

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 090-2014

Ministry of Health

Summary: The Applicant submitted an access to information request to the Ministry of Health (Health). She did not receive a response within the legislated timelines so she appealed to the Information and Privacy Commissioner (IPC). 163 days after the access to information request was submitted, the Applicant received a response from Health. The Applicant was not satisfied with the response either. The IPC found that Health did not respond to the access to information request within the legislated timelines but he found that subsection 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP) was properly applied. He recommended that Health make changes to its processes so that it responds to access to information requests within legislated timelines, that it continue to withhold information pursuant to subsection 17(1)(a) of FOIP but to release the remainder of the record.

I BACKGROUND

[1] On April 17, 2014, the Ministry of Health (Health) received the following access to information request:

All briefing notes, including attachments relating to Third Party Delivery of Surgeries and diagnostics, from June 1, 2013 to March 1, 2014.

[2] My office received a request for review from the Applicant on September 8, 2014 because the Applicant had not received a response from Health.

[3] Health responded to the Applicant's request in a letter dated September 26, 2014. Health advised that there were 43 pages of responsive records. It advised the Applicant it was

withholding portions of the record pursuant to subsection 17(1)(a), 17(1)(c), 17(3), 18(1)(d), 19(1)(b), and 19(1)(c)(iii) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Also, in its January 29, 2015 email, Health provided my office with its index of records that said it was relying on subsection 27(1) of *The Health Information Protection Act* (HIPA).

[4] In an email dated October 14, 2014, the Applicant advised my office that she was dissatisfied with Health's response. My office notified Health of the review on November 21, 2014. The third parties, Regina Qu'Appelle Health Region and Saskatoon Health Region, were notified on March 5, 2015.

[5] Neither third parties had objections to the portions of the records that were withheld pursuant to subsection 19(1) of FOIP to being released.

[6] Health provided my office with a submission dated May 6, 2015 with arguments as to why subsection 17(1)(a) of FOIP would be applicable. Based on a new index of records and the submission, Health is only relying on subsection 17(1)(a) of FOIP to withhold portions of the records. It is not relying on any other of the subsections of FOIP it cited in its section 7 letter dated September 26, 2014.

II RECORDS AT ISSUE

[7] The record is 29 pages. Within those 29 pages are six briefing notes.

III DISCUSSION OF THE ISSUES

1. Did Health respond to the Applicant within the legislated timelines?

[8] Subsection 7(2) of FOIP requires government institutions to respond to access to information requests within 30 days after the request is made. Subsection 7(2) provides:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:...

[9] Subsection 12(1) of FOIP enables government institutions to extend the 30 days for a reasonable period not exceeding 30 days.

[10] It took 163 days for Health to provide a response to the Applicant. I find that Health did not respond to the Applicant within the legislated timelines.

[11] In its Draft Review Report, my office recommended that Health make changes to its processes so that it can respond to access to information requests within legislated timelines. In its letter dated May 15, 2015, Health advised it will continue to take steps to improve its response times including holding an additional Kaizen event to examine and find solutions to improve the routing and approval of responses.

2. Does subsection 17(1)(a) of FOIP apply?

[12] In order for subsection 17(1)(a) of FOIP to apply, the following three part test must be met:

- a. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
- b. The advice, recommendations, proposals, analyses and/or policy options must:
 - i. must 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.
- c. Was the advice, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

[13] Below, I will determine if this three part test is met.

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

[14] In its submission dated May 6, 2015, Health asserts that the withheld portions of the record qualify as advice, proposals, recommendations, analyses or policy options. My office has defined these terms as follows:

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

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.

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

[15] There are portions of records that clearly qualify as recommendations and/or analyses based on the definitions above, such as the withheld portions on pages 7, 14, 25 and 29. Other withheld portions, when read on their own, may not initially appear to qualify as analysis. However, when read in the context of the briefing note, these portions may lead to inferences about the recommendations and/or analyses that appear on pages 7, 14, 25 and 29. Therefore, I am satisfied that the withheld portions qualify as recommendations and/or analyses based on the definitions above.

- b. The advice, recommendations, proposals, analyses and/or policy options:
 - i. must 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.

[16] The withheld portions are embedded within six briefing notes. Health asserts that these briefing notes are for the purpose of providing advice, recommendations and proposals to senior government officials. I agree these briefing notes are for that purpose.

[17] On some of the briefing notes, the names of the employees who prepared the briefing notes appear at the end. However, on the face of the record, it is not immediately

apparent who the briefing note is for. Health's submission dated May 6, 2015, and its Index of Records, assert that the briefing notes were for senior officials within Health.

[18] When I consider the format of these records, along with Health's submission and Index of Records, I find that the second part of the three part test is met.

- c. Was the advice, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

[19] Based on the comments above, I find that the recommendations and/or analyses were developed by or for the Ministry of Health.

[20] I find that the three part test is met and that subsection 17(1)(a) of FOIP applies to the withheld portions of the record.

[21] In its Draft Review Report, my office recommended that Health withhold the portions of the record to which it is applying subsection 17(1)(a) of FOIP but to release the remainder of the record. In a letter dated May 15, 2015, Health advised that it would comply with the recommendation.

IV FINDINGS

[22] I find that Health did not respond within the legislated timelines.

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

V RECOMMENDATIONS

[24] I recommend that Health follow through with its commitment to hold a Kaizen event to improve its response times for access to information requests, and

[25] I recommend that Health withhold the portions of the record to which it is applying subsection 17(1)(a) of FOIP and release the remainder of the record.

Dated at Regina, in the Province of Saskatchewan, this 20th day of May, 2015.

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