

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 045/2012

Ministry of Health

Summary:

The Applicant submitted an access to information request that had four parts to the Ministry of Health (Health). To the first part, Health responded by stating no records exist. To the second part, Health responded by referring the Applicant to Public Account documents. To the third part, Health responded by stating that records have been destroyed. To the fourth part, Health responded it was withholding records pursuant to subsections 19(1)(b) and 19(1)(c) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant appealed to the Information and Privacy Commissioner (IPC). The IPC found that Health made a reasonable effort to search for records. The IPC also found that subsections 19(1)(b) and 19(1)(c) of FOIP did not apply. The IPC recommend that Health develop more effective records management practices and release the records it withheld pursuant to subsections 19(1)(b) and 19(1)(c) of FOIP. Health agreed.

I BACKGROUND

[1] The Applicant submitted a request to the Ministry of Health (Health) on April 16, 2012. Health provided a response on June 28, 2012. The response did not meet the requirements of section 7 of *The Freedom of Information and Protection of Privacy Act* (FOIP) but Health stated it was withholding information from the Applicant under subsection 19(1)(c) of FOIP.

[2] The Applicant submitted a request for review dated July 7, 2012 to my office. During the review, Health provided a proper section 7 response dated September 20, 2012 to the Applicant. A year later, my office received a submission dated September 27, 2013 from

- Health. Health provided a second submission dated June 26, 2014. The Applicant provided a submission dated July 7, 2014.
- [3] The Saskatchewan Association of Health Organizations (SAHO) was named by Health as the third party. SAHO provided submissions dated July 24, 2014 and August 7, 2014 to my office.
- [4] A description of the Applicant's access to information request to Health, and Health's response is as follows. There were four parts to the Applicant's access to information request he submitted to Health.
- [5] First, the Applicant sought information on the opening balances of Health Districts for the 2002-2003 fiscal year. Health responded by stating it had narrowed this portion of his request, through telephone correspondence with the Applicant, to only include the Saskatoon Health Region for the 2002-2003 fiscal year. Health stated it searched for records and it was unable to find responsive records.
- [6] Second, the Applicant sought information regarding payments that were paid to the Health Districts and Ambulance operators by the Ministry of Health in September or October of 2004 pursuant to a Health Sciences Association of Saskatchewan (HSAS) contract. Health responded by referring the Applicant to Public Account documents.
- [7] Third, the Applicant sought supporting documents for \$516,711 that Saskatoon Health Region received in the fiscal year 2002-2003. Health responded by stating that the responsive records had been destroyed.
- [8] Fourth, he sought information on "[Emergency Medical Services] funding information for contracted ambulance operators that was prepared after the settlement of the 2009-2013 HSAS agreement." He provided Health with a copy of a printout as an example of the type of record he sought. The printout was entitled "Sunrise – Private EMS" and it had a Saskatchewan Association of Health Organizations (SAHO) letterhead. Health

responded by stating that they are withholding these records pursuant to subsection 19(1)(c) of FOIP.

II RECORDS AT ISSUE

[9] The record that is being withheld is printouts that have been described as “compensation projections” for funding to health regions by Health. In a telephone conversation on July 3, 2014, Health confirmed to my office that the printout entitled “Sunrise – Privacy EMS” that was provided to Health (and to my office) by the Applicant is the representative sample. The printout is a chart created by SAHO. The rows of the chart lists five different ambulance operators and breaks down six different variables for each operator, including wage increase, “MA” Costs, Standby, Shift and Weekend Premium, Northern Retention, and Maternity. The columns of the chart are divided into years 2009 through 2012 with the final column describing the total amount of funding over the course of the four years.

[10] Health did not advise my office of how many pages of records were being withheld from the Applicant. Presumably, there would be a printout for each of the twelve health regions in Saskatchewan.

III DISCUSSION OF THE ISSUES

[11] Health is a government institution as defined by subsection 2(1)(d)(i) of FOIP.

1. Did the Ministry of Health conduct an adequate search for responsive records in response to the first three portions of the Applicant’s request?

[12] The following will be an analysis of Health’s search efforts to determine if Health has made a reasonable effort to locate responsive records to address the first three portions of the Applicant’s request. 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” and not a standard of perfection.

[13] Details that should be provided to my office to describe search efforts, a public body should provide the following:

- 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?

[14] During the review, the Applicant provided to my office a copy of a spreadsheet to assist Health in its search for records. He explained he obtained the spreadsheet from Health in the past. He was seeking records that supported numbers that appeared in the spreadsheet.

[15] The first three portions of the Applicant's request were for records that date back to 2002 to 2004. Health was organized differently over ten years ago so in its efforts to locate responsive records, it consulted its 2002-2003 organization structure. It determined that it would have been the District Management Services Branch (DMSB) who would have prepared funding summaries. DMSB no longer exists but Health determined that the responsibility for health regions is now with its Risk and Relationship Management Unit.

[16] A search with the Risk and Relationship Management resulted in fourteen records entitled 2003-04 Saskatchewan Health Funding Confirmation. Health determined that five of the fourteen records may have information responsive to the Applicant's request. These five

records have three columns. The first column is entitled “Special Payments”, the second column is the 2003-04 Funding, and then a date. The description for some of the special payments was “Compensation Parity – Contracted Ambulance Services Staff”. My office shared these five records with the Applicant on July 3, 2014 with Health’s consent.

[17] In its submission, Health asserted that it believes that these five records were the basis for the spreadsheet that the Applicant provided to my office (and my office gave to Health). Health’s Director of Regional Financial Services Unit asserted that she believes these funding confirmation reports were used to create the spreadsheet the Applicant had. She admitted that the funding confirmation reports displayed “high level conglomerate payment” information and that the details behind how Health came up with the amount to pay health regions are “likely long gone.”

[18] Based on the details of the search efforts by Health’s Director of Regional Financial Services Unit, it is evident she undertook a comprehensive search of Health’s electronic records to locate responsive records. Her search began with where she would locate current funding information and conducted her search in a retrospective and intuitive manner. However, as detailed above, she was only able to locate the funding confirmation reports but no other documents that would provide detailed information as to how Health calculated the amounts that appear in the spreadsheet the Applicant provided to my office.

[19] Finally, since Health had stated that records were destroyed in response to the third portion of the Applicant’s request, our office sought evidence of the records destruction. Evidence could come in the form a disposal request sent to the Saskatchewan Archives Board (SAB) and all correspondence between the ministry and SAB. Unfortunately, Health was unable to locate any “disposition requisition and/or correspondence between Health, Gemini and/or the Provincial Archives Board regarding the destruction of such records.”

[20] Based on the above, my office found that Health has made reasonable efforts to locate responsive records. However, it found that Health could develop more effective record

management practices to withstand ministry re-organization and staff turnover. This can relieve frustrations that employees encounter when they need to retrieve records for the purposes of their job duties (such as processing an access to information request) and it can also enable the ministries to be accountable for its actions. Further, it would enable Health to conduct a search in a timelier manner. Although my office found that Health has made a reasonable effort to locate responsive records, this effort should have been made within 30 days that Health received the access to information request rather than during the review process.

[21] I recommend that Health develop a plan for more effective record management practices. These record management practices should enable employees to retrieve records even in the event of ministry reorganizations and/or staff turnovers. These practices should also include records disposition processes that are in accordance with the *Saskatchewan Archives Board Guidelines to Records Disposal*, available at http://www.saskarchives.com/sites/default/files/6_4_1_disposal_process_-_guidelinestorecordsdisposalsystem.pdf.

2. Did the Ministry of Health properly apply subsection 19(1)(b) of FOIP?

[22] Health did not cite subsection 19(1)(b) of FOIP as a reason for withholding records in response to the fourth part of the Applicant's request. However, this subsection was raised in Health's submission.

[23] Subsection 19(1)(b) of FOIP provides:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;

[24] The test to determine if subsection 19(1)(b) applies is as follows:

1. Is the information in question financial, commercial, scientific, technical or labour relations information?

2. Was the information supplied by the third party to the public body?

3. Was the information supplied in confidence implicitly or explicitly?

[25] First, SAHO asserted that the information in the responsive records is labour relations information. However, it did not provide any supporting arguments for its assertion. Labour relations information can be defined as information that relates to the management of personnel and would include information regarding the collective relationship between an employer and its employees (Alberta IPC Order 2000-003; Ontario IPC Order P-1614). Certainly the information in the records could have been a result of collective bargaining. However, on the face of the record, the information appears to be more financial information. Financial information relates to money and its use or distribution and must contain or refer to specific data (Review Report F-2005-003; Ontario IPC Order MO-1246). The first part of the test has been met.

[26] Second, SAHO qualifies as a third party as defined by subsection 2(j) of FOIP. The information contained within the record seems to have been derived by SAHO and then given to Health. As such, the information was supplied by SAHO to Health. The second part of the test is met.

[27] Third, in the past, to determine if the information was supplied in confidence, my office looked at all relevant facts and circumstances to determine if there is an understanding of confidentiality. Some circumstances that can be used to determine if information was supplied in confidence explicitly includes:

1. The existence of an express condition of confidentiality in an agreement between a public body and the third party;
2. The fact that the public body request the information be supplied in a sealed envelope;
3. The third party's evidence that it considered the information to have been supplied in confidence;
4. The fact that the third party supplying the information was promised by the public body that he or she would not be identified;
5. The passing of a motion that the information remain private;

(Review Report F-2006-002 at [56]; *Annotated Alberta Freedom of Information and Protection of Privacy Act*)

[28] Some of the circumstances we looked at in the past included:

1. The information was communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
2. The information has been treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body;
3. The information not otherwise disclosed or available from sources to which the public has access; or
4. The information was prepared for a purpose which would not entail disclosure.

(Review Report F-2006-002 at [57]; *Annotated Alberta Freedom of Information and Protection of Privacy Act*)

[29] Health, in its submission, asserted that the information was supplied in confidence because the information is not otherwise accessible by the public nor could the information in the records be obtained “by observation or independent study by a member of the public acting alone”. It also commented that it “would not and has not released information provided by SAHO without the express consent of SAHO”.

[30] SAHO, in its submission, asserted that the information was supplied in confidence to Health. It then detailed the harm that would result if the records were disclosed. Harm is a consideration for subsection 19(1)(c), which will be analyzed in the next portion of this analysis.

[31] On the face of the record, it is difficult to determine if the information was supplied in confidence. The bottom of the record states that the record is “for discussion purposes only”. However, this is not enough to establish that the information was supplied in confidence.

[32] Based on the above, it has not been established that the information was supplied in confidence. As such, I find that subsection 19(1)(b) is not applicable.

3. Did the Ministry of Health properly apply section 19(1)(c) of FOIP?

[33] In its section 7 response to the Applicant, Health relied on subsection 19(1)(c) of FOIP to withhold the records responsive to the fourth portion of the Applicant's request. Subsection 19(1)(c) of FOIP provides:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(c) information, the disclosure of which could reasonably be expected to:

- (i) result in financial loss or gain to;
 - (ii) prejudice the competitive position of; or
 - (iii) interfere with the contractual or other negotiations of;
- a third party;

[34] In order to determine if subsection 19(1)(c) of FOIP applies, a three part test must be met. The three parts are:

1. There must be a clear cause and effect relationship between the disclosure and the harm which is alleged,
2. The harm caused by the disclosure must be more than trivial or inconsequential, and
3. The likelihood of harm must be genuine and conceivable.

[35] Health asserted that the withheld information is estimates generated by a third party, which is SAHO, "to inform funding to health regions". Health did not identify the harm that would result if the information was disclosed.

[36] SAHO asserted that the disclosure of the requested information would prejudice future negotiations because the union will know the funded amounts for EMS. SAHO asserted the following:

The information concerning EMS funding would prejudice all future negotiations concerning EMS workers. As you have correctly captured, collective bargaining is a continuous contractual relationship that is interrupted only by a decertification. While at times, particularly during the duration of a negotiated agreement, the bargaining is at a lull, the issues arise every negotiation session and frequently during the contract term. For example, let us assume that the union has negotiated a wage rate that is lower than the funded rate. If after concluding an agreement, that funding amount or formula is disclosed, then that will negatively affect the relationship between the parties and prejudice future negotiations. Further, the [sic] making the

formula public will create an unfair advantage to the union in all future collective bargaining as the union will know exactly how much the employer has to spend. This is a undermining the fundamental principle of free and unfettered collective bargaining. It throws the delicate balance of bargaining rights off center.

[37] Therefore, disclosing the funding amounts could result in giving the union an unfair advantage in future collective bargaining.

[38] On the face of the record, there does not appear to be any formula but only dollar amounts. Neither SAHO nor Health has explained how the Applicant would be able to derive any formula if the information in the responsive records were disclosed.

[39] Further, the information in the responsive records is funding information broken down by year (years 2009 to 2012) and for individual ambulance operators. On the face of the record, it is not clear how the Applicant might be able to determine how much the employer would have to spend in years beyond 2012 that would prejudice future collective bargaining.

[40] I find that the disclosure of the requested records would not harm the competitive position of the third party, and therefore subsection 19(1)(c) is not applicable.

IV FINDINGS

[41] I find that Health has made reasonable efforts to locate responsive records.

[42] I find that Health has not established that subsection 19(1)(b) is applicable to the records that are responsive to the fourth portion of the Applicant's request.

[43] I find that subsection 19(1)(c) of FOIP is not applicable to the records that are responsive to the fourth portion of the Applicant's request.

V RECOMMENDATIONS

[44] My office sent Health a draft copy of the Review Report containing the following recommendations. In its letter dated November 13, 2014, Health agreed to comply with both of them:

- I recommend that Health develop more effective records management practices that withstand ministry re-organization and staff turnover.
- I recommend that Health release the responsive records it was withholding under subsections 19(1)(b) and 19(1)(c) of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 18th day of November, 2014.

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