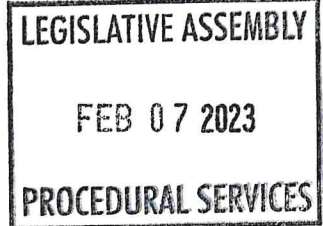




Office of the
Saskatchewan Information
and Privacy Commissioner



February 7, 2023

OPEN LETTER

Dereck Meyers
Chair, Human Services Committee
Legislative Building,
2405 Legislative Drive,
Regina, SK, Canada, S4S 0B3

derekmeyersmla@sasktel.net

Dear Derrick Meyers:

Re: Bill 101 An Act to amend *The Child and Family Services Act* and to make a consequential amendment to *The Freedom of Information and Protection of Privacy Act*

I note Bill 101 was tabled in the Legislative Assembly on November 14, 2022. I understand this Bill will be reviewed by the Human Services Committee in the next while. I would ask this letter and the attached submission be provided to each of the Committee members.

In my submission, I request that the Committee consider amendments to section 24 of Bill 101. Details of my reasons for the request are contained in the submission.

Freedom of information legislation is viewed across Canada as quasi-constitutional, and I believe changes in legislation that affects citizens' rights to information, protection of privacy and independent oversight should not be made without rigorous consideration of the implications. Bill 101, section 24, diminishes the coverage and protections afforded by *The Freedom of Information and Protection of Privacy Act* and *The Health Information Protection Act* to records to which *The Child and Family Services Act* applies (see Part I of the submission).

Also, I believe administrative fairness requires that citizens affected by decisions of government officials should be entitled to written reasons for their decisions given within a reasonable time and should have the ability to have that decision reviewed (see Parts II and III of the submission). I am requesting the Committee consider the amendments to section 24 of Bill 101 (see Part IV of the submission).

If the Committee requires any further information, I would be pleased to provide it and I can be reached at rkruzeniski@oipc.sk.ca or call me at (306) 537-4287.

Yours truly,

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

cc. Deputy Chair, Meara Conway reginaelphinstonecentre@ndpcaucus.sk.ca
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Office of the
Saskatchewan Information
and Privacy Commissioner

February 07, 2023

**Submission by the Information and Privacy Commissioner regarding section 24 of Bill 101
To the Human Services Committee of the Legislative Assembly of Saskatchewan**

Section 33 of *The Freedom of Information and Protection of Privacy Act* (FOIP) provides:

33 The commissioner may:

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

My comments pertain to citizen's rights under *The Child and Family Services Act* (CFSA) and how the proposed amendments to section 74 of the CFSA will impact those rights.

My comments begin by acknowledging that the right of access to information and the right to protection of one's privacy are quasi-constitutional rights enshrined in FOIP. It is important to note that across Canada, all access and privacy legislation has been given quasi-constitutional status. Former Supreme Court of Canada, Chief Justice Beverley McLachlin affirmed these rights and also instructed on how they should be interpreted in a commentary titled, [*Access to Information and Protection of Privacy in Canadian Democracy*](#):

... The Supreme Court of Canada has interpreted these Acts as quasi-constitutional legislation. It follows that as fundamental rights, the rights to access and to privacy are interpreted generously, while the exceptions to these rights must be understood strictly.

For my comments on the proposed amendments in Bill 101, specifically section 24 of the Bill, the comments are divided into four parts. Part I will comment on the proposed new subsection 74(1), Part II will comment on the balance of section 74, Part III will comment on new proposed section 74.1 and Part IV provides suggested amendments that would improve the legislation.

PART I

Subsection 74(1)

Section 24 of Bill 101 proposes to repeal the existing section 74 of the CFSA and replace it with significant amendments. Of particular concern is the proposed new subsection 74(1). This new subsection would be as follows:

74(1) Notwithstanding The Freedom of Information and Protection of Privacy Act and The Health Information Protection Act, the use of, disclosure of and access to information in

records pertaining to information mentioned in subsection (2) obtained pursuant to this Act is to be governed by this Act.

I have concerns with this proposed amendment. It appears that the purpose of the proposed new subsection 74(1) is to remove the right a citizen has to appeal a matter to my office. For example, it would prevent my office from investigating a breach of privacy complaint involving the Ministry of Social Services (Ministry). I would request the Committee inquire of the Ministry as to the purpose of the proposed new subsection 74(1) of the CFSA.

To further explain my comment above, I wish to highlight existing features in FOIP that demonstrate that the proposed new subsection 74(1) would be a step backward for the citizens of Saskatchewan.

FOIP was passed by the Legislative Assembly of Saskatchewan in 1992. It was intended to be overriding legislation that would apply to government, including ministries, Crown corporations and other agencies. Subsection 23(1) of FOIP provides as follows:

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.

The Legislative Assembly deemed it appropriate to create exceptions to this general approach at subsection 23(3) of FOIP. One of those exceptions is for the current section 74 of the CFSA. Subsection 23(3)(c) of FOIP provides:

23(3) Subsection (1) does not apply to the following provisions, and those provisions prevail:

...

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

I rely on *The Legislation Act* when interpreting these provisions. Subsection 2-10(2) of *The Legislation Act* provides:

2-10(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.

It is clear under the current provisions in FOIP that the CFSA overrides FOIP only where the provision in the CFSA pertains to restricting or prohibiting access. Therefore, other parts of FOIP still currently apply such as Part IV (protection of privacy) and Part VII (review and appeal).

Although my concerns center on the impact to FOIP, it is important to point out *The Health Information Protection Act* (HIPA) also has similar provisions as FOIP. The Legislative Assembly took a similar approach as it did to FOIP when it passed HIPA in 2003. The equivalent provisions in HIPA provide:

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.

Again, the Legislative Assembly has provided exceptions to the general rule. One of those exceptions is for the CFSA. Subsection 4(4) of HIPA provides:

4(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*;

Again, it is clear under the current provisions of HIPA that Parts III, VI, VII and VIII of HIPA still apply to the CFSA. It is important to point out that these parts of HIPA address important duties and rights. I will quickly summarize some of them below:

PART III

Part III of HIPA deals with the duty of a trustee to protect personal health information. Some important provisions in this Part include:

- Section 16 of HIPA which imposes a duty on the trustee to have policies and procedures in place to maintain safeguards that will protect the integrity and accuracy of personal health information and protect against any threat or hazard to the security or integrity of the information.
- Section 19 of HIPA imposes a duty to collect accurate information.
- Sections 20 and 21 of HIPA impose duties where a trustee discloses personal health information to another trustee or to non-trustees.

The proposed new subsection 74(1) of the CFSA attempts to erase these duties noted above. These duties help protect citizens in relation to some of the most sensitive health information that can exist. Therefore, I submit the proposed new subsection 74(1) of the CFSA unnecessarily takes away rights that citizens now have under HIPA.

PART VI

Part VI of HIPA deals with reviews by my office and the ability of the Court of King's Bench to hear appeals on access and privacy matters.

The effect of the proposed new subsection 74(1) of the CFSA is to take away the right of a citizen of Saskatchewan to have their access or privacy matter reviewed or investigated by my office or to appeal to the Court of King's Bench. I do not think changes to the CFSA should go as far as to take away these rights.

PART VIII

Part VIII of HIPA deals with general matters. It includes section 56 which provides for the exercise of rights by other persons.

- Section 56 allows a person to be represented by a personal representative, a personal guardian, a child's legal custodian or a proxy under *The Health Care Directives and Substitute Health Care Decision Makers Act, 2015*. The effect of the proposed new subsection 74(1) of the CFSA would eliminate these representatives from acting or obtaining information under the CFSA on behalf of other persons. This clearly would be a backward step.

For the reasons given above, I would request that the Committee consider removing the proposed new subsection 74(1).

PART II

Before addressing specific subsections, I wanted to note the Ombudsman's position on administrative fairness. In its resource entitled "[What is Fairness?](#)" the Ombudsman addresses procedural fairness and suggests the following questions should be asked:

- Did government take the time to listen?
- Did government provide reasons for its decisions?
- Was the decision delivered within a reasonable time?
- Was the decision-maker unbiased?

The Alberta Ombudsman in its [Administrative Fairness Guidelines](#) states:

In determining fairness, the Alberta Ombudsman uses the following guidelines to assess whether a situation has been dealt with in an administratively fair manner.

...

2. Duty of Fairness.

The courts require that decision making which affects the rights of individuals must follow a fair process. This duty of fairness means there must be procedural fairness in decision making.

3. Participation rights.

Was the complainant given a full and fair opportunity to present their case to the decision maker? Was there full disclosure of the case against the person, to the person?

4. Adequate reasons.

It is not enough to outline the evidence and arguments made by the parties. There must be a rational connection drawn between evidence and conclusions, including a clear explanation of how relevant legislation, regulation or policy was applied.

...

Subsection 74(4)

I am concerned with the proposed new subsection 74(4) of the CFSA. There are some procedural things that I recommend be added to section 74, that are otherwise captured by FOIP and HIPA, but are lacking in the new provision, which I will outline below. The proposed new subsection 74(4) of the CFSA is as follows:

74(4) Subject to subsection (6) and the regulations, the minister, a director, or an officer may disclose or communicate information mentioned in subsection (2) to all or any of the following:

- (a) the guardian, parent, care provider or foster parent of a child;
- (b) Indigenous governing bodies, for the following purposes:
 - (i) in cases of significant measures being taken with a child;
 - (ii) with respect to information about the child's parents, siblings, extended family members, care providers, and affiliation with an Indigenous community or Métis authority;
- (c) bands receiving child and family services directly from the ministry;
- (d) First Nations Child and Family Services Agencies, including materials filed with the court;
- (e) Indigenous, provincial, and federal entities, as the case may be, for the purposes of advancing registration and membership of Indigenous children.

30-day Response Period

I note the minister, the director or an officer “may” disclose information to the persons listed. I also note that subsection 74(4) has no timeline to provide a response to a request for information. The director or an officer could in theory answer the request for information a year later.

I note in Bill 103, *The Accessible Saskatchewan Act*, subsection 6-10(4) requires the director to make a decision within 60 days and to give reasons.

I would suggest the Committee recommend the adoption of subsection 74.2(2) as outlined in Part IV of this submission.

Reasons for Decision

I also note the subsection refers to “may” which means the minister, director or an officer may refuse to provide information, when requested. Administrative best practice suggests that a person be given written reasons for a decision. Thus, I would suggest the Committee add subsection 74.2(3) as outlined in Part IV of this submission.

Reason for Denials of Access

I further note that there are no prescribed reasons that might justify refusal to provide information to a person. I note that the proposed new subsection 74.1(5) of the CFSA does give reasons why the Minister might refuse to provide information. I would suggest the Committee consider the addition of subsections 13 and 14 to section 74 as follows:

74(13) Subject to subsection (14) and the regulations, the minister may refuse to grant an individual access to the individual’s record if:

- (a) in the opinion of the minister, knowledge of the information could reasonably be expected to endanger the mental or physical health or the safety of the individual or another person;
- (b) disclosure of the information would reveal confidential information about another person who has not expressly consented to the disclosure;
- (c) disclosure of the information could reasonably be expected to identify a third party who provided the information in confidence under circumstances in which confidentiality was reasonably expected; or
- (d) the information was collected principally in anticipation of, or for use in, a civil, criminal, or quasi-judicial proceeding.

(14) If a record contains information to which an individual is refused access, the ministry shall grant access to as much of the record as can reasonably be severed without disclosing the information to which the individual making the request is refused access.

Review or Appeal

If an individual makes a request for information, and the request is refused, there is not an internal process where the individual could request a review of the decision.

Having a review of the decision is similar to what has been proposed in Bill 103, *The Accessible Saskatchewan Act*, currently before the Legislature. I note in section 6-10, an order by an inspector can be appealed to the Director. I note the Director is required to issue the decision within 60 days with written reasons. Section 6-10 provides:

6-10(1) A person named in an order made pursuant to subsection 6-9(1) may request the Director to review the order.

(2) A request mentioned in subsection (1) must be made, in writing, within 30 days after the order is issued and must include the prescribed information.

...

(4) The Director shall, within 60 days after receiving a request made pursuant to subsection (1), review the order that is the subject of the request and provide the person with:

(a) a copy of the Director's decision, with written reasons; and

(b) notification of the right to appeal the decision to the Court of King's Bench pursuant to section 7-4.

Similarly, I note section 10 of *The Social Services Administration Act* provides:

10(1) The minister may establish appeal committees that shall review or hear any grievances, arising out of the administration of this Act or any other Act administered by the ministry, that are submitted by persons who feel that they are aggrieved by a decision, act or omission of an official or representative of the ministry.

These are examples where the Legislative Assembly has required that there will be a review process for decisions made under a statute.

I would suggest the Committee add a provision that provides for a right to re-consideration of the decision by the Minister and that the Minister would respond in writing within 60 days. Such a provision is proposed in subsection 74.2(4) as outlined in Part IV in this submission.

Subsection 74(5)

Bill 101 proposes a new subsection 74(5) of the CFSA. The new provision reads as follows:

74(5) The minister, a director or an officer may, in accordance with the regulations, disclose or communicate information mentioned in subsection (2) relating to a deceased individual if the disclosure or communication:

(a) is being made to the personal representative of the deceased individual for a purpose related to the administration of the deceased individual's estate;

(b) is to the individuals prescribed in the regulations and is limited to the deceased individual's information; or

(c) is necessary to administer this Act or the regulations.

I note the same issues raised above. I would recommend a 30 day response period to respond to a request for access, written reasons for decisions to deny access be required, criteria be given for when access can be denied and enable a review and appeal process. Thus, I would request the Committee add section 74.2 as outlined in Part IV of this submission.

Subsection 74(7)

Bill 101 also proposes a new subsection 74(7) of the CFSA. The new provision reads as follows:

74(7) Any information that may be disclosed to the person to whom it relates may, with the written consent of the person to whom it relates, be disclosed to any other person.

If a person consents, their information may be disclosed to another person. I note it does not say “the minister, director or an officer may disclose...” The question then is, who is authorized to disclose or not disclose and who is obligated to communicate with the person making the request?

I would suggest the Committee add a reference to the minister, director, or an officer. In a similar way as noted at subsection 74(5) above, I would request the Committee add section 74.2 to address response times, written reasons for a decision, criteria for refusal and ability for review and appeal as outlined in Part IV of this submission.

Subsection 74(12)

Bill 101 also proposes a new subsection 74(12) of the CFSA. The new provision reads as follows:

74(12) The minister may, in accordance with the regulations, exchange information with a person or entity prescribed in the regulations for the purposes of a program or activity designed to benefit the health, safety, welfare or social well-being of an individual if that exchange is consistent with the purposes of this Act.

The Minister may exchange information, without consent, for the purposes as outlined in the subsection. If a person finds out that information was disclosed and objects to that disclosure, does the person have a right to an investigation to determine if the information was properly disclosed in accordance with this subsection? Would there be an internal review process to determine whether a breach of privacy had occurred? I believe a person who feels their personal information or personal health information has been improperly disclosed should have an opportunity to have someone consider the person’s concern. I would suggest the Committee add subsection 74.2(5) as outlined in Part IV of this submission.

The proposed subsection 74.2(5) would be important anytime the Minister releases information under section 74 or section 74.1. A person may have a concern that too much information was

released, or information was accidentally released, and a person should have an opportunity to have the ministry review excessive application of sections 74 or 74.1.

PART III

Subsection 74.1(1)

Bill 101 also proposes a new subsection 74.1 of the CFSA. Subsection 74.1(1) of the new provision reads as follows:

74.1(1) Subject to subsections (4) to (6) and the regulations, an individual has the right to obtain access to information about the individual that is contained in a record in accordance with this Act that is in the custody or control of the ministry.

Giving a person the right to information about himself or herself is a good provision which already exists in FOIP and HIPA. If a person makes a request, how long does the Minister have to provide the information? I note reasons in which the information may be withheld are listed in subsection 74.1(5), but the provision is silent as to if the Minister refuses to provide the information, does the Minister have to give reasons why and within a certain time period? If there is a decision to refuse to give information, will there be an appeal mechanism?

Thus, I would request the Committee add section 74.2 to address response times, written reasons for a decision, and ability for review and appeal as outlined in Part IV of this submission.

Subsection 74.1(5)

Subsection 74.1(5) of the new provision reads as follows:

74.1(5) Subject to subsection (6) and the regulations, the minister may refuse to grant an individual access to the individual's record if:

- (a) in the opinion of the minister, knowledge of the information could reasonably be expected to endanger the mental or physical health or the safety of the individual or another person;
- (b) disclosure of the information would reveal confidential information about another person who has not expressly consented to the disclosure;
- (c) disclosure of the information could reasonably be expected to identify a third party who provided the information in confidence under circumstances in which confidentiality was reasonably expected; or

(d) the information was collected principally in anticipation of, or for use in, a civil, criminal, or quasi-judicial proceeding.

As mentioned above, if the Minister refuses to provide the information, does the Minister have to give written reasons within a specified time period?

I would request the Committee add section 74.2 to address response times, written reasons for a decision, and ability for review and appeal as outlined in Part IV of this submission.

Disclosure of policies and procedures

Citizens need to know how their requests for information will be managed, and what procedures and criteria will be applied. I would suggest the Committee add subsection 74.2(6) as outlined in Part IV of this submission.

PART IV

Proposed new section 74.2

Bill 101 proposes a new section 74 and 74.1. In this submission, I have suggested there should be timelines for decisions, a requirement of written reasons, criteria for refusing a request and an internal appeal mechanism. These are all things that normally a good administrative practice would require. As a result, I would request the Committee consider adding the following section 74.2.

74.2 (1) The minister, director, or an officer in dealing with a request for information under sections 74 and 74.1 shall comply with this section.

(2) The minister, director or an officer shall respond to a request for information within 30 days of receiving the request.

(3) If the minister, director, or an officer decides to refuse to provide information requested, the minister, director, or an officer, after hearing from the person making the request shall, within 30 days of the request, provide written reasons for the refusal.

(4) If a director or an officer makes a decision after a request for information, that person or organization can appeal to the minister for re-consideration of the decision and the minister after hearing from the person making the request shall provide a decision with written reasons, within 60 days of the request.

(5) If a person considers their information has been improperly disclosed, under section 74 or 74.1, the person may request the minister consider the disclosure and the minister may direct the ministry to request return of the information or cease providing the information in the future and the minister after hearing from the person complaining of the disclosure shall provide a decision with written reasons within 60 days of receiving the complaint.

(6) The minister shall publish on the ministries' website any policies or procedures made in relation to sections 74 or 74.1 and any regulations made under those sections.

Conclusion

For all of the above reasons, I would ask the Committee consider amendments to section 24 of Bill 101. In summary, my recommendations are as follows:

- Removal of the proposed subsection 74(1) of the CFSA.
- Addition of subsections 74(13) and (14) to section 74.
- Addition of section 74.2 to section 24 of Bill 101.

I believe that when people deal with government officials, they are entitled to receive a decision with reasons within a reasonable time period, have any denials of access based on a set of criteria and a review and appeal process for decisions that impact them negatively.

All of which is respectfully submitted,



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