



REVIEW REPORT 269-2021

Ministry of Social Services

September 7, 2022

Summary:

The Applicant submitted an access to information request to the Ministry of Social Services (Social Services). Upon receiving Social Services' response, 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 the Minister of Justice and Attorney General repeal section 23(3)(c) of FOIP, so that section 74 of the CFSA is no longer included in section 23(3) of FOIP. The Commissioner also recommended that the Minister of Social Services consider the Applicant's request and determine whether he would make a decision to release some or all of the information requested and if a decision is made not to release any information to the Applicant, he provides reasons for the decision to the Applicant. Finally, the Commissioner recommended that the Minister of Social Services develop a policy as to when the Minister will release information covered by section 74(5.1) of the CFSA and make the policy publicly available pursuant to section 65 of FOIP.

I BACKGROUND

[1] The Applicant made a formal access to information request to the Ministry of Social Services (Social Services) on September 30, 2021, requesting access to:

My [Parent] was a Metis ... born in [Place of Birth in Saskatchewan (POB)] in 1930. [parent] passed away in 2015. [Parent] involvement with the Ministry of Social services in [POB] let [Parent] being sent to Marymound ... in Winnipeg in the 1940s. I have spoken to current day Marymound staff, who provided some information and recommended I contact the Ministry of Social Services to learn more. My [Parent's] time as a ward of the state impacted [Parent] significantly. The recent increased public

discourse and understanding around the impact of residential schools, sixties scoop, and the treatment of First Nations and Metis children in care strengthened my resolve to seek out information. I am seeking to know:

1. If the Ministry of Social Services has information about their involvement with my [Parent's] time a ward of the state, including [Parent] time at Marymount;
2. The reason that my [Parent] was sent to Marymount....
3. My [Parent] was sexually assaulted (according to Marymount's file, this person was "charged and convicted") ... whether there is any information about these events in [Parent's] file;
4. As much of the contents of [Parent's] file that would not violate the legal tests for disclosure. When considering the benefits of disclosure, please consider my [Parent's] institutionalization impacted [Parent], as well as myself and my siblings significantly. We are seeking to know as much about this time of [Parent's] life as possible in order to value [Parent's] legacy, heal as a family, and honour the goals of truth and reconciliation.

[2] By letter dated October 14, 2021, Social Services responded to the Applicant's access to information request. Social Services' response stated, 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). Section 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)...

If you would like to exercise your right to request a review of this notice under the provisions of clause 49(1)(a) of FOIPP, you may do so by completing a request for review form and forwarding it to the Saskatchewan Information and Privacy Commissioner within one year of this notice.

[3] By letter dated October 18, 2021, Social Services again responded to the Applicant's request under *The Child and Family Services Act* (CFSA). This letter stated, in part:

...
Access to the records you have requested is subject to the [CFSA] section 74(1). We do not have legal authority to release the requested records to you....

[4] By letter dated October 29, 2021, the Applicant requested that my office review Social Services' decision.

[5] On November 4, 2021, my office notified Social Services and the Applicant of my office's intention to undertake a review of this matter and invited both parties to make a submission. My office received a submission from Social Services on November 26, 2021, and the Applicant on December 2, 2021.

II RECORDS AT ISSUE

[6] This review will determine whether section 74 of the CFSA fully applies to the record.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[7] 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 find I have jurisdiction.

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

[8] 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.

[9] 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.

[10] In my office's [Review Report 054-2020](#), I provided the analysis regarding the relationship of section 23(3)(c) of FOIP and section 74 of the CFSA in paragraphs [10] to [16]. In my office's [Review Report 145-2020](#), I summarized that analysis as follows:

[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.

[11] For this current review, Social Services has provided my office with evidence that the confidentiality provisions provided for in section 74 of the CFSA applies fully to the record requested by the Applicant.

[12] 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.

[13] I would however, like to outline some concerns that the Applicant raised in their request for review:

My name is [Applicant]. I am the [Child] of [Parent]. [Parent] passed away in 2015 and after [Parent] passing I had many days reflecting on memories of our time together and my [Parent]'s life. Having some unanswered questions about my [Parent]'s five-year stay at Mary Mound School in Winnipeg, a reformatory boarding school This experience loomed large in [Parents] background, although it was difficult for [Parent] to talk about. After obtaining some interesting information from staff at Mary Mound, and at the suggestion of staff there, I proceeded with my search for more clarification through the Ministry of Social Services, which led me to submit a request for access to information. That request was first submitted (and rejected) in December of 2017. Then, upon discovery of the mass graves at residential schools across Canada and the public conversation this prompted regarding the actions of child welfare agencies more broadly, I felt strengthened to renew my search for answers.

My access to information request was denied ... pursuant to the [CFSA] section 74(1). It was my understanding though that the Minister [of Social Services] could opt to disclose information if the benefits outweighed the cost. So, I submitted another request and was again denied. At that point, I approached the official critic for the Ministry of Social Services.... [They] submitted a follow-up letter to the Minister and again, I was denied. At that time, I reached out to the [Office of the Saskatchewan Information and

Privacy Commissioner] to conduct a review. I was informed that my original access to information request was submitted before the cut-off and so I re-submitted my request.

I have now received two responses to my follow-up request for the records in question. One from Privacy Officer ... dated October 14, 2021, and a second letter from Manager of Records and Privacy ... on October 18, 2021. The letter dated October 18, 2021, indicates the Ministry of Social Services lacks the “legal authority to release the requested records” and doesn't refer to an appeal or review process. A letter of May 12, 2021 that I received from Assistant Deputy Minister [of Social Services] indicated there is no review or appeal process under the CFSA, and that the Act prevails over [FOIP. While the October 14, 2021 letter reiterates that the CFSA prevails over FOIPP, it also indicates I can review the decision under the (FOIPP). I am struggling to square these letters and understand how to move forward.

However, I am submitting this denial to your office hoping for a review. The reason I would like your independent review is because I have received a blanket denial with very few options or clarification as why the Minister considered the benefit of disclosure would not outweigh the invasion of privacy. My [Parent] is passed and more than likely many of the people involved at that time are gone as well as [Parent] was born in 1930. I don't know what is in my [Parent]'s file but [Parent] time at this school shaped [Parent] and my family deeply. [Social Services] states the benefit of confidentiality must outweigh the benefit of sharing information and that based on this consideration, the release was denied. My question is benefits who? My deceased [Parent]? My grandparents? The Social Worker my [Parent] said made advances on [Parent]? Or does it benefit the ministry itself because of the manner [Parent] may have been placed? **I feel they hold all the power and there is no checks and balances regarding this denial for access to information.** There's very little, to no explanation other than privacy with this blanket denial.

Lastly, there is no Truth & Reconciliation without the truth. I submitted my request for information on September 30, 2021, the first National Day for Truth and Reconciliation. This was by no means a coincidence. I just finally want to know the truth around this matter because it affected my [Parent], me and our family. Therefore, I feel it is our truth and our story to understand. Any assistance you can offer is greatly appreciated. Please let me know if you require any more information.

Thank you kindly for your time and consideration regarding this matter.

[Emphasis added]

[14] The Applicant emailed my office a submission on December 2, 2021, which in part stated:

...
The Ministry states the benefit of confidentiality far outweigh the benefit of sharing information. My question is benefits who? My deceased [Parent]? My deceased grandparents? Me? ... Or the ministry itself in the manner [Parent] may have been

placed? Does [Social Services] think it's better to leave families in the dark and leave them guessing?

I feel [Social Services] hold all the balance of power and there is no checks & balances regarding this denial for access to information. There's very little, to no explanation other than privacy. The first time I inquired for information their reply was basically No, can't appeal, done. How often do they give that response? If they are allowed to hid [sic] behind privacy what prevents them from destroying /editing records if in fact, there is one.

...

Lastly, there is no Truth & Reconciliation without the truth. I sincerely hope that Truth & Reconciliation is not just a convenient catch phrase without real action or intent. I just finally want to know the truth around this matter because it affected [Parent], me and our family.

Therefore, I feel it is our truth and our story to understand.

...

[15] In my view, the Applicant's experience is evidence of a system that does not seem to have appropriate checks and balances in place to ensure that privacy or confidentiality is not treated as an absolute when in fact other legal instruments such as FOIP already have this built in.

[16] This is not helpful to the citizens of this province or to the Applicant who is seeking answers in order to help with generational family healing. The lack of my office's ability to conduct a neutral and independent review of access to child and family service program files allows Social Services to operate in secret and be accountable to no one. It allows for an arbitrary yes or no answer by Social Services. It may also allow a cover up of potential past actions.

[17] It also forces an applicant into a very costly judicial review process should they wish to appeal a decision made by Social Services. In my office's [Review Report 254-2017](#), I stated as follows:

[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 ... 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.**

[Emphasis added]

[18] I have now recommended in several reports that Social Services work to repeal section 23(3)(c) of FOIP ([Review Report 254-2017](#) at paragraph [59], [Review Report 150-2018](#) at paragraph [49], [Review Report 054-2020](#) at paragraph [21] and [Review Report 145-2020](#) at paragraph [22]). In response to these reports, Social Services advised my office that it referred the reports to the Ministry of Justice (Justice). Referring the report to Justice is of very little assistance since Justice would have already received a copy of the report. I am not aware of any efforts on the part of Social Services to bring forward any such amendments for consideration.

[19] In my office's [Review Report 254-2017](#), I outlined the legislative framework in other provinces as follows :

[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.
- [20] As outlined in the Applicant's request for review to my office, "...the reason I would like your independent review is because I have received a blanket denial with very few options or clarification as why the Minister considered the benefit of disclosure would not outweigh the invasion of privacy."
- [21] From what the Applicant has provided my office, they are very confused as to why no explanation was provided by Social Services regarding why the benefit of disclosure would not outweigh the invasion of privacy. There is no requirement under section 74(1) of the CFSA to explain to individuals why decisions have been made to withhold information. However, in FOIP, there is.
- [22] Sections 5.1(1) and 61 of FOIP provide:
- 5.1(1)** Subject to this Act and the regulations, a government institution shall respond to a written request for access openly, accurately and completely.
- ...
- 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.
- [23] With these two provisions, under FOIP, the Applicant could ask further questions as to why access was denied and if they were not satisfied, they could request a review by my office. Through that process, Social Services would need to explain why the information was exempt from release. This, at the very least, could help the Applicant understand why they were denied access to the information.
- [24] However, as I am aware that repealing section 23(3)(c) of FOIP would take some time, I would like the Applicant's request to be reconsidered in the interim. Section 33 of FOIP provides:

33 The commissioner may:

(a) **offer comment on the implications for privacy protection** of proposed legislative schemes or **government programs**;

[Emphasis added]

[25] I take this opportunity, then, to make comment on Social Services program under the CFSA and, in particular, what appears to be its arbitrary, secretive approach to providing information under section 74.

[26] Section 74(5.1) of the CFSA provides:

74(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.

[Emphasis added]

[27] This section gives the Minister the power to provide information, when in their opinion, the benefit of providing it would outweigh any invasion of privacy. As a side note, section 30(2) of FOIP also contemplates releasing personal information when it would not constitute an unreasonably invasion of privacy as follows:

30(2) Where, in the opinion of the head, disclosure of the personal information of a deceased individual to the individual's next of kin would not constitute an unreasonable invasion of privacy, the head may disclose that personal information before 25 years have elapsed after the individual's death.

[28] In this instance, we are dealing with a deceased parent and the request by a child of that parent and the Applicant has clearly set out the personal benefit of receiving such information. The information is not being released to the public, but to a child of a deceased parent. It is not a broadcasting of the information, but instead is a very narrow disclosure. The Minister also has the discretion to determine how much information would be released. The Minister might provide some extracted information, some records, or all the information. I am sure any information the Minister releases would be appreciated by the

Applicant. Any information would assist the Applicant in finding the truth and completing the parent's story.

[29] Through the course of this review, my office asked Social Services the following two questions:

1. Does Social Services have a policy re disclosing information under section 74 of the CFSA? If so, could you share a copy of the policy with [my office]?
2. Did this matter get referred to the Minister of Social Services to consider release of some information under section 74(5.1) of the CFSA?

[30] In response to these questions, Social Services advised my office, in part, on September 2, 2022:

Records and Privacy does have a procedural manual that is used with respect to all access requests, including those falling within the scope of section 74 of [CFSA].

With respect to your second question, once it is determined that the records requested are s. 74 CFSA records, the Commissioner does not have the ability to question the discretion of the Minister on the release of the records

...it would be in excess of the Commissioner's jurisdiction to question the exercise of discretion in not releasing the records under any part of s. 74, including ss. 74(5.1) [of the CFSA]. We will therefore not be providing any information with respect to how those decisions were made.

[31] My question to Social Services was whether the Minister had considered the matter. I have to react to the evasive answer given by Social Services that the Minister never heard of this request. When I refer to the Minister, I do not mean executives in Social Services, I in fact mean the Minister.

[32] Regardless of this response from Social Services, I will bring this matter to the Minister of Social Service's attention to consider the Applicant's request and the powers granted to him under section 74(5.1) of the CFSA. As such, I recommend that the Minister of Social Services consider the Applicant's request and determine whether he would make a decision to release some or all of the information requested and if a decision made is not to release

any information to the Applicant, then I recommend he provides reasons for the decision to the Applicant.

[33] Although Social Services did confirm it has a policy related to disclosures under section 74 of the CFSA, it did not provide my office with a copy of said policy. Again, it just adds to the lack of transparency and reinforces that Social Services makes its decisions under a veil of secrecy with no ability for an individual to question its practices. Section 65(1) of FOIP provides:

65(1) Every government institution shall take reasonable steps to:

(a) make available on its website all manuals, policies, guidelines or procedures that are used in decision-making processes that affect the public by employees of the government institution in administering or carrying out programs or activities of the government institution; or

(b) provide those documents when requested in electronic or paper form.

[34] In light of what is required by section 65 of FOIP, I am unclear why Social Services would not provide my office with a copy of the policy in question.

IV FINDINGS

[35] I find I have jurisdiction.

[36] 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 RECOMMENDATIONS

[37] I recommend the Minister of Justice and Attorney General repeal section 23(3)(c) of FOIP, so that section 74 of the CFSA is no longer included in section 23(3) of FOIP.

[38] I recommend that the Minister of Social Services consider the Applicant's request and determine whether he would make a decision to release some or all of the information

requested and if a decision is made not to release any information to the Applicant, he provides reasons for the decision to the Applicant.

[39] I recommend that the Minister of Social Services develop a policy as to when the Minister will release information covered by section 74(5.1) of the CFSA and make the policy publicly available pursuant to section 65 of FOIP.

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

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