



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 288-2023

Ministry of Health

January 9, 2024

Summary:

The Applicant submitted an access to information request to the Ministry of Health (Health). Health responded providing a fee estimate. The Applicant paid the deposit, then Health advised the Applicant that it was applying a 30-day extension pursuant to subsection 12(1)(a) and (b) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant requested a review by my office when they did not receive Health's section 7 decision after the extended timeline. My office provided Health with a notice of review, and Health subsequently provided my office with the responsive records and a submission identifying it was withholding portions of the records pursuant to subsections 27(1) of *The Health Information Protection Act* (HIPA) and 29(1) of FOIP. The Commissioner found that Health did not comply with section 7 and subsection 12(3) of FOIP. The Commissioner also found that Health did not properly apply subsections 27(1) of HIPA and 29(1) of FOIP. The Commissioner recommended that within 30 days of the issuance of this Report, Health return the Applicant's \$180 deposit, release the records to the Applicant and consider using visible redaction for future access to information requests.

I BACKGROUND

[1] On July 16, 2023, the Ministry of Health (Health) received an access to information request under *The Freedom of Information and Protection of Privacy Act* (FOIP) from the Applicant. The Applicant sought access to records described as follows:

I am requesting the data compiled for the Drug Task Force dashboard: overdose deaths; emergency department visits and hospitalizations due to overdose/durg [sic] poisoning;

emergency medical services (EMS) and police calls for overdose/drug poisoning; take-home naloxone kit distribution/ overdose data by substance; opioid overdose data by opioid; other drug-related harms by substance category (mental health or related disorders, substance use disorders). I request the data be formatted in machine-readable spreadsheet provided by email.

April 1, 2028 until current date.

- [2] On July 19, 2023, Health sent the Applicant a letter acknowledging their request for information and that they could expect a response by August 17, 2023, unless a fee estimate was required.
- [3] On July 20, 2023, Health sent the Applicant a fee estimate for \$360.00, indicating that it would require a deposit in the amount of \$180.00 to proceed with the request or alternatively it would work with the Applicant to modify the request in order to reduce or eliminate the fees.
- [4] Only July 28, 2023, the Applicant sent half the fee estimate of \$180.00 to Health by money order. It was received by Health on August 8, 2023.
- [5] On August 22, 2023, Health advised the Applicant by way of letter that it was extending the time period for responding to their request by 30 days pursuant to subsection 12(1)(a) and (b) of FOIP. This extended the due date to October 4, 2023.
- [6] On October 16, 2023, the Applicant contacted Health for an update on its response as it was past the due date and they had paid the deposit as requested.
- [7] On October 18, 2023, the Applicant received an email response from Health apologizing for the delay indicating the file was still being processed.
- [8] On November 6, the Applicant again contacted Health to see whether there were any updates on the file as they had not yet received a response.
- [9] On November 7, 2023, the Applicant contacted my office to initiate a request for review.

[10] On November 7, 2023, my office also contacted Health indicating that it had not responded to the Applicant's request within the legislated timelines and requested that Health provide its section 7 decision letter to the Applicant by November 14, 2023.

[11] On November 14, 2023, after no response from Health, my office called and left a message requesting a call back with an update on the status of its section 7 response. Health responded by email with the following:

Unfortunately, the above referenced file is still being processed. Therefore, the ministry will not meet the proposed deadline for a response.

[12] On November 15, 2023, my office again reached out to Health providing an extension and requesting it then provide its section 7 decision by November 21, 2023.

[13] On November 22, 2023, as no response was received from Health, my office provided notice to both the Applicant and Health of my office's intention to undertake a review of whether Health complied with its obligations under sections 7 and 12 of FOIP.

[14] On December 20, 2023, Health provided my office with a copy of the responsive records, an index of records and its submission as requested by my office. On the same day, my office inquired if Health had issued its section 7 decision along with releasing all or portions of responsive records to the Applicant. Health responded that it had not.

II RECORDS AT ISSUE

[15] Health identified 515 pages of records (Record A) along with an Excel spreadsheet of 32,911 rows and 51 columns of data (Record B). As of the date of this Report, Health has not released any of the records to the Applicant. In its submission, Health indicated that it intended to withhold parts of the records pursuant to subsection 29(1) of FOIP and subsection 27(1) of *The Health Information Protection Act* (HIPA).

[16] My office is also reviewing whether Health met its legislated timelines under sections 7 and 12 of FOIP.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[17] Health qualifies as a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction under FOIP to undertake this review.

[18] As Health applied subsection 27(1) of HIPA to the responsive records, I will consider whether HIPA applies in my analysis of subsection 27(1) below.

2. Did Health comply with sections 7 and 12 of FOIP?

[19] Subsections 7(2) and (5) of FOIP provide as follows:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

(a) stating that access to the record or part of it will be given on payment of the prescribed fee and setting out the place where, or manner in which, access will be available;

(b) if the record requested is published, referring the applicant to the publication;

(c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;

(d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;

(e) stating that access is refused for the reason that the record does not exist;

(f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4); or

(g) stating that the request has been disregarded pursuant to section 45.1, and setting out the reason for which the request was disregarded.

...

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

[20] The *Guide to FOIP*, Chapter 3, “Access to Records,” updated May 5, 2023 (*Guide to FOIP*, Ch. 3) at, page 97 states that subsection 7(2) of FOIP requires that a government institution respond to an applicant within 30 calendar days of receiving an access to information request unless the response deadline was extended pursuant to section 12 of FOIP. Section 12 of FOIP allows for government institutions to extend the 30-day time period for a reasonable period not exceeding 30 days in limited circumstances. In total, government institutions would have 60 days in total to respond to access requests.

[21] As indicated in the *Guide to FOIP*, Ch. 3, at page 62, subsection 7(5) of FOIP provides that where a government institution has failed to respond to an applicant within 30 days, it is deemed to have responded on the 30th day refusing access to the record.

[22] The *Guide to FOIP*, Ch. 3 at page 49, states that section 2-28 of *The Legislation Act* provides guidance on how to calculate 30 days. Based on *The Legislation Act*, the following can be applied for calculating 30 days under FOIP:

- The first day the access request is received is excluded in the calculation of time [s. 2-28(2)].
- If the due date falls on a holiday, the time is extended to the next day that is not a holiday [s. 2-28(5)].
- If the due date falls on a weekend, the time is extended to the next day the office is open [s. 2-28(6)].
- As FOIP expresses the time in a number of days, this is interpreted as 30 calendar days, not business days.

[23] When a fee estimate is issued and a deposit is required, the clock stops and does not resume until the applicant pays the deposit. Subsections 9(3) and 9(4) of FOIP provide:

9(3) Where an estimate is provided pursuant to subsection (2), the time within which the head is required to give written notice to the applicant pursuant to subsection 7(2) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application.

(4) Where an estimate is provided pursuant to subsection (2), the head may require the applicant to pay a deposit of an amount that does not exceed one-half of the estimated amount before a search is commenced for the records for which access is sought.

[24] In this matter, Health received the Applicant's access to information request on Sunday July 16, 2023, which meant it had until August 16, 2023, to provide its section 7 decision to the Applicant unless it extended its time to respond. In a letter dated July 20, 2023, Health provided a fee estimate to the Applicant which paused the application process until a deposit was received by Health pursuant to subsections 9(3) and 9(4) of FOIP.

[25] The Applicant mailed the deposit on July 28, 2023, and it was received by Health on August 8, 2023. Health then sent a letter to the Applicant on August 22, 2023, stating that it was extending the time to respond by an additional 30 days to October 6, 2023, pursuant to subsections 12(1)(a) and (b) of FOIP.

[26] Section 12 provides limited circumstances where a government institution can extend the initial 30 day response time set in subsection 7(2) of FOIP by up to an additional 30 days. Subsections 12(1)(a), (b), 12(2) and 12(3) of FOIP provide 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;

...

(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.

[27] If an extension is applied, subsection 12(3) of FOIP sets out the obligation of the government institution to respond to the Applicant within the period of extension.

[28] The access to information request was received on Sunday July 16, 2023, which meant the date was extended to the first working day of Monday July 17, 2023. Therefore, two days had elapsed when Health sent its fee estimate on July 20, 2023, and stopped the clock. Once the deposit was received by Health on August 8, 2023, the 30-day time clock started again from where it left off which means the new date for Health's response was then due September 4, 2023, but as this date was a holiday the date was extended to September 5, 2023. On August 22, 2023, however, within the initial 30-day period pursuant to subsection 12(2) of FOIP, Health extended the response period an additional 30 days which pushed to legislated due date for a response to the Applicant to October 4, 2023. However, Health did not provide its section 7 decision by that date which is required by subsection 12(3) of FOIP. It has now been 173 days since the request was received by Health and it has still not provided its section 7 decision for the Applicant.

[29] In my office's Review Reports [322-2021](#), [030-2022](#) at paragraph [19] and [164-2021](#) at paragraph [124], I indicated that if a government institution has not complied with subsection 12(3) of FOIP, I will not consider whether the government institution has complied with subsections 12(1) or 12(2) of FOIP.

[30] Therefore, I find Health was not in compliance with subsection 12(3) of FOIP. As it has not met its legislated timelines, I find that Health has not complied with section 7 and subsection 12(3) of FOIP.

[31] On January 2, 2024, the Applicant again emailed Health asking for an update on their access to information request. The following day Health responded stating that the file was still being processed. At this time, over 177 days have passed since the Applicant submitted their access to information request. Health still has no update on when it intends to provide its response and has collected \$180.00 in fees from the Applicant. This is not acceptable and continues a concerning pattern from Health and its continued lack of ability to respond within legislated timelines.

[32] In my office's recent [Review Report 232-2023](#) issued December 15, 2023 and [Review Report 003-2022](#), issued December 15, 2022, I found that Health did not respond to an applicant's access to information request within the legislated timelines. In [Review Report 003-2022](#), I stated as follows:

[19] On January 26, 2022, my office issued [Review Report 249-2021](#), where I found that Health did not meet its legislated timelines to respond to the Applicant's access to information request. In that report, I summarized Health's continued lack of compliance in responding to access requests in accordance with legislated timelines:

[17] Further, I have stated many times in past reports that public bodies cannot use a lack of resources as an excuse for excessive response times. If Health's access and privacy unit is short of resources or expects one person to respond to 28 active access to information requests, then it needs to address its resource issues so that the public is not negatively impacted by such lengthy delays. I find it concerning that, over the past several years, my office has continually needed to remind Health of its statutory obligation to meet legislated timelines. My office has done so, for example, in the following Review Reports:

- [Review Report 232-2023](#)
- [Review Report 082-2019, 083-2019](#)
- [Review Report 036-2018](#)
- [Review Report 209-2015 to 213-2015](#)
- [Review Report 063-2015 to 077-2015](#)
- [Review Report 115/2014](#)
- [Review Report 090-2014](#)

[33] Although Health has provided the records with exemptions applied and its submission explaining the applicable exemptions to my office, it has not provided any part of the record to the Applicant. When asked by my office, Health responded that the request was still being ‘processed’. If Health has provided the records, index of records and submission to my office, it is unclear what would yet be required to be ‘processed’ by Health. This is concerning as clearly the records are already processed and Health needs to issue its section 7 decision to the Applicant and release the portions of the records to which Health has not applied an exemption.

[34] In past reports, I have also recommended that public bodies issue refunds of fees due to excessive delays. Most recently, I made this recommendation in [Review Report 142-2023](#) concerning the Ministry of Social Services. I also recommend in this matter, that within 30 days of the issuance of this Report, Health return the Applicant’s \$180.00 deposit due to its excessive delays.

3. Did Health properly apply subsection 27(1) of the HIPA or subsection 29(1) of FOIP?

[35] Subsection 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.

[36] “Personal health information” is defined by subsections 2(1)(m) of HIPA as follows:

2(1) 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;

(ii) information with respect to any health service provided to the individual;

...

(iv) information that is collected:

(A) in the course of providing health services to the individual; or
...

(v) registration information;

[37] The records contain data elements and graphs regarding opioid deaths in Saskatchewan. Health applied subsection 27(1) of HIPA to the following on Record A:

- Pages 13 to 14:
 - Number of deaths for 2022 and 2021
- Pages 17 to 45:
 - Gender
 - Age

[38] Health applied subsection 27(1) of HIPA to the following on Record B:

- Rows 2 to 32911:
 - Month
 - Month-year
 - Patient zone
 - Gender
 - Age
 - Cause
 - PolySUflag
 - PolyODflag
 - ODflag

[39] In its submission, Health provided that the information withheld “was collected in the course of providing health services to the individual” or “speaks to health care services that an individual has received”.

[40] Before I review if subsection 27(1) of HIPA applies to the data elements and graphs, I need to consider if the “personal health information” is associated with an identifiable individual or if it can qualify as “de-identified personal health information”. Subsection 2(1)(d) of HIPA defines “de-identified personal health information” as follows:

2(1) In this Act:

...

(d) “**de-identified personal health information**” means personal health information from which any information that may reasonably be expected to identify an individual has been removed;

[41] Furthermore, subsection 3(2)(a) of HIPA states:

3(2) This Act does not apply to:

(a) statistical information or de-identified personal health information that cannot reasonably be expected, either by itself or when combined with other information available to the person who receives it, to enable the subject individuals to be identified;

[42] Upon reviewing the records provided to my office by Health, I note that the data elements and graphs are statistical or de-identified personal health information containing nothing that would identify the individual. Therefore, I find that personal health information is not involved and subsection 27(1) of HIPA does not apply.

[43] Subsection 29(1) of FOIP applies to the personal information of an individual, which a government institution cannot disclose unless it has the consent of the subject individual or unless it has authority to disclose without consent pursuant to subsection 29(2) or section 30 of FOIP.

[44] Health also withheld some of the same information under subsection 29(1) of FOIP. Subsection 29(1) of FOIP provides:

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

[45] In Records A and B, Health withheld the same data elements under subsection 29(1) of FOIP as it did under 27(1) of HIPA as well as the following in Record A:

- Pages 46 to 494:

- Month of overdose
- Gender
- Age

- Pages 495 to 515:
 - Gender
 - Age

[46] In order for subsection 29(1) of FOIP to apply, the data needs to constitute personal information under subsection 24(1) of FOIP. My office's *Guide to FOIP*, Chapter 6, "Protection of Privacy", updated January 18, 2023 (*Guide to FOIP*, Ch.6) at pages 32 to 35 state that to qualify as personal information, the information must: 1) be about an identifiable individual; and 2) be personal in nature. Information is about an "identifiable individual" if the individual can be identified from the information (e.g., their name is provided) or if the information, when combined with information otherwise available, could reasonably allow the individual to be identified. To be "personal in nature" means the information reveals something personal about the identifiable individual.

[47] Health has not indicated how an individual could be identified from the information provided or otherwise. Upon my review of the records, they do not contain information of any identifiable individual.

[48] Therefore, I find that Health has not properly applied subsection 27(1) of HIPA or subsection 29(1) of FOIP and recommend it release the records to the Applicant.

[49] Also of note is that the redacted copy of the records provided to my office by Health show that Health used "white space redaction" to sever the information.

[50] The *Guide to FOIP*, Chapter 3, "Access to Records" (*Guide to FOIP*, Ch. 3) at page 69 states that my office discourages the use of white space redacting. White space redacting is where software removes the content of a record in such a way that it renders the redacted content indistinguishable from the blank background of the document. This type of

redacting creates uncertainty as to what, if anything, has been redacted. White space redaction lacks specificity because when reviewing the responsive pages, an applicant cannot tell if the white space accounts for a missing line, paragraph, table, image etc. or if the page was naturally left blank. Government institutions have a duty to assist applicants by responding openly, accurately and completely. Invisible white space redactions fall short of this mandatory duty. Applicants should be able to evaluate the amount of missing information. The preference is black-out or grey-out redacting which allows sufficient visual context to indicate the length and general nature of the information (e.g., chart, column, list, sentence or paragraph). I have addressed this issue in Review Reports [129-2020](#), [025-2020](#), [127-2020](#), and [133-2020](#).

[51] In the future, to promote openness, transparency and accountability, Health should consider using black-out or grey-out redacting when processing records. For assistance with severing, Health can review my office's blog issued June 21, 2017 titled, [Severing](#).

IV FINDINGS

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

[53] I find that Health has not complied with section 7 and subsection 12(3) of FOIP.

[54] I find that Health has not properly applied subsection 27(1) of HIPA.

[55] I find that Heath has not properly applied subsection 29(1) of FOIP.

V RECOMMENDATIONS

[56] I recommend that within 30 days of the issuance of this Report, Health return the Applicant's \$180 deposit.

[57] I recommend that within 30 days of the issuance of this Report, Health release all of the records to the Applicant.

[58] I recommend that in future requests, Health consider using black-out or grey-out redacting when processing records responsive to access to information requests.

Dated at Regina, in the Province of Saskatchewan, this 9th day of January 2024.

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