



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 124-2018, 125-2018

Ministry of Health

August 7, 2019

Summary:

The Ministry of Health (Health) denied access to a portion of the record in response to two Access to Information requests pursuant to subsections 17(1)(a), 17(1)(b)(i), 19(1)(b), 22(a) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that the exemptions applied to the record, except the email headers and signature lines on one of the pages. The Commissioner recommended that Health release the email headers and signature line found on one of the pages and continue to withhold the remaining information.

I BACKGROUND

[1] On May 8, 2018, the Applicant submitted two access to information requests to the Ministry of Health (Health) requesting:

124-2018

Please provide all emails to and from [name of eHealth Saskatchewan (eHealth) Chief Executive Officer (CEO)] related to concerns about possible or actual employee misconduct or misappropriation of funds in eHealth – and provide emails to and from [name of eHealth Saskatchewan CEO] related to concerns about contracts entered into by eHealth June 2017 to present.

125-2018

Please provide all emails to or from the Deputy Minister related to possible or actual employee misconduct or misappropriation of funds in eHealth – and please provide all emails to or from the DM related to concerns over contracts entered into by eHealth June 1, 2017 to present.

- [2] On June 13, 2018, Health responded to the Applicant’s requests providing access to the responsive records, in part. Health noted in its responses to the Applicant that portions of the responsive records had been withheld pursuant to subsections 17(1)(a), 17(1)(b)(i), 19(1)(b), 22(a) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [3] On July 6, 2018, the Applicant submitted requests for review to my office for both access to information requests to review the exemptions applied by Health.
- [4] On July 20, 2018, my office notified Health, the Applicant and the third party of our intention to undertake a review and invited the parties to make a submission.

II RECORDS AT ISSUE

[5] Health identified 14 pages of records responsive to the Applicant’s access to information request for IPC File: 124-2018 and 13 pages of records for IPC File: 125-2018. Health has withheld these pages in full or in part pursuant to subsections 17(1)(a), 17(1)(b)(i), 19(1)(b), 22(a) and 29(1) of FOIP. However, most of the records identified in each files are the same records. Below is a table showing the overlap of records in both files:

124-2018 Page numbers	125-2018 Page numbers	Section(s) Applied
1	-	29(1) of FOIP
2	-	Non-responsive – not being reviewed per applicant.
3	1	17(1)(a), 17(1)(b)(i), 19(1)(b), 22(a) of FOIP
4	2	17(1)(a), 17(1)(b)(i), 19(1)(b), 22(a) of FOIP
5	3	17(1)(a), 17(1)(b)(i), 29(1) of FOIP
6	4	17(1)(a), 17(1)(b)(i), 29(1) of FOIP
7	5	17(1)(a), 17(1)(b)(i), 29(1) of FOIP
8	6	17(1)(a), 17(1)(b)(i), 29(1) of FOIP

9	7	<ul style="list-style-type: none"> • 29(1) of FOIP to a portion of the pages. • 17(1)(a) and 17(1)(b)(i) of FOIP to a portion of the pages.
10	8	17(1)(a) and 17(1)(b)(i) of FOIP.
11	9	17(1)(a), 17(1)(b)(i), 29(1) of FOIP
-	10	17(1)(a), 17(1)(b)(i) of FOIP
12	11	Released in Full (<i>will not be reviewed as no exemptions are at issue</i>)
13	12	17(1)(a), 17(1)(b)(i), 19(1)(b), 22(a) of FOIP
14	13	17(1)(a), 17(1)(b)(i), 19(1)(b), 22(a) of FOIP

[6] On July 24, 2019, my office asked the Applicant if they were interested in our office reviewing page #2 of 124-2018 as it was marked as non-responsive. Further, my office advised the Applicant that this page was completely unrelated to their access to information request. The Applicant advised they were not interested in that page being reviewed. In addition, page 12 of 124-2018 and page 11 of 125-2018 will not be reviewed as those pages have been released in full to the Applicant.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction to review this matter?

[7] Health qualifies as a government institution pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, my office has jurisdiction in this matter.

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

[8] Health applied subsection 22(a) of FOIP to the redacted portions of pages 3, 4, 13 and 14 in 124-2018 and to duplicate pages 1, 2, 12 and 13 in 125-2018, and it provided copies of these pages to my office. 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.

[9] 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?

[10] In its submission, Health provided the following to support its position that subsection 22(a) of FOIP applied to the portions of the records:

The information withheld were email exchanges between eHealth and their legal counsel who provided legal advice...eHealth requested legal counsel to review information and provide advice...As the correspondence between the client and legal counsel was for the purpose of requesting a providing legal advice or legal assistance, the individuals engaged in the subject correspondence did so with the implied intent that such communication would be confidential as between solicitor and client.

[11] Health's submission outlines what is required by the three-part test in order for subsection 22(a) of FOIP to apply. Further, a review of the records supports that this information is subject to solicitor-client privilege.

[12] Therefore, I find subsection 22(a) of FOIP applies to pages 3, 4, 13 and 14 in 124-2018 and to duplicate pages 1, 2, 12 and 13 in 125-2018.

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

[13] Health applied subsection 17(1)(a) of FOIP to the redacted portions of pages 5, 6, 7, 8, 9, 10 and 11 in 124-2018 and to duplicate pages 3, 4, 5, 6, 7, 8 and 9 in 125-2018 and page 10 of 125-2018. 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;

[14] Subsection 17(1)(a) of FOIP is an exemption that is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice. My office has recently adopted the following test for subsection 17(1)(a) of FOIP, in consideration of two recent court decisions (*Britto v University of Saskatchewan*, 2018 SKQB 92 and *Hande v University of Saskatchewan*, QBG 1222 of 2018 May 21, 2019). The test is as follows:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. Was the advice, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

[15] I will now consider each part of the test.

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

[16] *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. Further, 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.

[17] *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.

[18] *Analysis* 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.

[19] Further, in *Britto v University of Saskatchewan*, 2018 SKQB 92, Justice Danyliuk broadened the definitions for “advice” and “recommendations” as follows:

22 The Court of Appeal also found that “[a]dvice may be construed more broadly than recommendation” (para. 29). However, it distinguished these terms by finding that “recommendation” may be understood to “relate to a suggested course of action’ more explicitly and pointedly than “advice”, while “[a]dvice” ... encompass[es] material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation” (ibid.). In oral argument in this Court, the Information and Privacy Commissioner of British Columbia and the Canadian Civil Liberties Association made a similar distinction: that while “recommendation” is an express suggestion, “advice” is simply an implied recommendation (transcript, at pp. 52 and 57).

23 In this case, the IPC Adjudicator applied MOT. She found that to qualify as “advice” and “recommendations” under s. 13(1), “the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised” (p. 4). I accept that material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised falls into the category of “recommendations” in s. 13(1).

24 However, it appears to me that the approach taken in MOT and by the Adjudicator left no room for “advice” to have a distinct meaning from “recommendation”. A recommendation, whether express or inferable, is still a recommendation. “[A]dvice” must have a distinct meaning. I agree with Evans J.A. in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C. 421 (“Telezone”), that in exempting “advice or recommendations” from disclosure, the legislative intention must be that the term “advice” has a broader meaning than the term “recommendations” (para. 50 (emphasis deleted)). Otherwise, it would be redundant. By leaving no room for “advice” to have a distinct meaning from “recommendation”, the Adjudicator’s decision was unreasonable.

[20] In its submission, Health outlined that the information found on pages 5 to 11 in file 124-2018 (duplicate to pages 3 to 9 in file 125-2018) are communication materials that were drafted by eHealth for eHealth officials to refer to when addressing both internal and external stakeholders regarding procurement and contract issues. Further, Health advises that the documents were created by eHealth for its own officials and provides analysis, advice and recommended approaches as to how to respond to questions from internal and external stakeholders. In its submission, Health also noted that it was not clear who at eHealth produced the documents.

[21] From a review of these pages, I agree that they qualify as analysis, advice and recommendations. Therefore, the first part of the test has been met.

[22] The information that has been severed on page 10 of 125-2018 is an email chain. From a review of this page, the body of the email would qualify under subsection 17(1)(a) of FOIP. However, the signature line (found at the bottom of this page) and the three email headers which include the following elements, would not:

- From,
- Sent,
- To,
- Subject, and
- Importance.

[23] Therefore, the first part of the test has not been met for the signature line (found at the bottom of this page) and the three email headers.

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

[24] For information to be developed *by or for* a government institution, the person developing the information should be an official, officer or employee of a government institution, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the government institution.

[25] As noted above, Health advised these pages were developed by eHealth officials, for eHealth officials, and Health has a copy of the pages. In order to qualify under this exemption, the record must have been developed, "...by or for a government institution..." so it does not matter that it was developed by or for a government institution other than Health. Therefore, the second part of the test has been met for this information.

[26] I find that subsection 17(1)(a) of FOIP applies to the severed information found on pages 5 to 11 in file 124-2018, duplicate to pages 3 to 9 in file 125-2018 and portions of the information severed on page 10 of 125-2018.

[27] I find that subsection 17(1)(a) of FOIP does not apply to the email headers and signature line found on page 10 of 125-2018.

4. Does subsection 29(1) of FOIP apply to the record?

[28] Health applied subsection 29(1) of FOIP to a portion of a sentence on page 1 of 124-2018 and one paragraph on page 9 of 124-2018 (duplicate page 7 of 125-2018).

[29] Subsection 29(1) of FOIP states:

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.

[30] Subsection 24(1) of FOIP provides an enumerated list of examples of what is considered personal information under FOIP. In order to qualify as personal information two elements must exist:

1. Is there an identifiable individual? and
2. Is the information personal in nature?

[31] I will now consider each part of the test.

1. Is there an identifiable individual?

[32] *Identifiable individual* means that it must be reasonable to expect that an individual may be identified if the information were disclosed. The information must reasonably be capable of identifying particular individuals because it either directly identifies a person or enables an accurate inference to be made as to their identity when combined with other available sources of information (data linking) or due to the context of the information in the record.

[33] Use of the term “individual” in this provision makes it clear that the protection provided only applies to natural persons. Therefore, it does not include information about a sole proprietorship, partnership, unincorporated association or corporation.

[34] From a review of the records, I note that the names of the individuals do not appear in the information that has been severed. Although the name(s) do not appear, it is reasonable that one would be able to identify the individual(s) if it was combined with other available sources of information. Therefore, I find the first part of the test has been met.

2. Is the information personal in nature?

[35] *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. An example of this would be information that fits the definition of employment history.

[36] In its submission, Health advised that the information that relates to professional individuals did reveal something personal about them from a labour relations perspective (employment history).

[37] As noted above, subsection 24(1) provides examples of types of information that qualifies as personal information under FOIP. Specifically, subsection 24(1)(b) provides:

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;

[38] The information that has been withheld does include information that relates to the individual(s) employment history, and not information about the individual(s) in a professional capacity with eHealth. In addition, a portion of the information that has been

withheld reveals details of what one of the individuals is involved in, in a personal capacity. Therefore, the second part of the test has been met.

[39] I find that subsection 29(1) of FOIP was properly applied to the portion of a sentence on page 1 of 124-2018 and one paragraph on page 9 of 124-2018 (duplicate page 7 of 125-2018).

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

[40] Health has applied subsection 17(1)(b)(i) of FOIP to the email headers and signature line found on page 10 of 125-2018.

[41] 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;

[42] Subsection 17(1)(b)(i) of FOIP is meant to permit public bodies to consider options and act without constant public scrutiny. 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. 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.

[43] 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.

[44] Public bodies should identify those individuals involved in the consultations or deliberations, include the job title of each, list organization affiliation and clarification as to each individual's role in the decision making process. For FOIP, the consultations and/or deliberations must involve:

- officers or employees of a government institution;
- a member of Executive Council; or
- the staff of a member of the Executive Council.

[45] The provision is not meant to protect the bare recitation of facts, without anything further. Further, the exemption does not generally apply to records or parts of records that in themselves reveal only the following:

- that a consultation or deliberation took place at a particular time;
- that particular persons were involved; or
- that a particular topic was involved.

[46] In cases where this is an exception, the public body must demonstrate why.

[47] As noted above, this exemption has been applied to email headers and a signature line. The release of this information may reveal that a consultation or deliberation took place at a particular time, but would not reveal the details of the consultation or deliberation. Therefore, the test has not been met.

[48] I find that subsection 17(1)(b)(i) of FOIP does not apply to the email headers and signature line found on page 10 of 125-2018.

IV FINDINGS

[49] I find that subsection 22(a) of FOIP applies to pages 3, 4, 13 and 14 in 124-2018 and to duplicate pages 1, 2, 12 and 13 in 125-2018.

- [50] I find that subsection 17(1)(a) of FOIP applies to the severed information found on pages 5 to 11 in file 124-2018, duplicate to pages 3 to 9 in file 125-2018 and portions of the information severed on page 10 of 125-2018.
- [51] I find that subsection 17(1)(a) of FOIP does not apply to the email headers and signature line found on page 10 of 125-2018.
- [52] I find that subsection 29(1) of FOIP was properly applied to the portion of a sentence on page 1 of 124-2018 and one paragraph on page 9 of 124-2018 (duplicate page 7 of 125-2018).
- [53] I find that subsection 17(1)(b)(i) of FOIP does not apply to the email headers and signature line found on page 10 of 125-2018.

V RECOMMENDATIONS

- [54] I recommend that Health release the email headers and signature line found on page 10 of 125-2018.
- [55] I recommend that Health continue to withhold the remaining information.

Dated at Regina, in the Province of Saskatchewan, this 7th day of August, 2019.

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