



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 171-2018, 189-2018

eHealth Saskatchewan

October 17, 2019

Summary:

eHealth Saskatchewan (eHealth) was delayed in responding to an access to information request. Once it responded to the request, eHealth denied access to a portion of the record pursuant to subsections 13(2), 15(1)(c), 15(1)(e), 17(1)(b)(i), 17(1)(d), 18(1)(b), 22(a), 22(b), 22(c) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found eHealth did not respond within the legislative timelines provided for in FOIP and was 83 days late in responding to the Applicant's access to information request. The Commissioner also found eHealth should not have provided third party notification after the 30-day response time of June 21, 2018. The Commissioner recommended that eHealth review its processes to ensure it is compliant with the legislated timelines in FOIP. Further, the Commissioner found that some of the exemptions applied to the record, and other exemptions did not. The Commissioner recommended that eHealth continue to withhold portions of the record and release the remainder of the record.

I BACKGROUND

- [1] The Applicant submitted an access to information request to eHealth Saskatchewan (eHealth) on May 7, 2018, requesting access to:

Please provide all emails to and from [former CEO] related to concerns about possible or actual employee misconduct or misappropriation of funds in eHealth -- and provide emails to and from [former CEO] related to concerns about contracts entered into by eHealth.

- [2] On May 24, 2018, eHealth issued an estimate of costs in the amount of \$20,776.00 to the Applicant. On June 4, 2018, the Applicant narrowed the search parameters for the above request to include search terms as follows:
- [Name 1] or [first/last initial 1];
 - [Name 2] or [first/last initial 2];
 - [Name 3] or [first/last initial 3];
 - [Name 4] or [first/last initial 4]; or
 - RCMP or “Regina Police”
- [3] On June 7, 2018, eHealth sent the Applicant an amended estimate of costs for \$1,898.00. After further clarification from the Applicant, eHealth sent an updated estimate of costs on June 8, 2018, for \$489.00. On June 8, 2018, the Applicant paid a deposit of \$244.50 to proceed with work on the file.
- [4] On August 22, 2018, eHealth wrote the Applicant advising that some of the requested records may affect the interests of third parties pursuant to subsection 19(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP), and that eHealth is considering if it is in the public interest to release these records. Further, eHealth advised they are required to give the third parties the opportunity to make a submission to eHealth regarding the records. I note this letter did not include a notification of an extension of time.
- [5] On August 30, 2018, the Applicant requested a review by my office stating that they had not received a response to the request submitted 110 days ago and that they had been refused access to all or part of the record.
- [6] Through the early resolution process, my office contacted eHealth on September 5, 2018 to inquire when the Applicant could expect a response to the request. We were informed they were endeavoring to get the response out that week.

- [7] On September 6, 2018, my office notified eHealth and the Applicant of our intention to undertake a review of this matter (file 171-2018) and invited both parties to make a submission to my office. In addition, we requested that eHealth provide a response to the Applicant's request by September 13, 2018.
- [8] By letter dated September 12, 2018, eHealth responded to the Applicant's access to information request, denying access to a portion of the records pursuant to subsections 13(2), 15(1)(c), 15(1)(e), 17(1)(b)(i), 17(1)(d), 18(1)(b), 22(a), 22(b), 22(c) and 29(1) of FOIP. In addition, eHealth advised the Applicant it would be refunding all fees collected to process the request. I note that eHealth did not rely on subsection 19(1) of FOIP to deny access to a portion of the record in its response to the Applicant.
- [9] On September 12, 2018, the Applicant requested a review of the exemptions claimed by eHealth to deny access to a portion of the record.
- [10] On September 17, 2018, my office notified eHealth and the Applicant of our intention to undertake a review of the exemptions claimed by eHealth (file 189-2018) and invited both parties to make a submission.
- [11] On September 6, 2019, eHealth notified my office they were raising third party exemptions to the record pursuant to subsection 19(1) of FOIP. My office notified the third parties named by eHealth on September 18, 2019, and invited the third parties to make a submission.
- [12] On September 27, 2019, eHealth informed my office they were withdrawing its reliance on subsection 19(1) of FOIP and notified the Applicant and the third parties of the same. Therefore, this review will not consider subsection 19(1) of FOIP.

II RECORDS AT ISSUE

- [13] These reviews will focus on eHealth's delayed response to the request and whether its third party notification was provided within the legislated timelines.

[14] These reviews will also focus on the exemptions applied to the record by eHealth. The record at issue is 233 pages. eHealth released 23 pages to the Applicant in full. eHealth has withheld the remaining 210 pages in full or in part pursuant to subsections 13(2), 15(1)(c), 15(1)(e), 17(1)(b)(i), 17(1)(d), 18(1)(b), 22(a), 22(b), 22(c) and 29(1) of FOIP. When eHealth provided my office with a submission, it advised it was no longer relying on subsection 18(1)(b) of FOIP, which it had previously applied to page 188 of the record.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction to review this matter?

[15] eHealth qualifies as a government institution pursuant to subsection 2(1)(d)(ii) of FOIP. Therefore, my office has jurisdiction in this matter.

2. Did eHealth respond within the legislative time frame?

[16] The Applicant submitted the access to information request to eHealth on May 7, 2018. Subsection 7(2) of FOIP requires that a public body 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:

[17] However, eHealth issued an estimate of costs for \$20,776.00 on May 24, 2018, 17 days after the application was received. Section 9 of FOIP addresses fees. Subsections 9(3) and 9(4) of FOIP provide:

9(3) Where an estimate is provided pursuant to subsection (2), the time within which the head is required to give written notice to the applicant pursuant to subsection 7(2) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application.

(4) Where an estimate is provided pursuant to subsection (2), the head may require the applicant to pay a deposit of an amount that does not exceed one-half of the estimated amount before a search is commenced for the records for which access is sought.

- [18] For the purposes of this request, the response time was suspended at day 17, the day the estimate of costs was provided to the Applicant.
- [19] The Applicant and eHealth worked to narrow the scope of the request once the estimate of costs was received. This resulted in a second estimate of costs for \$1,898.00 being provided to the Applicant on June 7, 2018.
- [20] Further discussions with eHealth resulted in the Applicant narrowing the scope of the request. On June 8, 2018, an estimate of costs for \$489.00 was provided to the Applicant. The Applicant accepted this estimate and paid the deposit of \$244.50 that same day.
- [21] The calculation of time resumed on June 8, 2018. As noted above, 17 days had elapsed from the time the first fee estimate was provided to the Applicant; therefore, eHealth had 13 days left to respond to the request. The due date for eHealth's response to the Applicant was now June 21, 2018. eHealth responded to the Applicant on September 12, 2018.
- [22] Section 12 of FOIP provides for a 30 day extension of the response time when a prescribed circumstance exists. However, eHealth did not notify the Applicant that it was extending the response time.
- [23] When it finally responded, eHealth was 83 days late. The request was considered a deemed refusal beginning on day 31.
- [24] In its submission, eHealth provided my office with reasons for the delay in a high-level timeline. This included:
- **May 8, 2018:** eHealth received 5 ATI [access to information] requests including this one.
 - **August 21, 2018:** It was determined that notice to third parties would be required.
 - **August 22, 2018:** The response required a review by the Head. eHealth's Interim CEO [Chief Executive Officer] is also the Deputy Minister of the Ministry of

Health. Although this file was a priority for him, given the capacity of his responsibilities he is faced with balancing numerous other priorities.

- **September 4, 2018:** due to the nature of the information involved in this request and the possibility of legal implications for eHealth, it was determined that a review by eHealth's legal counsel was necessary before any records could be released.

[25] In its submission, eHealth advised my office that since May of 2018, it has received a significant increase in access to information requests. This along with a shortage of resources (i.e., vacation leaves of key resources) during the time of this request has impacted the timelines of the response to this applicant.

[26] eHealth further advised that it did not provide notice to extend the response date due to third party notifications as eHealth had not previously received access to information requests involving restoration of a mailbox, and the amount of effort and time was unknown. It advised that the request involved obtaining emails of former employees of eHealth. A process did not exist for requesting these types of records. Due to the large volume of emails involved and the amount of time it took to review the record, the initial 30-day response time in which a public body can invoke an extension of time had elapsed. eHealth noted that it has since established a process for mailbox retrievals and is committed to an ongoing process improvement.

[27] In addition, eHealth determined on August 21, 2018, that third party notification was required for this request – or 61 days after the response was due. Section 34 of FOIP outlines the process for notice of a third party. Subsection 34(2)(b) of FOIP provides:

34(2) The notice mentioned in subsection (1):

...

(b) subject to subsection (3), is to be given within 30 days after the application is made.

[28] eHealth did not provide third party notification within the 30 days of the application, as required by FOIP. Therefore, eHealth should not have provided third party notification. The third party notification should have been provided before the due date of June 21, 2018.

[29] eHealth has accepted responsibility for the delays in this request. In its submission, it notes:

eHealth recognizes we have failed to meet the timelines for this access to information request. While many factors can be attributed to the multiple delays, not only at the time the requests were received but throughout the processing, eHealth acknowledges these factors do not outweigh our obligation both under the law and to the applicant to release ATI requests within legislative timelines.

eHealth continues to be committed to processing and releasing ATI requests as quickly as possible and within legislative timelines.

eHealth has since developed and implemented procedures for requests that involve email retrieval and has revised and improved existing processes for responding to all access to information requests.

[30] I commend eHealth for accepting responsibility for the long delay in responding to the Applicant's request and appreciate that it is committed to continuous improvement. eHealth should review its practices on an ongoing basis to ensure it is responding to requests within the legislative timelines in FOIP.

[31] I find eHealth did not respond within the legislative timelines provided for in FOIP and was 83 days late in responding to the Applicant's access to information request, but has taken responsibility to change.

[32] I find eHealth should not have provided third party notification after the 30-day response time of June 21, 2018.

3. Does subsection 22(a) of FOIP apply to the record?

[33] eHealth applied subsection 22(a) of FOIP, in part or in full, to pages 19, 20, 27, 29, 31, 33, 49, 51 – 63, 64 – 109, 111 – 152, 155 – 166, 174, 176 – 178, 180, 182 – 185, 208 – 210, 214 – 218, 223 – 225, and 227 – 233. eHealth provided copies of these pages to my office.

[34] Subsection 22(a) of FOIP provides:

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

(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege.

[35] My office has established the following test for subsection 22(a) of FOIP:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Was the communication intended to be confidential?

[36] In its submission, eHealth asserted that it retained external counsel to conduct an investigation into alleged employee misconduct and to provide legal advice in relation to disciplinary options, procurement and eHealth contracts with vendors. Further, eHealth advised that the emails and attachments withheld under subsection 22(a) of FOIP are subject to solicitor-client privilege as they include correspondence between the CEO of eHealth and external legal counsel. Finally, eHealth advised that the records relate to legal advice provided by external counsel relating to findings of the investigation, disciplinary options available to eHealth, eHealth procurement and eHealth contracts with vendors.

[37] After review of the records, I am satisfied that the records are subject to solicitor-client privilege. Further, eHealth's submission supports what is required by the three-part test in order for subsection 22(a) of FOIP to apply.

[38] I am fully supportive and understanding of the public body claiming solicitor-client privilege, and I would like to commend eHealth for the manner in which they have dealt with our office in claiming that privilege. Their approach has made it easy for my office to conclude that solicitor-client privilege existed.

[39] I find subsection 22(a) of FOIP applies to the withheld information found on pages 19, 20, 27, 29, 31, 33, 49, 51 – 63, 64 – 109, 111 – 152, 155 – 166, 174, 176 – 178, 180, 182 – 185, 208 – 210, 214 – 218, 223 – 225, and 227 – 233.

4. Does subsection 29(1) of FOIP apply to the record?

[40] eHealth applied subsection 29(1) of FOIP, in part, to pages 1, 153, 167, 172, 186, 189 - 191, and 211.

[41] Subsection 29(1) of FOIP provides:

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.

[42] Subsection 24(1) of FOIP provides an enumerated list of examples of what is considered personal information under FOIP; however, it is not an exhaustive list. In order to qualify as personal information two elements must exist:

1. Is there an identifiable individual? and
2. Is the information personal in nature?

[43] I will now consider each part of the test.

1. Is there an identifiable individual?

[44] *Identifiable individual* means that it must be reasonable to expect that an individual may be identified if the information were disclosed. The information must reasonably be

capable of identifying particular individuals because it either directly identifies a person or enables an accurate inference to be made as to their identity when combined with other available sources of information (data linking), or due to the context of the information in the record.

[45] Use of the term “individual” in this provision makes it clear that the protection provided only applies to natural persons. Therefore, it does not include information about a sole proprietorship, partnership, unincorporated association or corporation.

[46] From a review of the information that has been withheld on these pages pursuant to subsection 29(1) of FOIP, it can be connected to an identifiable individual. Therefore, the first part of the test has been met.

2. Is the information personal in nature?

[47] *Personal in nature* means that the information reveals something personal about the individual. Information that relates to an individual in a professional, official or business capacity could only qualify if the information revealed something personal about the individual. An example of this would be information that fits the definition of employment history.

[48] In its submission, eHealth noted that the information withheld under this subsection contains personal information about identifiable individuals. The withheld portions contain information about employees’ personal vacations, activities and personal appointments. Further, eHealth noted the records also contain the names or initials of the employees investigated for misconduct. Finally, eHealth noted that releasing this information would reveal personal details about the employees investigated including details of their employment history, as well as personal details of employees involved in the investigation.

[49] As noted above, subsection 24(1) of FOIP provides examples of types of information that qualifies as personal information under FOIP. Specifically, subsection 24(1)(b) and (k) of FOIP provide:

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;

...

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual;
or

(ii) the disclosure of the name itself would reveal personal information about the individual.

[50] The information that has been withheld on pages 1 and 167 would qualify as personal information pursuant to subsection 24(1)(k) of FOIP as it relates to employees personal lives, including vacations and activities they are personally involved in. The information that has been withheld on pages 172, 186, 189, 190 and 191 would qualify as personal information pursuant to subsection 24(1)(b) of FOIP as it relates to employment history and disciplinary information of employees or former employees of eHealth.

[51] However, only a portion of information withheld on pages 153 and 211 qualifies as personal information. A portion of a sentence on page 153, and one sentence on page 211 qualifies as personal information pursuant to subsection 24(1)(b) of FOIP as it relates to employment history and disciplinary information of employees or former employees of eHealth. One sentence found on page 153 qualifies as personal information pursuant to subsection 24(1)(k) of FOIP as it is the personal plans of an employee. The remainder of the information that has been withheld on pages 153 and 211 would not qualify as personal information.

[52] Upon review of the record, I note there is additional information that qualifies as personal information throughout the record pursuant to subsection 24(1)(b) of FOIP. This is the personal information of former employees. The only reason it appears in the records is because the former employees were being investigated for misconduct. Thus, it relates to the employment history of the former employees. The information includes first and last names, initials, email addresses and former eHealth contact information of the employees being investigated for misconduct.

[53] In many cases, eHealth has applied other exemptions to the information, but not subsection 29(1) of FOIP. Therefore, regardless of my findings and recommendations related to the other exemptions, eHealth should continue to withhold that information from the Applicant.

[54] I find subsection 29(1) of FOIP applies to the withheld information found on pages 1, 167, 172, 186 and 189 – 191 and a portion of the information withheld on pages 153 and 211.

[55] I find subsection 29(1) does not apply to a portion of the information withheld on pages 153 and 211 that I will identify to eHealth.

[56] I find subsection 29(1) of FOIP applies to the former investigated employee information found throughout the record including first and last names, initials, email addresses and contact information.

5. Does subsection 15(1)(c) of FOIP apply to the record?

[57] eHealth applied subsection 15(1)(c) of FOIP in full or in part to pages 1, 2, 5, 7 – 10, 19, 22 – 26, 30, 35 – 49, 154, 167, 168, 186 – 189, 191 – 193, 195, 199, 207, 219, 221 – 223 and 229.

[58] Subsection 15(1)(c) of FOIP provides:

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

...

(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;

[59] In order for subsection 15(1)(c) of FOIP to apply, both parts of the following test must be met:

1. Does the public body's activity qualify as a "lawful investigation"?
2. Does one of the following exist?
 - a. The release of information would interfere with a lawful investigation; or
 - b. The release of information would disclose information with respect to a lawful investigation.

[60] I will now consider each part of the test.

1. Does the public body's activity qualify as a "lawful investigation"?

[61] A *lawful investigation* is an investigation that is authorized and required or permitted by law. The public body should identify the legislation under which the investigation is occurring.

[62] In its submission, eHealth noted that the emails and attachments withheld under this subsection relate to an investigation of eHealth's Code of Conduct and procurement rules, including compliance with trade agreements. eHealth also advised that the emails and attachments also relate to a potential criminal investigation. Further, eHealth advised the release of this information would expose details of the investigation including impacted employees and the vendor contracts involved and could negatively impact any additional investigations, if required. Finally, eHealth asserted these records include conversations between the investigators and senior officials, as well as detailed reports and findings of the investigation prepared both internally and by eHealth's external legal counsel.

[63] eHealth has asserted that the investigations relate to its Code of Conduct and procurement rules, including compliance with trade agreements. These are not laws, and therefore do not qualify as lawful investigations. Further, it also asserts that these records also relate to a potential criminal investigation, but have not provided additional details as to why or how it could become a criminal investigation.

[64] Therefore, eHealth has not persuaded me that subsection 15(1)(c) of FOIP applies to the record as it has not met the first part of the test.

[65] I find subsection 15(1)(c) of FOIP does not apply to the record.

6. Does subsection 17(1)(b)(i) of FOIP apply to the record?

[66] eHealth applied subsection 17(1)(b)(i) of FOIP in full or in part to pages 1, 2, 5, 35 – 38, 49, 152, 153, 167 – 170, 172, 186, 187, 195 – 207, 211, 219, 221, 222 and 226.

[67] Subsection 17(1)(b)(i) of FOIP provides:

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(b) consultations or deliberations involving:

(i) officers or employees of a government institution;

[68] This provision is meant to permit public bodies to consider options and act without constant public scrutiny. A *consultation* occurs when the views of one or more officers or employees of a public body are sought as to the appropriateness of a particular proposal or suggested action. A *deliberation* is a discussion or consideration, by the persons described in subsection 17(1)(b)(i), (ii) and (iii), of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

[69] In order to qualify, the opinions solicited during a consultation or deliberation must:

(i) be either sought, expected, or be part of the responsibility of the person who prepared the record; and

(ii) be prepared for the purpose of doing something, such as taking an action, making a decision or a choice.

[70] Public bodies should identify those individuals involved in the consultations or deliberations, include the job title of each, list organization affiliation and clarification as to each individual's role in the decision making process. For FOIP, the consultations and/or deliberations must involve:

- officers or employees of a government institution;
- a member of Executive Council; or
- the staff of a member of the Executive Council.

[71] The provisions is not meant to protect the bare recitation of facts, without anything further. Further, it does not generally apply to records that in themselves reveal only the following:

- that a consultation or deliberation took place at a particular time;
- that particular persons were involved; or
- that a particular topic was discussed.

[72] In cases where the above is an exception, the public body must demonstrate why.

[73] In its submission, eHealth has outlined that the withheld information are deliberations. Further, it has described who the deliberations occur between and the topic of the deliberations.

[74] From a review of the record, eHealth has withheld signature lines and/or email headers on pages 5, 35, 36, 37, 38, 170, 172, 204 and 205. In addition, it has removed the name of a carbon copied recipient on page 207. This type of information does not qualify under this exemption as it only discloses who was involved, when it was discussed and what topic was discussed.

[75] Further, eHealth has withheld the title of an attachment found on pages 195 and 199. From a review of the information released to the Applicant, the attachment is referred to. The

name of an attachment does not qualify as a consultation or deliberation. Therefore, this type of information does not qualify under this exemption.

[76] From a review of the remaining information, I am satisfied that they are deliberations that involved officers or employees of a government institution.

[77] I find that subsection 17(1)(b)(i) of FOIP does not apply to the email header or signature lines found on pages 5, 35, 36, 37, 38, 170, 172, 204 and 205, the name of the carbon copied recipient found on page 207 and the title of the attachment found on pages 195 and 199, but applies to the remaining information.

7. Does subsection 17(1)(d) of FOIP apply to the record?

[78] eHealth applied subsection 17(1)(d) of FOIP in full or in part to pages 2, 3 and 4 of the record.

[79] Subsection 17(1)(d) of FOIP provides:

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(d) plans that relate to the management of personnel or the administration of a government institution and that have not yet been implemented;

[80] This provision covers plans relating to the internal management of public bodies, including information about the relocation or reorganization of government departments and agencies, as well as reorganization of local authorities. In order to be found to apply, all three parts of the following test must be met:

1. Does the record contain a plan(s)?
2. Does the plan(s) relate to the management of personnel or the administration of a public body?
3. Has the plan(s) been implemented by the public body?

[81] I will now consider each part of the test.

1. Does the record contain a plan(s)?

[82] A *plan* is a formulated and especially detailed method by which a thing is to be done. In other words, a design or scheme.

[83] From a review of the record, I am satisfied that the withheld information qualifies as a plan. Therefore, the first part of the test has been met.

2. Does the plan(s) relate to the management of personnel or the administration of a public body?

[84] *Management of personnel* refers to all aspects of the management of human resources of a public body that relate to the duties and responsibilities of employees. This includes staffing requirements, job classification, recruitment and selection, employee salary and benefits, hours and conditions of work, leave management, performance review, training, separation and layoff. It also includes the management of personal service contracts (i.e. contracts of service) but not the management of consultant, professional or other independent contractor contracts (i.e. contracts for service).

[85] *Administration of a public body* comprises all aspects of a public body's internal management, other than personnel management, that are necessary to support the delivery of programs and services. Administration includes business planning, financial operations, and contract, property, information, and risk management.

[86] In its submission, eHealth has outlined that the withheld information includes a proposal for a structural change within eHealth. From a review of the record, I am satisfied that it relates to the management of personnel and the administration of eHealth. Therefore, the second part of the test has been met.

3. *Has the plan(s) been implemented by the public body?*

[87] *Implementation* means the point when the implementation of a decision begins. For example, if a public body decides to go forward with an internal budget cut or restructuring of departments, implementation commences with this plan of action is communicated to its organizational units. In order for the third part of the test to be met, the plan cannot yet have been implemented.

[88] In its submission, eHealth advised that the plan has not been implemented. Therefore, the third part of the test has been met.

[89] I find that subsection 17(1)(d) of FOIP applies to pages 2, 3 and 4 of the record.

8. Does subsection 13(2) of FOIP apply to the record?

[90] eHealth applied subsection 13(2) of FOIP in full or in part to pages 5, 6, 35, 36, 37, 167, 186 and 191.

[91] Subsection 13(2) of FOIP provides:

13(2) A head may refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from a local authority.

[92] This provision is meant to protect information obtained by a government institution in confidence, implicitly or explicitly from a local authority.

[93] In order to be found to apply, both parts of the following test must be met:

1. Was the information obtained from a local authority?
2. Was the information obtained implicitly or explicitly in confidence?

[94] I will now consider each part of the test.

1. Was the information obtained from a local authority?

[95] Subsection 2(2) of the FOIP Regulations points to the definition of a local authority for the purpose of subsection 13(2), and provides:

2(2) For the purposes of these regulations and subsection 13(2) of the Act, “**local authority**” means a local authority as defined in *The Local Authority Freedom of Information and Protection of Privacy Act*.

[96] Subsection 2(f) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) defines local authority.

[97] In this case, there are two public bodies that qualify as local authorities – the Saskatchewan Health Authority and the Saskatchewan Cancer Agency.

[98] Section 13 of FOIP uses the term “information contained in a record” rather than “a record” like other exemptions. Therefore, the exemption can include information within a record that was authored by the public body provided the information at issue was obtained from a local authority.

[99] The records being withheld are email chains. eHealth has withheld the email headers and signature lines on pages 5, 6, 35, 36 and 37. This information shows that a communication took place and would not qualify as information obtained from one of the two local authorities. Therefore, the email headers and signature lines would not qualify under this exemption.

[100] From a review of the record, I am satisfied that the content of the emails was obtained from either the Saskatchewan Health Authority or the Saskatchewan Cancer Agency. Therefore, the first part of the test has been met for this information.

[101] I will now consider the second part of the test.

2. Was the information obtained implicitly or explicitly in confidence?

[102] *In confidence* usually describes a situation of mutual trust in which private matters are related 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 local authority at the time the information was obtained.

[103] The expectation of confidentiality must be reasonable and must have an objective basis. Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated.

[104] *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.

[105] Factors to consider when determining whether information was obtained in confidence implicitly include (not exhaustive):

- What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the public body or the local authority?
- Was the information treated consistently in a manner that indicated a concern for its protection by the public body and the local authority from the point it was obtained until the present time?
- Is the information available from sources to which the public has access?
- Does the public body have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially?
- Was there a mutual understanding that the information would be held in confidence? *Mutual understanding*, in this context, means that the public body and the local authority both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intends the information to be kept confidential but the other does not, the information is not considered to have

been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.

[106] The above factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments. The bare assertion that the information was obtained implicitly in confidence would not be sufficient.

[107] *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.

[108] Factors to consider when determining if information was obtained in confidence explicitly include (not exhaustive):

- The existence of an express condition of confidentiality between the public body and the local authority;
- The fact that the public body requested the information be provided in a sealed envelope and/or outlined its confidentiality intentions prior to the information being provided.

[109] Again, the above factors are not a test but rather guidance on factors to consider. Each case will require different supporting arguments.

[110] Simply labelling documents as “confidential” does not, on its own, make the documents confidential (i.e. confidentiality stamps or standard automatic confidentiality statements at the end of emails). It is just one factor to consider when determining whether the information was explicitly supplied in confidence.

[111] In its submission, eHealth advised that given the nature of these records, there was an implicit understanding and mutual trust between eHealth and the local authorities that the communication and information contained in these records would remain confidential.

[112] From a review of the record, I agree that an implicit understanding of confidentiality existed. Therefore, the second part of the test has been met.

[113] I find that subsection 13(2) of FOIP does not apply to the email headers and signature lines on pages 5, 6, 35, 36 and 37.

[114] I find subsection 13(2) of FOIP applies to the content of the emails found on pages 5, 35, 36, 37, 167 and 186.

9. Does subsection 15(1)(e) of FOIP apply to the record?

[115] eHealth applied subsection 15(1)(e) of FOIP in full or in part to pages 19, 22 – 26, 30, 39 – 48, 154, 186, 188, 189, 191 – 193, 219, 221 – 223 and 229.

[116] Subsection 15(1)(e) of FOIP provides:

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

...

(e) reveal investigative techniques or procedures currently in use or likely to be used;

[117] For this exemption to be found to apply, both parts of the following test must be met:

1. Does the information in question constitute “investigative techniques” or “procedures”?
2. Are the investigative techniques and/or procedures currently in use or likely to be used?

[118] I will now consider each part of the test.

1. Does the information in question constitute “investigative techniques” or “procedures”?

[119] *Investigative techniques and procedures* means the techniques and procedures that are used to conduct an investigation or inquiry for the purpose of law enforcement. The following should be considered when determining whether information qualifies as *investigative techniques and procedures*:

- The techniques or procedures must include specific steps. General information (such as forms and standard policies that do not include specific investigative steps and procedures) would not qualify;
- Routine, common or customary investigative techniques and procedures would not qualify; and
- Generally known investigative techniques and procedures which the public is already aware of would not qualify.

[120] It does not include well-known investigative techniques, such as wire-tapping, fingerprinting and standard sources of information about individuals’ addresses, personal liabilities, real property, etc. Further, if a technique or procedure is generally known to the public, disclosure would not normally compromise its effectiveness.

[121] In its submission, eHealth outlined that the emails and attachments withheld under this subsection contain information detailing the techniques used in the investigation. Further, eHealth asserted that the release of these techniques will provide individuals insight into how to circumvent investigations, thus hindering eHealth’s ability to conduct investigations of a similar nature in the future.

[122] From a review of the record, I am not convinced that the information that has been withheld would reveal investigative techniques or that would not otherwise be known to an individual working within a public body. Rather, it would be the type of actions an employee would expect when being investigated for potential employee misconduct.

[123] For example, a portion of the information that has been withheld on page 39 includes a list of the actions taken by eHealth to investigate. I view this as a list of what eHealth did in order to find information. This would, in my opinion, be more routine steps or common steps taken in an investigation and are not captured under this exemption.

[124] Further, much of what eHealth has withheld under subsection 15(1)(e) of FOIP includes timelines of events, questions and discussions between senior officials, official's insights and observations and status updates on the investigation. This would not qualify as an investigative technique and procedure.

[125] eHealth has also advised in its submission that the emails contain correspondence between eHealth's CEO and internal senior officials involved in the investigation, as well as detailed reports and findings of the investigation prepared both internally and by eHealth's external legal counsel. This argument does not relate to investigative techniques or procedures. Rather, it relates to discussions and findings of the investigations.

[126] Therefore, the first part of the test has not been met for this information.

[127] I find subsection 15(1)(e) of FOIP does not apply to the withheld pages 19, 22 – 26, 30, 39 – 48, 154, 186, 188, 189, 191 – 193, 219, 221 – 223 and 229.

IV FINDINGS

[128] I find eHealth did not respond within the legislative timelines provided for in FOIP and was 83 days late in responding to the Applicant's access to information request.

[129] I find eHealth should not have provided third party notification after the 30-day response time of June 21, 2018.

[130] I find subsection 22(a) of FOIP applies to the withheld information found on pages 19, 20, 27, 29, 31, 33, 49, 51 – 63, 64 – 109, 111 – 152, 155 – 166, 174, 176 – 178, 180, 182 – 185, 208 – 210, 214 – 218, 223 – 225, and 227 – 233.

- [131] I find subsection 29(1) of FOIP applies to the withheld information found on pages 1, 167, 172, 186 and 189 - 191, and 211 and a portion of the information withheld on pages 153 and 211.
- [132] I find subsection 29(1) of FOIP does not apply to a portion of the information withheld on pages 153 and 211 that I will identify to eHealth.
- [133] I find subsection 29(1) of FOIP applies to the former investigated employee information found throughout the record including first and last names, initials, email addresses and contact information.
- [134] I find subsection 15(1)(c) of FOIP does not apply to the record.
- [135] I find that subsection 17(1)(b)(i) of FOIP does not apply to the email header or signature lines found on pages 5, 35, 36, 37, 38, 170, 172, 204 and 205, the name of the carbon copied recipient found on page 207 and the title of the attachment found on pages 195 and 199, but applies to the remaining information.
- [136] I find that subsection 17(1)(d) of FOIP applies to pages 2, 3 and 4 of the record.
- [137] I find that subsection 13(2) of FOIP does not apply to the email headers and signature lines on pages 5, 6, 35, 36 and 37.
- [138] I find subsection 13(2) of FOIP applies to the content of the emails found on pages 5, 35, 36, 37, 167 and 186.
- [139] I find subsection 15(1)(e) of FOIP does not apply to the withheld pages 19, 22 – 26, 30, 39 – 48, 154, 188, 189, 191 – 193, 219, 221 – 223 and 229.

V RECOMMENDATIONS

- [140] I recommend that eHealth review its processes on an ongoing basis to ensure it is compliant with the legislated timelines in FOIP.
- [141] I recommend that eHealth continue to withhold the information found on pages 1 – 4, 20, 27, 29, 31, 33, 49, 51 – 109, 111 – 153, 155 – 169, 174, 176 – 178, 180, 182 – 185, 187, 190, 196 – 198, 200 – 203, 206, 208 – 211, 214 – 218, 224 – 228 and 230 – 233.
- [142] I recommend that eHealth fully release the information found on pages 6 – 10, 22 – 26, 30, 39 – 48, 154, 188, 192 and 193 once it has severed the first and last names, initials, email addresses and contact information of the former investigated employees.
- [143] I recommend that eHealth partially release the information I will identify to eHealth found on pages 5, 19, 35 – 38, 170, 172, 186, 189, 191, 195, 199, 204, 205, 207, 219, 221 – 223 and 229 once it has severed the first and last names, initials, email addresses and contact information of the former investigated employees.

Dated at Regina, in the Province of Saskatchewan, this 17th day of October, 2019.

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