



REVIEW REPORT 290-2017 and 346-2017

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 18(1)(h) 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 subsections 18(1)(h) and 29(1) of FOIP were appropriately applied. 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 information withheld under subsections 18(1)(h) and 29(1) of FOIP.

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 Winners Immigration Consulting or any concern about the legitimacy of any documentation coming from Winners Immigration Consulting. January 1, 2010 to December 2014.

- [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 18(1)(h) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [4] On November 14, 2017, my office received a Request for Review from the Applicant in which the Applicant 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 December 14, 2017, Immigration and Career Training provided my office with its submission, Index of Records and copy of the records.

II RECORDS AT ISSUE

- [7] The responsive records total 47 pages. 40 pages had information withheld pursuant to subsections 18(1)(h) and 29(1) of FOIP. Seven pages were released in full.

III DISCUSSION OF THE ISSUES

[8] 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?

[9] 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.

[10] 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.

[11] 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.

[12] 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.

[13] 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.

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

[15] 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;
 - Immigration Branch;
 - Program Integrity Unit.
 2. The Assistant Deputy Minister of Economic Development.
- According to Immigration and Career Training, the records identified by the searches were emails with attachments, as the request specifically requested emails.
- Details of the searches conducted were provided as follows:
 - 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 dated June 15, 2017, indicating responsive records had been found.
 - Search of shared email address used in Immigration Branch and search of one employee's email records:
 - Employee who conducted the search had been with Immigration and Career Training for three years;
 - The employee conducted the search on June 7, 2017;
 - The employee did not search the C: drive because nothing is stored on the C: drive;

- The employee searched the archived folders for his own government email address and for the shared email address. This search took approximately six minutes. He located 70 pages;
 - The calendar was not searched;
 - The Program Integrity Paper files were searched; and
 - The employee searched four directories in the G: drive. He located 42 pages.
- Search of a former employee's records:
- The same employee who conducted the search of the shared email address conducted this search;
 - The employee conducted the search on June 8, 2017;
 - One directory was search in the C: drive. This took two minutes;
 - The former employee's emails were archived when the employee left. All archived email folders were searched. This took 30 minutes and eight pages were located;
 - The calendar was not searched;
 - No paper records were searched as the former employee did not have any paper records;
 - Outside-storage was not searched; and
 - The G: drive was not searched.

[16] There is a lack of detail pertaining to the searches conducted. No details were provided for some of the searches. In addition, it is not clear what key terms were used in each of the searches, paper files were searched, how long some of the searches took and why calendars and off-site storage was not searched. It is also not clear what the difference is between the C: drive and the G: drive and how the records are structured in those drives. This was not explained in the submission or the *Responsive Records Search Logs*. Based on the wording of the access request, it is not clear why all Program Integrity Officers were not required to conduct a search. Finally, Immigration and Career Training's

submission referred to Canmax but the access request is for records involving Winners Immigration Consulting. Immigration and Career Training has confirmed that this was a typo in its submission and it did not have any bearing on the search that was done.

[17] In conclusion, in order to be confident the search was thorough, details were needed. 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.

[18] 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 adequate for purposes of FOIP.

[19] 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?

[20] 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.

[21] 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.

[22] Immigration and Career Training severed information on 40 pages citing subsection 29(1) of FOIP. The records consist of email chains and one attachment. Some of the information is repeated multiple times on several pages. In addition to subsection 29(1) of FOIP, Immigration and Career Training also severed information on pages 13 to 17 under subsection 18(1)(h) of FOIP. I will address that severed information later in this report.

[23] On all 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.

[24] 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;

[25] 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.

[26] I recommend Immigration and Career Training continue to withhold the personal information that has been severed on the following pages: 1, 3-5, 6, 8-10, 11-12, 13-17, 18-20, 21, 22-23, 24-25, 26, 27, 28, 29, 30, 32, 34, 36-37, 38, 39, 40, 41, 42, 43 and 45-47.

3. Did Immigration and Career Training properly apply subsection 18(1)(h) of FOIP?

[27] Subsection 18(1)(h) of FOIP is a discretionary harm-based exemption and provides:

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

...

(h) information, the disclosure of which could reasonably be expected to result in an undue benefit or loss to a person.

[28] This provision is meant to prevent undue benefit or loss to a person if particular records were disclosed. *Person* includes an individual, a corporation, a partnership and the legal representatives of a person.

[29] For this provision to apply there must be objective grounds for believing that disclosing the information would result in the undue benefit or loss. The Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner)*, (2014) set out the standard of proof for harms-based provisions as follows:

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how

much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”...

- [30] The government institution does not have to prove that a harm is probable, but needs to show that there is a “reasonable expectation of harm” if any of the information were to be released. In *British Columbia (Minister of Citizens’ Service) v. British Columbia (Information and Privacy Commissioner)*, (2012), Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.
- [31] The government institution should be able to detail what the undue benefit or loss is and be able to tie the undue benefit or loss to the record in question. Government institutions should not assume the undue benefit or loss is self-evident. Particularity in describing it is needed to support the application of this provision.
- [32] Immigration and Career Training severed two columns on a spreadsheet on pages 13 to 17. In its submission, Immigration and Career Training advised that the information removed was the names of companies and the employer contact person who had allegedly provided job offers to the SINP applicants also listed on the spreadsheet. The job offers and business information was not provided to the SINP by the companies themselves but rather through another individual with Winners Immigration Consulting. An investigation into the individual with Winners Immigration Consulting revealed that these job offers were invalid and that this individual was providing falsified information to SINP. The investigation also did not identify that these companies had done anything wrong. For these reasons, Immigration and Career Training asserted it severed the information pursuant to subsection 18(1)(h) of FOIP. It asserted that if the names of the companies were released, innocent companies would be unfairly associated with someone who falsified job offers to vulnerable immigrants. Further, it asserted it was reasonable to expect that members of the public would think poorly of these companies because of the association with the investigation into this individual with Winners Immigration Consulting. Finally, it asserted that it removed the company names to avoid unintended impacts on consumer behavior and undue attention or impact to the potential profits and viability of these small businesses.

[33] *Undue* is defined in the *Oxford English Dictionary* as “excessive or disproportionate.” In British Columbia IPC Order 00-08, former Commissioner Loukidelis stated, “the word ‘undue’ must be given real meaning, determined in the circumstances of each case. Generally speaking, that which is ‘undue’ can only be measured against that which is ‘due’.” Further, in British Columbia IPC Order 00-10, the former Commissioner stated further that:

When is a financial gain or loss “undue”? ...The ordinary meanings of the word “undue” include something that is unwarranted, inappropriate or improper. They can also include something that is excessive or disproportionate, or something that exceeds propriety or fitness. Such meanings have been approved regarding the similar provision in Alberta’s freedom of information legislation...The courts have also given ‘undue’ such meanings, albeit in relation to other kinds of legislation...

[34] It is more than possible that these businesses could suffer undue loss as a result of their company’s names being associated with the fraudulent activity of another company. An investigation did not indicate these companies had done anything wrong so the loss would be undue.

[35] Therefore, I find that Immigration and Career Training appropriately applied subsection 18(1)(h) of FOIP to the names of the companies and employer contact persons in the two columns on pages 13 to 17. I recommend it continue to withhold this information.

IV FINDINGS

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

[37] I find that subsection 29(1) of FOIP was appropriately applied to pages: 1, 3-5, 6, 8-10, 11-12, 13-17, 18-20, 21, 22-23, 24-25, 26, 27, 28, 29, 30, 32, 34, 36-37, 38, 39, 40, 41, 42, 43 and 45-47.

[38] I find that subsection 18(1)(h) of FOIP was appropriately applied to pages 13 to 17.

V RECOMMENDATIONS

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

[40] I recommend that Immigration and Career Training continue to withhold the personal information on pages: 1, 3-5, 6, 8-10, 11-12, 13-17, 18-20, 21, 22-23, 24-25, 26, 27, 28, 29, 30, 32, 34, 36-37, 38, 39, 40, 41, 42, 43 and 45-47.

[41] I recommend that Immigration and Career Training continue to withhold pages 13 to 17.

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

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