



## **REVIEW REPORT 078-2018**

### **Ministry of Health**

**March 21, 2019**

**Summary:** The Ministry of Health withheld records responsive to the Applicant's access to information request pursuant to subsections 13(2), 17(1)(a), 22(a) and 29(1) of *The Freedom of Information and Protection of Privacy Act*. The Commissioner found that subsections 22(a) and 29(1) of FOIP applied to portions of the record and recommended release of the rest.

### **I BACKGROUND**

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

- information pertaining to the termination of the ambulance services agreement with 338384 Alberta Ltd. operating as Lloydminster Emergency Care Services (LECS) by the Prairie North Health Region in April/May of 2010 and the reduction of funding for the ambulance services agreement of \$275,000;
- information pertaining to the refusal to assign the ambulance services agreement between LECS and the Prairie North Health Region to the agreement purchaser, Dutchak Holdings Limited in December 2009 - April 2010;
- all emails, letters, and any other relevant documents between the Prairie North Health Region, the Ministry of Health and the Health Minister regarding the termination of the ambulance services agreement with LECS by the Prairie North Health Region in April/May of 2010 and the reduction of funding for the ambulance services agreement of \$275 ,000; and

- all emails, letters and any other relevant documents between the Prairie North Health Region, the Ministry of Health and the Minister of Health regarding the refusal to assign the ambulance services agreement between LECS and the Prairie North Health Region to the agreement purchaser, Dutchak Holdings Limited in December 2009 - April 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. On April 2, 2018, the Ministry provided the Applicant with an amended response. The Ministry provided the Applicant with some responsive records and withheld some pursuant to subsections 13(2), 17(1)(a), 22(a) and 29(1) 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 decision to withhold records and the Ministry's search for records. On May 4, 2018, my office notified both the Ministry and the Applicant of my intention to undertake a review.

## **II RECORDS AT ISSUE**

- [6] The Ministry identified 14 pages of responsive records. It withheld information on 10 pages of the record. Appendix A provides more details about the record.

### **III DISCUSSION OF THE ISSUES**

#### **1. Does my office have jurisdiction in this matter?**

[7] 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?**

[8] 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.

[9] 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*.

[10] 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.

[11] 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.

- [12] 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.
- [13] For electronic searches, the Ministry indicated that the keywords used were Lloydminster Emergency Care services, Prairie North Health Region, and Dutchak Holdings.
- [14] 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.
- [15] 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).
- [16] 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.
- [17] 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.
- [18] I am satisfied with the Ministry's search for records.

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

- [19] 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.

[20] 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*.

[21] 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?

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

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

[24] 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.

[25] 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.

[26] 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.

[27] 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.

[28] 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.

[29] In its submission, it 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

[30] 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.

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

#### **4. Does subsection 22(a) of FOIP apply to the record?**

[32] Subsection 22(a) of FOIP provides:

22 A head may refuse to give access to a record that:

(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

[33] The Ministry applied subsection 22(a) of FOIP to a two page briefing note. It released the first page of the briefing note to the Applicant. It withheld the entire second page. It did not provide a copy of the second page to my office.

[34] On May 16, 2018, the Court of Appeal for Saskatchewan determined whether my office had authority to require local authorities to produce records that may be subject to solicitor-client privilege. *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 concluded that my office should follow the "absolutely necessary" principle. As a result, it suggested that my office follow a process to gather information about records and consider whether a prima facie case for solicitor-client privilege has been made before requiring a record.

[35] My office has established a process to consider a claim of solicitor-client privilege. When considering claiming solicitor-client privilege, public bodies have three options when preparing records for review with the Information and Privacy Commissioner (IPC):

1. Provide the documents to the IPC with a cover letter stating the public body is not waiving the privilege;

2. Provide the documents to the IPC with the portions severed where solicitor-client privilege is claimed; or
3. Provide the IPC with an affidavit with a schedule of records (see sample in the [\*Rules of Procedure\*](#)).

[36] The Ministry provided my office with an affidavit that was signed on December 18, 2018.

[37] My office has established the following test for subsection 22(a) of FOIP:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Was the communication intended to be confidential?

[38] In its submission, the Ministry indicated that the record reflects a legal opinion given by crown counsel to the Ministry. However, it does not appear to be a communication between crown counsel and the Ministry.

[39] In Review Report 005-2017, 214-2015 – PART II, I discussed the continuum of legal advice. I noted that documents that are not actually a communication between a solicitor and a client may be part of the continuum of legal advice, or reveal information subject to solicitor-client privilege. I listed the following examples that could qualify as part of the continuum:

- A discussion between two public officials about how to frame the question that is to be asked of the lawyer;
- Written communications between officials or employees of a public body, in which they quote or discuss the legal advice given by the public body's solicitor;
- Communications discussing the application of legal advice given by a solicitor;
- An employee's notes regarding a solicitor's legal advice, and comments on that advice;
- Notes "to file" in which legal advice is quoted or discussed; and
- Solicitors' briefing notes and working papers that are directly related to the seeking or giving of legal advice.

[40] The Ministry has indicated that the information found on the last page of the briefing note reflects the communication between the crown counsel and the Ministry. As such, it qualifies as being part of the continuum of legal advice and the first part of the test is met.



[41] In its affidavit, the Ministry indicated that the information on the second page contains a legal opinion from legal counsel. I am satisfied that it contains legal advice and that the second test is met. I am also satisfied that it was intended to be confidential.

[42] Although I have not reviewed this portion of the record, I find that the Ministry has made a prima facie case that subsection 22(a) of FOIP applies to this portion of the record. There is no need to consider subsection 17(1)(a) of FOIP.

**5. Did the Ministry properly apply subsection 29(1) of FOIP to the record?**

[43] Subsection 29(1) of FOIP provides:

29(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[44] In order for subsection 29(1) of FOIP to apply, the information in the record must first qualify as “personal information” as defined by subsection 24(1) of FOIP; however, it is not an exhaustive list. Some relevant provisions include:

24(1) Subject to subsections (1.1) and (2), “personal information” means personal information about an identifiable individual that is recorded in any form, and includes:

...

(e) the home or business address, home or business telephone number or fingerprints of the individual;

...

(g) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to the correspondence that would reveal the content of the original correspondence, except where the correspondence contains the views or opinions of the individual with respect to another individual;

(h) the views or opinions of another individual with respect to the individual;

[45] The list provided in subsection 24(1) of FOIP is not meant to be exhaustive. There can be other types of information that would qualify as personal information that are not listed. Part of that consideration involves assessing if the information has both of the following:

1. Is there an identifiable individual?
2. Is the information personal in nature?

Personal in nature means that the information reveals something personal about the individual. Information that relates to an individual in a professional, official or business capacity could only qualify if the information revealed something personal about the individual for example, information that fits the definition of employment history.

[46] The record in question is a letter from a board member of the Prairie North Regional Health Authority (PNRHA) to the Ministry of Health. The Ministry's submission indicated that the information in the letter is personal in nature.

[47] The letter appears to contain the board member's personal address and home, business and cellular telephone numbers. I agree that this individual's home address and telephone number would qualify as personal information pursuant to subsection 24(1)(e) of FOIP and should be withheld pursuant to subsection 29(1) of FOIP.

[48] In Review Report 277-2016, the Commissioner found that employer assigned cellular telephone numbers for government employees was considered business card information. The Commissioner also found that the same approach is taken to business cellular telephone number for non-government employees, professionals and corporate officers. I find that the individual's work telephone number is not personal information and should be released to the Applicant. If the Applicant is interested in receiving a copy of this individual's cellular telephone number, I recommend that the Ministry ascertain if it is a personal or work issued cellular telephone number and make the decision to release accordingly.

[49] The remaining text of the record discusses a PNRHA board decision and provides views and opinions of the board member.

[50] I have found in past reports, such as Review Report 298-2018, that any opinions given by the individuals in the course of their work do not constitute personal information as they are not personal in nature but rather constitute work product.

[51] I have defined work product as information generated by or otherwise associated with an individual in the normal course of performing his or her professional or employment responsibilities, whether in a public or private setting. Work product is not considered personal information.

[52] In this case, the board member was acting in a professional capacity as board member of the PNRHA to bring concerns to the Minister's attention. As such, I find that it does not qualify as personal information and should be released to the Applicant.

#### **IV FINDINGS**

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

[54] I find that subsection 13(2) of FOIP does not apply to the record.

[55] I find that the Ministry has made a prima facie case that subsection 22(a) of FOIP applies to a portion of the record.

[56] I find the portions of the record qualify as personal information pursuant to subsection 24(1) of FOIP.

**V RECOMMENDATION**

[57] 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**

<b>PAGE OF THE RECORD</b>	<b>SECTION(S) APPLIED BY THE MINISTRY</b>	<b>DOES IT APPLY?</b>	<b>RELEASE OR WITHHOLD?</b>
3	17(1)(a)	No need to review	Withhold
	22(a)	Yes	
5-11	13(2)	No	Release
12-13	13(2)	No	Withhold address/personal telephone numbers Release remainder
	29(1)	Applies only to address and personal telephone numbers	