



REVIEW REPORT 289-2017 and 345-2017

Ministry of Immigration and Career Training

April 17, 2018

Summary: The Applicant made an access request to the Ministry of Immigration and Career Training (Immigration and Career Training). Immigration and Career Training provided its response to the Applicant indicating that access to the records was partially granted. In addition, it advised that some of the information was being withheld pursuant to subsections 13(1)(a), 15(1)(f), 17(1)(a), (b)(i) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant requested a review by the Office of the Information and Privacy Commissioner requesting the Commissioner review Immigration and Career Training's application of the above provisions. The Applicant also believed that records were missing from the package Immigration and Career Training provided and requested the Commissioner review Immigration and Career Training's search efforts. Upon review, the Commissioner found that the search conducted by Immigration and Career Training was not adequate for purposes of FOIP. In addition, the Commissioner found that Immigration and Career Training had not met its obligations under section 61 of FOIP and as a result, subsections 13(1)(a), 17(1)(a) and 17(1)(b)(i) of FOIP were not appropriately applied. The Commissioner also found that Immigration and Career Training appropriately applied subsection 29(1) of FOIP to the personal information in the records. The Commissioner recommended that Immigration and Career Training conduct a more fulsome search for responsive records. Further, the Commissioner recommended Immigration and Career Training continue to withhold the personal information and release what remains.

I BACKGROUND

[1] At the time of the access to information request, the Ministry of the Economy was a single ministry. However, during the course of this review, the Ministry of the Economy was split into three ministries: the Ministry of Energy and Resources, the Ministry of

Export and Trade Development and the Ministry of Immigration and Career Training (Immigration and Career Training). My office has been advised that the records involved with this review are for Immigration and Career Training. Therefore, this report will refer to Immigration and Career Training.

- [2] On May 26, 2017, Immigration and Career Training received the following access to information request from the Applicant:

Please provide all of the emails to or from Program integrity officers related to concerns about the authenticity of job offers provided by any Immigration consulting/representing firm with “Canmax” in its name or any concern about the legitimacy of any documentation coming from “Canmax” companies.

- [3] By letter dated August 31, 2017, Immigration and Career Training provided its response to the Applicant indicating that access to the records was partially granted. In addition, it advised that some of the information was being withheld pursuant to subsections 13(1)(a), 15(1)(f), 17(1)(a), (b)(i) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [4] On November 13, 2017, my office received a Request for Review from the Applicant in which he disagreed with Immigration and Career Training’s application of the above provisions. The Applicant also believed that records were missing from the package provided and requested my office review Immigration and Career Training’s search efforts.

- [5] On November 21, 2017, my office notified Immigration and Career Training and the Applicant of my office’s intent to undertake a review and invited all parties to provide submissions.

- [6] On January 8, 2018, Immigration and Career Training provided my office with its submission, Index of Records and copy of the records.

[7] On January 11, 2018, the Index of Records was shared with the Applicant. Following which the Applicant advised that he did not need my office to review Immigration and Career Training's application of subsection 15(1)(f) of FOIP. In addition, the Applicant advised my office it did not have to review the application of subsection 29(1) of FOIP to any passport information. Therefore, this review will focus on the search efforts conducted by Immigration and Career Training and its application of subsections 17(1)(a), (b)(i), 13(1)(a) and 29(1) of FOIP.

II RECORDS AT ISSUE

[8] The total responsive record consists of 154 pages. 69 of the pages were released in full. 10 of the pages have information involving subsection 15(1)(f) and passport information under subsection 29(1) of FOIP, so do not need to be addressed in this review. 75 pages have information withheld pursuant to subsections 13(1)(a), 17(1)(a), (b)(i) and 29(1) of FOIP.

III DISCUSSION OF THE ISSUES

[9] Immigration and Career Training is a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP.

1. Did Immigration and Career Training conduct an adequate search?

[10] Section 5 of FOIP provides an Applicant 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.

[11] Section 5 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 exemptions under Part III of FOIP.

[12] FOIP does not require a government institution to prove with absolute certainty that records responsive to an access to information request do not exist. It must, however, demonstrate that it has conducted a reasonable search to locate them.

[13] 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.

[14] 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 submission to my office should outline the search strategy conducted which can include:

- For personal information requests – explain how the individual is involved with the public body (i.e. client, employee, former employee etc.) and why certain departments/divisions/branches were included in the search.
- For general requests – tie the subject matter of the request to the departments/divisions/branches included in the search. In other words, explain why certain areas were searched and not others.
- Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
- Explain how the records management system is organized (both paper & electronic) in the departments/divisions/branches included in the search:
 - Describe how records are classified within the records management system. For example, are the records classified by:
 - alphabet
 - year
 - function
 - subject

Consider providing a copy of your organizations record schedule and screen shots of the electronic directory (folders & subfolders).

If the record has been destroyed, provide copies of record schedules and/or destruction certificates.

- Explain how you have considered records stored off-site.
- Explain how records that may be in the possession of a third party but in the public body's control have been searched such as a contractor or information service provider.
- Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Which folders within the records management system were searched and explain how these folders link back to the subject matter requested?
 - For electronic folders – indicate what key terms were used to search if applicable.
- On what dates did each employee search?
- How long did the search take for each employee?
- What were the results of each employee's search?
 - Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided. For more on this, see the IPC resource, *Using Affidavits in a Review with the IPC* available on our website.

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

[16] In its submission, Immigration and Career Training outlined the search it conducted. Its details included the following:

- A meeting was held to determine which divisions would have records. It was determined that only two divisions of six would have had any involvement with Canmax:
 1. Labour Market Development Division; and
 2. The Assistant Deputy Minister of Economic Development.
- Responsive records were received from three individuals. Immigration and Career Training advised the following was the structure of the organization and where the individuals that conducted searches fit within them:

- Labour Market Development Division:
 - Immigration Services Branch:
 - Assistant Deputy Minister/former Executive Director of Immigration Services Branch;
 - Director of Entrepreneur Immigration; and
 - Director Program Integrity Unit.
- Immigration and Career Services advised that the Program Integrity Unit within the Immigration Services Branch was small, and during the time frame of the request, the above three individuals were the most likely to have received the emails in question. It added that given the management positions they held, they were copied on emails or corresponded directly with the Program Integrity Officers.
- The Assistant Deputy Minister/former Executive Director of Immigration Services Branch:
 - He has been with government for 17 years; and
 - Details of how he conducted his search were not received. He only provided an email indicating he found responsive records.
- The Director of Entrepreneur Immigration:
 - He has been with Immigration and Career Training (and its previous designations) for 10 years so is familiar with the subject matter; and
 - Details of how he conducted his search were not received. He only provided an email indicating he found two responsive records with approximately four pages.
- The Director Program Integrity Unit:
 - He has been with Immigration and Career Training (and its previous designations) for 15 years so is familiar with the subject matter;
 - Details of his search were received:
 - He did not search the C:drive because he has never utilized that drive for any matters so no records would be located there;
 - He searched his government email folders including “Inbox” and “Sent” folders and the Archived “Inbox” and “Sent” folders on

June 7, 2018. This search took approximately 10 minutes. He located six emails totaling 15 pages;

- He also searched his calendar which took approximately one minute. No responsive records were found there;
- He did not search paper records because he did not have access to Program Integrity paper records since the April 1, 2017 transfer of FWRISA administration to LRWS. He does not keep his own paper records;
- He did not search outside storage because he never utilized outside storage for any case matters; and
- A search of the electronic storage G: drive was not completed as ISB completed that search.

[17] There is a lack of detail pertaining to the searches conducted by the Assistant Deputy Minister/former Executive Director of Immigration Services Branch and the Director of Entrepreneur Immigration. In order to be confident the search was thorough, details were needed.

[18] Further, a number of questions still remain. For example, given that the searches appear to all be electronic, what key terms were used in the electronic searches? Who conducted the search of the electronic G: drive and what were the details of that search? Are there any paper records that should have been searched? Is there off-site storage of any paper records that should have been searched? Why were others in the small Immigration Services Branch not asked to conduct a search? If the unit is small, this would not have been a big undertaking. The responsive records provided are based on the assumption that management would have been included in any and all emails that were to or from Program Integrity officers related to Canmax and the scope of the access request. To be thorough, all Program Integrity Officers should have conducted a search. Further, were there any Program Integrity Officers that left their positions in the specified timeframe of the records outlined in the access request (January 1, 2011 to present)? If so, their archived email accounts should have been searched.

[19] As noted earlier, a government institution does not have to prove with absolute certainty that records responsive to an access to information request do not exist. It must, however, demonstrate that it has conducted a reasonable search to locate them. The threshold that must be met is one of “reasonableness”. Reasonableness does not mean perfection but rather an effort that is objectively diligent and prudent in all the circumstances.

[20] Based on what has been provided to my office, I find that Immigration and Career Training has not demonstrated that its search for records was reasonable and adequate for purposes of FOIP.

[21] I recommend Immigration and Career Training conduct a more fulsome search for records responsive to the Applicant’s request. If additional records are located and withheld in full or in part, the Applicant has the right to request a review of those records by my office.

2. Did Immigration and Career Training properly apply subsection 29(1) of FOIP?

[22] When dealing with information in a record that appears to be personal information, the first step is to confirm the information indeed qualifies as personal information pursuant to subsection 24(1) of FOIP. Part of that consideration involves assessing if the information has the following two elements:

1. An identifiable individual; and
2. Information that is personal in nature.

[23] Once identified as personal information, the public body needs to consider subsection 29(1) of FOIP which 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.

[24] Immigration and Career Training withheld information on 55 pages citing subsection 29(1) of FOIP. The records are all email chains. Some of the information is repeated multiple times on several pages. In addition, Immigration and Career Training severed information on page 92 under subsection 29(1) of FOIP. However, it withheld the page in full citing subsection 13(1)(a) of FOIP. I will address the severed information first under subsection 29(1) of FOIP.

[25] On the majority of the pages, Immigration and Career Training severed the names of applicants to the Saskatchewan Immigration Nominee Program (SINP) combined with their SINP file numbers, personal email addresses, home addresses, telephone numbers and dates of birth. On page 88, Immigration and Career Training severed a sentence where an employee referred to a personal appointment.

[26] All of this information qualifies as personal information pursuant to subsections 24(1)(a), (d), (e) and (k)(i) of FOIP which 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:

(a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;

...

(d) any identifying number, symbol or other particular assigned to the individual, other than the individual’s health services number as defined in *The Health Information Protection Act*;

(e) the home or business address, home or business telephone number or fingerprints of the individual;

...

(k) the name of the individual where:

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

[27] As the information constitutes personal information and there is no apparent consent from the individuals to release it, I find that subsection 29(1) of FOIP was appropriately applied by Immigration and Career Training.

[28] I recommend Immigration and Career Training continue to withhold the personal information that has been severed on the following pages: 36, 46-48, 85-87, 88-90, 92, 110-112, 113-114, 115-116, 117-119, 120, 121, 122-123, 124-125, 126-127, 128, 129-130, 131, 132-135, 136-141, 142-147, 148-149, 150-151 and 152-154.

3. Did Immigration and Career Training properly apply subsection 17(1)(a) of FOIP?

[29] Subsection 17(1)(a) of FOIP is a discretionary exemption and provides as follows:

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

(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;

[30] This exemption is meant to allow for candor during the policy-making process, rather than providing for non-disclosure of all forms of advice. All three parts of the following test must be met in order for subsection 17(1)(a) of FOIP to be found to apply:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. The advice, recommendations, proposals, analyses and/or policy options must:
 - i) be either sought, expected, or part of the responsibility of the person who prepared the record; and
 - ii) be prepared for the purpose of doing something, for example, taking an action or making a decision; and
 - iii) involve or be intended for someone who can take or implement the action.
3. Was the advice, recommendations, analyses and/or policy options developed by or for the public body?

[31] Immigration and Career Training applied subsection 17(1)(a) of FOIP to 18 pages. The records constitute briefing notes, letters and drafts of those briefing notes and letters. Immigration and Career Training withheld all 18 pages in full.

[32] In its submission, Immigration and Career Training provided limited information and argument. In fact, Immigration and Career Training provided the same argument for the information on all 18 pages:

“...This information qualifies as advice as it is an analysis of a situation and a presentation of options. This presentation of this information would be a responsibility of the person, a government employee, who presented the information. The information was presented to someone who could take an action.”

[33] Government institutions should not assume that it is self-evident on the face of the record that a test is met. Section 61 of FOIP provides as follows:

61 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[34] From a review of the 18 pages, there is information that may qualify for subsection 17(1)(a) of FOIP. However, there is also information that may not. I cannot make assumptions. The submission is not persuasive because it does not explain how the information on the 18 pages meets the three-part test. For example, what the action is that will be taken, what the employee's role was who prepared the records or who the briefing notes or letters were intended for. There is no explanation as to how the exemption applies to individual line items or sections of the 18 pages. The 18 pages have been withheld in full with only the above arguments presented.

[35] Therefore, I find that Immigration and Career Training has not met its obligation under section 61 of FOIP. As such, I am not persuaded that subsection 17(1)(a) of FOIP has been appropriately applied to the 18 pages. This includes pages 2-4, 15-17, 18, 19, 43-45, 96, 102-104, 105 and 106-107.

[36] Immigration and Career Training also applied subsection 17(1)(b)(i) of FOIP to the 18 pages. Therefore, I will also consider them under that provision.

4. Did Immigration and Career Training properly apply subsection 17(1)(b)(i) of FOIP?

[37] Subsection 17(1)(b)(i) of FOIP is a discretionary exemption and 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;

[38] This provision is meant to permit public bodies to consider options and act without constant public scrutiny.

[39] A *consultation* occurs when the views of one or more officers or employees of the public body are sought as to the appropriateness of a particular proposal or suggested action.

[40] A *deliberation* is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

[41] 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.

[42] Immigration and Career Training applied subsection 17(1)(b)(i) of FOIP to 18 pages. The records constitute briefing notes, letters and drafts of those briefing notes and letters. Immigration and Career Training withheld all 18 pages in full.

[43] In its submission, Immigration and Career Training provided limited information and argument. In fact, Immigration and Career Training provided the same argument for the information on all 18 pages that it provided for subsection 17(1)(a) of FOIP:

“...This information qualifies as advice as it is an analysis of a situation and a presentation of options. This presentation of this information would be a responsibility of the person, a government employee, who presented the information. The information was presented to someone who could take an action.”

[44] Government institutions should not assume that it is self-evident on the face of the record that a test is met. Section 61 of FOIP requires government institutions to demonstrate that an exemption applies. This includes explaining how each part of the section or subsection applies.

[45] From a review of the 18 pages, there is information that may qualify for subsection 17(1)(b) of FOIP. However, there is also information that may not. I cannot make assumptions. The submission is not persuasive because it does not explain how the information on the 18 pages qualifies. For example, whether it is asserting there are consultations or deliberations going on or both, how the information in the 18 pages constitutes consultations or deliberations, what the action is that will be taken or what the employee's role was who prepared the records and why it was the employee's responsibility. There is no explanation as to how the exemption applies to individual line items or sections of the 18 pages. The 18 pages have been withheld in full with only the above arguments presented.

[46] Therefore, I find that Immigration and Career Training has not met its obligation under section 61 of FOIP. As such, I am not persuaded that subsection 17(1)(b)(i) of FOIP has been appropriately applied to the 18 pages. This includes pages 2-4, 15-17, 18, 19, 43-45, 96, 102-104, 105 and 106-107.

[47] As neither subsections 17(1)(a) or (b)(i) of FOIP have been found to apply, I recommend Immigration and Career Training release these pages.

5. Did Immigration and Career Training properly apply subsection 13(1)(a) of FOIP?

[48] Subsection 13(1)(a) of FOIP is a mandatory class-based exemption and provides:

13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:

(a) the Government of Canada or its agencies, Crown corporations or other institutions;

...
unless the government or institution from which the information was obtained consents to the disclosure or makes the information public.

[49] The provision is meant to protect information received in confidence both formally and informally from the Government of Canada unless those governments or organizations consented to release of the information or made it public. It includes the Government of Canada's agencies, Crown corporations or other institutions.

[50] In order for subsection 13(1)(a) of FOIP to apply, the following test must be met:

- i) Was the information obtained from the Government of Canada or its agencies, Crown corporations or other institutions?
- ii) Was the information obtained implicitly or explicitly in confidence?

[51] Immigration and Career Training applied subsection 13(1)(a) of FOIP to all of the information on pages 92 and 93. The pages constitute emails.

[52] In its submission, Immigration and Career Training provided limited information and argument. It asserted that:

“...the information contained within is information from the Government of Canada, or sent to the Government of Canada...”

[53] From a review of the two pages, there is information that may qualify for subsection 13(1)(a) of FOIP. However, there is also information that may not. The submission is not persuasive because it does not explain how the information was obtained in

confidence. In addition, some of the emails were created by Immigration and Career Training staff. Generally, to obtain information suggests that a government institution did not create it. The submission does not address these issues. There is no explanation as to how the exemption applies to individual line items or sections of the two pages which constitute an email chain. The two pages have been withheld in full with only the above arguments presented.

[54] I cannot make assumptions and it is not clear on the face of the record that the two-part test is met. Therefore, I find that Immigration and Career Training has not met its obligation under section 61 of FOIP. As such, I am not persuaded that subsection 13(1)(a) of FOIP has been appropriately applied to pages 92 and 93.

[55] As such, I recommend Immigration and Career Training release pages 92 and 93.

IV FINDINGS

[56] I find that the search conducted by Immigration and Career Training was not reasonable or adequate for purposes of FOIP.

[57] I find that subsection 29(1) of FOIP was appropriately applied to pages 36, 46-48, 85-87, 88-90, 110-112, 113-114, 115-116, 117-119, 120, 121, 122-123, 124-125, 126-127, 128, 129-130, 131, 132-135, 136-141, 142-147, 148-149, 150-151 and 152-154.

[58] I find that Immigration and Career Training has not met its obligations under section 61 of FOIP.

[59] I find that subsection 17(1)(a) of FOIP was not appropriately applied to pages 2-4, 15-17, 18, 19, 43-45, 96, 102-104, 105 and 106-107.

[60] I find that subsection 17(1)(b)(i) of FOIP was not appropriately applied to pages 2-4, 15-17, 18, 19, 43-45, 96, 102-104, 105 and 106-107.

[61] I find that subsection 13(1)(a) of FOIP was not appropriately applied to pages 92 and 93.

V RECOMMENDATIONS

[62] I recommend that Immigration and Career Training conduct a more fulsome search for responsive records.

[63] I recommend that Immigration and Career Training continue to withhold the personal information on pages 36, 46-48, 85-87, 88-90, 92, 110-112, 113-114, 115-116, 117-119, 120, 121, 122-123, 124-125, 126-127, 128, 129-130, 131, 132-135, 136-141, 142-147, 148-149, 150-151 and 152-154.

[64] I recommend that Immigration and Career Training release pages 2-4, 15-17, 18, 19, 43-45, 92-93, 96, 102-104, 105 and 106-107.

Dated at Regina, in the Province of Saskatchewan, this 17th day of April, 2018.

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