Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 008-2024

Saskatchewan Health Authority

June 25, 2024

Summary: The Applicant submitted an access to information request to the Saskatchewan Health Authority (SHA). SHA responded advising that some of the requested records do not exist citing subsection 7(2)(e) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Applicant requested a review of the SHA's search efforts. The Commissioner found that the SHA conducted a reasonable search; however, he recommended the SHA conduct a search for procedures relating to the handling of nasal swabs. The Commissioner recommended that, within 30 days of the issuance of this Report, subject to any exemptions, the SHA release a work standard and draft procedure that it had not identified as responsive to the Applicant's request, and procedures for the handling of nasal swabs, if they exist.

I BACKGROUND

[1] On August 28, 2023, the Saskatchewan Health Authority (SHA) received the Applicant's access to information request for the time period March 1, 2021 to August 28, 2023, as follows:

> 1. With respect to [name of Applicant] and COVID nasal swab, provide the Chain of Custody documents from time of collection on March 15, 2021 through the periods of assorted testing (PCR testing, Molecular Diagnostic testing, SARS-COVID-2 NAAT N501Y testing, SARS-COVID-2 VOC Sequencing testing, DNA testing; and any or all SHA testing, including third-party testing) – until said nasal swab was destroyed.
>
> 2. Provide all polices [sic] associated with SAR-COVID-2 and or the associated variants with respect to nasal swab testing chain of custody.

[2] On November 2, 2023, the SHA responded to the Applicant's access to information request as follows:

> Your request is two parts:
>
> 1. The first part of your request is a request for your personal health information under *The Health Information Protection Act* (HIPA) and
>
> 2. The second part of your request is a request for records under *The Local Authority Freedom of Information Protection Act* [sic] (LAFOIP).
>
> I have contacted the SHA laboratory and below are the responses.
>
> HIPA request:
>
> Regarding the SHA Laboratory Audit Trail Report shows the date the specimen went into storage March 17, 2021 after it was tested (all of the test dates are on the reports) and it was discarded February 2, 2022. We have enclosed copies of your laboratory test results, which you can also be [sic] viewed in your MySaskHealthRecord.
>
> LAFOIP request:
>
> We do not have a written documentation that outlines the chain of custody with respect to nasal swabs. The record you are requesting does not exist and this notification has been provided pursuant to clause 7(2)(e) of the LAFOIP.

[3] On January 7, 2024, the Applicant submitted a request for review to my office.

[4] On January 29, 2024, my office asked if the SHA would consent to sharing details of its search efforts with the Applicant. On February 5, 2024, the SHA provided my office with a letter and search record and consented to my office sharing the search record with the Applicant.

[5] On February 6, 2024, my office shared the SHA's search record with the Applicant and requested that the Applicant advise if they were satisfied with the SHA's assertion that records do not exist.

[6] On February 12, 2024, The Applicant responded, stating as follows:

> It has come to my attention that the SHA kept records of samples that were froze/storage; In essence those are a form of chain of custody documents.
>
> The health records the SHA provided me that pertained to my DNA/nasal swab does not provide those records proving storage. It reads:
>
> > This Audit trail – specimen went into storage March 17, 2021 after it was tested (all of the test dates are on the reports) and it was discarded February 2, 2022.
>
> I seek those storage records. And, I would like proof it was destroyed. My trust for the protection of my personal health records, including my DNA, is very limited when applied to the SHA. The SHA has lied to the public too long, they must be held accountable.

[7] On February 28, 2024, my office emailed the Applicant to clarify the scope of the review. On February 29, 2024, the Applicant responded stating:

> …I have reason to believe the SHA is lying when they claim records do not exist. I believe my personal records are relevant to my argument. They admit my DNA went into storage. In a previous FOIP, the SHA provided me 9 binders of information. Within one of those binders, they state they freeze DNA. Storage is a form of custody—held by the SHA. Chain of custody refers to not only the employee who handles the DNA but ALSO, the SHA having possession of said DNA while in storage. I find it very hard to believe that the SHA does not have proper documentation in handling potentially hazardous material, or handling our most sacred health records (our DNA).

[8] On March 11, 2024, my office notified the SHA and the Applicant that my office would be undertaking a review of the SHA's search efforts.

[9] On April 12, 2024, the SHA advised that the search record and accompanying letter emailed to my office on February 5, 2024, should be treated as its submission. The Applicant did not provide a submission; however, I note their January 7, 2024 request for review email contains arguments regarding their position about the SHA's search efforts.

II RECORDS AT ISSUE

[10] This review is about SHA's search efforts; therefore, there are no records at issue.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[11] SHA qualifies as a "local authority" as defined by subsection 2(1)(f)(xiii) of LA FOIP.

[12] HIPA is engaged when three elements are present: (1) there is a trustee; (2) there is personal health information; and (3) the personal health information is in the trustee's custody or control.

[13] SHA is the "provincial health authority" as defined by section 1-2 of *The Provincial Health Authority Act*. The SHA has confirmed with my office that the Roy Romanow Provincial Laboratory (RRPL) is an SHA facility, or a part of the SHA. The RRPL conducts testing on samples or specimens. SHA is, therefore, the "trustee" pursuant to subsection 2(1)(t)(ii) of HIPA.

[14] This matter involves COVID-19 testing done via nasal swabs and the results. This would be personal health information as defined by subsection 2(1)(m)(i) and (iii) of HIPA as follows:

> **2**(1) In this Act:
>
> …
> (m) **"personal health information"** means, with respect to an individual, whether living or deceased:
>
> (i) information with respect to the physical or mental health of the individual;
>
> …
> (iii) information with respect to the donation by the individual of any body part or bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual;

[15] Finally, the SHA, via the RRPL, collects specimens for testing and manages the results. The results are then in SHA's custody or control. As the three elements are present, HIPA is engaged.

[16] Based on the above, I find I have jurisdiction to conduct this review.

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

[17] The Applicant, in an email dated January 7, 2024, provided the following concerns about SHA's search efforts:

> 23. During collection, your DNA sample is automatically considered contaminated with a disease, and thus should be considered a toxic, dangerous good and at least handled and transported accordingly [sic] to the Transportation of Dangerous Goods Act [sic] (TDG); and Workplace Hazardous Materials Information System (WHMIS).
>
> 24. During transportation of any goods or products, there are bills of lading, and or records of custody.
>
> 25. To imply that no such records exist, nor that there are internal records/policy/procedures concerning the safe handling and storage of a person's DNA or hazardous material from our health authority, is highly improbable.
>
> …
> 27. To state that there are protocols, I wholeheartedly question the validity of the SHA's response. Which I interpret as a brush off.
>
> …
> 31. I question the accuracy of the SHA's November 2nd response when I discover policies and procedures, such as:
>
> - **FAQ About DNA Banking at the Roy Romanow Provincial Laboratory (RRPL).pdf**
> - **NOV 2023 - Viral Respiratory Testing Refresher.pdf**
> - **SHA-07-004P1 Destruction of Records Procedure.pdf**
> - **SHA-02-0006P1 Research-Procedure-Handbook.pdf**
> - **Biomedical2BManagement2B2008 (5).pdf**
>
> 32. It appears that the SHA brushed my request off by confining their searching within a narrowly defined criterion.

[18] As noted earlier, the SHA indicated that the first part of the request related to the Applicant's own COVID-19 nasal swab (HIPA), and the second part relates to SHA policies regarding handling of swabs (LA FOIP). I will address each separately.

Part 1 – The Applicant's nasal swabs (HIPA)

[19] The Applicant's first concern is about how their COVID-19 test results were managed by SHA. SHA provided the Applicant with records regarding this part of their access request.

[20] Subsection 35(1) of HIPA requires a trustee to respond to an applicant's access to information request openly, accurately and completely:

> **35**(1) Subject to sections 36 to 38, a trustee shall respond to a written request for access openly, accurately and completely.

[21] The above means that a trustee should make a reasonable effort to not only identify and seek records responsive to an applicant's access to information request, but to explain the steps in the process. 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. In past reports (e.g., Review Report 043-2022, Review Report 004-2022), I have considered if public bodies have provided reasonable explanations for why records do not exist.

[22] In its search record, SHA outlined the steps it took to search for records related to the Applicant's nasal swab from collection to disposal as follows:

> 2-Oct
> emailed Digital Health Manager – Lab Medicine North to see who I would contact to get the LIS audit that would show the flow of the nasal swab,
>
> …
> 17-Oct
> Then I was given a Laboratory Information System Technologist, Digital Health-Laboratory Medicine in [location of collection of nasal swab specimen] to contact. I sent [them] the request.

> Then heard back and [they] indicated that this patient was seen at a testing site on March 15, 2021 and no sample was ordered in their Lab system and at that time they were being shipped directly to RRPL for testing.
>
> …
> 26-Oct
> Contacted Manager for Digital Health-Laboratory Services that I was needing the audit report. Asked [them] about the chain of custody
>
> 27-Oct
> Manager for Digital Health-Laboratory Services sent me email saying that the dates on the report show the chain of custody…
>
> …
> 2-Nov
> Manager for Digital Health-Laboratory Services emailed me the audit report but indicated that all the test dates are on the reports.

[23] SHA added as follows:

> As you can see in the attachment, I have talked with the subject matter experts and they have advised that there is not a record that shows how a specimen goes from one area to another.
>
> However, we have described the tracking of the applicant's swab as per [their] lab results and audit report that were provided to [them]:
>
> - Collected in [location of collection] at the Covid Assessment Centre March 15, 2021 10:48
> - Received in Regina Lab March 15, 2021 at 14:50
> - Tested for Flu A, Flu B and Covid (all negative except for Covid "positive" by PCR) reported out to [name of doctor] March 16, 2021 18:43
> - Tested for Flu A, Flu B and Covid (all negative except for Covid "positive" by PCR) reported out to [name of doctor]
> - Tested for Covid 'Variant of Concern' detected reported out to [name of doctor]
> - Sample sent for confirmatory testing by 'Whole Genome Sequencing' (WGS) testing
> - Tested by WGS reported out as type B.1.1.7. April 23, 21 at 11:52

- As per the note on the bottom of the audit, the specimen went into storage March 17, 2021 after it was tested.
- Discarded February 2, 2022

[24] SHA's search record outlines the subject matter experts it consulted with to identify records related to the Applicant's request. The records released to the Applicant disclose the date, time and location that SHA collected the specimen. The records also disclose the specimen test results from the RRPL, which indicate the date the specimen was received and recorded. An audit trail report also indicates the date SHA discarded the specimen. The audit trail notes that the "specimen went into storage March 17, 2021 after it was tested (all of the test dates are on the reports) and it was discarded February 2, 2022."

[25] The SHA clarified that, prior to disposal, the Applicant's nasal swab specimen "was stored in a fridge at RRPL; an aliquot of the sample was stored in a freezer at RRPL." The SHA further noted that "routinely, original specimens submitted for COVID-19 testing are kept for 1 week and aliquots of samples that test positive are kept for 1-2 years." The SHA's response appears to indicate there would have been two destruction timelines for the nasal swabs. SHA's audit appears to only address the storage of the aliquot of the sample and its destruction approximately a year after collection.

[26] My office asked SHA if the user indicated on the audit report is the same individual that destroyed the nasal swab aliquot sample and, if not, if the SHA documented the name of the employee that destroyed the sample. The SHA responded that it places samples in a biohazardous waste container, which is taken and incinerated by a contracted service provider. The SHA provided my office with a waybill for the shipment of biomedical units to Biomed Recovery & Disposal Ltd. with a shipping date of February 4, 2022, and a receiving date of February 7, 2022. I suspect that during COVID-19, the SHA collected and disposed of thousands of nasal swab specimens and aliquots of samples this way.

[27] For Part 1 of the request, the SHA released to the Applicant their diagnostic testing results. The test results indicated items such as the collection date, place of collection, what test was being completed, etc. Based on SHA's details, it appears that SHA consulted with

subject matter experts to ensure all details regarding its handling of the Applicant's specimen were captured in these records. SHA also noted that a week after collecting a specimen for COVID-19 testing, the nasal swabs were routinely disposed of by being placed in a biohazardous waste container. It also appears that in the Applicant's case, there was an aliquot of specimen that SHA stored and tracked from storage to disposal, as shown on the audit report.

[28] A trustee does not have to prove beyond a reasonable doubt that records do not exist, but they need to have conducted a reasonable search and provided a reasonable explanation for why a record does not exist. In this case, I am satisfied that SHA demonstrated it took reasonable steps to search, and also provided reasonable explanations for how it managed the Applicant's swab. As such, I find that the SHA has conducted a reasonable search for part 1 of the Applicant's access request and recommend that it take no further action regarding part 1.

Part 2 - SHA policies related to COVID-19 nasal swabs (LA FOIP)

[29] The SHA's response to the Applicant advised that records responsive to this part of the Applicant's access request do not exist. SHA cited subsection 7(2)(e) of LA 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;

[30] The *Guide to LA FOIP*, Ch. 3 at pages 57 and 58, outlines that a statement made by a local authority that records do not exist does not mean that records do not exist at all. It means that: 1) a search was conducted and did not produce results, or 2) a record may exist, but is not in the possession or under the control of the local authority. In coming to either conclusion, a local authority needs to demonstrate that it undertook reasonable search efforts to locate records.

[31] The *Guide to LA FOIP*, Chapter 3, "Access to Records" (*Guide to LA FOIP*, Ch. 3) at page 3, provides that section 5 of LA FOIP establishes a right of access by any person to records in the possession or control of a local authority subject to limited and specific exemptions, which are set out in LA FOIP. Section 5 of LA 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 local authority.

[32] Page 7 of the *Guide to LA FOIP*, Ch. 3, provides that subsection 5.1(1) of LA FOIP requires a local authority to respond to an applicant's access to information request openly, accurately and completely. This means that local authorities 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. The threshold that must 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.

[33] The *Guide to LA FOIP*, Ch. 3 at pages 9 and 10, provides that the focus of a search review, including when a local authority states no records exist, is whether the local authority conducted a reasonable search. A reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records reasonably related to the access to information 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. Examples of information to support its search efforts that local authorities can provide to my office include the following:

- For personal information requests – explain how the individual is involved with the local authority (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
    - 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 local authority'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.*

The above list is meant to be a guide. Each case will require different search strategies and details depending on the records requested.

[34] The SHA noted as follows regarding its search:

> ...searched the intranet document finder (is a search in SHA policys [sic] and procedures and Clinical Standards) using the key words of Chain of custody, Laboratory, swab, and covid. Nothing was found that documented the chain of custody from the time of collection to the destruction of the swab.
>
> …
> 11-Oct
> Clinical Microbiologist, Regina to see if any of the SOP I requested from a previous request for this requester to see if any apply to this request.
>
> 17-Oct
>
> …
> Heard back from Clinical Microbiologist, Regina to say that there was no SOP's that directly address the chain of custody.
>
> Heard from the Director of Laboratory Medicine – Regina stating that 1.) Chain of custody is a legal term and we do not have those types of specific tracking from step to step, nor are we accredited for.
>
> Then the Clinical Microbiologist asked [their] Director if they have a policy that describes how specimens are labelled and tracked from lab to lab? The answer from the Director was no.

[35] The term "chain of custody" is a legal term that describes the movement of evidence and describes the history of who had that evidence in their possession, usually from the time it is obtained to when it is presented in court. It is reasonable, then, that I am not dealing with a chain of custody issue here, but rather an issue of what policies or procedures SHA has in place to describe how samples, such as nasal swabs, are managed from the time they are collected to the time they are disposed.

[36] My office asked SHA if it had such policies and procedures in place and requested copies of any such documentation. SHA responded that it, "has individual protocols for each specimen type and each laboratory test that is provided by laboratory services. This constitutes thousands of documents." As an example, SHA provided copies of procedures for collecting blood specimens, processing of blood samples tested for HIV, and storing and retaining blood specimens tested for HIV and other serology. Given SHA's response,

it is unclear why amongst its thousands of documents it does not have a policy and procedures for handling nasal swabs in general, whether for COVID-19 or not.

[37] My office also asked the SHA if it had a written policy that outlines the transport of specimens from one SHA facility to another. The SHA responded as follows:

> We have an SOP describing how to pack specimens into totes that are sent to the laboratory. **There is no policy** describing transportation specifically, but we have a contract with a third party courier.
>
> [Emphasis added]

[38] The SHA provided my office with a copy of a work standard called, *Collection and Referral of COVID-19 Respiratory Samples to Reference Lab for testing*. However, based on a review of its section 7 decision and copy of the responsive records provided to my office by the Applicant, it does not appear that SHA released this work standard to the Applicant as a responsive record.

[39] Lastly, my office asked SHA to clarify how it determines when nasal swab specimens can be destroyed and if it has documentation outlining when and how such specimens are destroyed. The SHA stated as follows:

> An SOP does not currently exist for this section of the lab (it is in draft). Routinely, original specimens submitted for COVID-19 testing are kept for 1 week and aliquots of samples that test positive are kept for 1-2 years. The lab section follows a policy of rolling discard, which throws out the oldest samples when the physical space of the fridge/freezer is full.

[40] Based on SHA's response, it appears that a procedure is or was in development as a "draft", but SHA did not provide my office with a copy of the draft document (or final version, if there is one). If the draft existed at the time of the Applicant's access to information request, though, it is unclear why the SHA did not identify this as a responsive record and either release or withhold it subject to exemptions.

[41] In its arguments, SHA acknowledges that it does not have a document describing "chain of custody," which is understandable given what this term means or under what circumstances it applies. Based on the Applicant's representation to my office, it seems that what they sought is documentation describing how the SHA handles nasal swabs collected and tested for COVID-19 from the time they are collected until they are destroyed. If the SHA was not clear on what the Applicant sought, then it had a duty to seek clarification. As noted earlier, subsection 5.1(1) of LA FOIP requires a local authority to respond to an applicant's written access to information request openly, accurately and completely. This means that local authorities should make reasonable effort 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 and seek any necessary clarification on the nature or scope of the request within the legislated timeframe. To respond "accurately" means to seek clarification when necessary, and to respond "completely" means to respond without gaps.

[42] As discussed above, for Part 2 of the request, SHA provided my office with a work standard for how to pack specimens. The SHA also referred to a "draft" procedure that outlines when a specimen should be destroyed. The SHA did not indicate if the "draft" procedure was finalized, or if it still exists in "draft" form. It does not appear that the SHA identified either of these documents as being responsive when issuing its section 7 decision to the Applicant. The SHA also indicated it has thousands of documents with individual protocols for each type of specimen and laboratory test, but it is not clear to me why it would not have a policy and procedure regarding nasal swabs in general, whether for COVID-19 or not. And, if a policy or procedure for nasal swab does exist, why it would not have identified this record as being responsive to the Applicant's request is unclear.

[43] It appears that the SHA conducted a reasonable search based on its interpretation of the Applicant's request. However, the SHA may have been unclear on what records the Applicant sought based on the terminology they used. Had the SHA clarified with the Applicant what they sought, it might have been able to identify if it had documents or standards related to the management of nasal swabs and then provided those to the

Applicant subject to any exemptions found to apply. This includes anything SHA may have had in "draft" form.

[44] While I find that SHA's search efforts for Part 2 of the Applicant's request are reasonable based on the Applicant's wording, I nonetheless recognize that there are documents that may be responsive that the SHA should have considered providing to the Applicant, subject to any exemptions that may apply. I recommend, therefore, that within 30 days of the issuance of this Report, that the SHA, subject to any exemptions that may apply, release to the Applicant the work standard, *Collection and Referral of COVID-19 Respiratory Samples to Reference Lab for testing* and the "draft" procedure that outlines when a specimen should be destroyed.

[45] I also recommend that the SHA conduct a search for procedures relating to the handling of nasal swabs and, if any exist, release those to the Applicant within 30 days of the issuance of this Report, subject to exemptions.

IV FINDINGS

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

[47] I find that the SHA has conducted a reasonable search for both Part 1 and Part 2 of the Applicant's access request, except as noted.

V RECOMMENDATIONS

[48] I recommend that the SHA, take no further action regarding the search for Part 1 of the Applicant's request.

[49] I recommend that, within 30 days of the issuance of this Report, the SHA, subject to any exemptions that may apply, release to the Applicant the work standard *Collection and*

Referral of COVID-19 Respiratory Samples to Reference Lab for testing and the "draft" procedure that outlines when a specimen should be destroyed.

[50] I recommend that the SHA conduct a search for procedures relating to the handling of nasal swabs and, if any exist, release those to the Applicant within 30 days of the issuance of this Report, subject to exemptions.

Dated at Regina, in the Province of Saskatchewan, this 25th day of June, 2024.

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