



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 021-2021, 022-2021, 023-2021

Ministry of Highways

August 31, 2021

Summary:

The Applicant made three separate access to information requests to the Ministry of Highways (Highways). Not satisfied with Highways' responses, the Applicant asked the Commissioner to review, for each request, Highways' need to extend the timeline to respond, as well as its failure to respond within the legislated timeline. The Commissioner found that Highways failed on both counts, and recommended that within 15 days of the issuance of this Report, Highways complete processing the Applicant's three access to information requests, provide a properly executed section 7 response in each case to the Applicant and to my office, and refund the deposits already paid by the Applicant.

I BACKGROUND

- [1] On November 23, 2020, the Ministry of Highways (Highways) received three separate access to information requests from the Applicant for the following:

File 021-2021

Project H 18005 All internal Ministry correspondence with respect to Project H18005, including contractor evaluation reports, scoring, internal memos, and recommendations. All written policies and procedures pertaining to the evaluation of how projects are scored and weighted, and how they are connected to Saskatchewan Best Value. [Timeframe May 22, 2018 to Nov. 23, 2020]

File 022-2021

Tender H20126 All internal Ministry correspondence with respect to the award of Tender H20126, including contractor evaluation reports, scoring, internal memos, and recommendations. All written policies and procedures pertaining to the evaluation of how projects are scored and weighted. All correspondence regarding control section

selection/deletion specifically regarding CS 13- 15. [Timeframe Oct. 15, 2020 to Nov. 23, 2020].

File 023-2021

All internal Ministry correspondence with respect to the award of Tender H20127, including contractor evaluation reports, scoring, internal memos, and recommendations. All written policies and procedures pertaining to the evaluation of how projects are scored and weighted. All correspondence regarding control section selection/deletion specifically regarding CS 8-08 and CS 35-12. [Timeframe: Oct 15, 2020 to Nov. 23, 2020].

[2] In correspondence dated December 16, 2020, Highways responded to the Applicant by providing a separate fee estimate for each of the Applicant's access to information requests.

[3] In correspondence dated December 22, 2020, Highways acknowledged each deposit the Applicant paid in relation to each of the three access to information requests. Highways also notified that for each of the three requests, it was extending the time to respond by 30 days pursuant to subsections 12(1)(a)(ii), (b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[4] In correspondence dated January 18, 2021, for each of the access to information requests, Highways advised the Applicant as follows:

We understand we will not be able to comply with our mandated timeline for responding to your access to information request. We apologize for this.

The records responsive to your request may also be relevant to the trade dispute which [Applicant] has initiated. The Government of Saskatchewan has engaged external legal counsel with regards to the dispute who will need to review the records prior to completion of your access to information request.

We continue to process your request and hope to have a response to you as soon as possible. Thank you for your patience.

If you have any questions, please contact the Information Management Branch at accessprivacymhi@gov.sk.ca.

[5] On January 29, 2021, the Applicant asked my office to undertake a review of Highways' response, stating, "The Saskatchewan Ministry of Highways and Infrastructure did not

respond to our requests within the legislated timeframe and is improperly withholding information”.

- [6] On February 11, 2021, my office notified the Applicant and Highways of my office’s intent to undertake a review of Highways’ failure to respond within the legislated timeframe, and its need to extend its response time by 30 days pursuant to subsections 12(1)(a)(ii), (b) and (c) of FOIP.

II RECORDS AT ISSUE

- [7] As this is a review of Highways’ failure to respond within the legislated timeframe and its decision to extend the response time, there are no records at issue.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

- [8] Highways is a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did Highways’ extension of the response deadline satisfy the criteria set out in section 12 of FOIP?

- [9] Section 12 of FOIP is clear that government institutions can extend the initial 30-day response deadline for a maximum of 30 more days. This means 60 days in total. However, this is only under limited circumstances, which are outlined in subsection 12(1) of FOIP (*Guide to FOIP, Chapter 3: Access to Records*, Updated: June 29, 2021, at page 72 (*Guide to FOIP*)). Section 12 of FOIP provides as follows:

12(1) The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

(a) where:

(i) the application is for access to a large number of records or necessitates a search through a large number of records; or

(ii) there is a large number of requests;

and completing the work within the original period would unreasonably interfere with the operations of the government institution;

(b) where consultations that are necessary to comply with the application cannot reasonably be completed within the original period; or

(c) where a third party notice is required to be given pursuant to subsection 34(1).

(2) A head who extends a period pursuant to subsection (1) shall give notice of the extension to the applicant within 30 days after the application is made.

(3) Within the period of extension, the head shall give written notice to the applicant in accordance with section 7.

[10] Subsection 12(2) of FOIP indicates that notice of an extension must be provided to an applicant within the first 30-days after an application is received by the government institution. Subsection 12(3) of FOIP adds that this notice must be in accordance with section 7 of FOIP. In this matter, I note Highways provided its notice to extend the time within the 30 days.

[11] Highways stated it extended the 30-day time to respond pursuant to subsections 12(1)(a)(ii), (b) and (c) of FOIP. I will consider if Highways' reasons for extending satisfy the criteria set out in these subsections of FOIP prior to considering if it met the timeline to respond.

Subsection 12(1)(a)(ii) of FOIP

[12] Subsection 12(1)(a)(ii) of FOIP provides that an extension can be applied where the government institution has received a large number of access to information requests and completing them within the original 30 days would unreasonably interfere with the operations of the public body (Guide to FOIP, p. 75).

[13] In the event an applicant requests a review of the government institution's application of an extension, the Commissioner will consider whether the government institution's application of the extension complied with section 12 of FOIP. For this purpose, both parts of the following test must be met for subsection 12(1)(a) of FOIP:

1. Were there a high number of requests at the time?
2. Will meeting the original time limit unreasonably interfere with the operations of the government institution?

(Guide to FOIP, pp. 75 - 76)

[14] With respect to whether there was a high number of requests, my office considers how many requests were involved, and if the volume compares to the average request volume (Guide to FOIP, p. 76).

[15] *Unreasonably interferes* means the request is beyond the limits of what is reasonable or equitable in time, resources and impact (Guide to FOIP, p. 75).

[16] Circumstances that may contribute to unreasonable interference include significant increase in FOIP requests (e.g. sharp rise over 1-4 months), significant increase in FOIP caseloads, computer or technical problems, unexpected turnover of staff, unusual number of new staff in training, cross-government requests, discovery of significant number of additional records, type of records, number of program areas searched and location of records (Guide to FOIP, pp. 76 – 77).

[17] Circumstances that would not qualify include insufficient allocation of resources, long-term or system problems, vacations, office processes (e.g. sign off or review), personal commitments, pre-planned events (e.g. retirements), no work done during initial 30 days and type of applicant (e.g. media, political, etc.).

[18] In terms of its arguments, Highways stated as follows:

...

3. The Ministry of Highways submits that seven Access to Information Requests were received by the Ministry of Highways during the month of November.
 4. The request involves a broad review of historic documents and correspondence information within Government.
 5. The requests involve internal Ministry information relating to contractual performance and procurement information that is considered sensitive business information and requires additional review and redaction.
- [19] Highways has not provided anything further with respect to the number of access to information requests it received or why processing them would unreasonably interfere with operations. Having seven access to information requests in a month does not appear to be unreasonably or unusually high, and if it was for Highways, Highways did not state why. As such, I find the circumstances for subsection 12(a)(ii) of FOIP to apply do not exist.

Subsection 12(1)(b) of FOIP

- [20] Subsection 12(1)(b) of FOIP provides that an extension can be applied where the government institution needs more time to consult in order to process the request. The consultations must be necessary in order to comply with the application. *Comply with* means to act in accordance with or fulfil the requirements (Guide to FOIP, p. 78).
- [21] The following two-part test can be applied:
1. Was the government institution consulting a third party or other public body?
 2. Was it not reasonable for the consultations to be completed within the first 30 days?
- [22] The government institution should be able to explain why it was necessary to consult with a third party or other public body in order to make a decision about access, including how the third party or other public body is expected to assist (Guide to FOIP, p. 78).
- [23] Public body, in this context, means a separate government institution or local authority as defined by *The Local Authority Freedom of Information and Protection of Privacy Act* (LA

FOIP) or health trustee as defined by *The Health Information Protection Act* (HIPA) (Guide to FOIP, p. 78).

[24] Some valid reasons for consulting include the third party or other public body has an interest in the records, and records were created or controlled jointly. Consultations with staff, program areas or branches within the government institution processing the access to information request do not qualify for this provision. Internal consultations are part of every government institution's routine responsibilities when responding to access to information requests. Therefore, activities that constitute consultations should be those outside of intrinsic and routine obligations of any government institution. Consultations for a purpose other than deciding whether to give access do not qualify for this provision (Guide to FOIP, pp. 78 – 79).

[25] To determine whether it was not reasonable for the consultations to be completed within the first 30 days, my office considers the following:

- When did the government institution initiate consultations?
- Were a large number of consultations required?
- Availability of third party and public body contacts.
- Did the government institution set deadline expectations?
- Is time required for consultation reasonable?
- Did the government institution follow up on consultation requests?
- Has the government institution proceeded with a phased release?

(Guide to FOIP, p. 79).

[26] For its arguments, Highways submitted as follows:

...

6. The requests involve a past Ministry contract that is in litigation involving various parties. The requests require review by internal legal counsel for privileged information.

7. The requests involve information which is currently at issue in a trade dispute between the Ministry and applicant. It requires review by internal and external legal counsel for privileged information.

[27] In Review Report F-2006-003 concerning (then) Saskatchewan Justice, my office considered subsection 12(b) of FOIP and what constitutes “consultations” that occur either internal or external (outside of) the government institution. In so doing, my office looked toward Ontario Information and Privacy Commissioner (ON IPC) Order PO-1876 wherein Ontario’s Commissioner considered a parallel provision under its *Freedom of Information and Protection of Privacy Act*. At paragraph [44] of Review Report F-2006-003, my office agreed with Ontario’s Commissioner that while a public body may not want to put itself in a “deemed refusal” situation, it does not mean it can “automatically avail itself of the time extension provisions...”. My office agreed that any legal consultations that occurred for the purposes of reviewing records were an “intrinsic and routine part of an institution’s obligations to comply with the request within the statutory 30 day limit”. Further, if consultations of any nature are to occur, the public body needs to provide sufficient evidence that the consultations are or were necessary.

[28] In my view, internal or external legal consultations necessary to review “privileged information” would have been an intrinsic part of Highways’ review of this access to information request. Further, Highways provided no evidence to support the notion that such consultations were necessary in the first place. Such evidence could have included a copy of correspondence between Highways and its internal and external legal counsel discussing the type of consultation Highways sought. As such, I find the circumstances for subsection 12(1)(b) of FOIP to apply do not exist.

Subsection 12(1)(c) of FOIP

[29] Subsection 12(1)(c) of FOIP provides that an extension can be applied where the government institution needs to provide notice to third parties pursuant to subsection 34(1) of FOIP (Guide to FOIP, p. 80).

[30] In this context, a third party is a third party pursuant to section 19 of FOIP. FOIP defines a third party as a person, including an unincorporated entity, other than an applicant or a government institution.

[31] Highways did not provide any arguments regarding third parties or that it required time to notify any third parties. As well, Highways did not indicate in its initial response to my office or to the Applicant that any third parties were involved. As such, I find the conditions for subsection 12(1)(c) of FOIP to apply do not exist.

[32] In conclusion, I find Highways extension of the response deadline did not satisfy the criteria set out in section 12 of FOIP.

3. Did Highways meet the legislated timeline to respond?

[33] Subsections 7(2), (3) and (5) of FOIP provide as follows:

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

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

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

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

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

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

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

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

(3) A notice given pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

...

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

[34] Subsection 7(2) of FOIP provides that within 30 days of receiving an access to information request, the government institution must provide a response to the applicant. The response should include one or more of the enumerated statements listed at subsection 7(2) of FOIP (Guide to FOIP, p. 27).

[35] *The Legislation Act*, SS 2019, c L-10.2, establishes general rules governing the interpretation of all statutory instruments in the province. Section 2-28 of *The Legislation Act*, provides guidance on the computation of time and can be applied to the 30-day calculation as follows:

- The first day the access to information request is received is excluded in the calculation of time;
- If the due date falls on a holiday, the time is extended to the next day that is not a holiday; and
- As FOIP expresses the time in number of days, this is interpreted as 30 calendar days, not business days.

[36] All responses provided to applicants pursuant to subsection 7(2) of FOIP must include a statement that advises applicants of their right to request a review by the Information and Privacy Commissioner pursuant to subsection 7(3) of FOIP (Guide to FOIP, p. 37).

[37] Subsection 7(5) of FOIP then provides that where a government institution has failed to respond to an applicant within 30 days it is deemed to have responded on the 30th day refusing access to the record (Guide to FOIP, p. 40).

[38] In this matter, Highways received the Applicant's three access to information requests on November 23, 2020, and issued fee estimates for each one on December 16, 2020, or 23

days later. At this point, the 30-day clock to process the access to information requests stopped until the Applicant paid their deposit. The Ministry received the Applicant's deposits on December 21, 2020, which is the day on which the 30-day clock resumed.

[39] I previously found in this Report that Highways' extension of the timeline to respond did not satisfy the criteria set out in subsection 12(1) of FOIP, so it would have had an additional seven days from December 21, 2020 to respond to the Applicant. Taking into account Christmas Day, Boxing Day and New Year's Day as holidays, Highways' 30-day timeline to respond would have fallen on Saturday, January 2, 2021. As such, the time to respond would have been the next business day after that, or January 4, 2021. In other words, once the Applicant paid their deposit, Highways had until January 4, 2021, to provide a response to the Applicant pursuant to subsections 7(2) and (3) of FOIP.

[40] In correspondence dated January 18, 2021, Highways issued three separate letters to the Applicant responding to each of their access to information requests. Each of the three letters was worded in the same manner as follows:

We understand we will not be able to comply with our mandated timeline for responding to your access to information request. We apologize for this.

The records responsive to your request may also be relevant to the trade dispute which [name of Applicant] has initiated. The Government of Saskatchewan has engaged external legal counsel with regards to the dispute who will need to review the records prior to completion of your access to information request.

We continue to process your request and hope to have a response to you as soon as possible. Thank you for your patience.

If you have any questions, please contact the Information Management Branch at accessprivacymhi@gov.sk.ca.

[Emphasis added]

[41] Highways' three correspondences to the Applicant were provided 14 days after they were due. This has resulted in a deemed refusal pursuant to section 7(5) of FOIP for each of the three access to information requests. As such, I find Highways did not meet the legislated timeline to respond to each of the three access to information requests.

[42] Further, Highway's response needed to contain elements enumerated at subsection 7(2) of FOIP, and include a statement that the Applicant could request a review by my office within one year of receiving Highways' response pursuant to subsection 7(3) of FOIP. Highways did not include a statement advising the Applicant of their right to request a review by my office pursuant to subsection 7(3) of FOIP. Upon review of these letters, I note Highways mentioned it may withhold records from the Applicant as the two were in a trade dispute, but it is clear it had not finished processing the request. This type of response does not address its obligations pursuant to subsection 7(2) of FOIP. As such, Highways' correspondences to the Applicant were not properly executed pursuant to subsections 7(2) and (3) of FOIP as they did not contain the necessary elements.

[43] My office confirmed with the Applicant that as of August 19, 2021, they still had not received responses to their access to information requests from Highways, which is 227 days beyond when they were due. It is not acceptable for Highways to disregard the Applicant's access to information requests in this manner. Accordingly, I recommend that within 15 days of the issuance of this Report, Highways complete processing the Applicant's three access to information requests, provide a properly executed section 7 response in each case to the Applicant and to my office, and refund the deposits already paid by the Applicant.

IV FINDINGS

[44] I find Highways extension of the response deadline did not satisfy the criteria set out in section 12 of FOIP for each of the three access to information requests.

[45] I find Highways did not meet the legislated timeline to respond to each of the three access to information requests.

V RECOMMENDATIONS

[46] I recommend that within 15 days of the issuance of this Report, Highways complete processing the Applicant's three access to information requests, provide a properly executed section 7 response in each case to the Applicant and to my office, and refund the deposits already paid by the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 31st day of August, 2021.

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