



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **REVIEW REPORT 329-2023**

### **Financial and Consumer Affairs Authority of Saskatchewan**

**February 22, 2024**

**Summary:**

The Applicant submitted an access to information request to the Financial and Consumer Affairs Authority of Saskatchewan (FCAA) for hard copies of policies and protocols with respect to contacting a complainant during an investigation. The FCAA indicated no records exist. The Applicant appealed to the Commissioner. The Commissioner found that FCAA had not demonstrated it conducted a reasonable search for records. He recommended that FCAA conduct a reasonable search for responsive records within 30 days of issuance of this Report.

### **I BACKGROUND**

[1] The Applicant had requested updates from the Consumer Protection Division (CPD) of the Financial and Consumer Affairs Authority of Saskatchewan (FCAA) regarding an investigation into a complaint they had made. According to the Applicant, an FCAA employee said that the Applicant was not entitled to meaningful updates regarding the investigation in accordance with the CPD's "protocols and policies."

[2] Then, on October 12, 2023, the Applicant submitted a three-part access to information request to the FCAA. The first part of the access request is what is at issue in this Report. It read as follows:

Hard copies of policies and protocols in the Consumer Protection Division with respect to contacting complainants during an investigation of (a) general commercial issues (b) cemetery issues b1) commercial b2) non commercial issues.

- [3] In a letter dated November 6, 2023, FCAA responded to the Applicant's access request. Regarding the first part of the access request, FCAA responded as follows:

Thank you for your access to information request dated October 12, 2023. The access request consists of a series of questions, and these have all been responded to in Appendix A hereto. ...

....

Appendix A

- 1) Hard Copies of policies and protocols in the Consumer Protection Division with regards [sic] to contacting complainants during an investigation of:
  - a. Commercial issues;
  - b. Cemetery issues (commercial and non-commercial? [sic])

Please be advised that the record(s) you wish to access to do not exist in the Financial and Consumer Affairs Authority of Saskatchewan. For your information, this notification has been provided pursuant to clause 7(2)(e) of *The Freedom of Information and Protection of Privacy Act*.

- [4] On December 8, 2023, my office received a letter from the Applicant. Enclosed with the letter, was another letter (dated November 29, 2023) that the Applicant received from the FCAA. In that letter, FCAA said:

One of your main concerns is that you believe FCAA employees, particularly [Name] have been deliberately dishonest with you. I have spoken with my staff and am satisfied staff have not engaged in falsehoods. You cite my response to your access to information request in which we informed you that we do not have hard copies of policies or protocols in our Consumer Protection Division (CPD) with respect to contacting complainants during an investigation. **You suggest this proves that Mr. [REDACTED] was untruthful when he told you it is our practice to not disclose information about our investigations, including to the complainants. Mr. [REDACTED]'s statement to you was not untruthful, we do have a protocol or practice in this regard that has not been reduced to writing, and as such, there are no hard copies of these protocols or practices in existence.**

[Emphasis added]

- [5] The Applicant wrote to my office (in their letter dated December 8, 2023) describing their disbelief at FCAA's statement:

That is truly a remarkable amorphous statement bordering on incredulity. Somehow the CPD is practising a policy or protocol that is not written and is yet is [sic] being applied uniformly to me and to others.

- [6] The Applicant requested a review by my office of FCAA's response that no records exist.
- [7] My office made efforts to resolve the matter informally. In a letter dated January 4, 2024, FCAA explained why conducting a search for records "was viewed to be unnecessary". It said:

CPD is one of the divisions within the FCAA. When the Applicant requested the records in question, our determination that the records do not exist at the FCAA was not solely based on my individual knowledge. There were internal discussions that took place with and within CPD Staff. While I did not personally conduct a search, I made inquiries, including written inquiries, to verify whether there were any such policies or protocols (including whether informal policy/protocol on the subject was captured in emails) in CPD. I was informed that there were no such written policies or protocols. The Executive Director of CPD, who has been with the organization for over a decade, advised me that no such written policy or protocol exists, and I have no reason to doubt the veracity of his statement.

...

CPD conducts hundreds of investigations every year. If there was any such written policy/protocol, CPD staff would very much be aware of it – particularly the Executive Director and Director of Enforcement, who are responsible for ensuring CPD staff comply with all applicable policies and protocols. Nobody in CPD is aware of the existence of any written policy/protocol respecting contacting complainants during the aforementioned types of investigations. **As such, conducting any search in the circumstances was viewed to be unnecessary.**

[Emphasis added]

- [8] On January 8, 2024, my office contacted the Applicant to see if they were satisfied with FCAA's reason for not conducting a search for records. The Applicant indicated they were not.
- [9] On January 9, 2024, my office notified FCAA and the Applicant that my office would be undertaking a review of FCAA's efforts to search for records responsive to the Applicant's access request.

## II RECORDS AT ISSUE

- [10] At issue is FCAA's efforts to search for records responsive to the Applicant's access request. Therefore, there are no records at issue in this review.

## III DISCUSSION OF THE ISSUES

### 1. Do I have jurisdiction?

- [11] FCAA qualifies as a "government institution" pursuant to subsection 2(1)(d)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP) and subsection 3(a) and Part I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Therefore, I find that I have jurisdiction to conduct this review.

### 2. Did FCAA conduct a reasonable search for records?

- [12] My office reviews a government institution's efforts to search for records when it responds to an Applicant's access request by indicating that records do not exist. The focus of a search review by my office is whether the government institution conducted a reasonable search. As noted above, 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*, Chapter 3, "Access to Records", updated May 5, 2023 [*Guide to FOIP*, Ch. 3] at pp. 13-14).

- [13] When a government institution receives a notice of a review from my office requesting details of its search efforts, some or all of the following can be included in the government institutions' submission (not exhaustive):

- 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 *Using Affidavits in a Review with the IPC*.

(*Guide to FOIP*, Ch 3, pp. 14-15)

[14] In its submission, FCAA indicated it inquired with the following individuals to determine whether records exist:

- The CEO of the FCAA,
- The Executive Director of CPD, and
- The Director of Enforcement of CPD.

[15] FCAA explained that the above three individuals were unaware of the existence of the policies and protocols requested by the Applicant. The CEO had sent an email to the Executive Director of CPD as well as the Director of Enforcement of CPD. The Executive Director indicated that they were “not aware of any email communications that address this.” The Director indicated “There are no such emails in CPD. At least not circulated to the investigators during my time here.”

[16] FCAA also indicated it inquired with CPD staff who are knowledgeable of both documented policies and undocumented practices and protocols within CPD. FCAA indicated that none of the CPD staff are aware of the policies and protocols requested by the Applicant.

[17] Employees being unaware of records existing does not constitute a search for records. The Office of the Information and Privacy Commissioner of Alberta (AB IPC) said in [Order 99-021](#) that a public body should not rely on anyone’s memory as to whether records were created:

[para 33.] In my view, there would have to be very unusual circumstances for it to be reasonable for a public body to rely on an individual’s opinion that no records were created, when deciding not to search.

[para 34.] Moreover, I do not think that a public body should rely on anyone’s memory as to whether records were created. A public body cannot know in advance of doing a

search whether an individual will be right about whether records were created. All an individual can say, with any reasonable certainty, is whether he or she personally created any records. Otherwise, the individual is merely expressing an opinion as to the likelihood of whether anyone else created records, but the individual cannot speak for others.

[para 35.] A public body cannot absolve itself of its duty to search based on an individual's opinion about whether records were created. If a public body could forego its duty to search based on such an opinion, the Act would be frustrated.

[18] In its submission, FCAA cited paragraph [59] of my office's [Review Report 248-2020, 167-2021](#) on the Ministry of Labour Relations and Workplace Safety (LRWS). FCAA argued that the efforts undertaken by LRWS are "exceptionally similar" to the steps taken by FCAA in this case. FCAA said:

34. The Commissioner summarized the LRWS' submission of its search efforts as follows:

[59] LRWS indicated that it was the Director of Risk Assessment and Planning that conducted the search for responsive records. **LRWS asserted that the Director contacted the manager and supervisor (respectively) of the two officers who conducted the inspection to ensure all inspection records were in the folder. The manager and supervisor confirmed that all inspection records were in the folder. Further, the manager advised the Director that no body camera footage was recorded on September 22, 2020.** Therefore, that particular record does not exist.

35. Based on the inquiries made within LRWS, the review of the LRWS' Body Worn Camera Technology Procedure Manual, and the review of the handwritten notes made by the Officer who conducted the inspection, the Commissioner was satisfied that LRWS had conducted a reasonable search for records (para 64).

36. We submit that LRWS' search efforts (which were found to be reasonable by the Commissioner), are exceptionally similar to the steps taken by the FCAA to search for the Assumed Written Policies. Reasonable inquiries were made of the Executive Director of CPD, the Director of Enforcement of CPD, and CPD Staff, who would have knowledge of the existence of the Assumed Written Policies. The finding was that no such records exist.

[Emphasis added]

[19] The difference between the search efforts by LRWS from FCAA's search efforts in this case is that LRWS checked the folder to determine if there were responsive records.

Similarly, LRWS checked to see if there were any camera footage recorded on September 22, 2020. FCAA has done nothing more than ask employees if they are aware if any records exist.

[20] Further in its submission, FCAA cited paragraphs [16] to [19] of my office's [Review Report 111-2022](#), involving the Saskatoon Police Service (SPS). FCAA said that I found SPS's search was reasonable "in large part due to the context and circumstances". FCAA said:

38. The Commissioner, summarized the SPS' explanation of why the records did not exist, and these paragraphs are included below for ease of reference:

[16] ... SPS' asserted that the ASU is a specialized team within SPS that operates a twelve-hour shift according to a "predetermined duty calendar." The ASU is used primarily to respond to dispatched calls for service and patrol areas for suspicious activity, but it does not attend all calls for service and is not in the air for the entire shift. During the shift, it is required to land for fueling and other reasons.

[17] SPS asserted that its Access and Privacy Unit staff examined the ASU team calendar and determined that the ASU was not operating at the time of the incident and therefore, no video footage would exist. SPS explained that on the day in question, the ASU had completed its twelve-hour shift prior to the occurrence, and it did not return to duty until the following day at 6 am.

[18] SPS also asserted that there were no notes or information in the Occurrence Report (Record 1) that would indicate that the ASU was operating at the time.

[19] I find that SPS' search for records was conducted by staff with knowledge of the record holdings and the subject matter of the request. I am also satisfied that SPS provided a reasonable explanation as to why the ASU video footage did not exist. For all these reasons, I find that SPS conducted a reasonable search for responsive records. I recommend that it take no further action.

[Emphasis in underline added by FCAA]

39. The Commissioner found that a reasonable search occurred, and implied that the search was reasonable in large part due to the context and circumstances, which provided a reasonable explanation as to why the requested records would not exist. Further, the Commissioner noted that the search was conducted by persons with knowledge of the subject matter of the request.



[21] The difference between SPS's search efforts from FCAA's search efforts is that SPS examined the Air Support Unit's (ASU) team calendar to determine if the ASU was operating at the time of the incident in question. Since the team calendar indicated the ASU was not in operation at the time, then it was reasonable to conclude no records existed. Again, FCAA has done nothing more than ask its employees if they are aware if any records exist.

[22] Finally, FCAA cited paragraphs [16] to [17] of my office's [Review Report 265-2023](#), involving the Ministry of Immigration and Career Training (Immigration). FCAA asserted that I had given a significant amount of weight to a reasonable explanation as to why no records exist. FCAA said:

42. The Commissioner's comments regarding search efforts and the reasonable explanation for why records did not exist are included below:

[16] In other review reports... in addition to a description of search efforts, I have also considered if public bodies have provided reasonable explanations for why records would not exist. At the same time, I am mindful that public bodies do not need to prove beyond a reasonable doubt that records do not exist.

[17] In this matter, I consider the Deputy Minister's statement to be a statement of fact, and that they are in an acceptable position of authority to provide such a statement to my office. This includes their assertion that no records were generated, such as discussion papers or briefing notes, because the "pilot project" was undertaken within existing policy and did not require approval. I am also mindful that it does not appear, as the Deputy Minister states, that there was an announcement or communication on the so-called "pilot project"; rather, it appears the media picked up on something it believed was newsworthy and reported on it.

[Emphasis in underline added by FCAA]

43. The Commissioner's comments in Review Report 265-2023 make it clear that a significant amount of weight can be given to a reasonable explanation that is given as to why no records exist. This is particularly so when the explanation is given by an individual who has an "acceptable position of authority" within the government organization. It is our position that [Name] occupies an acceptable position of authority such that his statement in the OIPC Response Letter that the Assumed Written Policies do not exist should be taken as a statement of fact, especially in light of the inquiries that [Name] made of the Executive Director of CPD, the Director of Enforcement of CPD, and CPD Staff all of whom would have had knowledge of the existence or otherwise of the Assumed Written Policies.

[23] The difference between Immigration's search efforts from FCAA's search efforts is that Immigration did indeed conduct a search for records. At paragraph 15 of my office's Review Report 265-2023, I noted that Immigration conducted a search of its records holdings using a key term from the Applicant's access request. Another thing to note about Review Report 265-2023 is that the Applicant requested records related to Immigration developing a new policy. Immigration's Deputy Minister explained that the program occurred within existing policy, so no records were generated on that basis. FCAA has not provided any similar explanation. In fact, the basis for the Applicant's access request was that a FCAA employee had told them that FCAA does not provide updates based on FCAA's policy.

[24] In my office's [Review Report 107-2019](#), I discussed an access request submitted to the Water Security Agency (WSA) for "rules, regulations, procedural guidelines for determining and divesting excess lands." Although WSA's General Counsel had reason for believing no records existed, WSA still undertook a reasonable search for responsive records. At paragraphs 12 and 13 of that report, I said:

[12] In its submission to my office on April 18, 2019, WSA indicated that it consulted with WSA's General Counsel about records. The General Counsel has been working for WSA since 2009 and has been responsible for land administration for the entire 10 years. The General Counsel indicated that there has never been written material addressing "determining excess land and procedures to divest of same". WSA indicated that the reason is that WSA only holds lands for water management purposes. However, there was one instance in 10 years where WSA held potentially excess lands. Further, WSA only reviews the lands it holds in the event of a Treaty Land Entitlement request.

[13] On July 24, 2019, my office asked further questions about WSA's search for records. WSA provided the following details about its search:

- WSA rules, regulations, and procedural guidelines are located on the corporate Intranet under the heading 'Policies'. This directory was searched on March 20, 2019.
- WSA staff searched the Lands database, Legal database, and hardcopy files located in the Legal, Lands and Aboriginal Affairs work unit on March 20, 2019.

- Between the dates of March 13 and 26, 2019, the following WSA work units were asked to search for responsive records in physical and/or electronic format:
  - Regulatory Affairs;
  - Licensing & Water Use;
  - Special Projects;
  - Planning & Business Improvement; and
  - Environmental & Municipal Management Services.
- On March 20 and 21, 2019, WSA's General Counsel reviewed all WSA's Lands-related policies and confirmed that none dealt with the disposal of WSA land.
- WSA's General Counsel also consulted with WSA's President and CEO (who formerly held the position of WSA General Counsel) about the existence of a WSA land disposal policy.

[14] WSA indicated that no responsive records were identified during this search process, and there was no indication that any land disposal policy was ever approved by WSA management.

[15] WSA has provided me with details of its search. It has also provided reasons why responsive records do not exist. I am satisfied that WSA has performed a reasonable search for records.

[25] As I said at the beginning of this Report, when a government institution responds to an access to information request by indicating records do not exist, my office reviews a government institution's efforts to search for records. This is consistent with the approach by other Information and Privacy Commissioner's across Canada. For example, the Office of the Information and Privacy Commissioner of Ontario (ON IPC) said in [Order P-830](#):

Where the requester provides sufficient details about the records which he is seeking and the Ministry indicates that such records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

[26] Further, the Office of the Information and Privacy Commissioner of British Columbia (BC IPC) said in [Order 00-32](#) that the duty to assist in British Columbia's *Freedom of*

*Information and Protection of Privacy Act* (BC FIPPA) requires that a public body's search for records must be thorough and comprehensive in order to discharge its duty to assist pursuant to subsection 6(1) of BC FIPPA:

The only issue to be considered in this inquiry is whether the Ministry has performed its duty, under s. 6(1) of the Act, to make every reasonable effort to assist the applicant and to respond to the applicant without delay openly, accurately and completely. The Ministry accepts that it has the burden of proving that it has discharged its s. 6(1) duty.

...

Given my findings in this case, it is worth repeating what I have said before – for example, in Order 00-15, Order 00-26 and Order 00-30 – about the standards imposed by s. 6(1) on a public body's search for records. Although the Act does not impose a standard of perfection, a public body's efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. In an inquiry such as this, the public body's evidence should candidly describe all the potential sources of records, identify those it searched and identify any sources that it did not check (with reasons for not doing so). It should also indicate how the searches were done and how much time its staff spent searching for the records. The question here is whether the Ministry has discharged its s. 6(1) search obligations in light of this.

[27] Subsection 5.1(1) of FOIP is similar to subsection 6(1) of BC FIPPA. Subsection 5.1(1) of FOIP says:

**5.1(1)** Subject to this Act and the regulations, a government institution shall respond to a written request for access openly, accurately and completely.

[28] Therefore, similar to the BC IPC, a reasonable search must be conducted even if employees of FCAA are unaware if records exist.

[29] Further, I note subsection 65(1) of FOIP provides that government institutions must take reasonable steps to make all manuals policies, guidelines or procedures available to its website or provide such documents when requested in electronic or paper form. It says:

**65(1)** Every government institution shall take reasonable steps to:

(a) make available on its website all manuals, policies, guidelines or procedures that are used in decision-making processes that affect the public by employees of the government institution in administering or carrying out programs or activities of the government institution; or

(b) provide those documents when requested in electronic or paper form.

[30] Given that subsection 65(1) of FOIP requires that government institutions be prepared to make available or provide copies of policies, then FCAA should be well-prepared to conduct a search through its policies similar to what WSA had done as described in Review Report 107-2019.

[31] I should emphasize that I am not saying that the requested policy exists nor am I saying that the requested policy should exist. My focus is on whether FCAA has demonstrated whether or not it conducted a reasonable search for records to conclude that the requested policy does not exist. Stating that employees are not aware of the policy requested by the Applicant is not proof that the FCAA has done so. I find that FCAA has not demonstrated it conducted a reasonable search for records.

[32] I recommend that FCAA conduct a reasonable search for responsive records within 30 days of issuance of this Report. It should provide both my office and the Applicant details of its search for records. FCAA can use paragraphs [12] and [13] of my office's Review Report 107-2019 as guidance as to what a reasonable search for records would look like. It can also refer to Chapter 3 of my office's *Guide to FOIP* for guidance, to which my office referred FCAA in its email dated January 9, 2024.

#### **IV FINDINGS**

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

[34] I find that FCAA has not demonstrated it conducted a reasonable search for records.

#### **V RECOMMENDATION**

[35] I recommend that FCAA conduct a reasonable search for responsive records within 30 days of issuance of this Report. It should provide both my office and the Applicant details of its search for records.

Dated at Regina, in the Province of Saskatchewan, this 22nd day of February, 2024.

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