



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 078-2016 to 091-2016

Global Transportation Hub Authority

January 5, 2017

Summary:

The Global Transportation Hub Authority (GTH) provided the Applicant with a single estimate of costs in the amount of \$111,842.50 to process 15 access to information requests. The Commissioner found the GTH inappropriately provided one estimate of costs to respond to the 15 access to information requests and should have contacted the Applicant to attempt to narrow the scope of the requests prior to issuing the estimate of costs. The Commissioner also found the \$100,160.00 fee to be inappropriate, as it was largely based on searching the email archive which would have not been an issue with effective records management policies and procedures in place. The Commissioner recommended the GTH has written procedures in place to properly address estimate of costs. The Commissioner also recommended the GTH establish procedures that complement the *Guidelines for Government Communications During a General Election* to ensure access to information requests are handled in the routine manner during the Writ period. Finally, the Commissioner recommended the GTH fully implement its ORS as well as adopt consistent records management policies and procedures including email and transitory records in accordance with the advice and guidelines provided by the Provincial Archives of Saskatchewan (PAS).

I BACKGROUND

- [1] The Applicant, a journalist, submitted 15 access to information requests pursuant to *The Freedom of Information and Protection of Privacy Act* (FOIP) to the Global Transportation Hub Authority (GTH) on March 9, 2016. Each of these requests were submitted on the prescribed Access to Information Request Form - Form A in Part II of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations):

Access to information request #1 (Review file 078-2016)

Please provide all internal records (emails, notes, reports etc.) which mention [Name], [Name] and/or their numbered company 101225232 Saskatchewan Ltd. from February 1, 2013 until June 30, 2014.

Access to information request #2 (Review file 079-2016)

Please provide all correspondence related to [Name] and comments he made in CBC stories about land transactions along the West Regina Bypass near the GTH from February 1, 2016 until March 5, 2016.

Access to information request #3 (Review file 080-2016)

Please provide all records related to any and all appraisals of Surface Parcel 165025414 (NW 20-17-20 W2 Ext 1) and or Surface Parcel 166005862 (SW 20-17-20 W2 Ext 1) from January 1, 2013 until April 30, 2014.

Access to information request #4 (Review file 081-2016)

Please provide all correspondence between the Global Transportation Hub employees/executive or the Global Transportation Hub board and the Ministry of Economy related to Surface Parcel 165025414 (NW 20-17-20 W2 Ext 1) and/or Surface Parcel 166005862 (SW 20-17-20 W2 Ext 1) from January 1, 2012 to March 5, 2016.

Access to information request #5 (Review file 082-2016)

Please provide all records (emails, reports, notes etc) related to the 204 acres of land the Global Transportation Hub purchased from 101225232 Saskatchewan Ltd. ie – Surface Parcel 165025414 (NW 20-17-20 W2 Ext 1) and or Surface Parcel 166005862 (SW 20-17-20 W2 Ext 1) – from September 1, 2013 until June 30, 2014.

Access to information request #6 (Review file 083-2016)

Please provide all correspondence between the GTH and Vertex from June 1, 2013 until March 6, 2016.

Access to information request #7 (Review file 084-2016)

Please provide the contract between Vertex and the GTH signed August 2013.

Access to information request #8 (Review file 085-2016)

Please provide all correspondence with the Ministry of Economy and/or Ministry of Highways related to Surface Parcel 165025414 (NW 20-17-20 W2 Ext 1) and/or Surface Parcel 166005862 (SW 20-17-20 W2 Ext 1) excluding any discussion of a land sale agreement between the entities involving this land from July 1, 2013 until June 30, 2014.

Access to information request #9 (Review file 086-2016)

Please provide all correspondence related to an appraisal of Surface Parcel 165025414 (NW 20-17-20 W2 Ext 1) and or Surface Parcel 166005862 (SW 20-17-20 W2 Ext 1) provided to the Global Transportation Hub and/or Ministry of

Economy by [Name], [Name] and/or their numbered company 101225232 Saskatchewan Ltd. from March 1, 2013 until March 31, 2014.

Access to information request #10 (Review file 087-2016)

Please provide all internal and external correspondence related to [Name] and/or a CBC reporter and/or the CBC regarding stories about GTH land transactions along the West Regina Bypass and/or [Minister] from February 3 2016 until March 5 2016.

Access to information request #11 (Review file 088-2016)

Please provide all correspondence related to [Name] and comments he made in CBC stories about land transactions along the West Regina Bypass near the GTH from February 3, 2016 until March 5, 2016 – including any correspondence with [Name].

Access to information request #12 (Review file 089-2016)

Please provide all internal and external correspondence related to [Name] and/or a CBC reporter and/or the CBC regarding stories about GTH land transactions along the West Regina Bypass and/or [Name] from December 1 2015 until February 3 2016.

Access to information request #13 (Review file 090-2016)

Please provide all correspondence, including attachments, between the GTH and [Name], [Name] and/or their numbered company 101225232 Saskatchewan Ltd. from February 1, 2013 until June 30, 2014.

Access to information request #14 (Review file 091-2016)

Please provide all records (emails, reports, briefing notes, etc.) related to a land sale agreement between the Global Transportation Hub and the Ministry of Highways – related to Surface Parcel 165025414 (NW 20-17-20 W2 Ext 1) and or Surface parcel 166005862 (SW 20-17-20 W2 Ext 1) signed in March 2014 – including but not limited to drafts, emails, briefing notes etc. from July 1, 2013 to June 30, 2014.

Access to information request #15 (Review file 092-2016)

Please provide a copy of the \$125,000 an acre appraisal Minister [Name] referred to in the attached CBC news article entitled “Businessmen made millions on Regina land that wound up in taxpayers’ hands.”

- [2] By letter dated April 7, 2016, the GTH provided the Applicant with a single estimate of costs in the amount of \$111,842.50 to process all 15 requests.
- [3] On April 20, 2016, my office received a Request for Review from the Applicant, in which he disagreed with the \$111,842.50 estimate of costs and that the GTH provided one estimate of costs to respond to these requests.

- [4] Upon receipt of the Request for Review, it was agreed that my office would work with the GTH and the Applicant to narrow the scope of the 15 requests in an attempt to reduce the costs.
- [5] On June 23, 2016, my office provided notification to the GTH and the Applicant of our intention to conduct 15 reviews. My office requested the GTH provide a submission in support of the \$111,842.50 estimate of costs and its decision to provide the Applicant with one estimate of costs to process the 15 access to information requests. The Applicant was also invited to provide a submission.
- [6] During the early stages of these reviews, the GTH responded to our file 092-2016 at no cost to the Applicant by denying access to the records. The Applicant subsequently requested a review of the GTH's denial of the records, which was addressed by my office in Review Report 077-2016 and 092-2016. Once the Applicant agreed on the narrowed scope of the remaining access to information requests, the GTH advised him which requests could be responded to at no cost and provided amended estimate of costs where there were still costs associated with processing the requests. The GTH has now responded to those requests.
- [7] On August 26, 2016, the Applicant narrowed the scope of these reviews to the issues of the combined estimate of costs and the estimated fee related to the time to search and retrieve electronic records by the Information Technology Office pursuant to subsection 6(3) of the FOIP Regulations. This portion of the estimate of costs was approximately 90% of the total estimate of costs - \$100,160.00.

II RECORDS AT ISSUE

- [8] This review is of the fee estimate provided by the GTH to the Applicant. Therefore, no records are at issue.

III DISCUSSION OF THE ISSUES

[9] The GTH is a “government institution” as defined by subsection 2(1)(d)(ii) of FOIP.

1. Did the GTH appropriately issue one estimate of costs to process the 15 access to information requests?

[10] Section 5 of FOIP provides the right of access to records in the possession or under the control of a government institution:

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.

[11] Subsection 6(1) of FOIP outlines the requirements for an applicant when requesting access to records under FOIP. Subsection 6(1) of FOIP provides:

6(1) An applicant shall:

- (a) make the application in the prescribed form to the government institution in which the record containing the information is kept; and
- (b) specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject matter to identify the record.

[12] The Applicant submitted 15 separate access to information requests each on the prescribed form to the GTH on March 9, 2016. The following was provided to my office by the Applicant when he requested the reviews:

In my view, the GTHA illegitimately lumped all of the requests together when they are all in fact distinct requests, asking for access to a wide range of different documents from several different time periods....

...

Not only is there no good logistical reason for lumping these requests together, it also creates significant problems in determining how to narrow these requests. It seems that a request for a contract or a specific appraisal would not generate large fees while it's conceivable that some request for documents over a longer period of time may generate larger fees.

- [13] The GTH outlined in its submission to my office that they used the “common sense approach” when they received these requests:

When the GTH received the 15 requests from the applicant on March 9, 2016 it noted that there was significant overlap in the requested records and related to a common subject matter. As a result, it looked to apply a common sense approach to best serve the applicant, reduce disruption within the GTH by the need to respond to all of the requests at the same time, and to reduce the duplication of the records being assembled, redacted and released....

...

The requests all sought records related to the persons and activities surrounding land transactions regarding two parcels of land west of Regina.

- [14] As outlined in section 5, FOIP provides a right of access to records in the possession or under the control of a government institution. In section 5 of FOIP, “application” is singular not plural. The right of access is triggered when a person makes a formal application for the records they wish to access.

- [15] Provisions exist within FOIP to clarify an access to information request when it is unclear what an applicant is requesting. In addition, our office encourages public bodies to work with applicants to narrow the scope of requests in order to reduce work and fees.

- [16] Currently, FOIP does not specifically state that there is a duty to assist applicants. Nonetheless, my office has taken the position that there is an implied duty on the part of government institutions to take reasonable steps to ensure that they respond to access to information requests openly, accurately and completely. The GTH did not meet this implied duty when it provided the Applicant with the single estimate of costs.

- [17] Bill 30, which has received second reading by the Legislative Assembly, introduces a duty to assist. Bill 30, section 5 introduces a new section 5.1 which provides as follows:

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.

[18] Based on the above, I would encourage all access and privacy offices when they receive an access request to make contact with the Applicant and offer to assist the Applicant to clarify or narrow the access request. If clarification or narrowing occurs, the access and privacy officer should follow up with a confirmation letter or email to the Applicant summarizing the agreed upon clarification or narrowing.

[19] In its submission, the GTH advised:

It was identified by the GTH staff that restoration of historical email boxes would be required through ITO and ISM, in order to provide a complete and thorough response to the applicant.

...

Through review of these requests it came to our attention that there were significant email records for up to 11 former GTH employees that would be relevant to this response.

...

While we are confident that significant and important emails related to these matters were retained in our filing system [emphasis added] we expect that other records resided within these former employee's email archives that would be responsive to the request.

[20] As the GTH was confident that the "significant and important emails" had been retained in its filing system, this further supports why the GTH should have contacted the Applicant to discuss these requests. I do note that once my office worked with the Applicant and the GTH to narrow the scope of the requests, in almost all cases, the Applicant decided to proceed without searching the historical email accounts.

[21] My office's resource *IPC Guide to Exemptions for FOIP and LA FOIP*, outlines the following seven steps when a public body is considering charging fees:

1. Clarify or narrow the access request with the applicant;
2. Make a search strategy;

3. Based on the search strategy, prepare a fee estimate (do not complete search);
4. Decide whether to charge a fee (refer to your public body's policy);
5. Send out fee estimate and suspend work;
6. If the applicant initiates, clarify or narrow request with applicant; and
7. When the applicant pays 50% deposit, start search.

[22] The first step is to clarify or narrow the access request with the Applicant. There should be conversations with the Applicant well in advance to see if there are ways to narrow the scope in order to reduce or eliminate work and costs, especially when a government institution is considering such a large estimate of work and costs.

[23] The GTH indicated they used a common sense approach when determining how to calculate the estimate of costs. However, I agree with the Applicant that some of his requests appeared to be requesting access to very specific records. For example, in access to information request #7, the Applicant requested access to a specific contract and in access to information request #15, he requested access to a specific appraisal. It appears records such as these would be easily identified, and therefore easy to obtain.

[24] Further, although some of the access to information requests involved records related to a particular topic or subject for long periods of time, there were some requests that included very recent and short time frames. For example, access to information request #2 was to be very specific as to what the Applicant was requesting and the timeframe was just over one month - February 1, 2016 to March 5, 2016. Given that the GTH received the requests on March 9, 2016, I would expect that records generated a little more than a month earlier would be readily available.

[25] In determining a strategy to respond to these requests within the 30 day legislated timeframe, the GTH should have first identified those requests that the responsive records were easily identified and that could be responded to at little or no cost to the Applicant. Then, the GTH should have contacted the Applicant to discuss the remaining requests to see if there was a way to narrow the scope of the requests and identify to the Applicant where there was overlap in his requests.

[26] In its submission, the GTH also advised there were extenuating circumstances surrounding the timing of when the Applicant filed the access to information requests. In its submission, the GTH advised:

The general provincial election was called on March 8, 2016. As with any general election, there are restrictions placed on government officials respecting who they can speak to and what they can speak about.

The *Guidelines for Government Communications Activities During a General Election* provide that Freedom of Information requests are to be handled in the routine manner. However, the guidelines also instruct that “*during the 90 days before the commencement of the election period, no government ministry/official shall advertise or speak to in any manner any information other than information that is intended to inform the public about programs and services of the government ministry for the broad public benefit of Saskatchewan people, e.g. to address an emergency or compelling public safety concern.*”

Our belief is that section 277(1)(2) of *The Elections Act* is unambiguous and states the following:

277 (1) In this section and in sections 277.1 and 277.2, “**government ministry**” means any ministry of the Government of Saskatchewan and includes any government institution as defined in *The Freedom of Information and Protection of Privacy Act*.

(2) During a general election, no government ministry shall **publish** in any manner any information with respect to the activities of the ministry. [emphasis added].

[27] I have reviewed the *Guidelines for Government Communications Activities During a General Election* (Guidelines) and the above is accurate. However, as the GTH noted in its’ submission, the Guidelines have a section that specifically addresses freedom of information requests. This section has a distinct heading *Freedom of Information (FOI) Requests*, which states:

Freedom of Information requests are to be handled in the routine manner.

[28] The Guidelines have not distinguished a separate protocol for freedom of information requests filed by the media. Further, FOIP does not speak to special handling of requests because of an election. Therefore, the GTH should have handled these requests routinely.

[29] Discussing the requests with an applicant in order to narrow the scope cannot be interpreted as publishing information as provided in subsection 277(2) of *The Elections Act, 1996*, even if an applicant is a member of the media. Further, providing an applicant with copies of records pursuant to an access to information request during an election would not be publishing information as provided in subsection 227(2) of *The Elections Act, 1996*, even if an applicant is a member of the media. Also, as outlined above the Guidelines clearly state that freedom of information requests are to be handled in the routine manner. There is nothing routine with providing a \$111,842.50 estimate of costs without first discussing the requests with the Applicant.

[30] The GTH also advised in its submission:

During the Writ period, government/ministry officials are also under instruction that all media contact and messaging is to be through Communications officials.

[31] I recognize that there is a heightened level of caution when a government institution is communicating during the Writ period and it may be appropriate for communications to be vetted through communications personnel. The GTH has a Communications and Marketing Director whose role includes media inquiries. Therefore, that official could have handled any discussions with the Applicant in terms of clarifying the request, narrowing the scope and where appropriate, working with the Applicant to combine similar requests.

[32] Factoring in all considerations, I find the GTH inappropriately issued one estimate of costs to respond to the Applicant. Further, I find GTH should have contacted the Applicant to discuss his requests prior to issuing the \$111,842.50 estimate of costs to attempt to narrow the scope of the requests.

2. Is the fee related to search and retrieval of electronic records estimated by the GTH reasonable?

[33] The GTH provided the Applicant with a total estimate of costs in the amount of \$111,842.50. This estimate included the three types of fees provided for in FOIP:

1. Fees for searching for a responsive record;
2. Fees for preparing the record for disclosure; and
3. Fees for the reproduction of records.

[34] During these reviews, the Applicant advised our office that he was primarily concerned with the fee the GTH calculated to search and retrieve electronic records. This made up \$100,160.00 of the total fee estimated by the GTH. Therefore, I will only be looking at the calculation of that particular fee in this review.

[35] The GTH provided my office with an email dated April 7, 2016 from the Ministry of Central Services. This email broke down the \$100,160.00 quote as follows:

500 hours estimated total for ISM to gather and restore data
 480 hours estimated total for ITD to search each mailbox for key words

[36] The GTH’s estimate of costs to the Applicant outlined that the \$100,160.00 was as follows:

Type of Fee	Staff	Calculation of Fees	Fee
Time required to prepare documents for disclosure	Information Technology Office – query	26 computer accounts active within the ministry during time period specified for 12 requests.	\$100,160.00

[37] In its submission, the GTH referred to subsection 6(3) of the FOIP Regulations. Subsection 6(3) of the FOIP Regulations provide:

6(3) Where a search and retrieval of electronic data is required to give access to a record requested by an applicant, a fee equal to the actual cost of the search and retrieval, including machinery and operator costs, is payable at the time when access is given.

[38] As a prescribed “government institution” under FOIP, the GTH is subject to *The Archives and Public Records Management Act* (APRM). Under section 2 of APRM, “public record” as it relates to a government institution is defined as, “a record made or received by a government institution in carrying out that government institution’s activities.”

Further, subsection 21(1) of the APRM outlines the requirement for government institutions to preserve public records:

21(1) Subject to subsections (2) and (3), the Legislative Assembly, the Legislative Assembly Service, every Officer of the Legislative Assembly, every government institution and the courts shall preserve the public records that are in the custody or under their control until those public records are:

- (a) transferred to the Provincial Archives of Saskatchewan pursuant to this Act; or
- (b) destroyed pursuant to this Act.

[39] The Provincial Archives of Saskatchewan (PAS) administers APRM. The PAS's website states:

It is the policy of the Government of Saskatchewan that all government institutions manage the records in their possession or control to meet the obligations outlined in *The Archives and Public Records Management Act*.

The Information Management Unit of the Provincial Archives of Saskatchewan is responsible for the development of records management policies, guidelines and standards for the Government of Saskatchewan....

[40] Further, the PAS's resource *Email Management Guidelines*, in part provides:

Emails created and received as part of government business are considered government (public) records and must be managed in accordance with *The Archives and Public Records Management Act*, which states that records must be retained in a **useable and accessible manner** [emphasis added] until their approved disposal.

...

Not all of the email messages you send and receive will meet the definition of a government record that needs to be classified and retained.

- Non-work related emails are those that do not pertain to government business; they are sent to you as an individual, rather than a government employee....
- Transitory records do relate to government business, but are of short term use and have no future value....

[41] As outlined above the GTH asserted in its submission:

While we are confident that significant and important emails related to these matters were retained in our filing system [emphasis added] we expect that other records resided within these former employee's email archives that would be responsive to the request.

[42] As the GTH has advised that they feel the most important and significant records had been retained, it appears the GTH may have estimated \$100,160.00 to search transitory records which are of short term use and are not required to be retained under APRM. If this was not the case and the emails were not transitory records, then the GTH did not have appropriate records management processes in place to manage its emails.

[43] The GTH should ensure they are following the provisions of APRM and utilizing the resources produced by the PAS to assist with compliance.

[44] Through this review, I have determined that there is one underlying issue that led to the large estimate of costs being that the GTH did not communicate with the Applicant. I believe this large estimate of costs could have been avoided if the GTH had communicated with the Applicant after the requests were received.

[45] Therefore, I find the \$100,160.00 Information Technology fee inappropriate as I found the GTH should not have issued the combined estimate of costs and should have communicated with the Applicant prior to issuing the estimate of costs.

[46] As I have found the \$100,160.00 Information Technology fee inappropriate, I do not need to consider if the fee was properly calculated under subsection 6(3) of the FOIP Regulations.

[47] The GTH has advised my office that they have implemented the Administrative Records Management System (ARMS) that was developed by the PAS. In addition, the Public Records Committee has approved the GTH's Operational Records System (ORS) and the GTH is currently working on implementation. The GTH has further advised they have

continual team discussions surrounding the management of transitory records. Finally, the GTH advised they follow the PAS guidelines for email management. These are positive steps for the GTH to be better equipped to handle access to information requests under FOIP and its records management obligations under APRM.

[48] Upon receipt of the Requests for Review, it was agreed that my office would work with the GTH and the Applicant to attempt to narrow the scope of these requests and to reduce costs. On May 16, 2016, my office provided the GTH with the narrowed scope of each of the 15 requests. This included a breakdown of which requests the GTH determined they could respond to the Applicant at no charge. The GTH provided the Applicant with amended estimate of costs based on the narrowed scope of the requests. Upon receiving the revised estimate of costs, the Applicant advised the GTH which requests he wished to proceed with and the GTH has now responded to those requests.

[49] FOIP provides for a reasonable cost recovery associated with providing individuals access to records. Fees encourage responsible use of the right of access by applicants. However, fees should not present an unreasonable barrier to access. As the GTH did not communicate with the Applicant prior to issuing the estimate of costs, this excessive fee was an unreasonable barrier to access.

[50] As a best practice where an estimate of costs is being issued by a public body, the public bodies' access and privacy office should take reasonable steps to contact the applicant in an attempt to narrow the scope of the requests to reduce work and costs.

[51] I would like to commend the GTH as I have seen a significant change concerning its obligations under FOIP since receiving these requests for review.

IV FINDINGS

[52] I find the GTH inappropriately provided one estimate of costs to the Applicant to respond to the 15 access to information requests.

[53] I find the GTH should have contacted the Applicant to attempt to narrow the scope of the requests prior to issuing the estimate of costs.

[54] I find the \$100,160.00 fee provided in the estimate of costs to be inappropriate, as it was largely based on searching the email archive which would have not been an issue with effective records management policies and procedures in place.

V RECOMMENDATIONS

[55] I recommend the GTH have written procedures in place to properly address estimate of costs and provide a copy to my office in 30 days.

[56] I recommend the GTH establish procedures that complement the *Guidelines for Government Communications During a General Election* to ensure that access to information requests are handled in the routine manner during the Writ period.

[57] I recommend the GTH fully implement its ORS as well as adopt consistent records management policies and procedures including email and transitory records in accordance with the advice and guidelines provided by PAS.

Dated at Regina, in the Province of Saskatchewan, this 5th day of January, 2017.

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