

**SASKATCHEWAN  
INFORMATION AND PRIVACY COMMISSIONER**

**REVIEW REPORT 059-2014**

**Ministry of Highways and Infrastructure**

**Summary:** The Applicant made an access to information request to the Ministry of Highways and Infrastructure for certain contracts. Although the Ministry provided the Applicant with 895 responsive records, she was not satisfied with the Ministry's response. The Commissioner found that the Ministry did not comply with section 11 of *The Freedom of Information and Protection of Privacy Act* (FOIP) nor meet the duty to assist. He recommended the Ministry provide more training to its staff and work with Saskatchewan Archives Board to improve compliance with FOIP.

**I BACKGROUND**

[1] On January 7, 2014, the Ministry of Highways and Infrastructure (Highways) received the Applicant's access request for the following:

All consulting contracts between third parties and:

- 1) Northern Region Fleet Services, Regional Services Division, Ministry of Highways and Infrastructure;
- 2) Central Region Fleet Services, Regional Services Division, Ministry of Highways and Infrastructure;
- 3) Southern Region Fleet Services, Regional Services Division, Ministry of Highways and Infrastructure;
- 4) Regional Operations, Northern Region, Regional Services Branch, Ministry of Highways and Infrastructure;
- 5) Regional Operations, Central Region, Regional Services Division, Ministry of Highways and Infrastructure;
- 6) Regional Operations, Southern Region, Regional Services Division, Ministry of Highways and Infrastructure;
- 7) Financial Services Branch, Ministry Services and Standards Division, Ministry of Highways and Infrastructure;
- 8) Corporate Support Branch, Ministry Services and Standards Division, Ministry of Highways and Infrastructure; and,

9) Information Management Branch, Ministry Services and Standards Division, Ministry of Highways and Infrastructure.

- [2] Highways attempted to clarify the request with the Applicant. As a result, the request was narrowed from January 1, 2012 to December 31, 2013. The Applicant also clarified that she was “looking for personal service contracts, or in other words, contracts in these areas between the Ministry and individuals.” Highways responded to the Applicant in a letter dated February 3, 2014 indicating that access to the responsive records was denied pursuant to subsection 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [3] The Applicant was dissatisfied with this response and requested a review by my office on June 19, 2014. On July 11, 2014, my office provided notification to both Highways and the Applicant of our intention to undertake a review.
- [4] Upon receiving our notification, Highways contacted my office to indicate that it was willing to work with the Applicant to achieve informal resolution for this file. It indicated that it believed that both the Applicant and Highways would benefit from further clarifying the request. The Applicant indicated that she was open to this suggestion.
- [5] Over the course of the next few months my office attempted to facilitate communications between Highways and the Applicant. It became apparent that Highways had applied section 19(1)(b) of FOIP and issued its section 7 response before it had identified the responsive records.
- [6] During that time, my office also asked Highways to provide the contact information for the third parties. Relevant third parties have a right to participate in reviews when section 19 of FOIP is engaged. Highways informed my office that it was no longer relying on this exemption.
- [7] On November 6, 2014, my office participated in a conference call with the Applicant and Highways. At that time, the request was clarified and the scope of the review was set as follows:

- The contract for [name of an individual]
- Contracts with Engineers (includes members of the Engineering Association, not those only with licenses granted by APEG)
- Day Labour contracts
- Construction contracts that relate to crack sealing, etc.
- Fleet services – only standing contracts for external repairs on vehicles
- Winter Snow Removal – standing contracts only

[8] It was agreed that Highways would have 30 days to provide the responsive records to the Applicant. By the second week of January 2015, Highways reported that it had provided the Applicant with copies of 895 contracts responsive to the request.

[9] My office asked the Applicant to inform us if she had any outstanding issues with the response from Highways by March 31, 2015. The Applicant informed my office of the following outstanding issues:

- She had not received the contract with the specific individual.
- She had not received any fleet services contracts.
- Several of the records had illegible or missing pages. She provided a list of 7 contracts with illegible pages and 16 with missing pages.

[10] In response, Highways maintained that it had provided the Applicant with a copy of the contract with the specific individual. It provided another copy to my office and we forwarded it to the Applicant. On April 21, 2015, Highways transferred the request for any fleet services contracts to the Ministry of Central Services pursuant to section 11 of FOIP. Finally, on April 28, 2015, Highways provided a letter to the Applicant. With it, Highways provided the missing portions of three of the contracts. It indicated that it could not find the missing portion of two of the contracts. It indicated that the missing portions of the rest of the contracts did not exist and “cost of service” figures had previously been provided. Finally, Highways indicated that the original copies of the identified records were illegible.

[11] The Applicant was dissatisfied with this response and my office issued this report on the narrowed scope of the review.

## II RECORDS AT ISSUE

[12] Highways provided the Applicant with copies of 895 contracts. Seven of the contracts have illegible portions. The Applicant contends that 13 of the contracts are missing portions.

## III DISCUSSION OF THE ISSUES

### 1. Did Highways comply with section 11 of FOIP?

[13] Subsection 11(1) of FOIP states:

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 date of the transfer to the applicant.

[14] The Applicant's original request, received by Highways on January 7, 2014, clearly requested fleet services contracts. The request was further clarified by teleconference between my office, Highways and the Applicant on November 6, 2014. Highways did not indicate that it required further clarification. On March 31, 2015, once the responsive records had been provided to her, the Applicant indicated that she had not received any fleet services contracts. Highways indicated that it did not have any fleet services contracts as they were negotiated through the Ministry of Central Services. My office suggested that Highways to transfer that portion of the request to the Ministry of Central Services pursuant to section 11 of FOIP. It did so on April 21, 2015.

[15] Subsection 11(1)(a) of FOIP indicates that a request should be transferred within 15 days of receiving the access request. Highways did not transfer the request until more than 15 months after receiving the request. As such, it did not comply with section 11 of FOIP.

**2. Did Highways meet the duty to assist?**

[16] FOIP does not have an explicit duty to assist. However, my office has asserted that there is an implied duty to assist. In other words, government institutions, such as Highways, must respond to access requests openly, accurately and completely.

[17] Subsections 6(3) and 6(4) of FOIP state as follows:

6(3) Where the head is unable to identify the record requested, the head shall advise the applicant, and shall invite the applicant to supply additional details that might lead to identification of the record.

(4) Where additional details are invited to be supplied pursuant to subsection (3), the application is deemed to be made when the record is identified.

[18] Subsection 7(2)(d) of FOIP states:

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

...

(d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;

[19] I note that once Highways received the Applicant's original request, it made attempts to clarify the request pursuant to subsection 6(3) of FOIP. However, it did not fully clarify the request until the teleconference that occurred on November 6, 2015. Pursuant to subsection 6(4) of FOIP, an access request is deemed to have been received by the government institution when the record is identified.

[20] Highways sent the section 7 response and applied subsection 19(1)(b) of FOIP before it clarified the request and identified the record. As such, Highways did not meet the duty to assist as its original response to the Applicant was neither complete nor accurate. The result was a great delay in the processing of this request. Once the request was clarified, Highways provided 895 contracts to the Applicant. Highways should have clarified the request with the Applicant in a timely manner before it issued the section 7 response. Highways should have also been more accurate when stating the reason for denying records.

**3. Did Highways conduct a reasonable search for records?**

[21] 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.

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

[23] 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.

[24] This case is unique. A search has been performed and the records have been found. However, the Applicant contends that 13 of the 895 contracts that were provided by Highways were not complete. A detailed account of Highway's search for records would not be helpful under these circumstances. Instead, my office asked Highways to explain the missing pages of the contracts.

***A. Contracts not executed (DLL12004 and an unnamed contract)***

[25] In the case of these two particular contracts, the Applicant was concerned that they were missing pages. Highways explained that they were cancelled or never executed.

[26] Highways explained that it searched the government accounting database (Oracle) for the contract *DLL12004* and this number was not active and no payments had been made under the number. It explained that they may have been cancelled or there may have been an error in the contract and it was never executed.

[27] With respect to the other unnamed contract, Highways provided the following explanation: "If there is no agreement #, the contract was either not pursued or cancelled. If a contract falls outside the parameters of our estimate, if no one enters a bid, if the

contractor withdraws, or if the decision was made to delay the project to a future date, the ministry will cancel the contract. In this case as there was no Agreement # it is most likely the contract was cancelled and not tendered; an Agreement # would have been assigned if the contract were tendered and we would have a copy of the agreement/bid.”

[28] I accept Highway’s explanation for these two contracts and it is reasonable there would be no additional pages.

***B. Other Contracts***

[29] I reviewed three of the other 11 contracts in which the Applicant indicated that there were missing pages. Upon review, it appeared as though the documents were missing large portions. For example, one of them was 11 pages. The first five pages were not paginated and appeared to be the main portion of the contract. Next, there were four more un-paginated pages without a title or header. Finally, the tenth page was titled “Schedule C” and said “Page 19 of 21” and the last page was “Schedule E” and said “Page 21 of 21”.

[30] My office also asked Highways to provide an explanation with respect to these other 11 contracts.

[31] Highways explained that before 2014, the process for preparing contracts was not standardized. Highways had similar templates for the regions to use when preparing the contracts, however, the regions were free to amend the templates at their discretion. Some contracts were prepared simply by taking relevant pages from different templates and filling in the blanks. As a result, the portions of the record that appear to be missing never existed for the particular contract. Highways also noted that it has recently created a Contracts Administration Unit that is working on standardizing future contracts.

[32] Highways also stated: “the dollar value (Contract Pricing) of the contract can be found listed as described in my April 23 memo to [the Applicant]. Most often the contract price

is listed in “Other” as 6.4., but contract listing may also be found in section 4 or 5 of the agreement”. It also explained that, after the contracts were executed, contractors would submit invoices which would be paid against the purchase order, created in Oracle by Highways, throughout the duration of the project for payment.

[33] I accept the Highways’ explanation as to why no additional portions of these records exist.

***C. Illegible Contracts***

[34] With respect to the illegible records, my office reviewed three of these contracts and agree that portions are illegible. Highways explained that some contracts are collected from Highways by the contractor, signed and then faxed back to Highways. The faxing of certain contracts made them illegible. The Ministry’s copies of these contracts are therefore illegible.

[35] I note the Ministry’s responsibility to ensure that records are legible was pursuant to subsection 21(5)(b)(iii) of *The Archives Act, 2004* as follows:

(5) The Legislative Assembly Service, every officer of the Legislative Assembly who has custody or control of public records and every government institution shall:

...

(b) protect and maintain all public records that are in the custody or under the control of that service, person or government institution so that those public records are, considering the purposes for which they are being maintained:

...

(iii) legible and understandable; and

...

**IV FINDINGS**

[36] I find that Highways did not comply with section 11 of FOIP.

[37] I find that Highways did not meet the duty to assist which resulted in delay for the Applicant.



[38] I find Highways search to be reasonable.

## **V RECOMMENDATIONS**

[39] I recommend that Highways provide more training to its staff responsible for processing access requests.

[40] I recommend that Highways work with Saskatchewan Archives Board to prevent illegible records.

Dated at Regina, in the Province of Saskatchewan, this 26th day of June, 2015.

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