



REVIEW REPORT 112-2015

Ministry of Health

September 1, 2015

Summary:

The Applicant submitted an access request to the Ministry of Health (Health). Health issued a fee estimate to the Applicant, which the Applicant accepted. Health responded to the Applicant. The Applicant was dissatisfied with the response and appealed to the Information and Privacy Commissioner (IPC). The IPC made a number of findings including that Health did not respond within the legislated timelines. The IPC recommended that Health provide his office with a date when a kaizen event will take place to refine Health's processing of access to information requests, that Health release some but not all the information it withheld pursuant to subsection 17(1)(a) of FOIP, that Health release the information it had originally labelled as non-responsive, that Health remains committed to refining its method of calculating fee estimates, and that Health include an explanation, using actual numbers of pages, in its responses to access requests if the majority of records alluded to in the fee estimate were not provided because they are records the Applicant explicitly stated she was not seeking.

I BACKGROUND

[1] On December 24, 2014, the Ministry of Health (Health) received an access to information request. The request was clarified between Health and the Applicant on January 13, 2015 to the following:

All reports, analysis and briefing materials regarding the changes in services offered, and changes to the usage of space of Saskatoon City Hospital, between January 1, 2013 and December 24, 2014. Do not include email.

[2] In a letter dated February 9, 2015, Health sent a fee estimate of \$288.00. In that letter, it estimated that there are 372 pages of responsive records. The Applicant accepted the fee estimate and paid a 50% deposit. Health proceeded to process the request.

[3] In a letter dated June 8, 2015, Health advised the Applicant it would be providing 27 pages of responsive records with portions withheld pursuant to subsection 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP). It also stated that portions of the record were considered to be non-responsive to the request so those portions were redacted.

[4] The Applicant appealed to my office. Her concerns was the time it took Health to respond to her request, the withheld portions of the record, and the discrepancy between the number of pages of records estimated and the number of pages of records that were actually provided to her. My office notified both Health and the Applicant in emails dated June 18, 2015. On July 15, 2015, it was discovered that due to technical reasons, the notification email to Health was not received. Therefore, my office re-sent the notification email to Health on that day.

II RECORDS AT ISSUE

[5] Of the 27 pages of records provided to the Applicant, the withheld portions were from briefing notes.

III DISCUSSION OF THE ISSUES

1. Did Health respond to Applicant's access to information request within the legislated timeline?

[6] 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:...

[7] Subsections 6(3) and 6(4) of FOIP should be noted in this case since Health clarified the request with the Applicant on January 13, 2015. Subsections 6(3) and 6(4) of FOIP provide:

6(3) Where the head is unable to identify the record requested, the head shall advise the applicant, and shall invite the applicant to supply additional details that might lead to identification of the record.

6(4) Where additional details are invited to be supplied pursuant to subsection (3), the application is deemed to be made when the record is identified.

[8] Subsection 9(3) of FOIP states that the time within which a government institution is required to give written notice is suspended when a fee estimate is provided. It is suspended until the Applicant notifies the government institution it wishes to proceed with the access request. Further, subsection 9(4) of FOIP states that the government institution may require a deposit from the Applicant before it commences a search for the records:

9(3) Where an estimate is provided pursuant to subsection (2), the time within which the head is required to give written notice to the applicant pursuant to subsection 7(2) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application.

(4) Where an estimate is provided pursuant to subsection (2), the head may require the applicant to pay a deposit of an amount that does not exceed one-half of the estimated amount before a search is commenced for the records for which access is sought.

[9] Health clarified the access request on January 13, 2015 and issued a fee estimate dated February 9, 2015 to the Applicant. Therefore, 26 days elapsed between the time the request was clarified and the fee estimate was issued. However, the time within which Health was to provide a response pursuant to section 7 of FOIP was suspended until the Applicant notified Health she wished to proceed.

[10] On March 12, 2015, Health received a 50% deposit from the Applicant. Health responded to the Applicant in a letter dated June 8, 2015. In total, it took Health 113 days to respond to the Applicant's request.

[11] I find that Health did not respond to the Applicant's request within the legislated timelines.

- [12] According to its submission, Health's response was in "routing" from April 17, 2015 to June 8, 2015. In its submission, Health asserted that it will hold a kaizen event to examine and find solutions to improve its routing and approval of responses. The issue of routing was dealt with in the Commissioner's Review Report 063-2015 to 077-2015. During that review, Health indicated it would have a kaizen event that will focus on the routing, review and approval of responses to access to information requests.
- [13] Because the Commissioner's Review Report 063-2015 to 077-2015 was issued at the same time as this request was still being processed (April 30, 2015), my office requested an update on the results of the kaizen event. In an email dated August 12, 2015, Health indicated that it has initiated work on a kaizen event, with some tasks completed, some tasks still underway, but the event has not been completed yet due to several factors including staff absences and the volume of work that the Health Information and Privacy Unit has. It noted that since April 1, 2015, it has received 73 access to information requests compared to 39 last year at the same time. Health said it is working on finalizing the attendees/participants and finding a date that is mutually acceptable for participants.
- [14] In the course of this review, my office asked Health to provide a date when the kaizen event will take place. Health responded by stating it will provide my office with the date once it is set.
- [15] I recommend that Health provide my office with a date when the kaizen event will take place within 30 days of issuing this Review Report.

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

- [16] Health applied subsection 17(1)(a) of FOIP to two bullet points. The second bullet point also has two sub-bullet points. Health applied subsection 17(1)(a) to the two sub-bullet points as well.
- [17] 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;

[18] The following is a three-part test that must be met in order for subsection 17(1)(a) of FOIP to apply:

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

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.

2. 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.
3. Was the advice, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

[19] In its Draft Review Report, my office found Health did not meet the above test. Health agreed that subsection 17(1)(a) of FOIP did not apply to the second bullet and agreed to release the second bullet. However, it maintained its position that the first bullet and the two sub-bullets qualified for exemption under subsection 17(1)(a). Health provided further arguments.

[20] Initially, my office found that subsection 17(1)(a) of FOIP did not apply because it appeared that the information was policy options developed by or for a local authority,

not for a government institution or a member of Executive Council. However, Health responded by stating that the withheld information was a part of the overall analysis presented in the briefing note, prepared by a Senior Policy Analyst at Health for the Deputy Minister of Health. It provided context surrounding the information that was withheld. When I consider the withheld information and the additional information provided to my office, I am satisfied that the three-part test is met. The withheld information makes up a part of the analysis of a particular situation (which qualifies as advice, as defined above), prepared by a Senior Policy Analyst at Health for a government institution.

[21] I find that subsection 17(1)(a) of FOIP applies to the first bullet point, and the two sub-bullets.

2. Are portions of the record non-responsive?

[22] The majority of the redacted portions of the records were labelled as non-responsive. In this case, the Applicant sought all records (but not email records) regarding changes in service or changes in the usage of space at the Saskatoon City Hospital for the time period January 1, 2013 to December 24, 2014.

[23] In its submission, Health said it reviewed the records and determined that unless the information three key elements, the information would be considered non-responsive: 1) change in service, 2) change to the use of space, and 3) the Saskatoon City Hospital.

[24] In order to determine if a record, or portion thereof, is responsive, I must closely examine the access request. The request itself defines the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. However, I must note that the purpose of FOIP is best served when there is a broad and liberal interpretation of the request. The Applicant requested *all reports, analysis and briefing materials* regarding changes in service or changes in the usage of space at the Saskatoon City Hospital. She did not request only the information within reports, analysis and briefing materials regarding changes in service or changes in the

usage of space at the Saskatoon City Hospital. I understand the Applicant's request to mean records that contains not only information about changes in services or the usage of space but the information contained within those records that provides background to such changes would be relevant to the access to information request.

[25] I reviewed the portions of the responsive records Health labelled as non-responsive. There is certainly some information that is non-responsive. For example, information about hospitals other than Saskatoon City Hospital. However, the remainder of the information, while not specifically about changes in service or changes in the usage of space at the Saskatoon City Hospital, provides background for the changes in service or changes in the usage of space at the Saskatoon City Hospital. I find that such information is responsive.

[26] My office recommended that Health consider the background information as responsive to the request and release as much as it can to the Applicant. Health responded by stating that while it still considered portions of the background information as non-responsive, it would release more information to the Applicant found on pages 3, 5, 7, and 10 of the records.

[27] I recommend that Health consider releasing more information it labelled as "non-responsive" to the Applicant.

3. Did Health improperly prepare its fee estimate?

[28] The Applicant took issue at the discrepancy between the number of pages estimated and the actual number of pages provided to her. Health's fee estimate letter dated February 9, 2015 estimated 372 pages of responsive records. However, the Applicant only received 27 pages of responsive records.

[29] In the past, my office has said that a fee estimate should be prepared prior to substantial work being done in processing the access request. A fee estimate should provide the requestor with sufficient information to make an informed decision as to whether or not to pay the fee and pursue access. It is also to facilitate a discussion between the

government institution and the Applicant. Through the discussion, the Applicant is able to modify his or her request and minimize fees, and it prevents the government institution from doing more work than is necessary.

[30] In its submission, Health explained that its standard practice for preparing fee estimates is that it contacts branches within the ministry that “may hold an interest in the records being sought”. It requests each branch to respond with an estimate of time for search/retrieval of records, and an estimate of the number of pages responsive to the request. If the estimated cost will be \$50 or greater, Health will prepare a fee estimate. Health prepares its fee estimate based on the responses that each branch provides.

[31] In this case, Health followed its standard practice described above. Once the Applicant accepted the fee estimate and paid a 50% deposit, Health compiled the records and proceeded to process the access request. It was only at this point that the Senior Policy Analyst determined that over 90% of the records that were reflected in the fee estimate were non-responsive.

[32] I acknowledge that the estimated 372 pages are considerably higher than the 27 pages that were actually provided to the Applicant. Understandably so, the Applicant expected much more records than what she received. However, government institutions do not have to provide a precise number of responsive records in preparing fee estimates. To do so would require the government institution to undertake a substantial amount of work prior to the issuance of the fee estimate. This would defeat the purpose of a fee estimate. I find Health’s method of preparing fee estimates acceptable.

[33] However, I find that overestimated fee estimates could deter an Applicant from exercising his or her legal right to access. In this case, this overestimate did not deter the Applicant. In fact, in its email dated August 12, 2015 to my office, Health said that this was the first instance in which it needed to provide a refund to an Applicant since it made it its practice to issue fee estimates pursuant to section 9 of FOIP in January 2015. This implies that this overestimate is a one-off, and not a persistent issue. Nevertheless, in the course of this review, my office recommended that Health implement measures so that fee estimates are as reasonably close to what will be released. A more accurate estimate

would provide Applicants with sufficient information to make informed decisions about proceeding with the request or not.

- [34] In response to my office's recommendation, Health advised that it is committed to improving its processing of access to information requests, including the calculation of fee estimates. It advised that its process of having branches within the Ministry conduct searches, and calculating time and the number of pages is a new process. It intends to improve its processes by creating training modules and rolling out the training this fiscal year.
- [35] I commend Health on its efforts to continue to refine its processes. I recommend that Health remains committed to its efforts to improve its processes so that more accurate fee estimates are issued.
- [36] Finally, my office was concerned that information in the 372 pages of records that were gathered but perhaps deemed as non-responsive (as in, pages of records beyond the 27 pages that were provided to the Applicant) was actually responsive. My office recommended that Health reconsider the pages it deemed as non-responsive (beyond the 27 pages that were provided to the Applicant) and release as much as it can to the Applicant within 30 days of receiving my office's Draft Review Report.
- [37] Health responded to my office's recommendation by stating that the records beyond the 27 pages provided to the Applicant "consist of duplicates of previously provided materials and emails". It asserted that the Applicant had explicitly stated that she did not seek such records. I recommend that Health include such an explanation, using actual number of pages deemed non-responsive, in its letters to Applicants when responding to access requests. I note in Health's June 8, 2015 letter to the Applicant, Health explains that portions of the records were redacted because they were non-responsive. However, Health does not allude to the fact that over 90% of the 372 pages of records alluded to in its fee estimate letter were deemed as non-responsive. Therefore, the Applicant had expected 372 pages of records but had only received 27 pages of records. Without an explanation, the Applicant is left with the impression that Health is withholding records that are responsive to her request.

IV FINDINGS

- [38] I find that Health did not respond to the Applicant's request within the legislated timelines.
- [39] I find that subsection 17(1)(a) of FOIP applies to the first bullet and the two sub-bullets on pages 2.
- [40] I find that information in the records about hospitals other than Saskatoon City Hospital not to be responsive to the request.
- [41] I find that the background information about changes in service or changes in the usage of space at the Saskatoon City Hospital in the records to be responsive to the request.
- [42] I find that Health's method of preparing fee estimates acceptable.

V RECOMMENDATIONS

- [43] I recommend that Health provide my office with a date when the kaizen event will take place within 30 days of receiving this Review Report.
- [44] I recommend that Health release the second bullet point that was originally withheld on page 2.
- [45] I recommend that Health continue to withhold the first bullet and the two sub-bullets that appear on page 2.
- [46] I recommend that Health release the information that it said it would on pages 3, 5, 7, and 10 of the record.
- [47] I recommend that Health consider releasing more background information it originally considered non-responsive to the Applicant's request within 30 days of receiving this Review Report.

[48] I recommend that Health remains committed to its efforts to improve its processes to calculate fee estimates, including creating and rolling-out training modules this fiscal year.

[49] I recommend that Health provide Applicants with an explanation, using actual numbers of pages, in its responses to access requests if the majority of records alluded to in the fee estimate were not provided because they were records that the Applicant explicitly stated she was not seeking.

Dated at Regina, in the Province of Saskatchewan, this 1st day of September, 2015.

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