



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 055-2017

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 indicating it did not have possession or control of the records. 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 February 6, 2017 requesting access to the following records for the time period of March 1, 2013 to December 31, 2013:

...all emails written to or from [former ministerial assistant] (or cc'd) related to the Global Transportation Hub and/or cabinet's land use committee and/or [government official].

[2] By letter dated February 27, 2017, Highways responded to the request denying access pursuant to section 5 of FOIP, explaining that the Ministry is not in the possession or has in its control any records related to the access request.

[3] The Applicant requested a review of this decision by my office on March 16, 2017. My office provided notification to Highways and the Applicant of my office's intention to conduct the review on March 17, 2017 and invited both parties to make a submission. My office received a submission from Highways. The Applicant requested that my office use a previous submission he submitted because this review dealt with similar issues.

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 records use, disclosure or disposition.
- [8] In its February 27, 2017 response, Highways advised the Applicant that its reason for denying access was pursuant to section 5 of FOIP, which I have cited above.
- [9] Section 5 of FOIP is not a reason to deny access under FOIP; it speaks to an individual's right to access records. However, Highways did note in its February 27, 2017 letter to the Applicant that the records were not in the possession or under the control of Highways. In its submission, Highways noted that [former ministerial assistant] was a ministerial assistant of the Minister of Highways and Infrastructure. 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;

- [10] 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.

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

[12] Highways has not provided evidence to demonstrate that the potential emails would be outside of the scope of government business. Further, the potential emails that have been requested would have flowed between Highways and the Minister's office. As noted above, Highways is a government institution and therefore records that are "*in the possession or under the control*" of Highways would be subject to the provisions of FOIP.

[13] 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.

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

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

[15] Through the course of this review Highways has advised my office that it did conduct a search for the records. This is confusing as Highways informed the Applicant in its February 27, 2017 response letter that the records are not in the possession or under the

control of Highways. Therefore, 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 within Highways, in its submission Highways indicated that it requested executive members to search for records in their email and no records were found. It also noted that it would be highly unlikely for a ministerial assistant to communicate with Highways staff other than executive members.

[19] Highways advised that it instructed senior lands staff to conduct a self-search for emails in their email system by using key words from the access request. Again it advised my office that no records were located.

[20] Highways advised my office that [former ministerial assistant] is no longer with the Minister's office and was not with the Minister's office at the time the access request was received. Therefore, Highways contacted [former ministerial assistant] to ask if he had retained any of his emails from when he was a ministerial assistant with Highways. He informed Highways staff he had not.

[21] In terms of the emails of [government official], in its submission Highways advised my office that he has not been employed by Highways, but he is an employee of the Ministry of the Economy (Economy). FOIP requires Highways to search for records in Highway's possession or control. Therefore, if Highway's search resulted in responsive records that included [government official] emails within the Ministry, they would be in Highways possession or control. FOIP does not require Highways to go to Economy and request that Economy search for and provide Highways with records to respond to the request. However, the Applicant can submit the same request to Economy.

[22] Further, if a public body does not believe it has records in its possession or under its control but another public body may, section 11 of FOIP outlines the ability to transfer an access to information request. Subsection 11(1) and (2) provide:

11(1) Where the head of the government institution to which an application is made considers that another government institution has a greater interest in the record, the head:

(a) may within 15 days after the application is made, transfer the application and, if necessary, the record to the other government institution; and

(b) if a record is transferred pursuant to clause (a), shall give written notice of the transfer and the dated of the transfer to the applicant.

(2) For the purposes of this section, a government institution has a greater interest in a record if:

(a) the record was originally prepared in or for the government institution; or

(b) the government institution was the first government institution to obtain the record or a copy of the record.

[23] Highways should consider if it would have been appropriate to transfer the request to Economy.

[24] Through the course of this review, Highways advised my office that at the time they received the request it had experienced a complete turnover of its executive with respect to the timeframe of the request. Because of this, Highways is concerned that emails had not been retained.

[25] Highways must ensure that it is properly maintaining its records in accordance with the approved administrative and operational records systems. 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 these obligations in several recent reports.

[26] Employees must also 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.

[27] In its submission, Highways has provided my office with an additional reason why it believes records do not exist. Highways asserts this request is related to land procurement. As such, Highways noted that whether it is acquiring land through negotiation, expropriation or a combination of both, this process is one of the most commercially sensitive endeavors it undertakes. Highways further notes that unless absolutely necessary the Ministry does not discuss, engage with or communicate with elected or non-elected officials when purchasing land. Finally, Highways advised that land procurement is not reviewed, approved or denied by any committee other than Cabinet and Treasury Board. Highways further explained that land expropriation proceedings of Highways can only be approved by the Minister of Highways and Infrastructure and this function cannot be delegated to a non-elected official.

[28] As outlined in paragraph [16] significant detail is required in order to guide search efforts and to document the outcome. Although the above explanation surrounding land procurement may support that records do not exist, Highways has not demonstrated to this office that an adequate search was conducted for the records.

[29] Therefore, I find that Highways did not conduct an adequate search for records.

3. Did Highways issue an appropriate response under FOIP?

[30] Based on its submission, Highways clearly 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.

[31] When a public body conducts a reasonable search for records and none are located, the appropriate response is 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;

[32] I have found the search to be inadequate, but based upon the fact that Highways conducted a search that resulted in no records being found, the Applicant should have been advised of this.

[33] 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.

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

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

IV FINDINGS

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

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

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

V RECOMMENDATIONS

[39] 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.

[40] 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.

[41] 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