SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REVIEW REPORT F-2013-005

Ministry of Health

Summary: In December 2011, an Applicant submitted two access to information requests, one to the Ministry of Finance (Finance) and the other to the Ministry of Health (Health). Finance transferred its access to information request to Health. Health then transferred both requests to the Ministry of Justice (Justice), stating that Justice held the responsive records for litigation purposes. However, Health admitted that there were responsive records "contained" within its Ministry. The Commissioner found that Health did not demonstrate that Justice had a "greater interest" in the records pursuant to section 11(2) of *The Freedom of Information and Protection of Privacy Act*. The Commissioner also found that Health improperly transferred Finance's request to Justice. Further, he found that Health should have processed the responsive records it had in its possession in response to the Applicant's request. The Commissioner recommended that Health complete a search for additional records it may have in its possession and process those records in response to the Applicant's request.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, ss. 2(1)(d)(i), 11, 11(1), 11(2), 11(2)(a), 11(2)(b), 61; *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1; Ontario's *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, ss. 18(3), 18(4); Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A 2000, c. F-25, ss. 10, 15, 15(1)(a).

Authorities Cited: Saskatchewan OIPC Review Reports F-2010-001, F-2004-006, F-2004-003, F-2012-002 F-2008-001, F-2006-004, F-2004-005; Saskatchewan

OIPC Investigation Report H-2007-001; Alberta IPC: Order 2000-021; Ontario IPC: Orders MO-1494, P-279.

Other Sources Cited: Saskatchewan OIPC: *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review*; Service Alberta, Policy and Governance Branch: *FOIP Guidelines and Practices (2009).*

I BACKGROUND

[1] The Applicant sent an access to information request dated December 13, 2011 to the Ministry of Finance (Finance). He requested:

> I request access to Saskatchewan's agreement with [Law Firm A] and [Law Firm B] concerning a legal action on behalf of Saskatchewan to recover health care costs from the tobacco industry. This is the agreement to which Saskatchewan's September 29, 2011 news release entitled *Saskatchewan Taking Steps to Recover Health Care Costs from Tobacco Industry* refers: see http://www.gov.sk.ca/news?newsId=0141357a-e920-4340-9b0d-697a8c6719b8.
>
> I also request access to all records (including, but not limited to, analyses, authorizations, briefing notes, correspondence, drafts, e-mails, inter- and intra-governmental communications, letters, memos, notes, presentations, reports and research papers) that relate to the agreement and that are in the possession or under the control of the Ministry of Finance.

[2] The Applicant also submitted an access to information request dated December 13, 2011 to the Ministry of Health (Health). He requested:

> I request access to all records (including, but not limited to, analyses, authorizations, briefing notes, correspondence, drafts, inter- and intra-governmental communications, e-mails, letters, memos, notes, presentations, reports and research papers) that are in the possession or under the control of the Ministry of Health and that relate to Saskatchewan's agreement with [Law Firm A] and [Law Firm B] concerning a legal actions on behalf of Saskatchewan to recover health care costs from the tobacco industry. This is the agreement to which Saskatchewan's September 29, 2011 news released entitled *Saskatchewan Taking Steps to Recover Health Care Costs from Tobacco Industry* refers: see http://www.gov.sk.ca/news?newsId=0141357a-e920-4340-9b0d-697a8c6719b8.

[3] Finance responded to the Applicant in a letter dated December 15, 2011, which stated:

> **This is to inform you that your access request has been transferred to the Ministry of Health as they have a greater interest in the records you are requesting.** The transfer of your access request is pursuant to clause 11(2)(a) of *The Freedom of Information and Protection of Privacy Act* (the Act) as, "…the record was originally prepared in or for the government institution."
>
> [emphasis added]

[4] On or about December 29, 2011, Health responded to the Applicant in a letter. It advised that it had transferred both access requests to the Ministry of Justice (Justice):

> Thank you for your Access to Information Request received in this office on December 14, 2011, pursuant to *The Freedom of Information and Protection of Privacy Act* (the Act)…
>
> **This is to inform you that your access request has been transferred to the Ministry of Justice and Attorney General as they have a greater interest in the records you are requesting.** The transfer of your access request is pursuant to clause 11(2)(a) of *The Freedom of Information and Protection of Privacy Act* (the Act) as, "…the record was originally prepared in or for the government institution." **The Ministry of Justice and Attorney General has taken the lead on this file due to potential litigation and as such, holds all relevant records.**
>
> **We recognize receipt of a transfer letter from the Ministry of Finance which will be directed to the Ministry of Justice and Attorney General. As such, we are forwarding, along with you request submitted to this office, a copy of your request that originated in the Ministry of Finance.**
>
> [emphasis added]

[5] On April 2, 2012, my office received a request for review dated March 30, 2012 dealing with the transfer of both access requests from Health to Justice. The Applicant wrote:

> By letter dated December 29, 2011…, the Ministry of Health advised me that my request to the Ministry of Health, as well as the request already transferred by the Ministry of Finance to the Ministry of Health, were being transferred to the Ministry of Justice and Attorney General pursuant to clause 11(2)(a) of the [*The Freedom of Information and Protection of Privacy Act*] as "the record was originally prepared in or for the government institution". The letter went on to state as follows:
>
> > The Ministry of Justice and Attorney General has taken the lead on this file due to potential litigation and, as such, holds all relevant records.
>
> …

> Second, my requests to the Ministry of Health and to the Ministry of Finance were transferred to the Ministry of Justice and Attorney General on the basis that all the records requested were "originally prepared in or for" the Ministry of Justice and Attorney General. While the Agreement itself may been "originally prepared in or for" the Ministry of Justice and Attorney General, it is impossible that all records relating to the Agreement that are now in the possession or under the control of any of the three Ministries were "originally prepared in or for" the Ministry of Justice and Attorney General. Indeed, **the Ministry of Health's December 29, 2011 letter appears to conflate the Ministry of Justice and Attorney General having "taken the lead" on this file with all records in relation to that file having been "originally prepared in or for" the Ministry of Justice and Attorney General.**
>
> Third, the transfer by the Ministry of Finance to the Ministry of Health and the transfer by the Ministry of Health to the Ministry of Justice and Attorney General are irreconcilable with one another. If my request to the Ministry of Finance was for access to records "originally prepared in or for" the Ministry of Health, and therefore properly transferred to the Ministry of Health, then the Ministry of Health was wrong subsequently to transfer my request to the Ministry of Justice and Attorney General. Alternatively, if my request to the Ministry of Finance was, as later asserted by the Ministry of Health, for access to records "originally prepared for or in" the Ministry of Justice and Attorney General, then the Ministry of Finance was wrong to transfer my request to the Ministry of Health in the first place.
>
> [emphasis added]

[6] My office provided notification letters dated June 21, 2012 to both the Applicant and Health. The notification letter to Health requested as follows:

> Please provide your submission in support of the exemptions cited in your section 7 notice to the Applicant, namely sections [sic] 11(2)(a) of FOIP. I notice in your section 7 response to the applicant you state that "*your access request has been transferred to the Ministry of Justice and Attorney General as they have a greater interest in the records you are requesting. The transfer of your access request is pursuant to clause 11(2)(a) of The Freedom of Information and Protection of Privacy Act…*". You also state: "*We recognize receipt of a transfer letter from the Ministry of Finance which will be directed to the Ministry of Justice and Attorney General. As such, we are forwarding, along with your request submitted to this office, a copy of your request that originated in the Ministry of Finance.*" Please provide details as to how the Ministry of Health arrived at these conclusions.

[7] On July 16, 2012, my office received Health's submission dated July 12, 2012. Health stated:

> …The Ministry of Health determined that the Ministry of Justice and Attorney General held a greater interest in the records as the majority of records responsive to this request originated within that Ministry.
>
> The Ministry of Justice and Attorney General is considered the lead on this file as there is potential litigation of this issue and therefore they hold the responsive documents within the records. The records related to this request contained in the Ministry of Heath [sic] are primarily secondary correspondence between the Ministries regarding meetings. Based on this information the request was transferred to the Ministry of Justice and Attorney General.

[8] On or about May 23, 2013, my office provided its preliminary analysis with recommendations. Health refused to comply in full. As such, it became necessary for my office to issue a formal Review Report on the issue.

II RECORDS AT ISSUE

[9] This Review is mainly about Health's decision to transfer the Applicant's requests to Justice. Health provided my office with some responsive records as part of its evidence to support the transfer decision. As a result of this Review, I am not confident that Health has completed a comprehensive search for records. As such, Health may have more responsive records in its possession or control.

III ISSUES

1. Did the Ministry of Health properly transfer the Applicant's requests under section 11(2)(a) of *The Freedom of Information and Protection of Privacy Act*?

a. What are the circumstances in which a government institution may transfer an access request?

b. Which party bears the burden of proof?

c. Did the Ministry of Health meet the burden of proof?

d. Did the Ministry of Health properly transfer the request originally submitted to the Ministry of Finance?

e. Did the Ministry of Health properly exercise its discretion when it transferred the Applicant's access requests?

f. Does the Ministry of Health have the responsibility of processing the records it has in its possession in response to the Applicant's access requests?

IV DISCUSSION OF THE ISSUES

1. Did the Ministry of Health properly transfer the Applicant's requests under section 11(2)(a) of *The Freedom of Information and Protection of Privacy Act*?

[10] Health is a "government institution"[1] within the meaning of section 2(1)(d)(i) of *The Freedom of Information and Protection of Privacy Act* (FOIP).[2] Section 2(1)(d)(i) of FOIP states:

> **2**(1) In this Act:
>
> ...
>
> (d) "government institution" means, subject to subsection (2):
>
> (i) the office of Executive Council or any department, secretariat or other similar agency of the executive government of Saskatchewan; or

a. What are the circumstances in which a government institution may transfer an access request?

[11] Section 11 of FOIP states as follows:

[1]Office of the Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Review Report F-2010-001 at [7] and Investigation Report H-2007-001 at [17], available at: www.oipc.sk.ca/reviews.htm.
[2]*The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 (hereinafter SK FOIP).

> **11**(1) Where the head of the government institution to which an application is made considers that another government institution has a greater interest in the record, the head:
>
> (a) may, within 15 days after the application is made, transfer the application and, if necessary, the record to the other government institution; and
>
> (b) if a record is transferred pursuant to clause (a), shall give written notice of the transfer and the date of the transfer to the applicant.
>
> (2) For the purposes of this section, a government institution has a greater interest in a record if:
>
> (a) the record was originally prepared in or for the government institution; or
>
> (b) the government institution was the first government institution to obtain the record or a copy of the record.
>
> (3) For the purposes of section 7, an application that is transferred pursuant to subsection (1) is deemed to have been made to the government institution on the day of the transfer.

[12] A government institution has a greater interest in a record in two circumstances, as noted in section 11(2)(a) and 11(2)(b) in FOIP. It is in these two circumstances in which a government institution may transfer an access request, and if necessary, the record to the other government institution.

[13] Sections 18(3) and 18(4) of Ontario's *Municipal Freedom of Information and Protection of Privacy Act*[3] are similar to sections 11(1) and 11(2) of FOIP. Sections 18(3) and 18(4) of Ontario's *Municipal Freedom of Information and Protection of Privacy Act* state:

> **18**(3) If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.
>
> (4) For the purpose of subsection (3), another institution has **a greater interest** in a record than the institution that receives the request for access if,

[3]Ontario's *Municipal Freedom of Information and Protection of Privacy Act* R.S.O. 1990, c. M.56.

> (a) the record was originally produced in or for the other institution; or
>
> (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy of it.
>
> [emphasis added]

[14] Ontario's Office of the Information and Privacy Commissioner (Ontario IPC) issued Order MO-1494 which stated that determining a greater interest in a record is a prerequisite for a valid transfer. In Order MO-1494, a municipality (referred to as the "Region" in the quote below) transferred a part of the request to another municipality (referred to as the "Town" in the quote below):

> ***Greater Interest***
>
> I have reviewed the records whose transfer is at issue, and I am satisfied that although Peel [Region] has some measure of interest in all of them, Caledon [Town] has a greater interest, with the exception of Records C01(b) and (c), C02(b), C03(d) and (e), C13 and C14 (all of which were transferred on January 17) and B24 (transferred on April 27).
>
> As a general observation, all of these records were produced as part of the CCRS [Caledon Community Resources Study] process, in which both the Region and the Town have an interest. By itself, the fact that a record relates to or was created for the CCRS does not lead to a conclusion that the Town has a greater interest. **Which of the two institutions has the "greater interest" in a particular record produced during this process depends on the circumstances of its creation and dissemination, having regard to the criteria in sections 18(4)(a) and (b).** With respect to section 18(4)(a), I find that the CCRS and the Town are not synonymous, and that a record created "for" the CCRS is not the same as a record created "for" the Town. However, a record created "for" the CCRS may still be a record in which the Town has a greater interest if it is established that the Town was the initial recipient of the record, pursuant to section 18(4)(b).
>
> **I find that a number of the records at issue meet the requirement of section 18(4)(a) that they be produced "in or for" the Town. Where the records were created by others, I accept the Region's general submission that it received the records secondarily from the Town, except where this is contradicted by the record itself. For instance, where a record was created by the Region's staff, I find it unreasonable to conclude that it was produced "in or for" the Town, or that the Town was the initial recipient of the record. Thus, I conclude that Records C01(b) and (c) do not meet the criteria in either section 18(4)(a) or (b) as they were produced by staff with the Region.** Without any specific evidence otherwise, I also conclude that the handwritten notes on Records C02(b) and B24

were produced by the Region's staff and also do not meet the criteria in section 18(4)(a) or (b).

I find that it has not been established that Records C03(d) and (e) and Records C13 and C14 were produced "in or for" the Town or that the Town was the initial recipient of them.

Some of these records were produced by consultants to the CCRS, are addressed to the Town, but are shown as having been copied to the Region. As indicated above, I have treated these records as records created "for" the CCRS rather than the Town. **However, I have decided that the Town has a greater interest in these records on the basis that it was the initial recipient of them.**

I also note that there are some records in which I have found the Town to have a greater interest, which bear some incidental handwritten notes. It may well be that these notes are authored by the Region's staff but since they are incidental to the main text of the records, they do not affect my findings on "greater interest".

Since a finding of "greater interest" is a prerequisite for a valid transfer decision under section 18(3), I do not uphold the Region's decision to transfer Records C01(b) and (c), C02(b), C03(d) and (e), C13 and C14 (all of which were transferred on January 17) and B24 (transferred on April 27).[4]

[emphasis added]

[15] In order to determine which government institution in this case has a "greater interest", I must first determine which party in this particular case bears the burden of proof.

b. Which party bears the burden of proof?

[16] Section 61 of FOIP places the burden of proof upon the head of the government institution:

> **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.

[17] It appears that FOIP only states that the burden of proof is upon the head of the government institution when access to the record may or must be refused or granted.

[4]Office of the Ontario Information and Privacy Commissioner (hereinafter ON IPC) Order MO-1494 at pp. 6 to 7, available at: www.ipc.on.ca/english/decisions-and-resolutions/.

Section 61 of FOIP is silent on whom the burden of proof is upon when a request is transferred to another government institution.

[18] Similarly, Alberta's *Freedom of Information and Protection of Privacy Act* (Alberta's FOIP)[5] is also silent on the matter of whom the burden of proof is upon when a request is transferred to another government institution. The former Alberta Information and Privacy Commissioner stated the following in his Order 2000-021 about burden of proof in regards to the transferring of a request:

> [para. 12.] There are three issues in this inquiry:
>
> **A. Did the Public Body properly transfer the Applicant's request under section 14 of the Act?**
>
> B. Did the Public Body discharge its section 9(1) duty?
>
> C. What is the relationship, if any, between section 9 and section 14 of the Act?
>
> Burden of Proof
>
> [para. 13.] The Act is silent on the burden of proof relating to each of the three issues above. **In previous Orders, I have said that where the Act is silent, I will allocate the burden of proof, which is on a balance of probabilities, to the party that is in the best position to provide evidence on a particular issue.** I will also look to who raised the issue, among other considerations.
>
> [para. 14.] Following this principle, although the Applicant raised all of the issues, **it is obvious that the Public Body is in the best position to provide evidence on whether it properly transferred a request. So the burden of proof will lie on the Public Body for issue A.** I have said in previous Orders that where section 9(1) is at issue, the burden of proof lies upon the public body. Therefore, the burden of proof lies on the Public Body for issue B. As issue C concerns a matter of interpretation, I find that there is no applicable burden of proof lying on either party.[6]
>
> [emphasis added]

[19] I agree with the above approach in determining which party bears the burden of proof.

[5]Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A 2000, c. F-25 (hereinafter AB FOIP).
[6]Office of the Alberta Information and Privacy Commissioner (hereinafter AB IPC) Order 2000-021, available at: www.oipc.ab.ca/pages/OIP/default.aspx. It should be noted that since the release of this Order, AB FOIP has been revised. What was cited as sections 9 and 14 of AB FOIP is now sections 10 and 15 of AB FOIP.

[20] My office's publication, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* states the following:

> **When it is said that a party has the "burden of proof," what is meant is that one party has a duty in law first to bring forward evidence that a particular fact or situation exists, and then to persuade the Commissioner that the evidence meets the necessary standard of proof.**
>
> For example, if a government institution applies section 19(1)(a) of FOIP to refuse access to certain records, it falls to the government institution to bring forward some evidence that disclosure could reasonably be expected to disclose a trade secret. If the government institution is able to convince the Commissioner of this, the government institution will have met the burden of proof.
>
> A public body/trustee has the burden of proof pursuant to section 61 of FOIP, section 51 of LA FOIP and/or section 47 of HIPA if it claims that access should or must be refused. The burden is not on the Applicant to establish that an exemption does not apply. **This means that it is not enough to write the Commissioner and simply say "access is denied because of section 19 [or some other mandatory or discretionary exemption]," rather it is up to the public body/trustee to 'make the case' that a particular exemption(s) applies.** That means presenting reasons why the exemption is appropriate for the part of the record that has been withheld. However, in certain circumstances, the burden may shift to the applicant (e.g. proving financial hardship when the applicant requests a fee waiver).[7]
>
> [emphasis added]

[21] Since Health is in the best position to explain why it transferred the request (and the request transferred to it from Finance) to Justice, Health bears the burden of proof.

c. Did the Ministry of Health meet the burden of proof?

[22] It would appear that Health relied on section 11(2)(a) of FOIP, at least in part, as its reason to transfer the requests to Justice. As quoted earlier, in its letter dated July 12, 2012, Health stated:

> …The Ministry of Health determined that the Ministry of Justice and Attorney General held a greater interest in the records **as the majority of records responsive to this request originated within that Ministry.**

[7]SK OIPC, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* at pp. 8 to 9, available at: www.oipc.sk.ca/resources.htm.

> The Ministry of Justice and Attorney General is considered the lead on this file as there is potential litigation of this issue and therefore they hold the responsive documents within their records. The records related to this request contained in the Ministry of Heath [sic] are primarily secondary correspondence between the Ministries regarding meetings…
>
> [emphasis added]

[23] It is not enough to meet the burden of proof by paraphrasing section 11(2)(a) of FOIP in its submission and by stating that the responsive records originated "within" Justice. My office's letter, dated June 21, 2012, requested that Health provide us details as to how it came to the conclusion that Justice had greater interest in the requested records. Without sufficient details and/or evidence of how Health came to its conclusion or that the records originated from Justice, I can only conclude that the burden of proof has not been met.

[24] In Ontario IPC Order P-279, the Assistant Commissioner found that even though a government institution (referred to as the "institution" in the quote below) was in possession of records responsive to an access request, another government institution (referred to as the "Ministry" in the quote below) had a greater interest in the access request:

> Further, section 25(3) of the [Ontario's *Freedom of Information and Protection of Privacy Act*] outlines how "greater interest" is determined. Section 25(3) reads as follows:
>
> > **For the purpose of subsection (2), another institution has a greater interest in a record than the institution that receives the request for access if,**
> >
> > **(a) the record was originally produced in or for the other institution; or**
> >
> > (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy thereof.
>
> **Section 25(3)(a) recognizes that, regardless of whether an institution has custody or control of a record, another institution can have a "greater interest" in that record if it was the institution that originally produced the record or the institution for which the record was originally produced.**
>
> In its representations, the institution indicates:

> [The institution] is authorized by statute to represent the Government of the Province of Ontario in all transactions involving the transfer of real property on behalf of its various client ministries.

Further, the institution submits:

> Notwithstanding that [the institution] was the registered owner of such lands, [the institution] was not a party to such discussions and did not in any way participate in any of the negotiations between [the Ministry] and the Purchaser surrounding the preparation of the...agreement. [The Ministry] proceeded entirely independently of [the institution] in the negotiation of the agreement granting the option to purchase to the Purchaser.

The institution indicates that portions of the record were in the possession of both the institution and the Ministry. **The portions in the possession of the Ministry were produced by the Ministry for its own benefit as the current user of the subject lands. I am satisfied that the Ministry had the greater interest in these portions of the record.**

The portions of the record in the possession of the institution were produced by the institution for the purpose of completing the legal documentation necessary to transfer the subject lands from the Crown, as represented by the institution, to the Purchaser. In my view, these portions were produced for the benefit of both the institution and the Ministry.

The evidence before me indicates that the institution's role in the purchase and sale of the lands was limited to preparing and processing the documentation transferring the lands to the Purchaser, preparing an Agreement of Purchase and Sale, and clarifying the terms and conditions of the agreement of purchase and sale between the Purchaser and the Ministry. **The institution prepared the record for its client ministry, which the evidence demonstrates had the primary role in negotiations and discussions surrounding the agreement. Therefore, in my view, the Ministry had a greater interest in the record for the purposes of section 25(3) of the [Ontario's *Freedom of Information and Protection of Privacy Act*].**

I am further satisfied that the head, in considering the client/agent relationship between the Ministry and the institution, and the limited role the institution played in the sale of the property, properly exercised his discretion in transferring the request under section 25(2) of the [Ontario's *Freedom of Information and Protection of Privacy Act*].[8]

[emphasis added]

[25] In its submission dated July 12, 2012, Health stated the following:

[8]ON IPC Order P-279 at pp. 3 to 4, available at: www.ipc.on.ca/english/decisions-and-resolutions/.

> The Ministry of Justice and Attorney General is considered the lead on this file as there is potential litigation of this issue **and therefore they hold the responsive documents within their records.** The records related to this request contained in the Ministry of Heath [sic] are primarily secondary correspondence between the Ministries regarding meetings. **Based on this information the request was transferred to the Ministry of Justice and Attorney General.**
>
> [emphasis added]

[26] Health made the argument that Justice is in possession of responsive records and therefore, the request was transferred to Justice. However, section 11(2) of FOIP does not allow a government institution to determine that another government institution has greater interest in a record solely because the other government institution has possession of the record. As described in Ontario IPC Order P-279, Health must demonstrate that the responsive records were originally prepared in or for the government institution. Or, as exemplified by some of the responsive records reviewed for Ontario IPC Order MO-1494, if the government institution was the first government institution to obtain the responsive records or a copy of the records. Health provided my office with no details or evidence to fulfill either prerequisite described in section 11(2) of FOIP.

[27] An example of how a public body met the burden of proof in a similar situation is illustrated in the former Alberta Information and Privacy Commissioner's Order 2000-021. The Applicant had submitted a request to a Public Body. The Public Body stated that that the records were produced by or for Alberta Municipal Affairs. The Public Body made the case that clearly, on the face of the records, solicitor-client privilege applied – legal advice was provided to Alberta Municipal Affairs – thus the transfer of the request and record was authorized by section 14(1)(a) of Alberta's FOIP.[9]

> [para. 38.] The Public Body argued that the nineteen pages of records it located satisfy either section 14(1)(a) or (b). The Public Body says that these records were found in the file of a lawyer who was in the employ of the Public Body. The records were created in the context of that lawyer providing legal advice to Municipal Affairs. Therefore, the records are covered by solicitor-client privilege. This privilege prevents the Public Body from disclosing the records unless its client, Municipal Affairs, waives the privilege and consents to disclosure. The legal privilege gives

[9]Since the issuance of AB IPC Order 2000-021, AB FOIP has been revised. Section 14(1)(a) is now section 15(1)(a) of AB FOIP.

> Municipal Affairs the right to control the disclosure of those records. This right of control satisfies section 14(1)(a) and justifies the transfer of the Applicant's request so far as those records are concerned.

[28] However, in this case, with Health transferring the requests to Justice, Health did not provide sufficient detail and/or evidence that the records were originally prepared in or for Justice. Health also does not explain how Justice being the "lead on this file" is evidence of the responsive records having been originally prepared in or for Justice. Being a lead does not automatically equate to records being originally prepared in or for Justice, nor is being a lead on a file an option that can be relied upon under section 11(2) of FOIP.

[29] I find that Health has not met the burden of proof in demonstrating that the records were originally being prepared in or for Justice.

d. Did the Ministry of Health properly transfer the request originally submitted to the Ministry of Finance?

[30] As quoted earlier, the Applicant argued the following:

> Third, the transfer by the Ministry of Finance to the Ministry of Health and the transfer by the Ministry of Health to the Ministry of Justice and Attorney General are irreconcilable with one another. If my request to the Ministry of Finance was for access to records "originally prepared in or for" the Ministry of Health, and therefore properly transferred to the Ministry of Health, then the Ministry of Health was wrong subsequently to transfer my request to the Ministry of Justice and Attorney General. Alternatively, if my request to the Ministry of Finance was, as later asserted by the Ministry of Health, for access to records "originally prepared for or in" the Ministry of Justice and Attorney General, then the Ministry of Finance was wrong to transfer my request to the Ministry of Health in the first place.

[31] My office dealt with the issue of Finance's transfer to Health in a separate file.

[32] My office requested that Health provide our office with details as to how it concluded that it ought to transfer the request it received from Finance to Justice. My office's letter dated June 21, 2012 stated:

> Please provide your submission in support of the exemptions cited in your section 7 notice to the Applicant, namely sections [sic] 11(2)(a) of FOIP. I notice in your section 7 response to the applicant you state that *"your access request has been transferred to the Ministry of Justice and Attorney General as they have a greater interest in the records you are requesting. The transfer of your access request is pursuant to clause 11(2)(a) of The Freedom of Information and Protection of Privacy Act..."*. **You also state: "*We recognize receipt of a transfer letter from the Ministry of Finance which will be directed to the Ministry of Justice and Attorney General. As such, we are forwarding, along with your request submitted to this office, a copy of your request that originated in the Ministry of Finance.*" Please provide details as to how the Ministry of Health arrived at these conclusions.**
>
> [emphasis added]

[33] In its July 12, 2012 letter to my office, Health did not provide sufficient detail and/or evidence on how it came to the conclusion that the circumstances listed in sections 11(2)(a) and 11(2)(b) of FOIP existed to authorize the transfer of the Finance request to Justice. Therefore, I find that Health improperly transferred the request it received from Finance.

e. Did the Ministry of Health properly exercise its discretion when it transferred the Applicant's access requests?

[34] Transferring an access request is a discretionary decision. Even if Health met the pre-requisite of section 11(2) of FOIP in establishing that another government institution has a greater interest, it must be able to demonstrate that it exercised its discretion properly in its decision to transfer the access request.

[35] In my Review Report F-2004-006, I stated the following about the exercise of discretion:

> [24] …**To exercise its discretion properly, the government institution must show that it considered the objects and purposes of the Act (one of which is to allow access to information) and did not exercise its discretion for an improper or irrelevant purpose.** The objects and purposes of the Act were considered by this office in Report 2004-03 [sic], [5] to [11].[10]
>
> [emphasis added]

[10]SK OIPC Review Report F-2004-006, available at: www.oipc.sk.ca/reviews.htm.

[36] I stated the purpose of FOIP and *The Local Authority Freedom of Information and Protection of Privacy Act*[11] in my Review Report F-2004-003, which states as follows:

> [10] Over the twenty two years since the *Access to Information Act* came into force, provincial and territorial governments have enacted their own access to information and protection of privacy legislation. Many of those more recent provincial instruments have included a more comprehensive purpose clause. Those purpose clauses tend to reflect and reinforce the approach taken by the federal Information Commissioner and numerous decisions of superior courts in Canada. A good example is section 2 of the British Columbia *Freedom of Information and Protection of Privacy Act*:
>
> > "2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
> >
> > (a) giving the public a right of access to records
> >
> > (b) giving individuals a right of access to, and a right to request corrections of, personal information about themselves
> >
> > (c) specifying limited exceptions to the rights of access
> >
> > (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
> >
> > (e) providing for an independent review of decisions made under this Act"
>
> [11] I find that this neatly summarizes and clearly identifies the purpose of legislation such as the Saskatchewan Act. Our office will deal with the subject request for review and future requests for review by reference to those same five purposes.[12]

[37] Alberta's *FOIP Guidelines and Practices (2009)* states the following about the exercise of discretion:

> The exercise of discretion is not a mere formality. **The public body must be able to show that the records were reviewed, that all relevant factors were considered and, if the decision is to withhold the information, that there are sound reasons to support the decision.**
>
> In *IPC Order 2000-021*, the Commissioner stated that legislated discretion amounts to the power to make a decision that cannot be determined to be right or wrong in an objective sense. **Discretion amounts to the power to choose a particular course of**

[11] *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1.
[12] SK OIPC Review Report F-2004-003, available at: www.oipc.sk.ca/reviews.htm.

> **action for good reasons and in good faith, after the decision-maker has considered the relevant facts and circumstances; the applicable law, including the objects of the Act; and the proper application of the law to the relevant facts and circumstances.**[13]
>
> [emphasis added]

[38] In its submission, Health failed to provide sufficient detail and/or evidence that it considered the objects and purposes of FOIP or relevant facts and circumstances when exercising its discretion to transfer the Applicant's access requests.

f. Does the Ministry of Health have the responsibility of processing the records it has in its possession in response to the Applicant's access requests?

[39] Health admitted that it had responsive records in its possession, as stated in its July 12, 2012 letter to my office: "The records related to this request **contained in the Ministry of Heath** [sic] are primarily secondary correspondence between the Ministries regarding meetings." [emphasis added]

[40] Although the Applicant requested records that were in the possession or control of Health, it appears that Health did not process the records that it had.

[41] Health did not demonstrate that these records, described as "primarily secondary correspondence", fit into either scenario described in sections 11(2)(a) or 11(2)(b) of FOIP. Given this, I find that Health should have processed the records that were "contained in the Ministry of Health" in response to the Applicant's access requests.

[42] In a letter to Health dated May 23, 2013, my office recommended the following to Health:

> We recommend that the Ministry of Health contact the Applicant to see if he is still interested in the responsive records. If so, we recommend that the Ministry of Health

[13] Service Alberta, Policy and Governance Branch: *FOIP Guidelines and Practices (2009)* at pp. 97 to 98, available at: www.servicealberta.ca/foip/documents/chapter4.pdf.

> process the responsive records it has **in its possession** in response to the Applicant's original access request.
>
> [emphasis added]

[43] Health responded to my office in a letter dated June 28, 2013 as follows:

> We are concerned however, about the recommendation that the Ministry contact the Applicant to determine if he is interested in the Ministry's records and if so, essentially process [name of Applicant]'s original access application **as if it had not been transferred. The Ministry's records are already transferred to Justice,** and Justice advises that the records transferred, which were relevant and not duplicates, are included in the index of records which Justice has provided to the Applicant and for which Justice has already provided a submission. For ease of reference we enclose the records which involve the Ministry of Health and which are included in the Justice submission.
> …
>
> In light of how far this has already advanced through the process, and the fact that the above records are already part of a submission and substantive review which will be adjudicated by your office, it would be the Ministry's view that it would be more expedient for all to simply continue on with that review. Following the recommendation may require an additional application to be processed for records that are already under review, creating the potential for additional appeals, submissions and reviews for the same records.
> …
>
> **If there is to be a processing of the application, in the Ministry's view such should only be in relation to only those records in the package which are internal to Health, as the remainder do meet the criteria for transfer.** Those records involve two small emails noted above, both of which disclose no information about the Agreement, but rather relate to the CII being prepared and garner some protection under section 16. **In order to be certain there are no additional records involved we are again conducting a search internally, which has not yet been completed at this time.** Assuming for the moment that these two records continue to be all that are uncovered, and they are disclosed, the ministry would prefer that they be adjudicated with the Justice submission which is already in process.
>
> [emphasis added]

[44] Health acknowledged in its July 12, 2012 letter that it had responsive records in its possession quite apart from other records it transferred to Justice. My office recommended that it process such records in response to the Applicant's requests, if the Applicant was still interested.

[45] What is troubling is that Health states it will conduct yet another search for records "in order to be certain" there are no further responsive records. The lack of certainty in its thoroughness of its search for records when the Applicant first submitted the access to information request suggests that Health failed to meet its duty to assist implicit in FOIP.[14] Furthermore, it states that it had not completed the search yet. A year and a half elapsed from the time the Applicant submitted his access request in December 2011 to the June 28, 2013 letter from Health to my office. Section 7(2) of FOIP states that a public body is to provide a response to the Applicant within 30 days after the access to information request is made.[15] It is inexplicable how a comprehensive search for records was not conducted some year and a half after the Applicant made his access to information requests.

[46] At the time of drafting this Review Report, there was no indication from Health that it completed the search it suggested in its June 28, 2013 letter.

V FINDINGS

[47] I find that the Ministry of Health has not met the burden of proof in demonstrating that the records were originally prepared in or for the Ministry of Justice.

[48] I find that the Ministry of Health improperly transferred the requests.

[49] I find that the Ministry of Health did not demonstrate it exercised its discretion properly when transferring the Applicant's access requests.

[50] I find that the Ministry of Health should have processed the records that it had in its possession in response to the Applicant's access request.

[14]SK OIPC Review Reports F-2012-002 at [50], F-2010-001 at [58], F-2008-001 at [41], F-2006-004 at [13], F-2004-005 at [19], F-2004-003 at [15], available at: www.oipc.sk.ca/reviews.htm.
[15]There are circumstances in which this time period can be extended for a period not exceeding 30 days pursuant to section 12 of SK FOIP.

VI RECOMMENDATIONS

[51] I recommend that the Ministry of Health complete a comprehensive search for records it has in its possession within 15 days of the issuance of this Review Report.

[52] I recommend that the Ministry of Health proceed to process such records in response to the Applicant's access to information requests within 30 days of the issuance of this Review Report pursuant to section 7(2) of *The Freedom of Information and Protection of Privacy Act*.

Dated at Regina, in the Province of Saskatchewan, this 29th day of November, 2013.

R. GARY DICKSON, Q.C.
Saskatchewan Information and Privacy Commissioner