

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 016/2014

Ministry of Education

Summary:

In November 2013, an Applicant submitted an access to information request to the Ministry of Education (Education). Education advised the Applicant that it was withholding records in part pursuant to subsection 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant proceeded to request a review by the Office of the Information and Privacy Commissioner (OIPC). In the request for review, the Applicant raised issue with Education withholding some information as non-responsive and the search conducted by Education. Upon review, the Commissioner found that Education had conducted a reasonable search for responsive records. Further, that some information withheld as non-responsive was responsive to the access request. He also found that some information was not responsive. Finally, the Commissioner found that Education appropriately applied subsection 17(1)(a) of FOIP to some of the information in the records. The Commissioner recommended release of the information found to be responsive to the access request and the information found not to qualify for exemption pursuant to subsection 17(1)(a) of FOIP and to withhold the remainder.

I BACKGROUND

[1] On November 28, 2013, the Ministry of Education (Education) received an access to information request from the Applicant requesting the following:

Any record, document, or email that mentions [Applicant's name], held by Deputy Minister Dan Florizone; Assistant Deputy Minister Greg Miller; and the Assessment Unit of the Student Achievement and Supports Branch in the Ministry of Education from January 2013 – December 2013.

[2] Education advised the Applicant by a letter dated January 17, 2014, that access to the records were denied in part pursuant to subsection 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On February 27, 2014, my office received a Request for Review from the Applicant. In the request, the Applicant raised the issue of records being withheld, records not being provided that should have been and records being overly redacted.

[4] In a letter dated March 10, 2014, my office notified both parties of our intention to conduct a review. My office received a copy of the record and Index of Records from Education on March 21, 2014. Its submission was received on June 16, 2014. The Applicant provided a submission to my office on July 15, 2014.

II RECORDS AT ISSUE

[5] The record at issue is 17 redacted pages consisting largely of emails.

III DISCUSSION OF THE ISSUES

[6] Education is a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP.

1. Did Education conduct a reasonable search for the records?

[7] Section 5 of FOIP provides:

5 Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the possession or under the control of a government institution.

[8] Section 5 is clear that access can be granted provided the records are in the possession or under the control of the government institution. Education did not advise the Applicant that records did not exist in its response to the Applicant dated January 17, 2014.

Education's position is that all records that were responsive to the access request were provided.

[9] FOIP does not require a government institution to prove with absolute certainty that records do not exist. It must however, demonstrate that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request. The threshold that must be met is one of "reasonableness". In other words, it is not a standard of perfection, but rather what a fair and rational person would expect to be done or consider acceptable.

[10] To ensure a complete and adequate search, government institutions should utilize a search strategy which could include consideration of the following:

- Were records in any form or format considered (i.e. electronic, paper, and other)?
- Is the original access request broad and does it include information developed over a wide open time period? If so, determine how you will define the search?
- How do you intend to conduct the search for records in the public body's possession?
 - Do you search yourself?
 - Do you delegate others to do the search? If so, how can you be sure that the search was comprehensive?
 - Do you send out an email to other units, etc.?
- Could records also exist that are responsive but are not in your possession, but in your control?
- Did agents, consultants or other contracted services have any role in the project the access request is referencing? If yes, should these records be included?

[11] When providing details of search efforts to our office, generally, the details should include:

- Who conducted the search?
- On what dates did each employee search?

- What was the search strategy?
 - For paper files; and
 - For electronic files (i.e. what key terms were used to search)?
- Which files or departments were searched and why?
- How long did the search take for each employee?
- What were the results of each employees search?
- Are there any additional program areas that should be searched in order to ensure that every reasonable effort was made?
- Have staff searched files held apart from the main department files (such as those held by individual employees), or records stored off-site?

[12] Education must establish that it has conducted a reasonable search for the records requested. On June 16, 2014, Education provided its initial submission. However, it did not include details of its search efforts. Education was invited to supplement its submission with the necessary details.

[13] It is noted that according to Education's initial submission to our office, the Applicant advised Education on February 3, 2014, that there were records missing from the package provided to him. The Applicant indicated that there was correspondence to and from himself and the Deputy Minister that were not included. Education arranged for the Deputy Minister's emails to be searched again which did not produce any additional records. Following this, Education apparently invited the Applicant to provide them with any specific information (topic, date, person, etc.) to assist them to further search for records he believed were missing. The Applicant did not provide further details and advised Education that he would refer the matter to our office instead. The Applicant then requested a review by our office and produced emails to support his assertion that records were missing. It is not clear why the Applicant did not provide these details to Education to assist them in satisfying his request.

[14] Our office received a supplementary submission from Education on July 21, 2014. It included details of its search efforts. Education provided a detailed chart listing each employee involved in the search, the dates and times taken to search and how many

records each employee located. In addition, Education provided a copy of the detailed instructions (search strategy) it provided to its staff. In total, 26 employees of Education conducted searches of their records. In addition, the Deputy Minister's emails were searched twice in an effort to satisfy the Applicant.

[15] On July 24, 2014, our office sent an email to Education advising them of the emails provided by the Applicant and requesting an explanation as to why the emails were not provided. On August 6, 2014, our office received a response from Education acknowledging that the emails had been missed and that it could not explain why or how the emails had been missed. From a review of the emails provided to our office by the Applicant, some of the emails appear to originate from an employee who is not captured by the Applicant's access to information request although the Deputy Minister was copied on some of the emails.

[16] As noted above, FOIP does not require a government institution to prove with absolute certainty that records do not exist. It must however, demonstrate that it has made a reasonable effort to identify and locate responsive records. Education conducted two searches to locate responsive records for the Applicant. In addition, Education provided our office with details of its search efforts and strategy.

[17] Therefore, I find that Education has demonstrated that its search for records responsive to the Applicant's access request was reasonable and adequate for purposes of FOIP.

2. Was there information in the records that was not responsive to the access request?

[18] The Applicant raised the issue of the records being overly redacted in his request for review to our office. Upon review of the record, Education severed portions of the record and wrote "not responsive".

[19] There are 3 criteria which must be considered:

- i. The test of relevancy;

- ii. Responsive information vs. records; and
- iii. Interpretation of the access request.

(Ontario IPC Order P-880 at p. 9)

i. The test of relevancy

[20] The need for a government institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a “head”. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. In the context of FOIP, “*relevancy*” must mean “*responsive*”. That is, by asking whether information is “*relevant*” is to ask whether it is “*responsive*”. The term describes anything that is reasonably related to the request. It follows that any information or records that do not reasonably relate to an applicant’s request for access will be “*non-responsive*” to the applicant’s request. (Ontario IPC Order P-880 at p.10)

[21] The purpose of FOIP is best served when a government institution adopts a liberal interpretation of a request. If a government institution has any doubts about the interpretation to be given to a request, it has a duty to assist the applicant in reformulating it. (Ontario Order P-880 at p.10)

[22] In its submission, Education asserted that any record that did not contain any of the three versions of the Applicant’s name as indicated in his access to information request was not considered responsive. Further, all information that was regarding other Education business was withheld.

ii. Responsive information vs. records

[23] A government institution can remove information as non-responsive only if the applicant has requested specific information, such as his or her own personal information. The government institution may treat portions of a records as non-responsive if they are

clearly separate and distinct and entirely unrelated to the access request. (Service Alberta, *FOIP Guidelines and Practices, 2009* at p. 85)

[24] It should not follow that merely because responsive information is contained in a larger document, one must reinterpret the request to find that the balance of the document is also responsive to the request. However, where not applied in good faith, a particular record could end up parsed and examined line by line offending the spirit of FOIP. (Ontario IPC Order P-880 at p. 21)

[25] The access request, in this case, was specific and clearly requested records or documents that mention the Applicant's name as opposed to one for general information. The request specified dates, authors and content. As the request was specific, it would not be appropriate for Education to treat portions of records as non-responsive where the Applicant has clearly requested records or documents.

iii. Interpretation of the access request

[26] The Applicant's request was for any record, document, or email that mentioned the Applicant's name held by two employees of Education and any employee in a particular unit of Education between the dates of January 2013 to December 2013.

[27] I will now consider the records and what has been deemed "non-responsive" by Education.

Pages 1 to 3

[28] Pages 1 through 3 are emails internal to Education. For page 1, Education severed the end of an email that appears to have started on an earlier page. The remainder of the page, which mentions the Applicant is a full email which was disclosed in part to the Applicant except for one sentence withheld pursuant to subsection 17(1)(a) of FOIP. The information that was severed and formed a portion of a different email does not appear to

mention the Applicant, directly or indirectly. Therefore, it would be non-responsive to the access request.

Page 6

[29] Page 6 is an email internal to Education. Several line items were severed by Education as non-responsive. Some of the information appears to be clearly non-responsive. For example, Education severed the name of another individual and two sentences that pertained to the other individual. This information does not mention the Applicant in any way and is about another individual.

[30] Education also severed other information that appears to be responsive. Education released the following to the Applicant but severed the information in brackets as non-responsive:

[Applicant's last name] is very heavily [name of political party] – he ran against [name of another individual] in the [specific election]...

[31] In addition, the email quotes opinions from a public website where students rate their university professors which appear to refer to the Applicant. Education severed this information. The information is about the Applicant. Therefore, this information is responsive.

Pages 39, 40 and 41

[32] Pages 39, 40 and 41 are emails internal to Education. Education severed the content of the email chain but released the “to” and “from”, date and subject lines of the emails only on page 39. From a review of the content of the email chain they do not appear to mention the Applicant in any way, directly or indirectly. Therefore, the severed information on pages 39, 40 and 41 are non-responsive to the access request.

Pages 42 and 43

[33] Pages 42 and 43 are emails internal to Education. Education severed the entire contents of the two pages. Page 42 clearly names the Applicant in the two emails dated Monday December 9, 2013 sent at 1:46 and 1:35pm. Therefore, this information is responsive.

[34] The information on page 43 does not appear to mention the Applicant, directly or indirectly in any way. Therefore, it would be non-responsive.

Page 50

[35] Page 50 is an email internal to Education. The email lists four items of information. Education severed three of the items as non-responsive and released the remainder of the email. From a review of the severed items, they do not appear to mention the Applicant, directly or indirectly, in any way. Therefore, this information would be non-responsive.

Pages 112 to 114

[36] Pages 112 to 114 are emails internal to Education. Education severed portions of the emails as non-responsive. However, on page 112, the information specifically names the Applicant and refers to him. This is information which mentions the Applicant directly and would be responsive to the access request.

[37] On page 113, Education severed an entire email chain. Page 114 is the end of the email chain that started on page 113. The email mentions the Applicant directly. Therefore, pages 113 and 114 are also responsive.

2. Does subsection 17(1)(a) of FOIP apply?

[38] Subsection 17(1)(a) of FOIP is a discretionary exemption and provides:

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;

[39] Education applied subsection 17(1)(a) of FOIP to a portion of the record.

[40] The following two criterion must be met in order for subsection 17(1)(a) of FOIP to be found to apply:

- i. The information in the record must constitute “advice”, “proposals” “recommendations”, “analyses” and/or “policy options”; and
- ii. It is offered or developed “by or for ” a government institution or member of the Executive Council.

i. Does the information in the record constitute “advice”, “proposals” “recommendations”, “analyses” and/or “policy options”?

[41] Education asserted in its submission that the information severed in the record constituted “advice”, “analyses” and “policy options”.

[42] *Advice* includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts.

[43] *Analyses or policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

[44] Further, the advice, analyses and/or policy options must be:

- sought or expected, or be part of the responsibility of a person by virtue of that person’s position;
- directed towards taking an action, including making a decision; and

- made to someone who can take or implement the action.

[45] Education indicated in its submission that pages 1, 6, 21 and 115 contained analyses. Education asserts that the employees involved analyzed a situation and provided their assumptions informally through email conversations. From a review of these pages, the information on pages 21 and 115 appear to qualify as analyses as the information sets out advantages and disadvantages of a course of action. However, the information on pages 1 and 6 would not qualify as analysis as the information does not fit the definition noted above.

[46] Education indicates in its submission that page 44 contains advice. Education asserts that the advice was provided by a Director. From a review of this page, the information appears to qualify as advice as defined above as it is information setting out options for future action.

[47] Education indicates in its submission that page 94 contains policy options. More specifically, an Executive Director proposed a new internal policy. From a review of this page, the information appears to qualify as a policy option as defined.

[48] In conclusion, I find that pages 21, 44, 94 and 115 meet the first part of the test. Further, I find that pages 1 and 6 do not meet the first part of the test and will not be considered further. The information severed in these two pages should be released.

ii. Was it offered or developed “by or for” a government institution or member of Executive Council?

[49] For information to be developed by or on behalf of a public body, the person developing the information should be an official, officer or employee of the public body, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the public body.

[50] For each page, Education addressed which individuals were responsible for providing the advice, analyses and policy options. In all cases, the individuals were individuals employed by Education. Therefore, pages 21, 44, 94 and 115 meet the second part of the test.

[51] In conclusion, I find that Education demonstrated that subsection 17(1)(a) of FOIP applied to the information severed in pages 21, 44, 94 and 115. Further, I find that Education did not demonstrate that subsection 17(1)(a) of FOIP applied to pages 1 and 6.

IV FINDINGS

[52] I find that Education has demonstrated that its search for records responsive to the Applicant's access request was reasonable and adequate for purposes of FOIP.

[53] I find that the information severed on pages 1, 2, 3, 39, 40, 41, 43, 50 and parts of page 6 are non-responsive to the access request.

[54] I find that the information severed on pages 42, 112, 113, 114 and parts of page 6 are responsive to the access request.

[55] I find that Education demonstrated that subsection 17(1)(a) of FOIP applies to pages 21, 44, 94 and 115.

[56] I find that Education did not demonstrate that subsection 17(1)(a) of FOIP applies to the severed information on pages 1 and 6.

V RECOMMENDATIONS

[57] I recommend that the Ministry of Education release the information severed on pages 1, 42, 112, 113 and 114 and parts of 6.

[58] I recommend that the Ministry of Education continue to withhold the severed information on pages 21, 44, 94 and 115.

Dated at Regina, in the Province of Saskatchewan, this 24th day of October, 2014.

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