

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT F-2014-007

Ministry of Justice

Summary:

In November 2013, an Applicant submitted an access to information request to the Ministry of Justice (Justice). Justice advised the Applicant that it did not have responsive records pursuant to subsection 7(2)(d) of *The Freedom of Information and Protection of Privacy Act* (FOIP) and that any records that would be responsive were the personal records of a government employee. The Applicant proceeded to request a review by the Office of the Information and Privacy Commissioner (OIPC). Upon review, the Commissioner found that Justice did not have possession or control of the records responsive to the access request and as a result, FOIP did not apply. As FOIP was found not to apply, the Commissioner made no recommendations.

I BACKGROUND

- [1] On November 14, 2013, the Ministry of Justice (Justice) received an access to information request for any records containing the name of an individual written, processed or possessed by a specific government employee.
- [2] Justice provided a response to the Applicant on or about January 15, 2014 indicating that it did not have any responsive records pursuant to subsection 7(2)(d) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [3] On January 23, 2014, my office received a request for review from the Applicant.

[4] My office notified Justice and the Applicant of its intention to undertake a review via letter dated January 31, 2014. At that time, my office requested that Justice provide a submission to my office supporting its reliance on the subsection 7(2)(d) of FOIP.

[5] On April 3, 2014, a submission from Justice was received in my office. The Applicant provided one on May 1, 2014.

II RECORDS AT ISSUE

[6] Justice asserts that it does not have responsive records in its possession and/or control. Justice asserts that any responsive records are the personal records of a government employee which have been described as emails.

III DISCUSSION OF THE ISSUES

[7] Justice is a “government institution” within the meaning of subsection 2(1)(d) of FOIP.

1. Is the responsive record within the possession and/or control of Justice pursuant to section 5 of FOIP?

[8] Section 5 of FOIP provides the right of access as follows:

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.

[emphasis added]

[9] Section 5 is clear that access can be granted provided the records are in the possession or under the control of the government institution. Therefore, in this case, making this determination is the focus.

a) Does Justice have “possession” of the records?

[10] *Possession* means having physical possession of a record plus a measure of control over it (Review Report LA-2010-002 at [93]).

[11] In its submission, Justice acknowledged that it had physical possession of the records. However, Justice argued that the records are the personal records of the government employee and therefore they could not be considered to be in the possession or control of Justice. Justice referred to *City of Ottawa v. Ontario* as support for its position. It appears from the government employee’s affidavit, provided with Justice’s submission, that the government employee in question has emails of a personal nature that would be responsive to the access request.

[12] I first need to determine if Justice has possession of the record. There is no doubt it physically has the records. So, I need to consider whether it has a measure of control.

b) Does Justice have a measure of “control” of the records?

[13] A record is under the control of a public body when the public body has the authority to manage the record, including restricting, regulating and administering its use, disclosure or disposition (Review Report F-2008-002 at [35]).

[14] 15 criteria can be considered for determining control which are as follows:

1. The record was created by a staff member, an officer, or a member of the public body in the course of his or her duties performed for the public body;
2. The record was created by an outside consultant for the public body;
3. The public body possesses the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory or statutory or employment requirement;
4. An employee of the public body possesses the record for the purposes of his or her duties performed for the public body;

5. The record is specified in a contract as being under the control of a public body and there is no understanding or agreement that the records are not to be disclosed;
6. The content of the record relates to the public body's mandate and core, central or basic functions;
7. The public body has a right of possession of the record;
8. The public body has the authority to regulate the record's use and disposition;
9. The public body paid for the creation of the records;
10. The public body has relied upon the record to a substantial extent;
11. The record is closely integrated with other records held by the public body;
12. The contract permits the public body to inspect, review, possess, copy records produced, received or acquired by the contractor as a result of the contract;
13. The public body's customary practice in relation to possession or control of records of this nature in similar circumstances;
14. The customary practice of other bodies in a similar trade, calling or profession in relation to possession or control of records of this nature in similar circumstances; and
15. The owner of the records.

(Review Report LA-2010-002 at [61])

[15] Below, I have reviewed the criteria relevant to these circumstances.

The record was created by a staff member, an officer, or a member of the public body in the course of his or her duties performed for the public body

[16] The individual involved is a government employee. The records appear to be emails. Further, there appears to be a familial relationship between the government employee and the name of the individual outlined in the access to information request.

[17] Included with the Applicant's submission was a copy of a letter sent by the family member to the government employee at his work address. From a review of this letter, it

appears that there is a family feud occurring involving the individual and the government employee. It does not appear, from what has been provided to my office, that the feud is related in any way to the government employee's employment functions or government business. It appears that the government employee has carried on some personal matters from his work. This would not be unusual.

- [18] There is no evidence to suggest that the contents of the records are related to a Justice matter. However, there has been evidence provided to my office to support that it involves a personal matter between the government employee and the family member.

The public body possesses the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory or statutory or employment requirement

- [19] The government employee appears to have personal emails on Justice's email server system. The first question to consider is whether the emails could be considered to have been voluntarily provided by the government employee to Justice as a result of the employee's use of the email system for personal use.

- [20] Justice cited *City of Ottawa v. Ontario* in support of its assertion that even though the emails were on Justice's email server it did not have control over those emails. Justice provided a copy of its policy on acceptable use of information technology. It confirms that incidental personal use is acceptable.

- [21] Justice further highlights privacy concerns in its submission. I agree that there are privacy concerns involved for the government employee.

- [22] It does not appear that the emails were voluntarily provided by the government employee to Justice or were created as a result of any mandatory, statutory or employment requirement.

An employee of the public body possesses the record for the purposes of his or her duties performed for the public body

- [23] It has been shown that the emails are personal in nature as per the government employee's affidavit. Therefore, it does not appear the records were created for purposes of his employment duties.

The content of the record relates to the public body's mandate and core, central or basic functions

- [24] It has been shown that the emails are personal in nature as per the government employee's affidavit.

The public body has a right of possession of the record

- [25] There is no apparent right of possession to the record as they are personal in nature.

The public body has the authority to regulate the record's use and disposition

- [26] In its submission, Justice outlined its acceptable use policy dealing with email. According to Justice, email that is of a personal or transitory nature need not be archived. However, email that is an official record of government is to be retained.

The public body has relied upon the record to a substantial extent

- [27] There is no evidence to suggest that Justice relied on these emails to any extent.

The record is closely integrated with other records held by the public body

- [28] It appears the employee's personal emails are housed in Justice's email system and would not be closely integrated with other records held by Justice.

The public body's customary practice in relation to possession or control of records of this nature in similar circumstances

- [29] In its submission, Justice asserted that the records in question constitute 'non-government records'. Government employees are permitted to use the email system for personal use, subject to certain conditions. Employees are not required to retain emails sent and received by them and can delete them whenever they want in any manner they see fit.

The customary practice of other bodies in a similar trade, calling or profession in relation to possession or control of records of this nature in similar circumstances

- [30] As noted by Justice, *The Archives Act, 2004* applies to all government institutions in Saskatchewan. The policies referred to by Justice are policies created by the Public Service Commission and apply to all government employees.

The owner of the records

- [31] Justice has asserted that it does not have possession and/or control of the records in question. The government employee can create, edit, store and destroy the emails as he sees fit. Therefore, ownership would appear to belong to the government employee in this case.

- [32] In conclusion, I find that based on the above, Justice does not have "control" of the records in question. The emails are the personal records of the government employee and were not created as part of his employment duties.

IV FINDINGS

- [33] I find that the records in question are not records in the possession or control of Justice and therefore FOIP does not apply.

V RECOMMENDATIONS

[34] As FOIP has been found not to apply, there are no recommendations at this time.

Dated at Regina, in the Province of Saskatchewan, this 26th day of August, 2014.

RONALD J. KRUZENISKI, Q.C.
Saskatchewan Information and Privacy
Commissioner