



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 091-2021

Saskatchewan Human Rights Commission

December 13, 2021

Summary:

The Saskatchewan Human Rights Commission (SHRC) received an access to information request under *The Freedom of Information and Protection of Privacy Act* (FOIP). The SHRC issued a fee estimate that the Applicant paid in full. In its response, the SHRC withheld records and portions of records claiming that they were non-responsive, withheld other information as exempt pursuant to section 29(1) of FOIP and refunded the fees. The Applicant sought a review of the SHRC's search efforts, its claim that some information was non-responsive or exempt under section 29(1) of FOIP, and the fee estimate. In this review, the Commissioner found that the SHRC had conducted a reasonable search, improperly withheld information as non-responsive and properly applied section 29(1) of FOIP. The Commissioner also found that the issues related to the fee estimate were moot. The Commissioner recommended that the SHRC consider releasing non-responsive information, subject to exemptions; release the information found to be responsive, subject to exemptions, and continue to withhold information pursuant to section 29(1) of FOIP.

I BACKGROUND

[1] On March 11, 2021, the Applicant made an access to information request to the Saskatchewan Human Rights Commission (SHRC) seeking access to information under *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant's request sought a waiver of fees and access to records dated February 8 and 9, 2021, as follows:

...all documents, correspondence, emails, notes and text messages, whether written, issued, received or exchanged, by employees and/or officials of the [SHRC], in which any reference is made to [the Applicant], whether by name or not, including, but not limited to, the following [5 named individuals]

- [2] On April 6, 2021, the SHRC responded to the request. In its response, the SHRC denied the fee waiver, issued a fee estimate calculated in accordance with section 6 of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations) and requested a deposit of \$72.50.
- [3] By letter dated April 9, 2021, the Applicant paid the full amount of the fee estimate and requested that the SHRC proceed with processing the request.
- [4] The SHRC responded to the request on April 14, 2021, by letter signed by the Executive Director of the SHRC (who, the SHRC asserts, also served as Head under FOIP) stating that it was releasing two emails in full. Other records were withheld in full or in part as non-responsive to the request. In addition, severances were made to two pages pursuant to section 29(1) of FOIP. The SHRC also refunded the Applicant in full for the fees paid, because it decided that the estimated cost of processing the request was less than the actual cost of processing.
- [5] The Applicant filed a request for a review of the SHRC's decision with my office on April 19, 2021. In their request for a review, the Applicant disputed the SHRC's decision to deny access.
- [6] On May 11, 2021, my office notified the Applicant and the SHRC of my intention to conduct a review and invited both parties to provide a submission on the fee estimate, adequacy of search for records, claim that some information was non-responsive and possible application of section 29(1) of FOIP.
- [7] On November 19, 2021, the SHRC sent a revised section 7 response releasing information that it had previously withheld pursuant to section 29(1) of FOIP and noting that it continued to rely on section 29(1) of FOIP to withhold other information.

[8] On November 22, 2021, my office received a submission from the SHRC. The Applicant did not provide my office with a submission.

II RECORDS AT ISSUE

[9] The following table describes the records released, records at issue and the exemptions claimed in this review:

Record No.	Description	Page Number*	Released/Withheld	Exemptions
1	Email dated February 8, 2021	13-14	Released in full	N/A
2	Draft <i>Deaf and deaf and Hard of Hearing Report</i> dated January 18, 2021 (attachment to Record 1)	15-40	Pages 15-27 and 29-39 withheld	Non-responsive
			Page 40 is a duplicate of Page 155 of Record 5 which was released in full Nov. 19, 2021	N/A
3	Draft <i>Access and Equality for Renters in Receipt of Public Assistance Report</i> dated December 16, 2020 (attachment to Record 1)	41-63	Withheld in full	Non-responsive
4	Email dated February 8, 2021	64	Released in full	N/A
5	Systemic Operations Package (SOP)(attachment to Record 4) – N.B. SOP is	65-353	Pages 65-128 withheld in full	Non-responsive
			Page 129 released in part	29(1)

	comprised of a file list, and number of emails, memos and draft reports		Pages 130-154 withheld in full	Non-responsive
			Page 155 released in full Nov. 19, 2021	N/A
			Pages 156 -353 withheld in full	Non-responsive

*Page numbers refer to page numbers used in the SHRC submission package.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[10] The SHRC qualifies as a “government institution” pursuant to subsection 2(1)(d)(ii) of FOIP and section 3 and Part I of the Appendix to the FOIP Regulations. Therefore, I have jurisdiction to review this matter.

2. Did the SHRC conduct a reasonable search for records?

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

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.

[12] Section 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 (IPC *Guide to FOIP*, Chapter 3: “Access to Records”, updated: June 29, 2021, at p. 7 (*Guide to FOIP*, Ch. 3)).

[13] If a search does not produce any records or some records are produced, but a specific record has not been found, government institutions shall give a written notice to the applicant in accordance with section 7(2)(e) of FOIP. Section 7(2)(e) of FOIP provides:

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;

[14] The threshold to be met is one of “reasonableness.” In other words, it is not a standard of perfection, but rather what a fair and rational person would expect to be done or consider acceptable.

[15] A “reasonable search” is one in which an employee, experienced in the subject matter of the records, 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).

[16] When an applicant requests a review of a government institution’s search efforts, the government institution should provide my office with detailed information about its efforts to conduct a search. The following examples of the type of information that can be provided to my office are relevant here:

- 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.
- 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).
 - 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 my office's resource, Using Affidavits in a Review with the IPC, available on my office's website.

(Guide to FOIP, pp. 9 - 10)

[17] The above list is intended to be a guide. Providing these details is not a guarantee that my office will find the search conducted was reasonable. Each case will require different search strategies and details depending on the records requested.

[18] The SHRC submission on the adequacy of its search stated that documents received and generated by the SHRC are kept in files stored in central filing cabinets and in an electronic filing system. It added that some records may be located in email accounts of its employees and officers.

[19] It also stated that the specific individuals named in the Applicant's access to information request were provided with a copy of the request, and instructions on how to conduct the search for responsive records. These individuals conducted a search of their email accounts,

and their other electronic and paper record holdings. One individual found responsive records and provided them to the Executive Director. Two other individuals located the same records. The remainder of the individuals did not locate any responsive records.

[20] The Executive Director then sent an email to all SHRC employees and officials directing them to perform a search of their electronic and paper record holdings for responsive records. The Executive Director completed a search of their own records. Another individual, described by the SHRC as the Executive Assistant to the Commission, completed searches in their own record holdings and the email accounts for three former staff who were employed during the relevant time-period. According to the SHRC, a total of 25 people, including the named individuals, conducted searches of their electronic and paper record holdings.

[21] The searches were conducted by staff between March 24 and March 29, 2021. The SHRC submission also stated:

All Commission employees and officers are required to take and pass a training course about FOIP, including the duty to respond to FOI requests and how to conduct a search, including searching all devices (desktop computers, laptop computers and tablets, cell phones, and paper files) and all locations where records may be stored.

[22] Based on the information provided by the SHRC, I find that its search for responsive records was conducted by staff and officials with knowledge of the record holdings and their obligations to conduct a reasonable search under FOIP. The search was sufficiently comprehensive in that it included all electronic and paper record holdings of relevant staff and officials, including staff that were no longer with the SHRC, and was conducted using appropriate keywords.

[23] For all of these reasons, I find that the SHRC has conducted a reasonable search for responsive records.

3. Did the SHRC properly withhold information on the basis that it is non-responsive to the Applicant's access to information request?

[24] As noted above, information was severed from Records 2, 3 and 5, because it was found to be non-responsive. The SHRC stated that the information was found to be non-responsive because it did not include any reference to the Applicant, by name or otherwise.

[25] When a government institution receives an access to information request, it must determine what information is responsive to the access request. The term "responsive" describes anything that is reasonably related to the request. The wording of the request sets out the boundaries of relevancy and defines the records or information that will be identified as responsive (*Guide to FOIP*, Ch. 3, p. 12).

[26] The purpose of FOIP is best served when a government institution adopts a liberal interpretation of a request. If it is just as easy to release the information as it is to claim not responsive, the information should be released (i.e. releasing the information will not involve time consuming consultations nor considerable time weighing discretionary exemptions). If a government institution has any doubts about the scope, it has a duty to assist an applicant in clarifying or reformulating the request (*Guide to FOIP*, Ch. 3, p. 13).

[27] The access to information request, in this case, is very specific. The Applicant seeks access to "documents correspondence, emails, notes and text messages" generated during a specific time period "in which any reference is made to [the Applicant], whether by name or not." Therefore, the Applicant is not only seeking access to information that references their name. As the request is very specific in that it applies to "documents correspondence, emails, notes and text messages" that mention the Applicant, it would not be appropriate for the SHRC to treat portions of these records as non-responsive. This is consistent with the approach that was taken in [Review Report 016-2014](#).

[28] Record 5 is described by the SHRC in its Index of Records as the Systemic Operations Package. As noted in the description of the records above, it is comprised of a number of

different documents, emails and reports. The Systemic Operations Package was attached to Record 4, which is an email to senior staff of the SHRC.

[29] In its submission, the SHRC referred to the various documents that comprise the Systemic Operations Package as records. Subsequently, in correspondence with my office regarding the Index of Records, the SHRC described the Systemic Operations Package as “one record, in the sense that it was attached to an e-mail as one, omnibus attachment. However, it was made up of a number of discrete documents ...” For these reasons, and taking a liberal approach to the interpretation of the request, I have treated the Systemic Operations Package as one record, namely Record 5.

[30] Looking at Records 2 and 5 on a record-by-record basis, I find that they include a reference to the Applicant by name, and therefore, these records, in their entirety, should be treated as responsive to the Applicant’s request.

[31] I note that Records 2 and portions of Record 5 include information about work that involved the Applicant. Given the circumstances of the request, including the Applicant’s claim that there is a dispute between them and the SHRC regarding the termination of their employment, I find that Records 2 and 5 are reasonably related to the request.

[32] I note that Record 3 does not include a reference to the Applicant, by name or otherwise, and therefore, I find that it is not responsive to the request. However, the SHRC should nonetheless consider releasing this information, subject to exemptions.

[33] I recommend that the SHRC review Records 2 and 5, with the exception of page 129 of Record 5, and issue a new section 7 response to the Applicant treating Records 2 and 5 as responsive, and setting out its decision regarding release or any applicable exemptions.

4. Did the SHRC properly apply section 29(1) of FOIP to page 129 of Record 5?

[34] I now turn to consider the SHRC claim that portions of page 129 of Record 5 are exempt pursuant to section 29(1) of FOIP. Section 29(1) of FOIP is a mandatory exemption that

protects the privacy of individuals whose personal information may be contained in records that are responsive to a request made by someone else. This information is referred to as third party “personal information.” Section 29(1) of FOIP requires a government institution to have consent of the individual whose personal information is in the record prior to disclosing it (*Guide to FOIP*, Ch. 4, p. 281).

[35] Section 29(1) of FOIP provides:

29(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[36] In order for section 29(1) of FOIP to apply, the information must qualify as third party “personal information” as defined by section 24(1) of FOIP. Section 24(1) of FOIP provides, in part:

24(1) Subject to subsections (1.1) and (2), “personal information” means personal information about an identifiable individual that is recorded in any form, and includes:

(a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;

[37] Section 24(1) of FOIP does not provide an exhaustive list of what qualifies as personal information. Other information may qualify as personal information if two elements exist:
1. The information is identifiable, and 2. The information is personal in nature.

[38] The SHRC stated that the information severed from page 129 of Record 5 qualifies as the personal information of individuals other than the Applicant, because it relates to their “personal status and unofficial associations.”

[39] I agree that the information severed from page 129 of Record 5 qualifies as personal information under section 24(1)(a) of FOIP, because it reveals the individuals’ family status and associations of a personal nature. As these individuals have not consented to the

disclosure of their personal information, I find that the severed information is exempt pursuant to section 29(1) of FOIP.

5. Was the SHRC fee estimate reasonable?

[40] I now turn to the Applicant's request that my office review the SHRC's fee estimate. Section 9(2) of FOIP requires a government institution to provide a fee estimate where the cost for providing access to records exceeds the prescribed amount of \$100. This prescribed amount is found in section 7(1) of the FOIP Regulations (*Guide to FOIP*, Ch. 3, p. 48).

[41] As noted above, the SHRC decided to withdraw its fee estimate and provided the Applicant with a full refund of the fee. Since the Applicant has received a full refund of the fee, the issue as to the reasonableness of the fee estimate has disappeared and has become academic. I am not persuaded that I should exercise my discretion to decide the issue as I see no useful purpose in doing that. I find that the fee estimate issue is moot.

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

[42] In their request for a review and subsequent correspondence with my office, the Applicant raised a concern about a potential conflict of interest or perceived conflict of interest regarding the Executive Director's role in processing their access to information request.

[43] As noted in [Review Report 023-2020, 027-2020](#), an employee with a personal or special interest in whether records are released should not be the person who decides the issue about the release. To determine whether a conflict or perceived conflict exists, my office has followed the approach taken by the Ontario Information and Privacy Commissioner (Ontario IPC). In [Order MO-1285](#), the Ontario IPC stated that a determination as to whether a conflict of interest exists requires a consideration of two factors. The factors are (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. It is not necessary to provide proof of "actual bias."

[44] As noted, the Applicant set out their claim of a conflict of interest in their request for a review and in subsequent correspondence with my office. They stated:

[The Executive Director] is not the privacy officer for the SHRC, nor is she the “head” as outlined in *The Freedom of Information and Protection of Privacy Act*. She is however, directly in conflict in my request and should not have involved herself in determining what information was released or not released to me. At the very least [the Executive Director] has created a presumption of interference and collusion.

[45] The Applicant also explained their employment with the SHRC was terminated by the Executive Director. The termination and the actions of the SHRC are the subject of a grievance process and two separate human rights complaints to the SHRC. One of those complaints involves a claim of discriminatory action by the SHRC, relating to conduct that occurred after the original complaint was filed. The Applicant notes that the Executive Director is specifically named in the complaints.

[46] As noted above, the responsibility for conducting the search for records responsive to the Applicant’s request was shared with multiple staff and officials from across the SHRC. I also note that none of the responsive records includes information pertaining to the Applicant’s employment dispute or human rights complaints, and they were not written or prepared by the Executive Director. In my view, the conduct of the search and the content of the records do not reveal anything that would suggest that the Executive Director had a personal or special interest in the records or the request.

[47] Consistent with findings made by the Ontario IPC in orders that address conflict of interest, the fact that staff processing the access to information request had an involvement in the subject matter of the request or were the subject of complaints made by the requesters in other forums, is not sufficient, by itself, to support a finding of conflict of interest. See for example, Ontario IPC Orders [MO-1285](#), [PO-2381](#), [MO-4101](#) and [MO-3204](#).

[48] Based on my review of the totality of the information and evidence before me, I am not persuaded that a well-informed person would reasonably perceive a conflict of interest on the part of the Executive Director in this case. Nonetheless, I recommend that SHRC

develop a defined process to address potential conflicts of interest or claims of conflict of interest when processing access to information requests.

[49] For the reasons set out above, I find that no conflict of interest exists in this case.

V FINDINGS

[50] I find that the SHRC conducted a reasonable search for records.

[51] I find that the SHRC properly withheld Record 3 on the basis that it was non-responsive to the Applicant's access to information request.

[52] I find that the information withheld from Records 2 and 5 is responsive to the Applicant's access to information request.

[53] I find that the SHRC properly applied section 29(1) of FOIP to withhold information from Page 129 of Record 5.

[54] I find that the issue involving the reasonableness of the SHRC's fee estimate is moot.

[55] I find that there is no conflict of interest in the Executive Director's role in processing the Applicant's access to information request.

V RECOMMENDATIONS

[56] I recommend that the SHRC consider releasing Record 3, subject to exemptions.

[57] I recommend that, within 30 days of the issuance of this Report, the SHRC review Records 2 and 5, with the exception of page 129 of Record 5, and issue a new section 7 response to the Applicant treating Records 2 and 5 as responsive, and setting out its decision regarding release or applying applicable exemptions to withhold.

[58] I recommend that the SHRC continue to withhold the information severed from page 129 of Record 5 that I found to be exempt pursuant to section 29(1) of FOIP.

[59] I recommend that SHRC develop a defined process to address potential conflicts of interest or claims of conflict of interest when processing access to information requests.

Dated at Regina, in the Province of Saskatchewan, this 13th day of December, 2021.

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