



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 290-2023

Ministry of Justice and Attorney General

March 14, 2024

Summary:

The Applicant submitted an access to information request to the Ministry of Justice and Attorney General (Justice). Justice in its response withheld the record, in part, pursuant to subsection 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant requested a review of Justice's decision. Upon review, the Commissioner found that the information withheld was personal information pursuant to subsection 24(1)(b) of FOIP. However, the Commissioner recommended Justice exercise its discretion and consider subsections 29(2)(o)(i) of FOIP and 16(g)(ii) of *The Freedom of Information and Protection of Privacy Regulations*. The Commissioner also found that Justice did not engage in best practices by severing information using white space redaction and recommended that going forward, Justice use black-out or grey-out redaction when processing records. As well, the Commissioner found that Justice properly claimed that some information was not responsive to the request but recommended that it consider releasing the non-responsive emails to the Applicant, subject to any exemptions that may apply. The Commissioner recommended, additionally, that Justice revise its policy and procedures so that its section 7 decision letters indicate when records are being withheld as non-responsive and give reasons why.

I BACKGROUND

[1] On September 26, 2023, the Applicant submitted an access to information request to the Ministry of Justice and Attorney General (Justice) under *The Freedom of Information and Protection of Privacy Act* (FOIP) stating:

Please provide copies of all emails sent by [employee name withheld] to other employees of the Ministry of Justice since September 24, 2023-present.

[2] On October 3, 2023, following a telephone conversation to clarify details of the request, Justice sent an email to the Applicant requesting that they confirm the scope of the request.

[3] On October 16, 2023, the Applicant responded to Justice confirming the scope as:

Please provide copies of all emails sent by [employee name withheld] to other employees of the Ministry of Justice since September 24, 2023, regarding his changing role within the Ministry. September 24, 2023 – present (September 27, 2023).

[4] In correspondence on November 6, 2023, Justice in its section 7 decision denied access to the record, in part, pursuant to subsection 29(1) of FOIP.

[5] The same day, my office received a request for review from the Applicant regarding the exemption cited by Justice.

[6] On November 8, 2023, the Applicant in confirming the scope of the review with my office explained that they were disputing that the information in the redacted body of the email constituted personal information and wanted access to this.

[7] On December 6, 2023, my office sent notice of this review to the Applicant and to Justice. My office invited both parties to provide submissions. My office also requested from Justice a copy of the record, Index of Records and arguments for any portions of the record withheld as non-responsive.

[8] In correspondence on January 5, 2024, Justice provided my office with copies of the records at issue and an Index of Records.

[9] On February 12, 2024, Justice provided a submission to my office. The Applicant did not provide a submission to my office.

II RECORDS AT ISSUE

[10] Justice identified four responsive records, comprised of four pages of emails. Each page contained a separate email correspondence, and these were partially redacted pursuant to subsection 29(1) of FOIP.

[11] Justice also identified five other records, comprised of seven pages of emails as being non-responsive to the Applicant’s access request.

[12] The following table describes the four records and four pages at issue, as well as the five records and seven pages identified as being non-responsive to the access request.

Record No.	Page No.	Description	Date on Record	Status	FOIP Exemption Applied
1	1	Email	September 25, 2023	Denied in part	29(1)
2	2	Email	September 25, 2023	Denied in part	29(1)
3	3	Email	September 25, 2023	Denied in part	29(1)
4	4	Email	September 25, 2023	Denied in part	29(1)
5	5 to 6	Email	September 25, 2023	Withheld in full	Non-responsive
6	7	Email	September 25, 2023	Withheld in full	Non-responsive
7	8 to 9	Email	September 25, 2023	Withheld in full	Non-responsive
8	10	Email	September 25, 2023	Withheld in full	Non-responsive
9	11	Email	September 25, 2023	Withheld in full	Non-responsive

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[13] Justice is a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I find I have jurisdiction to undertake this review.

2. Did Justice properly apply subsection 29(1) of FOIP?

[14] Justice severed information from each page of the four emails claiming that the severed information was exempt pursuant to subsection 29(1) of FOIP. My office’s *Guide to FOIP*, Chapter 6, “Protection of Privacy” (*Guide to FOIP*, Ch. 6) at page 186, explains that section 29 of FOIP prohibits the disclosure of personal information unless the individual about whom the information pertains consents to its disclosure or if disclosure without consent is authorized by one of the enumerated subsections of 29(2) or section 30 of FOIP.

[15] The *Guide to FOIP*, Ch. 6 at page 187, provides that section 29 of FOIP only applies to “personal information” as defined by section 24 of FOIP.

[16] Subsection 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.

[17] Subsection 24(1) of FOIP defines “personal information” and provides some examples of the types of information that can be considered “personal information”. The following subsection is relevant in this review:

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:

...

(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved

[18] As per the *Guide to FOIP*, Ch. 6 at page 32, the list of examples provided for at subsection 24(1) of FOIP is not meant to be exhaustive. This means there can be other types of information that could qualify as personal information.

[19] Also, page 32 of the *Guide to FOIP*, Ch. 6, states that to constitute personal information, the information must be about an identifiable individual; and the information must be personal in nature.

[20] I now turn to consider if the information severed from the four pages under review qualifies as personal information and if it is exempt pursuant to subsection 29(1) of FOIP.

[21] The *Guide to FOIP*, Ch. 6 at page 43, defines *employment history* as the type of information normally found in a personnel file such as performance reviews, evaluations, disciplinary actions taken, reasons for leaving a job, information in a résumé or leave transactions.

[22] Justice withheld the body of emails dated September 25, 2023, from pages 1 to 4. The emails announced that an employee was stepping down from their position within Justice, their considerations in arriving at the decision and some next steps concerning their career. This is information that would normally appear in a personnel file such as reasons for leaving their job.

[23] In my office's [Review Report 017-2023](#), I found that:

SHA withheld the body of a letter dated November 24, 2021... While I cannot reveal the contents of the letter, it contains information that would normally appear in a personnel file such as information surrounding the termination of an employment contract. This is consistent with findings made by my office in previous reports such as [Review Report LA-2007-001](#) and [Review Report 097-2017](#). Therefore, I find that the withheld information qualifies as personal information pursuant to subsection 23(1)(b) of LA FOIP...

[24] The same as the above applies in this case. I find that the information withheld by Justice qualifies as personal information pursuant to subsection 24(1)(b) of FOIP.

[25] Despite this conclusion, the analysis does not end there. FOIP provides a government institution the ability to exercise its discretion to disclose personal information under specific circumstances. Two provisions which may be relevant in this case are subsections 29(2)(o)(i) and 29(2)(u) of FOIP together with subsection 16(g)(ii) of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations).

[26] Subsections 29(2)(o)(i) and (u) of FOIP state:

29(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:

...

(o) for any purpose where, in the opinion of the head:

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or

...

(u) as prescribed in the regulations.

[27] According to page 241 of my office's *Guide to FOIP*, Ch. 6, subsection 29(2)(o)(i) of FOIP provides that a government institution can disclose personal information about an individual without consent for any purpose where the public interest in disclosure clearly outweighs any invasion of privacy that could result from disclosure.

[28] Again, as set out on page 241 of the *Guide to FOIP*, Ch. 6, the following test can be applied to assist with determining whether to rely on this provision:

1. Is the information "personal information" as defined by FOIP?
2. Is there a public interest in the personal information?
3. Does the public interest clearly outweigh any invasion of privacy?

[29] On page 242 of the *Guide to FOIP*, Ch. 6, the criteria for assessing whether there is a public interest in information are as follows:

1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it?
2. Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public?
3. If the records are about the process or functioning of the government institution, will they contribute to open, transparent and accountable government?

[30] Page 243 of the *Guide to FOIP*, Ch. 6, provides that when considering the public interest, the government institution should create a list of factors in favour of withholding and public interest factors for releasing. This will help when it comes to assessing the relative weight of the factors and whether disclosing is in the public interest.

[31] Page 243 of the *Guide to FOIP*, Ch. 6 further clarifies that, to be in the public interest, the personal information must relate to a matter of compelling public interest, and not just be of interest or of curiosity to the public, a group of people or individuals.

[32] Regarding part 3 of the test, it is provided on page 244 of the *Guide to FOIP*, Ch. 6, that where a public interest has been established, the government institution must then weigh the public interest against the personal privacy interests of the individual whose personal information may be disclosed pursuant to subsection 29(2)(o)(i) of FOIP. To rely on the provision, the public interest must clearly outweigh any invasion of privacy.

[33] Based on the submissions received from Justice, I find that Justice did not appear to consider subsection 29(2)(o)(i) of FOIP.

[34] The other provision enabling a government institution to disclose personal information relevant in this instance is subsection 16(g)(ii) of the FOIP Regulations. Subsection 16(g)(ii) is enabled by subsection 29(2)(u) of FOIP.

[35] Subsection 16(g)(ii) of the FOIP Regulations also creates an exception to the mandatory exemption in subsection 29(1) of FOIP. It gives discretion to disclose personal information in some circumstances. It states that:

16 For the purposes of clause 29(2)(u) of the Act, personal information may be disclosed:

...

(g) to any person where the information pertains to:

...

(ii) the terms or circumstances under which a person ceased to be an employee of a government institution including the terms of any settlement or award resulting from the termination of employment;

[36] The term “employee of a government institution” is defined in subsection 2(1)(b.1) of FOIP which states:

2(1) In this Act:

...

(b.1) “**employee of a government institution**” means an individual employed by a government institution and includes an individual retained under a contract to perform services for the government institution;

[37] I first considered subsection 16(g)(ii) of the FOIP Regulations in [Review Report 173-2018](#). I derived my analysis in that Review Report from [Investigation Report 296-2017](#), where I first considered the equivalent provision in *The Local Authority Freedom of Information and Protection of Privacy Regulations* (LA FOIP Regulations).

[38] In [Review Report 173-2018](#), I stated:

[27] ...I have not considered this provision before. However, I first considered the equivalent provision in *The Local Authority Freedom of Information and Protection of Privacy Regulations* (LA FOIP Regulations) in [Investigation Report 296-2017](#). In that report, I established ... that for subsection 10(g)(ii) of the LA FOIP Regulations to apply, two criteria must be met. I adopt and adjust these criteria for subsection 16(g)(ii) of the FOIP Regulations. The personal information must either be:

i) Terms under which a person ceased to be an employee of a government institution; or

ii) Circumstances under which a person ceased to be an employee of a government institution.

[39] In [Investigation Report 296-2017](#), relying on definitions in *Black's Law Dictionary, Tenth Edition*, and *The Concise Oxford English Dictionary*, I stated:

[19] My office's view is that in the context of subsection 10(g)(ii) of the Regulations, "terms" means any contractual obligation of the local authority or the individual related to a termination of employment...

[20] "Circumstances under which a person ceased to be an employee of a local authority" means something different. *The Concise Oxford English Dictionary* defines "circumstance" as "a fact or condition connected with or relevant to an event or action" ...

[21] It is also important to note that this is a discretionary clause. In other words, even if the personal information in question meets the criteria set out in subsection 10(g)(ii) of the Regulations, the local authority is not obligated to disclose it.

[40] The individual to whom the information on the redacted pages relates was an "employee" of Justice as that term is defined in subsection 2(1)(b.1) of FOIP. As indicated in paragraph [22] above, the withheld information describes the reasons the employee stepped down from their position and some next steps concerning their career. This falls within the circumstances under which they ceased to be an employee. As the criteria for the application of subsection 16(g)(ii) of the FOIP Regulations have been met, I find that Justice has discretion to disclose the information.

[41] Again, I note that in its submission to my office, Justice did not appear to consider subsection 16(g)(ii) of the FOIP Regulations.

[42] Page 11 of my office's *Guide to FOIP*, Chapter 4, "Exemptions from the Right of Access" (*Guide to FOIP*, Ch. 4), provides that a discretion conferred by statute must be exercised consistently with the purposes underlying its grant. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.

- [43] I recommend that, within 30 days of issuance of this Report, Justice consider the exercise of its discretion under subsection 29(2)(o) of FOIP and subsection 16(g)(ii) of the FOIP Regulations to determine if it can release additional information from the documents to the Applicant.
- [44] I also note that the redacted copy of the records provided to my office by Justice show that Justice used “white space redaction” to sever the information.
- [45] My office’s *Guide to FOIP*, Chapter 3, “Access to Records” (*Guide to FOIP*, Ch. 3) at page 69, emphasizes that my office discourages the use of white space redacting. White space redacting is where software removes the content of a record in such a way that it renders the redacted content indistinguishable from the blank background of the document. This type of redacting creates uncertainty as to what, if anything, has been redacted. White space redaction lacks specificity because when reviewing the responsive pages, an applicant cannot tell if the white space accounts for a missing line, paragraph, table, image etc. or if the page was naturally left blank.
- [46] It is also highlighted at page 69 of the *Guide to FOIP*, Ch. 3, that government institutions have a duty to assist applicants by responding openly, accurately, and completely. Invisible white space redactions fall short of this mandatory duty. Applicants should be able to evaluate the amount of missing information. The preference is black-out or grey-out redacting which allows sufficient visual context to indicate the length and general nature of the information (e.g., chart, column, list, sentence, or paragraph).
- [47] In my office’s [Review Report 288-2023](#), I found that:
- [51] In the future, to promote openness, transparency and accountability, Health should consider using black-out or grey-out redacting when processing records. For assistance with severing, Health can review my office’s blog issued June 21, 2017, titled, [Severing](#).
- [48] I take the same approach here. I find that Justice did not engage in best practices by severing information using white space redaction. I recommend that going forward Justice use

black-out or grey-out redaction when processing records, so an applicant is fully aware what information has been severed from the record.

3. Did Justice properly withhold information as non-responsive to the Applicant's request?

[49] Justice claimed that five other records were non-responsive to the request. In its submission Justice asserted:

Information on records 5, 6, 7, 8 and 9 are outside the scope of the access request. The Applicant specifically requested records that were "sent by [employee name withheld] to other employees of the Ministry of Justice...". Records 5 through 9 were not sent to employees of the Ministry of Justice and therefore are clearly separate and distinct from the access request. It is submitted that this information is non-responsive to the access request and therefore exempt from disclosure on that basis.

[50] As per my office's *Guide to FOIP*, Ch. 6 at page 26, when a government institution receives an access to information request, it must determine what information is responsive to the request. "Responsive" means relevant. The term describes anything that is reasonably related to the request. It follows that any information or records that do not reasonably relate to an applicant's request will be considered "not responsive".

[51] The *Guide to FOIP*, Ch. 6 at pages 26 and 27, in listing the factors that should be considered when determining what information is responsive provides that, the request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive. Also importantly, the government institution may treat portions of a record as not responsive if they are clearly separate and distinct and entirely unrelated to the access request. However, use it sparingly and only where necessary.

[52] In Review Reports [061-2017](#) and [023-2017 & 078-2017](#), my office considered the Ministry of Economy (Economy) and the Saskatchewan Power Corporation's (SaskPower) claimed that records or information were not responsive to the applicant's access to information requests. In both reviews, my office found that Economy and SaskPower did not indicate

in its section 7 response to the applicants that it was severing or withholding information deemed non-responsive. My office recommended that Economy and SaskPower revise policy and procedures so that its section 7 decision letters indicate when records are being withheld as non-responsive or information is being severed from a record as non-responsive and give reasons why.

[53] The Applicant's clarified request was clear in that they sought access to copies of emails sent by the employee to "other employees" of Justice. Based on a review of the records, the portions of the records that Justice identified as non-responsive were emails sent by the employee to persons outside Justice.

[54] Therefore, I find that Justice properly claimed that the information described in paragraph [49] above is not responsive to the request. However, consistent with my blog, "[What About the Non-Responsive Record?](#)", I recommend that Justice consider releasing the non-responsive emails, subject to any exemptions that may apply.

[55] I also recommend that Justice revise its policy and procedures so that its section 7 decision letters indicate when records are being withheld as non-responsive and give reasons why.

IV FINDINGS

[56] I find I have jurisdiction to undertake this review.

[57] I find that the information withheld by Justice qualifies as personal information pursuant to subsection 24(1)(b) of FOIP.

[58] I find that Justice did not appear to consider the possible application of subsections 29(2)(o)(i) of FOIP and 16(g)(ii) of the FOIP Regulations.

[59] I find that Justice did not engage in best practices by severing information using white space redaction.

[60] I find that Justice properly identified information as being non-responsive to the Applicant's request.

V RECOMMENDATIONS

[61] I recommend that, within 30 days of issuance of this Report, Justice exercise its discretion under subsections 29(2)(o)(i) of FOIP and 16(g)(ii) of the FOIP Regulations and consider releasing additional information from the emails to the Applicant.

[62] I recommend that going forward Justice use black-out or grey-out redaction when processing records.

[63] I recommend that Justice consider releasing to the Applicant the non-responsive emails, subject to any exemptions that may apply.

[64] I recommend that Justice revise its policy and procedures so that its section 7 decision letters indicate when records are being withheld as non-responsive and give reasons why.

Dated at Regina, in the Province of Saskatchewan, this 14th day of March, 2024.

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