



REVIEW REPORT 177-2021

Ministry of Corrections, Policing and Public Safety

March 16, 2022

Summary:

The Applicant asked for copies of contract tracing logs, to which the Ministry of Corrections, Policing and Public Safety (Corrections) denied access, in part, pursuant to sections 15(1)(c), (k), 17(1)(b) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP), and section 38(1)(b) of *The Health Information Protection Act* (HIPA). The Commissioner found Corrections did not properly apply section 38(1) of HIPA to the personal health information in the records, but that section 27(1) of HIPA instead applied to this information. The Commissioner also found Corrections properly applied sections 17(1)(b) and 29(1) of FOIP. The Commissioner recommended Corrections continue to withhold all this information pursuant to section 27(1) of HIPA and sections 17(1)(b) and 29(1) of FOIP. As such, the Commissioner had no need to review the other exemptions Corrections had applied. Lastly, the Commissioner found Corrections properly applied a time extension pursuant to section 12 of FOIP, and satisfied the criteria set out in section 12(1)(a)(ii) of FOIP.

I BACKGROUND

- [1] On May 10, 2021, the Ministry of Corrections, Policing and Public Safety (Corrections) received an access to information request from the Applicant as follows:

Self-monitoring tracking log for covid 19 OHS.

As per Saskatchewan.ca website:

Workplace will complete the template and send to Public Health within 24 hours. I request copies of all self-monitoring tracking logs with my name attached [sic] to them.

2019-present

- [2] On June 9, 2021, Corrections responded that pursuant to section 12(1)(a)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP), it was extending the 30-day response period by an additional 30 days. Corrections stated to the Applicant it would provide a response by July 9, 2021.
- [3] On July 6, 2021, Corrections responded to the Applicant advising it was denying access to the records pursuant to sections 15(1)(c), (k) and 29(1) of FOIP.
- [4] On July 8, 2021, the Applicant asked my office to undertake a review of Corrections' decision to withhold the information along with its decision to extend the response period an additional 30 days.
- [5] On July 16, 2021, my office provided notification to Corrections and the Applicant that my office would undertake a review. Both parties were invited to provide submissions. My office also requested a copy of the record and an Index of Records from Corrections. The Applicant provided a submission on December 30, 2021.
- [6] On January 9, 2022, Corrections provided my office with its submission, a copy of the records and an Index of Records. From a review of these materials, it appeared that Corrections added a new discretionary exemption to support withholding the information. Corrections added section 38(1)(b) of *The Health Information Protection Act* (HIPA). I will consider the application of this provision in this review.

II RECORDS AT ISSUE

- [7] The record involves 23 pages as follows:

Record #	Pages	Description	Exemptions Applied	Status
1	1 to 21	Contact tracing lists	Sections 15(1)(c), (k) and 29(1) of FOIP; 38(1)(b) of HIPA	Withheld in part
2	22 and 23	Email	Sections 15(1)(c), (k), 17(1)(b) and 29(1) of FOIP; 38(1)(b) of HIPA	Withheld in part

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[8] Corrections is a “government institution” pursuant to section 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction under FOIP to conduct this review. As Corrections raised section 29(1) of FOIP, I must consider to what extent the record contains personal information as defined by section 24 of FOIP.

[9] Corrections has also stated HIPA is involved. HIPA is engaged when three elements are present: 1) there is personal health information; 2) there is a trustee; and 3) the personal health information is in the custody or control of the trustee.

[10] First, it is helpful to describe the records and what data elements they contain. Record 1 is broken down into several individual tables of names. At the top of each table is the name of the Corrections employee who apparently tested positive for COVID-19 (the “COVID-19 positive employee”), and the names in each table underneath the COVID-19 positive employee indicate the co-workers or employees (the “contacts”) who were in contact with them (including their telephone numbers). The Applicant is also named on several other lists in Record 1 as a contact. Corrections has severed the names of the COVID-19 positive employees who are not the Applicant, as well as the names and telephone numbers of all contacts in the list except where the Applicant is listed as a contact.

[11] Record 2 includes an email and with an attached list that describes the Applicant, as a COVID-19 positive employee, and their contacts. Corrections has severed the names and telephone numbers of the contacts.

[12] On the first element, then, personal health information is defined by section 2(m) of HIPA. The records themselves indicate the Applicant as well as several other individuals have tested positive for COVID-19. This is personal health information pursuant to section 2(m)(i) of HIPA, which provides as follows:

2 In this Act:

...
(m) “personal health information” means, with respect to an individual, whether living or deceased:

(i) information with respect to the physical or mental health of the individual;

[13] With respect to those named on a contact tracing list, I need to consider the process and intent of contact tracing. The Northwest Territories Information and Privacy Commissioner (NWT IPC) summed up this topic as follows in [Review Report 20-HIA 24](#):

‘Contact tracing’ is a prescribed process carried out by employees of the health system, such as public health nurses or communicable disease staff, under the *Public Health Act*. Their task in such cases, is to contact individuals who may have been exposed to a positive reported disease and ensure those persons are tested. ...

[14] Contact tracing, then, can be viewed as a means of tracking people who have or may have a communicable disease. With respect to the matter before me, sections 2(h) and (i) of [The Public Health Act, 1994](#) define “communicable disease” and “contact” as follows:

2 In this Act:

...
(h) “**communicable disease**” means an infection in humans that:

(i) is caused by an organism or micro-organism or its toxic products; and

(ii) is transmitted directly or indirectly from an infected person or animal or from the environment;

(i) “**contact**” means a person or animal that:

(i) has likely been infected or exposed to infection by a communicable disease as a result of having been:

(A) in association with another person or animal that is infected with the disease;

(B) exposed to the body fluids of a person or animal that is infected with the disease; or

(C) in an environment that is contaminated by the disease; or

(ii) has likely infected another person or animal with a communicable disease;

[15] Pursuant to Table 1 of the Appendix of [The Disease Control Regulations](#), COVID-19 is established as a “Category I Communicable Disease”.

[16] Based on the preceding, COVID-19 is considered a communicable disease in Saskatchewan, and a contact appears to be someone who may have been exposed to, or may be infected with, COVID-19. Section 8 of *The Disease Control Regulations* further outlines that a person who is listed as a contact is required to seek testing and care, and to reduce the risk of affecting others. Therefore, this is also personal health information pursuant to section 2(m)(i) of HIPA.

[17] On the second element, in my office’s [Review Report 110-2019](#), I found that Corrections is a government institution pursuant to section 2(t)(i) of HIPA, which provides as follows:

2 In this Act:

...

(t) “trustee” means any of the following that have custody or control of personal health information:

(i) a government institution;

[18] On the third element, Corrections was responsible for collecting the names of individuals who tested positive for COVID-19 and their contacts, which means that this personal health information was in Corrections’ custody or control.

[19] As all three elements have been met, I find HIPA is engaged and I have jurisdiction under HIPA to conduct this review.

2. Did the Ministry properly apply section 38(1)(b) of HIPA?

[20] Section 38(1)(b) of HIPA provides as follows:

38(1) Subject to subsection (2), a trustee may refuse to grant an applicant access to his or her personal health information if:

...

(b) disclosure of the information would reveal personal health information about another person who has not expressly consented to the disclosure;

[21] Section 38(1)(b) of HIPA requires a trustee to refuse to disclose personal health information to an applicant if the personal health information is also about an individual other than the applicant, unless the other individual has consented to the disclosure ([Guide to HIPA](#), updated December 2016, p. 81).

[22] Corrections applied section 38(1)(b) of HIPA to Record 1 (contact tracing lists on pages 1 to 21), and Record 2 (contact tracing lists embedded in an email on pages 22 and 23). Corrections described these lists as follows:

Record 1 and part of Record 2 contains lists that were compiled by the Ministry. When staff advised the Ministry that they had tested positive for COVID-19, the Ministry determined who that staff member worked with when they may have been contagious. Record 1 is an example of this list.

Record 2 is an email that contains a list of staff members who were determined by the Ministry to be close contacts of the Applicant. Record 2 was provided to the SHA in order to assist with the contact tracing related to the Applicant. The SHA contacted the staff members on the list and the SHA determined who was deemed a close contact and required to self-isolate.

[23] With respect to its reliance on section 38(1)(b) of HIPA, Corrections stated as follows:

The Ministry submits that the names of employees who had tested positive for COVID-19 is the personal health information of those employees. The Ministry submits that the names of employees who were identified by the Ministry as being close contacts of a staff member who tested positive for COVID-19 is also the personal health information of employees because it is information with respect to their physical health. The Ministry appreciates that being a close contact of someone who has COVID-19 does not mean that that individual has COVID-19. However, this designation does indicate that the individual may have COVID-19 and be contagious. This interpretation is supported because at the time the records were created, individuals who were identified as close contacts by the SHA were required to self isolate. The Ministry also appreciates that the lists in Records 1 and 2 were ones created by the Ministry and therefore not all of the individuals [sic] were determined by the SHA as being close contacts. However, the Ministry submits that being identified as a close contact by the Ministry is the personal health information of the employee to whom the designation relates.

[24] I have already determined the Applicant's COVID-19 positive status and contact status in Record 1 and Record 2 is personal health information as defined by section 2(m)(i) of HIPA. I note, however, Corrections has not denied the Applicant access to their own personal health information. Rather, Corrections released to the Applicant the portions of Record 1 and Record 2 where they are named as either a COVID-19 positive employee or a contact. Section 38(1) of HIPA, therefore, has no application in this matter with respect to the Applicant's own personal health information.

[25] What I need to consider now is if Corrections properly applied section 38(1) of HIPA to this information.

[26] Section 38(1) of HIPA contemplates when a trustee can deny access to an individual's own personal health information ([Guide to HIPA](#), updated December 2016, p. 79). Since we are dealing with the COVID-19 positive status or contact status of others, I find that Corrections did not properly apply section 38(1) of HIPA to this information in Record 1 and Record 2.

[27] Since it is personal health information of others, however, I am mindful that a mandatory provision of HIPA may apply to its disclosure. Section 27(1) of HIPA provides as follows:

27(1) A trustee shall not disclose personal health information in the custody or control of the trustee except with the consent of the subject individual or in accordance with this section, section 28 or section 29.

[28] Section 27(1) of HIPA applies to the personal health information of an individual, which a trustee cannot disclose unless the trustee has the consent of the subject individual ([Guide to HIPA](#), updated December 16, p. 44). As such, I find section 27(1) of HIPA applies to the COVID-19 positive status or contact status of others listed in Record 1 and Record 2, and recommend Corrections continue to withhold this personal health information pursuant to section 27(1) of HIPA.

[29] As I have found that section 27(1) of HIPA applies as I have described in the preceding paragraph, I do not need to consider Corrections' application of sections 15(1)(c), (k) and 17(1)(b) of FOIP to Record 1 and Record 2. The only exception to this is to two sentences on page 22 where Corrections has applied section 17(1)(b) of FOIP on its own, which I will review in the next part of this report.

3. Did Corrections properly apply section 17(1)(b) of FOIP?

[30] Section 17(1)(b) of FOIP provides as follows:

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(b) consultations or deliberations involving:

- (i) officers or employees of a government institution;
- (ii) a member of the Executive Council; or
- (iii) the staff of a member of the Executive Council;

[31] Section 17(1)(b) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose consultations or deliberations involving officers or employees of a government institution, a member of the Executive Council or the staff of a member of the Executive Council (*Guide to FOIP*, Chapter 4, "Exemptions from the Right of Access", updated April 30, 2021 [*Guide to FOIP*, Ch. 4], p. 131)

[32] The following two-part test can be applied:

1. Does the record contain consultations or deliberations?
2. Do the consultations or deliberations involve officers or employees of a government institution, a member of the Executive Council, or the staff of a member of the Executive Council?

(Guide to FOIP, Ch. 4, pp. 132-133)

[33] Corrections applied section 17(1)(b) to two sentences on page 22 of Record 2, which is part of an email.

1. *Does the record contain consultations or deliberations?*
2. *Do the consultations or deliberations involve officers or employees of a government institution, a member of the Executive Council, or the staff of a member of the Executive Council?*

[34] Corrections stated the portion of the records on page 22 where it applied section 17(1)(b) of FOIP involves consultations regarding, “the contact tracing of staff member who may have been in close contact with the Applicant”. Corrections added the purpose was to help determine who the close contacts were.

[35] Corrections added the consultation occurred between the Deputy Director, Standards and Communications for the Regina Correctional Centre, who is a Ministry employee. The portion of the email released to the Applicant indicates Corrections was providing this information to the Saskatchewan Health Authority (SHA) as required.

[36] “Consultation” means the act of consulting or taking counsel together, or a conference in which the parties can consult or deliberate. A consultation can occur when the views of one or more officers or employees of a government institution are sought as to the appropriateness of a particular proposal or suggested action. It can include consultations about prospective future actions and outcomes in response to a developing situation (*Guide to FOIP, Ch. 4, p. 132*).

[37] “Involving” means including (Guide to FOIP, Ch. 4, p. 132).

[38] “Employee of a government institution” means an individual employed by a government institution and includes an individual retained under a contract to perform services for the government institution (Guide to FOIP, Ch. 4, p. 133).

[39] From a review of the record, I can tell there was a discussion or question(s) asked regarding actions required for COVID-19 in the workplace, which was a developing situation at the time. The email header, which I stated Corrections released to the Applicant, indicates the email was sent by a Corrections employee to SHA. This meets both the first and second parts of the test. As such, I find Corrections properly applied section 17(1)(b) of FOIP to page 22 of Record 2, and recommend it continue to withhold this information pursuant to section 17(1)(b) of FOIP.

4. Did Corrections properly apply section 29(1) of FOIP?

[40] Section 29(1) of FOIP provides as follows:

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.

[41] Section 29(1) of FOIP protects the privacy of individuals whose personal information may be contained within records responsive to an access to information request made by someone else (*Guide to FOIP*, Ch. 4, p. 281).

[42] When dealing with information in a record that appears to be personal information, the first step is to confirm the information indeed qualifies as personal information pursuant to section 24 of FOIP (*Guide to FOIP*, Ch. 4, p. 281).

[43] I only need to consider the application of section 29(1) of FOIP, as Corrections has applied it, to the telephone numbers in Record 1 and Record 2. Corrections confirmed that the

telephone numbers are home telephone numbers (i.e. not business-related telephone numbers). In many past reports, I have made the distinction that an individual's home telephone number is an individual's personal information pursuant to section 24(1)(e) of FOIP, which provides as follows:

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:

...

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

[44] I find, therefore, Corrections properly applied section 29(1) of FOIP to the telephone numbers in Record 1 and Record 2.

5. Did Corrections satisfy the criteria set out in section 12 of FOIP?

[45] Corrections decided to extend the 30-day response deadline by an additional 30 days pursuant to section 12(1) of FOIP.

[46] Section 12 of FOIP provides as follows:

12(1) The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

(a) where:

(i) the application is for access to a large number of records or necessitates a search through a large number of records; or

(ii) there is a large number of requests; and completing the work within the original period would unreasonably interfere with the operations of the government institution;

(b) where consultations that are necessary to comply with the application cannot reasonably be completed within the original period; or

(c) where a third party notice is required to be given pursuant to subsection 34(1).

(2) A head who extends a period pursuant to subsection (1) shall give notice of the extension to the applicant within 30 days after the application is made.

(3) Within the period of extension, the head shall give written notice to the applicant in accordance with section 7.

[47] I first note Corrections received the Applicant's access to information request on May 10, 2021, and provided a notice of extension to the Applicant in correspondence dated June 9, 2021. This was within the 30 days required by section 12(2) of FOIP.

[48] This means Corrections had until July 9, 2021, to provide its section 7 response to the Applicant; Corrections did so on July 6, 2021. This was within the time required by section 12(3) of FOIP.

[49] I will now consider if Corrections properly applied its time extension pursuant to section 12(1)(a)(ii) of FOIP. Section 12(1)(a)(ii) of FOIP provides that an extension can be applied where the government institution has received a large number of access to information requests and completing them within the original 30 days would unreasonably interfere with the operations of the public body (*Guide to FOIP*, Chapter 3, "Access to Records", updated June 29, 2021 [*Guide to FOIP*, Ch. 3], p. 75).

[50] In the event an applicant requests a review of the government institution's application of an extension, the Commissioner will consider whether the government institution's application of the extension complied with section 12 of FOIP. For this purpose, both parts of the following test must be met:

1. Were there a high number of requests at the time?
2. Will meeting the original time limit unreasonably interfere with the operations of the government institution?

(*Guide to FOIP*, Ch. 3, p. 76)

1. Were there a high number of requests at the time?

[51] Volume considerations include factors such as how many requests are involved, and how does the volume compare with the average request volume (*Guide to FOIP*, Ch. 3, p. 76).

[52] In terms of volume, Corrections stated as follows:

From May 10 to June 8, the Ministry had 38 active access to information requests. During the same time frame in 2020, the number of active requests was 19. For the same time frame in 2019, this number was 12.

The number of requests the Ministry received on June 2 was substantial. On June 2, the Ministry received 31 access to information requests. The Ministry submits that it was dealing with a large number of access to information requests during the time it decided to extend the request by an additional 30 days. This large number is demonstrated when the Ministry looks at the number of requests it handled during comparable periods in 2020 and 2019.

[53] In my office's [Review Report 123-2015](#), concerning the Ministry of Justice, I found that double the number of requests received by a public body would qualify as a large number. In terms of percentage increase, Corrections doubled its caseload over a one-year period from 19 to 38 cases, which is a 100% increase. The Ministry has demonstrated that there was a high number of cases at the time. Therefore, the first part of the test has been met.

2. Will meeting the original time limit unreasonably interfere with the operations of the government institution?

[54] “Unreasonably interfere” means going beyond the limits of what is reasonable or equitable in time and resources and the impact, which this use of resources would have on the government institution’s day-to-day activities (*Guide to FOIP*, Ch. 3, p. 74).

[55] Circumstances that may contribute to unreasonable interference include:

- significant increase in access to information requests (e.g. sharp rise over 1-4 months);
- significant increase in access to information caseloads;
- computer systems or technical problems;

- unexpected employee leaves from the FOIP branch;
- unusual number (high percentage) of new FOIP employees in training;
- cross government requests;
- program area discovers a significant amount of additional records;
- type of records (maps, etc.);
- number of program areas searched; and
- location of records

(Guide to FOIP, Ch. 3, p. 75)

[56] Circumstances that would not qualify include the allocation of insufficient resources, long-term systemic problems, vacation times, pre-planned events or sign off procedures (*Guide to FOIP, Ch. 4, p. 75*).

[57] In terms of its staffing, Corrections stated as follows:

In addition to the large number of requests, the Ministry also had a limited amount of experienced staff. At the time of the request, the Branch had three experienced staff, which was down from six. The combination of factors mentioned above meant that completing the work within the the [sic] 30 day timeframe would have interfered with operations of the Branch and the Ministry during a pandemic. The Ministry submits it has established that it had a large number of requests at the time the request was received and that completing the work within the original period would have unreasonably interfered with the operations of the Ministry.

The Ministry submits that the large number of requests, in addition to the staffing challenges, demonstratev [sic] that completing the work within the 30 day time period would have unreasonably interefered [sic] with the Ministry's operations.

[58] In my office's [Review Report 158-2017](#), concerning the Ministry of Energy and Resources (Energy), I found that being down one staff due to vacancies could, in that matter, unreasonably interfere with Energy's ability to meet the legislated timeline if the number of requests was high. In that matter, Energy was facing a 61% increase in caseload.

[59] In this matter, Corrections was down three staff, and its caseload had increased 100% over a one-year period. This would increase the number of cases per staff. This meets the second part of the test; both factors would unreasonably interfere with Corrections' operations and its ability to meet the 30-day deadline to respond. As both parts of the test are met, I find Corrections properly applied a time extension to its response to the Applicant pursuant to section 12(1)(a)(ii) of FOIP.

[60] I find Corrections satisfied the criteria set out in section 12(1)(a)(ii) of FOIP.

IV FINDINGS

[61] I find Corrections did not properly apply section 38(1) of HIPA to Record 1 and Record 2.

[62] I find section 27(1) of HIPA applies as I have outlined at paragraph [28] of this Report.

[63] I find Corrections properly applied section 17(1)(b) of FOIP to page 22 of Record 2.

[64] I find Corrections properly applied section 29(1) of FOIP to the telephone numbers in Record 1 and Record 2.

[65] I find Corrections properly applied a time extension to its response to the Applicant pursuant to section 12 of FOIP, and that it satisfied the criteria set out in section 12(1)(a)(ii) of FOIP.

V RECOMMENDATION

[66] I recommend Corrections continue to withhold the personal health information and personal information (telephone numbers) in Record 1 and Record 2 pursuant to section 27(1) of HIPA and sections 17(1)(b) and 29(1) of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 16th day of March, 2022.

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