



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 276-2017

Public Complaints Commission

March 27, 2018

Summary:

Public Complaints Commission (PCC) received an access to information request from the Applicant for records pertaining to another individual (the subject individual). The Applicant also provided PCC with a letter signed by the subject individual consenting to the disclosure of personal information. In response, PCC provided a letter to the Applicant asking for further details regarding the subject individual's consent. The Commissioner found that PCC's response did not comply with section 7 of *The Freedom of Information and Protection of Privacy Act* (FOIP). He also found that the consent provided by the Applicant did not meet the consent provisions found in *The Freedom of Information and Protection of Privacy Regulations*. The Commissioner recommended that PCC try to work with the Applicant and the subject individual to obtain informed consent. He also recommended that PCC provide a compliant response to the Applicant within 30 days.

I BACKGROUND

[1] On September 14, 2017, the Public Complaints Commission (PCC) received an access to information request where the Applicant requested "all records, regarding [name of another individual]". The request also included the birthdate of the other individual (the subject individual). Finally, with his access to information request, the Applicant provided PCC with a copy of a letter from the subject individual, dated December 5, 2016, granting the Applicant permission to receive any information about the subject individual.

- [2] On October 16, 2017, PCC provided a letter to the Applicant. In the letter, it indicated that responsive records would include the personal information of the subject individual. PCC also indicated that the consent letter written by the subject individual was too general. PCC's letter requested that the Applicant provide more specific consent from the subject individual and listed what elements would be required as part of that consent.
- [3] On October 23, 2017, the Applicant requested a review by my office. On November 7, 2017, my office provided notification to both PCC and the Applicant of my intention to undertake a review.

II RECORDS AT ISSUE

- [4] There are no responsive records to review at this time.

III DISCUSSION OF THE ISSUES

- [5] PCC is a government institution as defined by subsection 2(1)(d)(ii)(A) of *The Freedom of Information and Protection of Privacy Act* (FOIP) and subsection 3(a) and Part I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations* (the Regulations).

1. Did PCC provide an appropriate response to the Applicant's access to information request?

- [6] On October 16, 2017, PCC provided a letter to the Applicant indicating that the consent from the subject individual was too general and listed what was required in order to proceed with the request.

[7] Section 7 of FOIP describes what type of response a government institution must provide when it receives an access to information request. It provides:

7(1) Where an application is made pursuant to this Act for access to a record, the head of the government institution to which the application is made shall:

(a) consider the application and give written notice to the applicant of the head's decision with respect to the application in accordance with subsection (2); or

...

(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;

...

(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;

...

(5) A head who fails to give notice pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record.

[8] Amendments to both FOIP and the Regulations came into force on January 1, 2018. One of those amendments was the addition of a duty to assist applicants. Subsection 5.1(1) of FOIP provides:

5.1(1) Subject to this Act and the regulations, a government institution shall respond to a written request for access openly, accurately and completely.

[9] Although this amendment came into force after PCC responded to the Applicant, it has been the position of my office that there has always been an implied duty on the part of a government institution to assist an applicant.

[10] While the duty to assist means that a government institution respond openly, accurately and completely, the duty also involves making every reasonable effort to assist without delay. This should occur before and after receipt of any access to information request. When an individual first contacts a public body, reasonable efforts to assist could include explaining the access to information processes to the applicant. This would include letting

the applicant know if any further information would be required to process the request such as a more detailed consent to release personal information of an individual other than the applicant.

[11] In this case, PCC should have used the initial 30 days to communicate with the Applicant about its need for a more detailed consent from the subject individual. By October 15, 2017, PCC should have communicated its final decision to the Applicant, in accordance with section 7 of FOIP, based on the information it had at that time. This respond should have included access to some or all of the records. Alternatively, if PCC was not satisfied that the subject individual had not provided informed consent, a statement that access was refused and the reason for the refusal which identified the specific provision(s) of FOIP on which the refusal was based.

[12] PCC indicated that it was justified in providing this response because subsection 31(1)(b) of FOIP was engaged. It provides:

31(1) Subject to Part III and subsection (2), an individual whose personal information is contained in a record in the possession or under the control of a government institution has a right to, and:

(a) on an application made in accordance with Part II; and

(b) on giving sufficient proof of his or her identity;

shall be given access to the record.

[13] In this situation, the Applicant was requesting the personal information of another individual, not his/her own information. Therefore, subsection 31(1)(b) of FOIP is not engaged.

[14] As noted, PCC's letter to the Applicant dated October 16, 2017 indicated that the consent letter written by the subject individual was too general and requested that the Applicant provide a more specific consent from the subject individual. PCC's response did not include the head's decision with respect to the application pursuant to subsection 7(1)(a) of FOIP.

[15] In addition, at no time did PCC indicate if there were records that did not qualify as the subject individual's personal information but were responsive to the Applicant's access request. If so, PCC should have processed these records in accordance with section 7 of FOIP. In response to my draft report, PCC indicated that all of the records would qualify as the subject individual's personal information. I question PCC's assertion because it also informed my office that it "conducted no search for the records".

[16] PCC's submission noted the amendments made to the Regulations that may impact the application of FOIP to responsive records. It indicated that subsection 23 of FOIP provides:

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 to it shall prevail.

(2) Subject to subsection (3), subsection (1) applies notwithstanding any provision in the other Act or regulation that states that the provision is to apply notwithstanding any other Act or law.

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

...

(m) any prescribed Act or prescribed provisions of an Act; or

(n) any prescribed regulation or prescribed provisions of a regulation.

[17] It also pointed out the following provisions of the Regulations that were added by amendments that came into force on January 1, 2018:

12 For the purposes of clauses 23(3)(l) and (m) of the Act, the following provisions are prescribed as provisions to which subsection 23(1) of the Act does not apply:

...

(q) subsections 39(5) and (6) and subsection 56(9.2) of *The Police Act, 1990*;

(r) Part IV of *The Police Act, 1990* as it relates to a complaint concerning the actions of a member.

[18] The purpose of subsection 23(1) of FOIP is to ensure that FOIP would prevail over other statutory provisions unless the records or information fall within the enumerated list of exclusions in subsection 23(3) of FOIP. This recent amendment makes it clear that the Legislature intended that Part IV of *The Police Act, 1990*, which includes subsections 39(5) and (6) and subsection 56(9.2) of *The Police Act, 1990*, to prevail over FOIP. However, these sections are limited in scope and do not cover all records in the possession or control of PCC. Part IV of *The Police Act, 1990* has several provisions that both require the release of documents to certain individuals and that prohibit the release of information in circumstances such as if it would jeopardize or prejudice a police investigation. If none of these conditions exist, the triggering event or threshold for subsections 12(q) and (r) of the Regulations to be engaged would not occur. As a result there would not be an actual conflict between Part IV of *The Police Act, 1990* and FOIP.

[19] Determining whether subsections 12(q) and (r) of the Regulations apply is not relevant in this review because these provisions did not exist at the time that PCC responded to the Applicant's request on October 16, 2017. However, subsection 7(2)(d) of FOIP indicates that a public body must identify the specific provision of FOIP on which the refusal is based, if access is denied. This must occur within 30 days after the request has been received. If subsections 12(q) and (r) of the Regulations were a reason to deny access to information because records may not fall into the scope of FOIP, it would be an example of the type of information that a government institution should convey to an applicant in a section 7 response.

[20] I find that PCC did not respond to the Applicant's access to information request in accordance with section 7 of FOIP.

2. Did PCC have the subject individual's consent to disclose his personal information to the Applicant?

[21] PCC indicated in its letter dated October 16, 2017 to the Applicant that records responsive to the request would qualify as the subject individual's personal information. In its submission, PCC indicated that, given the nature of the Applicant's request and the type of records held by PCC, it anticipated that any responsive records in its possession or control would qualify as personal information pursuant to subsections 24(1)(a), (b), (e) or (k) of FOIP. Subsection 24(1) of FOIP provides:

24(1) Subject to subsections (1.1) and (2), "personal information" means personal information about an identifiable individual that is recorded in any form, and includes:

(a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;

(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

...

(e) the home or business address, home or business telephone number or fingerprints of the individual;

...

(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.

[22] Subsection 29 of FOIP provides:

29(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[23] Section 18 of the Regulations (effective January 1, 2018) describes the type of consent that is required. It provides:

18(1) If consent is required by the Act for the collection, use or disclosure of personal information, the consent:

- (a) must relate to the purpose for which the information is required;
- (b) must be informed;
- (c) must be given voluntarily; and
- (d) must not be obtained through misrepresentation, fraud or coercion.

...

(3) A consent may be given that is effective for a limited period.

(4) A consent may be express or implied unless otherwise provided.

(5) An express consent need not be in writing.

(6) A government institution, other than the government institution that obtained the consent, may act in accordance with an express consent in writing or a record of an express consent having been given without verifying that the consent meets the requirements of subsection (1) unless the government institution that intends to act has reason to believe that the consent does not meet those requirements

[24] Section 18 of the Regulations was changed by the amendments that came into force on January 1, 2018. However, it has always been a best practice for government institutions to obtain informed consent before disclosing personal information. Further, as a government institution, PCC has been bound by a similar provision in *The Health Information Protection Act* (HIPA) when disclosing personal health information.

[25] Some of the best practices for obtaining informed consent as noted in the *IPC Guide to HIPA* are as follows:

True consent must be informed consent. It is best practice that the subject individual understand:

- i) The specific personal health information to be collected, used or disclosed;
- ii) Anticipated uses and/or disclosures;
- iii) To whom the personal health information may be disclosed;
- iv) The date the consent is effective and the date on which the consent expires; and
- v) Any potential risks associated with the collection, use or disclosure.

[26] I accept this as best practice prior to January 1, 2018.

[27] The consent provided by the Applicant on behalf of the subject individual is addressed to “whom it may concern” and states:

I, [name of subject individual], am writing to provide, consent for [name of the Applicant], to have access and be able to request any information with regard to my personal information/records.

I give to him, my authority to request, as well as receive any and all records, that may have my personal information, he may also sign documents on my behalf, when requesting same.

This is for all intents and purposes a full approval with my consent.

[28] The consent was dated December 5, 2016 and signed.

[29] I agree with PCC that the consent provided is too vague. Because the consent is not addressed specifically to PCC, PCC cannot be sure that the subject individual understands that the consent was intended for PCC. Further, PCC cannot be sure the subject individual understands what specific personal information is to be disclosed to the Applicant. In addition, PCC could not describe any potential risks associated with the disclosure.

[30] Also, the consent form was dated December 5, 2016 and the Applicant made the request almost 10 months later on September 14, 2017. The consent did not address the date the

consent expired. PCC had no way of knowing if the subject individual had changed his mind in that extended time period.

[31] Finally, with only the vague signed letter of the subject individual PCC had no way of knowing if the consent was given voluntarily or if it was obtained through misrepresentation, fraud or coercion.

[32] In response, PCC asked that the Applicant provide more in terms of consent from the subject individual, including:

- the date the consent is effective and the date on which the consent expires;
- specific types of personal information;
- phone number of subject individual;
- subject individual should identify specific records; and
- photocopy of two pieces of identification that include address and signature.

[33] It is reasonable for PCC to ask the subject individual to provide the date the consent is effective and the date on which the consent expires and specific types of personal information, as it is part of the best practices. It is also reasonable to ask for the subject individual's phone number. It is best practice for PCC to have as much direct contact as possible with the subject individual to ensure that informed consent has been given.

[34] It is not reasonable for PCC to ask the subject individual to identify specific records that can be disclosed to the Applicant. My office has indicated in several resources that, in general, applicants may not be familiar with the record holdings of a government institution. In those cases, my office recommends that the government institution work with the applicant to narrow the scope of the request. In this case, it would also be best practice to work directly with the subject individual to identify what personal information should be disclosed to the Applicant, if the subject individual is interested in narrowing it down. However, if informed consent has been obtained by PCC and the subject individual is not interested in narrowing the request, it should not be a requirement of PCC. Either way, the subject individual should not be expected to identify specific records on his/her own.

[35] Finally, it is not reasonable to ask the subject individual to provide photocopies of two pieces of identification that include both an address and a signature. It is unlikely that all individuals have two pieces of identification that meet this criteria. PCC indicated that it is following a resource entitled *Verifying the Identity of an Applicant* created by the Ministry of Justice's Access and Privacy Branch. This resource recommends that two pieces of identification be required, but does not stipulate that both must contain an address and signature.

[36] There are multiple ways to confirm the identity of an individual. Service Alberta's resource *FOIP Bulletin – Consent and Authentication* indicates that the degree of authentication must be appropriate to the nature of the use or disclosure and the sensitivity of the personal information involved. I urge PCC to work directly with the subject individual to find a mutually acceptable way to confirm identity in order to ensure that informed consent has been given. For more information about ways to confirm identity that meet best practices, I suggest the following resources:

- *Verifying the Identity of an Applicant* - Saskatchewan Ministry of Justice's Access and Privacy Branch;
- *FOIP Bulletin – Consent and Authentication* – Access and Privacy, Service Alberta; and
- *Guidelines for Identification and Authentication* – Office of the Privacy Commissioner of Canada.

[37] As noted above, the best practice would be for PCC to work directly with the subject individual to obtain informed consent and authenticate identity. In an attempt to reach informal resolution in this review, my office asked the Applicant to provide contact information for the subject individual for the purposes of suggesting that the subject individual work with PCC to ensure informed consent. The Applicant was unwilling to do so. It is in the best interest of the Applicant to facilitate this connection between the subject individual and PCC.

[38] I find that PCC does not have the informed consent of the subject individual to disclose personal information to the Applicant.

IV FINDINGS

[39] I find that PCC did not respond to the Applicant's access to information request in accordance with section 7 of FOIP.

[40] I find that PCC does not have the informed consent of the subject individual to disclose personal information to the Applicant.

V RECOMMENDATIONS

[41] I recommend that PCC work with the Applicant to make contact with the subject individual.

[42] I recommend that PCC work directly with the subject individual to obtain informed consent within 30 days, if the subject individual still wishes to give consent.

[43] I recommend that PCC work with the subject individual to authenticate the subject individual's identity in accordance with best practices discussed in this report within 30 days.

[44] I recommend that, within 30 days, PCC provide a new section 7 response to the Applicant. If informed consent cannot be obtained within that time, PCC's response should provide access to any responsive records that do not qualify as the personal information of the subject individual. This should all be done in accordance with section 7 of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 27th day of March, 2018.

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