



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 032-2017

Ministry of Highways and Infrastructure

November 8, 2017

Summary:

The Applicant submitted an access to information request to the Ministry of Highways and Infrastructure (Highways). Highways denied access to the request pursuant to subsection 2(2)(b) of FOIP. The Commissioner found that the emails, if they exist, to be under the control of Highways and that Highways did not conduct an adequate search for the records. The Commissioner also found that Highways issued the incorrect response to the Applicant. The Commissioner recommended Highways develop a procedure with its Minister's office to facilitate searching for and collecting records responsive to an access to information request where the records are in the possession of the Ministers' office but under the control of Highways. The Commissioner also recommended Highways conduct and document a proper, reasonable search for the records responsive to this request using the search process outlined in the *IPC Guide to Exemptions for FOIP and LA FOIP* and if records are located, provide them to the Applicant at no cost subject to only mandatory exemptions. Finally, the Commissioner recommended that Highways implement a procedure to ensure it is providing the appropriate responses to applicants under FOIP.

I BACKGROUND

- [1] The Applicant submitted an access to information request pursuant to *The Freedom of Information and Protection of Privacy Act* (FOIP) to the Ministry of Highways and Infrastructure (Highways) on December 12, 2016:

...all of [chief of staff]'s emails between September 1, 2011 and July 31, 2012, relating to the Global Transportation Hub/land acquisition and/or [landowner/interested party #1] and/or [landowner/interested party #2] and/or [landowner/interested party #3] and/or [former Chief Executive Officer of the Global

Transportation Hub Authority (GTH)] and/or [former Minister of the Economy and former Minister Responsible for the GTH].

[2] By letter dated February 17, 2017, Highways responded to the request denying access pursuant to subsection 2(2)(b) of FOIP as the [chief of staff] is the Chief of Staff for [Minister of Highways and Infrastructure].

[3] The Applicant submitted a request for review to my office on February 21, 2017. My office provided notification to Highways and the Applicant of our intention to conduct the review on February 21, 2017 and invited both parties to make a submission. My office received submissions from both Highways and the Applicant.

II RECORDS AT ISSUE

[4] This review addresses the question whether Highways has possession or control of the record, therefore there are no records at issue.

III DISCUSSION OF THE ISSUES

[5] Highways is a “government institution” as defined by subsection 2(1)(d)(i) of FOIP.

1. Does Highways have possession and/or control of the records?

[6] FOIP provides individuals the right to access records in the possession or under the control of a provincial government institution. 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. [Emphasis added]

[7] In the context of FOIP, *possession* is physical possession plus a measure of control of the record. *Control* connotes authority. A record is under the control of a public body when

the public body has the authority to manage the record including restricting, regulating and administering the record's use, disclosure or disposition.

- [8] In its February 17, 2017 response, Highways advised the Applicant that its reason for denying access was pursuant to subsection 2(2)(b) of FOIP. Subsection 2(2)(b) of FOIP provides:

2(2) **“Government institution”** does not include:

...

(b) the Legislative Assembly Service or offices of members of the Assembly or members of the Executive Council;

- [9] The issue of records in a Minister's office was considered by the Supreme Court of Canada in 2011. In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 S.C.R., the Court noted that if a government institution controls a record in a Minister's office, the record falls within the scope of the federal *Access to Information Act*. If it falls within the scope of the Act, the head of the government institution must facilitate access to it. The decision stated:

The fact that Ministers' offices are separate and different from government institutions does not mean that a government institution cannot control a record that is not in its premises. If a government institution controls a record in a Minister's office, the record falls within the scope of the Act. If it falls within the scope of the Act, the head of the government institution must facilitate access to it on the basis of the two-part control test as stated in the reasons of Charron J. If the record holder is the Minister, the fact that his or her office is not part of the government institution he or she oversees may weigh in the balance. The reality that Ministers wear many hats must also be taken into account. A Minister is a member of Cabinet who is accountable to Parliament for the administration of a government department, but is usually also a Member of Parliament in addition to being a member of a political party for which he or she performs various functions and, finally, a private person. It is conceivable that many records will not fall neatly into one category or another. The head of a government institution is responsible for determining whether such hybrid documents should be disclosed. The first step in the assessment is to consider whether the records fall within the scope of the Act. If they do, the head must then perform the second step of the assessment process: to determine whether the records fall under any of the exemptions provided for in the Act. Depending on which exemption applies, the head may or may not have the discretion to disclose the document.

[10] I adopt the same interpretation of records within a Minister's office as outlined in the Courts decision.

[11] Highways has not provided evidence to demonstrate that the potential emails would be outside of the scope of government business. Based upon the wording of the access request, I can conclude the Applicant is requesting access to emails that would be related to government business as the emails, if they exist, would relate to the government acquiring land with public funds.

[12] In his submission, the Applicant has provided examples of various minister and ministerial staff emails that have been provided to him through the access to information process. He asserts that by doing so the government has already acknowledged that these emails are accessible through access requests. I agree, provided the emails relate to government business.

[13] I find the emails, if they exist, to be under the control of Highways.

2. Did Highways conduct an adequate search for the records?

[14] Through the course of this review Highways has advised my office that it did conduct a search for the records. Further, Highways indicated that it made [chief of staff] aware of the request, however it is unclear if he searched for responsive records. This is confusing as Highways informed the Applicant in its February 17, 2017 response letter that the records are not in the possession or under the control of Highways.

[15] Nevertheless, since Highways advised me it did search for the records, I will now assess if it conducted an adequate search.

[16] An effective search strategy can be found in the *IPC Guide to Exemptions for FOIP and LA FOIP*. This includes:

- For personal information requests explain how the individual is involved with the public body and why certain departments/divisions/branches were included in the search.
- For general requests tie the subject matter of the request to the departments/divisions/branches included in the search. In other words, explain why some areas were searched and not others.
- Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
- Explain how the records management system is organized (both paper and electronic) in the departments/divisions/branches included in the search:
 - Describe how records are classified within the records management system.
 - Explain how you have considered records stored off-site.
 - Explain how records that may be in the possession of a third party but in the public body's control have been searched, such as a contractor.
 - Explain how a search of mobile electronic devices was conducted.
- Explain which folders within the records management system were searched and explain how these folders link back to the subject matter requested.
 - For electronic folders indicate what key terms were used to search if applicable.
- On what date did each employee search?
- How long did the search take for each employee?
- What were the results of each employee's search?
 - Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided.

[17] When search efforts are at issue, a public body must demonstrate that a *reasonable search* was undertaken for the records. A reasonable search is one in which an employee experienced in the subject matter expends a reasonable effort to locate records which are reasonably related to the request. Using the above as a guide for searching for records can assist a public body in demonstrating that a reasonable search was conducted.

[18] In terms of the search conducted, in its submission Highways indicated that it requested a self-search of senior officials who could reasonably be expected to be in the possession of

responsive records. It has not detailed which senior staff searched for records or even what Highways considers to be senior staff positions. Highways also noted that it would be highly unlikely for a ministerial assistant to communicate with Highways staff other than executive members.

[19] Highways also advised my office that two of the Executive Committee members were replaced with new people. Because of this, Highways is concerned that it may not have taken measures to retain their email records. It is not clear whether Highways is using the terminology for senior staff and executive members interchangeably or if it is two separate sets of officials.

[20] Highways has a legal obligation to properly maintain and dispose of records under *The Archives and Public Records Management Act* and I have reminded Highways of its obligations to maintain records in several recent reports.

[21] It is very important for staff to be made aware that emails he or she sends in the conduct of government business are not the property of the employee who sends or receives the emails. The emails are the property of the public body that they work for. As such, if an employee is preparing to leave a position or unexpectedly leaves a position, there needs to be procedures in place so the emails that relate to government business are retained.

[22] In terms of emails that may be in the possession of [chief of staff], Highways indicated in its submission that it discussed the access request with the ministerial assistant. Highways did not clarify if the ministerial assistant and [chief of staff] are the same individual. Highways also did not advise this office if a search was conducted by [chief of staff] for these records.

[23] Highways has not demonstrated to this office that an adequate search was conducted for the records. As outlined in paragraph [16] significant detail is required in order to guide search efforts and to document the outcome.

[24] I find that Highways did not conduct an adequate search for records.

3. Did Highways issue an appropriate response under FOIP?

[25] Based on its submission, Highways conducted a search for these records. Further, through the course of this review Highways seemed to change its initial position of the emails not being under its possession or under its control to the emails do not exist. In the process Highways has created unnecessary confusion for my office and the Applicant.

[26] The timeframe in which the Applicant has requested the information for is between September 1, 2011 and July 31, 2012. In its submission, Highways referred to the Saskatchewan Provincial Auditor's *2016 Special Report – Land Acquisition Processes* (Auditor's Report) at Part B, Figure 1: Key Events relating to the GTH's Land Acquisition from Third Parties. According to this table, the key event that occurred during the period of August to November 2013 was:

MHI staff actively prepared for acquisition of East Parcels (e.g., discussed acquisition schedule, obtained October 2013 appraisal with an appraised value of \$6.7 million determined using the direct-comparison approach). In addition, MHI communicated with its Minister's Office on its acquisition plans.

[27] Highways has asserted that prior to the final design approval, landowners, interested parties and the public in general would have been aware of the plans of Highways. However, notice to enter into negotiations and/or expropriation would not have occurred without notice to the Minister.

[28] In other words, Highways has advised this office that the timeframes in which the Applicant has requested this information occurs before the actual communications with the landowners/interested parties would likely have occurred.

[29] If this is the case, and had Highways conducted a reasonable search for records and none were located, the appropriate response would have been to advise the Applicant that the records do not exist pursuant to subsection 7(2)(e) of FOIP, which provides:

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

...

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

[30] I would like to note that when an applicant is informed that records do not exist, he or she still has the right to request a review by my office. Those reviews will typically consider the adequacy of the search efforts of a public body.

[31] Going forward Highways must ensure it is providing applicants with appropriate responses under FOIP. In this case it appears it did not.

[32] Therefore, I find Highways issued the incorrect response to the Applicant.

IV FINDINGS

[33] I find the emails, if they exist, to be under the control of Highways.

[34] I find that Highways did not conduct an adequate search for records.

[35] I find Highways issued the incorrect response to the Applicant.

V RECOMMENDATIONS

[36] I recommend Highways develops a procedure with its Minister's office to facilitate searching for and collecting records responsive to an access to information request where the records are in the possession of the Ministers' office but under the control of Highways.

[37] I recommend Highways conduct and document a proper, reasonable search for the records responsive to this request using the search process outlined in the *IPC Guide to*

Exemptions for FOIP and LA FOIP and if records are located, provide them to the Applicant at no cost subject to only mandatory exemptions.

[38] I recommend Highways implement a procedure to ensure it is providing the appropriate responses to applicants under FOIP.

Dated at Regina, in the Province of Saskatchewan, this 8th day of November, 2017.

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