REVIEW REPORT 059-2020

Community Health Services Association (Regina) Ltd.

September 3, 2020

Summary: The Applicant submitted an access to information request to the Community Health Services Association (Regina) Ltd. (the Clinic) for personal records. The Commissioner found that the personal records were not in the possession or under the control of the Clinic for the purposes of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) and that the request was not responded to within the legislated timeframe. The Commissioner recommended that the Clinic develop and implement a records management policy or procedure on the management of records, including regularly saving records to the appropriate location in the records management system and deleting personal or transitory records. The Commissioner also recommended the Clinic develop a policy or procedure to ensure it is processing access to information requests in compliance with LA FOIP.

I BACKGROUND

[1] On January 30, 2020, the Applicant, a former employee of the Community Health Services Association (Regina) Ltd., also referred to as the Regina Community Clinic (the Clinic), submitted an access to information request under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Applicant requested access to personal records that they asserted were stored on their work-issued computer in a folder labeled with their first name at the time their employment with the Clinic was terminated.

[2] On March 9, 2020, the Applicant contacted my office by email asking for a review of the Clinic's decision to not respond to their access to information request. Along with their request for review, the Applicant submitted supporting documentation. This included

Canada Post tracking information showing that the Applicant's request was delivered to the Clinic on February 3, 2020.

[3] On March 19, 2020, in communication with my office, the Clinic responded to the Applicant stating:

> …in our review of the computer system we have only located a folder titled "[first name of Applicant's] Data" and there are two sub-directories in it titled "Documents" and "Downloads". We have looked at the file names of the files [sic] in each of the sub directories and the titles all suggest they are Regina Community Clinic documents or related to [the Clinic]. They do not have file names suggesting any kind of personal documentation…

[4] On April 6, 2020, the Clinic requested the Intake Officer share screen shots of the files in the folder it had located. This was requested to determine if any of the folders located contained the documents the Applicant was seeking.

[5] On April 7, 2020, the Applicant responded stating the folders in the screen shots were not of folders or documents that they were seeking.

[6] On April 13, 2020, my office notified the Applicant and the Clinic of my intentions to undertake a review.

II RECORDS AT ISSUE

[7] The Clinic has not identified any records responsive to the Applicant's request, as such there are no records at issue in this review. This review will consider if the Clinic responded within the legislated timeframe and if there are any responsive records in the possession or under the control of the Clinic.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[8] Subsection 2(f) of LA FOIP provides a list of bodies that qualify as local authorities. Subsection 2(f)(xvii) of LA FOIP provides:

> **2** In this Act:
> …
>
> (f) **"local authority"** means:
> …
>
> (xvii) any board, commission or other body that:
>
> (A) receives more than 50% of its annual budget from the Government of Saskatchewan or a government institution; and
>
> (B) is prescribed;

[9] The Clinic's submission stated it is "a non-profit, primary health care clinic, licensed under the Co-operative Act receiving most of the funding from the Ministry of Health." The Ministry of Health is a government institution as defined by *The Freedom of Information and Protection of Privacy Act* (FOIP). Based on the Clinic's submission, the Clinic receives more than 50% of its annual budget from a government institution.

[10] Subsection 3(2) of *The Local Authority Freedom of Information and Protection of Privacy Regulations* (LA FOIP Regulations) provides:

> **3**(2) For the purposes of subclause 2(f)(xvii) of the Act, the bodies set out in Part II of the Appendix are prescribed as local authorities.

[11] Part II of LA FOIP Regulations provides:

> PART II
>
> **Boards, Commissions and Other Bodies Prescribed as Local Authorities**
> [*Subclause 2(f)(xvii) of the Act*]
>
> …
>
> 2. Community clinics as defined in section 263 of *The Co-operatives Act, 1996*

[12] Section 263 of *The Co-operatives Act, 1996*, provides as follows:

263 In this Part:

"community clinic" means a co-operative incorporated, continued or registered pursuant to this Act whose primary objectives are:

(a) to promote a scheme of providing health or hospital services to its members and their dependants on a mutual benefit plan;

(b) to establish, maintain and operate facilities for group medical practice of duly qualified medical practitioners;

(c) to establish, maintain and operate facilities for health care; or

(d) to encourage and provide financial assistance for medical research in the community; (*«clinique communautaire»*)

"health services" includes services provided by a licensed medical practitioner or dentist, a registered nurse or any other qualified person and the provision of health appliances and optical and pharmaceutical supplies; (*«services de santé»*)

"hospital services" includes services provided by a facility designated as a hospital pursuant to *The Provncial* [sic] *Health Authority Act*; (« *services hospitaliers* »)

[13] The Clinic provided a Certificate of Continuance that certifies the Clinic is continued under *The Co-Operatives Act, 1996*. The Clinic qualifies as a prescribed body under Part II of LA FOIP Regulations. As such, the Clinic qualifies as a local authority pursuant to subsection 2(f)(xvii) of LA FOIP. Therefore, I have jurisdiction to undertake this review.

2. Are there records responsive to the Applicant's request in the possession and/or under the control of the Clinic?

[14] The Applicant indicated in the access to information request that they were seeking access to personal records. The Clinic's submission provided that the laptop had been 'wiped' and a factory reset was completed by the Applicant before returning it to the Clinic. This was after the Applicant's employment was terminated. Any records that were stored on the desktop computer were saved to a USB drive, and a screenshot of those records were shared with the Applicant. However, the Applicant stated those were not the records they were seeking. The Clinic indicated that its IT technician had conducted the search and could not find the file that the Applicant was seeking.

[15] Section 5 of LA FOIP provides the right of access 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.

[16] As section 5 of LA FOIP provides that it only applies to those records under the possession or under the control of a local authority, I will need to determine if the records in question would be in the possession or control of the Clinic.

[17] In my office's resource, *Guide to LA FOIP*, *Chapter 1*, updated July 28, 2020, at pages 9 to 11, it provides the following:

> **Possession** is physical possession plus a measure of control of the record.
>
> **Control** connotes authority. A record is under the control of a local authority when it has the authority to manage the record including restricting, regulating and administering its use, disclosure or disposition.
>
> Possession and control are different things. It is conceivable that a local authority might have possession but not control of a record or that it might have control but not possession.
>
> To determine whether a local authority has a measure of control over a record(s), both parts of the following two-part test must be met:
>
> **1. Do the contents of the document relate to a local authority matter?**
>
> The first question acts as a useful screening device. If the answer is no, that ends the inquiry. If the answer is yes, the inquiry into control continues.
>
> **2. Can the local authority reasonably expect to obtain a copy of the document upon request?**
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> All factors must be considered when determining the second question. These factors include:
>
> - The substantive content of the record;
> - The circumstances in which it was created; and
> - The legal relationship between the local authority and the record holder.
>
> The reasonable expectation test is objective. If a local authority, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is met.

If both test questions are answered in the affirmative, the document is under the control of the local authority.

In answering these questions, the following factors may also be considered:

- The record was created by a staff member, an officer, or a member of the local authority in the course of their duties performed for the local authority;
- The record was created by an outside consultant for the local authority;
- The local authority possesses the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory, statutory or employment requirement;
- An employee of the local authority possesses the record for the purposes of their duties performed for the local authority;
- The record is specified in a contract as being under the control of a local authority and there is no understanding or agreement that the records are not to be disclosed;
- The content of the record relates to the local authority's mandate and core, central or basic functions;
- The local authority has a right of possession of the record;
- The local authority has the authority to regulate the record's use and disposition;
- The local authority paid for the creation of the records;
- The local authority has relied upon the record to a substantial extent;
- The record is closely integrated with other records held by the local authority;
- A contract permits the local authority to inspect, review and/or possess copies of the records the contractor produced, received or acquired;
- The local authority's customary practice in relation to possession or control of records of this nature in similar circumstances;
- The customary practice of other bodies in a similar trade, calling or profession in relation to possession or control of records of this nature in similar circumstances; and
- The owner of the records.

[18] In my office's resource, *Best Practices for the Management of Non-Work Related Personal Emails in Work-Issued Email Accounts: A Guide for Public Bodies*, it states, "personal emails that do not pertain to any aspect of the public body's business, would not be records in the possession or under the control of the public body for the purposes of section 5 of FOIP and LA FOIP, regardless if the emails reside in the employee's email account."

[19] While I have not received any records that relate to this request, regardless of the type of records at issue, the records the Applicant is seeking are personal records that do not relate to the business of the Clinic. Therefore, even if the Clinic still had copies of the records on its devices or servers, I find that the personal records would not be in the possession or under the control of the Clinic for the purposes of LA FOIP. As such, there is no requirement under LA FOIP to provide access to these records.

[20] In Review Report 007-2019, a former employee of the Government of Saskatchewan was seeking access to personal emails. My office found that the emails would not be in the possession or under the control of the Ministry, but provided the following recommendations:

> [11] Central Services' submission quoted a number of court decisions and referenced my office's Review Report F-2014-007 to support its position that these records were not in the possession or control of Central Services. In that report, my office found that FOIP did not apply as the Ministry "does not have 'control' of the records in question. The emails are the personal records of the government employee and were not created as part of [their] employment duties."
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> [12] In Review Report 096-2015 and 097-2015, my office found that personal emails of an employee of the Saskatchewan Transportation Company (STC) were not in the possession or control of STC, for the purposes of FOIP, as "the personal records of the STC employee and were not created as part of their employment duties."
>
> [13] In the Provincial Archives of Saskatchewan's resource Basic Records Management Practices for Saskatchewan Government, it defines non-public (non-government) records as "records that do not pertain to any aspect of Government business. These include records such as external publications and non work related records (personal e-mails or letters, memberships in associations or groups etc. which do not relate to the employees position within the organization)."

> [14] As such, there is no requirement in *The Archives and Public Records Management Act* for a government institution to retain an employee's personal emails, as they are not an official record of the government.
> …
>
> [24] As a general rule, employees' government email accounts should not be used to store emails that are not official government records including personal emails. Providing employees with guidance on the proper management of email records will ensure emails that are official government records are regularly saved to the appropriate location in their filing system or electronic document management system and ensure email records are integrated with other records management practices, consistent with other records of the government institution. Once emails that are official government records are saved to the appropriate location, the copy in their email account can be deleted.
>
> [25] Ensuring emails that are official government records are managed in a manner consistent with other records and filed in the appropriate locations may assist FOIP Coordinators when searching for responsive records. Additionally, if personal and transitory emails are regularly deleted, rather than being stored in their email accounts, it may reduce the number of emails that would need to be reviewed to determine if they are responsive. When an employee's employment with a government institution ceases, this would also limit the amount of work by other government employees saving emails to the appropriate locations and sorting through personal emails that an employee has stored in their government email account.
> …
>
> [27] As a best practice, I encourage government institutions to have a documented practice in place to provide employees with the ability to gain access to any of their personal emails remaining in their government email account, within a specified timeframe of their employment ceasing (i.e. within 10-30 days of employment ceasing). This can assist the government institution to ensure it is not retaining any employee's personal emails where there is no work related purpose and reduce the risk of privacy breaches resulting from the unnecessary retention of these records.
> …
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> [29] I recommend that Central Services encourage government institutions to develop and implement a policy or procedure on the management of emails, including regularly saving email to appropriate locations and deleting personal or transitory emails.

[21] The Clinic should have the same considerations in place for personal records stored on the Clinic's servers and devices as those recommended for personal emails.

[22] As a general rule, employees' should not use the Clinic's server or devices to store records that are not official records of the Clinic. Providing employees with guidance on the proper

management of records will ensure records that are official records of the Clinic are regularly saved to the appropriate location in their filing system or electronic document management system.

[23] Ensuring records that are official records of the Clinic are filed in the appropriate locations may assist FOIP Coordinators when searching for responsive records. Additionally, if personal and transitory records are regularly deleted, rather than being stored on the Clinic's server or devices, it may reduce the number of records that would need to be reviewed to determine if they are responsive. When an employee's employment with the Clinic ceases, this would also limit the amount of work by other Clinic employees saving records to the appropriate locations and sorting through personal records that an employee has stored on the Clinic's server or devices.

[24] I recommend that the Clinic develop and implement a records management policy or procedure on the management of records, including regularly saving records to the appropriate location in the records management system and deleting personal or transitory records.

[25] As a best practice, I encourage the Clinic to have a documented practice in place to provide employees with the ability to gain access to any of their personal records stored on the Clinic's servers or devices, within a specified timeframe of their employment ceasing (i.e. within 10-30 days of employment ceasing). This can assist a public body to ensure it is not retaining any employee's personal records where there is no work related purpose and reduce the risk of privacy breaches resulting from the unnecessary retention of these records.

3. Did the Clinic meet the legislated timelines?

[26] While I have found that the records the Applicant was seeking were not in the possession or under the control of the Clinic for the purposes of LA FOIP, the Clinic still had an obligation to respond to the Applicant's access to information request within 30 days pursuant to section 7 of LA FOIP which provides:

> **7**(1) Where an application is made pursuant to this Act for access to a record, the head of the local authority to which the application is made shall:
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> (a) consider the application and give written notice to the applicant of the head's decision with respect to the application in accordance with subsection (2); or
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> (b) transfer the application to another local authority or to a government institution in accordance with section 11.
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> (2) The head shall give written notice to the applicant within 30 days after the application is made:
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> (a) stating that access to the record or part of it will be given on payment of the prescribed fee and setting out the place where, or manner in which, access will be available;
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> (b) if the record requested is published, referring the applicant to the publication;
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> (c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;
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> (d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;
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> (e) stating that access is refused for the reason that the record does not exist;
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> (f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4); or
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> (g) stating that the request has been disregarded pursuant to section 43.1 and setting out the reason for which the request was disregarded.
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> (3) A notice given pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.
>
> (4) If an application is made with respect to a record that is exempt from access pursuant to section 14, 20 or 21 or subsection 28(1), the head may refuse to confirm or deny that the record exists or ever did exist.
>
> (5) A head who fails to give notice pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record.

[27] At the time the Applicant submitted their request for review to my office, more than 30 days had elapsed without a response from the Clinic. During the early resolution phase, my office made many attempts to have the Clinic issue a compliant section 7 response to

the Applicant. On April 9, 2020, the Clinic emailed the Applicant stating that it could not find the file they were seeking. This response was provided 66 days after the Clinic received the Applicant's access to information request. This response was beyond the legislated timeframe to respond pursuant to LA FOIP. Additionally, the Clinic's section 7 response did not contain the necessary elements to be compliant with LA FOIP.

[28] In the future, the Clinic should ensure that when it responds to access to information requests under LA FOIP, it provides responses within 30 days with a reference to subsection 7(2) of LA FOIP for its decision and includes notice to applicants of the right to request a review within one year pursuant to subsection 7(3) of LA FOIP.

[29] I find that the Clinic did not respond within the legislated timeframe.

[30] I recommend the Clinic develop a policy or procedure to ensure it is processing access to information requests in compliance with LA FOIP.

IV FINDINGS

[31] I find that the personal records the Applicant is seeking, are not in the possession or under the control of the Clinic for the purposes of LA FOIP.

[32] I find that the Clinic did not respond within the legislated timeframe.

V RECOMMENDATIONS

[33] I recommend that the Clinic develop and implement a records management policy or procedure on the management of records, including regularly saving records to the appropriate location in the records management system and deleting personal or transitory records.

[34] I recommend the Clinic develop a policy or procedure to ensure it is processing access to information requests in compliance with LA FOIP.

Dated at Regina, in the Province of Saskatchewan, this 3rd day of September, 2020.

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