



REVIEW REPORT 254-2017

Ministry of Social Services

January 29, 2020

Summary:

This Review Report is a continuation of Review Report 149-2017 and will look at the issue of whether or not section 74 of *The Child and Family Services Act* (CFSA) applies to the record and precludes the Commissioner from reviewing it to make that determination. The Commissioner found that Social Services failed to demonstrate that section 74 of the CFSA applies to the record. The Commissioner also found that Social Services is not cooperating with his office to demonstrate that section 74 of the CFSA applies to the records that is subject to the Applicant's request. The Commissioner recommended that Social Services review the record, considering the exercise of rights by other person's provisions in section 59 of FOIP, the personal information of a deceased individual provisions in section 30 of FOIP, any mandatory exemptions that apply to the record, and provide the remainder of the record to the Applicant. The Commissioner also 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, so that section 74 of the CFSA is no longer included in that section. Finally, the Commissioner recommended that Social Services amend its process to only use the prescribed form in FOIP and change its response letters for requests for child and family services records to advise an individual of their right to request a review by his office.

I BACKGROUND

- [1] A lawyer submitted a written request for information on behalf of their 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). The Applicant is the deceased child's father.

[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] This letter did not advise the Applicant of the right to request a review by my office. The Applicant requested a review of Social Services' response. On July 27, 2017, my office notified the Applicant, the Lawyer and Social Services of our intention to undertake a review under our review file #149-2017.

[4] 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).

[5] On October 18, 2017, my office notified the Applicant and Social Services that my office would be opening a second review file (254-2017), to address the following two issues related to Social Services' September 25, 2017 response:

1. Why there was such a delay in providing a response, including the records, to the Applicant; and
2. ...Subsection 23(3)(b) of FOIP outlines that the provisions mentioned in section 74 of the CFSA shall prevail over FOIP provisions. As you have notified the Applicant in the September 25, 2017 letter that some of the information was severed pursuant to subsection 74(1) of the CFSA, please describe how the severed portions of the record qualify under subsection 74(1) of CFSA.

[6] However, before addressing the above two issues, my office had to address preliminary issues under review file 149-2017. Review Report 149-2017 was issued on August 6, 2019, and addressed the following questions:

- Was this a formal access to information request pursuant to section 5 of FOIP?

- Does my office have jurisdiction to conduct a review of records that may be subject to section 74 of the CFSA? and
- Did Social Services provide an appropriate section 7 [FOIP] response to the Applicant?

[7] In Review Report 149-2017, I made the following findings in paragraphs [100] to [102] and the following recommendations in paragraphs [103] and [104]:

[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 the section 74 of the CFSA as provided for in subsection 23(3)(c) of FOIP [*The Freedom of Information and Protection of Privacy Act*].

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

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

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

[8] On August 8, 2019, my office spoke with the Applicant to confirm they wished to continue with the second review file and also to discuss the scope of the second review file. Through conversations with my office, the Applicant advised that we did not need to review the issue of the delay in the response, but they wished to continue with the remainder of review file 254-2017.

[9] On August 20, 2019, my office provided Social Services with an updated notification email for review file 254-2017.

[10] By letter dated September 5, 2019, Social Services advised my office and the Applicant that it, "...declines to follow the recommendations..." in Review Report 149-2017.

II RECORDS AT ISSUE

[11] The record at issue is the Applicant's deceased child's record that Social Services asserts is fully covered by section 74 of the CFSA. A copy of these records has not been provided to my office. This review will look at the issue of whether or not section 74 of the CFSA fully applies to the record and precludes my office from reviewing it to make that determination.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[12] Social Services is a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP. Thus, I have jurisdiction to conduct this review.

2. Does section 74 of the CFSA apply to the record?

[13] By letter dated September 23, 2019, Social Services provided my office with a submission. My office determined that we required additional details in order to be satisfied that section 74 of the CFSA fully applied to the records. Therefore, on September 24, 2019, my office requested additional details from Social Services.

[14] My office's request for additional details resulted in discussions and meetings between the Deputy Minister of Social Services, the Deputy Minister of Justice and my office throughout November and December of 2019.

[15] From those discussions, I have determined that Social Services and my office have come to a major disagreement. In Review Report 149-2017, I found that I have the authority to conduct a review of records that may be subject to section 74 of the CFSA. However, Social Services refuses to move from its position.

[16] I would like to note that at no time during this review did my office request that Social Services' provide us with a copy of the record. We simply asked for additional information so I could be satisfied that section 74 of the CFSA fully applies to the record.

[17] As I have not been provided the details to be satisfied that section 74 of the CFSA fully applies to the record, I find that Social Services has failed to demonstrate that section 74 of the CFSA applies to the record.

[18] Thus, I recommend that Social Services review the record, considering the exercise of rights by other person's provisions in section 59 of FOIP, the personal information of a deceased individual provisions in section 30 of FOIP, any mandatory exemptions that apply to the record, and provide the remainder of the record to the Applicant.

3. Should section 74 of the CFSA be included in subsection 23(3) of FOIP?

[19] In its September 23, 2019 letter to my office, Social Services advised, in part:

...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....

[20] First of all, disclosing that a file exists in this particular case is a non-issue as the Applicant, the child's father, was fully aware a child and family services record exists.

[21] Secondly, I disagree with Social Services' assertion that, "...the confidentiality requirements in section 74 of the CFSA prevent us from providing information related to a specific file...." Subsection 74(3) of the CFSA gives the discretion to the minister, a director or an officer to disclose information to anyone the minister considers appropriate. Subsection 74(3) of the CFSA provides:

74(3) On the request of a person, the minister or a director may:

- (a) disclose; or
- (b) authorize an officer to disclose;

information mentioned in subsection (1) relating to that person in any form that the minister or director considers appropriate.

[22] If an individual requests a review by my office, they would expect that my office reviews the record. If this is the case and they request that the minister or director disclose the information, it is fully within Social Service's discretion to provide my office with records.

[23] In response to Social Services' assertion that I cannot review records that are subject to section 74 of the CFSA, I make the following points below.

[24] On April 7, 2017, the following amendment was made to *The Child and Family Services Regulations* (CFSA Regulations). Subsections 17.2(1) and (3) of the CFSA Regulations provides:

17.2(1) In this section:

“common or integrated service” means a program or activity designed to benefit the health, safety, welfare or social well-being of an individual that is delivered by a government institution and one or more of the following:

- (a) another government institution;
- (b) a local authority;
- (c) a trustee as defined in The Health Information Protection Act;
- (d) a First Nation;
- (e) a police service or regional police service as defined in The Police Act, 1990;
- (f) the Royal Canadian Mounted Police;
- (g) a non-profit organization that provides a service of the type to be included in the common or integrated service;
- (h) any other agency or organization that the minister determines is appropriate;

“information sharing agreement” means an agreement that governs the collection, use and disclosure of personal information by the parties involved in the provision of a common or integrated service and that meets the requirements of subsection (2).

...

(3) Personal information may be disclosed to a party to an information sharing agreement entered into for the purpose of providing a common or integrated service:

(a) if that information is disclosed in accordance with the agreement for any or all of the following purposes:

(i) determining the eligibility of an individual to receive the common or integrated service;

(ii) assessing and planning the common or integrated service and delivering that service to an individual or that individual’s family; or

(b) if consent to the disclosure was obtained pursuant to any other Act or regulation that does not require the consent to be in writing.

[25] An example of a “common or integrated service” is the Community Mobilization Prince Albert, commonly known as the Hub, which I examined in Investigation Report 105-2014.

[26] As subsection 17.2(3) of the CFSA Regulations provides that Social Services can share information found in a child and family service record to a party to an information sharing agreement for the purpose of providing a common or integrated service.

[27] The list of parties that can be part of the information sharing agreement is lengthy, as outlined in subsection 17.2(1) of the CFSA Regulations, and includes government institutions, local authorities, trustees, police services, the RCMP, First Nations, non-profit organizations and “any other agency or organization that the minister determines is appropriate.”

[28] Based upon the list of bodies that can be part of a common or integrated service, there are many bodies, agencies and organizations that could potentially receive this type of sensitive information from child and family services records.

[29] By way of example, an individual could request access to the portions of their child and family services record that was shared at a Hub meeting. As a result of the request, the individual may not be satisfied with the response received by Social Services and therefore, would not have a right to request a review by my office because there is no oversight.

[30] The thought that this information could be shared with multiple organizations, without oversight for child and family records, is quite frankly troubling. I take the position that the subject individuals would be very concerned about this, if they were fully aware of what could happen.

[31] My office shared a copy of the draft report with Social Services where my office sought input as to any factual errors to which my office appreciates when those are pointed out. In response to the draft report, Social Services asserted:

In short, the [CFSA] regulations provide clear legal authority for Social Services to disclose s. 74 [of the CFSA] confidential information about an individual.

[32] Since the CFSA Regulations provide “clear legal authority” to share this highly sensitive information, my office should have the clear legal authority of oversight for CFSA files.

[33] Also, in response to the draft report, Social Services asserts:

It is factually incorrect to say that...there is no oversight. The Courts provide oversight though the judicial review process. The IPC [Information and Privacy Commissioner] may not like judicial review as an oversight mechanism, but the mechanism does exist.

[34] Judicial review is a costly process which many individuals would not be able to afford, if they are even made aware the process is available to them. It is unfair to expect applicants, many of which I assume are current and former Social Services clients, to bear the expense of judicial review.

[35] I would like to stress that a request for review by my office is free for all applicants. Further, if an applicant is not satisfied with the outcome of the review, they can file an appeal to the Court of Queen’s Bench.

[36] In addition, over the past several years, Social Services has been dealing with the issue commonly known as the Sixties Scoop. I expect that many individuals who were part of the Sixties Scoop will be requesting records from Social Services. I believe these individuals should have the right to question the decisions of Social Services through oversight bodies such as the Provincial Ombudsman, the Advocate for Children and Youth and the Information and Privacy Commissioner (IPC). Although this matter does not relate to the Sixties Scoop, my office currently has another review underway that does.

[37] The following statutes provide our three respective offices with broad powers to compel information. Firstly, section 54 of FOIP provides my office with the following powers to compel information during a review:

54(1) Notwithstanding any other Act or any privilege that is available at law, the commissioner may, in a review:

(a) require to be produced and examine any record that is in the possession or under the control of a government institution; and

(b) enter and inspect any premises occupied by a government institution.

(2) For the purposes of conducting a review, the commissioner may summon and enforce the appearance of persons before the commissioner and compel them:

(a) to give oral or written evidence on oath or affirmation; and

(b) to produce any documents or things;

that the commissioner considers necessary for a full review, in the same manner and to the same extent as the court.

(3) For the purposes of subsection (2), the commissioner may administer an oath or affirmation.

[38] Further, the Ombudsman and the Advocate for Children and Youth have broad powers to compel information during an investigation by their respective offices. Subsections 25(1), (2) and (3) of *The Ombudsman Act, 2012* (Ombudsman Act) and subsections 26(1), (2) and (3) of *The Advocate for Children and Youth Act*, share substantially similar language; therefore, I have only included subsections 25(1), (2) and (3) of the Ombudsman Act below:

25(1) Subject to section 26, the Ombudsman may require any person who in the Ombudsman's opinion is able to give any information relating to any matter being investigated pursuant to this Act:

(a) to furnish information to him or her; and

(b) to produce any document, paper or thing that, in the Ombudsman's opinion:

(i) relates to the matter being investigated; and

(ii) may be in the possession or under the control of that person.

(2) The Ombudsman may exercise the powers mentioned in subsection (1) whether or not:

(a) the person mentioned in that subsection is an officer or employee of a ministry, agency of the government, publicly-funded health entity or municipal entity or a council member or a board member; and

(b) the document, paper or thing is in the custody or under the control of a ministry, agency of the government, publicly-funded health entity or municipal entity.

(3) The Ombudsman may take possession of any document, paper or thing mentioned in subsection (1) to make copies for the purposes of the investigation.

[39] My office was established as an oversight body to hold public bodies to account. Through my legislative mandate, I act as a referee helping government achieve openness, transparency and accountability. In addition, my office ensures that public bodies are meeting their protection of privacy requirements under FOIP, *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) and *The Health Information Protection Act* (HIPA).

[40] The Applicant has suffered the tragic loss of their child. As a result, they have lost trust in the system. They respect that we are a neutral body, looking at their side and Social Services side, and then making recommendations based on the law.

[41] I would like to note that child and family services records are subject to review by IPCs in other jurisdictions in Canada.

- [42] In Alberta, the IPC has the authority to conduct a review of records of Alberta Children's Services. The Alberta IPC is typically provided a copy of the record to conduct the review, with limited exceptions.
- [43] BC's IPC can also review records subject to its *Children, Family and Community Services Act*. Through a review, BC's IPC receives a copy of the record and the review is conducted in the same manner as any other review by the BC IPC.
- [44] The Nova Scotia IPC can conduct a review of child and family service records and is provided a full copy of the child and family services record.
- [45] Further, on January 1, 2020, Part X of Ontario's *Child, Youth and Family Services Act* (CYFSA) came into force. Part X of Ontario's CYFSA has given Ontario's IPC oversight over CYFSA records. The Introduction of the Ontario IPC's *Part X of the CFSYA: A Guide to Access and Privacy for Service Providers* (access at <https://www.ipc.on.ca/part-x-cyfsa/introduction/>), states, in part:
- Part X of the *Child, Youth and Family Services Act* sets the rules that service providers must follow to protect privacy and enable access to personal information, effective January 1, 2020.
- ...
- The IPC provides oversight of Ontario's access and privacy laws, including Part X. These laws establish the rules for how Ontario's public institutions, health information custodians and service providers may collect, use, and disclose personal information.
- As part of our mandate, we investigate privacy complaints related to personal information and ensure compliance with Ontario's access and privacy laws. Any person can file a complaint with the IPC about anyone who has or is about to break the rules of Part X...
- [46] The citizens of Saskatchewan deserve the same rights as the citizens of these provinces.
- [47] As noted above and demonstrated in Review Report 149-2017, I have the right to review records that Social Services claims are subject to section 74 of the CFSA. However, Social Services refuses to provide my office with what we require to be satisfied that section 74 applies.

[48] Therefore, it is time for the Government of Saskatchewan to amend FOIP and repeal subsection 23(3)(c) of FOIP, so that section 74 of the CFSA is no longer included in that section. This would explicitly clarify, without question, that my office can review these records.

[49] In response to my draft report, Social Services took exception that I included reference to legislation from other jurisdictions as it relates to child and family services records and my IPC colleagues' powers. Social Services asserts:

It is a matter of fact that legislation from other provinces does not apply in Saskatchewan, so has no application in the matter currently before the IPC. The IPC has the ability to make requests to Government for legislative change but that is a separate process from the IPC Review process....It is respectfully submitted that the substance of legislation in other jurisdictions has no relevance to the issue of whether the IPC has jurisdiction under the Saskatchewan FOIP Act to review disclosure of child protection information that is subject to the confidentiality provision in s. 74 of [the CFSA].

[50] As noted above, Social Services and my office is at a major disagreement. Therefore, I have determined it is essential for amendments to FOIP to be made in order to provide explicit clarity in the legislation. I have used the examples from other jurisdictions to show the legislative direction that is being taken across Canada. I have this right as outlined in subsections 55(1) and 55(3) of FOIP which provide:

55(1) On completing a review or investigation, the commissioner may prepare a written report setting out the commissioner's recommendations with respect to the matter and the reasons for those recommendations.

...

(3) In the report mentioned in subsection (1), the commissioner may make any recommendations with respect to the matter under review or investigation that the commissioner considers appropriate.

[51] It is fully appropriate for my office to comment on this and, as such, I have.

[52] I find that Social Services is not cooperating with my office to demonstrate that section 74 of the CFSA applies to the record that is subject to the Applicant's request.

[53] As mentioned earlier, before a final report is issued, my office sends a draft report to the public body and requests it reviews the report for **factual errors**. However, in its response to my draft report, Social Services' six page response was more of a commentary on the draft report including a critique of my office's tone, specific wording, and areas that Social Services felt should not be included in the report.

[54] In *Crombie Stebner v Office of the Information and Privacy Commissioner 2019*, SKQB 91, Justice Danyliuk commented on my office's role as follows:

[63] To properly fulfil his statutory mandate, the Commissioner cannot be unduly fettered. He cannot be influenced by individuals who will not like what he has to say. He must be - and thus far has been - able to speak plainly and honestly about his findings and recommendations.

[69] ...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.

[55] I have been appointed by the Legislative Assembly as the oversight body for FOIP. Although what I say in reports may not be popular with a public body, calling it as I see it is part of my role.

IV FINDINGS

[56] I find that Social Services has failed to demonstrate that section 74 of the CFSA applies to the record.

[57] I find that Social Services is not cooperating with my office to demonstrate that section 74 of the CFSA applies to the record that is subject to the Applicant's request.

V RECOMMENDATIONS

[58] I recommend that Social Services review the record, considering the exercise of rights by other person's provisions in section 59 of FOIP, the personal information of a deceased

individual provisions in section 30 of FOIP, any mandatory exemptions that apply to the record, and provide the remainder of the record to the Applicant.

[59] 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, so that section 74 of the CFSA is no longer included in that section.

[60] I recommend that Social Services amend its process to only use the prescribed form in FOIP and change its response letters for requests for child and family services records to advise an individual of their right to request a review by my office.

Dated at Regina, in the Province of Saskatchewan, this 29th day of January, 2020.

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