

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 096-2015 and 097-2015

Saskatchewan Transportation Company

Summary:

In March 2015, two Applicants submitted access to information requests to the Saskatchewan Transportation Company (STC) for emails sent or received by an STC employee that included any variation of their names. STC released records responsive to the Applicants' requests and advised that other records that could be responsive to the request were not under their possession or control as they were personal emails of the STC employee. The Commissioner found that STC did not have possession or control of the STC employee's personal emails and therefore FOIP did not apply. As FOIP was not found to apply, the Commissioner recommended that STC take no further action regarding the request.

I BACKGROUND

- [1] On March 5, 2015, the Saskatchewan Transportation Company (STC) received two access to information requests from two Applicants for the same records, email correspondence received by or sent from an STC employee that included any variation of the Applicants' names.
- [2] In letters dated April 2, 2015, STC responded to both the Applicants releasing records responsive to their requests. STC indicated that it "determined that the remainder of the records that could be responsive to [the Applicants'] request are private records that are outside the scope of this legislation, and not in our possession or under our control. On that basis access to those records is refused."

- [3] On April 30, 2015, my office received two requests for review from both Applicants indicating that they had been refused access to all or part of the records.
- [4] On May 14, 2015, my office notified both the Applicants and STC of its intention to conduct reviews. My office requested STC provide the records, index of records and submissions to support their position that the records requested were not under their possession or control.
- [5] My office received submissions from STC on June 1, 2015 and a submission from both of the Applicants was received on May 19, 2015.
- [6] In STC's submissions, it provided arguments that records that could be responsive to both the Applicants' requests were not within the possession or control of STC.

II RECORDS AT ISSUE

- [7] STC provided personal email correspondence that could be responsive to the Applicant's request but has taken the position that the records are not under STC's possession or control.

III DISCUSSION OF THE ISSUE

- [8] STC qualifies as a "government institution" pursuant to subsection 2(1)(d)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

1. Is the responsive record within the possession and/or control of STC pursuant to section 5 of FOIP?

- [9] Section 5 of FOIP provides the right of access as follows:

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] As section 5 of FOIP provides that FOIP only applies to those records under the possession or under the control of a government intuition, I will need to determine if the records in question are under the possession or control of STC.

i. Does STC have “possession” of the records?

[11] *Possession* is defined in the *IPC Guide to Exemptions: For FOIP and LA FOIP* (Guide to Exemptions) as “physical possession plus a measure of control of the record.”

[12] In STC’s submission they recognize that STC has physical possession of the personal emails on their email system. However, they take the position that it also needs to be determined whether the records are related to a government matter.

[13] There is no doubt that STC physically has the records. So, I now must consider whether or not it has a measure of control over the responsive records to determine if it has possession of the records.

ii. Does STC have a measure of “control” of the records?

[14] The Guide to Exemptions indicates that *control* connotes authority and “a record is under control of a public body when the public body has the authority to manage the record, including restricting, regulating and administering its use, disclosure or disposition.”

[15] There are 15 criteria to consider when determining any measure of control, however not all have to be met in order to find that a public body has a measure of control:

1. The record was created by a staff member, an officer, or a member of the public body in the course of his or her duties performed for the public body;
2. The record was created by an outside consultant for the public body;
3. The public body possesses the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory or statutory or employment requirement;

4. An employee of the public body possesses the record for the purposes of his or her duties performed for the public body;
5. The record is specified in a contract as being under the control of a public body and there is no understanding or agreement that the records are not to be disclosed;
6. The content of the record relates to the public body's mandate and core, central or basic functions;
7. The public body has a right of possession of the record;
8. The public body has the authority to regulate the record's use and disposition;
9. The public body paid for the creation of the records;
10. The public body has relied upon the record to a substantial extent;
11. The record is closely integrated with other records held by the public body;
12. The contract permits the public body to inspect, review, possess or copy records produced, received or acquired by the contractor as a result of the contract;
13. The public body's customary practice in relation to possession or control of records of this nature in similar circumstances;
14. The customary practice of other bodies in a similar trade, calling or profession in relation to possession or control of records of this nature in similar circumstances; and
15. The owner of the records.

[16] I will review the criteria relevant to this matter.

a. The record was created by a staff member, an officer, or a member of the public body in the course of his or her duties performed for the public body

[17] The Applicants requested emails that were received or sent by a specific STC employee. The email correspondence that STC has indicated is not under their possession or control appears to be personal emails between the employee and other individuals that are not employees of STC.

[18] Based on a review of these emails, it does not appear that the emails are in any way related to the employee's employment functions or government business. It appears that the employee had carried on some personal matters from his work email account. It would not be unusual for employees to use work email accounts for some personal matters.

[19] There is no evidence to suggest that the contents of the records are related to an STC business matter.

b. The public body possesses the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory or statutory or employment requirement

[20] The STC employee appears to have personal emails on STC's email server. I will need to consider whether the emails could be considered to have been voluntarily provided by the STC employee to STC as a result of the employee's use of the email system for personal use.

[21] These emails were personal in nature and in an STC policy referenced in both parties submissions it indicates that "while personal use of email is not strictly prohibited, there should be no expectation of privacy during its use."

[22] STC's policy provides that personal use of email is allowed but does indicate that the emails are not private. However, the policy does not indicate that the use of the email system was a method that the employee would be voluntarily providing the emails to STC.

[23] It does not appear the STC employee's emails were voluntarily provided to STC for any of the matters outlined.

c. An employee of the public body possesses the record for the purposes of his or her duties performed for the public body

[24] Based on my review of the emails, it appears the emails contain information relating to personal matters. Therefore, it does not appear the records were created for purposes of employment duties.

d. The content of the record relates to the public body's mandate and core, central or basic functions

[25] Based on a review of these emails, it appears the information in the emails relates to personal matters and does not relate to any business purpose.

e. The public body has a right of possession of the record

[26] There is no apparent right of possession as the emails contain information regarding personal matters.

f. The public body has the authority to regulate the record's use and disposition

[27] STC provided my office with a copy of their Records Management Policy which states:

All official **government records** that STC creates and acquires **must be coded in accordance with either Administrative Records Management System 2006 (ARMS 2006) or the appropriate Operational Records System (ORS) schedule.**

...

Non-Government Records – are records that **do not document government business** or activities, **such as** transitory records, publication and **non-work related records.**

...

Non-Work Related Records – are records of government employees concerning their private life. These records do not pertain to any aspects of government business. Typical examples of **non-work related records are employee's personal email** or letters...

[emphasis added]

[28] The policy indicates that STC's records management system only covers government records and states that personal emails would not fit this definition.

[29] Based on this, STC does not have the authority to regulate the use and disposition of these emails.

g. The public body has relied upon the record to a substantial extent

[30] There is no evidence that suggests STC relied on these emails to any extent.

h. The record is closely integrated with other records held by the public body

[31] The employee's personal emails are housed in STC's email system but do not appear to be integrated at all with any business records held by STC.

i. The public body's customary practice in relation to possession or control of records of this nature in similar circumstances

[32] As indicated earlier in this Report, employees of STC are not prohibited from using email for personal matters and STC has indicated that personal emails would not be government records.

j. The customary practice of other bodies in a similar trade, calling or profession in relation to possession or control of records of this nature in similar circumstances

[33] In my office's Review Report F-2014-007, the Ministry of Justice also took the position that personal records of a government employee were not under the possession or control of the Ministry. A review of this matter resulted in my office finding that Justice did not have possession or control of the records.

[34] Further, STC referred to Saskatchewan Archives Board's *Saskatchewan Records Management Guidelines* which provides advice to government institutions that employee's personal emails would be an example of non-work-related records.

[35] Based on this, it is my assumption that other government institutions would be approaching possession or control of these types of records in the same manner.

k. The owner of the records

[36] As noted earlier, the emails contain information regarding a personal matter and would not be considered government records. Ownership of these emails would appear to belong to the STC employee.

[37] In conclusion, I find that based on the above, STC does not have "control" of the records in question, nor would they have "possession" of the records. The emails are the personal records of the STC employee and were not created as part of their employment duties.

IV FINDING

[38] I find that the records in question are not records in the possession or control of STC and therefore FOIP does not apply.

V RECOMMENDATION

[39] As FOIP has been found not to apply, I recommend that STC take no further action.

Dated at Regina, in the Province of Saskatchewan, this 22nd day of June, 2015.

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