

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 039-2015 and 040-2015

Ministry of Labour Relations and Workplace Safety

Summary: The Applicant made two requests for certain records. The Ministry of Labour Relations and Workplace Safety indicated that responsive records did not exist. The Commissioner found that the Ministry performed a reasonable search.

I BACKGROUND

[1] On January 15, 2015, the Ministry of Labour Relations and Workplace Safety received two similar access to information requests from the same Applicant. The first request was for “All correspondence, documents or reports authored by [name of Deputy Minister] related to the exemption given to SaskPower for electrical work on the AMI project...” The second request was the same except the Deputy Minister’s name was replaced with that of another former employee of the Ministry.

[2] In each case, the Ministry provided a response to the Applicant indicating that responsive records did not exist. The Applicant was dissatisfied with those responses and requested reviews by my office on February 23, 2015. On March 10, 2015, my office notified both the Ministry and the Applicant of our intention to undertake the reviews.

II RECORDS AT ISSUE

[3] The Ministry has indicated that there are no records responsive to the Applicant’s request.

III DISCUSSION OF THE ISSUES

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

[4] 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.

[5] Section 5 is clear that access can be granted provided the records are in the possession or under the control of the government institution.

[6] The Applicant's request was for records on a specific topic authored by two specific Ministry employees. The Ministry has indicated that no responsive records exist.

[7] 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.

[8] 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?

[9] 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?

[10] The Ministry must establish that it has conducted a reasonable search for the records requested.

[11] With respect to the access to information request for records authored by the Deputy Minister, the Ministry described its search for my office. It took approximately three hours over January 27 and 28, 2015 to perform both an electronic and manual search. The search involved three Ministry employees, one of which was the Deputy Minister's Executive Coordinator who was responsible for processing and maintaining the Deputy Minister's records and correspondence.

[12] Electronically, the Ministry searched the Deputy Minister's personal e-mails, as well as electronic file folders within the Deputy Minister's Office (DMO). It used search terms "SaskPower", "AMI" and "Advanced Metering Infrastructure". My office asked why the search did not extend beyond the DMO. The Ministry replied that "All correspondence that is authored by [the Deputy Minister] is kept in the DMO, this includes any documents prepared for his signature, there would be no reason to search beyond our area." Further, my office asked if the Deputy Minister's personal drive was searched.

The Ministry indicated that the Deputy Minister did not use his personal drive. Finally, the Ministry searched an electronic list of records that are stored at off-site archives. Any possible matches were reviewed manually. The Ministry indicated that no responsive records were found as a result of this electronic search.

[13] The Ministry also performed a manual search of the DMO's paper files. Four boxes and 18 drawers of records were searched. The Ministry indicated that no responsive records were found.

[14] With respect to records authored by the other former Ministry employee, the Ministry explained that three individuals were involved in an electronic search for records. The Ministry explained that the Occupational Health and Safety Division, where the former employee had worked, had moved to a paperless work environment and had a strong electronic filing system. It further explained that all records regarding the type of exemption described in the request are scanned and saved into the electronic filing system. The Ministry provided my office with a detailed explanation of how the electronic files are organized within that system. The Ministry also indicated that the search was also extended to all electronic files of the division. The search terms "SaskPower", "AMI", "smart meter" and "exemption" were used for this search. The Ministry reported no responsive records were found.

[15] In its submission, the Ministry did not indicate if it searched the e-mails or the personal drive of the former employee. When asked, the Ministry indicated that "a decision had been made not to search the e-mail account or personal drives". My office informed the Ministry on April 15, 2015 that it would be essential to do so. A few weeks later, the Ministry reported that it had restored this employee's e-mails for 2011, 2012 and 2013 and searched for responsive records. This included a search on the inbox, sent items folder, deleted items folder and other personalized folders. Only one responsive record was found. This record has been disclosed to the Applicant.

[16] The Ministry also attempted to restore and search the personal drive of the former employee. However, the Ministry explained that retention period for these drives was recently changed from two to seven years. This employee left the Ministry at the end of January 2013; therefore, no back up of her personal drive exists.

[17] I note that restoring e-mails and backup files constitutes an extensive search. However, this action should have been performed by the Ministry within 30 days of January 15, 2015, when the access to information request was received. However, the search was not completed until April when my office indicated that it was required. Had the decision been made to search these files at the time of the request, the files in question may not have been deleted. I urge all public bodies to halt the regularly scheduled destruction of records if an access request that may involve them has been received.

[18] As the searches produced no records, we asked the Ministry who had been responsible for approving the exemption and what materials had been authored. The Ministry explained that the exemption had been approved by the former employee's replacement after her departure from the Ministry.

[19] In this case, the Applicant was looking for records authored by the particular individual and not the position. However, I would like to remind the Ministry that it is my view that FOIP places an implied duty to assist applicants on government institutions. In other words, at the time the access request was made, it is my expectation that the Ministry would have provided an explanation as to why records do not exist and clarify if the Applicant would have wanted records authored by a different individual.

[20] I accept the Ministry's description of the search and find it to be reasonable.

IV FINDINGS

[21] I find the search conducted by the Ministry for records responsive to these access requests was reasonable.

V RECOMMENDATIONS

[22] I recommend that all public bodies stop the regularly scheduled destruction of records if an access request that might involve those records has been received until the matter has been resolved.

[23] I recommend that all public bodies encourage their FOIP co-ordinators to assist applicants to focus a request, narrow the scope of the request, narrow the date ranges, target the request to specific employees, determine whether requesting paper or electronic records and otherwise assist the applicant in requesting what he or she really requires.

[24] I recommend that the Ministry take no further action with regard to these access requests.

Dated at Regina, in the Province of Saskatchewan, this 25th day of May, 2015.

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