



## INVESTIGATION REPORT 210-2021, 211-2021

### Ministry of Social Services, Street Worker's Advocacy Project Regina Inc.

August 17, 2022

**Summary:** An employee of the Street Worker's Advocacy Project Regina Inc. (SWAP) alleged that SWAP had breached their privacy under *The Health Information Protection Act* (HIPA) and brought forward their complaint to the Ministry of Social Services (Social Services). Social Services asserted that SWAP does not qualify as a trustee under HIPA. The Complainant requested that my office investigate this matter. The Commissioner determined that he did not have jurisdiction to investigate this alleged breach of privacy under HIPA or *The Freedom of Information and Protection of Privacy Act*. He recommended to the Minister of Justice to adopt a law similar to British Columbia's *Personal Information Protection Act* and Alberta's *Personal Information Protection Act*, so that employees of private sector organizations receive similar privacy protections as employees in the public sector.

### I BACKGROUND

- [1] An employee of the Street Worker's Advocacy Project Regina Inc. (SWAP) submitted a complaint to my office alleging that their privacy had been breached by the organization. Specifically, that SWAP disclosed their personal health information to a third party some time between December 2020 and February 2021. The employee (the Complainant) asserted that their privacy had been breached under *The Health Information Protection Act* (HIPA).
- [2] On July 16, 2021, the Complainant brought forward their privacy concern to the Ministry of Social Services (Social Services).

[3] On August 10, 2021, Social Services responded:

During our investigation we confirmed that personal health information pertaining to you was provided inappropriately to another individual. However, it is not a breach of HIPA, as community based organizations are not considered trustees under *The Health Information Protection Act*.

[4] On August 10, 2021, an advocate for the Complainant emailed my office expressing concern over Social Services' response. The advocate also asked if my office would be investigating this matter.

[5] On August 30, 2021, my office notified the Complainant, Social Services, and SWAP that my office would undertake an investigation to determine if my office has jurisdiction under *The Freedom of Information and Protection of Privacy Act* (FOIP) or HIPA to investigate this alleged breach of privacy matter.

## **II DISCUSSION OF THE ISSUES**

### **1. Do I have jurisdiction?**

[6] At issue in this alleged breach of privacy matter is the information of a SWAP employee. I must determine if either FOIP or HIPA applies to this matter. If so, then I would have jurisdiction to investigate.

#### **a. FOIP**

[7] FOIP applies to records in the possession or under the control of government institutions. First, I will determine if both or either Social Services or SWAP qualify as "government institutions". If either of them qualifies as a government institution, then I will determine if the record at issue (i.e. information of a SWAP employee) is in the possession or under the control of the government institution.

#### **i. Does Social Services and/or SWAP qualify as "government institutions"?**

[8] FOIP applies to all government institutions as defined by section 2(1)(d) of FOIP. Government institutions that are subject to FOIP have statutory duties with regard to providing access to information and protection of personal information in its possession or control (*Guide to FOIP* Chapter 1, “Purposes and Scope of FOIP”, updated July 28, 2020 [*Guide to FOIP*, Ch. 1], p. 7). Section 2(1)(d) of FOIP provides as follows:

2(1) In this Act:

...

(d) “**government institution**” means, subject to subsection (2):

(i) the office of Executive Council or any department, secretariat or other similar agency of the executive government of Saskatchewan; or

(ii) any prescribed board, commission, Crown corporation or other body, or any prescribed portion of a board, commission, Crown corporation or other body, whose members or directors are appointed, in whole or in part:

(A) by the Lieutenant Governor in Council;

(B) by a member of the Executive Council; or

(C) in the case of:

(I) a board, commission or other body, by a Crown corporation; or

(II) a Crown corporation, by another Crown corporation;

[9] Section 2(1)(d)(ii) of FOIP provides that the definition includes a body that is prescribed in *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Section 3(a) of the FOIP Regulations indicates bodies listed in Part I of the Appendix are prescribed as government institutions (*Guide to FOIP*, Ch. 1, p. 8).

[10] I find that Social Services qualifies as a “government institution” as defined by section 2(1)(d)(i) of FOIP. However, I find that SWAP does not qualify as a “government institution” as defined above.

[11] Since Social Services qualifies as a government institution, I must determine if the records at issue (i.e., information about the SWAP employee) is in the possession or control of Social Services.

**ii. Does Social Services have possession or control of the records at issue?**

[12] Section 2(1)(i) of FOIP defines “record” as follows:

2(1) In this Act:

...

(i) “**record**” means a record of information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include computer programs or other mechanisms that produce records;

[13] “Possession” is the physical possession plus a measure of control of the record. “Control” connotes authority. A record is under the control of a government institution when the government institution has the authority to manage the record including restricting, regulating and administering its use, disclosure or disposition (*Guide to FOIP*, Ch. 1. p. 9).

[14] As summarized in the background, the Complainant was concerned about SWAP disclosing their information to a third party. Based on the complaint itself, SWAP had possession of the Complainant’s information (and not Social Services). Therefore, I find that Social Services does not have possession of the record at issue.

[15] To determine whether a government institution has records under its control, the following two-part test can be applied.

1. Do the contents of the document relate to a government institution matter?
2. Can the government institution reasonably expect to obtain a copy of the document upon request?

(*Guide to FOIP*, Ch. 1. p. 10)

[16] Below is an analysis to determine if the two-part test is met.

**1. Do the contents of the document relate to a government institution matter?**

[17] Since this investigation is to determine if my office has jurisdiction to investigate this matter, my office has not obtained a copy of any records (or information) that may be at issue yet. Therefore, I will proceed to the second part of the test to determine if Social Services may have control of the record (or information) at issue.

**2. Can the government institution reasonably expect to obtain a copy of the document upon request?**

[18] If a senior official of a government institution is able to obtain a copy of the record, then the government institution has control over the record.

[19] My office received a copy of the agreement for services between Social Services and SWAP. The agreement was for the time period between April 1, 2018 to March 31, 2021. Based on a review of the agreement, I note it applies to “Records”, “Client Records” and “Service Records”, which are defined in clause 1.1 of the agreement as follows:

(c) “Client Records” means file recordings, documents and information kept by the Agency which relate to the provision of Services by the Agency to its clients;

...

(e) “Records” means Client Records and Services Records;

(f) “Services” means those Services set out in Appendix “B”, and unless otherwise indicated includes all labour, equipment and materials which the Agency may require to provide the Services;

(g) “Services Records” means all documents, books, accounts and other information of the Agency relating to the provision of Services under this Agreement other than Client Records;

[20] I find that information about a SWAP employee does not qualify as “Records”, “Client Records” or “Service Records” as defined above. Even if the agreement provided Social Services a degree of control over “Records”, “Client Records” or “Service Records”, the agreement does not provide Social Services with control over the information about a SWAP employee.

[21] I also note that article 9 of the agreement provides that Social Services has control over “confidential information”. Clause 9.1 of the agreement defines “confidential information” as personal information as defined in FOIP and personal health information as defined in HIPA that the Ministry provides to SWAP. Clause 9.1 of the agreement provides:

9.1 The Agency acknowledges that in the course of providing the Services, it will require and receive documents, data and other information **from the Minister**, including personal information within the meaning of *The Freedom of Information and Protection of Privacy Act* and/or personal health information within the meaning of *The Health Information Protection Act* (collectively referred to throughout this paragraph as “confidential information”). This confidential information will be included in Records that come into existence as a result of the provision of Services under this Agreement. In that regard, the Agency agrees that it will:

- (a) comply with all retention and disposal requirements for Records as set out in Appendix “F”;
- (b) protect and secure confidential information to ensure that it remains confidential;
- (c) not disclose the confidential information to any third party without the written authorization of the Minister except as may be required to perform the Services or to comply with the terms of Appendix “F”, or as may be authorized or required by law;
- (d) not use or disclose the confidential information for any purpose other than for the provision of the Services under this Agreement;
- (e) promptly return the confidential information to the Minister, if requested;**
- (f) dispose of the confidential information in the manner described in Appendix “F”;
- and
- (g) provide evidence of secure records disposal practices as described in Appendix “F”, if requested by the Minister.

[Emphasis added]

[22] Even though the agreement provides Social Services with a degree of control over “confidential information” as defined in the agreement, the information about the SWAP employee does not qualify as “confidential information” as defined in the agreement. Therefore, Social Services does not have control over the information about the SWAP employee. Since Social Services does not have control over the information at issue, FOIP does not apply to this matter. I find that I do not have jurisdiction to investigate this matter under FOIP.

**b. HIPA**

[23] HIPA is engaged when three elements are present: (1) a trustee, (2) personal health information, and (3) the trustee has custody or control over the personal health information. First, I will determine if both or either Social Services or SWAP qualifies as a trustee. If so, then I will determine if the information at issue qualifies as “personal health information” as defined by section 2(m) of HIPA. If so, then I will determine if the personal health information is in the custody or control over the personal health information.

**i. Does Social Services and/or SWAP qualify as a “trustee”?**

[24] Section 2(t) of HIPA defines “trustee” 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;

(ii) the provincial health authority or a health care organization;

...

(iv) a licensee as defined in *The Personal Care Homes Act*;

(v) a person who operates a facility as defined in *The Mental Health Services Act*;

(vi) a licensee as defined in *The Health Facilities Licensing Act*;

(vi.1) a licensee as defined in *The Patient Choice Medical Imaging Act*;

(vii) an operator as defined in *The Ambulance Act*;

(viii) a licensee as defined in *The Medical Laboratory Licensing Act, 1994*;

(ix) a proprietor as defined in *The Pharmacy and Pharmacy Disciplines Act*;

(x) a community clinic:

(A) as defined in section 263 of *The Co-operatives Act, 1996*;

...

(C) incorporated or continued pursuant to *The Non-profit Corporations Act, 1995*;

(xi) the Saskatchewan Cancer Foundation;

(xii) a person, other than an employee of a trustee, who is:

(A) a health professional licensed or registered pursuant to an Act for which the minister is responsible; or

(B) a member of a class of persons designated as health professionals in the regulations;

(xiii) a health professional body that regulates members of a health profession pursuant to an Act;

(xiv) a person, other than an employee of a trustee, who or body that provides a health service pursuant to an agreement with another trustee;

(xv) any other prescribed person, body or class of persons or bodies;

[25] I find that Social Services qualifies as a “trustee” as defined by section 2(t)(i) of HIPA. I find that SWAP does not qualify as a “trustee” as defined by section 2(t) of HIPA, nor does it qualify as a trustee pursuant to *The Health Information Protection Regulations*.

[26] Next, I need to determine if the records (or information) at issue qualifies as “personal health information”.

**ii. Does the records (or information) at issue qualify as “personal health information?”**

[27] My office reviewed the Complainant’s allegation of a breach i.e. their information being shared by SWAP to a third party. Based on how the Complainant characterized the information, I find that such information would qualify as personal health information as defined by 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;

[28] Next, I must determine if the trustee (Social Services) has custody or control over the personal health information at issue.

**iii. Does Social Services have custody or control over the personal health information at issue?**

[29] “Custody” is the physical possession of a record by a trustee. “Control” connotes authority. A record is under the control of a trustee when the trustee has the authority to manage the record, including restricting, regulating and administering its use, disclosure or disposition. Custody is not a requirement (*IPC Guide to HIPA*, updated December 2016, [*Guide to HIPA*], p. 12).

[30] As I have already found earlier, I found that Social Services does not have possession of the record (or information) at issue. Similarly, I find that Social Services does not have custody of the personal health information at issue.

[31] Pages 12 to 13 of my office’s *Guide to HIPA* lists 15 criteria to consider when determining if a trustee has control of the personal health information. One of the criteria is how a contract permits the trustee to inspect, review and/or possess copies of the records that the contractor produced, received or acquired. Earlier, I referenced an agreement between Social Services and SWAP. The agreement applies to “Client Records”, “Records”, “Service Records” and “confidential information”, which are all defined in the agreement. The agreement does not apply to information about a SWAP employee since information or records of a SWAP employee is not subject to the agreement. As such, I find that Social Services (as the trustee) does not have control over the personal health information at issue. In other words, I find that HIPA does not apply to this matter.

[32] Since I have found that neither FOIP nor HIPA apply to this matter, then I find that I do not have jurisdiction to investigate this alleged breach of privacy matter.

[33] In the past, I have [proposed](#) that Saskatchewan should adopt a private sector privacy law similar to British Columbia's (BC) *Personal Information Protection Act* (BC PIPA) and Alberta's *Personal Information Protection Act*. (AB PIPA). One of the reasons for such a proposal is so that employees in the private sector have similar protections as employees have in the public sector. I recommend that the Minister of Justice and Attorney General adopt a law similar to BC PIPA and AB PIPA.

### **III FINDINGS**

[34] I find that FOIP does not apply to this matter.

[35] I find that HIPA does not apply to this matter.

[36] I find that I do not have jurisdiction to investigate this alleged breach of privacy matter.

### **IV RECOMMENDATIONS**

[37] I recommend that Social Services and SWAP take no further action.

[38] I recommend that the Minister of Justice adopt a law similar to BC PIPA and AB PIPA.

Dated at Regina, in the Province of Saskatchewan, this 17th day of August, 2022.

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