to apply for access to information in the hands of a government agency has no basis in common law. It is purely statutory. The Act is a code unto itself. The code sets out a detailed method for applications, reviews, and ultimately for appeals to the Court of Queen's Bench. Absent compliance with the process contained therein, this Court has no jurisdiction to entertain the matter." [43]

[8] In *General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance* [1993] S.J. No. 601 at [11], the Saskatchewan Court of Appeal has stated as follows:

> "The [Freedom of Information and Protection of Privacy 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." [underlining added for emphasis]

[9] The Saskatchewan Act closely corresponds to provisions in the federal *Access to Information Act*. The purpose of the *Access to Information Act* is described as follows:

> "2(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government."

In 1997, a Government of Canada Green Paper discussed the reasons for access to information legislation. The authors of that paper concluded that:

- "Effective accountability - the public's judgment of choices taken by government - depends on knowing the information and options available to the decision-makers";
- "Government documents often contain information vital to the effective participation of citizens and organizations in government decision-making"; and
- (as) "government has become the single most important storehouse of information about our society, information that is developed at public expense so should be publicly available wherever possible."

[10] Over the twenty two years since the *Access to Information Act* came into force, provincial and territorial governments have enacted their own access to information and protection of privacy legislation. Many of those more recent provincial instruments have included a more comprehensive purpose clause. Those purpose clauses tend to reflect and reinforce the approach taken by the federal Information Commissioner and numerous decisions of superior courts in Canada. A good example is section 2 of the British Columbia *Freedom of Information and Protection of Privacy Act*:

> "2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
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> (a) giving the public a right of access to records
>
> (b) giving individuals a right of access to, and a right to request corrections of, personal information about themselves
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> (c) specifying limited exceptions to the rights of access
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
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> (e) providing for an independent review of decisions made under this Act"

[11] I find that this neatly summarizes and clearly identifies the purpose of legislation such as the Saskatchewan Act. Our office will deal with the subject request for review and future requests for review by reference to those same five purposes.

[12] There is no explicit duty to assist applicants in the Saskatchewan *Freedom of Information and Protection of Privacy Act*. Such an explicit duty exists in certain other provinces. For example, in the British Columbia *Freedom of Information and Protection of Privacy Act* the head of a public body "must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely". [section 6(1)] A similar provision appears in the Alberta *Freedom of Information and Protection of Privacy Act* [section 10(1)].

[13] The right of access under the Act is described in section 5 as follows:

> "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."

[14] I am mindful that most citizens will not have a detailed knowledge of the types and description of records that a government institution maintains. A requirement for government institutions to take reasonable steps to search for responsive records is an important feature to address the knowledge imbalance between the institution and the applicant. If there is no duty to assist, the right of access may be more illusory than real.

[15] My view is that to realize and respect the "right" guaranteed to Saskatchewan residents by the Act, there is an implicit requirement for government institutions to assist applicants and to respond openly, accurately and completely to an access request.

Although the duty to assist is only an implicit requirement we want to clearly signal to government institutions, local authorities and health trustees that this office views it as an important duty. It is intended to complement those objectives articulated by the Saskatchewan Court of Appeal.

Issue B: Has SGI satisfied the duty to assist in this case?

[16] To positively respond to the Applicant's request, SGI would have to create a record for the Applicant.

[17] We note that in some jurisdictions there is an obligation on public bodies in certain circumstances to create a record. This is usually in the case where information is in an electronic format.

[18] In the Alberta FOIP Act, section 10(2) provides as follows:

> "(2) The head of a public body must create a record for the applicant if
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> (a) the record can be created from a record that is in electronic form and in the custody or under the control of a public body, using its normal computer hardware and software and technical expertise, and
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> (b) creating the record would not unreasonably interfere with the operations of the public body."

[19] The Alberta Information and Privacy Commissioner considered this provision in Order 2001-033 and F2002-005 and concluded that the Alberta section did not impose a duty upon the public body to create records where they do not exist in a format the Applicant desired. These decisions are available at www.oipc.ab.ca.

[20] An Alberta OIPC Adjudicator also considered a request for records to be created in Order F2002-017. The Applicant made a request to Mount Royal College for access to 10 years of employment-related records in CD ROM format. A search by the College revealed that the Applicant's name could potentially appear on thousands of computer logs found on 70 servers. The Public Body estimated that it would take in excess of 70 hours to process the computer logs into a readable format and would result in the printing of 4,099 pages. The Adjudicator concluded that the educational body that received the access request was not required to create any record, electronic or paper from the computer logs.

[21] The British Columbia *Freedom of Information and Protection of Privacy Act* provides as follows:

> "6(2) Moreover, the head of a public body must create a record for an applicant if
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> (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
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> (b) creating the record would not unreasonable interfere with the operations of the public body."

[22] This provision was considered by the Information and Privacy Commissioner of British Columbia in Order 01-31 [available at www.oipc.bc.ca] In that case, an applicant had sought vendor numbers for all ICBC suppliers whose status as such had, throughout ICBC's existence, been revoked, reinstated, suspended or refused. ICBC asserted that it kept no record of, and could not generate a record of, any businesses who had been refused supplier numbers when they applied or of suppliers whose supplier numbers had been reinstated after suspension or revocation. The Commissioner held that ICBC was not obliged under section 6(2) to create a record responding to the applicant's request. He commented as follows:

> "Section 6(2) speaks to an obligation to create records that arises only in the circumstances explicitly set out in that section. [ICBC affiant's] evidence is that it is simply not possible for ICBC to generate responsive records in this way, not least because it has no underlying paper-based records (much less machine-readable records). Section 6(2) does not require ICBC to go any further than it has done. If it cannot create a record as contemplated by that section-and I accept that it cannot in this case- no more need be done." [11]

[23] I note also the discussion of a similar issue by former Ontario Information and Privacy Commissioner Tom Wright in IPC M-33. [available at www.ipc.on.ca] He quoted Ontario Commissioner Sidney B. Linden from Order 99 as follows:

> "While it is generally correct that institutions are not obliged to "create" a record in response to a request, and a requester's right under the Act is to information contained in a record existing at the time of his request, in my view the creation of a record in some circumstances is not only consistent with the spirit of the Act but it also enhances one of the major purposes of the Act i.e. to provide a right of access to information under the control of institutions."

[24] I agree that there may be certain circumstances where it may be appropriate to require that a record be created. Given the vast scope of the information sought and the substantial amount of work that would be required to produce a record in this case it would clearly not be appropriate to require that this kind of record be created.

[25] We also note some relevant comments by the Anita Fineberg, Inquiry Officer for the Ontario Information and Privacy Commissioner, in Ontario Order P-491. Ms. Fineberg was reviewing a fee estimate determined by the Management Board Secretariat in the province. The Secretariat had advised the applicant that access could not be granted to the record sought since it was not available in the format requested and in order to provide this record, it would have to be compiled from a large volume of files. She observed that:

> "The [Freedom of Information and Protection of Privacy Act] requires the institution to provide the requester with access to all relevant records, however in most cases, the Act does not go further and require an institution to conduct searches through existing records, collecting information which responds to a request, and then creating an entirely new record in the requested format. In other words, the Act gives requesters a right (subject to the exemptions contained in the Act) to the "raw material" which would answer all or part of a request, but, subject to special provisions which apply only to information stored on computer, the institution is not required to organize this information into a particular format before disclosing it to the requester."

[26] My conclusion is that as a general rule, the obligation on a government institution to assist an applicant does not include an obligation to create records which do not currently exist. There may be some unusual circumstances that might make it appropriate to require that the institution create a record as suggested by Commissioner Linden but I find no such circumstances here. In some provinces there is an explicit requirement to go further if the information is in electronic format. The Saskatchewan Act has no such provision. In any event the information sought is not available in electronic format.

[27] I note that by a letter dated January 9, 2004, the Access, Privacy and Ethics Officer for SGI advised the Applicant that he had contacted the Head Office Injury Claims Department to address the access request. He received certain information to the effect that the information sought was not tracked and was not available. He communicated the results of his inquiries to the Applicant. He clearly provided an explanation for the position taken by SGI. His letter included the following notice:

> "If you wish to have this decision reviewed, you may do so within one year of this notice. To request a review you must complete a "Request for Review" form, a copy of which is attached. Your Request for Review should be directed to [Saskatchewan Information and Privacy Commissioner address]"

[28] In addition, the Access, Privacy and Ethics Officer indicated that:

> "Further correspondence on this request should be directed to me at SGI Legal Department, 14th Floor, 2260-11th Avenue, Regina, Saskatchewan, S4P OJ9, telephone: (306) 775-6301."

[29] My conclusion is that SGI has responded to the access request openly, accurately and completely.

Issue C: Did SGI properly invoke section 29 of the *Freedom of Information and Protection of Privacy Act* to deny access?

[30] The definition of "personal information" in the Act is expansive [section 24]. It includes personal information about an identifiable individual that is recorded in any form and includes: "…(b) information that relates to ….or information relating to financial transactions in which the individual has been involved…(j) information that describes an individual's finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness; or (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."

[31] The information sought by the Applicant clearly would include personal information of third parties who had made claims under the *Automobile Accident Insurance Act.*

[32] Section 29 limits disclosure of personal information to cases where the individual has provided consent or to one of approximately 22 different circumstances where disclosure can be made without consent. None of those circumstances appear to exist in this case.

[33] Given the view we take with respect to the previous issue, we need not consider whether severance pursuant to section 8 of the Act would be possible and appropriate.

IV RECOMMENDATIONS

[34] My finding is that, for government institutions under the Act, there is an implicit duty to make every reasonable effort to assist an applicant and to respond without delay to an applicant openly, accurately and completely.

[35] My finding is that the Act does not require SGI in these circumstances to create a record in order to satisfy the request of the Applicant.

[36] My finding is that SGI has properly discharged its duty to make every reasonable effort to assist the Applicant and to respond without delay to the Applicant openly, accurately and completely.

[37] My finding is that the access request would require the disclosure of personal information and that the exemption in section 29 has been properly invoked by SGI to deny access.

[38] Dated at Regina, in the Province of Saskatchewan, this 31st day of May, 2004.

R. GARY DICKSON, Q.C.
Information and Privacy Commissioner for Saskatchewan

Postscript: The Saskatchewan Information and Privacy Commissioner, unlike the Commissioners in Ontario, British Columbia and Alberta, is a type of Ombudsman. That means the Saskatchewan IPC can make recommendations to government institutions and local authorities and health trustees but has no order-making power. The format for Saskatchewan IPC reports has been deliberately designed to correspond to some extent to the format employed in those three provinces. The difference is that each report will describe a "recommendation(s)". This format also follows the format used by previous Saskatchewan Information and Privacy Commissioners.

We will attempt to post most reports to the Saskatchewan OIPC website, www.oipc.sk.ca. We will not normally disclose the identity of the complainant or applicant. We will routinely disclose the identity of the government institution or local authority or health trustee. Wherever possible our office will attempt to mediate complaints and access requests. If the applicant/complainant and the government institution/local authority/health trustee agree on a particular disposition of an access request or complaint then our office will send both parties a letter confirming the agreement and will not normally publish the terms of that agreement.

The reason for adopting this particular format is the apparent need in this province for clearer direction and more explanation as to the way the Freedom of Information and Protection of Privacy Act, the Local Authority Freedom of Information and Protection of Privacy Act and the Health Information Protection Act will be interpreted and applied. Even though the model and powers of the Saskatchewan IPC are different than counterparts in Ontario, British Columbia and Alberta, the object of the four statutes and indeed, similar statutes in other Canadian jurisdictions, is very similar. Decisions in other Canadian jurisdictions represent persuasive but not binding authority in Saskatchewan.