



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 042-2018

Ministry of Health

March 21, 2019

Summary:

The Ministry of Health (the Ministry) withheld portions of the record pursuant to subsections 16(1) and 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that subsection 16(1)(a) of FOIP applied and recommended that the Ministry continue withholding the records. He also recommended that the Ministry search for more records, perform a privacy impact assessment and develop policies respecting the use of text messages.

I BACKGROUND

[1] On June 21, 2017, the Ministry of Health (the Ministry) received an access to information request for the following information:

I am requesting information pertaining to the 2007 Amendments to the Regional Health Services Act.

I am requesting copies of all emails, letters, and any other relevant documents pertaining to these revisions as they pertain to ambulance services between the Ministry of Health, the Health Minister and the Saskatchewan Emergency Medical Services Association.

I am also requesting copies of any texting messages by Ministry of Health officials (including but not limited to [name of individual]) during the Human Services Committee meeting of May 16, 2007 in which the Amendments to the Regional Health Services Act were discussed.

- [2] On August 8, 2017, the Ministry issued a fee estimate to the Applicant. The Applicant paid a deposit on August 26, 2017.
- [3] On December 18, 2017, the Applicant had not yet received a response from the Ministry and requested a review by my office. On January 31, 2018, I issued Review Report 326 to 332-2017 which addressed the Ministry's delay in responding to this request and six others.
- [4] On January 29, 2018, the Ministry responded to the Applicant. It provided the Applicant with responsive records, but indicated that some information had been withheld pursuant to subsections 16(1) and 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [5] On March 3, 2018, the Applicant requested a review by my office. The Applicant requested that my office review the Ministry's decision to withhold records and the Ministry's search for records.
- [6] On April 2, 2018, my office notified both the Ministry and the Applicant that my office would be undertaking the review.

II RECORDS AT ISSUE

- [7] The Ministry identified 36 pages of responsive records. It withheld some information pursuant to subsection 16(1)(a) of FOIP on all of the pages. Additionally, it withheld information pursuant to subsection 17(1)(a) of FOIP on nine of the pages.

III DISCUSSION OF THE ISSUES

1. Does my office have jurisdiction in this matter?

- [8] The Ministry qualifies as a government institution pursuant to subsection 2(d)(i) of FOIP. Therefore, my office has jurisdiction in this matter.

2. Did the Ministry perform a reasonable search for records?

[9] 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.

[10] 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. FOIP does not require the public body to prove with absolute certainty that records do not exist. Public bodies can provide information in describing its search efforts. Examples of the type of information that can be provided can be found in my office’s resource *IPC Guide to Exemptions for FOIP and LA FOIP*.

[11] In the request for review, the Applicant identified three issues related to search: the timeframe of the records searched, the search of text messages and a search of the Executive Director of the Acute and Emergency Services branch.

Time frame of the search

[12] The Applicant questioned the timeframe of the Ministry’s search. The Applicant noted that *The Regional Health Services Act* received first reading November 13, 2006 and royal assent on May 17, 2007. The Applicant expected that there would be more records from before the introduction of the bill and was surprised that there were records created in 2011. As discussed later in this report, all records appear to be related to Executive Council.

[13] In its submission, the Ministry indicated that it searched all active and available paper filing systems, email folders, local and personal drives and electronic/network directories.

[14] The Ministry also indicated that it provided a fee estimate to the Applicant on August 8, 2017. The fee estimate indicated that there would be an additional charge for searching for records in eDiscovery, a system where the Ministry stores email records. eDiscovery is

maintained by eHealth Saskatchewan (eHealth). Later, the Ministry confirmed with the Applicant that the Applicant was not interested in pursuing the records held in eDiscovery.

[15] The Ministry's submission implied that there may have been additional records in eDiscovery.

[16] As the Applicant told the Ministry not to pursue the records in eDiscovery, there was no need for the Ministry to search those records for the purposes of the review.

[17] However, one page of the record mentions 'discussions' that relate to the Applicant's request. The Ministry did not identify any records related to those discussions. My office asked the Ministry about its search for these records. Specifically, my office asked in what form these discussions took place, to identify those involved in the discussions and if there were records related to the discussions.

[18] In response, the Ministry simply indicated that the discussions "could have been verbal with employees of the Ministry or formal meetings". It also indicated that all documented information was searched and provided.

[19] I am not satisfied with the Ministry's assertion that it searched all information. Were the discussions as mentioned in the record documented? If so, how was it documented? Could records of these discussions exist in the eDiscovery system?

[20] I recommend that the Ministry further pursue the search of records related to the discussions mentioned in the record. This would begin by identifying those individuals involved in those discussions and attempting to discover what records may have been created as a result even if only hand written. I recommend that the Ministry report the results to the Applicant and provide a detailed description of its search to my office within 30 days of the issuance of this report.

A search of the Executive Director of the Acute and Emergency Services Branch

[21] The Applicant also noted that emails and letters were requested and none were provided. The Applicant also identified that the Executive Director of the Acute and Emergency Services Branch should have been involved in the relevant subject matter. The Applicant wondered why no correspondence related to this position was identified as a responsive record.

[22] The Ministry indicated that the Acute and Emergency Services Branch conducted a thorough search of the Executive Director emails, all electronic documents on the branch's network drive, all hardcopy documents regardless of format of document as well as all hardcopy documents, binders and filing cabinets. The Ministry indicated it used the key word "Regional Health Services Act" for the electronic searches.

[23] This search was reasonable.

Search for Text Messages

[24] The Applicant's request also requested copies of text messages. The Applicant did not receive any copies of text messages.

[25] The Ministry indicated that it did not search for text messages separately from other electronic messages.

[26] The Ministry indicated that it did not have a policy that specifically covers text messaging. However, it acknowledged that *The Archives and Public Records Management Act* considers electronic messages as public records and the expectation is public records are to be retained and disposed of accordingly. It also acknowledged the Ministry of Justice's *Electronic Messaging Considerations* and its own *Mobile Device Policy*.

[27] The *Electronic Messaging Considerations* resource advises that it should be “modified as necessary to suit the purposes of each government institution”. The *Mobile Device Policy* does not cover text messaging.

[28] The Ministry did not indicate if its staff were in the practice of correctly saving text messages even though there was no specific policies during the timeframe of the Applicant’s request.

[29] My office’s resource *Best Practices for Managing the Use of Personal Email Accounts, Text Messaging and Other Instant Messaging Tools* recommends the following:

Develop clear and consistent policies on the appropriate use of communications tools. These policies should:

- identify which instant messaging tools and email accounts are permitted for business related communications, and clearly prohibit the use of other tools and accounts;
- require staff, if they have sent or received business-related communications using unauthorized tools or accounts, to immediately, or within a reasonable time, copy records to their official public body associated email account or the public body’s computer or network. This can be as simple as saving a copy to a shared drive or forwarding it to a public body’s email account. After ensuring these records are saved or forwarded to the public body, the public body should ensure copies on the unauthorized tool or account are destroyed;
- inform staff that all business-related communications are subject to disclosure and retention requirements, regardless of the tool, account or device used and that they will have to provide a copy of all business-related communications upon request;
- remind staff that when they are collecting records in response to an access to information request, they must search for and produce any relevant records from instant messaging and personal email accounts.

Remember that it is not enough to develop policies. A public body must ensure that they are implemented. This can be done by developing clear practice guidelines and by providing annual staff training.

[30] The Ministry indicated that it has no policy regarding text messages. Further, it has not demonstrated that it is or was the practice of its employees to save text messages in

accordance with *The Archives and Public Records Management Act*. Yet, the Ministry also indicated that it did not search for text messages separately from other electronic messages.

[31] As the Ministry has not demonstrated that any text messages would have been saved correctly, I recommend that the Ministry explore ways of searching the text messages of the employees that attended the Human Services Committee meeting of May 16, 2007 that may be in the possession or control of the Ministry, as per the Applicant's request.

[32] I also recommend that the Ministry conduct a Privacy Impact Assessment of the use of text messaging as discussed in *Best Practices for Managing the Use of Personal Email Accounts, Text Messaging and Other Instant Messaging Tools*. The Ministry should then develop a policy regarding text messages.

3. Does subsection 16(1)(a) of FOIP apply to the record?

[33] Subsection 16(1)(a) of FOIP provides:

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

(a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;

[34] Subsection 16(1) is a mandatory class-based exemption. Subsection 16(1)(a) of FOIP specifically protects records that contain advice, proposals, recommendations, analyses or policy options developed from sources outside of the Executive Council for presentation to the Executive Council is intended to be covered by the provision.

[35] Executive Council consists of the Premier and Cabinet Ministers. Executive Council is also referred to as Cabinet. *The Federal Access to Information and Privacy Legislation Annotated 2015* (Canada: Thomas Reuters Canada Limited, 2014) generally defines cabinet confidences as:

- ...in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public.
- [36] Advice includes the analysis of a situation or issue that may require action and the presentation of options for future action. Advice includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.
- [37] Recommendations relate to a suggested course of action as well as the rationale for a suggested course of action. Recommendations are generally more explicit and pointed than advice.
- [38] Proposals and analyses or policy options are closely related to advice and recommendations and refer to the concise setting out of the advantages or disadvantages of particular courses of action.
- [39] Many of the documents convey advice, recommendations, analyses and/or policy options. These include a briefing note, a memorandum, drafting instructions, a recommendation for Order in Council, proposed regulations and an approval of policy. Further, I am satisfied by the description of these records that they were developed from sources outside of the Executive Council for presentation to the Executive Council. Subsection 16(1)(a) of FOIP applies to these records.
- [40] It should also be noted that subsections 16(1)(a) through (d) are not an exhaustive list. Therefore, even if none of the subsections are found to apply, the introductory wording must still be considered. In other words, a government institution must consider if the information is a confidence of Executive Council.
- [41] The Ministry also applied subsection 16(1)(a) of FOIP to a draft template letter for a minister's signature. The Ministry submitted that Part of a briefing package for the Minister of Health to approve and bring to Executive Council. It also noted that the letter

details the consequences and impact to regional health authorities on proposed amendments. I am also satisfied that the letter contained analysis that was developed from sources outside of the Executive Council for presentation to the Executive Council. I am satisfied that the draft letter constitutes a confidence of Executive Council and that subsection 16(1)(a) of FOIP applies to the draft letter.

[42] Finally, the Ministry has applied subsection 16(1)(a) to speaking points. The Ministry's submission indicates that they were developed for the Minister and were provided to Executive Council. In Review Report 116-2013, I found that speaking notes provided to Executive Council qualifies for exemption pursuant to subsection 16(1) of FOIP. I find that subsection 16(1) of FOIP applies to the speaking notes.

[43] I find that subsection 16(1)(a) of FOIP applies to the portions of the record in question. There is no need to consider subsection 17(1)(a) of FOIP.

IV FINDINGS

[44] I find that the Ministry did not perform a reasonable search for records.

[45] I find that subsection 16(1)(a) of FOIP applies to the portions of the record in question.

V RECOMMENDATIONS

[46] I recommend that the Ministry continue to withhold portions of the record to the Applicant as described in Appendix A.

[47] I recommend that the Ministry explore ways of searching the text messages of the employees that attended the the Human Services Committee meeting of May 16, 2007 that may be in possession or control of the Ministry, as per the Applicant's request.

- [48] I recommend that the Ministry conduct a Privacy Impact Assessment of the use of text messaging as discussed in the resource *Best Practices for Managing the Use of Personal Email Accounts, Text Messaging and Other Instant Messaging Tools*.
- [49] I recommend the Ministry develop a policy regarding text messages.
- [50] I recommend that the Ministry pursue the search of records related to the discussions mentioned in the record. This would begin by identifying those individuals involved in those discussions and attempting to discover what records may have been created as a result. I recommend that the Ministry report the results to the Applicant and provide a detailed description of its search to my office within 30 days of the issuance of this report.

Dated at Regina, in the Province of Saskatchewan, this 21st day of March, 2019.

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

APPENDIX A

PAGE OF THE RECORD	SECTION(S) APPLIED BY THE MINISTRY	DOES IT APPLY?	RELEASE OR WITHHOLD?
1 to 4	16(1)(a)	Yes	Withhold
5 to 9	16(1)(a)	Yes	Withhold
10	16(1)(a)	Yes	Withhold
11 to 26	16(1)(a)	Yes	Withhold
27 to 30	16(1)(a)	Yes	Withhold
31 to 32	16(1)(a)	Yes	Withhold
33 to 35	16(1)(a)	Yes	Withhold
36	16(1)(a)	Yes	Withhold