



## **REVIEW REPORT 292-2017, 348-2017**

### **Ministry of Immigration and Career Training**

**December 18, 2018**

#### **Summary:**

The Applicant submitted an access to information request to the former Ministry of the Economy, now the Ministry of Immigration and Career Training (Ministry). The Ministry denied access to a portion of the record pursuant to subsections 17(1)(a), 17(1)(b)(i), 18(1)(b)(i) and 18(1)(b)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant requested a review by my office of the use of these exemptions and the Ministry's search efforts. Through this review, subsections 18(1)(b)(i) and 18(1)(b)(ii) of FOIP were removed from the scope of the review as the Applicant was no longer interested in receiving the information to which those exemptions had been applied. The Commissioner found the Ministry conducted a reasonable and adequate search, even though he also found that one of the areas of the Ministry did not properly detail the search efforts. The Commissioner recommended that going forward, the Ministry require that the amended *Responsive Record Search Log* be completed by all officials searching for records responsive to all access to information requests and encouraged other ministries to use a similar search log form. The Commissioner also found that subsection 17(1)(a) of FOIP applied to the withheld information and recommended the Ministry continue to withhold that information. The Commissioner did not need to consider if subsection 17(1)(b)(i) of FOIP applied to the record.

#### **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 the review, the Ministry of the Economy was split into three ministries: the Ministry of Energy and Resources, the Ministry of Trade and Export Development and the Ministry of Immigration and Career Training. My office has

been advised that the records involved with this review are now in the possession and under the control of the Ministry of Immigration and Career Training (Ministry). Therefore, this report will refer to the new Ministry.

- [2] The Applicant submitted an access to information request that was received by the Ministry on May 31, 2017, requesting access to:

Please provide all correspondence to and/or from [former Assistant Deputy Minister (ADM), Labour Market Development Division] related to Brightenvue Development International's GTEC [Global Trade and Exhibition Centre] project and/or its DIEC [Dundurn International Exhibition Centre]. September 1, 2016 to present.

- [3] By letter dated August 31, 2017, the Ministry responded to the request. In the response, it indicated they were denying access to a portion of the information pursuant to subsections 17(1)(a), 17(1)(b)(i), 18(1)(b)(i) and 18(1)(b)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [4] My office received a Request for Review from the Applicant on November 13, 2017. On the form, the Applicant indicated the reason for the review was that partial or full access to the record was denied.

- [5] On November 21, 2017, my office notified the Applicant and the Ministry of our intention to undertake a review of this matter pursuant to Part VII of FOIP and invited both parties to make a submission.

- [6] On December 14, 2017, the Ministry released additional information to the Applicant that had been originally severed from the record.

- [7] On December 27, 2017, the Applicant advised my office that the original request for review also outlined that he would like the search efforts reviewed. Upon review of the covering email provided to our office by the Applicant, it was determined this was an oversight by my office.

[8] On December 28, 2017, my office notified the Applicant and the Ministry that we would also be conducting a review of the search efforts undertaken to locate the records requested by the Applicant. My office invited both parties to make a submission.

[9] Through the course of this review the Applicant advised my office that he was not interested in the severed “file name” portion of the record. This was the only portion of the record in which the Ministry was claiming subsections 18(1)(b)(i) and 18(1)(b)(ii) of FOIP, so I do not need to consider them further.

## **II RECORDS AT ISSUE**

[10] The responsive record totals 45 pages. My office will review information found on nine pages that the Ministry has withheld in full or in-part pursuant to subsections 17(1)(a) and 17(1)(b)(i) of FOIP. My office will also review the Ministry’s search efforts.

## **III DISCUSSION OF THE ISSUES**

### **1. Do I have jurisdiction?**

[11] The Ministry is considered a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I have authority to conduct this review.

### **2. Did the Ministry conduct an adequate search?**

[12] Section 5 of FOIP provides an individual’s right to access records of a government institution. This section is clear that access to records must be given if they are in the possession or control of a government institution subject to any exemptions under Part III of FOIP. 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.

[13] FOIP does not require a public body to prove with absolute certainty that records responsive to an access to information request do not exist. However, it must demonstrate that it has conducted a reasonable search in order to locate the records.

[14] The focus of a search review is whether or not the public body conducted a reasonable search. A reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records 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.

[15] When a public body is demonstrating search efforts, the following can be included in the public body's submission to outline its search strategy. I would like to note this is not an exhaustive list when demonstrating search efforts:

- 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 and 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 folders and sub-folders of the electronic directory. If the record

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

- Explain how you have considered records stored offsite.
- 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 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 it take for each employee to search?
- 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.

[16] The above list is meant to be a guide. Providing the above details is not a guarantee that this office will find that the search efforts are reasonable. Each case will require different search strategies and details depending on the records requested.

[17] I would like to note that the Applicant's request is limited to correspondence to and from the former ADM, Labour Market Development Division. The Ministry advised my office that at the time, this position was also responsible for immigration.

[18] In its submission, the Ministry outlined that it received 16 Access to Information requests, all referring or relating to the same or similar information. Therefore, it was determined that a meeting with all of the affected officials was needed to learn where potential overlap in records may occur and to determine who and what areas were responsible for the records

for each of the 16 requests. Through these consultations with officials, it determined that there were two areas of the Ministry that would potentially have records: the former Labour Market Development Division (also responsible for immigration) and the office of the ADM of the Economic Development Division.

[19] Further, at the time this request was received, the office responsible for access to information requests was introducing a new process of having areas complete a *Responsive Record Search Log* (search log). The Ministry has advised that the purpose of the search log is to ensure that divisions with records conduct a thorough search for records when an Access to Information request is received. It details who conducted the search, when, how long the search took, what was searched and why.

[20] The Ministry provided me a copy of one search log that details the search for records of the former ADM, Labour Market Development Division. The search was conducted by the former ADM's Administrative Assistant. The search log details the date the searches were conducted, the length of time it took to search each area and the areas searched for the former ADM, including:

- the computer directories search;
- active and archived emails;
- calendar;
- paper records;
- offsite storage files; and
- electronic storage.

[21] Through the course of the review, my office asked the Ministry what search terms were used for the electronic record search. It advised the following:

- GTEC;
- Global Trade and Exhibition Centre;
- DIEC;
- Dundurn International Exhibition Centre; and
- Brightenvew.

- [22] Given the details of the request, I am satisfied that these are reasonable search terms used to locate the responsive records.
- [23] I commend the Ministry for the use of the search log. The search log guides areas that potentially have responsive records on where they should be searching. It also helps to satisfy the Access Co-ordinator that a reasonable search was conducted and, in the event of a search review by my office, it provides the necessary detail my office requires.
- [24] At the time of the review, the search log did not include an area to note the search terms used. The Ministry has provided my office with an amended search log that now has an area to note the search terms. This amended search log will assist areas in conducting more fulsome searches for responsive records. I would encourage other ministries to use a similar search log form.
- [25] Regarding the search of the ADM of the Economic Development Division's records, my office has been provided with little detail regarding search efforts that were conducted. They outlined that the ADM of the Economic Division has been with government for 17 years and has had considerable experience with access to information requests. However, the search log was not completed for the search.
- [26] The Ministry provided me a copy of the email that the ADM of the Economic Division forwarded the responsive records as attachments without details of where searches took place and what search terms were used.
- [27] Through the course of the review, the Ministry advised my office that although the ADM of the Economic Division conducted a search for the records, he was not required to so as the request was specifically for correspondence to and from the former ADM of Labour Market Development Division. He conducted a search because at the time this request was received, the Ministry was searching for responsive records for several similar requests and he conducted searches even though the request was not for his records.

[28] Although the search resulted in responsive records being located, the Ministry advised me these records were also located by the former ADM of Labour Market Development Division and therefore were not required.

[29] It is a good practice for public bodies to have more than one area searched, even for requests that are directed at records of one official. This provides an extra assurance that all the responsive records are located. However, search details should still be documented for all searches that are conducted.

[30] Even though the Ministry has not provided my office with the search efforts of the ADM of the Economic Division, it has demonstrated that it conducted a reasonable and adequate search for records that were specific to this request.

[31] I find the Ministry conducted a reasonable and adequate search to locate the records responsive to this request.

[32] I find the Ministry did not properly detail the search efforts of the ADM of the Economic Division.

### **3. Did the Ministry properly apply subsection 17(1)(a) of FOIP?**

[33] The Ministry has withheld a portion of the information found on pages 16, 18, 19 and 22 and all of the information found on pages 31 to 35 pursuant to subsection 17(1)(a) of FOIP.

[34] Subsection 17(1)(a) 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:

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



[35] The exemption is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice or all records related to the advice. The object of the provision includes maintaining an effective and neutral public service capable of producing full, free and frank advice.

[36] In order to be found to apply, all three parts of the following test must be met:

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

[37] I will now assess each part of the test.

***Does the information qualify as advice, proposals, recommendations, analyses or policy options?***

[38] *Advice* includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of the facts. Advice includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.

[39] *Recommendations* relate to a suggested course of action as well as the rationale for a suggested course of action. Recommendations are generally more explicit and pointed than advice.

[40] *Proposals, analyses and policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

[41] In summary, advice is the course of action put forward, while analyses refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals and policy options as a course of action.

[42] In its submission, the Ministry has outlined how the information that has been withheld on pages 16, 18, 19, 22 and 31 to 35 are questions and answers that were prepared for a potential interview and questions posed. The Ministry has prepared the answers as a recommended approach for the ADM to answer questions.

[43] As such, the withheld information qualifies as recommendations and the first part of the test has been met for these pages.

***Were the advice, recommendations, proposal, analyses and/or policy options:***

- i. sought, expected, or part of the responsibility of the person who prepared the record; and***
- ii. prepared for the purpose of doing something, for example, taking an action or making a decision; and***
- iii. involved or intended for someone who can take or implement the action?***

[44] For this part of the test to be met, the information does not have to have been received by the person who can take or implement the action in order to qualify as advice, recommendations, proposals, analyses and/or policy options.

[45] Drafts and redrafts of advice, recommendations, proposals, analyses and/or policy options may be protected by the exemption. A public servant may engage in writing any number of drafts before communicating part or all of their content to another person. The nature of the deliberative process is to draft and redraft advice or recommendations until the writer is sufficiently satisfied that he is prepared to communicate the results to someone else. All the information in those earlier drafts informs the end result even if the content of any one draft

is not included in the final version. For example, in Review Report 216-2017, the Commissioner found that edits and comments (track changes) within draft policies qualified as recommendations.

[46] In its submission, the Ministry has outlined that the information that has been withheld on pages 16, 18, 19, 22 and 31 to 35 were prepared by both the Communications and Immigration Services Branch to prepare responses for interview questions for the ADM. Further, the information was prepared for the purpose of doing something, that is for the ADM to answer interview questions from a member of the media. Finally, the Ministry has outlined that the information was prepared for the ADM, who was going to give the interview.

[47] Therefore the second part of the test has been met.

***Was the advice, recommendations, analyses and/or policy option developed by or for the public body?***

[48] For information to be developed by or for a public body, the person developing the information should have one of the following relationships with the public body:

- be an official, officer or employee;
- be contracted to perform services;
- be specifically engaged in an advisory role, even if not paid; or
- have a specific connection.

[49] Further, the role of the individual(s) involved should be explained by the public body and the information must have been developed by or for a government institution or a member of Executive Council.

[50] The provision is not meant to protect the bare recitation of facts, without anything further. It does not generally apply to records or parts of records that in themselves reveal only the following:

- that advice was sought or given;

- that particular persons were involved in the seeking or giving of advice; or
- that advice was sought or given on a particular topic or at a particular time.

[51] The Ministry has outlined in its submission that officials in the Communications Branch and the Executive Director of Immigration services developed the questions and answers in order to prepare the ADM for the interview. Upon commencement of the review, the Ministry did provide the Applicant with some additional information found on these pages. From a review of the record, I am satisfied the remaining withheld information meets the third part of the test.

[52] I find subsection 17(1)(a) of FOIP applies to the withheld information found on pages 16, 18, 19, 22 and 31 to 35.

[53] As I have found subsection 17(1)(a) applies, there is no need to assess if subsection 17(1)(b)(i) of FOIP applies to this record.

#### **IV FINDINGS**

[54] I find the Ministry conducted a reasonable and adequate search to locate the records responsive to this request.

[55] I find the Ministry did not properly detail the search efforts of the ADM of the Economic Division.

[56] I find subsection 17(1)(a) of FOIP applies to the withheld information found on pages 16, 18, 19, 22 and 31 to 35.

## V RECOMMENDATIONS

[57] I recommend that going forward the Ministry require that the amended *Responsive Record Search Log* be completed by all officials searching for records responsive to all access to information requests and I would encourage other ministries to use a similar search log form.

[58] I recommend that the Ministry continue to withhold the information found on pages 16, 18, 19, 22 and 31 to 35.

Dated at Regina, in the Province of Saskatchewan, this 18th day of December, 2018.

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