



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **REVIEW REPORT 160-2019, 161-2019, 162-2019**

### **eHealth Saskatchewan**

**February 27, 2020**

**Summary:**

The Applicant received information from eHealth Saskatchewan (eHealth) in January 2019. Then, the Applicant submitted three access to information requests based on the information they had received. eHealth responded to the Applicant by indicating that no records exist for each of the three access requests. The Commissioner found that eHealth did not meet its duty to assist, that eHealth did not provide a reasonable explanation as to why records do not exist, and that eHealth did not respond within the legislated timeline. The Commissioner made several recommendations including that eHealth release certain records to the Applicant, that eHealth adjust its processes so that it takes liberal and broad interpretations of access requests, and that eHealth communicate with applicants at an early stage and throughout the processing of access requests.

## **I BACKGROUND**

- [1] Prior to submitting three access to information requests to eHealth Saskatchewan (eHealth), the Applicant was corresponding with eHealth from November 2018 to January 2019. In the course of their correspondence, on January 8, 2019, eHealth sent the Applicant a table. A portion of the table is below:

Vendor	Total Equipment Price (1)	Type of Equipment
Powerland (reseller)	\$17,076,363	Servers, storage, network connectivity, security, professional services to support provincial delivery of IT for the health system

[2] Then, on January 17, 2019, the Applicant submitted the following three access to information requests to eHealth:

Please provide the RFP that resulted in a \$17,076,363 contract with Powerland - financed through Cisco Systems Capital. Please provide Powerland's response to that RFP and provide every other response to that RFP as well. (Herein referred to as Access Request #1.)

Please provide the \$17,076,363 contract with Powerland - financed through Cisco Systems Capital including all appendices. (Herein referred to Access Request #2.)

Please provide all of Wilbour Craddock's work product related to a \$17,076,363 contract with Powerland - financed through Cisco Systems Capital. (Herein referred to as Access Request #3.)

[3] In three separate letters dated May 22, 2019, eHealth responded to each of the access requests the same way – that records do not exist.

[4] Then, the following day, on May 23, 2019, eHealth's Interim Director, Communications emailed the Applicant the following:

Hi [Name of Applicant],

The \$17 million value of goods and services is captured within an agreement between Cisco Systems Capital Canada Inc. and Powerland.

**Background:**

In 2014, eHealth entered into a Master Agreement for financing through Cisco Systems Capital Canada Inc.

In 2015, eHealth Saskatchewan issued an invitation to tender for a value added reseller for the supply of data center infrastructure. After Powerland was deemed the successful reseller, eHealth requested quotes for the cost of goods and services from Powerland. Once eHealth received the quotes from Powerland, eHealth and Cisco Systems Capital Canada Inc. then discussed the financing terms. When eHealth and Cisco Systems Capital Canada Inc. agreed to the terms, Powerland issued a purchase order to Cisco Systems Capital Canada Inc. Cisco then paid Powerland the purchase order amount and eHealth entered into a Schedule to the Master Agreement with Cisco Systems Capital Canada Inc. for the financing.

[5] On May 24, 2019, the Applicant requested reviews by my office.

[6] On June 7, 2019, my office notified both the Applicant and eHealth that it would be undertaking reviews into eHealth's responses to each of the access requests.

## II RECORDS AT ISSUE

[7] At issue is eHealth's responses to the Applicant indicating the records that they wish to access do not exist. Therefore, there are no records at issue.

## III DISCUSSION OF THE ISSUES

### 1. Does *The Freedom of Information and Protection of Privacy Act* (FOIP) apply and do I have jurisdiction to review this matter?

[8] eHealth is a "government institution" as defined by subsection 2(1)(d)(ii) of FOIP, and section 3 and Part I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Therefore, I find that FOIP applies and I have jurisdiction to review this matter.

### 2. Has eHealth met the duty to assist?

[9] Subsection 5.1(1) of FOIP provides that government institutions must respond openly, accurately and completely to access requests. Subsection 5.1(1) of FOIP provides as follows:

**5.1(1)** Subject to this Act and the regulations, a government institution shall respond to a written request for access openly, accurately and completely.

[10] To determine if eHealth has met the duty to assist, I must determine if eHealth has responded openly, accurately and completely to the Applicant's three access requests. To make such a determination, I must also analyze if eHealth has conducted a reasonable search for records and if it has provided my office with a reasonable explanation of why records do not exist.

**a. Openly**

[11] To respond openly to an access request, government institutions must be transparent and provide explanations of the processes, actions and decisions taken to respond to an access request.

[12] As it will be discussed later in this Report, eHealth took the position that since it did not have a \$17,076,363 contract with Powerland, that no records exist in response to Access Request #2. Since no such contract exists, then there would be no related RFP, which is what the Applicant requested in Access Request #1. Finally, since no such contract exists, then there would be no work product by Wilbour Craddock, which is what the Applicant requested in Access Request #3.

[13] However, after formally responding to the Applicant on May 22, 2019, stating that no records exist, eHealth's Interim Director, Communications sent an email dated May 23, 2019 to the Applicant stating that the \$17 million value of goods and services is captured within "an agreement" between Cisco Systems Capital Canada Inc. (Cisco) and Powerland. In the course of my office's review, eHealth clarified to my office that eHealth itself is not a party to the agreement between Cisco and Powerland. It also asserted that the \$17 million agreement is not in eHealth's possession or control. I will discuss this below.

**b. Accurately**

- [14] In order to respond accurately to an access request, government institutions must have an accurate understanding of the record(s) the Applicant is seeking. As said earlier, most applicants do not have a sophisticated understanding of what records a government institution has. Therefore, when it receives an access request, the government institution should make sure it has an accurate understanding of what the Applicant is seeking.
- [15] In its submission, eHealth provides that since the wording in the three access requests are clear and concise, it did not need clarification from the Applicant. However, I find that there are circumstances that should have prompted eHealth to contact the Applicant to clarify the access requests. For example, eHealth explained that it had already provided the Applicant with all contracts and agreements it has with Cisco or Powerland on June 4, 2019 and June 5, 2019, in response to two previous requests submitted by the Applicant. If eHealth believed it had already provided all the contracts and agreements to the Applicant in response to two previous access requests, then it should have contacted the Applicant to explain this and to allow the Applicant to possibly clarify and reformulate their access requests.
- [16] Another circumstance that should have prompted eHealth to clarify the access requests is that based on its May 23, 2019 email to the Applicant, eHealth's Interim Director, Communications explained that eHealth issued an "invitation to tender" and not an RFP. The Applicant sought an RFP in Access Request #1. It is confusing as to why eHealth waited until the day after it formally responded to the Applicant in order to clarify this point. eHealth should have contacted the Applicant in the course of processing Access Request #1 to determine if the Applicant was seeking the "invitation to tender" instead of an RFP.
- [17] The wording of an access request being clear and concise is not always a sufficient reason for not contacting the Applicant to seek clarification. After all, applicants should not be penalized for being clear and concise. They should not also have to write lengthy and confusing access requests in order to prompt a government institution to contact them to

clarify requests. Applicants often don't have a sophisticated understanding of a government institution's record holdings, so government institutions should be contacting Applicants to clarify access requests.

**c. Completely**

[18] In order to respond to an access request completely, the government institution should make every reasonable effort to search all locations where responsive records may be found.

**i. Has eHealth provided a reasonable explanation as to why records do not exist?**

[19] Section 5 of FOIP provides individuals with the right of access to records in the possession or control of a government institution:

**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.

[20] Government institutions must grant access to records in their possession or control subject to any exemptions in Parts III and IV of FOIP. When my office conducts a review where the government institution has indicated that records do not exist, my office will review the government institution's search efforts. FOIP does not require that a government institution prove with absolute certainty that records responsive to an access to information request do not exist. It must, however, demonstrate that it has conducted a reasonable search to locate the records. A reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the access request. A reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances. Examples of information that government institutions can provide to my office are as follows:

- For personal information requests – explain how the individual is involved with the public body (i.e. client, employee, former employee etc.) and why certain departments/divisions/branches were included in the search.
- For general requests - tie the subject matter of the request to the departments/divisions/branches included in the search. In other words, explain why certain areas were searched and not others.
- Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
- Explain how the records management system is organized (both paper & electronic) in the departments/divisions/branches included in the search:
  - Describe how records are classified within the records management system. For example, are the records classified by:
    - alphabet
    - year
    - function
    - subject
  - Consider providing a copy of your organizations record schedule and screen shots of the electronic directory (folders & subfolders). If the record has been destroyed, provide copies of record schedules and/or destruction certificates
  - Explain how you have considered records stored off-site.
  - Explain how records that may be in the possession of a third party but in the public body's control have been searched such as a contractor or information service provider.
  - Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Which folders within the records management system were searched and explain how these folders link back to the subject matter requested?
  - For electronic folders – indicate what key terms were used to search if applicable.
- On what dates did each employee search?
- How long did the search take for each employee?
- What were the results of each employee's search?

- Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided. For more on this, see the IPC resource, Using Affidavits in a Review with the IPC available on our website.

[21] The above list is meant to be a guide. Each case will require different search strategies and details depending on the records requested.

[22] Below is a description of eHealth's search efforts.

Access Request #1 and Access Request #2

[23] In Access Requests #1 and #2, the Applicant sought a copy of an RFP and a copy of a contract. In its submission, eHealth explained that its RFPs are organized by year and then by numeric file number assigned to each RFP. Contracts are organized in the same way. The Manager, Contracts and Procurement spent two hours searching through its network drive for the RFP and contracts specified in the access requests for years 2014 to 2016. The Manager located a schedule to a Master Service Agreement that eHealth has with Cisco that may be responsive to the Applicant's request. However, eHealth determined it was not because it is not a contract with Powerland. eHealth said the following in its submission:

The result of the search found a Schedule to the Master Service Agreement with Cisco that the Manager believed could be related to the requests; however, this was not a contract with Powerland nor did any of the payments outlined within the Schedule total the specified amount in the requests. Given that the search for the contract specified in all three requests was carried out first and found no records responsive, it was determined that no RFP exists. Since no contract was found in response to eH 48-18G there could be no RFP as requested in eH 47-18G and therefore no further search was required.

[24] Since eHealth determined that the contract specified by the Applicant in Access Request #2 does not exist, then it concluded there would be no RFP that was requested in Access Request #1.



[25] When the Manager located the Schedule to the Master Service Agreement with Cisco and thought that it *may* have been responsive to the request, eHealth should have contacted the Applicant to determine if this was the type of record that they were seeking in response to Access Request #2. Further, my office has said in the past that the purpose of FOIP is best served when the government institution adopts a liberal interpretation of an access request. If eHealth had any doubts whether this Schedule to the Master Service Agreement with Cisco was the record the Applicant sought, then eHealth should have contacted the Applicant and sought clarification. eHealth did not.

Access Request #3

[26] In Access Request #3, the Applicant sought the work product of Wilbour Craddock related to a \$17,076,363 contract with Powerland. In its submission, eHealth explained that Wilbour Craddock is no longer at eHealth. Therefore, the following are the employees who were involved in the search for records:

- Director, Service Design and Delivery
- Director, Finance
- Manager, Contracts and Procurement

[27] The Director, Service Design and Delivery searched through Wilbour Craddock's Outlook mailbox (both the active and archived emails). They used the keyword "Powerland" to conduct the search. However, since eHealth already determined that the contract specified by the Applicant did not exist, then eHealth also determined that none of the emails would be related to such a contract.

[28] Further, the Manager, Contracts and Procurement asserted that since the contract requested under Access Request #2 did not exist, then there would be no associated work product. As such, the Manager, Contracts and Procurement said there was no further search efforts required.

[29] The Director, Finance did not have anything to provide in terms of efforts to search for records.

[30] eHealth's explanation for why no records exist is hinged upon the fact that the Applicant specified an exact dollar amount in the three access requests and its position is that a \$17,076,363 contract with Powerland does not exist. Since such a contract does not exist, then there is no corresponding RFP or work product. While I understand the logic, I find that eHealth's explanation as to why records do not exist is not reasonable. eHealth did not make any effort to clarify the three access requests with the Applicant even though circumstances should have prompted it to do so. As noted earlier, eHealth sent an email dated May 23, 2019 to the Applicant (one day after it formally responded to the three access requests) indicating a \$17 million agreement between Cisco and Powerland existed. In that same email, eHealth explained the business relationship between eHealth, Cisco, and Powerland. It would have been helpful if eHealth provided such information to the Applicant in the course of processing the access request and indicated to the Applicant what records it does indeed have in its possession or control that relates to the \$17 million agreement between Cisco and Powerland. This would have enabled the Applicant to reformulate the three access requests. It is unhelpful to provide such information to the Applicant after processing the access request. By providing such information after processing the request, it would appear that eHealth is not acting within the spirit of FOIP. That is, it appears that eHealth is not being transparent and accountable to the Applicant.

[31] I find that eHealth has not met its duty to assist. I also find that eHealth has not provided a reasonable explanation as to why records do not exist.

[32] I recommend that eHealth release the following to the Applicant within 30 days of issuance of this Review Report, after applying any mandatory or discretionary exemptions:

- The invitation to tender referenced in the May 23, 2019 email by the Interim Director, Communications to the Applicant;
- All the tenders, including Powerland's tender, that eHealth received in response to the invitation to tender referenced in the May 23, 2019 email by the Interim Director, Communications to the Applicant;

- The agreement that captures \$17 million value of goods and services referenced in the May 23, 2019 email by the Interim Director, Communications and/or any records related to the \$17 million agreement, including Powerland, as the reseller for the supply of eHealth's data center infrastructure, quotes for the costs of goods and services from Powerland, purchase orders issued by Powerland (acting as eHealth's reseller) to Cisco, and records regarding the financing terms between eHealth and Cisco;
- The Schedule of the Master Services Agreement referenced in the May 23, 2019 email by the Interim Director, Communications to the Applicant, and also located by the Manager, Contracts and Procurement in their search for records;
- Work product by Wilbour Craddock related to the agreement that captures \$17 million value of goods and services referenced in the May 23, 2019 email by the Interim Director, Communications to the Applicant; and
- Work product by Wilbour Craddock related to the Schedule of the Master Services Agreement referenced in the May 23, 2019 email by the Interim Director, Communications to the Applicant and also located by the Manager, Contracts and Procurement in their search for records.

[33] I recommend that eHealth adjust its processes so that it takes liberal and broad interpretations of access to information requests. I recommend that, in the future, eHealth communicate with applicants at an early stage and throughout the processing of an access request to clarify access requests.

### **3. Did eHealth respond within the legislated timeline?**

[34] eHealth received the Applicant's three access requests on January 17, 2019. Subsection 7(2) of FOIP requires that the government institution respond to an applicant within 30 days. Subsection 7(2) of FOIP provides:

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

...

[35] eHealth advised my office that it sent a letter dated January 18, 2019 to the Applicant to confirm that it had received the access request and to extend the timeline to respond to the access request. Section 12 of FOIP allows government institutions to extend the timeline by a period not exceeding 30 days in specific circumstances. Even if I assume that eHealth

properly relied on section 12 of FOIP, it would have had no more than 60 days to respond to the access requests. eHealth responded on May 22, 2019, which is 125 days after it received the access requests. Therefore, I find that eHealth did not respond within the legislated timeline.

[36] My office's Review Report 171-2018, 189-2018 also deals with eHealth not responding to an access request within the legislated timeline. In that report, I had recommended that eHealth review its processes on an ongoing basis to ensure it is compliant with the legislated timelines in FOIP. I make that recommendation again. This includes ensuring that if other departments such as legal or communications need to be involved in the processing of access requests, that their involvement does not delay the processing of access requests. Further, if eHealth continues to receive a high number of complex general access requests, I recommend that eHealth increase its resources dedicated to the processing of access requests to ensure that it is responding within the legislated timelines.

#### **IV FINDINGS**

[37] I find that FOIP applies and I have jurisdiction to review this matter.

[38] I find that eHealth has not met its duty to assist.

[39] I also find that eHealth has not provided a reasonable explanation as to why records do not exist.

[40] I find that eHealth did not respond within the legislated timeline.

#### **V RECOMMENDATIONS**

[41] I recommend that eHealth release records to the Applicant as described at paragraph [32].

[42] I recommend that eHealth adjust its processes so that it takes liberal and broad interpretations of access to information requests.

- [43] I recommend that eHealth communicate with applicants at an early stage and throughout the processing of an access request to clarify access requests.
- [44] I recommend that eHealth review its processes on an ongoing basis to ensure it is compliant with the legislated timelines in FOIP. This includes ensuring that if other departments such as legal or communications need to be involved in the processing of access requests, that their involvement does not delay the processing of access requests.
- [45] If eHealth continues to receive a high number of complex general access requests, I recommend that eHealth increase its resources dedicated to the processing of access requests to ensure that it is responding within the legislated timelines.

Dated at Regina, in the Province of Saskatchewan, this 27<sup>th</sup> day of February, 2020.

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