



REVIEW REPORT 145-2020

Ministry of Social Services

February 7, 2022

Summary:

The Applicant submitted an access to information request to the Ministry of Social Services (Social Services) on February 12, 2020. Upon receiving Social Services' responses, the Applicant requested a review of the decision. The Commissioner found that pursuant to section 23(3)(c) of *The Freedom of Information and Protection of Privacy Act* (FOIP), the confidentiality provisions found in section 74 of *The Child and Family Services Act* (CFSA) prevail and apply to the record. The Commissioner recommended Social Services work with the Minister of Justice and Attorney General and the Commissioner's office to amend FOIP in order to repeal section 23(3)(c) of FOIP, so that section 74 of the CFSA is no longer included in that section.

I BACKGROUND

- [1] The Applicant made an access to information request to the Ministry of Social Services (Social Services) on February 12, 2020, requesting access to various information related to a group home final investigation report in which the Applicant was involved.
- [2] On June 19, 2020, the Applicant contacted our office advising they had not received a response to the request.
- [3] Through my office's early resolution process, Social Services responded to the Applicant's request on June 25, 2020. Social Services' response stated, in part:

Please note, the records you have requested were created pursuant to *The Child and Family Services Act*. Attached are the records responsive to your request that we are

legally authorized to release. Please note that, some of the information contained in the attached records has been severed pursuant to *The Child and Family Services Act* section 74(1)

[4] From a review of the information provided to the Applicant with the June 25, 2020 letter, it is information that specifically relates to the Applicant.

[5] On June 25, 2020, Social Services provided my office and the Applicant with a copy of a letter dated February 12, 2020 in which Social Services states, in part:

The records you have requested cannot be released pursuant to *The Freedom of Information and Protection of Privacy Act* (FOIPP) as they are subject to *The Child and Family Services Act* (CFSA). Subsection 23(3)(c) of FOIPP provides that the confidentiality provisions found in section 74 of the CFSA prevail over FOIPP. This notice is provided to you pursuant to FOIPP section 7(2)(d).

[6] On July 2, 2020, the Applicant advised my office they wished to proceed with their review based upon the exemptions used to deny access and not Social Services' delayed response.

[7] On July 28, 2020, my office notified Social Services and the Applicant of our intent to undertake a review in this matter.

II RECORDS AT ISSUE

[8] This review will determine whether section 74 of *The Child and Family Services Act* (CFSA) fully applies to the record.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[9] Social Services is a "government institution" pursuant to section 2(1)(d)(i) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Therefore, I have jurisdiction to conduct this review.

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

[10] Social Services has advised the Applicant that the confidentiality provisions found in section 74 of the CFSA prevail over FOIP pursuant to section 23(3)(c) of FOIP.

[11] Section 23(1) 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.

[12] In [Review Report 054-2020](#), I provided the following analysis regarding the relationship of section 23(3)(c) of FOIP and section 74 of the CFSA:

[10] The IPC *Guide to FOIP*, Chapter 1: “Purposes and Scope of FOIP”, updated July 28, 2020, (*Guide to FOIP*, Ch. 1) describes primacy clauses on page 21 as being clauses in a statute that define how a statute is interpreted if its provisions are inconsistent with another statute in the same jurisdiction. Primacy is defined as the state or position of being first in order, importance or authority.

[11] Section 23(1) of FOIP provides that where there is a conflict between FOIP and any other Act or regulation, FOIP will prevail even where another Act or regulation restricts or prohibits access. “Prevail” means a provision of one Act having priority over a conflicting provision in another Act (*Guide to FOIP*, Ch. 1, p. 21).

[12] However, section 23(3) of FOIP provides a list of provisions where FOIP does not prevail. The Legislative Assembly of Saskatchewan recognized that FOIP and some other provisions would be in conflict and provides the mechanism for resolving that by expressly stating the provisions listed at section 23(3) of FOIP would prevail over FOIP. This includes section 23(3)(c) of FOIP (*Guide to FOIP*, Ch. 1, p. 24).

[13] If engaging section 23(3) of FOIP, the government institution should be able to demonstrate that the record or information in question falls within the statutory provision that is not subject to FOIP. It should be noted that section 23 of FOIP only applies to portions of Parts II and III of FOIP, which refer to access to records. All of

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.

[14] Social Services has specifically raised section 23(3)(c) of FOIP, which provides:

23(3) Subsection (1) does not apply to the following provisions and those provisions prevail:

...
(c) section 74 of *The Child and Family Services Act*;

[15] Section 74 of the CFSA lays out the confidentiality provision for child and family services files. Section 74 of the CFSA provides:

74(1) Notwithstanding section 18 of *The Social Services Administration Act*, members of the board, members of family review panels, mediators, officers and employees of the ministry, members of boards of directors of agencies, officers and employees of agencies, foster parents and all other persons who are employed in or assist with the administration of this Act:

(a) shall preserve confidentiality with respect to:

(i) the name and any other information that may identify a person that comes to their attention pursuant to:

(A) this Act;

(B) *The Family Services Act*, not including Part III; or

(C) *The Child Welfare Act*, not including Part II; and

(ii) any files, documents, papers or other records dealing with the personal history or record of a person that have come into existence through anything done pursuant to:

(A) this Act;

(B) *The Family Services Act*, not including Part III; or

(C) *The Child Welfare Act*, not including Part II; and

(b) shall not disclose or communicate the information mentioned in clause (a) to any other person except as required to carry out the intent of this Act or as otherwise provided in this section or in the regulations.

(2) The minister, a director or an officer may disclose or communicate information mentioned in subsection (1) relating to a child to:

- (a) the guardian, parent or foster parent of that child; or
- (b) the child to whom the information relates.

(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.

(4) Notwithstanding subsection (2) or (3), no person shall, except while giving evidence in a protection hearing, disclose to anyone who is not an officer or a peace officer the name of a person who:

- (a) makes a report pursuant to section 12; and
- (b) requests that his or her name not be disclosed.

(5) Any information that may be disclosed to the person to whom it relates may, with the written consent of the person to whom it relates, be disclosed to any other person.

(5.01) The minister, the director or an officer may disclose information with respect to a person mentioned in subsection (1) without the written consent of the person to whom the information relates, in accordance with the regulations.

(5.1) Information mentioned in subsection (1) may be disclosed if, in the opinion of the minister, the benefit of the disclosure of information clearly outweighs any invasion of privacy that could result from the disclosure.

(5.2) Any information disclosed pursuant to this section may be disclosed in any form that the minister considers appropriate.

(6) Any disclosure of information pursuant to this section does not constitute a waiver of Crown privilege, solicitor-client privilege or any other privilege recognized in law.

[16] In its submission to my office, Social Services advised, in part:

Section 74 of the CFSA provides that those who are employed in or assist with the administration of the Act “**shall not disclose or communicate**” the “name and any other information that may identify a person that comes to their attention” pursuant to the CFSA, or “any files, documents, papers or other records dealing with the personal history or record of a person that have come into existence through anything done” pursuant to the CFSA, “**to any other person** except as required to carry out the intent of this Act or as otherwise provided in this section or in the regulations”;

...

Not only does s. 74 of the CFSA prohibit disclosure of **records** that have come into existence through anything done pursuant to the CFSA, but it also prohibits disclosure of identifiable **information** that comes to the attention of [Social Services] officials....

[Emphasis in original]

- [13] In summary, where there is a conflict in regards to access to information, section 23(1) of FOIP provides that FOIP will be the prevailing statute. However, section 23(3) of FOIP lists the specific statutes (or portions thereof) where the listed statute shall prevail over FOIP. In this particular matter, section 23(3)(c) of FOIP lists section 74 of the CFSA as the prevailing provision where there is a conflict regarding access to records.
- [14] In this review, I have been provided evidence from Social Services that the confidentiality provisions provided for in section 74 of the CFSA applies fully to the record requested by the Applicant.
- [15] Therefore, I find pursuant to section 23(3)(c) of FOIP, the confidentiality provisions found in section 74 of the CFSA prevail and apply to the record.
- [16] Regardless of this finding, I am troubled that my office is not able to conduct a more fulsome review of records that fall under the confidentiality provisions of section 74 of the CFSA under the current legislative structure.
- [17] In [Review Report 254-2017](#), I conducted extensive analysis of section 23(3)(c) of FOIP. In that report, I spoke to the judicial review process available to individuals regarding the CFSA:

[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 through 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.

...

[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).

...

[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/partx-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.

...

[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.

[18] As a result of the above observations, I made the following recommendation in [Review Report 254-2017](#):

[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.

[19] I made the same recommendation in the above-noted [Review Report 054-2020](#) at paragraph [21].

[20] As of the date of this Report, I understand there has been no progress on my recommended legislative review. Therefore, I will continue to make that recommendation in this Report in hopes that Social Services will move to the same position held by other Canadian jurisdictions.

IV FINDING

[21] I find pursuant to section 23(3)(c) of FOIP, the confidentiality provisions found in section 74 of the CFSA prevail and apply to the record.

V RECOMMENDATION

[22] I recommend Social Services work with the Minister of Justice and Attorney General and my office to amend FOIP in order to repeal section 23(3)(c) of FOIP, so that section 74 of the CFSA is no longer included in that section.

Dated at Regina, in the Province of Saskatchewan, this 7th day of February, 2022.

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