



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 023-2020, 027-2020 PART I

Ministry of Justice and Attorney General

November 30, 2021

Summary:

The Commissioner conducted a review of the Ministry of Justice's (Justice) response to an access to information request, which related to one of its employees. The Commissioner found that Justice did not comply with section 7(2) of *The Freedom of Information and Protection of Privacy Act* (FOIP) as it did not provide a section 7 response to the Applicant within 30 days of receiving the access to information request. The Commissioner found that Justice did not perform a reasonable search for records and that the employee who searched for records had a personal or special interest. He recommended it perform a new search and provide further details. Justice claimed that it did not have possession or control of records identified as responsive to the Applicant's request. The Commissioner found the records were in Justice's possession. The Commissioner found that section 22(c) of FOIP applied to a one page record.

I BACKGROUND

- [1] The spouse of the Applicant was in an automobile accident. The daughter of a Ministry of Justice and Attorney General (Justice) employee (the Employee) was the driver of the other vehicle and charges were laid. The Applicant made an access to information request related to this accident and the Traffic Safety Prosecutor (the Prosecutor). The Applicant indicated that they submitted an access to information request to Justice on November 29, 2019. The request contained five parts:

Any emails and Skype conversations to/from [the Prosecutor] with any of the following keywords in the date range of February 24th, 2019, to November 29th, 2019. This should include any deleted items (stored within the Office365 Litigation Hold

mailboxes that ISM will need to search) matching one or more of these keywords from this timeframe as well:

[first name of daughter]
[last name of the Employee]
[eight digit ticket number]
[last name of Applicant]

Any emails/Skype conversations to/from [the Employee] with any of the following keywords in the date range of February 24th, 2019, to November 29th, 2019. This should include any deleted items (stored within the Office365 Litigation Hold mailboxes that ISM will need to search) matching one or more of these keywords from this timeframe as well:

[first name of daughter]
[eight digit ticket number]
[last name of Applicant]

Any emails/Skype conversations between [the Prosecutor] and [the Employee] in the date range of February 24th, 2019, to November 29th, 2019. This should also include any deleted items of conversations between these individuals (stored within the Office365 Litigation Hold mailboxes that ISM will need to search).

All correspondence between February 25th, 2019 to November 29th, 2019, to, from, or within the Ministry of Justice that contain the following Ticket number: [eight digit ticket number]

On or about June 10th, 2019 (sometime between June 1st and July 23rd), a standard form from the RCMP should have been received by the courts or ministry, stating that [name of RCMP officer] of the Emerald Park RCMP Detachment would be unable to attend court on July 23rd, as [they were] away on training for that week. I would like a copy of this form, and would like to know it's path through the internal process (ie. is there confirmation that it was forwarded to [the Prosecutor] and what is the form's current status [in a Trash Folder of an Email Box, printed off and stored in a standard file folder, etc?]).

- [2] The Applicant contacted Justice on December 27, 2019, to request an update on their request. The Applicant alleges that Justice indicated that it tried to contact the Applicant to ask for more information about the request. The Applicant was not satisfied with Justice's description of the steps it took to try to make contact with them.
- [3] On January 27, 2020, Justice provided the Applicant with a section 7 response to the access request that it indicated was received on December 30, 2020. The response indicated that records responsive to the Applicant's request were denied pursuant to section 22 of *The*

Freedom of Information and Protection of Privacy Act (FOIP). The Applicant did not receive a copy of this response until January 31, 2020.

- [4] On January 28, 2020, the Applicant requested a review of the delay in receiving the section 7 response from Justice.
- [5] On January 31, 2020, after receiving the section 7 response, the Applicant also requested that my office review the application of section 22 of FOIP and Justice's search for records.
- [6] On February 6, 2020, my office notified both Justice and the Applicant of my intent to undertake a review.

II RECORDS AT ISSUE

- [7] Justice has identified one record that is responsive to the Applicant's request. It is one page in length. In its section 7 response, Justice indicated that it was being withheld pursuant to sections 22(a), (b) and (c) of FOIP. On October 22, 2021, Justice also indicated that section 15(1)(k.2) of FOIP applied to the record. On November 4, 2021, Justice informed my office that it was no longer relying on section 22(a) of FOIP.
- [8] Justice has also indicated that its search for responsive records produced records that it does not consider to be in its possession or under its control. I will discuss this issue in this Report.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

- [9] Justice qualifies as a government institution pursuant to section 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did Justice respond to the Applicant's request within the legislated timelines?

[10] Section 7(2) of FOIP provides:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

...

[11] The Applicant indicated that they submitted their request for review to Justice on November 29, 2019. They provided my office with a copy of this sent email. Justice provided the Applicant with a section 7 response dated January 27, 2020.

[12] In both its section 7 response and in its submission to my office, Justice indicated that it received the access to information request on December 30, 2019.

[13] In my office's notification letter of February 6, 2020, Justice was specifically asked to address, "the view of Justice as to when the application was received and deemed to have been made pursuant to section 6 of FOIP" and "the view of Justice as to whether it complied with the timeline described in subsection 7(2) of FOIP". Justice did not address this in its submission.

[14] I find that an application was made pursuant to section 6(1) of FOIP on November 29, 2019.

[15] I find that Justice did not comply with section 7(2) of FOIP as it did not provide a section 7 response to the Applicant within 30 days of receiving the access to information request.

3. Did Justice conduct a reasonable search for records?

[16] Section 5 of FOIP provides an applicant with a right of access to records in the possession or control of a government institution 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.

[17] Section 5 of FOIP establishes a right of access by any person to records in the possession or control of a government institution, subject to limited and specific exemptions, which are set out in FOIP (*Guide to FOIP*, Ch. 3, p. 3).

[18] The Applicant advised that on December 31, 2019, Justice contacted the Applicant by email and informed the Applicant that it would need to involve the Employee in its search for records. It asked the Applicant for their consent. The Applicant provided consent.

[19] When the Applicant requested a review from my office, after they received Justice's section 7 response on January 27, 2020, they stated that they had concerns about the validity of having the Employee completing searches of the Employee's own email inbox given the nature of the request. The Applicant requested a review of Justice's search.

[20] The threshold for search is one of reasonableness. A *reasonable search* is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records, which are reasonably related to the request. A reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances (*Guide to FOIP*, Ch. 3, p. 7).

[21] Examples of the details a government institution can provide to my office to support that it conducted a reasonable search for records includes the following:

- For personal information requests – explain how the individual is involved with the government institution (i.e. client, employee, former employee etc.) and why certain departments/divisions/branches were included in the search.
- For general requests – tie the subject matter of the request to the departments/divisions/branches included in the search. In other words, explain why certain areas were searched and not others.

- Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
- Explain how the records management system is organized (both paper & electronic) in the departments/divisions/branches included in the search:
 - Describe how records are classified within the records management system. For example, are the records classified by:
 - alphabet
 - year
 - function
 - subject
- Consider providing a copy of your organization's record schedule and screen shots of the electronic directory (folders & subfolders).
- If the record has been destroyed, provide copies of record schedules and/or destruction certificates.
- Explain how you have considered records stored off-site.
- Explain how records that may be in the possession of a third party but in the government institution's control have been searched such as a contractor or information management service provider.
- Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Explain which folders within the records management system were searched and how these folders link back to the subject matter requested. For electronic folders – indicate what key terms were used to search if applicable.
- Indicate the calendar dates each employee searched.
- Indicate how long the search took for each employee.
- Indicate what the results were for 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 the IPC website.

[22] The above list is meant to be a guide. Each case will require different search strategies and details depending on the records requested (*Guide to FOIP*, Ch. 3, pp. 9-10).

[23] In its submission, Justice indicated that it asked the Employee to search their own emails, including all sent items, all folders, including the conversation history folder, all deleted items and junk folders with the search terms included in the access to information request. Justice noted that the search terms included the last name of the Employee, the eight digit ticket number, the Applicant's last name, the Prosecutor's name and the Employee's daughter's name. The submission indicated that the conversation history folder contains Skype conversations. Justice indicated that the Applicant spelled the Employee's daughter's name incorrectly and that the Employee used the correct spelling of the name to search.

[24] Justice then provided a sworn affidavit from the Employee that was signed on October 14, 2021. With respect to search, the affidavit stated:

I searched my records electronically to determine if there were any responsive records in my possession. The only responsive records were e-mails. I reviewed all the responsive e-mails. I advised an official in our Access and Privacy Branch that I did not have any work-related records regarding [search terms listed in the access to information request] and all records in my possession in relation to [my daughter] are personal and private ones (for example, appointments or reminders)...

[25] With respect to the Prosecutor's emails, Justice reported that the Prosecutor had been on leave. Therefore, Justice relied on its Strategic Systems Initiative Branch to conduct the search of their emails in their absence. Justice indicated all sent items, all folders, including the conversation history folder, all deleted items and junk folders were searched using the terms mentioned in the access to information request. It indicated that only one responsive record was found.

[26] My office determined it required more information about the search for the purpose of this review. On September 8, 2021, my office asked Justice questions about its search.

[27] In relation to Justice's search of the Prosecutor's and the Employee's email inbox and folders my office pointed out that part of the Applicant's request was, "this should include

any deleted items (stored within the Office365 Litigation Hold mailboxes that ISM will need to search)”).

[28] Justice provided the following response on October 18, 2021:

Any records that would have been responsive to this request would have been located in Prosecutions or in the Access and Privacy Branch. Prosecutions conducted a search and had to engage the Strategic Systems and Innovation Branch to search [the Prosecutor’s] email and corresponding folders. [The Employee] also searched her emails and corresponding folders. There was one record located that was responsive to this request.

[29] The Applicant’s request referred to “Office365 Litigation Hold mailboxes”. In response to reading a draft copy of this Report, Justice indicated that, “Office365 Litigation Hold mailboxes” did not exist.

[30] On September 8, 2021, my office also asked about Justice’s search for other parts of the Applicant’s request. My office indicated that the Applicant requested, “[all] correspondence between February 25th, 2019 to November 29th, 2019, to, from, or within Justice of Justice, that contain the following Ticket number: [eight digit ticket number]”. My office asked Justice to describe its search strategy for this portion of the request and the result of the search.

[31] In response, Justice referred me to its October 18, 2021 answer to my first question, which I have described above. The previous answer only addressed aspects of the search of the Employee and the Prosecutor’s email. It did not address how Justice searched for or ruled out non-email correspondence. Justice should have also describe how it stores records related to each ticket and how those records were searched. I note that the Applicant provided my office with copies of written correspondence from the Prosecutor dated March 22, 2019 and June 26, 2019 that Justice did not identify in its search. Further, the record itself refers to additional correspondence that has not been identified as responsive records by Justice.

- [32] Finally, on September 8, 2021, my office asked Justice to address its search for the part of the request for “a standard form from the RCMP...stating that [name of RCMP officer] of the Emerald Park RCMP Detachment would be unable to attend court on July 23rd, as [they were] away on training for that week”.
- [33] In Justice’s response of October 18, 2021, it referred to the answer to my office’s first question. I expect Justice to explain how the process of summoning officers works and then explaining how a search strategy for a form was developed based on that information. An description of a search of emails does not satisfy the requirement of Justice to explain its search for such a form.
- [34] Based on the information provided by Justice about its search, I am not satisfied that Justice performed a reasonable search for records.
- [35] I recommend that, within 30 days of my office issuing this Report, Justice perform a new search for records and provide a description of its search and findings to the Applicant and to my office. I also recommend that Justice provide a new section 7 response to the Applicant.

4. Is there a conflict of interest or perceived conflict of interest?

- [36] The Applicant has raised concerns about why charges related to the accident were withdrawn at Traffic Safety Court by the Prosecutor. In the access to information request, the Applicant requested:

Any emails/Skype conversations to/from [the Employee] with any of the following keywords in the date range of February 24th, 2019, to November 29th, 2019...

Any emails/Skype conversations between [the Prosecutor] and [the Employee] in the date range of February 24th, 2019, to November 29th, 2019...

- [37] Orders of the Information and Privacy Commissioner of Ontario (ON IPC) have noted that, in access matters, an employee with personal or special interest in whether the records are

disclosed should not be the person who decides the issue of disclosure. It also provides a test to determine conflict of interest:

[22] In Order MO-1285, Adjudicator Laurel Cropley discussed the factors to consider when addressing whether a conflict of interest exists. She wrote:

Previous orders of this office have considered when a conflict of interest may exist. In general, these orders have found that an individual with a personal or special interest in whether the records are disclosed should not be the person who decides the issue of disclosure. In determining whether there is a conflict of interest, these orders looked at (a) whether the decision-maker had a personal or special interest in the records, and (b) whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker (see, for example: Order M-640).

(ON IPC, Order MO-2867, para. 22)

[38] Review Report 16-102 by the Nunavut Information and Privacy Commissioner (NU IPC) talked about conflicts of interest of employees searching for records. It stated:

When an employee is asked to search his/her electronic records to identify and provide copies of records in which he or she may not be reflected in the best light, there is an inherent conflict of interest and a very human urge to expunge or attempt to hide embarrassing records.

(NU IPC, Review Report 16-102, p.4)

[39] The NU IPC Report recommended that:

...in all cases in which there is a real or apparent conflict of interest in having an employee search his/her own records to identify and provide records responsive to an access to information request, these searches be conducted by the ATIPP Co-ordinator through the same process as was undertaken in this case to search the archived records of former employees...

(NU IPC, Review Report 16-102, p.5)

[40] Applying the Ontario criteria, the first question is whether the Employee had a personal or special interest in the records. It is my view that when the subject of an access request involves a family member of an employee of a public body, especially when that family member is not also an employee of a public body, there is a personal or special interest. In

this case, the Employee did have a personal and special interest in the records. In this incident, the Employee did have a special interest in that the Employee's daughter was involved in an accident, was charged and had to appear in Traffic Safety Court. Then, an access request is received by Justice requesting records of communications between the Employee and the Prosecutor of the daughter's case. Thus, I find that the Employee would have had a personal or special interest. I am not saying the Employee did anything improper, but the perception of special interest is there.

[41] The second question is whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker. I am of the view that any well-informed employee processing this request would have perceived a personal or special interest.

[42] I find that the Employee who did the search had a personal or special interest.

[43] I understand that normally Justice asks employees to search their records when an access request is received; and that is exactly what should be done. I do see an exception to that general approach and that is where there is a conflict of interest, perceived conflict of interest, or a personal or special interest. In those instances, the abundantly cautious approach would be to have someone else do the search of the employee's records and determine which records are responsive and not responsive to the access request.

[44] Above I have recommended a new search. I recommend that Justice designate an official in Justice, other than the Employee, to do the search of the Employee's emails and determine whether any of those emails are responsive to the access request.

[45] In the next section of this Report, I determine that Justice has possession of the records in question. As such, I believe it has the authority to search the Employee's emails. My advice to the Employee is that it is wise that the Employee consent to such a search. Such an independent search would clear the Employee of any perception of anything.

[46] I would hope Justice and the Employee can work out an independent search of the Employee's emails. I remind both that section 54 of FOIP allows me to require the production of records whether they are the records of a public body or an Employee's personal records.

5. Are responsive records within the possession or under the control of Justice pursuant to section 5 of FOIP?

[47] Section 5 of FOIP provides the right of access to records within the possession or under the control of a government institution.

[48] In its submission, Justice indicated that a search of the Employee's email folders produced responsive records. The Employee affirmed this in their affidavit of October 14, 2021. Justice indicated that the records were of a personal nature and therefore, not in the possession or under the control of Justice.

[49] Justice provided a submission as to why it is of the opinion that the responsive records were not in its possession or control. However, the submission also noted that Justice did not review the records identified by the Employee. Justice took the Employee's word that the records were personal in nature and are an incidental use of the Government of Saskatchewan's email system. Based on that, it came to the conclusion that they were not in its possession or under its control.

[50] It is now my role to determine if the records in question are in the possession or under the control of Justice.

[51] On September 8, 2021, my office asked Justice to provide a sample of these emails. My office noted that the practice would be consistent with the procedure that was followed by Justice and my office for [Review Report F-2014-007](#). My office also asked that Justice indicate the number of pages that were produced. It also asked Justice to confirm that none of the emails were related to the duties of the Prosecutor.

[52] Justice responded on October 18, 2021 and informed my office that the sworn affidavit provided to my office, “should be sufficient to establish the emails were personal in nature and not work related”. It indicated that Justice has determined the records are not subject to FOIP, and had no basis to request the records from the Employee. Justice also noted that it did not ask the Employee how many pages of responsive records there were. Also, in response to my questions, Justice asked the Employee if the records responsive to this request were in relation to the duties of the Prosecutor and it reported that they confirmed that they were not.

[53] I do not accept Justice’s claim that it had no basis to request the records from the Employee for the purposes of responding to the access to information request or this review. The Government of Saskatchewan’s *User Acceptable Use Policy* which is “applicable to all employees of the Government of Saskatchewan” states:

Employees should be aware that computer usage can be traced by site logs and other tracked information. **The Government reserves the right to access the contents of all files stored on its systems and all messages transmitted through its information technology infrastructure.** The systems are the Corporation’s property as well as, for access and security purposes, the information they contain. **We respect our employees’ right to privacy; however, we grant access to our systems for business use. Employees must not expect that information contained in these systems is private. The Company reserves the right, from time to time, for commercial, legal, or otherwise valid reasons, to read, monitor, control, and access user files and messages created, saved, transmitted, or received.** In the event of intercepted illegal activity, we will bring them to the attention of the appropriate authority without prior notification to the sender or receiver.

[Emphasis added]

(Accessed from taskroom.sp.saskatchewan.ca/Documents/User%20Acceptable%20Use%20Policy.pdf on October 28, 2021, revision date July 2021)

[54] Possession is physical possession plus a measure of control of the record. (IPC *Guide to FOIP*, Chapter 1, “Purposes and Scope of FOIP”, updated June 28, 2020 [*Guide to FOIP*, Ch. 1], p. 9)

[55] As the records are stored on its IT systems, and the *User Acceptable Use Policy* indicates that the Government reserves the right to access its contents, I find that Justice has physical possession of the records identified in the Employee's affidavit.

6. Does section 22(c) of FOIP apply to the record?

[56] Section 22(c) of FOIP provides:

22 A head may refuse to give access to a record that:

...

(c) contains correspondence between an agent of the Attorney General for Saskatchewan or legal counsel for a government institution and any other person in relation to a matter involving the provision of advice or other services by the agent or legal counsel.

[57] Subsection 22(c) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where a record contains correspondence between the government institution's legal counsel (or an agent of the Attorney General) and any other person in relation to a matter that involves the provision of advice or services by legal counsel (or an agent of the Attorney General). This provision is broader in scope than subsection 22(a) of FOIP (Guide to FOIP, Ch. 4, p. 279).

[58] The following two-part test can be applied:

1. Is the record a correspondence between the government institution's legal counsel (or an agent of the Attorney General) and any other person?
2. Does the correspondence relate to a matter that involves the provision of advice or other services by the agent or legal counsel?

(IPC *Guide to FOIP*, Chapter 4, "Exemptions from the Right of Access", updated April 30, 2021 [*Guide to FOIP*, Ch. 4], p. 279)

[59] Justice applied section 22(c) of FOIP to the entire record.

1. *Is the record a correspondence between the government institution's legal counsel (or an agent of the Attorney General) and any other person?*

[60] Correspondence means letters sent or received. It is an interchange of written communication. A memorandum or note from one employee of a government institution to another summarizing a conversation between that employee and the government institution's lawyer may meet the criteria for this provision.

[61] Agent means someone who is authorized to act for or in place of another.

[62] The record is a one page email string with two emails. In its submission, Justice indicated that the emails are between the Traffic Court Prosecutor and a second prosecutor. It submitted that both are agents of the Attorney General.

[63] Upon review, I agree that the record qualifies as correspondence between two agents of the Attorney General. The first part of the test is met.

2. *Does the correspondence relate to a matter that involves the provision of advice or other services by the agent or legal counsel?*

[64] Legal service includes any law-related service performed by a person engaged by a government institution and who is licensed to practice law (*Guide to FOIP*, Ch. 4, p. 281).

[65] Upon review of the record, I agree that the matter relates to a legal service and involves a person who is an agent of the Attorney General and is licensed to practice law. The second part of the test is met.

[66] I find section 22(c) of FOIP applies to the record. There is no need to consider if sections 15(1)(k.2) or 22(b) of FOIP apply to the record.

Exercise of Discretion

[67] Section 22(c) of FOIP is a discretionary exemption which means a government institution can decide whether to withhold or release information to which the exemption applies. When applying any discretionary exemption, the government institution must first determine if the circumstances meet the test, as discussed above. The head then should exercise their discretion when deciding whether to withhold records pursuant to a discretionary exemption or to instead, release them.

[68] The *Guide to FOIP* summarizes some factors that should be taken into account when exercising discretion as follows:

- the general purposes of the Act (i.e. public bodies should make information available to the public, and individuals should have access to personal information about themselves);
- the wording of the discretionary exception and the interests which the exception attempts to protect or balance;
- whether the applicant's request may be satisfied by severing the record and providing the applicant with as much information as is reasonably practicable;
- the historical practice of the public body with respect to the release of similar types of records;
- the nature of the record and the extent to which the record is significant or sensitive to the public body;
- whether the disclosure of the information will increase public confidence in the operation of the public body;
- the age of the record;
- whether there is a definite and compelling need to release the record; and
- whether Commissioner's Orders have ruled that similar types of records or information should or should not be disclosed.

(*Guide to FOIP*, Ch. 4, p. 12)

[69] The Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exemption and to return the matter for reconsideration by the head of a public body.

[70] The Supreme Court, in the same decision, also considered the following factors to be relevant to the review of discretion:

- the decision was made in bad faith;
- the decision was made for an improper purpose;
- the decision took into account irrelevant considerations; or
- the decision failed to take into account relevant considerations.

[71] During a review of a discretionary exemption, I may recommend that the head of the government institution reconsider its exercise of discretion. However, I will not substitute my discretion for that of the head (*Guide to FOIP*, Ch. 4, p. 13).

[72] The record contains factual information that the Applicant has provided to my office during this review. I encourage Justice to ensure that it has considered all of these factors before it withholds information pursuant to subsection 22(c) of FOIP.

IV FINDINGS

[73] I find that an application was made pursuant to section 6(1) of FOIP on November 29, 2019.

[74] I find that Justice did not comply with section 7(2) of FOIP as it did not provide a section 7 response to the Applicant within 30 days of receiving the access to information request.

[75] I find that Justice has not performed a reasonable search for records.

[76] I find that the Employee who did the search had a personal or special interest.

[77] I find that Justice has physical possession of the records identified in the Employee's affidavit.

[78] I find that section 22(c) of FOIP applies to the record.

V RECOMMENDATIONS

[79] I recommend that, within 30 days of my office issuing this Report, Justice perform a new search for records and provide a description of its search and findings to the Applicant and to my office. I also recommend that Justice provide a new section 7 response to the Applicant.

[80] I recommend that Justice designate an official in Justice, other than the Employee, to do the search of the Employee's emails and determine whether any of those emails are responsive to the access request.

Dated at Regina, in the Province of Saskatchewan, this 30th day of November, 2021.

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