Office of the
Saskatchewan Information
and Privacy Commissioner

INVESTIGATION REPORT 111-2021

Ministry of Social Services

October 3, 2022

Summary: The Ministry of Social Services (Social Services) received a complaint from the Complainant alleging inappropriate use and/or disclosure of their personal information and personal health information. Social Services stated it had authority under *The Child and Family Services Act* (CFSA) to provide the information to the courts and took the position that a privacy breach had not occurred. The Complainant was dissatisfied with Social Services' response and requested that the Commissioner investigate. Social Services continued to take the position that CFSA applied to this matter, that the Commissioner does not have jurisdiction to conduct an investigation, and refused to provide my office with necessary details to conduct this investigation. The Commissioner found, however, that he has jurisdiction under *The Freedom of Information and Protection of Privacy Act* and *The Health Information Protection Act* to conduct this investigation. The Commissioner found that Social Services had authority to disclose the information in order to carry out its duties pursuant to the CFSA, and that, therefore, no privacy breach had occurred. Since Social Services refused to provide his office with information, the Commissioner recommended Social Services review its policies and procedures to ensure individuals are provided with appropriate notice of the purpose of collection and any anticipated uses and disclosure of the information.

I BACKGROUND

[1] On December 1, 2020, the Complainant emailed the Minister of Social Services (Social Services) with their alleged privacy breach complaint:

> [sic] Beginning of Sept [sic] 2020 a Child and family worker came to our home because my [child] came to me with information that there was domestic abuse in [their] [other parent's] home. They interviewed my children and the worker that was at my house assured me that they do not get involved in custody matters between parents. [The Child

> and Family Worker] also assured me that no information would be shared with [the other parent] or [their] lawyer without a court order. Three days later there was affidavits from three child and family social workers in Regina and the social worker that visited my house on public record in the custodial matter. Things that my [child] told the child protection work was now viewable by the other parent on public record. I have tried to lodge a complaint with the deputy minister but never received a callback from them regarding this. I request a thorough investigation into this matter…

[2] On April 12, 2021, Social Services' Privacy Officer responded to the Complainant with the following:

> On December 1, 2020, you emailed Honourable Minister Carr regarding privacy concerns related to affidavits submitted to court regarding a custodial matter. These types of concerns are always investigated by the Records and Privacy Unit who worked with Child and Family Programs and the Ministry of Justice. We have determined a breach did not occur.
>
> When requested by legal counsel and/or the Court, the Ministry has discretionary authority under *The Child and Family Services Act* (CFSA) to provide information to the court in the form of affidavits. When the decision is made to provide affidavits, they must be factual, complete and balanced. This means they will cover the history of the family with Child and Family Programs, addressing investigations and resolutions. As this is an established process and within the authority of the CFSA, it is not considered a breach.
>
> In your initial email, you raised concerns about the affidavits being public. We have confirmed that affidavits are provided to legal counsel for both parents and the Court. They are not available to anyone else. Members of the public are not able to access documents from the Family Law Branch.

[3] On April 20, 2021, the Complainant submitted their complaint to my office.

[4] On April 30, 2021, my office notified Social Services and the Complainant that my office would be investigating the alleged inappropriate use and/or disclosure of personal information.

[5] On June 4, 2021, Social Services responded to my office stating "a privacy breach did not occur. The Ministry has a mandate under *The Child and Family Services Act* (CFSA) regarding the protection and well-being of children. The information provided to the court was done under the authority of the CFSA and is not a breach."

II DISCUSSION OF THE ISSUES

1. Does my office have jurisdiction to conduct an investigation of this complaint?

[6] Social Services is a "government institution" pursuant to section 2(1)(d)(i) of *The Freedom of Information and Protection of Privacy Act* (FOIP) and a "trustee" pursuant to section 2(t)(i) of *The Health Information Protection Act* (HIPA).

[7] In its submission, Social Services stated its position that FOIP and HIPA do not apply to this matter as follows:

> All information involved in this matter is subject to s. 74 of *The Child and Family Services Act* (CFSA). As such, s. 74 of the CFSA prevails over *The Freedom of Information and Protection of Privacy Act* (FOIPPA) pursuant to s. 23(3)(c) of FOIPPA. And s. 4(4)(d) of *The Health Information Protection Act* (HIPA) provides that Parts II, IV and V of HIPA do not apply to personal health information obtained for the purpose of the CFSA. Therefore, the collection, use, and disclosure provisions of FOIPPA and HIPA do not apply to this matter. The terms "personal information" and "personal health information" are limited to FOIPPA and HIPA; they are not terms used in the CFSA. In that sense, no personal information under FOIPPA or personal health information under HIPA is involved.

[8] Section 23 of FOIP and section 4 of HIPA provide as follows:

> **Section 23 of FOIP**
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> **23**(1) Where a provision of:
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> (a) any other Act; or
>
> (b) a regulation made pursuant to any other Act;
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> 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.
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> (2) Subject to subsection (3), subsection (1) applies notwithstanding any provision in the other Act or regulation that states that the provision is to apply notwithstanding any other Act or law.

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

…

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

Section 4 of HIPA

4(1) Subject to subsections (3) to (6), where there is a conflict or inconsistency between this Act and any other Act or regulation with respect to personal health information, this Act prevails.

(2) Subsection (1) applies notwithstanding any provision in the other Act or regulation that states that the provision is to apply notwithstanding any other Act or law.

(3) Except where otherwise provided, *The Freedom of Information and Protection of Privacy Act* and *The Local Authority Freedom of Information and Protection of Privacy Act* do not apply to personal health information in the custody or control of a trustee.

(4) Subject to subsections (5) and (6), Parts II, IV and V of this Act do not apply to personal health information obtained for the purposes of:

…

(d) *The Child and Family Services Act*;

…

(6) *The Freedom of Information and Protection of Privacy Act* and *The Local Authority Freedom of Information and Protection of Privacy Act* apply to an enactment mentioned in subsection (4) unless the enactment or any provision of the enactment is exempted from the application of those Acts by those Acts or by regulations made pursuant to those Acts.

[9] The *Guide to FOIP*, Chapter 1: Purposes and Scope of FOIP, Updated: July 28, 2020 (Guide to FOIP, Ch. 1) at pages 21 and 22, provides the following regarding section 23 of FOIP:

Subsection 23(1) of FOIP provides that where there is a conflict between FOIP and any other Act or regulation, FOIP will prevail. FOIP prevails 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. The ordinary meaning of the word means to be superior in strength or influence.

…

> Section 23 of FOIP 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.
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> The following three-part test can be used to determine whether two laws can coexist or are in conflict:
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> **1. Does compliance with one law involve the breach of the other?**
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> The first test is one of pure conflict.
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> **2. Does one law supplement the other?**
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> The second test is whether one law is supplemental to the other by adding something. If the law is supplemental, then it will be valid concurrently with the other law.
>
> **3. Does one law duplicate the other?**
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> The third test involves whether one law duplicates another such that there is not an actual conflict or contradiction. Mere duplication without actual conflict or contradiction is normally not sufficient to invalidate a law. It would simply mean that the government institution would be held to the higher standard of the competing statutes.

[10] Social Services' submission did not address the three-part test outlined by my office; its position regarding my office's jurisdiction on this matter, though, is as follows:

> Section 49(1)(a.4) of FOIPPA provides that, where "an individual believes that his or her personal information has not been collected, used or disclosed in accordance with this Act or the regulations" the applicant may apply to the Commissioner for a review. Since the information in question was not collected, used, or disclosed in accordance with FOIPPA, it is Social Service's view that s. 49 of FOIPPA does not provide the Commissioner with jurisdiction to conduct a review under FOIPPA.
>
> Section 33(d) of FOIPPA provides that the Commissioner may "from time to time, carry out investigations with respect to personal information in the possession or under the control of government institutions to ensure compliance with this Part." Since the information in question is not subject to FOIPPA, it is Social Service's view that s. 33(d) of FOIPPA does not provide the Commissioner with jurisdiction to carry out a privacy investigation with respect to this matter.

> Section 42(1)(c) of HIPA provides that a person may apply to the Commissioner for a review where "the person believes that there has been a contravention of this Act." As indicated above, Part II (Rights of the Individual), Part IV (Limits on Collection, Use and Disclosure of Personal Health Information by Trustees), and Part V (Access of Individuals to Personal Health Information) do not apply to personal health information obtained pursuant to the CFSA. The Commissioner's right of review is contained in Part VI, which does apply, but since Parts II, IV and V do not apply to the records or information in this case, he cannot find a contravention of the collection, use and disclosure provisions of HIPA.

[11] In my office's Review Report 269-2021 at paragraphs [11] and [12], I found that pursuant to section 23(3)(c) of FOIP, the confidentiality provisions at section 74 of the CFSA prevailed over a record that the applicant in that matter had requested access to as follows:

> [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.

[12] It is arguable that the intention of the exclusions found in section 23(3)(c) of FOIP and section 4(4)(d) of HIPA were enacted to ensure that certain records the government deemed critically sensitive could not be accessed using FOIP or HIPA. It does not seem, though, that the intent was that my office would not have oversight when a member of the public seeks access to such records from government institutions.

[13] Access to records is different from the protection of personal information and personal health information. Section 23 of FOIP is found within Part III of FOIP that provides exemptions to the right of access to records; however, the protection of privacy is dealt with elsewhere in Part IV of FOIP.

[14] I would like to bring attention to section 2-10 of *The Legislation Act* which provides as follows:

> **2-10**(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.

> (2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

[15] Section 2-10 of *The Legislation Act* codified the modern approach to statutory interpretation, providing that when interpreting legislation, one should adopt a liberal interpretation coupled with taking into account the overall purpose and intent of the legislation. A liberal interpretation of either FOIP or HIPA should recognize that their purpose and function is to provide independent oversight of government action in protecting information collected by government, and the public's access to government records.

[16] It is a fundamental principle of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament." A useful starting point, therefore, is to consider the general purpose of the Act and the specific wording of section 23 of FOIP.

[17] When taking the provisions in their entire context, there is no reason why – absent any conflict – 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 *Supreme Court of Canada in Lévis (City) v. Fraternité des policiers de Lévis Inc*, "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."

[18] Reading section 23(3) of FOIP consistently with section 23(1) of FOIP, and in a manner that can be reconciled with section 74 of the CFSA wherever possible, would not lead to absurd results. Interpreting these provisions together in the way we propose would further the Legislature's objectives and purposes under both laws to the extent that they do not conflict and can continue to co-exist as intended.

[19] This last point highlights a general principle of statutory interpretation in relation to the presumption of coherence and consistency between statutes which favors an interpretation that advances the objects of both Acts to the extent possible. There are several situations where additional privacy safeguards available under FOIP would not at all conflict with the provisions of section 74 of the CFSA. In fact, they could very logically co-exist and help complement the confidentiality protections afforded to records subject to section 74 of the CFSA.

[20] For example, the government institution's duty to protect personal information pursuant to section 24.1 of FOIP, namely by establishing "policies and procedures to maintain administrative, technical and physical safeguards that: (a) protect the integrity, accuracy and confidentiality of the personal information in its possession or control […]" can help further the privacy and confidentiality of records subject to section 74 of the CFSA. Likewise, the government institution's obligation to limit the collection of personal information (section 25 of FOIP) and to collect personal information directly from the individual whenever reasonably practicable (section 26 of FOIP) can also coexist and help buttress the intention to protect the confidentiality of records subject to section 74 of the CFSA.

[21] The contention that all these privacy-enhancing provisions of FOIP should be ousted and find no application in safeguarding child protection records when in fact no statutory conflict arises would, with respect, lead to a more absurd result. Instead of strengthening Social Services' privacy obligations with respect to these highly sensitive records, the statutory interpretation being put forward (i.e. removing these records from FOIP altogether, even in the absence of conflict) would lessen their obligations relative to other government institutions and compared with less sensitive records.

[22] Additionally, I do not agree with Social Services that the aforementioned sections of FOIP and HIPA result in the records in their control no longer being "personal and/or personal health information" as defined by FOIP and HIPA. If one were to accept these arguments from Social Services, then my office would have no oversight when it comes to the records that Social Services controls. As I said previously in this Report, the exclusion falls not in

the protection of privacy part of FOIP (Part IV) where personal information is also defined, but under the exemptions part (Part III), which sets out limits to the right of access to records. Also, I note that personal health information is defined in Part I of HIPA which is not one of the Parts that section 4(4) of HIPA provides that does not apply in the circumstances.

[23] Another area of inconsistency is that the CFSA does not speak to the manner in which information should be collected, the standard of accuracy, the purpose of the collection, or the use of the information collected. It is hard to imagine that the legislature intended that there be no obligations around such matters, and I would suggest they didn't include such provisions in the CFSA since they felt they would be adequately covered in FOIP.

[24] Yet another inconsistency is in how the term "confidentiality" is used in both the CFSA and FOIP. Section 23 of FOIP speaks to restricting access, while section 74 of the CFSA speaks to restricting disclosure - these are two different concepts. "Access" relates to an individual's right or ability to obtain their personal information from a government institution. "Disclosure" is the government institution's obligation to ensure that the personal information in its control is not disclosed to third parties without consent or where permitted by law.

[25] Section 4(4)(d) of HIPA excludes Social Services from the operation of many, but not all Parts of HIPA. Social Services is not excluded from Part III, which relates to the protection of personal health information. How can Social Services claim that the information that they have in their control is not personal health information when they are still subject to the protection of personal health information pursuant to HIPA? I cannot believe that the government of the day intended by the operation of section 4(4)(d) of HIPA to completely remove Social Services from HIPA. The government provided the exclusions that they felt were necessary given the very sensitive information collected by Social Services.

[26] Social Services has not provided my office with any arguments to support its position that the CFSA prevails over FOIP and HIPA. Social Services has not provided me with any arguments that would persuade me to conclude that complying with the protection of

privacy provisions in FOIP or HIPA would result in a breach of the confidentiality provisions of the CFSA. It is my opinion that the application of both FOIP and HIPA supplement the CFSA and provide additional protections to this sensitive information. I am not of the opinion that the there is a conflict or contradiction that prevents the Acts from co-existing, and that their co-existence would ensure Social Services is protecting personal information and personal health information at the highest standard.

[27] Returning to what information is involved, my office asked Social Services to clarify what personal information or personal health information was involved to assist in determining which piece of legislation was at issue in this complaint. Social Services responded as follows:

> All information involved in this matter is subject to s. 74 of *The Child and Family Services Act* (CFSA). As such, s. 74 of the CFSA prevails over *The Freedom of Information and Protection of Privacy Act* (FOIPPA) pursuant to s. 23(3)(c) of FOIPPA. And s. 4(4)(d) of *The Health Information Protection Act* (HIPA) provides that Parts II, IV and V of HIPA do not apply to personal health information obtained for the purpose of the CFSA. Therefore, the collection, use, and disclosure provisions of FOIPPA and HIPA do not apply to this matter. The terms "personal information" and "personal health information" are limited to FOIPPA and HIPA; they are not terms used in the CFSA. In that sense, no personal information under FOIPPA or personal health information under HIPA is involved.

[28] Social Services refused to provide my office with documentation or clarification regarding the information at issue in this investigation.

[29] However, the Complainant provided my office with copies of three affidavits that they claimed were the basis of their complaint to Social Services. The affidavits the Complainant provided to my office were completed by employees of Social Services who are officers under the CFSA. These affidavits include birth dates of the Applicant's children, information provided by the Applicant's children about their home life, information on medical conditions, and references to the Applicant's history of domestic violence. Based on my review, the affidavits contain information that would qualify as personal information or personal health information, as defined by sections 24(1)(a), (b), (h) and (k) of FOIP and section 2(m)(i) of HIPA as follows:

Definition of personal information (FOIP)

> **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:
>
> (a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;
>
> (b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
> …
>
> (h) the views or opinions of another individual with respect to the individual;
> …
>
> (k) the name of the individual where:
>
> (i) it appears with other personal information that relates to the individual; or
>
> (ii) the disclosure of the name itself would reveal personal information about the individual.

Definition of personal health information (HIPA)

> **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;

[30] Based on this, I find that there is personal information and personal health information involved in this matter, and that I have jurisdiction.

2. Did a privacy breach occur?

[31] As I have determined that personal information and personal health information is involved, and that I have jurisdiction, I now need to determine if the disclosure of the information was made in accordance with FOIP and HIPA.

[32] The *Privacy Breach Investigation Questionnaire* Social Services submitted to my office indicated that it opened an investigation on December 1, 2020. After meetings with various child family protection staff and legal counsel, Social Services concluded its investigation on March 10, 2021. Social Services then issued a letter to the Complainant on March 15, 2021, advising that a privacy breach did not occur. While Social Services indicated that a breach had not occurred and taken the position that the CFSA applied to this complaint, Social Services did not provide my offices with any other details regarding its investigation.

[33] On February 9, 2022, my office asked Social Services to specify which sections of FOIP or HIPA it was relying on for the use and disclosure of personal information and personal health information in this matter. Social Services responded it was relying on section 74 of the CFSA. On June 10, 2022, my office followed up with Social Services regarding its refusal to specify under which authority of FOIP and HIPA it was relying. In that correspondence, my office added it was of the opinion that the CFSA did not prevail and once again asked Social Services to identify which sections of FOIP and/or HIPA authorized the disclosure and why these provisions were applicable in this case. Social Services responded advising it had no further representations to submit.

[34] Based on the Complainant's original complaint, it appears they were under the impression that any information shared with the child protection workers regarding the reported concern would not be disclosed. The Complainant also expressed to my office that the disclosure of the information was against Social Services' policy.

[35] Social Services provided my office with a copy of a procedure entitled *Section 7.1.2: Disclosure of Information in Civil Proceedings*. This document can also be found on the

Government of Saskatchewan website in the *Child Protection Services Manual* which provides as follows:

> 1. Custody Proceedings
>
> - If a party requests information in a custody proceeding and the Ministry has relevant child protection information regarding one of the parties, the Ministry may disclose the information voluntarily pursuant to Section 74(1)(b) of *The Child and Family Services Act* because the release of information will further the protection of the child.
>
> - The voluntary release provisions do not apply if the Ministry is a party to a custody proceeding. In these cases, the rules of disclosure would apply to the Ministry as a party to the proceeding.

[36] Section 74(1)(b) of the CFSA provides as follows:

> **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:
>
> …
>
> (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.

[37] Based on Social Services' policy it appears in this instance that Social Services chose to exercise its discretion to disclose information to court for the purpose of these custody proceedings for the further protection of the children involved.

[38] Sections 29(2)(a) and (i) of FOIP and sections 27(2)(a) and 27(2)(l) of HIPA provide the following disclosure provisions:

> **FOIP**
>
> **29**(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:

> (a) for the purpose for which the information was obtained or compiled by the government institution or for a use that is consistent with that purpose;
> …
>
> (i) for the purpose of complying with:
>
> (i) an Act or a regulation;

HIPA

> **27**(2) A subject individual is deemed to consent to the disclosure of personal health information:
>
> (a) for the purpose for which the information was collected by the trustee or for a purpose that is consistent with that purpose;
> …
>
> (l) where the disclosure is permitted pursuant to any Act or regulation;

[39] The CFSA is "an Act respecting the Protection of Children and the Provision of Support Services to Families." In this case, it appears Social Services investigated a claim about the safety of the children's home life. One of the affidavits states the "purpose of this affidavit is to provide the Court with an overview of the Ministry's involvement… and to advise the Court the results of my investigation." Based on the information contained in the copies of the affidavits provided to my office by the Complainant, it appears Social Services disclosed this information to court for a purpose that was consistent with the collection - the protection of the children. Additionally, section 74(1)(b) of the CFSA provides that information may be disclosed where required to carry out the intent of the Act, which as noted above is the protection of children. As such, I find that Social Services had authority to disclose this information and that a privacy breach did not occur.

[40] It appears there may be a discrepancy between the Complainant's understanding that the information shared would be held in confidence, and Social Services' procedure relating to disclosure of information during custody proceedings. As Social Services has not provided my office with any details regarding this matter, it is unclear what type of notice or explanation was provided to the Complainant at the time of collection regarding the purpose of the collection or anticipated uses or disclosures, as provided by section 26(2) of FOIP and section 9 of HIPA:

FOIP

26(2) A government institution that collects personal information that is required by subsection (1) to be collected directly from an individual shall inform the individual of the purpose for which the information is collected unless the information is exempted by the regulations from the application of this subsection.

HIPA

9(1) An individual has the right to be informed about the anticipated uses and disclosures of the individual's personal health information.

(2) When a trustee is collecting personal health information from the subject individual, the trustee must take reasonable steps to inform the individual of the anticipated use and disclosure of the information by the trustee.

(3) A trustee must establish policies and procedures to promote knowledge and awareness of the rights extended to individuals by this Act, including the right to request access to their personal health information and to request amendment of that personal health information.

[41] I recommend Social Services review its policies and procedures to ensure appropriate notice is provided to individuals when collecting personal information or personal health information regarding the purpose of collection and any anticipated uses or disclosures of the information.

III FINDINGS

[42] I find that there is personal information and personal health information involved, therefore, both FOIP and HIPA are engaged.

[43] I find I have jurisdiction to conduct this investigation under FOIP and HIPA.

[44] I find that a privacy breach did not occur.

IV RECOMMENDATION

[45] I recommend Social Services review its policies and procedures to ensure appropriate notice is provided to individuals when collecting personal information or personal health information regarding the purpose of collection and any anticipated uses or disclosures of the information.

Dated at Regina, in the Province of Saskatchewan, this 3rd day of October, 2022.

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