



REVIEW REPORT 180-2019

Saskatchewan Housing Corporation

January 18, 2021

Summary: The Applicant submitted an access to information request to the Saskatchewan Housing Corporation (SHC). The SHC responded by indicating that no records exist. The Applicant appealed to the Commissioner. The Commissioner was unable to find that the SHC conducted a reasonable effort to locate records. He also found that the SHC had not met its duty to assist. The Commissioner recommended that the SHC contact the Applicant to clarify the access request and then conduct another search for records. After conducting another search, the Commissioner recommended that the SHC send another response to the Applicant.

I BACKGROUND

[1] On April 30, 2019, the Applicant submitted the following access to information request to the Saskatchewan Housing Corporation (SHC):

I am hereby requesting information with regard to the following lot:

Civic Address: [address]

Location: [land description]

Information requested:

Please confirm whether this lot was purchased by Saskatchewan Housing from Terra Developments and the date it was purchased. Could you please also confirm the purchase price for the lot, including any tax incentives or other incentives offered to Terra Developments as part of the transaction. Please confirm the full amount that was actually paid to Terra Developments.

Could we please also have information with regard to the development of the care home scheduled to be developed on this lot. We would like to know through what process Terra Developments was selected to be the consultant for this project.

[2] Included in the Applicant's access request was a screen print of an untitled document that provided information about the project and identified the SHC as the "owner" of the project, the Weyburn GROUP Homes Society Inc. as the "owner's agent", and Terra Developments Inc. as the "consultant" on the project.

[3] In a letter dated May 29, 2019, the SHC responded by indicating records that the Applicant wished to access do not exist in the Ministry. The Ministry said the following:

Thank you for your access to information request received in this office on April 30, 2019, requesting access to "information related to civic address [address] [land description]. Specifically, you requested:

1. "Please confirm whether this lot was purchased by Saskatchewan Housing from Terra Developments and the date it was purchased.
2. Could you please also confirm the purchase price for the lot, including any tax incentives or other incentives offered to Terra Developments as part of the transaction.
3. Please confirm the full amount that was actually paid to Terra Developments.
4. Could we please also have information with regard to the development of the care home scheduled to be developed on this lot.
5. We would like to know through what process Terra Developments was selected to be the consultant for this project."

This is to advise you the records you wish access to do not exist in the Ministry. This notification has been provided pursuant to clause 7(2)(e) of *The Freedom of Information and Protection of Privacy Act* (FOIPP); a copy is included for your reference.

The Ministry is able to provide the following information in relation to your questions:

1. In response to part 1-3 of your inquiry, the purchase of the identified lot has not been completed. We can confirm the purchase price will be \$122,010, based on the November 1, 2018 price list provided by the land developer. No incentives were offered or given.

2. The development of the care home is in preliminary stages and therefore records are not available for part 4 of your request.
3. In response to part 5 of your request, Terra Developments has not been retained as a consultant for this project by the Saskatchewan Housing Corporation.

If you would like to exercise your right to request a review of this notice under the provisions of clause 49(1)(a) of FOIPP, you may do so by completing a request for review form and forwarding it to the Saskatchewan Information and Privacy Commissioner within one year of this notice.

[4] On June 11, 2019, the Applicant requested a review by my office.

[5] On June 12, 2019, my office notified the Applicant and the SHC that it would be undertaking a review.

II RECORDS AT ISSUE

[6] At issue is the SHC's efforts to search for records responsive to the Applicant's access request. There are no records at issue in this review.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[7] Subsection 5(1) of *The Saskatchewan Housing Corporation Act* provides as follows:

5(1) The affairs and business of the corporation shall be conducted by a board of directors consisting of not less than five persons appointed by the Lieutenant Governor in Council.

[8] Pursuant to subsections 2(1)(d)(ii)(A) of *The Freedom of Information and Protection of Privacy Act* (FOIP) and section 3 and Part I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations), SHC qualifies as a "government institution". Therefore, I have jurisdiction to review this matter.

2. Did the SHC make a reasonable effort to search for records?

a. The wording of the Applicant's access request

[9] Section 5 of FOIP provides an applicant 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.

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

[11] In past reports, I have said that the Applicant's access request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive. My office has also said in Review Report F-2013-001 from paragraphs [17] to [21] that the access provisions of FOIP only apply to records that are in recorded form at the time of the access to information request. If no records exist, then a government institution cannot provide access to them as provided by subsection 7(2)(e) of FOIP:

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;

[12] Before analyzing the SHC's search efforts, I must consider the Applicant's reason for believing why records exist. Chapter 3 of my office's *Guide to FOIP* at page 7 provides that Applicants must establish that the existence of a reasonable suspicion that a government institution is withholding a record, or has not undertaken an adequate search for records. In their submission, the Applicant provided my office with hyperlinks to two news articles. In the [first news article](#) (dated March 12, 2019), the Applicant highlighted to my office that the opinion of a Weyburn City Councillor indicated that the "provincial

government” had picked a lot for the development of a particular project. As such, the Applicant argued that even if the purchase transaction was not complete, the Applicant asserted that one would expect correspondence between the buyers and seller with offers and counter-offers.

- [13] In the [second news article](#) (also dated March 12, 2019), the Applicant highlighted how an application for the development of the project was submitted to the City of Weyburn by the developer, but was voted down by city council in March. The Applicant argued there must be something that puts into writing the provincial government’s commitment to the project and some parameters on what will be built. The Applicant argued:

There must be something which puts into writing the commitment of the Government to go forward with this project and some parameters on what will be built. There must be some kind of budget. There must be some kind of consultation going on. There must be some kind of basic outline of how this care home will operate and by whom. There must be internal correspondence around the application to the City of Weyburn and its rejection, as well as its subsequent approval.

- [14] Finally, the Applicant indicated that the public attention that this matter has received, the Applicant asserted there must be letters from the public as well as from residents of the neighbourhood in which the development was to be built. The Applicant asserted that “[all] of this should be disclosed as it is information that pertains to the development of the care home, as had been requested”.

- [15] When I consider the Applicant’s submission, it appears as though the Applicant’s intention was to seek any and all records related to the project. However, based on the wording of the Applicant’s access request (which was quoted in the background section of this Report), that intention was not conveyed. For example, in their submission, the Applicant indicated to my office that there must be letters from the public regarding this matter. However, based on the wording of the Applicant’s access request, the Applicant did not request such records from the SHC. The Applicant’s access request appears to be very specific as to what records the Applicant was seeking.

[16] As said earlier, an applicant's access request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive. In this case, the wording of the Applicant's access request influenced the processing of the access request. I will address this in the next two subheadings.

b. The SHC's search efforts and explanation for why records do not exist

[17] When a government institution responds to an access request pursuant to subsection 7(2)(e) of FOIP, my office will ask the government institution to describe its search efforts in support of its assertion, which my office will then review. FOIP does not require a government institution to prove with absolute certainty that records do not exist but it must demonstrate that it has conducted a reasonable search to locate the records.

[18] A reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records related to the access to information 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 can be provided to my office to support a government institution's search efforts include the following:

- For personal information requests – explain how the individual is involved with the government institution (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 organization's 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 government institution's control have been searched such as a contractor or information management service provider.
 - Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
 - Explain which folders within the records management system were searched and how these folders link back to the subject matter requested. For electronic folders – indicate what key terms were used to search if applicable.
 - Indicate the calendar dates each employee searched.
 - Indicate how long the search took for each employee.
 - Indicate what the results were for 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 my office's resource, *Using Affidavits in a Review with the IPC* available on my office's website.

[19] The above list is meant to be a guide. It is not an exhaustive list of what could be considered by my office in a review. Providing the above details is not a guarantee that my office will find that the government institution's search efforts were reasonable. Each case will require different search strategies and details depending on the records requested.

[20] In its submission, the SHC indicated that it is supported by staff in the Housing Division within the Ministry of Social Services. In terms of this access request, the SHC contacted a Housing division staff member who had first-hand knowledge of the proposed project to search for records responsive to the access request. It asserted that this particular staff member would know which records do (or do not exist). In order to search for records, the SHC's understanding of the Applicant's access request was broken down into three categories. They are:

1. Details of the purchase related to SHC purchasing a specific lot of land;
2. Information related to the development of the care home scheduled to be developed on that specific lot of land; and
3. Details of the process used to select Terra Developments as a consultant on the project.

[21] The Housing division staff member indicated the following reasons as to why records do not exist for the above three categories. The explanations are as follows:

1. **Purchase of property:** The first paragraph of the Applicant's access request sought information about the purchase of the property, including "confirmation" that the SHC purchased the lot from Terra Developments, the date it was purchased, the purchase price, and the full amount that was paid to Terra Developments. At the time that SHC had received the access request (April 30, 2019), the property had not been purchased. As such, at the time that the SHC received the access request, the SHC did not have records responsive to this particular part of the Applicant's access request.
2. **Development of the care home:** The second paragraph of the Applicant's access request was for information with regard to the development of the care home, including the process to select Terra Developments as the consultant for the project. The SHC explained the development of the project would only begin after an architect was hired. A Request for Proposal (RFP) for an architect was posted from April 2, 2019 to April 24, 2019. At the time of the Applicant's access request (April 30, 2019), the SHC indicated that development of the project had not yet begun. As such, no records exist.
3. **Selection of Consultant:** The SHC had not hired Terra Developments as the consultant on the project so there were no responsive records related to that issue.

[22] While the SHC's rationale for why records do not exist appears plausible for the most part, the SHC did not provide my office details with regards to its search efforts. For example, it did not indicate where it had searched for records. I acknowledge that the Housing division staff member is obviously knowledgeable in the subject matter of the access request. However, being knowledgeable in the subject matter and conducting a search for records are two different things. Being knowledgeable means knowing where to search for responsive records, if they existed, but it does not mean a search has been conducted. Even if a government institution's position is that responsive records do not exist, the government institution is still required to conduct a search in order to meet its obligation pursuant to section 61 of FOIP. Order 99-021 by the Office of the Information and Privacy Commissioner of Alberta (AB IPC) provided that a government institution cannot rely solely on an employee's opinion alone that no records exist. A government institution must still conduct a search for records. AB IPC said:

[para 33.] In my view, there would have to be very unusual circumstances for it to be reasonable for a public body to rely on an individual's opinion that no records were created, when deciding not to search.

[para 34.] Moreover, I do not think that a public body should rely on anyone's memory as to whether records were created. A public body cannot know in advance of doing a search whether an individual will be right about whether records were created. All an individual can say, with any reasonable certainty, is whether he or she personally created any records. Otherwise, the individual is merely expressing an opinion as to the likelihood of whether anyone else created records, but the individual cannot speak for others.

[para 35.] A public body cannot absolve itself of its duty to search based on an individual's opinion about whether records were created. If a public body could forego its duty to search based on such an opinion, the Act would be frustrated.

[23] On November 12, 2020, my office sought details of SHC's search efforts. My office asked that the SHC provide the following:

- Details of any searches this particular staff member may have done? For example, did they search through electronic records? Paper records? Emails? Copies of any email instructions and results would be appreciated.
- If the staff member conducted a search, would you be able to provide me with the details of where and how they searched for records. For example, search terms

used to search through shared drives, email accounts, or a records management system.

- If the staff member conducted a search and since this staff member was/is a part of the Housing division at the ministry, would they have conducted a search of records in the possession/control of the Ministry and/or of the SHC? Specifically, since this access request is for records in SHC's possession or control, we need you to speak to what records were searched in its possession or control, not that of another government institution. If records were searched in both government institutions, please explain why.
- Alternatively, if the staff member didn't conduct a search because of the rationale of why they believed no records existed at the time of the access request, please let me know that too.

[24] In its response, the SHC provided a response to each of the above four bullets. SHC reiterated that the sale of the property had not occurred nor had the development of the care home begun at the time of the access request. As such, no records exist. The SHC's response was as follows:

...
The SHC staff member was involved in the project and therefore knew where to locate the records electronically to answer the questions. A copy of the initial request to search for records is provided.

...
As explained in the initial submission, a search for records was not required as the staff member assisting with the request was involved in the process and was aware that records did not yet exist as the project was still in early stages at the time of the access request.

...
The Ministry of Social Services (MSS) and the Saskatchewan Housing Corporation have a unique relationship. While SHC is a crown corporation, and a government institution under FOIP, Housing staff in MSS provide management services to SHC as the Corporation does not have staff. Record pertaining to SHC are considered in the custody and control of the Corporation and have a separate approved Operational Records Schedule.

...
As explained in the first submission, **the staff member did not search for records related to the sale of the property as it had not occurred at the time of the request. The development of the care home had also not yet started as the architect had not been hired at the time of the request. The individual was involved in the project, and therefore had first hand knowledge of the project and the stage it was in at the time of the request.**

[Emphasis added]

[25] Again, I find that the SHC's rationale for why records do not exist is plausible for the most part. However, I am assessing whether the SHC made reasonable efforts to search for responsive records. Without any details of its search efforts, I am unable to make a finding that the SHC conducted a reasonable effort to locate records. One may be mistaken in assuming the existence of records without actually conducting a search to verify that they are correct in the assumption. For example, a person may be unaware of what others may have created or received regarding the topic.

c. Duty to Assist

[26] In the SHC's response dated May 29, 2019, the SHC provided information (not records) to the Applicant. The information included what the purchase price of the lot will be based on the price listed by the land developer, that the development of the care home was in the preliminary stages, and that Terra Developments had not been retained as the consultant for the project by the SHC. This information could have been helpful in assisting the Applicant in formulating the wording for a subsequent access request.

[27] While it was helpful that the SHC provided information to the Applicant in its response to the access request, my position is that it would have been far more efficient and helpful if such information was conveyed to the Applicant early in the course of the SHC's processing of the access request. After all, the Applicant (or any member of the public) cannot be expected to know the details or the status of the project in order to formulate accurate access requests. If they did, they would not need to exercise their right to access records under FOIP. Nor can the Applicant be expected to have a sophisticated understanding of the record holdings of the SHC so they can precisely pinpoint the exact records they are seeking. For example, if the Applicant had known that the SHC was planning to but had not purchased the lot, then the Applicant could have reformulated the wording of their access request accordingly. It is a part of a government institution's duty to assist pursuant to section 5.1 of FOIP to respond openly, accurately, and completely to an applicant's access request. In past reports, I have said that in order for a government

institution to respond accurately to an Applicant's access request, the government institution must have an accurate understanding of the record(s) the Applicant is seeking.

[28] In its submission, the SHC explained that the Applicant contacted the SHC on June 13, 2019 (which is 15 days after the SHC responded to the Applicant's access request). The Applicant noted the discrepancy between the untitled screen print that was included in their access request that identified Terra Developments as a consultant on the project and the SHC's May 29, 2019 letter that said that the SHC did not hire Terra Developments as the consultant. The Applicant sought clarification on the matter.

[29] The SHC explained that it told the Applicant that it was unfamiliar with the untitled screen print. The Applicant clarified that the screen print was taken from MERX. The SHC understood MERX to be an online tendering service. However, the SHC utilizes SaskTenders as its tendering service, not MERX. Therefore, the SHC was unable to explain the entry on MERX.

[30] While the SHC cannot be expected to be familiar with MERX, it should have contacted the Applicant early in the processing of the access request to clarify what the untitled screen print was with the Applicant. The SHC should not have waited for the Applicant to contact them *after* it had issued its response pursuant to subsection 7(2)(e) of FOIP to request such clarification from the Applicant. If the SHC requested such clarification from the Applicant soon after it received the access request, then the SHC could have assisted the Applicant in understanding Terra Development's relationship (or there lack of) to SHC and to the project. This understanding could have assisted the Applicant in either reformulating the wording of their access request or, at least, managing the Applicant's expectations in terms of what records the Applicant could have expected to receive in response to their access request.

[31] I find that the SHC has not met its duty to assist.

[32] I note the amount of time that has passed since the Applicant submitted their access request and to the issuance of this Report. However, I recommend that the SHC contact the

Applicant within 30 days of the issuance of this Report to clarify the access request and then conduct another search for records. After conducting another search, I recommend that the SHC send another response to the Applicant.

[33] I recommend that the SHC adjust its processes so that it communicates with applicants at an early stage and throughout the processing of an access request so that it can have an accurate understanding of the Applicant's access request.

IV FINDINGS

[34] I am unable to find that the SHC conducted a reasonable effort to locate records.

[35] I find that the SHC has not met its duty to assist.

V RECOMMENDATIONS

[36] I recommend that the SHC contact the Applicant within 30 days of the issuance of this Report to clarify the access request and then conduct another search for records. After conducting another search, I recommend that the SHC send another response to the Applicant.

[37] I recommend that the SHC adjust its processes so that it communicates with applicants at an early stage and throughout the processing of an access request so that it can have an accurate understanding of the Applicant's access request.

Dated at Regina, in the Province of Saskatchewan, this 18th day of January, 2021.

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