

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 143/2014

Saskatchewan Research Council

Summary: Saskatchewan Research Council (SRC) received an access request for certain records. In response, SRC provided some responsive records, indicated that some did not exist and that others were being withheld pursuant to sections 17 and 22 of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that SRC performed a reasonable search for records and that subsection 17(1)(a) of FOIP applied to the withheld record.

I BACKGROUND

[1] The Saskatchewan Research Council (SRC) received an access to information request from the Applicant on July 14, 2014. The request contained an enumerated list of seven items. SRC responded in a letter dated August 11, 2014. The letter indicated that records responsive to items one to three did not exist. SRC provided records responsive to item four. Finally, it indicated that there were limited records responsive to items five to seven and they would be withheld pursuant to sections 17 and 22 of *The Freedom of Information and Protection of Privacy Act* (FOIP). Other records responsive to items five through seven did not exist.

[2] On November 25, 2014, my office received a request for review from the Applicant indicating that he was dissatisfied with SRC's response to items five to seven. On December 16, 2014, my office issued notification to both SRC and the Applicant of the office's intention to undertake a review.

II RECORDS AT ISSUE

- [3] The record at issue is a two paged e-mail. SRC has applied subsections 17(1)(a), (b), (f) and 22 of FOIP to the record. SRC's submission has also detailed its search efforts for other responsive records.

III DISCUSSION OF THE ISSUES

- [4] SRC qualifies as a government institution pursuant to subsection 2(d)(ii) of FOIP and Part I of the Appendix in the FOIP Regulations.

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

- [5] Subsection 17(1)(a) of FOIP states:

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

- [6] My office has an established test for this exemption as follows:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. The advice, recommendations, proposals, analyses and/or policy options:
 - i. must be either sought or expected, or be part of the responsibility of the person who prepared the record;
 - ii. be prepared for the purpose of doing something, such as taking an action or making a decision; and
 - iii. involve 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?

First Part of the Test

- [7] SRC's submission does not specifically state what the information in the responsive record would qualify as. This office has defined advice as "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." Upon reviewing the record, I agree that the record qualifies as advice.

Second Part of the Test

- [8] SRC's submission does not specifically address the questions asked in this part of the test. However, upon reviewing the record, it is clear that the e-mails were sent from SRC officers to SRC Board Members. The e-mail also indicates that the advice was also made by external legal counsel of SRC. It would be the responsibility of the SRC officers and external legal counsel to provide this kind of advice to board members. The advice was prepared so that the Board members could take action if a certain situation arose. Finally, from review of the record, it would be the members of the Board that would have to implement the actions. As such, the record meets this part of the test.

Third Part of the Test

- [9] Finally, I must determine if the information was developed by or on behalf of SRC. My office has stated in the past that the person developing the information should be an official, officer or employee of the public body, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the public body. The role of the individuals involved should be explained by the public body. In its submission, SRC explained that:

...the persons involved in developing this information were SRC's external legal counsel and officers or employees of SRC (i.e. the Privacy Officer, Chief Financial Officer, and other employees of SRC) who were contracted or employed to provide these services and/or advice and who have a clear connection to SRC, and the information was developed for SRC's Board of Directors.

- [10] As such, the third part of the test is met. Subsection 17(1)(a) applies to the record. I do not need to consider any other exemptions.

2. Did SRC conduct a reasonable search for the records?

[11] 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.

[12] Section 5 is clear that access can be granted provided the records are in the possession or under the control of the government institution.

[13] The Applicant's request was for briefing material for SRC's Board of Directors and Executive Team on a certain subject as well as meeting minutes for both Board and Executive Team for a certain day. SRC identified one record which qualifies as briefing material. It is discussed under issue one in this report. SRC indicated to the Applicant that other responsive records did not exist.

[14] FOIP does not require a government institution to prove with absolute certainty that records do not exist. It must however, demonstrate that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request. The threshold that must be met is one of "reasonableness". In other words, it is not a standard of perfection, but rather what a fair and rational person would expect to be done or consider acceptable.

[15] To ensure a complete and adequate search, government institutions should utilize a search strategy which could include consideration of the following:

- Were records in any form or format considered (i.e. electronic, paper, and other)?
- Is the original access request broad and does it include information developed over a wide open time period? If so, determine how you will define the search?
- How do you intend to conduct the search for records in the public body's possession?
 - Do you search yourself?
 - Do you delegate others to do the search? If so, how can you be sure that the search was comprehensive?
 - Do you send out an email to other units, etc.?

- Could records also exist that are responsive but are not in your possession, but in your control?
- Did agents, consultants or other contracted services have any role in the project the access request is referencing? If yes, should these records be included?

[16] When providing details of search efforts to our office, generally, the details should include:

- Who conducted the search?
- On what dates did each employee search?
- What was the search strategy?
 - For paper files; and
 - For electronic files (i.e. what key terms were used to search)?
- Which files or departments were searched and why?
- How long did the search take for each employee?
- What were the results of each employees search?
- Are there any additional program areas that should be searched in order to ensure that every reasonable effort was made?
- Have staff searched files held apart from the main department files (such as those held by individual employees), or records stored off-site?

[17] SRC must establish that it has conducted a reasonable search for the records requested.

[18] In its August 11, 2014 response to the Applicant, SRC indicated that the meetings in question were not formal meetings, no minutes were taken and no materials were distributed at the meetings, which were held by teleconference.

[19] SRC's submission provided details of its search. One of its vice presidents was in charge of searching and provided an affidavit which described the search. The affidavit indicates that she considered what form responsive records would take, the time periods and different locations to search. She consulted with colleagues who would have direct knowledge of any records. She asked recording secretaries for the Board and Executive teams if any minutes were recorded that may have occurred in verbal briefings. She reviewed electronic records regarding verbal briefings for the Board and Executive teams. The affidavit indicated that the Board and Executive team meeting minutes are maintained electronically, therefore no other offices were searched. E-mail accounts of the previous Chief Financial Officer and Privacy Officer were searched.

[20] The affidavit concludes one record was found which would qualify as briefing material. However, no minutes of meetings for the Board or Executive Team were found for the date in question.

[21] I am convinced that SRC has performed a reasonable search.

IV FINDINGS

[22] Subsection 17(1)(a) of FOIP applies to the record.

[23] I find SRC has performed a reasonable search for records.

V RECOMMENDATIONS

[24] I recommend that SRC take no further action.

Dated at Regina, in the Province of Saskatchewan, this 20th day of February, 2015.

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