



## REVIEW REPORT 088-2024

### Ministry of Health

September 30, 2024

#### Summary:

The Applicant requested from the Ministry of Health (Health) records that outline the criteria used to report deaths from COVID-19 or any SARS-CoV-2 variants. Health undertook a search, and then responded to the Applicant that, pursuant to subsection 7(2)(e) of *The Freedom of Information and Protection of Privacy Act* (FOIP), responsive records do not exist. The Applicant asked the Commissioner to undertake a review. In its submission, Health provided the A/Commissioner with a link to a manual called the “Communicable Disease Control Manual” (manual), which the A/Commissioner considered may be responsive. The A/Commissioner also found that Health’s search was not reasonable. The A/Commissioner recommended: 1) that within 30 days of the issuance of this Report, Health conduct another search for records and provide the Applicant and my office with the details and results of its search efforts; 2) that within 30 days of the issuance of this Report that Health provide a link to the manual to the Applicant; and 3) that Health ensure its staff is trained in meeting the duty to assist.

### I BACKGROUND

[1] On January 25, 2024, the Ministry of Health (Health) received the Applicant’s access to information request for the following with a specified timeframe of “January 1, 2020 to December 31, 2023”:

Provide the criteria the Chief Medical Officer used to define a “COVID death” or a death by any of SARS-CoV-2 variants.

[2] In its section 7 decision to the Applicant dated February 8, 2024, Health responded that pursuant to subsection 7(2)(e) of *The Freedom of Information and Protection of Privacy Act* (FOIP) that the record does not exist.

[3] On March 18, 2024, the Applicant asked my office to review Health’s response. The Applicant also provided their arguments on March 18, 2024, and stated:

4. On or about February 23, 2024, the *Western Standard*, published an article entitled, *Info request yields no documents on how Saskatchewan defined COVID-19 deaths*. In request to a query from the *Western Standard*, the Saskatchewan government gave the following response.

For COVID-19 reporting purposes, Saskatchewan considers a death to be a COVID-19 death when the death is a result of a clinically-compatible illness in a COVID-19 case, unless there is a clear and immediate alternative cause of death that cannot be related to COVID-19 (e.g., trauma). The reported cases would have tested positive for COVID-19 on a PCR test or were considered a highly probable COVID-19 case (e.g. were in close contact to a confirmed case and had COVID-19 symptoms) ...

[4] The Applicant further asserted that Health, “refuses to assist in its duty to provide [access] openly, accurately, and completely.” The Applicant added that while Health claims no records exist, the *Western Standard* article outlines that the “government stated there was a standard for reporting deaths. How can there be a standard, without records?”

[5] On April 18, 2024, my office notified the Applicant and Health that I would be undertaking a review of Health’s search efforts.

[6] On June 3, 2024, Health provided its submission to my office. As mentioned, the Applicant provided arguments with their request for review on March 18, 2024.

## **II RECORDS AT ISSUE**

[7] As this is a review of Health’s search efforts, there are no records at issue.

## **III DISCUSSION OF THE ISSUES**

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

[8] Health is a “government institution” as defined by subsection 2(1)(d)(i) of FOIP; therefore, I have jurisdiction to conduct this review.

**2. Did Health undertake a reasonable search?**

[9] Section 5 of FOIP provides 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.

[10] 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*, Chapter 3, “Access to Records”, updated May 5, 2023 [*Guide to FOIP*, Ch. 3], p. 3)

[11] Page 12 of the *Guide to FOIP*, Ch. 3, states that subsection 5.1(1) of FOIP requires a government institution to respond to an applicant’s access to information request openly, accurately, and completely. This means that government institutions should make reasonable efforts to not only identify and seek out records responsive to an applicant’s access to information request, but to explain the steps in the process.

[12] In this matter, Health claims that the record the Applicant requests does not exist pursuant to subsection 7(2)(e) of FOIP, which provides as follows:

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

...

(e) stating that access is refused for the reason that the record does not exist;

[13] A statement by a government institution that a record does not exist does not imply that the record in question does not exist at all. It would not be possible for a government institution to make such a sweeping statement about the general existence of a record. The term “exist” in subsection 7(2)(e) of FOIP is a function of being possessed or controlled by the

government institution to which the access request is being made. The *Guide to FOIP*, Ch. 3 at pages 56 and 57, describes the following two circumstances where a response that records do not exist can occur:

1. **A search did not produce records.** There are times when a search for a record turns up nothing. When this occurs, the government institution should explain the steps it took to search in coming to this conclusion. If a record has been destroyed, the government institution should be able to provide the date of destruction and cite its authority for carrying out the destruction.
2. **The government institution does not have possession or control of the record.** A record may exist, but the government institution does not have it in its possession or control. If a government institution determines that another government institution has a “greater interest” in the record, the government institution should transfer the access request in accordance with section 11 of FOIP.

[14] When there is claim that records do not exist, my office still considers if the government institution made reasonable efforts to search. 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. The *Guide to FOIP*, Ch. 3 at pages 14 and 15, outline examples of information a government institution can provide my office to support its search efforts:

- 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/committees/boards were included in the search.
- For general requests – tie the subject matter of the request to the departments/divisions/branches/committees/boards 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/committees/boards included in the search.
- Describe how records are classified within the records management system. For example, are the records classified by alphabet, year function and/or 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.

[15] The above list is meant to be a guide. Each case will require different search strategies and details depending on the records requested. In the past, I have also stated that I will consider reasonable explanations a government institution may provide to support how it searched.

[16] Health states it undertook the following in preparing its section 7 decision to the Applicant dated February 12, 2024:

On January 29, 2024, an email was sent to Deputy Minister’s Office (DMO), Communications Branch (CB), and Population Health Branch (PHB) to search and gather any records that may be responsive to this request. DMO and CB responded that the records being sought do not exist within their area. The Ministry also consulted further with PHB for the above requested records and according to PHB’s explanation based on their knowledge, the Chief Medical Health Officer did not and does not define “COVID death”; thus, the Ministry determined that the records do not exist within the Ministry of Health.

[17] Health explained that when it receives an access request, it forwards the request to branches within Health that are likely to have responsive records. In this matter, Health canvassed the Population Health Branch (PHB), Communications Branch (CB) and the Deputy Minister's office. Health describes that the PHB is a branch within Health that is responsible for communicable diseases including COVID-19, and where the "Chief Medical Health Officer" is located. Health further adds that the CB is where all "internal and external communications and media related issues are housed." Health asked these branches to undertake a "preliminary search" and to advise if other individuals or branches should be canvassed. Health states no other individuals or branches were identified. Health adds:

According to the response from PHB, the Ministry of Health does not have a Chief Medical Officer. The Ministry interpreted the applicant's request to refer to and include the Ministry's "Chief Medical Health Officer". It is not the responsibility of the Chief Medical Health Officer to determine causes of death, and the Chief Medical Health Officer did not create a definition or criteria to define "COVID death" or death by any of the SARS-CoV-2 variants. As such, no records can be found that contain any criteria used to define a "COVID death" within the Ministry. This information was provided by a Ministry employee, who is the Director of Environmental Health of PHB. This individual's job requirement within the Ministry is responsive to what the request was asking for.

...

Media requests are handled through a process different from ATI requests. ATI requests require searches for records that are in the possession or under the control of the Ministry. However, when responding to media requests, the Ministry can gather information internally or from other sources outside of the Ministry or the Government of Saskatchewan, such as eHealth Saskatchewan, the Government of Canada, or the World Health Organization (WHO). CB stated that the definition of a COVID death provided is consistent with the definition from the Public Health Agency of Canada (PHAC): <https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/health-professionals/national-case-definition.html#dec>

Response from CB:

For COVID-19 reporting purposes, Saskatchewan considers a death to be a COVID-19 death when the death is a result of a clinically compatible illness in a COVID-19 case, unless there is a clear and immediate alternative cause of death that cannot be related to COVID-19 (e.g., trauma). The reported cases would have tested positive for COVID-19 on a PCR test or were considered a highly probable

COVID-19 case (e.g. were in close contact to a confirmed case and had COVID-19 symptoms).

Public Health Agency of Canada's definition:

A probable or confirmed COVID-19 case whose death resulted from a clinically compatible illness, unless there is a clear alternative cause of death identified (e.g., trauma, poisoning, drug overdose). Medical Officer of Health, relevant public health authority, coroner or medical examiner may use their discretion when determining if a death was due to COVID-19, and their judgement will supersede the above-mentioned criteria. A death due to COVID-19 may be attributed when COVID-19 is the cause of death or is a contributing factor.

A "Communicable Disease Control Manual" is available online at eHealth Saskatchewan's website and is used in Saskatchewan to inform communicable disease investigations and reporting of Covid-19 deaths, but this record is not in possession or under the control of the Ministry. See the following link to the "Communicable Disease Control Manual" under "COVID-19" and "Deceased" ...

[18] What the Applicant is essentially asking for is records that outline the criteria the "Saskatchewan government" uses (or used) to define a death by or from COVID-19 or a SARS-CoV-2 variant. For example, during the COVID-19 pandemic, what criteria would an authorized health professional in a hospital have used to determine a death was from COVID-19? Ostensibly, such criteria would help support what was reported back to whichever branch of Health is responsible for such reporting.

[19] In my office's [Review Report 329-2023](#), concerning the Financial and Consumer Affairs Authority of Saskatchewan, I also considered a search matter where the claim was that records do not exist. At paragraphs [55] and [56] of that report, I cited statements made by the Information and Privacy Commissioners of Alberta and British Columbia that stated that a public body in searching for records "must be thorough and comprehensive in order to discharge [their] duty to assist..." The point being that while the standard on search is not perfection, there is a requirement that public bodies undertake thorough and comprehensive searches that "describe all the potential sources of records" and identify where it searched and areas it did not search and why. A public body does not properly discharge its duties if it does not take these steps. In the case of a government institution, this duty is found under subsection 5.1(1) of FOIP.

[20] I note that Health undertook what it describes as a “preliminary search”, which included a search of its PHB and CB. Health did not, however, include details such as how each branch searched including what key words each branch might have used, etc. While Health’s PHB appears to be an appropriate place to have searched, it’s a bit unclear why Health would focus at all on the media request and where its CB may or may have not received its information. The Applicant pointed to the media article as an example of how the “Saskatchewan government” was reporting on COVID-19 but wanted access to the criteria used to determine a death by COVID-19 or a SARS-CoV-2 variant. Saying that media requests are handled separately from access requests and that Health’s CB may pull its information from different sources is irrelevant to the matter at hand. I would not expect Health’s CB to be the keeper of records describing how (or by what criteria) an authorized medical professional determines a cause of death by COVID-19 or a SARS-CoV-2 variant.

[21] This brings me to a couple of issues with Health’s response to the Applicant. First, if Health was unclear by what the Applicant meant by the term “Chief Medical Officer”, then it had a duty to ask the Applicant for clarification, or to advise the Applicant of any correct terms it would use in its search. To respond accurately pursuant to subsection 5.1(1) of FOIP means to provide an applicant with sufficient and correct information, to clarify the nature of the access request, and to understand the nature of the record requested. Once these factors are addressed, then a government institution should be better prepared to search.

[22] Second, in its submission to my office, Health provided a link to the “Communicable Disease Control Manual” (manual) on eHealth’s website. I note that this manual is part of several manuals listed as “Public Health Manuals”. On the manual in question, there is a link to a disclaimer that states as follows:

The prevention, management and control of communicable diseases requires the active participation and cooperation of all health-care professionals and practitioners. **The guidelines included in the Communicable Disease Control (CDC) Manual have been developed by the Saskatchewan Ministry of Health** with input and advice from Medical Health Officers, public health nurses, public health inspectors, Saskatchewan Disease Control Laboratory, medical microbiologists and infectious disease specialists. The guidelines outline the recommended practices for the follow-up of selected communicable diseases and are intended for use by public health professionals in Saskatchewan...



[Emphasis added]

[23] According to the disclaimer, Health authored the manual. The footer in the manual also acknowledges the “Saskatchewan Ministry of Health” (other linked manuals also include headers or footers acknowledging the “Saskatchewan Ministry of Health”). As Health cites, section 2-20 of the manual (dated November 11, 2023) does contain a section on page 2 with the heading “Deceased”; I quote from section 2-20 as follows:

- A probable or confirmed COVID-19 case whose death resulted from a clinically compatible illness, unless there is a clear alternative cause of death identified (e.g., trauma, poisoning, drug overdose).
- A Medical Officer of Health, relevant public health authority, or coroner may use their discretion when determining if a death was due to COVID-19, and their judgement will supersede the above-mentioned criteria.
- A death can be attributed to COVID-19 when COVID-19 is the cause of death or is a contributing factor.

[24] Health provided a link to this manual to my office but did not provide a link to the Applicant. To respond completely means to respond with all its part or without omitting anything. To do this, a government institution needs to understand the records that are in its possession or under its control, keeping in mind that a government institution does not need to physically possess a record to have control over it. While Health maintains the manual in question is not in its possession or under its control, by authoring the manual I presume Health is in a position to provide the Applicant or anyone else with a link to that manual on the eHealth website. I add that it appears that section 2-20 of the manual contains the criteria created or collated by Health to assist those with authority (e.g., “Medical Health Officer”, “relevant public health authority”, or “coroner”) to determine when a death may be attributed to COVID-19. As well, the manual in question is dated November 11, 2023, and so would fall within the Applicant’s given timeframe. Given the type of information the manual contains and the fact that it is dated within the Applicant’s timeframe, it may be responsive to the Applicant’s access to information request – this is for Health to determine.

[25] If a government institution does not provide adequate details to support its search efforts, it is not fully demonstrating that it discharged its duties under subsection 5.1(1) of FOIP. Further, if a government institution's response was not accurate or complete, it can bring into question whether the government institution's search was comprehensive enough or if it missed records it should have located when undertaking its search. While the manual in question may be responsive to the Applicant's access to information request, there may be additional records Health finds to be responsive if it searches further.

[26] Based on the preceding, I find that Health did not undertake a reasonable search for records. I recommend that within 30 days of the issuance of this Report, Health conduct another search for records and provide the Applicant and my office with the details and results of its search efforts. I also recommend that within 30 days of the issuance of this Report that Health provide the Applicant with a link to the "Communicable Disease Control Manual". Lastly, I recommend that Health ensure its staff is trained on meeting the duty to assist.

#### **IV FINDINGS**

[27] I find that I have jurisdiction.

[28] I find that Health's search was not reasonable.

#### **V RECOMMENDATIONS**

[29] I recommend that within 30 days of the issuance of this Report, Health conduct another search for records and provide the Applicant and my office with the details and results of its search efforts.

[30] I recommend that Health provide the Applicant with a link to the "Communicable Disease Control Manual".

[31] I recommend Health ensure its staff is trained on how to meet the duty to assist.

Dated at Regina, in the Province of Saskatchewan, this 30th day of September, 2024.

Ronald J. Kruzeniski, KC  
A/Saskatchewan Information and Privacy  
Commissioner