



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **REVIEW REPORT 301-2017, 302-2017, 303-2017, 304-2017, 003-2018**

**Ministry of Social Services, Ministries of Energy and Resources/Trade and  
Export Development (formerly Ministry of the Economy), Ministry of  
Environment, Ministry of Labour Relations and Workplace Safety,  
Ministry of Central Services**

**August 14, 2018**

### **Summary:**

An Applicant submitted access to information requests to the Ministry of Social Services (Social Services), the Ministry of the Economy (Economy), the Ministry of Environment (Environment), the Ministry of Labour Relations and Workplace Safety (LRWS) and the Ministry of Central Services (Central Services) requesting all Deputy Minister emails “received from or sent to [a specified @saskparty.com email address] – or referencing [the specified @saskparty.com email address]” from January 1, 2014 to present. All five ministries initially applied subsection 6(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP) but later reconsidered the application and processed the Applicant’s requests. The Commissioner found that the ministries did not appropriately apply subsection 6(1)(b) of FOIP to the Applicant’s requests, the ministries did not respond to the Applicant within the legislated timeline and the ministries did not meet their duty to assist the Applicant. The Commissioner recommended the ministries establish a practice for processing requests to differentiate between clarification in an effort to assist the applicant and clarification pursuant to section 6 of FOIP. The Commissioner also reviewed Central Services’ search efforts and recommended Central Services develop an email management policy.

### **I BACKGROUND**

[1] On October 25, 2017, the Applicant submitted access to information requests to the Ministry of Social Services (Social Services), the Ministry of the Economy (Economy), the

Ministry of Environment (Environment), the Ministry of Labour Relations and Workplace Safety (LRWS) and the Ministry of Central Services (Central Services) requesting all Deputy Minister emails “received from or sent to [a specified @saskparty.com email address] – or referencing [the specified @saskparty.com email address]” from January 1, 2014 to present.

- [2] I note that during the course of this review, Economy has become three separate ministries – The Ministry of Energy and Resources, the Ministry of Trade and Export Development and the Ministry of Immigration and Career Training. The Access Officer has indicated that any responsive records would span both the Ministry of Energy and Resources and the Ministry of Trade and Export Development. For the purposes of this report, I will refer to the ministries as Economy.
- [3] On November 22, 2017, the Applicant received responses from each ministry. All of the responses to the access to information requests quoted subsection 6(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP) and included this statement:
- Before this advances further, we raise whether you are prepared to alter or narrow your request. Once you provide our office with a response, we will proceed with processing your request.
- [4] On November 23, 2017, the Applicant submitted requests for review to my office for four of the five responses to the access to information requests. The requests for review involved Social Services, Economy, Environment and LRWS.
- [5] On November 24, 2017, notification of my office’s intention to undertake a review was provided to the Applicant, Social Services, Economy, Environment and LRWS.
- [6] All five of the ministries reconsidered its application of subsection 6(1)(b) of FOIP and determined that a search for responsive records could be conducted based on the original wording of the Applicant’s access to information request. Each ministry issued a section 7 response as follows:

| <b>Ministry</b>                        | <b>Date of letter</b> | <b>Exemptions applied</b>  |
|--|-----------------------|--|
| <b>Social Services<br/>(301-2017)</b>  | December 22, 2017     | You have requested access to records that requires two email accounts to be restored. Therefore, in order to process your access to information request, the following fee will be necessary: \$2,868.96. At this time, we cannot advise whether any responsive records will be identified in the recovered tapes. If responsive records are identified, access to the records may still be denied in full or in part based on exemptions that may or must be applied pursuant to the Act. |
| <b>Economy<br/>(302-2017)</b>          | December 21, 2017     | You have requested access to a large amount of records that may require exemptions to be applied. Therefore, in order to process your access to information request, the fees outlined on the attached form, totaling \$360.00 will be necessary.  |
| <b>Environment<br/>(303-2017)</b>      | December 21, 2017     | In order to process your request the fees outlined in the attached form totaling \$4303.44 are necessary.  |
| <b>LRWS<br/>(304-2017)</b>             | January 2, 2018       | Access to the records you have requested is denied pursuant to clauses 15(1)(d), 17(1)(a), subclauses 17(1)(b)(i), (ii) and (iii), clauses 17(1)(d) and 18(1)(d) of <i>The Freedom of Information and Protection of Privacy Act</i> (FOIP).  |
| <b>Central Services<br/>(003-2018)</b> | December 22, 2017     | This is to advise you that the records that you wish to access do not exist in the Ministry of Central Services. For your information, this notification has been provided pursuant to clause 7(2)(e) of the Act.  |

[7] My office followed up with the Applicant to inquire if they were satisfied now that the ministries would be processing the requests. The Applicant wished for the review to proceed.

[8] Additionally, on January 9, 2018, the Applicant also submitted a request for review to my office for Central Services' application of subsection 6(1)(b) of FOIP to their request. The

request for review also requested my office review Central Services' search efforts that resulted in the conclusion that no responsive records exist.

## **II RECORDS AT ISSUE**

[9] There are no records at issue, as this report will review the ministries application of subsection 6(1)(b) of FOIP, if a response was provided pursuant to section 7 of FOIP within the legislated timeline, duty to assist the Applicant, as well as Central Services' search efforts that resulted in the conclusion that no responsive records exist.

## **III DISCUSSION OF THE ISSUES**

### **1. Does my office have jurisdiction in this matter?**

[10] The ministries are "government institutions" as defined by subsection 2(1)(d)(i) of FOIP. Thus, my office has jurisdiction to conduct this review.

### **2. Did the ministries appropriately process the Applicant's access to information requests?**

[11] The ministries each received separate access to information requests from the Applicant. All of the access to information requests were seeking emails of the Deputy Minister that referenced a specified @saskparty.com email address or were sent to or received from that email address. All of the ministries responded to the Applicant, requesting the Applicant alter or narrow their request.

[12] In my office's notification emails to the ministries, my office requested each ministry's submission address:

- How did the Ministry reach the conclusion that the Applicant's access to information request did not contain the elements required pursuant to subsection 6(1)(b) of FOIP in order to process the request or conduct a search for records?

- Prior to the November 22, 2017 response to the Applicant's request, did the Ministry attempt to gain clarification from the Applicant on this request? If not, please indicate why the Ministry waited until the 30-day time period had nearly elapsed to seek clarification?
- Based on the IPC's May 2017 blog, *3 Minutes for a Search*, it provides that three minutes is a reasonable timeframe to search an email account for recent emails. Based on the information provided in the Applicant's access to information request, had the Ministry considered searching the email account to determine if any emails were responsive to the request prior to issuing its November 22, 2017 response to the Applicant?
- In considering your response to this access to information request, did the Ministry have any discussions with any other government institutions regarding this request? If so, please explain why.

[13] The ministries each submitted separate submissions. All of the submissions provided to my office offered the same position regarding the application of subsection 6(1)(b) of FOIP and stated:

The Ministry respectfully submits that, during the review, it reconsidered the application of clause 6(1)(b) of FOIP to the Applicant's access to information request. The Ministry requests a finding that the Ministry reconsidered the application of clause 6(1)(b) of FOIP to the Applicant's access to information request... and provided a response to the Applicant within the legislated timelines.

[14] In determining whether the ministries appropriately processed the Applicant's access to information requests, I will consider:

- i. Did the ministries engage in coordination efforts in responding to the Applicant's request?
- ii. Was subsection 6(1)(b) of FOIP appropriately applied to the Applicant's access to information request?
- iii. Did the ministries respond to the Applicant's request within the legislated time period?
- iv. Did the ministries meet their duty to assist the Applicant?

**i. Did the ministries engage in coordination efforts in responding to the Applicant's request?**

- [15] As noted earlier, the Applicant submitted the same access to information request to each of the five ministries. All of the ministries responded identically to the Applicant, applying subsection 6(1)(b) of FOIP.
- [16] When my office issued notifications of my review, one of the points my office requested the ministries address was “in considering your response to this access to information request, did the Ministry have any discussions with any other government institutions regarding this request? If so, please explain why.”
- [17] Each ministry provided a response advising that they had engaged legal counsel for advice in processing this request and as such those records would be covered by solicitor-client privilege.
- [18] That being the case, my office requested information on discussions with other government institutions, not conversations with legal counsel.
- [19] As it appeared that some coordination efforts were taking place in this review, my office asked if any of the ministries had shared the name of the Applicant or an unredacted version of the access to information request.
- [20] Central Services responded indicating that it had shared the name of the Applicant with legal counsel. Economy responded indicating that the name of the Applicant was shared with two of the Access Officer's staff members who are responsible for processing access to information requests. Social Services, Environment and LRWS advised my office it had not shared the name of the Applicant.
- [21] In Investigation Report F2017-IR-01, the Alberta Information and Privacy Commissioner (Alberta IPC) undertook an investigation into a public bodies practices for processing access to information requests that were resulting in delays. One of the considerations was

the Cross-Department Request Process, which is a practice of collaboration between ministries that receive identical access requests. In that investigation report, the Alberta IPC provided:

[47] The [public body] said the cross-government practice is intended “to support consistency within the [Government of Alberta]”...

...

[49] ...interpreting applicable sections of the FOIP Act is a duty the Act ascribes to each individual public body. It is unclear to me why it is necessary to have a group decide on what sections apply to any given record or to determine the scope of the request. The Public Body’s FOIP staff is trained to do just that.

[50] Further, it is the responsibility of the Head of each public body to make disclosure decisions, with the assistance of her/his FOIP staff. Each exception to access set out in the Act explicitly states “the head of the public body” must make the decision. Obtaining an interpretation from outside the public body not only can delay a response but may also be seen to interfere with the discretion of the head.

#### Recommendation

The [public body] should review the Cross-Department Request Process and consider the extent to which this process delays responses to access requests and interferes with the delegated responsibilities of the Head of each public body.

[22] Without knowing what types of discussions have taken place, who was involved in these discussions, what the nature of these discussions were or what decisions were made, I have no way of knowing whether or not these discussions interfered with the discretion of the head. Regardless if the ministries are discussing the request with legal counsel or other ministries, it should ensure that these practices of seeking advice or undertaking discussions still provide the head with the ability to exercise their discretion and do not delay the process.

[23] The ministries should also ensure that any coordination efforts undertaken in the processing of an access to information request protect the identity of the Applicant and are in place to assist the Applicant and not delay or discourage the Applicant. The ministries should also ensure any coordination efforts are applied in a consistent manner to ensure Applicants are

not being treated differently based on who they are or what organization they may represent.

**ii. Was subsection 6(1)(b) of FOIP appropriately applied to the Applicant's access to information request?**

[24] Subsection 6(1)(b) of FOIP provides:

6(1) An applicant shall:

...

(b) specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject-matter to identify the record.

[25] None of the ministries' submissions addressed how they had concluded that the Applicant's access to information request did not contain the elements outlined in subsection 6(1)(b) of FOIP and instead asked my office take into consideration that it later reconsidered the application of this provision and processed the requests.

[26] As quoted earlier subsection 6(1)(b) of FOIP provides that the Applicant's access to information request is to include time, place and event.

[27] The Applicant's access to information request provided the *time*: January 1, 2014 to present (October 25, 2017); *place*: the Deputy Minister's email account; and *event*: where the email address [@saskparty.com email address] was referenced in the email or was sent to or received from that email address.

[28] Based on a review of the elements required and the information contained in the Applicant's request, the Applicant had supplied sufficient information to process the request.



[29] I am pleased that the ministries at a later date reconsidered their position and determined that the requests could be processed and provided the Applicant with a response pursuant to section 7 of FOIP.

[30] I find that initially the ministries did not properly apply subsection 6(1)(b) of FOIP to the Applicant's access to information requests, but I note, later, they reversed their position.

**iii. Did the ministries respond to the Applicant's request within the legislated time period?**

[31] Section 7 of FOIP provides:

7(1) Where an application is made pursuant to this Act for access to a record, the head of the government institution to which the application is made shall:

(a) consider the application and give written notice to the applicant of the **head's decision** with respect to the application in accordance with subsection (2); or

...

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

(a) stating that access to the record or part of it will be given on payment of the prescribed fee and setting out the place where, or manner in which, access will be available;

...

(d) stating that access is refused, setting out the reasons for the refusal and identifying the specific provision of the Act on which the refusal is based;

...

...

(5) **A head who fails to give notice pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record.**

[emphasis added]

[32] As noted earlier in this report, all of the ministries were of the opinion that the Applicant's access to information request had been processed and responded to within the legislated timeline.

[33] The ministries all received the Applicant's access to information request on October 25, 2017. As provided at subsection 7(2) of FOIP, the ministries had 30 days to respond to the Applicant's requests – November 24, 2017.

[34] As I have already addressed, the Applicant's access to information requests contained sufficient information to identify the record. Thus, the November 24, 2017 deadline to respond to the Applicant still applied.

[35] In a recent Review Report 311-2017, 312-2017, 313-2017, 316-2017, 340-2017, 341-2017 and 342-2017 my office discussed legislated timelines:

[30] GTH received the Applicant's access requests on May 26, 2017. Twenty-five days elapsed and then it issued fee estimate letters dated June 20, 2017 to the Applicant. That means that once the Applicant paid deposits for each of the fee estimates, GTH would have had only five more days to provide a response pursuant to section 7 of FOIP.

...

[32] GTH [did not provide the Applicant with a response within the legislated timelines and] it was deemed to have given notice of a decision to refuse to give access to the record pursuant to subsection 7(5) of FOIP:

7(5) A head who fails to give notice pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record.

[36] Economy and Environment's section 7 responses were dated December 21, 2017. Social Services and Central Services responses were dated December 22, 2017. LRWS' response to the Applicant was dated January 2, 2018.

[37] All of these responses were well beyond the 30-day legislated timeline with most nearly approaching 60 days and one response beyond 60 days. This caused unnecessary delay in responding to the Applicant's access to information requests. The ministries failed to

provide a section 7 response to the Applicant within the 30 day timeline, resulting in a deemed refusal pursuant to subsection 7(5) of FOIP. I find that the ministries did not provide a section 7 response to the Applicant within the legislated timeline.

**iv. Did the ministries meet their duty to assist the Applicant?**

[38] Subsection 5.1(1) of FOIP provides:

**5.1(1)** Subject to this Act and the regulations, a government institution shall respond to a written request for access openly, accurately and completely.

[39] I note that this provision is an amendment to FOIP and came into effect on January 1, 2018, after the Applicant made their access to information requests. Nevertheless, my office has been informing public bodies for many years that there was an implied duty to assist.

[40] My office's resource, *Best Practices for Responding to Access Requests* speaks to clarifying or narrowing requests and provides:

If an applicant makes a broad request or the request will result in a large fee because of the volume of records, it is best practice for a public body to contact the applicant and work together to clarify or narrow the scope of the request. This may have the result in getting the applicant the information they are seeking with less work for the public body. This is part of the duty to assist.

...

If a public body is just trying to narrow or clarify a request to produce fewer records, and the applicant is not responding promptly, the public body should keep working to process the request in order to meet legislated timelines.

[41] The Office of the Information and Privacy Commissioner for Nova Scotia's Review Report 16-05 provides the following regarding processing access to information requests:

[40] Best practices for public bodies when receiving and interpreting access to information requests are:

- Interpret access to information requests in a fair, reasonable, open and flexible manner.

- Before deciding whether sufficient particulars are required, consult with an individual familiar with the subject-matter and ensure that he or she is taking into account the public body's duty to make every reasonable effort to assist the applicant.
- If further particulars are required:
  - Immediately (within a day or two of receipt of the request) advise the applicant of the need for further particulars.
  - Ask specific questions and make specific suggestions or illicit the needed information.
  - Advise the applicant that he or she has the right to request a review of the public body's decision to place the request on hold.
  - Permit the applicant to amend the application to provide additional details.
  - Respond promptly to the applicant's communications and questions.
  - Conclude the on hold time as quickly as possible, generally within a few days.
  - Restart the 30 day timeline immediately upon receipt of the needed information.

[42] Had the ministries attempted to contact the Applicant within a few days of receiving the request in an effort to reduce the size of the record to reduce fees, this may have been interpreted as an attempt to assist the Applicant. However, in this case, the ministries waited until the 28<sup>th</sup> day to contact the Applicant requesting that the Applicant narrow the request before they proceeded with processing. When requesting information in an effort to assist the Applicant, the public body still has an obligation to respond to the Applicant within the legislated timeframe.

[43] I find the ministries did not meet their duty to assist the Applicant.

[44] I recommend the ministries implement a practice for processing access to information requests, such as the best practices outlined in the above Nova Scotia report.

### **3. Did Central Services conduct a reasonable search for responsive records?**

[45] Central Services' submission provided that it had conducted a search of the email accounts of the current and former Deputy Minister of Central Services. Using the @saskparty.com

email address specified by the Applicant in the access to information request, Central Services searched the two email accounts for any emails sent to or received from the email address, or any emails that referenced the email address for the period specified. The search of the email accounts also included any archived folders. Central Services indicated that the search on the two email accounts took 20 minutes each and resulted in no responsive records located.

[46] My office asked Central Services for additional information including if the ministry had searched for emails in its records management system and if the ministry had a records management policy for saving emails.

[47] Central Services advised that the Deputy Minister's office stores all emails within their outlook email account and does not have an electronic filing system for the storage of emails. The Deputy Minister's office also has access to email accounts of past Deputy Ministers within their own outlook email accounts.

[48] Central Services also provided a copy of its records management policy and advised it also follows the Provincial Archives of Saskatchewan (Archives) resource *Email Management Guidelines*. While Central Services' records management policy provides that emails are included in the definition of a government record, it does not appear the policy provides any further direction regarding how to manage emails.

[49] In Archives' resource *Basic Records Management Practices for Saskatchewan Government*, it provides the following regarding electronic records management:

An electronic or digital record is any item of information that is created, recorded or stored on any medium in or by a computer system or other similar device. **These records must be managed in the same manner as records in other formats.** Electronic records that are subject to records management requirements including e-mail and other electronic messages, social media and website and cloud computing.

**As *The Archives and Public Records Management Act* is media neutral, the management of electronic records (including e-mail) should be integrated with other records management practices for records in the custody or under the control of each institution.**

[50] Central Services should ensure its practices for managing emails is documented in a policy or procedure to ensure emails are managed in the same manner as all other records.

[51] My office does encourage public bodies to include email accounts in their search strategy for emails, however it is the office's opinion that public bodies also consider any other electronic and physical files where emails might be saved. As Central Services has advised that the Deputy Minister's office does not retain copies of emails outside of their outlook email accounts, there are not any other files for Central Services to consider. However, my office does encourage Central Services integrate its emails into its records management system.

[52] I find that Central Services has conducted a reasonable search for responsive records.

[53] I recommend Central Services develop an email management policy or procedure to ensure emails are managed in the same manner as all other records.

#### **IV FINDINGS**

[54] I find that the ministries initially did not appropriately apply subsection 6(1)(b) of FOIP, but note, later reversed their position.

[55] I find that the ministries did not provide a section 7 response to the Applicant within the legislated timelines.

[56] I find that the ministries did not meet their duty to assist the Applicant.

[57] I find that Central Services has conducted a reasonable search for responsive records.

## **V RECOMMENDATIONS**

[58] I recommend the ministries ensure its practice for processing access to information requests clearly differentiate between clarification sought to meet their duty to assist and clarification sought pursuant to section 6 of FOIP.

[59] I recommend Central Services develop an email management policy or procedure to ensure emails are managed in the same manner as all other records.

Dated at Regina, in the Province of Saskatchewan, this 14th day of August, 2018.

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