



REVIEW REPORT 206-2024

Ministry of Justice and Attorney General

November 20, 2024

Summary:

The Applicant submitted an access to information request to the Ministry of Justice and Attorney General (Justice). The request was for emails, memos and briefing notes sent to or received by the office of the Minister of Justice and the office of the Deputy Minister of Justice regarding the province's response to a Requirement to Pay from the Canada Revenue Agency. Justice gave written notice to the Applicant pursuant to subsections 7(2)(f) and 7(4) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Justice asserted that if records existed, it would rely on subsections 16(1), 22(a), (b) and (c) of FOIP to refuse the Applicant access. The Applicant requested a review by the A/Commissioner. The A/Commissioner found that if the records existed, they would be exempt pursuant to subsection 22(a) of FOIP. However, the A/Commissioner also found that Justice did not demonstrate that it properly invoked subsections 7(2)(f) and 7(4) of FOIP. He recommended that Justice issue a new section 7 response to the Applicant within 30 days of issuance of this Report.

I BACKGROUND

[1] On July 10, 2024, the Ministry of Justice and Attorney General (Justice) received the following access to information request from the Applicant:

Please provide a copy of all internal emails, memoes [sic] and briefing notes sent to or received by the office of the Minister of Justice and the office of the Deputy Minister of Justice regarding the province's response to a Requirement to Pay from the Canada Revenue Agency.

[2] The Applicant had specified the time period of the records sought to be June 20, 2024 to July 8, 2024.

[3] In a letter dated August 7, 2024 to the Applicant, Justice said:

On July 23, 2024, we contacted you by phone to narrow the scope of your request, and you amended it to include only memos and briefing notes.

On August 7, 2024, we informed you that fee estimates were no longer required, and we will proceed with your access to information request.

Under *The Freedom of Information and Protection of Privacy Act.*, [sic] the Ministry of Justice and Attorney General has a legislative timeline of 30 days to process access to information requests. The new due date for your request will be August 26, 2024.

[4] Then, in a letter dated August 22, 2024, Justice responded to the Applicant's access request:

This notice is provided pursuant to subsection 7(4) of *The Freedom of Information and Protection of Privacy Act* (FOIP) which states:

7(4) If an application is made with respect to a record that is exempt from access pursuant to section 15, 16, 21 or 22 or subsection 29(1), the head may refuse to confirm or deny that the record exists or ever did exist.

[5] On August 26, 2024, the Applicant requested a review by my office.

[6] On September 4, 2024, my office asked Justice if it would drop its reliance on subsection 7(4) of FOIP.

[7] On September 11, 2024, Justice indicated it continues to rely on subsection 7(4) of FOIP but it also cited subsections 16(1), 22(a), (b), and (c) of FOIP as the exemptions it would rely on to exempt access to records, if the records existed.

[8] On September 18, 2024, my office notified both Justice and the Applicant that my office would undertake a review.

[9] On October 21, 2024, Justice provided its submission to my office. The Applicant did not provide a submission.

II RECORDS AT ISSUE

[10] If records existed, Justice asserted that it would rely on subsections 16(1), 22(a), (b), and (c) of FOIP to exempt the Applicant's access to the records.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[11] Justice is a "government institution" as defined by subsection 2(1)(d)(i) of FOIP. Therefore, I find that I have jurisdiction to conduct this review.

2. Did Justice properly invoke subsection 7(4) of FOIP?

[12] Subsection 7(2) of FOIP provides:

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

...

(f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4);

[13] Subsection 7(4) of FOIP provides:

7(4) If an application is made with respect to a record that is exempt from access pursuant to section 15, 16, 21 or 22 or subsection 29(1), the head may refuse to confirm or deny that the record exists or ever did exist.

[14] By invoking subsection 7(4) of FOIP, Justice is denying the Applicant to the right to know whether a record (or records) exist. Subsection 7(4) of FOIP provides government institutions such as Justice to a significant discretionary power that should be exercised in only rare cases. This provision is meant to protect highly sensitive records where confirming or denying the mere existence of a record would in itself impose significant risk. For example, the risk of harm to witnesses as a result of revealing a law enforcement investigation is underway. Although section 15 of FOIP could protect records from being disclosed that fall in the category of law enforcement and investigations, subsection 7(4)

of FOIP enables government institutions such as Justice to address risks that could occur just by revealing records exist. It is not meant to protect a government institution from possible embarrassment or negative public scrutiny (*Guide to FOIP*, Chapter 3: “Access to Records”, Updated May 5, 2023 [*Guide to FOIP*, Ch. 3], pp. 59-60).

[15] In order for Justice to be able to show it properly invoked subsection 7(2)(f) and 7(4) of FOIP, it must be able to:

1. Demonstrate that records (if they existed) would qualify for the particular exemption provided for at subsection 7(4) of FOIP.
2. Explain how disclosing the existence of records (if they existed) could reasonably compromise what it is protecting.

(*Guide to FOIP*, Ch. 3, p. 60)

- 1. *Demonstrate that records (if they existed) would qualify for the particular exemption provided for at subsection 7(4) of FOIP.***

[16] Justice indicated that if records existed, it would rely on subsections 16(1), 22(a), (b), and (c) of FOIP to deny the Applicant access. I will consider if subsection 22(a) of FOIP would apply to the records, if they existed.

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

- (a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

[17] Part 9 of my office’s [*Rules of Procedure*](#) sets out the procedure to be followed in a review with my office when a head of a government institution claims solicitor-client privilege or litigation privilege. That is, the government institution may provide my office with a copy of the records at issue or an affidavit of records, schedule and redacted record over which solicitor-client or litigation privilege is claimed.

[18] Normally, when I review subsection 22(a) of FOIP, I discuss whether the government institution elected to provide my office with a copy of the records at issue or an affidavit of records, schedule and redacted record. In this case, though, Justice issued a response to

the Applicant pursuant to subsection 7(2)(f) and 7(4) of FOIP. Therefore, I will not provide detail as to how Justice complied with Part 9 of my office's *Rules of Procedure* in order to avoid confirming or denying whether records exist.

[19] In its submission, Justice asserted that the records would be subject to solicitor-client privilege, if the records existed. I will not quote anything from Justice's submission.

[20] My office uses the following three-part test to determine if records contain solicitor-client privileged information that would be exempt pursuant to subsection 22(a) of FOIP:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Did the parties intend for the communication to be treated confidentially?

(*Guide to FOIP*, Ch. 4, pp. 263-267)

[21] The *Guide to FOIP*, Ch. 4 at pages 260 to 266 provides the following definitions:

- "communication" is the process of bringing an idea to another's perception; the message or ideas so expressed or exchanged; the interchange of messages or ideas by speech, writing, gestures or conduct.
- "client" is a person who consults with a legal counsel and on whose behalf the legal counsel renders or agrees to render legal services; or, having consulted the legal counsel, reasonably concludes that the lawyer has agreed to render legal services on their behalf.
- "lawyer" is a member of the Law Society.
- "legal advice" is a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.

[22] I must be careful in summarizing Justice's arguments so that I do not reveal whether records exist or not.

- [23] Regarding the first part of the three-part test, Justice identified itself as the “client” and that solicitor would be Ministry Counsel as well as external counsel.
- [24] Regarding the second part of the three-part test, Justice indicated that records by counsel would contain legal advice and recommendations regarding a dispute that was before the Courts, if they existed.
- [25] Regarding the third part of the three-part test, Justice asserted that records (if they existed) would be kept confidential.
- [26] Based on Justice’s submission, I am satisfied that if records existed, they would be exempt pursuant to subsection 22(a) of FOIP. I do not need to consider the other exemptions cited by Justice.

2. Explain how disclosing the existence of records (if they existed) could reasonably compromise what it is protecting.

- [27] In its submission, Justice did not explain what it is protecting by refusing to confirm or deny the existence of records. Further, it did not explain how disclosing the existence of records (if they existed) could reasonably compromise what it is protecting.
- [28] I note that the Applicant’s access request was narrowed to memos and briefing notes sent to or received by the office of the Minister of Justice and the office of the Deputy Minister of Justice regarding the province’s response to a Requirement to Pay from the Canada Revenue Agency.
- [29] I note that the former Minister of Justice had released a video of her making a [public statement](#) regarding the matter indicating that the province has filed an injunction regarding the Canada Revenue Agency garnishing funds from the province.
- [30] Further, [the Federal Court’s website](#) confirmed that court file number T-1674-24 is regarding an application for judicial review filed by the Government of Saskatchewan. The

Federal Court's website also identifies the solicitor for the Government of Saskatchewan as Osler, Hoskin & Harcourt LLP.

[31] Based on what is publicly available, it would be difficult to believe that records do not exist. That is, it would be difficult to believe that the former Minister of Justice was not briefed by counsel prior to recording a public statement regarding the matter. Further, it would be difficult to believe the former Minister of Justice was not briefed by counsel when the province filed an application to the Federal Court.

[32] As such, I find that Justice has not demonstrated that it properly invoked subsections 7(2)(f) and 7(4) of FOIP. I recommend that Justice issue a new section 7 decision to the Applicant within 30 days of issuance of this Report.

IV FINDINGS

[33] I find that I have jurisdiction to conduct this review.

[34] I find that if records existed, they would be exempt pursuant to subsection 22(a) of FOIP.

[35] I find that Justice has not demonstrated that it properly invoked subsections 7(2)(f) and 7(4) of FOIP.

V RECOMMENDATION

[36] I recommend that Justice issue a new section 7 decision to the Applicant within 30 days of issuance of this Report.

Dated at Regina, in the Province of Saskatchewan, this 20th day of November, 2024.

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