



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **REVIEW REPORT 080-2018**

### **Ministry of Health**

**March 21, 2019**

#### **Summary:**

The Ministry of Health (the Ministry) withheld a portion of the records pursuant to subsections 13(2), 17(1)(b)(i), 19(1)(b), 19(1)(c) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that the exemptions applied to only portions of the record and recommended release of more of the record. The Commissioner also found that local authorities could qualify as third parties for the purposes of FOIP, but 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.

### **I BACKGROUND**

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

Ministry of Health funding sheets for Private EMS for 2013-2018 as described below:

- Requesting copies of the Incremental and Cumulative funding sheets and all related emails from the Ministry of Health to and from all twelve Health Regions related to this matter.
- In addition, I am requesting copies of the HSAS Contractor Costing Methodology and the formulas related to the Incremental and Cumulative funding sheets.

- [2] On December 15, 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.
- [3] On March 26, 2018, the Ministry provided the Applicant with 298 pages of responsive records. It also notified the Applicant that information within those pages were being withheld pursuant to subsections 13(2), 17(1)(b)(i), 19(1)(b), 19(1)(c) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [4] On April 23, 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. On May 5, 2018, my office notified the Ministry, the Applicant and several third parties that I would proceed with the review.
- [5] On June 5, 2018 and December 17, 2018, the Ministry released some additional records to the Applicant. On December 17, 2018, the Ministry also identified four pages of additional records to which it applied subsections 13(2), 19(1)(b) and 19(1)(c)(iii) of FOIP. On December 18, 2018, my office notified an additional third party about the review.

## **II RECORDS AT ISSUE**

- [6] The Ministry identified 302 pages of responsive records. It severed information from 21 pages of the record pursuant to subsections 13(2), 17(1)(b), 19(1)(b), 19(1)(c)(iii) and 29(1) of FOIP.
- [7] For a more detailed description of the record, please see Appendix A.

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

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

[8] 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?**

[9] 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.

[10] When requesting this review, the Applicant pointed out that Health did not appear to have provided attachments to several emails that were identified as responsive to the request. He requested that my office also include a review of the Ministry's search for the attachments for emails on pages 549-550, 663, 796-797, 1043, 1085, and 1087-1117 of the record.

[11] 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.

[12] 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.

[13] In this case, the Applicant is looking for attachments to emails that were provided by the Ministry of Health, particularly attachments that were identified on pages 101, 255-256 and 257 of the record.

- [14] In its submission, the Ministry indicated that there was no attachment for page 101. The record was an email indicating that a record was sent to the chief financial officers of each health authority. The Ministry also noted that it released the email to the chief financial officers and the attachment to the Applicant. I am satisfied that there is no attachment associated with page 101 of the record.
- [15] With respect to the attachment listed on pages 255 and 256 of the record, the Ministry indicated that it inadvertently did not include it as a responsive record. On December 17, 2018, the Ministry provided the four page record to my office but indicated it was withheld pursuant to subsections 13(2), 19(1)(b) and 19(1)(c)(iii) of FOIP.
- [16] Finally, with respect to the attachment listed on page 257 of the record, there is no actual attachment to the email on this page. The subject lines of the emails on this page contain the name of a document. However, there is no document attached to these e-mails. The Ministry indicated that information found in the document, referenced in the subject line, is duplicated in pages 140 to 143 and 283 of the record.
- [17] After receiving a copy of the Ministry's submission to my office, the Applicant questioned whether the email accounts of three Ministry employees were searched. The Ministry's submission did not indicate that the email accounts of these individuals had been searched, while the email accounts of others had been. The Ministry confirmed that the email accounts had been searched and pointed out examples in the record of emails from these accounts. I am satisfied that the Ministry searched these email accounts.
- [18] I am satisfied that the Ministry has performed a reasonable search for records.

**3. Does subsection 17(1)(b)(i) of FOIP apply to the record?**

[19] Subsection 17(1)(b)(i) 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:

...

(b) consultations or deliberations involving:

(i) officers or employees of a government institution;

[20] The provision is meant to permit public bodies to consider options and act without constant public scrutiny.

[21] A consultation occurs when the views of one or more officers or employees of a public body are sought as to the appropriateness of a particular proposal or suggested action.

[22] A deliberation is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

[23] In order to qualify, the opinions solicited during a consultation or deliberation 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, such as taking an action, making a decision or a choice.

[24] The Ministry applied this exemption to portions of two pages of the record. I note that in its submission, the Ministry appeared to be using the test for subsection 17(1)(a) of FOIP, not subsection 17(1)(b)(i) of FOIP. In support of subsection 17(1)(a) of FOIP, the Ministry stated that the information in question was an email from an employee of the Ministry where the employee provided advice and analysis on a matter. The analysis within the record was prepared by an employee of the Ministry for a third party organization.

[25] Upon review, the portion of the record which is withheld is the contents of an email which was originally written by a Ministry employee that contains a series of questions. However, it is not the final email in a chain of emails. A third party organization also provides answers to the questions in this particular portion of the email chain.

[26] With respect to either subsections 17(1)(b)(i) or 17(1)(a) of FOIP, it is essential to demonstrate that an action, decision or choice must be taken. The Ministry has not indicated what action, decision or choice must be taken and who is responsible for it. This information is not evident upon review of the record.

[27] Government institutions should not assume that it is self-evident on the face of the record that a test is met. Section 61 of FOIP provides as follows:

61 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[28] The Ministry has not met its section 61 obligation to demonstrate that subsection 17(1)(b)(i) of FOIP applies to the record.

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

[29] 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.

[30] 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*.

[31] 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?

[32] 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?***

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

[34] As of December 4, 2017, the former regional health authorities have been 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.

[35] Seven of the 17 pages appear to have been obtained by one of the former regional health authorities.

[36] With respect to the 10 remaining pages (264-273), the information was sent to the Ministry from the Saskatchewan Association of Health Organizations (SAHO).

[37] SAHO does not qualify as a local authority for the purposes of LA FOIP. SAHO provides leadership in the development of labour and employee relations policies and is engaged in the negotiation and interpretation of collective bargaining agreements between health care employers and the unionized workforce. It may have acted as an agent for former regional health authorities.

[38] 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.

[39] Although the Ministry obtained the information from SAHO, upon review, the information appears to be about a former regional health authority, now the Saskatchewan Health Authority (SHA), which qualifies as a local authority. The first test is met.

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

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

[41] 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.

[42] 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.

[43] 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.

[44] 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.

[45] 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 regions demonstrated this understanding.

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

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

*Which organizations qualify as a third party?*

[47] The Ministry identified several third parties that had an interest in portions of the record. The Ministry originally applied subsection 19(1)(b) of FOIP to more pages than what is identified in Appendix A of this report. However, when the Ministry gave notice to the third parties pursuant to section 52 of FOIP, many of the third parties consented to release

of those records. The Ministry has since released the records and they are not subject to the review. Also, during the course of the review, the Ministry identified four pages of additional responsive records and an additional third party. The third parties identified by the Ministry for the purpose of the remaining records in this review are as follows:

- SAHO,
- Kelvington Ambulance Care,
- North East EMS, and
- the SHA.

[48] Subsection 2(1)(j) of FOIP provides a definition of third party as follows:

2(1) In this Act:

...

(j) “third party” means a person, including an unincorporated entity, other than an applicant or a government institution.

[49] SAHO, Kelvington Ambulance Care and North East EMS are not government institutions and therefore, qualify as third parties pursuant to subsection 2(1)(j) of FOIP.

[50] However, the SHA qualifies as a local authority pursuant to subsection 2(f)(xiii) of LA FOIP. LA FOIP also defines third parties in a similar manner as FOIP. Subsection 2(k) of LA FOIP provides:

2 In this Act:

...

(k) “third party” means a person, including an unincorporated entity, other than an applicant or a local authority.

[51] In Review Reports F-2012-001/LA-2012-001, a previous Commissioner of this office found that FOIP and LA FOIP should be read together and as such a local authority could not be a third party for the purposes of FOIP and a government institution could not be a third party for the purposes of LA FOIP. This report cited various sources to support this view. It also pointed to subsection 13(2) of FOIP to make the point that, in FOIP, local authorities have a special third party like exemption. Thus, the conclusion was made.

[52] In my view, I agree with the principle that the former Commissioner was trying to establish, however, I am not persuaded that it is supported by the wording of the current legislation. As such, I will treat the SHA as a third party for the purpose of a review.

[53] I recommend 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.

*Analysis of subsection 19(1)(b) of FOIP*

[54] 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;

[55] The Ministry applied subsection 19(1)(b) of FOIP to 16 pages of the record.

[56] 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?

[57] None of the third parties provided submissions that specifically addressed subsection 19(1)(b) of FOIP.

[58] I will begin by addressing the third part of the test.

[59] In its submission, the Ministry noted that when it receives information from other organizations, even without the written statement of confidentiality, the Ministry 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 other organization to release it.

[60] As discussed when considering subsection 13(2) of FOIP, this is not enough to demonstrate that the information was supplied implicitly or explicitly in confidence.

[61] Subsection 19(1)(b) of FOIP does not apply to the newly identified pages one to four.

[62] The third party that has an interest in pages 55-56 and 264-273 also indicated that the record was supplied in confidence to the Ministry. It did not explain how it was communicated to the Ministry that the information was provided in confidence.

[63] I am not persuaded that subsection 19(1)(b) of FOIP applies to the record.

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

[64] Subsection 19(1)(c) 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:

(i) result in financial loss or gain to;

(ii) prejudice the competitive position of; or

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

a third party;

[65] For this provision to apply, there must first be objective grounds for believing that disclosing information could result in the harm alleged. The parties do not have to prove

that a harm is probable, but need to show that there is a reasonable expectation of harm if any of the information were to be released.

[66] The Ministry did not specifically address 19(1)(c) of FOIP in its submission.

***Page 8***

[67] The Ministry applied subsection 19(1)(c)(iii) of FOIP.

[68] Two third parties have interests in separate information severed from page 8. One third party did not make a submission. I am not persuaded that subsection 19(1)(c) of FOIP applies to that information on page 8.

[69] North East EMS is the other third party. It noted that it is in collective bargaining with the Health Sciences Association of Saskatchewan (HSAS). It indicated that the requested disclosure may create an unrealistic picture of the financial ability of North East EMS to agree to the financial demands of the HSAS.

[70] Upon review of the record, the information in question is not necessarily financial information of North East EMS. It is the number of hours billed to a public body for a specific service and the rate paid. I am unable to create any type of picture of financial ability of North East EMS based on this information.

[71] I am not persuaded that release of the information would interfere with negotiations between North East EMS and HSAS.

***Pages 264 to 273***

[72] The Ministry applied subsection 19(1)(c)(iii) of FOIP to the record.

[73] The Ministry identified SAHO as the third party with an interest in these records. Neither the Ministry nor SAHO addressed how subsection 19(1)(c)(iii) of FOIP applied to the record.

*Newly Identified Pages 1-4*

[74] The Ministry applied subsection 19(1)(c)(iii) of FOIP to the record. It identified the SHA as the third party with interest in the records.

[75] The SHA's submission indicated that the record was directly related to "the EMS Working Group's negotiation position". It noted that the Working Group is made up of representatives from the former regional health authorities (now the SHA), the Ministry and Alberta Health Services. The submission indicated that negotiations with private service providers occur on a regular basis, and release of records holding information on past negotiations could affect future negotiations. It indicated that it could reveal negotiation strategies.

[76] It is unclear what future negotiations the EMS Working Group will have in the future.

[77] The record is an unsigned agreement between a former regional health authority and a private EMS provider. Neither the Ministry nor the SHA has indicated if the agreement was ever executed with or without changes. If it was executed, it is unlikely that subsection 19(1)(c)(iii) of FOIP would apply to an agreement signed by a local authority for services. If it remained unsigned, it is unclear how it would reveal negotiation strategies. Either way, I have not been provided enough information about the record to conclude subsection 19(1)(c)(iii) applies.

[78] I find subsection 19(1)(c)(iii) of FOIP does not apply to the record.

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

[79] 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.

[80] 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:

...

(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

[81] The information in question relates to an identifiable individual’s leave. My office has defined employment history as the type of information normally found in a personnel file such as performance reviews, evaluations, disciplinary actions taken, reasons for leaving a job or leave transactions.

[82] The information in question qualifies as personal information pursuant to subsection 24(1)(b) of FOIP. The Ministry has correctly applied subsection 29(1) of FOIP to the record.

**8. Did the Ministry meet the duty to assist?**

[83] 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.

[84] 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.

[85] 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.

[86] The only exception to the order of the records, would be the attachments to emails. The Applicant also pointed out in the request for review that it appeared that several attachments to emails in the record were missing. I have discussed this issue at the beginning of the report where I examined the Ministry's search. The Ministry's submission was able to explain to the Applicant how to find the attachments. The Ministry's submission explained that some were not provided (and were subsequently provided), some were not provided because they were duplicates and that some were provided out of sequence.

[87] 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.

[88] The Applicant was also concerned that he did not know what records corresponded to each part of his request. The Applicant's request was as follows:



Ministry of Health funding sheets for Private EMS for 2013-2018 as described below:

- Requesting copies of the Incremental and Cumulative funding sheets and all related emails from the Ministry of Health to and from all twelve Health Regions related to this matter.
- In addition, I am requesting copies of the HSAS Contractor Costing Methodology and the formulas related to the Incremental and Cumulative funding sheets.

[89] 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.

[90] I find however that the Ministry did not meet the duty to assist because it was not clear if attachments to emails were included.

#### **IV FINDINGS**

[91] I find that the Ministry conducted a reasonable search for records.

[92] I find that subsections 13(2), 17(1)(b)(i), 19(1)(b) and 19(1)(c)(iii) of FOIP do not apply to the record.

[93] I find that the Ministry appropriately applied subsection 29(1) of FOIP to the record.

**V RECOMMENDATIONS**

[94] I recommend that the Ministry release records as described in Appendix A.

[95] I recommend 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.

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>
8	19(1)(c)	No	Release
22	29(1)	Yes	Withhold
42	13(2)	No	Release
55-56	17(1)(b)(i)	No	Release
	19(1)(b)	No	
92	13(2)	No	Release
227	13(2)	No	Release
264-273	13(2)	No	Release
	19(1)(b)	No	
	19(1)(c)(iii)	No	
Newly identified record 1 to 4	13(2)	No	Release
	19(1)(b)	No	
	19(1)(c)(iii)	No	