



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 178-2019, 264-2019

Office of the Residential Tenancies

December 17, 2020

Summary:

The Office of Residential Tenancies (ORT) received an access to information request from the Applicant. The Applicant requested a review as they had not received a response to their request. In its response to the Applicant, the ORT provided some records, but advised it could not locate the physical records. Therefore, the Applicant requested a review of the ORT's search efforts. The Commissioner found that ORT did not comply with section 7 of FOIP. The Commissioner also found that ORT did not perform a reasonable search for records. The Commissioner recommended that ORT provide access and privacy training to those employees responsible for FOIP in the organization. The Commissioner also recommended that ORT review relevant policies or procedures that addresses the storage of records to ensure that all records are accessible to ORT at all times for the purpose of responding to access requests. As well, the Commissioner recommended that ORT review its records management policies and practices with the Provincial Archives of Saskatchewan to ensure physical records are accessible for the purposes of FOIP amid staffing changes. Further, the Commissioner recommended that, independent of the process related to Review Report 176-2019, 177-2019, 262-2019, 263-2019, ORT go through the files related to that report and identify the records that would be responsive to the files requested in this Report and that ORT provide those records to the Applicant. Finally, the Commissioner recommended that ORT search all of its emails for responsive records within two weeks of the issuance of this Report and that ORT provide details of its search to my office and any responsive records to the Applicant.

I BACKGROUND

- [1] On April 22, 2019, the Office of the Residential Tenancies (ORT) received an access to information request for all records related to two specific ORT files and records used to make decisions on those files. The Applicant indicated that the time period for the records was August 2017.
- [2] On June 4, 2019, the Applicant requested a review from my office as they had not received a response from ORT. My office opened file 178-2019 to review the delayed response.
- [3] As a result of early resolution efforts by my office, ORT provided the Applicant with a response on September 30, 2019. ORT provided the Applicant with some responsive records, namely the decisions from those ORT files, but indicated that the physical files could not be located.
- [4] On October 3, 2019, the Applicant requested that my office review ORT's search for records. My office opened file 264-2019 to do so.
- [5] On October 8, 2019, my office notified both the Applicant and ORT of my intention to review ORT's response and its search for records.

II RECORDS AT ISSUE

- [6] ORT provided the Applicant with the decisions on the files they were seeking, but indicated it could not locate the remainder of the files. As I am reviewing ORT's search for records, there are no records at issue in this Report.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[7] Subsection 2(1)(d)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP) provides that the definition of a “government institution” includes a body that is prescribed in *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Subsection 3(a) of the FOIP Regulations indicates bodies listed in Part I of the Appendix are prescribed government institutions. ORT is one of the bodies listed in Part I of the Appendix, and as such qualifies as a government institution for purposes of FOIP. Therefore, I find that I have jurisdiction to conduct this review.

2. Did ORT comply with section 7 of FOIP?

[8] Section 7 of FOIP instructs a government institution on what to do if it receives an access to information request. Relevant portions are as follows:

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

...

(e) stating that access is refused for the reason that the record does not exist;

...

(3) A notice given pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

[9] ORT received the Applicant’s access to information request on April 22, 2019. The access request was received on this day pursuant to subsection 6(2) of FOIP, which provides:

6(2) Subject to subsection (4) and subsection 11(3), an application is deemed to be made when the application is received by the government institution to which it is directed.

[10] On May 24, 2019, ORT emailed the Applicant to advise that the access to information request was still being processed. When a government institution is extending the response time, it must do so pursuant to section 12 of FOIP. Section 12 of FOIP provides:

12(1) The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

(a) where:

(i) the application is for access to a large number of records or necessitates a search through a large number of records; or

(ii) there is a large number of requests; and completing the work within the original period would unreasonably interfere with the operations of the government institution;

(b) where consultations that are necessary to comply with the application cannot reasonably be completed within the original period; or

(c) where a third party notice is required to be given pursuant to subsection 34(1).

(2) A head who extends a period pursuant to subsection (1) shall give notice of the extension to the applicant within 30 days after the application is made.

(3) Within the period of extension, the head shall give written notice to the applicant in accordance with section 7.

[11] The email was not a proper extension of time, as it did not advise the reason for the extension. On June 4, 2019, 43 days after making the access request, the Applicant had not received a response from ORT.

[12] On June 4, 2019, the Applicant requested a review from my office. As a result of early resolution efforts by my office, ORT provided the Applicant with a response to the access request on September 30, 2019. ORT provided the Applicant with copies of some records it found in its old Residential Tenancies System (RTS). Its response also noted that, after extensive searching, ORT was unable to locate the physical files that held the remaining records that the Applicant was seeking. ORT did not provide this section 7 response to the Applicant's access request within 30 days of receiving it pursuant to subsection 7(2) of FOIP.

[13] In its submission, ORT indicated that its access and privacy officer was on an extended leave. The Deputy Director of ORT assumed the duties related to FOIP. The submission indicated that the Deputy Director was learning the role of access and privacy officer and as a result, ORT did not meet the timeline. I find that ORT did not meet the timeline to respond to the Applicant's access to information request as outlined in subsection 7(2) of FOIP.

[14] I recommend that ORT provide access and privacy training to those employees responsible for FOIP in the organization.

[15] Further, ORT reported that it was not sure if it had written policies or procedures for responding to access to information requests.

[16] I recommend that ORT develop written policies and procedures for responding to access to information requests, if it does not have them.

[17] I also note that my office started working with ORT to facilitate a response to this access request on June 6, 2019. However, ORT was unable to complete its search for records and provide a section 7 response until September 30, 2019. During this time period, ORT reported that it believed that responsive records might be held in the office of the employee who was on a leave. It noted that the employee had the only key to the office and that ORT had no way to retrieve the key from the employee or gain access to the office. Further, it noted that there were other factors which complicated gaining access to the former employee's office.

[18] FOIP provides a right to access information within a government institution's possession or control. 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.

[19] Government institutions must ensure that records in its possession or control are always accessible so that they are able to respond to access requests within the timelines described in Part II of FOIP. I recommend that ORT review relevant policies or procedures that addresses the storage of records to ensure that all records are accessible to the government institution at all times for the purpose of responding to access requests. These policies should also be reviewed to ensure that any personal information or personal health information is protected and accessible pursuant to section 24.1 of FOIP and section 16 and subsection 17(2)(a) of *The Health Information Protection Act* (HIPA).

3. Did ORT perform a reasonable search for records?

[20] Section 5 of FOIP is clear that access to records must be granted if they are in the possession or under the control of the government institution subject to any applicable exemptions under FOIP.

[21] My office's *IPC Guide to FOIP, CHAPTER 3: Access to Records*, pages 7 to 11 (updated August 7, 2020) outlines how a government institution should conduct its search efforts. 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. FOIP does not require the government institution to prove with absolute certainty that records do not exist. However, it must demonstrate that it has conducted a reasonable search to locate them.

[22] 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 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.

[23] When conducting a review of a government institution's search efforts, details are requested that help my office understand the level of effort made to locate the records. The following can be included in the public body's submission:

- Outline the search strategy conducted:
 - 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;
 - 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?

- [24] The above list is meant to be a guide. Providing the above details is not a guarantee that my office will find the search conducted was reasonable. Each case will require different search strategies and details depending on the records requested.
- [25] In this case, ORT does not claim that the records requested by the Applicant do not exist. However, it indicated that it cannot locate the files containing the responsive records.
- [26] In its submission, ORT indicated that the Deputy Director “repeatedly” asked ORT staff both in Regina and Saskatoon to locate the files. It was reported that all Regina staff were assigned to search all file cabinets and drawers in the office. The Deputy Director also searched the previous access and privacy officer's locked office and cabinets as well.
- [27] ORT indicated that the Deputy Director travelled to Saskatoon on May 21, 2019, and August 20, 2019 to search for the missing files with staff in Saskatoon. However, emails provided by ORT indicate that the Saskatoon office was asked to search in a short email on August 21, 2019 at 6:27am. Less than three hours later, at 8:51am, the Deputy Director received one email on behalf of all of the Saskatoon staff indicating that “[w]e looked for all the files in the cabinet and in the filing room. We were unable to locate the file.”
- [28] The Deputy Director also recalled boxes of files stored at GEMINI, a government record storage facility, and had staff search these boxes.
- [29] The responsive records were not found.
- [30] ORT also reported that it searched its electronic files and found only the decisions for the files listed in the access request, which it provided to the Applicant.
- [31] On January 23, 2020, my office asked additional questions to obtain more information about the search. The questions included the following:
- Where would ORT normally expect these files to be filed according to your records management system?

- ORT indicated to our office that the former access and privacy officer who went on leave may have been working on these files. Do you have reason to believe that these files had been pulled from the place that they should have been stored? Does your office have a method to track files as they move through the office?
- What records management systems does your office have in place? Were records management tools checked to see where the records in question should have been stored? If so, what was the result?
- How did you determine which boxes to recall from Gemini?
- Were the records in the boxes you recalled what you expected?

[32] In reply, ORT indicated it was a high volume administrative tribunal and there is always potential of human error such as misfiling. It also indicated that it has gone through some staffing changes.

[33] ORT explained that the boxes from GEMINI were recalled based on the claim numbers, as claim numbers are usually grouped together. The boxes that were recalled did not contain the files. It did not provide any speculation on why the files were not filed with this group of files.

[34] ORT indicated that it hoped the access and privacy officer could provide additional information, but the access and privacy officer did not return to the ORT.

[35] ORT did not provide any further details about where the records should have been stored and why it suspected that a former employee had recently been working on the file.

[36] My office again pressed ORT for more details about its search. On February 5, 2020, my office specifically asked:

- where ORT would normally expect the files in question to be filed according to ORT's records management system;
- what records management systems ORT had in place such as a records schedule or inventory of records and if it provided clues to where the files might be stored;
- for more detail about ORT's statement that it "repeatedly asked and assigned ORT staff both in Regina and Saskatoon to locate the files"; such as dates of the assignments, which employees were asked, the medium used to ask the staff (verbal or by email) and if mandatory responses were required;
- who the decision maker was on the file and if they were interviewed about the whereabouts of the files;

- again for more details about ORT's statement that the employee who went on leave may have been working on these files such as why ORT had reason to believe that these files had been pulled from the place that they should have been stored and if ORT had a method to track files as they move through the office; and
- if ORT searched its email systems for emails related to the files requested by the Applicant.

[37] On February 12, 2020, ORT provided some additional information in response to the questions posed. ORT said that it used its records schedule to determine where the files should be kept. However, ORT indicated that the files should be kept in a file room in either Regina or Saskatoon or in GEMINI, which was not specific. ORT addressed the question about the employee who had been on leave and indicated that it was just an assumption that this employee might have had the files. ORT also provided more detail about the employees who searched for records.

[38] On February 14, 2020, ORT also offered a new theory about the missing files. It indicated that the Applicant had two other claims, which are the subject of Review Report 176-2019, 177-2019, 262-2019, 263-2019, against the same landlord that are the subject of the access to information request of this report. ORT indicated that "most of the evidences and document [sic] on file would almost be the same for all 4 files." ORT also indicated that "the old procedure at the ORT did not involve security deposit claims having their own separate file. As they are attached to ongoing claims."

[39] In response to my office's Draft Report on the above point, the ORT advised, "...ORT sees accuracy in findings of [my office] related to information relayed to it; however, the information relayed is not accurate. The files related to review report 176-2019/262-2019 (RTS 178003) and 177-2019/263-2019 (RTS 178743) were for Rental Address A and landlord A. 178-2019/264-2019 (RTS 178005 and 179351) are regarding Rental Address B and landlord B. They are completely separate tenancy addresses and would not have been filed or heard together. This was miscommunicated by the ORT in an email to [Analyst] on April 17, 2020 at 5pm."

[40] In effect, nine months after receiving the Applicant's access to information request, ORT realized that there would be no stand-alone physical files related to the file numbers that

the Applicant had requested. ORT also theorized that it had already provided responsive records to the Applicant through separate access to information requests made by the Applicant, which are addressed in Review Report 176-2019, 177-2019, 262-2019, 263-2019. In response to my office's Draft Report, the ORT advised, "[w]hile the theorizing did happen, it is important to note there is no way the Applicant's information request could have been addressed in 176-2019, 177-2019, 262-2019, 263-2019 as they were not the same tenancy or landlord and would not have been combined with 178-2019, 264-2019." I would like to note that as the ORT admitted to my office in the above paragraph, this was miscommunicated by the ORT to my office.

[41] As I also noted in Review Report 176-2019, 177-2019, 262-2019, 263-2019, the ORT should be certain that the individual who corresponds with my office in a review or investigation knows what they are talking about to avoid miscommunication.

[42] On April 7, 2020, my office asked that ORT confirm that it fully checked the files related to Review Report 176-2019, 177-2019, 262-2019, 263-2019, to determine if the expected documents for the files related to the access request related to this report have been found. My office also asked ORT again to provide more information as to whether it searched its email for responsive records and about the decision maker on the files that the Applicant was seeking.

[43] On April 17, 2020, ORT again responded that records responsive to the requests related to this report were found on the files responsive to the requests discussed in Review Report 176-2019, 177-2019, 262-2019, 263-2019. ORT did not provide further details about what records those would be or confirmation that expected records appeared in those files. In response to the Draft Report, the ORT stated, "Correction required – ORT responded on April 7th, 8th and 17th to April 7th email from OIPC, not just the 17th...." In response, I would like to advise the ORT that in my reports I reference what is important to the file and not every single piece of correspondence to and from a government institution.

[44] On May 21, 2020, ORT indicated that it contacted the decision maker for the ORT file requested by the Applicant to confirm that they did not have the physical files. ORT

indicated that the decision maker did not participate in the search for records because the individual was a contract lawyer. ORT also indicated that the decision maker for the files allegedly intertwined with the files relevant to this report is no longer associated with ORT.

[45] In response to the Draft Report on the above point, the ORT stated, “Correction required – ORT also indicated that the decision maker for the files allegedly intertwined with the files relevant to this report is no longer associated with ORT”. On April 17, 2020, in an email to my office at 5:00pm, the ORT stated, “[h]earing officer for 178005 and 179351 is still with the ORT.” 178-2019, 264-2019 is associated with ORT RTS files 178005/179351.” I would like to advise the ORT this is not a correction, as they assert. It is however something they just want added in. The ORT seems so adamant about these alleged “corrections”. Instead, the ORT should really be focusing on organizing its records management and developing better practices to handle access requests.

[46] Finally, with respect to the search of ORT emails, on February 14, 2020, ORT asserted that it only sends emails from a common ORT inbox and not personal email addresses. However, ORT did not provide details of a search of any email records to support its claim and demonstrate it had performed a reasonable search. In addition to my office’s notification email of October 8, 2019 where ORT was asked to provide details of its search for responsive records, my office specifically asked ORT to provide details about its search for email records on February 5, 2020, April 7, 2020 and April 9, 2020. No details were provided.

[47] I find that ORT did not conduct a reasonable search for records.

[48] I am concerned with the ORT’s practice of merging different file numbers into one physical file. As described in this Report, the confusion around how the files are stored caused significant delays and obstacles with respect to ORT’s ability to respond to the Applicant’s access request. Access delayed is access denied. ORT did not have a process in place to signal that several files were kept in one physical file. This was only realized nine months after receiving the Applicant’s access request. Further, the fact that there were different decision makers on the files that were merged in to one raises concerns about whether each

decision maker had a need-to-know the personal information in each file. Although I have seen no evidence to suggest a breach of privacy occurred in this case, and ORT asserts that the evidence will be the same on all the files, this filing system raises red flags from a privacy prospective. In response to the Draft Report, the ORT claimed, "...[n]o files were merged, per say [sic]. RTS files are now archived at GEMINI by numerical order. The new online system holds evidence per claim entered." I truly hope this is the case and ORT is now organizing its files properly.

[49] ORT also noted that it had recently moved to a new electronic system. It explained that all documents, such as applications, evidence, photos, notes, decisions and orders are saved on ORT's online system. All external documents received via mail, email or in person are uploaded into the online system. However, hard copies of external documents are still being stored after they have been scanned and uploaded into the online system.

[50] I recommend that ORT review its records management policies and practices with the Provincial Archives of Saskatchewan to ensure physical records are accessible for the purposes of FOIP amid staffing changes.

[51] I recommend that, independent of the process related to Review Report 176-2019, 177-2019, 262-2019, 263-2019, ORT go through the files related to that report and identify the records that would be responsive to the files requested in this Report. I also recommend that ORT provide those records to the Applicant.

[52] In response to the Draft Report, the ORT stated, "ORT sees accuracy in findings of the OIPC related to information relayed to it; however, the information relayed while thought to be true by the staff who relayed the information, was not true in reality. The files related to review report 176-2019/262-2019 (RTS 178003) and 177-2019/263-2019 (RTS 178743) were for rental unit address A, landlord A. 178-2019/264-2019 (RTS 178005 and 179351) were for rental unit address B, landlord B. The only similarity in the files was the tenant involved with them. They are completely separate tenancy addresses and would not have been filed or heard together. This was miscommunicated by the ORT in an email to [the Analyst] on April 17, 2020 at 5pm. As such, there are no responsive records from 176-

2019/262-2019 (RTS 178003) and 177-2019/263-2019 (RTS 178743) that will be responsive records to 178-2019/264-2019 (RTS 178005 and 179351).” To this I would respond, there has been so much confusion by ORT in their handling of these files. Therefore, I must leave these recommendations as they stand.

[53] I recommend that ORT search all of its emails for responsive records within two weeks of the issuance of this Report. I recommend that ORT provide details of its search to my office and any responsive records to the Applicant.

[54] Through the course of this review, the ORT has demonstrated that they have some poor records management practices that need to be fixed. Further, the ORT follows bad practices in handling access to information requests. I trust the ORT has learned from this review and establishes better practices going forward.

IV FINDINGS

[55] I find that I have jurisdiction to conduct this review.

[56] I find that ORT did not comply with section 7 of FOIP.

[57] I find that ORT did not perform a reasonable search for records.

V RECOMMENDATIONS

[58] I recommend that ORT provide access and privacy training to those employees responsible for FOIP in the organization.

[59] I recommend that ORT develop written policies and procedures for responding to access to information requests, if they do not have any.

[60] I recommend that ORT review relevant policies or procedures that addresses the storage of records to ensure that all records are accessible to ORT at all times for the purpose of

responding to access requests. These policies should also be reviewed to ensure that any personal information or personal health information is protected and accessible pursuant to section 24.1 of FOIP and section 16 and subsection 17(2)(a) of HIPA.

[61] I also recommend that ORT review its records management policies and practices with the Provincial Archives of Saskatchewan to ensure physical records are accessible for the purposes of FOIP amid staffing changes.

[62] I recommend that, independent of the process related to Review Report 176-2019, 177-2019, 262-2019, 263-2019, ORT go through the files related to that report and identify the records that would be responsive to the files requested in this Report. I also recommend that ORT provide those records to the Applicant.

[63] I recommend that ORT search all of its emails for responsive records within two weeks of the issuance of this report. I recommend that ORT provide details of its search to my office and any responsive records to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 17th day of December, 2020.

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