Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 101-2023

Ministry of Finance

October 25, 2023

Summary: The Applicant requested that the Commissioner review a Ministry of Finance's (Finance) decision to withhold all requested records pursuant to subsection 23(3) of *The Freedom of Information and Protection of Privacy Act* (FOIP) and section 70 of *The Revenue and Financial Services Act* (RFSA). After receiving the Commissioner's notice of review, Finance claimed that the Commissioner did not have the authority to conduct a review. The Commissioner found that his office had jurisdiction to conduct a review. The Commissioner also found that Finance did not establish that the records fell within section 70 of the RFSA and therefore, it did not properly apply subsection 23(3)(m) of FOIP and subsection 12(d) of *The Freedom of Information and Protection of Privacy Regulations*. As no other exemptions were claimed, the Commissioner recommended that Finance release the responsive records to the Applicant within 30 days of issuance of this Report.

I BACKGROUND

[1] The Ministry of Finance (Finance) received an access to information request from the Applicant on November 16, 2022. The Applicant sought access to the following information:

> All records pertaining to all steps taken to collect PSR, for the period of February 1, 2019, to November 30, 2019, owed by Marr Management Inc. and from its directors (if steps taken against), [two named individuals]. This includes any records relating to collections upon the declaration of bankruptcy of Marr Management on January 7, 2020. The Ministry received notice of such Bankruptcy on January 29, 2020."

[2] Finance responded to the Applicant by letter dated December 16, 2022, denying access to the records pursuant to section 70 of *The Revenue and Financial Services Act* (RFSA) and subsection 12(d) of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations), read together with subsection 23(3)(m) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] As required by subsection 7(3) of FOIP, Finance's letter also advised the Applicant of their right to request a review by my office.

[4] On April 13, 2023, the Applicant filed a request for a review with my office.

[5] My office sent a notice to Finance on May 10, 2023, stating that it would be undertaking a review pursuant to Part VII of FOIP. The notice also invited Finance to provide a submission on how it determined that section 70 of *The Revenue and Financial Services Act* (RFSA), found in Part III of the RFSA, applies to the records in question and how by complying with that provision, Finance cannot comply with FOIP. The notice asked Finance to provide its submission, copies of the responsive records and an index of records to my office by June 9, 2023.

[6] Also on May 10, 2023, my office sent a notice to the Applicant inviting them to provide a submission.

[7] Between May 10, 2023 and mid-August, 2023, my office exchanged correspondence with Finance in which Finance sought multiple extensions of time for the delivery of its submission, records and index of records.

[8] On September 18, 2023, Finance provided my office with a letter and an affidavit. In its letter, it stated that my office does not have jurisdiction to conduct a review in this case, since all of the records in issue are subject to section 70 of the RFSA, which prevails over FOIP and the FOIP Regulations. It added that it would not be providing a submission pursuant to Part VII of FOIP. However, it provided a "letter of explanation" so that my office could satisfy itself that the records are subject to section 70 of the RFSA.

[9] Finance did not provide my office with copies of the responsive records and an index of records.

[10] The Applicant did not provide a submission.

II RECORDS AT ISSUE

[11] Finance did not provide my office with copies of the responsive records.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[12] Finance qualifies as a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, it is subject to FOIP.

[13] As noted above, Finance takes the position that my office has no jurisdiction to conduct a review in this case. Therefore, before I consider whether the responsive records are subject to section 70 of the RFSA and the application of subsection 23(3)(m) of FOIP and subsection 12(d) of the FOIP Regulations, I will make a determination regarding my office's authority to conduct this review.

[14] Section 23 of FOIP is relevant here. It states, in part:

> **23**(1) Where a provision of:
>
> any other Act; or
>
> a regulation made pursuant to any other Act;
>
> that restricts or prohibits access by any person to a record or information in the possession or under the control of a government institution conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant it shall prevail.
>
> …

> (3) Subsection (1) does not apply to the following provisions, and those provisions prevail:
>
> …
> (m) any prescribed Act or prescribed provisions of an Act;

[15] Section 12 of the FOIP Regulations sets out the provisions to which subsection 23(1) of FOIP does not apply. Subsection 12(d) of the FOIP Regulations states:

> **12** For the purposes of clauses 23(3)(m) and (n) of the Act, the following provisions are prescribed as provisions to which subsection 23(1) of the Act does not apply:
>
> …
> (d) Part III of *The Revenue and Financial Services Act*;

[16] Section 70 of the RFSA is found in Part III of the RFSA. Section 70 and other relevant provisions of the RFSA state:

> **70**(1) No return, record or information submitted by a collector or taxpayer pursuant to this Part or a revenue Act and no information obtained by way of audit, investigation or inspection is open to inspection except by:
>
> (a) officers of the ministry whose duty it is to inspect that return, record or information; or
>
> (b) the Board of Revenue Commissioners;
>
> (c) Repealed.
>
> (2) Unless authorized by this Act or any other law or with the consent of the person to whom a return or information relates, no person employed in the public service of Saskatchewan shall:
>
> (a) communicate, or allow to be communicated, any return or information obtained pursuant to this Part or a revenue Act to any person who is not legally entitled to the return or information; or
>
> (b) allow any person who is not legally entitled to a return or information obtained pursuant to this Part or a revenue Act to inspect or have access to the return or information.

[17] Finance's position regarding my office's authority to conduct this review was set out in its letter to my office dated September 18, 2023. It asserted:

For any Acts or provisions of Acts that are not listed in subsection 23(3) of FOIP or section 12 of FOIP Regulations, subsection 23(1) of FOIP would apply. In other words, FOIP would prevail in any conflict between the confidentiality provisions of those Acts and FOIP. However, the situation is different for Acts and provisions of Acts listed in section 23(3) of FOIP or section 12 of the FOIP Regulations. For those Acts or provisions, subsection 23(1) of FOIP prevails over "the provisions of this Act (FOIP) and the regulations made pursuant to it."

In *West Vancouver Police Department v. British Columbia (Information and Privacy Commissioner)*, 2016 BCSC 934, the Court examined the wording of section 79 of BC's FIPPA, which provides:

> 79 If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite the Act.

That case was a judicial review of a decision of the IPC delegate that the Court found to be reasonable. The IPC delegate had noted that only part of the *Police Act* "operated outside the scope of FIPPA," thus interpreting "prevails" to mean "operate outside the scope of FIPPA." The Court did not question that interpretation.

In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, the Supreme Court considered section 67 of the Ontario FIPPA, which also used the term "prevail". Section 67 of Ontario's FIPPA provides:

> 67(1) This Act prevails over a confidentiality provision in any other Act unless subsection (2), or the other Acts specifically provides otherwise.
>
> (2) The following confidentiality provisions prevail over this Act.

The Court said that the Commissioner reasonably concluded that the Act in question did not contain a confidentiality provision that specifically indicated it prevailed over FIPPA and said, "It follows that the Record is subject to FIPPA and its exemption scheme." The implication was that, if the Act had been listed in subsection 67 of Ontario's FIPPA, it would not have been subject to FIPPA and its exemption scheme.

Another consideration relevant to this analysis is that nowhere in section 23 of FOIP does it say that FOIP and an Act listed in subsection 23(3) should be read together to the extent that they can operate together.

Professor Pierre-Andre Cote, in collaboration with S. Beaulac and M. Devinat, described coherency of legislation at the same legislature as follows:

> Different enactments of the same legislature are deemed to be as consistent as the provisions of a single enactment. All the legislation of a legislature is deemed to make up a coherent system. Thus, interpretations favouring harmony between

> statutes should prevail over those favouring conflict, because the former are presumed to better represent the thought to the legislature.
>
> [The *Interpretation of Legislation in Canada* (4th ed. 2011) at p. 365 (quoted in the dissenting opinion of Justice Cote in *Barreau du Quebec v. Quebec (Attorney General)*, 2017 SCC 56 at para. 73)]

If all Saskatchewan legislation is "deemed to make up a coherent system" (sometimes referred to as the "statute book"), and if the statutes are deemed to be consistent, as if the provisions were in the same Act, then it follows that if FOIP and Part III of the RFSA were intended to operate together to the extent that they do not conflict, there would have been an express indication of that in FOIP. But no such language is found in FOIP. FOIP does not define what would constitute a direct conflict and there is no language that the two should operate concurrently if there is no direct conflict. Instead FOIP provides that subsection 23(1) "does not apply" to Part III of the RFSA and that Part III of the RFSA "prevails." Part III of the RFSA prevails over the provisions of FOIP and the FOIP Regulations, which means the access provisions (including processes and timelines) and the review provisions of FOIP do not apply to records subject to Part III of the RFSA.

Clause 49(1)(a) of FOIP provides as follows:

> 49(1) Where:
>
> > (a) An applicant is not satisfied with the decision of a head pursuant to section 7, 12 or 37;
> >
> > …
> > the applicant or individual may apply in the prescribed form and manner to the commissioner for a review of the matter.

For the records in question, there was no decision of the head under FOIP to review. As mentioned earlier, the decision to disclose information subject to Part III of the RFSA is governed by the RFSA.

[18] I understand Finance's position to be that for confidentiality provisions in acts that are not listed in subsection 23(3) of FOIP, FOIP prevails in the event of a conflict. For the acts or provisions specifically listed in subsection 23(3) of FOIP or incorporated by reference from the FOIP Regulations, those acts or provisions prevail over all of FOIP regardless of whether there is a conflict or not. It also asserted that my office does not have the authority to review the head's determination on the application of the listed acts or provisions to the requested records.

[19] Finance claimed that its position is supported by *West Vancouver Police Department v. British Columbia (Information and Privacy Commissioner)*, 2016 BCSC 934 (Can LII) *(West Vancouver)* and *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (Can LII) *(Community Safety)*.

[20] It stated that the *West Vancouver* case, supports the position that "prevail" means "operate outside the scope of FIPPA."

[21] It claimed that the implication to be drawn from the Supreme Court of Canada decision in *Community Safety* is that where an act is listed in section 67 of Ontario's *Freedom of Information and Protection of Privacy Act* (ON FIPPA) (which is similar to section 23 of FOIP), the records falling within the listed acts or provisions are not subject to ON FIPPA and its exemption scheme.

[22] Finance argued that nowhere in section 23 does it say that FOIP and an act listed in subsection 23(3) of FOIP should be read together so that they can operate together to the extent that they do not conflict. Therefore, where a finding is made that the listed act or provision applies, that provision prevails over all of FOIP and FOIP's access, review and other provisions do not apply.

[23] I do not accept Finance's position regarding the interpretation of section 70 of the RFSA and subsection 23(3) of FOIP. Section 70 of the RFSA, read together with subsection 23(3) of FOIP, does not exclude records from the operation of FOIP in its entirety, such as the review provisions. Rather section 70 of the RFSA exempts records from disclosure under FOIP. My office has the authority to review the head's claim that section 70 and other listed confidentiality provisions apply.

[24] In other words, subsection 23(3) of FOIP is not a jurisdiction-limiting provision that excludes certain categories of records from FOIP's application. It provides that FOIP is not the controlling statute for determining access or protecting the confidentiality of information that falls within the scope of one of the listed provisions, such as section 70 of the RFSA.

[25] The reasons for this view follow.

[26] I will begin my analysis with an overview of my office's approach to section 23 of FOIP. Then, I will survey prevailing provisions in other access to information regimes and their treatment by other access and privacy commissioners. I conclude with an analysis of Finance's argument regarding the findings in *West Vancouver* and *Community Safety,* and its interpretation of section 23 of FOIP.

Section 23 of FOIP

[27] Section 23 of FOIP works to help establish a balance between competing interests. It recognizes that there may be circumstances where the legislature determines that confidentiality or access rights in other statutes more appropriately regulate the release or disclosure of information or records. However, the structure of section 23 of FOIP makes it clear that, unless an alternative confidentiality provision is specific or listed in subsection 23(3) of FOIP or the FOIP Regulations, the default position is that FOIP will apply.

[28] My office's approach to the interpretation and application of section 23 of FOIP is described in my office's *Guide to FOIP*, Chapter 1, "Purposes and Scope of FOIP", updated March 7, 2023 [*Guide to FOIP*, Ch. 1], pp. 26-32.

[29] Section 23 of FOIP is referred to as a primacy clause that ensures that the fundamental rights enshrined in FOIP are given proper deference when interpreting legislative intent as to its application in conjunction with other statutes. This primacy clause is a strong expression of legislative intent and a tool for ensuring public policy objectives are met. In the event of a contest between two statutes, the legislature is presumed to not intend conflict between the statutes. Therefore, if an interpretation allows concurrent application, that interpretation should be adopted (*Guide to FOIP*, Ch. 1, p. 28).

[30] Section 23 of FOIP only applies to portions of Parts II and III of FOIP which refer to access to records because subsection 23(1) of FOIP states that it only applies to a provision that "restricts or prohibits access" to a record or information. All the other provisions of FOIP

would fully apply, such as the protection of privacy provisions in Part IV and the review and appeal provisions in Part VII (*Guide to FOIP*, Ch. 1, p. 27).

[31] Where subsection 23(1) of FOIP is engaged, my office first determines if the records or information fall within the statutory provision that restricts or prohibits access under FOIP. Then, my office applies the following three-part test to determine if the two laws can coexist or are in conflict:

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

(*Guide to FOIP*, Ch. 1, pp. 28-29)

[32] Where subsection 23(3) of FOIP is engaged, because the provisions that restrict or prohibit access are listed in the subsection or in the FOIP Regulations, the legislature recognized that the access provisions in FOIP and the listed provisions would be in conflict. Subsection 23(3) of FOIP was included in section 23 of FOIP to provide a mechanism for resolving the conflict by expressly stating that the listed provisions would prevail and subsection 23(1) of FOIP would not apply (*Guide to FOIP*, Ch. 1, p. 31). Therefore, the only question before my office when subsection 23(3) of FOIP is engaged is whether the records or information is caught by the listed provision that restricts or prohibits access. If the answer is yes, then the provision that restricts or prohibits access prevails over Parts II and III of FOIP.

[33] Several previous reports of my office demonstrate my office's approach to provisions that restrict or prohibit access in other laws and section 23 of FOIP. In each of these cases, my office first reviewed the records to determine if they fell within the provision that restricted or prohibited access, before turning to consider the application of subsections 23(1) or 23(3) of FOIP.

[34] For example, my office's Review Report 232-2020 considered Finance's decision to withhold records pursuant to section 70 of the RFSA and subsection 23(3) of FOIP. In this case, I reviewed a sample of the records and determined that they fell within section 70 of the RFSA. I then found that section 70 of the RFSA prevailed over Parts II and III of FOIP pursuant to subsection 12(d) of the FOIP Regulations, read together with subsection 23(3)(m) of FOIP. In that matter, I recommended that Finance take no further action in response to the access to information request.

[35] My office issued a series of reports involving the Ministry of Social Services (Social Services) and section 74 of *The Child, and Family Services Act* (CFSA) which sets limits on access to child and family services files. Section 74 of the CFSA is listed in subsection 23(3)(c) of FOIP. In Review Report 145-2020 and Review Report 054-2020, my office was provided with sufficient evidence to establish that section 74 applied to the records at issue. Consequently, following the approach described above, I found that section 74 of the CFSA prevailed and therefore, I had no authority to recommend release of the records.

[36] A confidentiality provision in section 61 of *The Mortgage Brokerages and Mortgage Administrators Act (MBMAA)* was the subject of a review by my office involving the Financial and Consumer Affairs Authority (FCAA) in 2014. Section 61 of the MBMAA was listed in subsection 12(l) of the FOIP Regulations as a provision to which subsection 23(1) of FOIP did not apply. The FCAA provided my office with a copy of the records at issue during the review. At the conclusion of the review, I issued Review Report 088-2014 finding that section 61 of the MBMAA applied to the records and prevailed over Parts II and III of FOIP. A similar finding was made in my office's Review Report 356-2021 which involved the Ministry of Justice and Attorney General (Justice) and section 14 of *The Enforcement of Maintenance Orders Act, 1997* which was listed in subsection 23(3)(d) of FOIP. Neither the FCAA nor Justice disputed my office's authority to conduct a review.

[37] In my office's Review Report 070-2023, I considered the application of the subsection 62(c) of *The Coroners Act, 1999* (CA) by the Saskatchewan Coroners Service (SCS). During the review, the SCS provided my office with copies of the records at issue. At the conclusion of the review, I found that subsection 62(c) of the CA, which is listed in

subsection 12(n) of the FOIP Regulations, did not apply to some of the records at issue. Therefore, FOIP applied to those records. I note that the SCS did not raise any objections to my authority to conduct the review.

[38] More recently, in my office's Review Report 109-2023, 144-2023, I considered the application of the confidentiality provision in subsection 39(5) of *The Police Act* for records held by the Public Complaints Commission (PCC). During the review, the PCC provided my office with copies of the records at issue. At the conclusion of the review, I upheld the PCC's claim that the confidentiality provision in subsection 39(5) of *The Police Act* applied to the records at issue and prevailed pursuant to subsection 23(3) of FOIP. The PCC did not dispute my office's authority to conduct a review.

[39] While the public bodies did not dispute my authority to conduct a review in the cases noted above, Finance is not the first public body to make such a claim in the context of a case involving section 23 of FOIP. In my office's Review Report 149-2017, Social Services argued that my office did not have jurisdiction to conduct a review of its decision to withhold records pursuant to section 74 of the CFSA. Its arguments were similar to those made by Finance in this case. In summary, Social Services asserted that section 74 of the CFSA contains "a complete code for the use and dissemination…of documents and information that have come into existence through anything done pursuant to the CFSA." It claimed that this precludes my office from exercising its jurisdiction over CFSA records (Review Report 149-2017, para. 56).

[40] After reviewing the relevant provisions of FOIP and other applicable authorities, I found that the case law supported the view that my office can review access to information requests for records that may be caught by the provisions listed in subsection 23(3) of FOIP. I added that in the context of a review, Social Services must demonstrate how the records fall under section 74 of the CFSA.

[41] I will return to a detailed analysis of the arguments and findings in my office's Review Report 149-2017 later in this Report. Before doing so, I will consider how other

information and privacy commissioners have approached equivalent prevailing provisions in the access to information laws that they oversee.

Approach of other Information and Privacy Commissioners

[42] Similar prevailing clauses exist in other Canadian access to information laws. While there are some differences in the provisions, a review of the orders and reports issued by the authorities that oversee these laws reveals one common element or approach.

[43] Access to information oversight bodies have the authority to review a claim that a confidentiality or access to information provision in other legislation applies and prevails over the access to information scheme.

[44] Section 5 of Alberta's *Freedom of Information and Protection of Privacy Act* (AB FOIPP) states:

> **5** If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless
>
> (a) another Act, or
>
> (b) a regulation under this Act
>
> expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

[45] Section 16 of Alberta's *Freedom of Information and Protection of Privacy Act Regulations* (AB FOIPP Regulations) sets out the provisions in other acts that prevail over AB FOIPP. Section 17 sets out the provisions in other regulations that prevail over AB FOIPP.

[46] This prevailing clause is much broader than section 23 of FOIP because it applies to any provision of another act. Whereas section 23 of FOIP only applies to provisions that **restrict or prohibit access** to a record or information. However, the Alberta's Information and Privacy Commissioner's (AB IPC) approach is consistent with my office in that its consideration of other enactments and the relationship with the applicable access to

information law requires a review of the information at issue, a consideration of whether it is caught by the other enactment and a finding as to whether the enactment prevails over the access to information law. See for example, AB IPC's Orders F2006-006, F2005-007 and F2005-029.

[47] A survey of Ontario Information and Privacy Commissioner's (ON IPC) orders on the prevailing provision in section 67 of Ontario's *Freedom of Information and protection of Privacy Act* (ON FIPPA) reveals that its approach is consistent with the approach taken by my office and the AB IPC. The application of a confidentiality or access provision in another act does not oust the jurisdiction of the ON IPC to conduct a review to determine if the confidentiality provision applies to the records and information at issue.

[48] Section 67(1) of ON FIPPA states that ON FIPPA prevails over a "confidentiality provision" in any other Ontario statute, unless section 67(2) of ON FIPPA or the other statute specifically provides otherwise. Section 67(2) of ON FIPPA lists a number of confidentiality provisions which prevail over ON FIPPA. Section 67(1) of ON FIPPA states:

> **67**(1) This Act prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise.

[49] ON IPC's Order PO-3669 considered a confidentiality provision in Ontario's *Legal Aid Services Act* (ON LASA) and the application of subsection 67(2) of ON FIPPA which refers to sections 89, 90 and 92 of the ON LASA. The adjudicator stated that the effect of a finding that section 90 does not apply, is that the LASA is not the controlling statute for determining disclosure of the records requested in the appeal.

[50] Following an extensive analysis of section 90 of the ON LASA and its application to the records at issue, the ON IPC adjudicator found that the responsive records did not fall within section 90 of the ON LASA and therefore the confidentiality provisions in the ON LASA did not prevail over FIPPA.

[51] In arriving at this conclusion, the adjudicator noted that they were guided by ON IPC's Order 9 where former ON IPC Commissioner Linden explained the approach to section 67 of ON FIPPA as follows:

> Where, as in this case, an institution purports to remove itself from the ambit of the [ON FIPPA] through the use of a "confidentiality provision" in another act, it is my responsibility to scrutinize the provision of that other act to ensure that both the subject matter and the person who would be releasing the requested information under that act (i.e. the head of the institution) are covered by the "confidentiality provision" relied on.
>
> …
> While the head of an institution must determine at first instance whether a particular statutory provision is a "confidentiality provision" precluding access to the requester, I, too, must be assured of the relevance and application of the provision upon receipt of an appeal. I regard this duty as fundamental to the effective operation of [ON FIPPA] and the principles of providing a right of access to information and protecting the privacy of individuals.

[52] In ON IPC Order PO-4264, the ON IPC considered a claim by the Ontario Securities Commission (OSC) that the confidentiality provision in section 16 of Ontario's *Securities Act* (ON SA) applied and prevailed over ON FIPPA. Section 26 of the ON SA was listed in subsection 67(2) of ON FIPPA. The adjudicator noted that they "scrutinized each record that the OSC claims contains information that should be maintained in confidence under" the confidentiality provisions. After considering the scope of the confidentiality provisions and the withheld information, the adjudicator found that the information at issue falls within the confidentiality provision. The adjudicator concluded that, for this information, the ON SA is the controlling statute for the non-disclosure and disclosure, and the access and privacy rules in ON FIPPA do not apply.

[53] There are multiple other examples of the ON IPC's exercise of its jurisdiction to consider the application of section 67 and its relationship to confidentiality clauses such as ON IPC Orders PO-2029, PO-2083, PO-2411-I and PO-4405.

[54] In Order PO-2029, the OSC disputed the ON IPC's authority to conduct a review where it claimed the application of a confidentiality clause. Former ON IPC Assistant Commissioner Mitchinson stated:

> The analysis in Order P-623 [upheld in *Ontario (Minister of Health) v. Big Canoe* [1995] O.J. No. 1277 (C.A), affirming (June 29, 1994), Toronto Doc. 111/94 (Div. Ct.)] deals with a different jurisdictional issue (i.e. section 65(2) rather than section 67(1)). However, in my view the principle articulated in [Order P-623 (upheld in *Ontario (Minister of Health) v. Big Canoe* [1995] O.J. No. 1277 (C.A), affirming (June 29, 1994), Toronto Doc. 111/94 (Div. Ct.)], that decisions about the accessibility of a record under [ON FIPPA] should be reviewed independently of government and the related view that the appeal provisions of the Act are available to review them, are equally applicable to my consideration of the relationship between sections 67(1) of [ON FIPPA] and section 153 of [ON SA], as they apply to the audit report at issue in this appeal.
>
> Several decisions of the courts, in other contexts, have confirmed that a tribunal has a duty to decide whether or not its home statute applies [see, for example, *Morgan v. Windsor Roman Catholic Separate School Board (1979)*, 29 O.R. (2d) 100 (Div. Ct.) and *Blue Mountains (Town) v. Canadian Development Management Corp.*, [2002] O.J. No. 2497 (Sup. Ct.)].
>
> Adopting the approach originally articulated by former Commissioner Linden in Order 9, and applied in subsequent orders of this office, I find I have a statutory responsibility under [ON FIPPA] to scrutinize section 153 of [ON SA] and the surrounding circumstances of this appeal, and to assure myself that it has been properly applied by the OSC in the context of the audit report at issue in this appeal. I have this responsibility, regardless of whether or not an appeal to the Divisional Court may be available under the [ON SA], because the appellant has made an otherwise valid request under [ON FIPPA].

[55] In ON IPC Order PO-2411-I, the OSC argued that section 153 of the ON SA prevailed over all of the provisions of ON FIPPA. Adjudicator Higgins considered this position and stated:

> Similarly, section 153 of the [ON SA] operates together with the right of access and the exemptions in the [ON FIPPA] to add a further exemption that forms part of the access scheme established under the *Act*. The effect is that the OSC is given authority to withhold records from disclosure to a requester where an access request has been made under [ON FIPPA]. In other words, section 153 of the [ON SA] is an exemption from the right of access under [ON FIPPA] in the same manner as the exemptions that actually appear in [ON FIPPA], found at sections 12 through 22.
>
> Therefore, like any other exemption in [ON FIPPA], section 153 prevails over the right of access if it is found to apply, but in so doing, it does not displace the operation of the entire [ON FIPPA]. It does not remove the oversight function of this office, nor any of its appeal powers, including those relating to the production of records under section 52(4) of the *Act*.

> Accordingly, I find that I have jurisdiction to conduct an inquiry into whether section 153 of the [ON SA] applies, and to order production of the record at issue in this appeal for that purpose.

[56] The Prince Edward Island Information and Privacy Commissioner (PEI IPC) follows a similar approach to its prevailing clause. I note that its prevailing clause is similar to the clause in AB FOIPP. Section 5(2) of the Prince Edward Island *Freedom of Information and Protection of Privacy Act* (PEI FOIPP) states:

> **5**(2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless
>
> (a) another Act; or
>
> (c) a regulation under this Act
>
> expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

[57] PEI IPC's Order FI-17-006 involved a claim that confidentiality provisions in the *Child Protection Act* (PEI CPA) applied and prevailed over PEI FOIPP. The PEI IPC reviewed the responsive records and determined that they fell within the provisions of the PEI CPA which were listed in section 14(e) of the General Regulations to the Prince Edward Island *Freedom of Information and Protection of Privacy Act*. Consequently, the adjudicator found that the listed provisions prevailed, and the PEI IPC did not have jurisdiction to order release of the records under PEI FOIPP.

Court Decisions

[58] In *Community Safety*, the SCC determined that the ON IPC's consideration of whether a confidentiality clause prevails over ON FIPPA was part of its core function. In that case, the ON IPC adjudicator had found, after reviewing the responsive records, that a confidentiality clause in *Christopher's Law (Sex Offender Registry), 2000*, S.O. 2000, c. 1 ("*Christopher's Law*") did not apply to information sought by a requester from Ontario's Sex Offender Registry. I note that *Christopher's Law* was not a provision listed in section 67(2) of ON FIPPA.

[59] In upholding the decision of the ON IPC, the court described the role and authority of the ON IPC in paragraph [27] as follows:

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

[60] This case was cited with approval in the *West Vancouver* case referenced by Finance. The BCSC stated:

> [31] More importantly, the [BC IPC] was obliged to consider s. 182 as a consequence of his function under his home statute, as was the case in *Ontario (Community Safety and Correctional Services)*. Section 79 of *FIPPA* is analogous to s. 67 of the *Ontario Act*, which was at issue in the Supreme Court of Canada's decision. This is apparent from a comparison of the two sections.
>
> …
> [34] While s. 79 of *FIPPA* [now section 3(7) of FIPPA] is obviously a more broadly worded provision, the purpose of both sections is the same: to determine the relationship of the freedom of information legislation to other Acts. Both sections required the delegate to examine external statutes to determine whether the provisions of that other statute prevailed, which the Supreme Court of Canada held to be a task that is intimately connected to the Information and Privacy Commissioner's core functions under his or her home statute relating to access to information and privacy. The same result must follow here.

[61] This approach was also followed by the BCSC in *College of Physicians and Surgeons of British Columbia v. British Columbia Information and Privacy Commissioner and Dr. Keith Laycock*, 2019 BCSC 354 (Can LII) (*BC College of Physicians*) involving the BC *Health Protection Act* (BC HPA). The case was a judicial review of a decision of the BC IPC requiring disclosure of information to the requester. Subsection 26.2(1) of the BC HPA sets limits on the disclosure of records or information provided to a quality assurance committee or assessor. Subsection 26(6) of the BC HPA specifically provides that subsection 26.2(1) applies despite BC FIPPA.

[62] In its argument on the standard of review, the College argued that BC HPA contained a specific exclusionary clause which "ousts" BC FIPPA altogether, and the decisions of *West Vancouver* and *Community Safety* are not applicable (see paragraph [55]).

[63] The court disagreed with the College's argument and described section 26.2 of HPA as an exception to BC FIPPA's access rights. It stated:

> [71] I am unable to accede to the College's submission on this issue. Instead, I agree with the IPC that there is little doubt that the Legislature would have expected the IPC to interpret and apply the exception to *FIPPA*'s access right created by s. 26.2 of the *HPA*. Because interpreting that provision is fundamental to the IPC carrying out the statutory mandate to adjudicate on access requests such as Dr. Laycock's, and is therefore "closely connected" to the IPC's core function, I am persuaded the presumption of reasonableness applies.

[64] Ultimately, the court found that the BC IPC's interpretation of section 26.2 of the BC HPA was not reasonable and quashed the BC IPC order. However, there was no suggestion before or from the court that the BC IPC did not have the authority to conduct the inquiry.

[65] I now turn to consider Finance's arguments regarding my office's jurisdiction to conduct this review.

West Vancouver

[66] Finance cites two decisions which it states "imply" that the Applicant cannot request a review under subsection 49(1) of FOIP in this matter.

[67] Turning first to the decision of the BCSC in *West Vancouver*. Finance relied on a passage from this decision to suggest that the BCSC interpreted "prevailed" to mean "falls outside of the scope of FIPPA." Finance stated:

> The IPC delegate had noted that only part of the *Police Act* "operated outside the scope of FIPPA," thus interpreting "prevails" to mean "operate outside the scope of FIPPA." The Court did not question that interpretation.

[68] Finance appears to be claiming that the words "falls outside the scope of FIPPA" were used by the BC IPC or the BCSC to suggest that the BC IPC has no authority or jurisdiction to conduct a review or inquiry when a public body claims that a provision in another act prevails over BC FIPPA. Finance's claim is not reasonable and is not supported by *West Vancouver*. First, the issue of the BC IPC's jurisdiction to conduct an inquiry under BC FIPPA was not before the court and it did not rule or comment on the issue, directly or indirectly. Second, it is clear from the context that the BC IPC did not intend to suggest that a finding that a provision prevails over BC FIPPA "ousts" the jurisdiction of the BC IPC to determine if the provision applies to the records.

[69] Turning to the context for this decision. The matter came before the BCSC on a judicial review from a decision of the BC IPC in Order F15-05 where the BC IPC exercised its authority to conduct a review involving a claim that a provision in another act prevailed over BC FIPPA. I note that in the course of its inquiry, the BC IPC reviewed the responsive records to determine if they were caught by the other provision.

[70] After reviewing the responsive records, the BC IPC found that section 182 of British Columbia's *Police Act* (BC PA) did not apply to the records at issue. Subsections 182(c) and (d) of the BC PA were relevant. Those subsections state:

> 182 Except as provided by this Act and by section 3(3) of the Freedom of Information and Protection of Privacy Act, that Act does not apply to
>
> …
> (c) any information or report in respect of which an investigation is initiated under this Part, or
>
> (d) any record related to information or a report described in paragraph (c), including, without limitation, any record related to a public hearing or review on the record in respect of the matter,
>
> whether that record, information or report is created on or after a complaint is made, submitted or registered or the investigation is initiated, as the case may be.

[71] Section 79 of BC FIPPA (now section 3(7) of BC FIPPA) stated:

> **79** If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

[72] The BC IPC described the issue before it as follows:

> [17] The issue in this inquiry is whether the investigator's notes and certain emails (and their attachments) relating to the investigation into the applicant are outside of the scope of FIPPA due to s. 182 of the *Police Act*.

[73] The adjudicator then described section 182 of BC PA as an exception to FIPPA when they stated:

> [18] The leading case on the scope of the **exceptions to FIPPA** that are contained in the *Police Act* has been Order 03-06. However, the *Police Act* has been substantially amended since that order was issued. [Emphasis added]

[74] The adjudicator then applied a two-part test to determine if section 182 of the BC PA applied to the responsive records and found that the records did not fall within that provision. The adjudicator concluded as follows:

> [21] Since s. 182 of the *Police Act* does not exclude the records at issue from the scope of FIPPA, WVPD must process the applicant's request with respect to these records.

[75] WVPD then applied for a judicial review of that decision.

[76] As noted above in paragraph [60] of this Report, the court acknowledged the BC IPC's authority to conduct the inquiry in its discussion on the standard of review.

[77] Given the context for the BC IPC's and the BCSC's use of the phrase "outside the scope of FIPPA," Finance's argument is not reasonable. It is apparent that neither the BC IPC nor the BCSC intended to suggest that where a public body claims that records are caught by a prevailing provision or enactment, the Applicant does not have the right to request a review and the BC IPC does not have the jurisdiction to conduct a review.

[78] As noted above, the *West Vancouver* decision was subsequently considered by the BCSC in the *BC College of Physicians* case.

[79] There was no suggestion from the BCSC in the *BC College of Physicians* case that the BC IPC did not have the authority to conduct its review. As noted above in paragraph [63] of this Report, in determining the standard of review, the BCSC in *BC College of Physicians* stated:

> …that there is little doubt that the Legislature would have expected the IPC to interpret and apply the exception to FIPPA's access right created by section 26.2 off the HPA. Because interpreting that provision is fundamental to the IPC carrying out the statutory mandate to adjudicate on access requests such as Dr. Laycock's, and is therefore "closely connected" to the IPC's core function, I am persuaded the presumption of reasonableness applies.

[80] For all of these reasons, I am not persuaded that the BCSC intended to suggest or implied in *West Vancouver* that the BC IPC did not the authority to conduct an inquiry in the context of a claim that another enactment or provision prevails over BC FIPPA.

Community Safety

[81] Finance also referred to the findings of the Supreme Court of Canada in *Community Safety*. Finance stated that:

> The Court said that the Commissioner reasonably concluded that the Act in question did not contain a confidentiality provision that specifically indicated it prevailed over FIPPA and said, "It follows that the Record is subject to FIPPA and its exemption scheme." The implication was that, if the Act had been listed in subsection 67 of Ontario's FIPPA, it would not have been subject to FIPPA and its exemption scheme.

[82] I do not agree with Finance. The SCC's decision in *Community Safety* did not imply that the ON IPC would have no jurisdiction to conduct an inquiry into claims that a listed confidentiality provision prevailed. Like Finance's argument involving *West Vancouver*, this argument ignores the court's findings and the other context for the decision.

[83] The issue before the SCC was the standard of review and the reasonableness of the IPC's decision regarding the application of a confidentiality clause. The issue of the IPC's jurisdiction to conduct the inquiry was not raised by the parties, the courts below or the SCC.

[84] Second, the SCC's discussion on the standard of review recognized that the interpretation of the confidentiality clause was part of the IPC's core functions and duties.

[85] Third, the court cited other cases where the ON IPC had considered the application of listed confidentiality clauses and did not suggest, by implication or otherwise, that the fact that the clauses were listed in the legislation had an impact on the jurisdictional questions.

Statutory Interpretation

[86] I now turn to Finance's argument regarding the statutory interpretation of section 67 of FOIP. Finance asserted that nowhere in section 23 of FOIP does it say that FOIP and an act listed in subsection 23(3) of FOIP should be read together to the extent that they can operate together. It added that if FOIP and Part III of the RFSA were intended to operate together to the extent that they do not conflict, there would have been an express indication of that in FOIP, but that no such language is found in FOIP. It claimed that the result is that the RFSA prevails over the provisions of FOIP and the FOIP Regulations in their entirety, including the provisions setting out the right to a review and my office's authority to conduct a review.

[87] Finance asserted that its position is supported by a reading of section 23 of FOIP. It quoted from the following passage of *The Interpretation of Legislation in Canada* (4th ed.2011) at p. 365:

> Different enactments of the same legislature are deemed to be as consistent as the provisions of a single enactment. All the legislation of a legislature is deemed to make up a coherent system. Thus, interpretations favouring harmony between statutes should prevail over those favouring conflict, because the former are presumed to better represent the thought to the legislature.

[88] Finance also asserted:

> If all Saskatchewan legislation is "deemed to make up a coherent system" (sometimes referred to as the "statute book"), and if the statutes are deemed to be consistent, as if the provisions were in the same Act, then it follows that if FOIP and Part III of the RFSA were intended to operate together to the extent that they do not conflict, there would have been an express indication of that in FOIP. But no such language is found in FOIP. FOIP does not define what would constitute a direct conflict and there is no language that the two should operate concurrently if there is no direct conflict. Instead FOIP provides that subsection 23(1) "does not apply" to Part III of the RFSA and that Part III of the RFSA "prevails." Part III of the RFSA prevails over the provisions of FOIP and the FOIP Regulations, which means the access provisions (including processes and timelines) and the review provisions of FOIP do not apply to records subject to Part III of the RFSA.

[89] If this were an appropriate interpretation of section 23 of FOIP and Part III of the RFSA, the result would be that there is no basis for independent review of a decision of Finance regarding the application of Part III of the RFSA. In my view, this is not what the legislature intended. The reasons for this view follow.

[90] I will begin my analysis with a consideration of the general purpose of FOIP and the specific wording of section 23 of FOIP. I will follow the approach set out by the SCC in *Rizzo & Rizzo Shoes Ltd. (Re),*[1998] 1 SCR 27 (SCC) which requires statutes to be read in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme and object of the act and intention of the legislature.

[91] Unlike some other access to information legislation in Canada, FOIP does not contain a purpose clause. However, the purpose of FOIP was described by the Saskatchewan Court of Appeal in *General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance,* 1993 CanLII 9128 (SK CA) as follows:

> [11] The Act's basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy is the dominant objective of the Act…. 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.

[92] The Supreme Court of Canada has interpreted acts, such as FOIP, as quasi-constitutional legislation. It follows that as fundamental rights, the rights to access and to privacy are interpreted generously, while the exceptions to these rights must be understood strictly (*Guide to FOIP*, Ch. 1, p. 2).

[93] In Review Report 149-2017, Social Services made similar arguments to those made here by Finance. As the findings and analysis in that Report directly address the arguments made here by Finance and apply equally to the application of section 70 of the RFSA, I will set them out here:

> [43] Consistent with this overarching legislative purpose, subsection 23(1) of FOIP provides that "[where] a provision of any other Act…restricts or prohibits access by any person to a record or information in the possession or under the control of a government institution *conflicts* with [FOIP]…the provisions of [FOIP]…shall prevail." Subsection 23(2) of FOIP entrenches this rule even further by providing that subsection 23(1) of FOIP applies notwithstanding any provision in the other Act that states the provision of that Act is to apply notwithstanding any other Act or law.
>
> [44] Therefore, to the extent that there is a conflict, subsections 23(1) and (2) of FOIP are clearly intended to create a legislative hierarchy such that the provisions of FOIP *prevail* over the provisions of the other conflicting Act. In short, the legislature has drafted section 23 of FOIP in a way that is described simply in *Sullivan on the Construction of Statutes* (Sullivan), 6th Edition (Toronto: LexisNexis Canada, 2014) at §11.42 "in cases where section x come into conflict with section y, section x prevails."
>
> [45] Subsection 23(2) of FOIP states that this hierarchy is subject to subsection (3) of FOIP. Subsection 23(3) of FOIP provides that "[subsection] (1) does not apply to the following provisions, and those provisions prevail…" and goes on to list section 74 of the CFSA among other specific provisions.
>
> [46] By reason of subsection 23(2) subjecting itself to subsection (3), and subsection (3) referring back to subsection (1), these provisions are grouped together. As noted by Sullivan:
>
> > **§14.55** ***Grouping of Provisions under headings.*** When provisions are grouped together under a heading it is presumed that they are related to one another in some particular way, that there is a shared subject or object or a common feature to the provisions. Conversely, the placement of provisions elsewhere, under a different heading, suggests the absence of such a relationship.

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

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

[49] In fact, the SCC has consistently applied this "presumption of consistent expression" in its interpretation of statutes. For examples, see *R v Zeolkowski* [1989] 1 SCR at para 19 and *Thomson v Canada (Deputy Minister of Agriculture)*, 1992 CanLII 121 (SCC), [1992] 1 SCR 385 at paras 26-28.

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

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

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

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

> 47 The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be

> eschewed unless it is unavoidable. The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:
>
> > According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.
> >
> > (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)

[94] I adopt the same approach in this case.

[95] I am also guided in my interpretation by the fact that section 3 of FOIP states:

> **3**(1) This Act does not apply to:
>
> (a) published material or material that is available for purchase by the public;
>
> (b) material that is a matter of public record; or
>
> (c) material that is placed in the custody of the Provincial Archives of Saskatchewan by or on behalf of persons or organizations other than government institutions.

[96] If the legislature had intended that subsection 23(3) of FOIP would operate to exclude the application of FOIP in its entirety, it would have used language similar to that used in section 3 of FOIP. This is based on the principle of uniform expression which provides that the legislature is presumed to use the same words and techniques to express the same meaning and different words and techniques to express different meanings (Sullivan R., *Statutory Interpretation in a New Nutshell*, 2003 CanLIIDocs 108, 2003 82-1 Canadian Bar Review 51, p. 60).

[97] This approach to the interpretation of section 23 of FOIP is consistent with the approach to the interpretation of ON FIPPA section 67 taken by the SCC in *Community Safety*. There the court stated that section 67 of ON FIPPA is "the mechanism the legislature chose to resolve any conflict." The SCC held that subsection 67(1) of ON FIPPA sets out the general priority of it over other confidentiality provisions found in other legislation. I note that, like

subsection 23(3) of FOIP, section 67 of ON FIPPA does not use the word conflict anywhere.

[98] For all these reasons, I find that my office has the authority to exercise its full jurisdiction to conduct a review to determine if section 70 of the RFSA applies to the records at issue and the jurisdiction to make recommendations regarding access to the records at issue where I find that section 70 of the RFSA does not apply.

[99] Before I conclude this analysis, I note that in support of its position, Finance asserted that there was no decision of the head pursuant to sections 7, 12 or 37 of FOIP to review under subsection 49(1)(a) of FOIP. This argument overlooks the fact that its letter (described in paragraphs [2] and [3] of this Report) sent in response to the access to information request contained all of the elements of a decision issued pursuant to section 7 of FOIP. So, there is evidence that Finance, at least initially, took the position that there was a right to request a review of the decision under FOIP.

[100] In fact, it was not until September 18, 2023, that Finance took the position that my office did not have authority to conduct a review under FOIP.

[101] I now turn to consider if Finance has established that subsection 23(3)(m) of FOIP and subsection 12(d) of the FOIP Regulations apply to the responsive records.

2. Does subsection 23(3)(m) of FOIP and subsection 12(d) of the FOIP Regulations apply?

[102] As noted above, Finance's section 7 decision referred to the application of subsection 12(d) of the FOIP Regulations. The relevant provisions of section 23 of FOIP, section 12 of the FOIP Regulations and section 70 of the RFSA are set out above. Before I turn to consider the application of these provisions, I will address the applicable burden of proof.

[103] Section 61 of FOIP states:

> **61** In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[104] Applying section 61 of FOIP, Finance has the burden of establishing that access to the records may or must be refused. As I have not been provided with copies of the records at issue, I must assess whether that burden has been met based on two affidavits filed by Finance and its correspondence with my office.

[105] Subsection 23(3)(c) of FOIP and subsection 12(d) of the FOIP Regulations specifically include Part III of the RFSA among the list of confidentiality provisions that prevail over FOIP. Section 70 of the RFSA is found in Part III of the RFSA. Therefore, the first task before me is to determine if, based on the information provided, the responsive records fall within section 70 of the RFSA.

[106] I note that the access to information request in this case stated that the Applicant seeks access to "all records pertaining to all steps taken to collect [provincial sales tax]" during a specific period of time from the identified company and its directors. Finance described the responsive records and explained how they qualified as "returns" as follows:

> All documents in the file are confidential tax information. The documents were either provided by the vendor to the Ministry regarding the filing and payment of provincial sales tax (PST) returns or were issued by the Ministry's collection and enforcement team to gain compliance from the vendor with respect to their outstanding PST liability. This information falls within the definition of "return" in section 70 of the RFSA.
>
> Return is defined in section of the RFSA as "a return prescribed by the minister and includes any other return or information which is required or may be demanded pursuant to this Part or any revenue Act."
>
> The information the vendor provided falls within the definition of return because it is a return prescribed by the minister and includes returns or information which is required or may be demanded pursuant to Part III or any revenue Act. The information on the file generated from the Ministry is information that may be demanded subsection 54(3) of the RFSA. That subsection provides:
>
> > 54(3) Notwithstanding section 53 and subsection (1), the minister may at any time require a collector or taxpayer to:
> >
> > (a) pay to him the amount of tax collected or payable for any period or periods; or

(b) furnish him with a return, or information, with respect to any period;

within a period of time that he may specify.

Therefore, it too falls within the definition of return in section 70 of the RFSA.

As such, the information Marr Management Inc. provided as a collector and the information that produced to collect payment of PST outstanding fall within the scope of subsection 70(1) of the RFSA.

Subsections 70(2), (3) and (4) of the RFSA provide circumstances under which information subject to subsection 70(1) of the RFSA may be disclosed and responding to an access to information request is not one of them.

[107] In an affidavit sworn by the Assistant Deputy Minister Revenue Division (ADM), the ADM attested to the fact that they have reviewed the file and that section 70 of the RFSA applied fully to the file.

[108] On October 3, 2023, the Deputy Minister of Finance provided my office with a summary of the records that Finance held regarding the named company and its "PST Account." The summary listed the following records: PST Notice to File; Period Balance Statements; correspondence to tax client; third party demands for payment; withdraw and/or reduction letters issued to third party; business consent forms; judgement registration notices; notice of estimated assessment; letter to third party; notices of assessment issued to third party; bankruptcy documents; and notes on collection case to maintain record of collection action.

[109] As noted, Finance asserted that all of these records are caught by section 70 of the RFSA.

[110] Section 70 of the RFSA applies to "returns", records or information submitted by a collector or taxpayer and information obtained by way of audit, investigation or inspection. Therefore, I must determine if Finance has established that the responsive records qualify as "returns", records or information submitted by a collector or taxpayer or information obtained by Finance by way of audit, investigation or inspection.

[111] Before turning to the definition of "returns", I note that on the face of the summary of records provided by Finance, it appears that of the 12 records listed, six of the records

would not have been submitted by a collector or taxpayer nor have been obtained by audit, investigation or inspection. The six records are: correspondence to tax client, third party demands for payment, withdrawal or reduction letters, letter to third party, notices of assessment issued to third party, and notes on collection case to maintain record of collection action. Unless those records qualify as "returns", on their face, they would not be caught by section 70 of the RFSA.

[112] Subsections 47(1)(d), (e), and (g)(ii) of the RFSA define the terms "return", "taxpayer" and "revenue Act", as used in section 70 of the RFSA as follows:

> **47**(1) In this Part:
>
> …
> (d) "return" means a return prescribed by the minister and includes any other return or information which is required or may be demanded pursuant to this Part or any revenue Act;
>
> (e) **"revenue Act"** means:
>
> …
> (ii) *The Provincial Sales Tax Act*;
>
> …
> (g) **"taxpayer"** means any person required by a revenue Act to pay a tax and includes:
>
> …
> (ii) a consumer and a user as defined in *The Provincial Sales Tax Act*;

[113] I am unable to determine if the records identified by Finance as responsive to this request include information that would be caught by section 70 of the RFSA. As noted above, it appears that some of the listed records include demands for information issued by Finance and other internally generated records. Regardless, even where the name or title assigned to a record *may* suggest that it includes information provided by a taxpayer that may qualify as a return as defined in the RFSA, I am not able to make that determination having only been provided with the title or name of the records.

[114] Along with the summary of records provided by Finance, it included "Comments/Explanations" regarding each of the records. However, the comments or explanations do nothing more than reassert its claim that section 70 of the RFSA applied and that the section prevailed over FOIP. The affidavit filed by the ADM was similar in that it included the ADM's assertion that section 70 of the RFSA applies to all of the records.

[115] As noted above, my office must conduct an independent review of Finance's claim that section 70 of the RFSA applies to the records at issue. Given the scope of the access to information request, the limited information about the contents of the responsive records and in the absence of a copy of the records, I find that Finance has not met its burden of establishing that section 70 of the RFSA applies to the records. Therefore, I find that section 70 of the RFSA does not apply. Consequently, I find that Finance did not properly apply subsection 23(3) of FOIP and subsection 12(d) of the FOIP Regulations to the responsive records.

[116] As no other exemptions have been claimed for the records, I recommend that Finance release them to the Applicant within 30 days of issuance of this Report, subject to any mandatory exemptions that may apply.

IV FINDINGS

[117] I find that I have jurisdiction to conduct this review.

[118] I find that section 70 of the RFSA does not apply to the responsive records.

[119] I find that Finance did not properly apply subsection 23(3) of FOIP and subsection 12(d) of the FOIP Regulations to the responsive records.

V RECOMMENDATION

[120] I recommend that Finance, within 30 days of issuance of this Report, release to the Applicant the records responsive to the access to information request, subject to any mandatory exemptions that may apply.

Dated at Regina, in the Province of Saskatchewan, this 25th day of October 2023.

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