



## REVIEW REPORT 125-2015

### Ministry of Justice

January 11, 2016

#### Summary:

The Applicant submitted an access to information request to the Ministry of Justice (Justice) for email correspondence pertaining to him held within the Public Prosecutions division of Justice. Justice applied a time extension pursuant to subsection 12(1)(a)(ii) and 12(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Justice then advised the Applicant that access to these records was denied pursuant to subsections 13(1)(a), 15(1)(c), 15(1)(k), 17(1)(a), 22(a), 22(b), 22(c) and 29(1) of FOIP. The Commissioner found that the time extension was applied appropriately pursuant to subsection 12(1)(a)(ii) of FOIP. The Commissioner also found that subsections 22(b) and 22(c) of FOIP applied to the responsive records. The Commissioner recommended that Justice continue to withhold the responsive records but consider releasing information that the Applicant had provided, such as the Applicant's interview transcript.

#### I BACKGROUND

[1] On December 23, 2014, the Ministry of Justice (Justice) received an access to information request for:

Any and all emails, letters and correspondence held within public prosecutions pertaining to [name of Applicant] from February 2012 until June 2014 specific to [a police service]; witness testimony, trials, etc.

(Correspondence both internal and external)

- Any and all information pertaining to me ([name of Applicant]) held by Prosecutions
- Individuals that may or may not be source of these emails, letters, official correspondence are:
- [names of three individuals]

- [2] In a February 2, 2015 letter to the Applicant, Justice indicated that it spoke to the Applicant on the phone to clarify the request. It also states that Justice would be extending the response period pursuant to subsections 12(1)(a)(ii) and 12(1)(b)(i) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [3] On March 16, 2015, Justice responded to the Applicant's request advising that the records would be withheld in full pursuant to subsections 13(1)(a), 15(1)(c), 15(1)(k), 17(1)(a), 22(a), 22(b), 22(c) and 29(1) of FOIP.
- [4] On June 3, 2015, my office received an email from the Applicant requesting a review. The Applicant requested we review the application of the exemptions and the extended response time pursuant to subsections 12(1)(a)(ii) and 12(1)(b)(i) of FOIP.
- [5] On June 30, 2015, my office provided notification emails to both the Applicant and Justice. Both parties were invited to provide submissions and Justice was asked to also provide an index of records and a copy of the responsive records.
- [6] On August 14, 2015, my office received Justice's submission, index and responsive records.

## **II RECORDS AT ISSUE**

- [7] The records at issue consist of three packages of documents which Justice named records A, B and C. In total, there are 88 pages of responsive records. Record A contains 69 pages, Record B contains 8 pages and Record C contains 11 pages.

## **III DISCUSSION OF THE ISSUES**

- [8] Justice qualifies as a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP.

**1. Did Justice appropriately apply an extension of time to their response?**

[9] Justice advised the Applicant in its February 2, 2015 letter that it was extending the response time pursuant to subsections 12(1)(a)(ii) and 12(1)(b) of FOIP.

[10] Subsections 12(1)(a)(ii) and (b) of FOIP provides as follows:

**12(1)** The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

(a) where:

...

(ii) there is a large number of requests;

and completing the work within the original period would unreasonably interfere with the operations of the government institution;

(b) where consultations that are necessary to comply with the application cannot reasonable be completed within the original period;

[11] Justice's submission to my office provided as follows:

At the end of December 2014, the Ministry had 64 Access to Information (ATI) Requests. This request was received December 23, 2014 and required clarification from the applicant, which was received January 13, 2015. By the end of January the number of open ATI requests had spiked to 108. Additionally, the staff member responsible for this request as well as several others left the branch at the end of January 2015. Due to these circumstances, the work assignments needed to be reallocated to the remaining staff. Through this process and in reference to the volume of requests opened in a very short period of time, consultations between the Freedom of Information and Privacy Branch and various other officials and program areas within the Ministry were extended to ensure requests were thoroughly searched...

[12] My office contacted Justice for further details and was advised that at the time there were seven vacancies in the Freedom of Information and Privacy Branch when the number of open requests rose to over 100. In an email, Justice advised that normally the average number of open requests would be "somewhere between twenty five to fifty."

[13] Both the Office of the Information and Privacy Commissioner for British Columbia and Nova Scotia's Freedom of Information and Protection of Privacy Review Office have resources entitled *Time Extension Requests Guidelines for Public Bodies*. Listed in these resources are circumstances that may contribute to unreasonable interference. The lists include: significant increase in requests, significant increase in analysts caseloads and unexpected analysts leave.

[14] Although a "large number of requests" is not defined, it is reasonable to consider at least double the amount of requests normally open with Justice to be a large number of requests for that Ministry. Further, the fact that at that time Justice had seven vacancies in their Freedom of Information and Privacy Branch, it is reasonable to conclude that this would cause interference with the operations of the government institution.

[15] Based on the information provided to my office, it appears Justice has reasonably applied an extension of time to their response to the Applicant.

[16] As an extension of time pursuant to subsection 12(1)(a)(ii) of FOIP appears to have been applied appropriately, I will not consider the application of subsection 12(1)(b) of FOIP.

**2. Did Justice properly apply subsection 22(b) of FOIP to the withheld record?**

[17] Subsection 22(b) of FOIP provides as follows:

**22** A head may refuse to give access to a record that:

...

(b) was prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel for a government institution in relation to a matter involving the provision of advice or other services by the agent of legal counsel;

[18] Justice applied subsection 22(b) of FOIP to all 88 pages of the record.

[19] In order to qualify for this exemption, the withheld information must meet both parts of the following test:

1. Were the records “prepared by or for” an agent or legal counsel for a public body?
2. Were the records provided in relation to a matter involving the provision of advice or other services by the agent of legal counsel?

[20] I will consider both parts of this test.

***i. Were the records “prepared by or for” an agent or legal counsel for a public body?***

[21] The record must be “prepared,” as the term is understood, in relation to the advice or services or compiled or created for the purpose of providing the advice or services.

[22] Based on a review of records A and B and Justice’s submission, it is clear that the information was prepared for Public Prosecutions. My office has found in the past that an agent of the Attorney General for Saskatchewan can include Public Prosecutions.

[23] Based on this, the first part of the test is met.

***ii. Were the records provided in relation to a matter involving the provision of advice or other services by the agent or legal counsel?***

[24] *Legal advice* includes a legal opinion about a legal issue, and a recommended course of action based on legal considerations, regarding a matter with legal implications.

[25] *Legal service* includes any law-related service performed by a person licensed to practice law.

[26] Records A and B contain letters to Public Prosecutions requesting advice on whether or not to pursue conviction or if any charges were recommended. In both records, Public Prosecutions responds with their legal advice on the matter and a recommendation.

[27] Pages two, ten and eleven of Record C are handwritten notes by Public Prosecutions regarding legal advice they are providing in emails found in this portion of the record.

[28] It appears Records A and B and pages two, ten and eleven of Record C qualify as records related to the provision of legal advice or a legal service and therefore meet the second part of the test. Justice should continue to withhold these pages of the records.

[29] Although Justice has provided arguments that these pages of the record fit this exemption, pages 14 through 47 of Record A is an interview transcript with the Applicant. As the Applicant provided the information contained on these pages and therefore would be aware of its contents, Justice should consider releasing these pages to the Applicant.

[30] As I have found subsection 22(b) of FOIP to apply to Records A and B and pages two, ten and eleven of Record C, I will not consider any other exemptions raised for these portions of the records.

**3. Did Justice properly apply subsection 22(c) of FOIP to the withheld record?**

[31] Subsection 22(c) of FOIP provides as follows:

**22** A head may refuse to give access to a record that:

...

(c) contains correspondence between an agency of the Attorney General for Saskatchewan or legal counsel for a government institution and any other person in relation to a matter involving the provision of advice or other services by the agency or legal counsel.

[32] Justice applied subsection 22(c) of FOIP to pages one and five of Record A, pages one through five and eight of Record B and pages one through ten of Record C.

[33] The portions of the records still at issue are page one, and pages three through nine of Record C. Therefore, I will only consider the application of subsection 22(c) of FOIP to these pages of the records.

[34] In order for subsection 22(c) of FOIP to apply the following test must be met.

1. The record must be correspondence between the public body's legal counsel (or an agent of the Attorney General for Saskatchewan) and any other person.
2. The correspondence must be in relation to a matter involving the provision of advice or other services by the agent or legal counsel.

***i. The record must be correspondence between the public body's legal counsel (or an agent of the Attorney General for Saskatchewan) and any other person.***

[35] *Correspondence*, in this context, is an interchange of written communications.

[36] The records at issue are email correspondence of the Public Prosecutions Division of Justice. As noted earlier in this report, my office has found in the past that an agent of the Attorney General for Saskatchewan can include Public Prosecutions.

[37] Based on this, I find that the first part of the test is met.

***ii. The correspondence must be in relation to a matter involving the provision of advice or other services by the agent or legal counsel.***

[38] In order to qualify for the second part of this test, the correspondence must relate to legal advice or a legal service.

[39] *Legal advice* includes a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.

[40] *Legal service* includes any law-related service performed by a person licensed to practice law.

[41] A review of the email correspondence found on page one and pages three through nine of Record C shows that the discussion contained within would qualify as legal advice. It appears that the second part of the test has also been met.

[42] As both parts of the test have been met, it appears that Justice appropriately applied subsection 22(c) of FOIP to this portion of the records.

[43] As subsection 22(c) of FOIP appears to apply to page one and pages three through nine of Record C, I will not consider any other exemptions applied to these pages of the record.

[44] My office provided Justice with the recommendation found below in a Draft Review Report. Justice advised my office that it intended to comply with the recommendation.

#### **IV FINDINGS**

[45] I find that Justice appropriately applied a time extension pursuant to subsection 12(1)(a)(ii) of FOIP.

[46] I find that subsection 22(b) of FOIP applies to portions of the record.

[47] I find that subsection 22(c) of FOIP applies to portions of the record.

#### **V RECOMMENDATION**

[48] I recommend that Justice continue to withhold the responsive records, but consider releasing the portions of the record where the information contained was provided by the Applicant, such as the interview transcript found on pages 14 through 47 of Record A.

Dated at Regina, in the Province of Saskatchewan, this 11<sup>th</sup> day of January, 2016.

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