



REVIEW REPORT 126-2018

Executive Council

July 8, 2019

Summary: In response to an access to information request, Executive Council advised the Applicant that the requested records do not exist pursuant to subsection 7(2)(e) of *The Freedom of Information and Protection of Privacy Act*. The Applicant requested a review and was concerned that the emails of the Premier's Press Secretary and Director of Communications (Director of Communications) were not searched, which was confirmed through my office's early resolution process. The Commissioner found that the records, if they exist, are not in the possession or under the control of Executive Council and recommended Executive Council take no further action on this file.

I BACKGROUND

[1] The Applicant submitted an access to information request that was received by Executive Council on April 24, 2018, requesting access to:

All correspondence between Executive Council and members of the media regarding Bill No. 126 between 12:00 noon on April 18, 2018 and 2:30PM April 23, 2018. Please be sure to include any emails sent by staff in Ministers' Offices operating within their capacity as government employees as outlined by OIPC Review Report 100/2013.

[2] By letter dated May 24, 2018, Executive Council responded to the request advising the Applicant that the records do not exist pursuant to subsection 7(2)(e) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [3] My office received a Request for Review from the Applicant on July 3, 2018. In the covering letter, the Applicant advised our office that they suspect Executive Council has failed to carry out a fulsome search for records as it relates to those of the Premier's Press Secretary and Director of Communications (Director of Communications).
- [4] During the early resolution process, the Applicant outlined his primary concern was that the Director of Communications' emails were not searched. During this process, Executive Council asserted that the emails are not within Executive Council's possession and/or control, and therefore not subject to FOIP.
- [5] On July 12, 2018, my office notified Executive Council and the Applicant of our intention to undertake a review and invited both parties to make a submission.

II RECORDS AT ISSUE

- [6] There are no records at issue as this review will determine if the Director of Communications' emails are in the possession or under the control of Executive Council.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

- [7] Executive Council is a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP. Thus, I have the authority to conduct this review.

2. Are the records of the Director of Communications in the possession or under the control of Executive Council?

- [8] The Applicant has requested a review because the Director of Communications' emails were not searched. Executive Council asserts that the Director of Communications' emails are not in the possession or under the control of Executive Council. Therefore, I must determine if Executive Council has possession and/or control of the Director of Communications' emails.

[9] Subsection 2(1)(d) of FOIP lists public bodies that are government institutions under FOIP. As noted above, Executive Council is a government institution. However, subsection 2(2) of FOIP outlines specifically what a government institution does not include. Subsection 2(2)(b) provides:

2(2) “**Government institution**” does not include:

...

(b) the Legislative Assembly Service or, subject to subsections 3(3) and (4), offices of the members of the Assembly or members of the Executive Council;

[10] Therefore, as it relates to the access to information provisions, Executive Council is a government institution, but the offices of the members of Executive Council, in this case the Premier’s Office and its supporting staff, are not.

[11] The Applicant pointed out that our office has reviewed this issue in the past in Review Report 100-2013 (Executive Council), where we considered the issue of the former Executive Director of Communications. Review Report 100-2013 states at paragraphs [8] to [11]:

[8] The Applicant asserts that the Executive Director of Communications at Executive Council holds a “bureaucratic position”, and therefore, the responsive records would be subject to FOIP. Executive Council argues that the Executive Director of Communications is a part of the Premier’s office so the responsive records are not subject to FOIP.

[9] The Government of Saskatchewan website provides the following description of the Executive Director of Communications:

- The Executive Director of Communications oversees the fulfilment of policies, procedures and standards in strategic communications across government to ensure information on government programs and services is provided to the public, media and other audiences in a timely, accurate and effective manner.
- Media Services/Media Relations prepares and distributes news releases and provides assistance to ministries, agencies and Crown corporations in the preparation of news releases and news conferences. It also co-ordinates the day-to-day media relations for the Premier's Office and Members of Executive Council.

(<http://www.gov.sk.ca/executive-council/communications>, accessed on October 28, 2014) [Link is no longer available as the Government of Saskatchewan website is now saskatchewan.ca]

[10] Based on the above, it would seem that a portion of the Executive Director of Communication's role, including overseeing the fulfilment of policies, procedures, and standards in strategic communications across government, and providing assistance to ministries, agencies and Crown corporations in the preparation of news releases and news conferences, would qualify her as an employee of a government institution. The records which the Executive Director of Communications creates fulfilling these duties would be subject to FOIP.

[11] However, her duty to coordinate the day-to-day media relations for the Premier's Office and Members of Executive Council would mean she also would be a part of an office of a member of Executive Council. Records she creates in fulfilling these duties would not be subject to FOIP.

[12] However, Executive Council has advised me that since Review Report 100-2013 was issued, the organization has changed. It advises that the Director of Communications is exclusively part of the Premier's Office and the Director reports to the Chief of Staff to the Premier. It further notes, that unit is in the office of a member of the Executive Council. In this case, the Premier's Office.

[13] From its submission, and further discussion with Executive Council, I am satisfied that the Director of Communications no longer holds a bureaucratic role, as it did when I issued Review Report 100-2013 and solely falls under the Premier's Office, directly reporting to the Premier's Chief of Staff.

[14] Therefore, I must now determine if Executive Council has possession or control of the Director of Communication's records at issue in the Applicant's request.

[15] FOIP provides a right of access to records that are in the possession or under the control of a government institution. Specifically, section 5 of FOIP provides:

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.

[16] *Possession* is physical possession plus a measure of control of the record, while *control* connotes authority. A record is under the 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.

[17] Possession and control are different things. It is conceivable that a public body might have possession but not control of a record or that it might have control but not possession. To determine whether a public body has a measure of control over a record, both parts of the following test must be answered in the affirmative:

1. Do the contents of the document relate to a government institution matter?
2. Can the public body reasonably expect to obtain a copy of the document upon request?

[18] I will now assess each part of the test.

1. Do the contents of the document relate to a government institution matter?

[19] As noted previously, Executive Council did not search the emails of the Director of Communications. It did search for records within Executive Council, and none were located.

[20] In its submission, Executive Council advised that the request is with respect to emails related to Bill No. 126, and that concerns government business and not a “departmental matter.” It notes that the records, if there are any, would be in the possession of the staff of an office of a member of the Executive Council (not Executive Council, the Ministry). Finally, it notes these records were not provided to the Deputy Minister of Executive Council, and even if the Deputy Minister requested the records, he would not be provided a copy of them.

[21] Therefore, I am satisfied that the records do not relate to a government institution matter and the first part of the test has not been met. As the first part of the test has not been met, I do not need to consider the second part of the test.

[22] I find the records, if they exist, are not in the possession or under the control of Executive Council.

IV FINDING

[23] I find the records, if they exist, are not in the possession or under the control of Executive Council.

V RECOMMENDATION

[24] I recommend Executive Council take no further action on this file.

Dated at Regina, in the Province of Saskatchewan, this 8th day of July, 2019.

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