



REVIEW REPORT 077-2018

Ministry of Health

March 21, 2019

Summary: The Ministry of Health (the Ministry) withheld some records responsive to the Applicant's access to information request pursuant to subsections 13(2), 17(1)(a) and 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP). A third party also raised subsection 19(1)(c)(iii) of FOIP. The Commissioner found that only subsection 17(1)(a) of FOIP applied to portions of the record. He recommended that the Ministry release the rest of the records to the Applicant.

I BACKGROUND

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

- information pertaining to the proposed purchase of 338384 Alberta Ltd. operating as Lloydminster Emergency Care Services (LECS) by the Prairie North Health Region in September of 2007;
- all emails, letters, appraisals, and any other relevant documents between the Prairie North Health Region, Ministry of Health and the Minister of Health regarding the authorization and proposed purchase of LECS by the Prairie North Health Region between January 1, 2007 and December 31, 2008;
- information pertaining to the proposed purchase of 338384 Alberta Ltd. operating as Lloydminster Emergency Care Services (LECS) by the Prairie North Health Region in June of 2009; and

- all emails, letters, appraisals, and any other relevant documents between the Prairie North Health Region, the Ministry of Health, Saskatchewan Minister of Health, Alberta Health Services and the Alberta Minister of Health regarding the authorization and proposed purchase of LECS by the Prairie North Health Region between January 1, 2009 and April 30, 2010.
- [2] On August 8, 2017, the Ministry provided the Applicant with a fee estimate. The Applicant paid the 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 March 26, 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 13(2), 17(1)(a) and 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [5] On April 20, 2018, the Applicant requested a review by my office of the Ministry's search for records, its duty to assist and application of the exemptions.
- [6] On May 14, 2018, my office notified both the Ministry, the Applicant and relevant third parties that my office would be undertaking the review.

II RECORDS AT ISSUE

- [7] The Ministry originally identified 39 pages of responsive records. It withheld 25 pages of the record pursuant to subsections 13(2), 17(1)(a) and 19(1)(b) of FOIP. A third party also raised subsection 19(1)(c)(iii) of FOIP.
- [8] After notifying a third party about the review, the Ministry released seven additional pages.

[9] On March 11, 2019, the Ministry provided my office with 46 additional pages of records that was not identified in its original Index of Records. The Ministry had previously identified a title page, which is page 4, and missed accounting for the other 46 pages in the Index, which are being withheld in full pursuant to subsection 13(2) of FOIP.

[10] My office has reviewed 64 pages of records. Appendix A provides more detail about the record.

III DISCUSSION OF THE ISSUES

1. Does my office have jurisdiction in this matter?

[11] 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?

[12] 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.

[13] 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*.

[14] With the request for review, the Applicant alleged that there should be additional documents and emails responsive to the request. In the notification, my office asked the Ministry to provide details about its search for records.

- [15] In its submission, the Ministry indicated that it searched for responsive records dated from January 1, 2007 to April 30, 2010. It indicated that the Acute Emergency Services branch searched for all electronic documents such as briefing notes, minutes, letters, etc. on the branch's shared drive and hardcopy files in their filing cabinets. The email accounts of the Executive Director of the Acute Emergency Services branch and the EMS Policy and Program Manager were searched.
- [16] The Ministry also indicated that it searched all paper documents of the Financial Services branch as well as the branch's shared drive. It also searched the email accounts and personal electronic folders of one of the assistant deputy ministers.
- [17] For electronic searches, the Ministry indicated that the keywords used were Lloydminster Emergency Care services, Prairie North Health Region, and Alberta Health Services.
- [18] The Ministry indicated that it only searched the emails of the three individuals indicated above for two reasons. The first is because these three employees had involvement in the subject matter of the records sought by the Applicant.
- [19] The second reason is that the Ministry would have to search the emails of other individuals in its eDiscovery system. eDiscovery is a system where the Ministry stores email records. It is maintained by eHealth Saskatchewan (eHealth).
- [20] The Ministry 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. Later, the Ministry confirmed with the Applicant that the Applicant was not interested in pursuing the records held in eDiscovery.
- [21] 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.
- [22] I am satisfied with the Ministry's search for records.

3. Does subsection 13(2) of FOIP apply to the record?

[23] Subsection 13(2) of FOIP provides:

13(2) A head may refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from a local authority as defined in the regulations.

[24] Subsection 2(2) of *The Freedom of Information and Protection of Privacy Regulations* provides:

2(2) For the purposes of these regulations and subsection 13(2) of the Act, “local authority” means a local authority as defined in *The Local Authority Freedom of Information and Protection of Privacy Act*.

[25] My office has established the following test for this exemption:

1. Was the information obtained from another local authority or a similar body in another province or territory of Canada?
2. Was the information obtained implicitly or explicitly in confidence?

[26] The Ministry withheld information pursuant to subsection 13(2) of FOIP on 59 pages of the record.

[27] The Ministry’s submission indicated that the information it redacted was obtained from the former regional health authorities.

[28] As of December 4, 2017, the former regional health authorities were amalgamated in to the Saskatchewan Health Authority. The regional health authorities qualified as local authorities for the purposes of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) before the amalgamation. The Saskatchewan Health Authority qualifies as a local authority pursuant to subsection 2(f)(xiii) of LA FOIP.

[29] For subsection 13(2) to apply, the Ministry must show that the information was obtained explicitly or implicitly in confidence. In its submission, the Ministry indicated that the

information was provided implicitly in confidence from the former regions. It indicated that if it receives information from other organizations, even without the written statement of confidentiality, it will always regard the information as confidential and assume it was provided implicitly in confidence and will withhold the information from access requests unless consent is provided from the organization to release it.

[30] Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential.

[31] Factors to consider when determining whether information was obtained in confidence implicitly include (not exhaustive):

- What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the public body or the local authority?
- Was the information treated consistently in a manner that indicated a concern for its protection by the public body and the local authority from the point it was obtained until the present time?
- Is the information available from sources to which the public has access?
- Does the public body have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially?
- Was there a mutual understanding that the information would be held in confidence? Mutual understanding, in this context, means that the public body and the local authority both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.

[32] The above factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments. The bare assertion that the information was obtained implicitly in confidence would not be sufficient.

[33] In its submission, the Ministry alluded to the fact that the information may have been provided with a mutual understanding that it was to be kept confidential, because it reproduced some of the guidance material above. However, the Ministry did not explain how the former regions demonstrated this understanding. The Ministry has not provided me with enough information to conclude that all of the information in question was provided implicitly in confidence.

[34] The Ministry's mere assertion that it "assumes" it was provided implicitly in confidence is not enough to persuade me that the second test is met.

[35] I am not persuaded subsection 13(2) of FOIP applies to the record.

4. Does subsection 17(1)(a) of FOIP apply to the record?

[36] Subsection 17(1)(a) of FOIP provides:

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;

[37] This exemption is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice or all records related to the advice. The object of the provision includes maintaining an effective and neutral public service capable of producing full, free and frank advice.

[38] In order for this exemption to be found to apply, all three parts of the following test must be met:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. The advice, recommendations, proposals, analyses and/or policy options must:

i) be either sought, expected, or be part of the responsibility of the person who prepared the record; and

ii) be prepared for the purpose of doing something, for example, taking an action or making a decision; and

iii) involve or be intended for someone who can take or implement the action.

3. Was the advice, recommendations, analyses and/or policy options developed by or for the public body?

[39] I will use this test to evaluate the application of subsection 17(1)(a) of FOIP to various portions of the record.

[40] The Ministry applied subsection 17(1)(a) of FOIP to three documents totaling four pages of the record.

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?

[41] In its submission, the Ministry indicated that the information in question qualified as advice, proposals, analyses and policy options. My office has defined these terms as follows:

Advice includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice has a broader meaning than recommendations.

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.

Proposals, analyses and policy options are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

[42] The first and last documents to which the Ministry has applied subsection 17(1)(a) of FOIP are briefing notes. The Ministry has severed portions of these documents. The Ministry's submission indicated that the information qualifies as advice and analysis.

[43] Upon review, I agree that the information qualifies as advice, recommendations and analysis. These two records have met the first test.

[44] The third record to which the Ministry has applied subsection 17(1)(a) of FOIP is a draft letter. The letter does not contain advice, proposals, recommendations, analyses or policy options. As such, it does not meet the first test. Subsection 17(1)(a) of FOIP does not apply to this record.

2. The advice, recommendations, proposals, analyses and/or policy options must:

i) be either sought, expected, or be part of the responsibility of the person who prepared the record; and

ii) be prepared for the purpose of doing something, for example, taking an action or making a decision; and

iii) involve or be intended for someone who can take or implement the action.

[45] From a review of the Ministry's submission and the record, it is clear that the briefing notes were written by employees of the Acute and Emergency Services branch of the Ministry of Health for the Minister of Health. It is apparent that both briefing notes were prepared for the Minister to take an action or make a decision. I am satisfied that the second test has been met.

3. Was the advice, recommendations, analyses and/or policy options developed by or for the public body?

[46] As employees of the Acute and Emergency Services branch of the Ministry of Health prepared these records for the Minister, I am satisfied that this test has been met

[47] Subsection 17(1)(a) of FOIP applies to the information severed from the briefing notes on pages 1, 2 and 9 of the record.

5. Does subsection 19(1)(b) of FOIP apply to the record?

[48] 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;

[49] The Ministry applied subsection 19(1)(b) of FOIP to nine pages of the record.

[50] In order for subsection 19(1)(b) of FOIP to apply, the three parts of the following test must be met.

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?
2. Was the information supplied by the third party to a public body?
3. Was the information supplied in confidence implicitly or explicitly?

Pages 16 to 22 of the Record

[51] The Ministry identified the Prairie North Regional Health Authority (PNRHA), now the Saskatchewan Health Authority (SHA), as the relevant third party for this record. In Review Report 080-2018, I found that the SHA, which qualifies as a local authority for the purposes of subsection 2(k) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), could be a third party for the purposes of FOIP. However, I recommended that the Minister of Justice consider an amendment to the definition of third party in both FOIP and LA FOIP that excludes both government institutions and local authorities in both Acts.

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?

[52] The third party's submission indicates that this record qualifies as commercial information about the structure of ambulance services including legal considerations.

[53] I have defined commercial information as information relating to the buying, selling or exchange of merchandise or services. Types of information included in the definition of commercial information:

- offers of products and services a third-party business proposes to supply or perform;
- a third-party business' experiences in commercial activities where this information has commercial value;
- terms and conditions for providing services and products by a third party;
- lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises - such lists may take time and effort to compile, if not skill;
- methods a third-party business proposes to use to supply goods and services; and
- number of hours a third-party business proposes to take to complete contracted work or tasks.

[54] Upon review, the record is a legal opinion from legal counsel to PNRHA.

[55] Order MO-1900-R of the Information and Privacy Commissioner of Ontario (ON IPC) found that a legal opinion did not qualify as commercial information. The Order stated that:

The record clearly does not contain a trade secret or scientific, technical, financial or labour relations information as this office has interpreted those terms. This office has said that "commercial information" means:

Information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [Order P-1621].

While the record remotely relates to a commercial matter (a proposed land development), this alone is not sufficient to fit within the scope of "commercial information" in section 10.

[56] Order PO-3158 of ON IPC found that a portion of a legal opinion qualified as commercial information as “it addresses Article 5 of the agreement requiring a legal opinion confirming the corporate status of the affected party, its power and authority to enter into the agreement and other topics.”

[57] While I agree that the record in question remotely relates to a commercial matter, it does not directly relate to the buying, selling or exchange of merchandise or services. Therefore, it does not qualify as commercial information.

[58] The first test is not met and subsection 19(1)(b) of FOIP does not apply to this record.

Pages 32 and 34 of the record

[59] The Ministry has identified a lawyer as the relevant third party for these two documents. The lawyer did not make a submission to my office.

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?

[60] The Ministry’s submission indicates that the severed information qualifies as financial information.

[61] My office has defined financial information as information regarding monetary resources, such as financial capabilities, assets and liabilities, past or present. Common examples are financial forecasts, investments strategies, budgets, and profit and loss statements. The financial information must be specific to a third party that must demonstrate a proprietary interest or right of use of the financial information.

[62] The two pages of the record in question reveal the specific details of the sale of a company between two organizations. The record describes assets of a third party. Therefore, it qualifies as financial information.

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

[63] As noted, the records relate to a sale of a company between two organizations. The Ministry is not one of the organizations. In its submission, the Ministry did not indicate how it obtained the information in question. The second part of the test has not been met.

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

[64] In its submission, the Ministry indicated that when it receives information from other organizations, even without the written statement of confidentiality, it will always regard the information as confidential and assume it was provided implicitly in confidence.

[65] As noted previously in this report, the Ministry's mere assertion that it "assumes" it was provided implicitly in confidence is not enough to persuade me that this test is met.

[66] I am not persuaded that subsection 19(1)(b) of FOIP applies to these records.

6. Does subsection 19(1)(c)(iii) of FOIP apply to the record?

[67] Subsection 19(1)(c)(iii) 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:

...
(iii) interfere with the contractual or other negotiations of;

a third party;

[68] The Ministry did not apply this exemption to the record. The SHA, a third party, raised the exemption for pages 16 to 22 of the record. As subsection 19(1)(c)(iii) of FOIP is a mandatory exemption, I must consider whether it applies.

[69] In order for subsection 19(1)(c) of FOIP to apply, there must first be objective grounds for believing that the disclosure of information within the records could reasonably expect to result in the harm alleged. The parties do not have to prove that harm is probable but they need to show there is a reasonable expectation of harm if any of the information was disclosed.

[70] To demonstrate harm, the government institution or third party should not assume that the harm is self-evident. Particularity in describing the harm is needed to support the application of the provision.

[71] The third party indicated that release of this record could interfere with the ongoing negotiations of third parties in ongoing litigation. It did not provide details of the specific negotiations or litigation to which it referred. Further, it did not explain how release of the record would interfere with such negotiations.

[72] I am not persuaded that subsection 19(1)(c)(iii) applies to the record.

7. Did the Ministry meet the duty to assist?

[73] As part of the request for review, the Applicant complained that the records he received were not in chronological order and that it was not made clear as to which records corresponded with particular parts of the request.

[74] Section 5.1 of FOIP imposes a duty on government institutions to assist an Applicant. It provides:

5.1(1) Subject to this Act and the regulations, a government institution shall respond to a written request for access openly, accurately and completely.

(2) On the request of an applicant, the government institution shall:

(a) provide an explanation of any term, code or abbreviation used in the information; or

(b) if the government institution is unable to provide an explanation in accordance with clause (a), endeavour to refer the applicant to a government institution that is able to provide an explanation.

[75] Section 5.1 does not address the order in which records should be provided. In Review Report 086-2018, I discussed that it is not necessary for a government institution to put records in any specific order unless negotiated with the Applicant beforehand.

[76] The Applicant was also concerned that he did not know what records corresponded to each part of the request as it was multifaceted.

[77] For greater clarity, the Applicant could have made two separate access to information requests. Further, the Ministry reported that the Applicant did not contact the Ministry to seek clarification about which records corresponded to each part of the request between the time he received the records and requested a review from my office. If the Ministry had refused to answer the Applicant's questions about how each record was responsive to the request, it may not have met the duty to assist. On this issue, I am satisfied that the Ministry responded appropriately.

[78] I find that the Ministry met the duty to assist.

IV FINDINGS

[79] I find that the Ministry performed a reasonable search for records.

[80] I find that subsections 13(2), 19(1)(b), 19(1)(c)(iii) of FOIP do not apply to the record.

[81] I find that subsection 17(1)(a) applies to portions of the record.

[82] I find that the Ministry met the duty to assist.

V RECOMMENDATION

[83] I recommend that the Ministry release and withhold records as described in Appendix A.

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?
1-2	17(1)(a)	Yes	Withhold
4	13(2)	No	Release
*additional 46 pages	13(2)	No	Release
5	17(1)(a)	No	Release
9	17(1)(a)	Yes	Withhold
11-15	13(2)	No	Release
16-22	13(2)	No	Release
	19(1)(b)	No	
	19(1)(c)(iii)	No	
32	19(1)(b)	No	Release
34	19(1)(b)	No	Release

* Page 4 is a title page. The Ministry did not identify the additional 46 pages of the document in its original Index of Records.