



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 079-2018

Ministry of Health

April 25, 2019

Summary:

The Ministry of Health (the Ministry) withheld records responsive to the Applicant's access to information request pursuant to subsections 13(2), 16(1)(a), 16(1)(c), 17(1)(a), 22(a) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner also reviewed the Ministry's search for records. He found that subsections 13(2), 16(1)(c) and 17(1)(a) of FOIP did not apply to the record. He recommended that the Ministry release these records. He recommended that it withhold records to which he found subsections 16(1)(a), 22(a) and 29(1) of FOIP. He also recommended that the Ministry amend its procedures to ensure that, when processing future access to information requests, attachments to responsive emails are accounted for.

I BACKGROUND

- [1] On June 21, 2017, the Ministry of Health (the Ministry) received an access to information request for information pertaining to the creation of the Lloydminster EMS BLS and ALS Medical Protocols including all emails, letters and any other relevant documents between the following parties: "Ministry of Health - Saskatchewan, Ministry of Health - Alberta, Prairie North Health Region, Alberta Health Services, Saskatchewan College of Paramedics, Alberta College of Paramedics, Saskatchewan College of Physicians and Surgeons, Saskatchewan Emergency Medical Services Association". The Applicant requested records dating back to 2013.

- [2] 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 other access requests.
- [3] On April 10, 2018, the Ministry provided the Applicant with 143 pages of responsive records, but indicated that portions were withheld pursuant to subsections 13(2), 13(1)(b), 17(1)(a), 17(1)(b)(i), 19(1), 22(a), 22(c) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [4] On April 20, 2018, the Applicant requested a review by my office of the Ministry's search, application of subsections 13(2), 13(1)(b), 17(1)(a), 17(1)(b)(i), 19(1), 22(a), 22(c) and 29(1) of FOIP, indication that some records were non-responsive and whether the Ministry met the duty to assist.
- [5] On May 15, 2018, my office provided notification to the Ministry, the Applicant and several third parties of my intention to undertake a review.
- [6] On April 1 and April 2, 2019, the Ministry identified additional records. On April 15, 2019, it provided most of these records to the Applicant, with the exception of one portion which it withheld pursuant to subsection 16(1)(c) of FOIP.

II RECORDS AT ISSUE

- [7] On June 4, 2018, after the review commenced, the Ministry provided the Applicant with a second package of 156 pages of records. It released some of the information that had been previously withheld as well as newly identified records.
- [8] Of the 156 pages, the Ministry only withheld information on ten pages of the record pursuant to subsections 13(2), 17(1)(a), 19(1)(b) and 29(1) of FOIP. Further, it withheld 22 pages in full pursuant to subsection 22(a) of FOIP.

[9] On April 1, 2019, the Ministry identified 27 pages of further responsive records. This includes attachments to several pages and a second page of an email that was not previously identified. On April 15 and 17, 2019, it provided most of these records to the Applicant, along with others records, with the exception of four pages which it withheld pursuant to subsections 16(1)(a) and 16(1)(c) of FOIP. See Appendix A for details.

III DISCUSSION OF THE ISSUES

1. Does my office have jurisdiction in this matter?

[10] 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?

[11] 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.

[12] When requesting this review, the Applicant pointed out that the Ministry did not appear to have provided attachments to several emails that were identified as responsive to the request. They requested that my office also include a review of the Ministry's search for the attachments for emails on pages 10, 26, 27, 98 and 114 of the record.

[13] In the notification, my office requested that the Ministry describe its search efforts for the records in its possession or control that are responsive to the Applicant's request.

[14] 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.

[15] On April 1, 2019 and April 2, 2019, the Ministry provided the attachments for pages 10, 26, 27, 98 and 114 of the record to my office. It applied exemptions to portions of these emails. On April 15, 2019, it provided most of these records to the Applicant, with the exception of four pages which it withheld pursuant to subsections 16(1)(a) and 16(1)(c) of FOIP.

[16] The Ministry also described its search. It searched for records from June 1, 2013 to the date of the access request. It searched all electronic and paper files of the Acute Emergency Services Branch. It searched the emails of three specific individuals. For electronic searches the Ministry used the keyword “protocol”.

[17] After receiving the Ministry’s submission, the Applicant did not raise further concerns about the Ministry’s search. I am satisfied with the Ministry’s search. However, I recommend that the Ministry find a way to ensure that, when processing future access to information requests, attachments to responsive emails are accounted for.

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

[18] 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.

[19] Subsection 2(2) of FOIP *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*.

[20] 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?

[21] The Ministry withheld information pursuant to subsection 13(2) of FOIP on 17 pages of the record.

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

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

[23] As of December 4, 2017, the former regional health authorities were amalgamated in to the Saskatchewan Health Authority (SHA). 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 SHA qualifies as a local authority pursuant to subsection 2(f)(xiii) of LA FOIP.

[24] Obtained means to acquire in any way; to get possession of; to procure or to get a hold of by effort. It can include information that was received indirectly provided its original source was the local authority. However, to obtain information suggests that the public body did not create it.

[25] The first test is met.

2. Was the information obtained implicitly or explicitly in confidence?

[26] For subsection 13(2) of FOIP to apply, the Ministry must also demonstrate that the information was obtained explicitly or implicitly in confidence.

[27] 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.

[28] 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.

[29] 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.

[30] In its submission, the Ministry indicated that the information was provided implicitly in confidence from the former regional health authorities. 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.

[31] The Ministry has not provided me with enough information to conclude that the information in question was provided implicitly in confidence. 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 regional health authorities demonstrated this understanding.

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

4. Does subsection 16(1)(a) of FOIP apply to the record?

[33] Subsection 16(1)(a) of FOIP provides:

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

(a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;

[34] Subsection 16(1) is a mandatory class-based exemption. Subsection 16(1)(a) of FOIP specifically protects records that contain advice, proposals, recommendations, analyses or policy options developed from sources outside of the Executive Council for presentation to the Executive Council is intended to be covered by the provision.

[35] Executive Council consists of the Premier and Cabinet Ministers. Executive Council is also referred to as Cabinet. *The Federal Access to Information and Privacy Legislation Annotated 2015* (Canada: Thomas Reuters Canada Limited, 2014) generally defines cabinet confidences as:

...in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public.

[36] Advice includes the analysis of a situation or issue that may require action and the presentation of options for future action. 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.

- [37] Recommendations relate to a suggested course of action as well as the rationale for a suggested course of action. Recommendations are generally more explicit and pointed than advice.
- [38] Proposals and analyses or policy options are closely related to advice and recommendations and refer to the concise setting out of the advantages or disadvantages of particular courses of action.
- [39] The record in question is a three page briefing note for the Minister of Health. The Ministry has severed portions on each page of the record. The information qualifies as advice, proposals, recommendations and analysis. Further, I am satisfied that they were developed from sources outside of the Executive Council for presentation to the Executive Council.
- [40] I find that subsection 16(1)(a) of FOIP applies to the portions of the record in question.

5. Does subsection 16(1)(c) of FOIP apply to the record?

- [41] Subsection 16(1)(c) of FOIP provides:

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

...

(c) records of consultations among members of the Executive Council on matters that relate to the making of government decisions or the formulation of government policy, or records that reflect those consultations;

- [42] This provision protects records used for, or records that reflect, consultations amongst members of the Executive Council on matters relating to the making of government decisions or the formulation of government policy. A consultation in this context occurs when one or more members of Executive Council discuss matters related to making government decisions or formulating government policy.
- [43] In its submission, the Ministry described the portion of the record in question as a letter to the chairperson of a regional health authority from the Minister of Health regarding a

recommendation for the EMS in Lloydminster and single EMS provider contract. The record does not reflect any discussions between members of the Executive Council. It only makes a recommendation. Upon review of the record, there is no evidence the matter was discussed between members of Executive Council.

[44] I am not persuaded that subsection 16(1)(c) of FOIP applies to the record.

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

[45] 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;

[46] 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.

[47] 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?

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

[49] The Ministry applied subsection 17(1)(a) of FOIP to two sentences found on two pages of the record.

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

[50] Upon review, the portion of the record in question qualifies as advice which I have defined as 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.

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.

[51] The information in question is part of an email chain between employees at the Ministry and the Saskatchewan College of Paramedics (the College). The College asked for advice from the Ministry to take an action and the Ministry provided the advice.

[52] I am satisfied that the second part of the test is met.

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

[53] For information to be developed by or for a public body, the person developing the information should be an official, officer or employee of the public body, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the public body. The role of the individuals involved should be explained by the public body. In other words, the decisions must be internal to the Ministry.

[54] In this case, it was the College that needed to take action. It was not a decision internal to the Ministry. As such, the third part of the test has not been met.

[55] The Ministry has not demonstrated that subsection 17(1)(a) of FOIP applies to the record as described in Appendix A.

7. Does subsection 22(a) of FOIP apply to the record?

[56] 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;

[57] The Ministry withheld eight documents totaling 22 pages of records pursuant to subsection 22(a) of FOIP. It did not provide these documents to my office for review.

[58] 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.

[59] 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](#)).

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

[61] 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?

[62] The first seven documents are emails. Six of the emails are between employees of the Ministry and crown counsel. I am satisfied that it meets the first test.

[63] The Ministry indicated that the remaining email is between Ministry employees that discuss the advice received by the crown counsel. Further, the Ministry indicated that the remaining document also reflects advice the Ministry received by crown counsel.

[64] 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.

[65] The information severed from the last document is a communication discussing the application of legal advice given by a solicitor. As such, the email and the document qualifies as being part of the continuum of legal advice and the first part of the test is met.

[66] The Ministry's affidavit indicates that each of the documents contain legal opinions and advice. I am satisfied that the second part of the test is met. I am also satisfied that these were intended to be confidential and the third part of the test is met.

[67] Even though I have not reviewed the documents, I find that the Ministry has made a prima facie case that subsection 22(a) of FOIP applies to these portions of the record.

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

[68] 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.

[69] 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.

[70] 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.

[71] The Ministry severed information from two pages of the record that described the reasons why individuals would not be available to meet. These reasons are personal in nature. As such, the information qualifies as personal information pursuant to subsection 24(1) of FOIP.

[72] The Ministry should continue withholding the information pursuant to subsection 29(1) of FOIP.

9. 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 by the Applicant beforehand.

[76] The only exception to the order of the records, would be the attachments to emails. In Review Report 086-2018, I discussed that an applicant should not have to request a review from my office to find out about attachments. If a public body is going to leave duplicate attachments out of the record, or re-order the record, it is best practice to provide an explanation to the applicant at the same time it provides the record. This would be part of the duty to assist.

[77] I find the Ministry met the duty to assist.

IV FINDINGS

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

[79] I find that subsections 13(2), 16(1)(c) and 17(1)(a) of FOIP do not apply to the record.

[80] I find that subsections 16(1)(a) and 29(1) of FOIP apply to the record.

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

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

V RECOMMENDATIONS

[83] I recommend that the Ministry amend its procedures to ensure that, when processing future access to information requests, attachments to responsive emails are accounted for.

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

Dated at Regina, in the Province of Saskatchewan, this 25th day of April, 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	13(2)	No	Release
4	29(1)	Yes	Withhold
9	29(1)	Yes	Withhold
43	13(2)	No	Release
99-100	17(1)(a)	No	Release
111	13(2)	No	Release
116			Released
121			Released
Additional page (2 nd page to email on 121)	13(2)	No	Release
130	13(2)	No	Release
22 pages to which 22(a) has been applied	22(a)	Yes	Withhold
Attachment 1 – page 10			Released
Attachment 2 – page 10			Released
Attachment 3 – page 10			Released
Attachment – page 26			Released
Attachment – page 27			Released
Attachment – page 98			Released
Attachment 1 – page 114	16(1)(c)	No	Release
Attachment 2 – page 114	16(1)(a)	Yes	Withhold
	17(1)(a)	No need to review	