



REVIEW REPORT 126-2020, 185-2020

Ministry of Justice and Attorney General

April 27, 2021

Summary: The Applicant made an access to information request to the Ministry of Justice and Attorney General (Justice) for a report. Justice denied the Applicant access to portions of the report pursuant to subsections 13(1)(b), 15(1)(m), 17(1)(a) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found Justice properly applied subsections 13(1)(b), 15(1)(m), 17(1)(a) of FOIP, but that it did not properly apply subsection 29(1) of FOIP. The Commissioner also found Justice did not meet the legislated time to respond to the access to information request, and recommended that it increase its resources so it is able to respond to access to information requests within legislated timelines.

I BACKGROUND

[1] On February 20, 2020, the Ministry of Justice and Attorney General (Justice) received the following access to information request from the Applicant for the timeframe “2018 to present”:

I would like to request a copy of the report focused on the subject of threat assessments for Sheriffs and Deputy Sheriffs in Saskatchewan that was authored and completed in January 2019 by former Saskatoon Police Deputy Chief Bernie PANNELL. I am especially interested in the full list of recommendations, the projected time line for implementation and any fiscal projection(s) for achieving the goal(s) of the report. Thank you for your assistance.

[2] On February 24, 2020, Justice provided an email response to the Applicant to acknowledge it had received the Applicant’s access to information request and was processing it.

[3] On March 11, 2020, Justice emailed the Applicant to advise which records may be responsive to their access to information request. Justice added, “[a]s the cost of providing access to these records is greater than \$100, our office is required to create a fee estimate as per section 7 of *The Freedom of Information and Protection of Privacy Regulations*.” In an emailed response to Justice the same date, the Applicant stated that two of the records may be responsive to their access to information request and proposed that, if they were not, Justice could then proceed with preparing its fee estimate. On March 12, 2020, Justice responded as follows:

As you have indicated you believe the reports will satisfy your request we will process them and provide them as soon as possible. Once you receive your request, if you determine that you would like the remaining records, follow-up with our office and we will work with you in obtaining the additional records. If you plan to resubmit, please quote this request number [file number] in the follow-up.

In regards to the fee estimate, we do not have the ability to provide you with an accurate estimate at this time. The overall cost is calculated at the finale stage of the estimate and varies depending on the data that is provided.

[4] The Applicant stated on March 19, 2020, they received a, “generic email [from Justice] that work from home [due to the pandemic] may impact legislated timeframes”.

[5] On May 20, 2020, the Applicant emailed my office regarding their concerns over Justice’s slow response time. The Applicant noted that 90 days had elapsed since they made their access to information request.

[6] Between May 21, 2020 and July 27, 2020, my office had ongoing contact with Justice regarding when the Applicant could expect to receive the records. At this point, Justice expected to, “have the file concluded either this week or next”.

[7] On August 7, 2020, Justice provided its section 7 response to the Applicant along with the records. Justice denied access to portions of the records pursuant to subsections 13(1)(b), 15(1)(m), 17(1)(a) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[8] On August 10, 2020, the Applicant asked my office to undertake a review of Justice’s response time as well as its decision to deny access to portions of the records pursuant to FOIP.

[9] On August 24, 2020, my office provided notice to Justice and the Applicant of my office’s intent to undertake a review of Justice’s response time and its decision to deny access to portions of the records pursuant to FOIP.

II RECORDS AT ISSUE

[10] Justice provided the Applicant with copies of two reports that are, respectively, 3 and 35 pages in length for a total of 38 pages. At issue are FOIP exemptions Justice applied to 20 pages of the two reports as follows:

Report One

Page Numbers	Description	Exemptions Applied
3	QB Court Security Report	29(1)

Report Two

Page Numbers	Description	Exemptions Applied
7	Major Themes	15(1)(m), 17(1)(a)
8 to 10	Recommendations	17(1)(a)
11	Discussion, Finding and Recommendations	17(1)(a)
12 to 17, 19 to 21	Policy and Procedure	15(1)(m) (on page 16), 17(1)(a)
22	Best Practices working with Police	17(1)(a)
23	Assessment by Ministry	17(1)(a)
25	Appendices	29(1)
30	Appendix D	13(1)(b), 15(1)(m)
31	Appendix E	15(1)(m)

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[11] Justice is a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did Justice meet the legislated timeline to respond to the access to information request?

[12] Subsection 7(2) of FOIP requires a government institution to respond to an applicant within 30 calendar days of receiving an access to information request. Subsection 7(2) of FOIP provides as follows:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

- (a) stating that access to the record or part of it will be given on payment of the prescribed fee and setting out the place where, or manner in which, access will be available;
- (b) if the record requested is published, referring the applicant to the publication;
- (c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;
- (d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;
- (e) stating that access is refused for the reason that the record does not exist;
- (f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4); or
- (g) stating that the request has been disregarded pursuant to section 45.1, and setting out the reason for which the request was disregarded.

[13] *The Legislation Act*, SS 2019, c L-10.2, establishes general rules governing the interpretation of all statutory instruments in the province. Section 2-28 of *The Legislation Act* provides guidance on the computation of time and can be applied to the 30-day calculation as follows:

- The first day the access to information request is received is excluded in the calculation of time;

- If the due date falls on a holiday, the time is extended to the next day that is not a holiday; and
- As FOIP expresses the time in number of days, this is interpreted as 30 calendar days, not business days.

[14] Justice stated it received the Applicant's access to information request on February 20, 2020. The 30th day to respond would have been March 21, 2020. Justice provided its response to the Applicant on August 7, 2020, which is 170 days later. As such, I find Justice did not meet the legislated timeline to respond to the access to information request.

[15] Justice provided as follows with respect to why it could not meet the legislated timeline:

On March 19, 2020, the Ministry acknowledged in an email to the Applicant that the request was impacted by the global pandemic and apologized for any inconvenience the delay may cause. Please see Appendix B. During the time when this request was received and processed, the Government of Saskatchewan was going through the beginnings of a global pandemic. Work from home orders were mandated which limited resources for the staff within the Access and Privacy Branch. In March 2020 to June 2020, the Director and Supervisor were the only staff managing requests while developing work from home processes for access to information requests received by the Ministry. Due to the pandemic, staffing redeployments and term renewals greatly decreased the resources typically available for responding to access to information requests. The decrease in resources during a global pandemic were the major cause of this file not being compliant with the legislated time frames allotted to access to information requests.

[16] The provincial lockdown occurred on March 20, 2020, which was a day before Justice's response to the Applicant was due. After that, it took Justice an additional 140 days to provide its response to the Applicant. While it is understandable the lockdown and staffing issues required Justice to adjust its activities and contributed to delays, an additional 140 days to respond is excessive. I say this in light of the fact that Justice acknowledged to the Applicant, and agreed to provide them with, the records in question on March 12, 2020. This left Justice 10 days to prepare the record for disclosure before 30 days would have elapsed, which included applying redactions to 20 pages. I am unclear, then, why even with limited resources it took Justice an additional 140 days to process the access to information request. If resources remain an issue for Justice in meeting its deadlines, I

recommend it increase its resources so that it is able to respond to access to information requests within legislated timelines.

3. Did Justice properly apply subsection 17(1)(a) of FOIP?

[17] Subsection 17(1)(a) of FOIP provides as follows:

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 *Guide to FOIP, Chapter 4: Exemptions from the Right of Access*, Updated: February 4, 2020, at page 119 (Guide to FOIP) states that subsection 17(1)(a) of FOIP is a discretionary, class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council.

[19] The two-part test for subsection 17(1)(a) of FOIP is as follows:

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

(Guide to FOIP, p. 120)

[20] Justice applied subsection 17(1)(a) of FOIP to record 2 as follows:

Page Numbers	Description
7	Major Themes
8 to 10	Recommendations
11	Discussion, Finding and Recommendations

12 to 17, 19 to 21	Policy and Procedure
22	Best Practices working with Police
23	Assessment by Ministry

[21] I note Justice also applied subsection 15(1)(m) of FOIP to the same portions of record 2 on pages 7 and 16; if I find that subsection 17(1)(a) of FOIP applies, then I do not need to consider Justice’s application of subsection 15(1)(m) of FOIP to these same portions.

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

[22] In its submission, Justice states the portions of the records where it applied subsection 17(1)(a) of FOIP include advice, recommendations and analyses.

[23] *Advice* is guidance offered by one person to another. It can include 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 encompasses material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It can be an implied recommendation. The “pros and cons” of various options also qualify as advice. It should not be given a restricted meaning. Rather, it should be interpreted to include an opinion that involves exercising judgement and skill in weighing the significance of fact. It includes expert opinion on matters of fact on which a government institution must make a decision for future action (Guide to FOIP, pp. 120 to 121).

[24] 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 (Guide to FOIP, pp. 120 to 121).

[25] Advice has a broader meaning than recommendations. The legislative intention was for advice to have a distinct meaning from recommendations. Otherwise, it would be redundant. While “recommendation” is an express suggestion, “advice” is simply an implied recommendation (Guide to FOIP, pp. 120 to 121).

[26] A *recommendation* is a specific piece of advice about what to do, especially when given officially; it is a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious. Recommendations relate to a suggested course of action more explicitly and pointedly than “advice”. It can include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised. It includes suggestions for a course of action as well as the rationale or substance for a suggested course of action. A recommendation, whether express or inferable, is still a recommendation (Guide to FOIP, pp. 120 to 121).

[27] *Analyses* (or analysis) is the detailed examination of the elements or structure of something; the process of separating something into its constituent elements (Guide to FOIP, pp. 120 to 121).

[28] Record 2 (the report) itself states its purpose is to, “conduct a review and risk assessment of the Court of Queens [sic] Bench Court Sheriff and Deputy Sheriff positions and duties. The consultant in this report provides recommendations on how best to carry out these duties safely”. In terms of its arguments for how it applied subsection 17(1)(a) of FOIP to the record, Justice stated as follows:

- Page 7 – “This information is an analysis of the themes that emerged relating to the risks involved and the issues surrounding...”
- Page 8 to 10 – “The information withheld are recommended courses of action and as such qualify as recommendations”.
- Page 11 – “provides a perspective regarding how responding to local issues over time has impacted the evolution of the Queen’s Bench Sheriff’s position... it is an analysis”.
- Page 12 – “the author draws out themes from interviews conducted regarding policies. The themes qualify as analysis because they provide a perspective to better understand the policies. The analysis supports the two recommendations withheld on page 12 and the two recommendations at the top of page 13. These four recommendations are recommended courses of action and qualify for the exemption provided for in clause 17(1)(a).

- Page 13 – “This information is an analysis of the procedures and this analysis supports the four recommendations that follow”.
- Page 14 – “The information that has been withheld prior to Recommendation 11 is advice. The information is an expression of opinion on prudent future action regarding... This advice supports the recommendation that follows and that has been withheld.”
- Page 15 – “the author offers guidance on the topic of... and this guidance qualifies as advice. The advice supports Recommendation 13, which is a recommended course of action”.
- Page 16 – “The first paragraph withheld is an analysis because it examines an issue critically. The first sentence in the second paragraph is a recommended course of action regarding the issue. The second sentence in that paragraph is advice because it offers an opinion that supports the recommendation. Recommendation 15 and 16 and the sentence in between these two recommendations are all recommendations. They recommend a specific course of action”.
- Page 17 – “The information that has been withheld is an analysis because the Report probes an issue and provides perspective to understand the issue better, including the drawbacks with the current practice and how if these were addressed, what a future state could include regarding intelligence and information. The analysis supports Recommendation 18, which is a suggested course of action”.
- Page 19 – “The information withheld is an analysis because it includes is a discussion of information gathered during interviews and provides an opinion on policy related matters that may explain the themes that were drawn from the interviews. The information withheld also examines the... and draws inferences from them regarding... Recommendation 21 flows from this analysis and is a suggested course of action”.
- Page 20 – “The author focuses on an important theme that emerged from the interviews and provides an explanation for that theme. The second set of information that has been withheld provides some context around.... Both sets of information qualify as analysis because they discover something through close examination. Recommendation 23 is the result of this analysis and is a recommended course of action that should also be withheld on the basis of clause 17(1)(a)”.
- Page 21 – “Recommendations 24 to 27 and the first block of information that has been withheld recommend a course of action and qualify as recommendations. The first block of information that has been withheld restates previous recommendations withheld on the basis of clause 17(1)(a). The information that has been withheld between Recommendation 24 and 25 offers guidance in regards to.... The information that proceeds [sic] Recommendation 26 is analysis because it explains...”.

- Page 22 – “the information before Recommendation 29 contains a recommendation and advice regarding the best practice... The first sentence is a recommended course of action and the two sentences that follow provide an opinion as to the benefits of the course of action. Recommendation 29 is a recommended course of action”.
- Page 23 – “the Report addresses an earlier Review that was conducted and the information that has been withheld is where there has been overlap between the two. This information is analysis regarding certain issues that were examined and a specific course of action recommended (i.e. a recommendation). This information falls within the purview of analysis and recommendation and clause 17(1)(a) has been properly applied.

[29] From a review of the materials, I am satisfied the information qualifies as *analyses* and *recommendations* as defined. As such, the first part of the test is met for these portions of record 2.

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

[30] *Developed by or for* means the advice, proposals, recommendations, analyses and/or policy options must have been created either: 1) within the government institution, or 2) outside the government institution but for the government institution (for example, by a service provider or stakeholder). For information to be developed by or for a government institution, the person developing the information should be an official, officer or employee of the 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 (Guide to FOIP, p. 122).

[31] I note from the portions released to the Applicant, the report itself on page 3 states it was completed by “Consultant, Retired Deputy Chief Bernie Pannell M.O.M” who was “contracted on October 1, 2018 by Court Services Branch of the Saskatchewan Ministry of Justice...” The report was submitted to the Executive Director, Course Services, Ministry of Justice and Attorney General, on January 9, 2019. As the report was contracted by Justice for the purposes of making a decision, it meets the second part of the test. As such,

I find Justice has properly applied subsection 17(1)(a) of FOIP to record 2 as outlined at paragraph [20] of this Report; I recommend Justice continue to withhold these portions pursuant to subsection 17(1)(a) of FOIP. I do not need to consider subsection 15(1)(m) of FOIP on pages 7 and 16 of record 2.

4. Did Justice properly apply subsection 15(1)(m) of FOIP?

[32] Subsection 15(1)(m) of FOIP provides as follows:

15(1) A head may refuse to give access to a record, the release of which could:

...
(m) reveal the security arrangements of particular vehicles, buildings or other structures or systems, including computer or communication systems, or methods employed to protect those vehicles, buildings, structures or systems.

[33] The Guide to FOIP at page 86 states that subsection 15(1)(m) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reveal the security arrangements of particular vehicles, buildings or other structures or systems, including computer or communication systems, or methods employed to protect those vehicles, buildings, structures or systems.

[34] The following two-part test can be applied. However, only one of the questions needs to be answered in the affirmative for the exemption to apply. There may be circumstances where both questions apply and can be answered in the affirmative:

1. Could release reveal security arrangements (of particular vehicles, buildings, other structures or systems)?
2. Could release reveal security methods employed to protect the particular vehicles, buildings, other structures or systems?

(Guide to FOIP, p. 87)

[35] I only need to consider Justice's application of subsection 15(1)(m) of FOIP to pages 30 (Appendix D) where it applied on the table, and on page 31 (Appendix E) of report 2.

- [36] Section 15 of FOIP uses the word “could” versus “could reasonably be expected to” as seen in other provisions of FOIP. The threshold for “could” is lower than the threshold for “could reasonably be expected to” (Guide to FOIP, p. 43).
- [37] *Reveal* means to make known; cause or allow to be seen (Guide to FOIP, p. 87).
- [38] *Security* means a state of safety or physical integrity. The security of a building includes the safety of its inhabitants or occupants when they are present in it. Examples of information relating to security include methods of transporting or collecting cash in a transit system; plans for security systems in a building; patrol timetables or patterns for security personnel; and the access control mechanisms and configuration of a computer system. Security means sufficient security (Guide to FOIP, p. 87).
- [39] *Method* means a mode of organizing, operating, or performing something (Guide to FOIP, p. 88).
- [40] In its submission, Justice stated as follows with respect to its reliance on subsection 15(1)(m) of FOIP:

The Ministry agrees that a lower standard applies when the language used in an exemption is “could.” The Ministry submits Merck Frosst is informative on this point and helps establish that the lower standard should be a harm that is possible; the standard is not so low that the harm is fanciful, imaginary or contrived. The Ministry submits it has met this standard and that the harm discussed below is possible.

Deputy Sheriffs provide security services as assigned within the Courts of Saskatchewan to ensure a safe and secure environment for all users of court facilities. This includes to secure the operation of detention areas within court facilities, conducting perimeter screening in accordance with The Court Security Act, the maintenance of good order in all areas of court facilities, and the assessment and management of threats to courts and court participants. The duties performed by the Deputy Sheriffs are an integral component of the administration of the court and in achieving the goals and objectives of the Court Services Branch.

As Peace Officers, Deputy Sheriffs operate under the Criminal Code of Canada, The Court Officials Act, 2012, and The Court Security Act.

For Record 2, on page 30, there is a chart that provides a summary of Queen's Bench Sheriff's Departments in different jurisdictions. Deputy Sheriffs provide and maintain a safe and secure setting for all persons within a court location, including security in the courtroom and holding cells. The information in the chart that has been withheld is on the basis of clause 15(1)(m) because the information reveals Saskatchewan's answers to the functions that the Queen's Bench Deputy Sheriff's perform.

On page 31, there is another chart that is a summary of a provincial enforcement agency scan. The answers were provided by various agencies and detail the equipment used, civil enforcement functions and whether use of force policies are in place and members armed. The agencies are all ones that operate in Saskatchewan. The responses identify methods used by these agencies, including training to protect vehicles, buildings, including but not limited to Court Houses and structures. The responses by their nature also identify potential security gaps.

[41] Upon review of pages 30 and 31 of report 2, I am satisfied that the information withheld pursuant to subsection 15(1)(m) of FOIP, if disclosed, could reveal security measures in place at the specified court houses in Saskatchewan. This information is intended to protect the building and structures. To some, such information may also identify potential security gaps. As such, I find Justice properly applied subsection 15(1)(m) of FOIP to page 30 and 31 of report 2; I recommend Justice continue to withhold this information pursuant to subsection 15(1)(m) of FOIP.

5. Did Justice properly apply subsection 13(1)(b) of FOIP?

[42] Subsection 13(1)(b) of FOIP provides as follows:

13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:

...

(b) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;

[43] The Guide to FOIP at page 22 states that subsection 13(1)(b) of FOIP is a mandatory, class-based exemption. It permits refusal of access to information in a record where the information was obtained in confidence, implicitly or explicitly from another provincial or territorial government in Canada unless there is consent to release or the information was

made public. It includes the province or territory's agencies, Crown corporations and other institutions.

[44] The three-part test for subsection 13(1)(b) of FOIP is as follows:

1. Was the information obtained from the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions?
2. Was the information obtained implicitly or explicitly in confidence?
3. Is there consent to disclose the information or has the information been made public?

(Guide to FOIP, p. 22)

[45] Justice applied subsection 13(1)(b) of FOIP to page 30 of record 2. I note the information that has been withheld is information in a table concerning Alberta, British Columbia, Manitoba, Ontario, Prince Edward Island, Quebec and Yukon. The information is the same type of information Justice withheld regarding Saskatchewan court houses pursuant to subsection 15(1)(m) of FOIP. I found that subsection 15(1)(m) of FOIP applied to Saskatchewan's information because release could reveal court house security or potential vulnerabilities.

- 1. Was the information obtained from the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions?*

[46] Upon review of the record, I am able to determine that governments of another province or territory of Canada, or its agencies, Crown corporations or other institutions, were consulted as part of the jurisdictional research that forms part of the report. As such, the first part of the test is met.

- 2. Was the information obtained implicitly or explicitly in confidence?*
- 3. Is there consent to disclose the information or has the information been made public?*

- [47] *Obtained* means to acquire in any way; to get possession of; to procure; or to get a hold of by effort. A government institution could obtain information either intentionally or unintentionally. It can also include information that was received indirectly provided its original source was the government of another province or territory of Canada. However, to obtain information suggests that the government institution did not create it (Guide to FOIP, p. 22).
- [48] *Information* means facts or knowledge provided or learned as a result of research or study (Guide to FOIP, p. 23).
- [49] *In confidence* usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained in confidence means that the provider of the information has stipulated how the information can be disseminated. In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the public body and the party that provided the information (Guide to FOIP, p. 23).
- [50] *Implicitly* means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential (Guide to FOIP, p. 24).
- [51] *Explicitly* means that the request for confidentiality has been clearly expressed, distinctly stated or made definite. There may be documentary evidence that shows that the information was obtained with the understanding that it would be kept confidential (Guide to FOIP, p. 25).
- [52] Subsection 13(1)(b) of FOIP has a built-in exception. The information contained in the record can be disclosed if the government of the other province or territory (or its agencies, Crown corporations or other institutions) agrees to its disclosure or if it has made the information public (Guide to FOIP, p. 24).

[53] *Consent* in this context means there is an agreement, approval or permission to disclose the information (Guide to FOIP, p. 25).

[54] *Public* in this context means the information in the record is open to view by the public. *Released to the public* means made available to the public at large either through active dissemination channels or through provision of the information at specific locations (e.g. public libraries, posted to a website) (Guide to FOIP, p. 26).

[55] In terms of its application of subsection 13(1)(b) of FOIP, Justice stated as follows:

Clause 13(1)(b) has been applied to information provided by jurisdictions in response the questionnaire that was sent to Queen's Bench Sheriffs across Canada on page 30. The questionnaire contained a statement that the results would be kept confidential. There is no consent to disclose this information and this information has not been made public.

[56] Upon review of the information provided by Justice, it appears that confidentiality was explicitly stated; that is, there was a statement of confidentiality on the survey, which means those who completed it would have had an expectation that the information would not be disclosed beyond those with a need to know. This meets the second part of the test. As it does not appear any jurisdiction gave its consent to share its information, and because the information does not appear to have been made public, the third part of the test is met. I find, therefore, Justice properly applied subsection 13(1)(b) of FOIP to page 30 of report 2; I recommend Justice continue to withhold this information pursuant to subsection 13(1)(b) of FOIP.

6. Did Justice properly apply subsection 29(1) of FOIP?

[57] Subsection 29(1) of FOIP provides as follows:

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.

[58] The Guide to FOIP at page 265 states that subsection 29(1) of FOIP protects the privacy of individuals whose personal information may be contained within records responsive to an access to information request made by someone else. Subsection 29(1) of FOIP requires a government institution to have the consent of the individual whose personal information is in the record prior to disclosing it.

[59] When dealing with information in a record that appears to be personal information, the first step is to confirm the information indeed qualifies as personal information pursuant to section 24 of FOIP (Guide to FOIP, p. 265).

[60] Justice applied subsection 29(1) of FOIP as follows:

- Page 3, record 1 (QB Court Security Report) – to the names of two judges who “set up interviews”; and
- Page 25 (Appendices), record 2 – to the home address, telephone, cell phone numbers and email address of the report’s author.

[61] In terms of its reliance on subsection 29(1) of FOIP, Justice stated as follows:

For Record 1, page 3, the names of the Queen’s Bench Justices have been withheld because they are not employees of the Government of Saskatchewan and the Interim Report outlines their role in setting up and completing interviews, which would be captured by the definition of work history and falls under the definition of employment history pursuant to clause 24(1)(b) of FOIP.

For Record 2, on page 25, the address, home and cell phone number and email address of the author of the Report have been withheld. The home address and home or business phone number of an individual are captured in the definition of personal information (clause 24(1)(b)). The Ministry submits that the personal or work email address of an individual are analogous to home or business telephone number and qualify as personal information for the purposes of subsection 24(1).

[62] Justice contends in this matter that the information at question is being withheld pursuant to subsection 24(1)(b) of FOIP, which provides as follows:

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;

[63] I have found in many past reports that a name by itself is not personal information unless the name is tied to something of a personal nature. Further, in many past reports, I have stated that employment history is the type of information normally found in personnel files, such as performance reviews, evaluations, disciplinary actions taken, reasons for leaving a job or leave transactions. Employment history does not include work product, which is information generated by or otherwise associated with an individual in the normal course of performing their professional or employment responsibilities, whether in a public or private setting. In this matter, the judges were helping coordinate meetings, which was done in the course of performing their employment duties. As such, I find Justice has not properly applied subsection 29(1) of FOIP to page 3 of record 1 and recommend it release this information.

[64] With respect to page 25 of record 2, I need to consider if the home address, home telephone and cellphone numbers, and home email address of the report's author are personal information pursuant to FOIP. In Review Report 117-2018, I considered a similar situation in which the Ministry of Agriculture withheld the post office box number, city/town, province, postal code and cellphone number of an individual acting in a professional, business capacity. In that Report, I stated as follows at paragraph [21]:

[21] Based on a review of the records, I find that the information listed at paragraph [18] to qualify as business card information (except for the business number that appears in record 1, which will be discussed later). This is because it appears that Regan Boyd, Bill Boyd, and the individual who is not named in the access request is acting in the professional, business capacities. My office's Review Report 277-2016 provided that the name and contact information of non-government employees, professionals and corporate officers is treated the same as the name and contact information of government employees. In other words, the name and contact information is "business card information" and would not be information that is personal in nature:

[42] For the names and contact information of lawyers, Economy asserted that names and contact information of the lawyers is personal information about the lawyers and they are not government employees.

[43] Decisions issued by this office dealing with non-government employees, professionals and corporate officers have treated the issue of personal information in much the same way as those dealing with government employees. From a review of the pages, it is clear the lawyers are acting in their professional capacities, including a lawyer acting as legal counsel for a government institution. This type of information is considered business card information.

[65] In this matter, the author of the report was contracted by Justice to undertake a review of the security needs in Court of Queen's Bench Court Houses. As such, they were acting in a professional or business capacity in the same way I outlined in the previous paragraph. As such, I find Justice has not properly applied subsection 29(1) of FOIP to page 25 of record 2 and I recommend it release this information.

IV FINDINGS

[66] I find Justice did not meet the legislated timeline to respond to the access to information request.

[67] I find Justice properly applied subsection 17(1)(a) of FOIP to record 2 as outlined at paragraph [20] of this Report.

[68] I find Justice properly applied subsection 15(1)(m) of FOIP to pages 30 and 31 of report 2.

[69] I find Justice properly applied subsection 13(1)(b) of FOIP to page 30 of report 2.

[70] I find Justice has not properly applied subsection 29(1) of FOIP to page 3 of record 1 and to page 25 of record 2.

V RECOMMENDATIONS

- [71] I recommend Justice increase its resources so it is able to respond to access to information requests within legislated timeframes.
- [72] I recommend Justice continue to withhold the portions of record 2 as outlined at paragraph [20] of this Report where it applied subsection 17(1)(a) of FOIP.
- [73] I recommend Justice continue to withhold the portions of the record on pages 30 and 31 of report 2 where it applied subsection 15(1)(m) of FOIP.
- [74] I recommend Justice continue to withhold the portions of the record on page 30 of report 2 where it applied subsection 13(1)(b) of FOIP.
- [75] I recommend Justice release the portions of the records on page 3 of record 1 and on page 25 of record 2 where it applied subsection 29(1) of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 27th day of April, 2021.

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