



REVIEW REPORT 100-2018

Saskatchewan Health Authority

November 5, 2019

Summary:

The Applicant made an access to information request to the Saskatchewan Health Authority (SHA). The SHA responded to the request stating portions of responsive records were withheld pursuant to subsections 16(1)(a) and 30(2) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The SHA also advised that no responsive records exist for part of the Applicant's request. The Applicant requested a review of the SHA's application of the exemptions and search efforts to conclude that no records exist. The Commissioner found that the SHA did not perform a reasonable search to conclude that no responsive records existed for part of the Applicant's request. The Commissioner also found the SHA had appropriately applied subsection 16(1)(a) of LA FOIP to portions of the responsive records. During the review, the SHA chose to release an unreadable portion of the record it had withheld pursuant to subsection 30(2) of LA FOIP. The Commissioner recommended the SHA develop and implement policies and procedures to ensure records are retained in a readable format.

I BACKGROUND

[1] The Applicant submitted a letter to the former Regina Qu'Appelle Regional Health Authority (RQRHA) along with the \$20 application fee. The date on the letter was January 5, 2017, but it was confirmed by my office that this was an error and should have read January 5, 2018. The Applicant requested the following records:

I am writing to request information on two counts: firstly, the Do Not Hire List and secondly, my personnel file and related records.

1. I understand the Do Not Hire List (DNHL) may be identified by alternate terminology, and I'd like to know:

1. The categories and work standards used to determine if/when someone should be placed on the DNHL
2. The policies and work standards used to determine if/when someone should be placed on the DNHL
3. Is my name on the DNHL
4. The policies used when disseminating names to be noted on a DNHL to former/current health regions.

2. Re my personnel file and related records:

1. I would like to request my personnel file. I would like to request emails, correspondence and other documentation pertaining to my evaluation, probation and termination from [names of three SHA employees] which may not be in my personnel file.

- [2] On December 4, 2017, the Saskatchewan Health Authority (SHA) was created and RQRHA along with other regional health authorities were merged into the SHA. As a result, the local authority in this Report is the SHA.
- [3] On January 24, 2018, the SHA emailed the Applicant providing an index of records and requesting the Applicant indicate which records they were interested in obtaining, in an effort to narrow the request and reduce associated fees.
- [4] The Applicant responded to the SHA on January 26, 2018, requesting all records identified in the index of records.
- [5] On February 2, 2018, the SHA sent a letter and forwarded the Applicant a copy of the responsive records, withholding portions pursuant to subsections 16(1)(a) and 30(2) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Additionally, the SHA noted, “there is no Do Not Hire list by that name or any other name neither within the former Regina Qu’Appelle Health Region nor in the current Saskatchewan Health Authority – Regina Qu’Appelle area.”

[6] On June 1, 2018, my office received a request for review from the Applicant requesting my office review the SHA’s application of subsections 16(1)(a) and 30(2) of LA FOIP, as well as requesting to know if a “do not hire” list exists.

[7] On June 13, 2018, my office notified both the Applicant and the SHA of my intention to undertake a review of the SHA’s application of subsections 16(1)(a) and 30(2) of LA FOIP and the SHA’s search efforts for a “do not hire” list. My office requested the SHA provide my office with a submission, index of records and a copy of the records at issue. My office also invited the Applicant to provide a submission.

II RECORDS AT ISSUE

[8] The SHA provided my office with five records totalling 29 pages. However, record 002 did not appear to contain any redactions. My office followed up with the SHA and confirmed the record had been released in full to the Applicant. Therefore, my review will consist of the remaining four records, totalling 23 pages, as follows:

Record Number	Number of Pages	Description	Withheld in Full or in Part	Exemptions applied
001	3	Email communication	Withheld in Part	Subsection 16(1)(a) of LA FOIP
003	9	Handwritten meeting notes	Withheld in Part	Subsection 30(2) of LA FOIP
004	5	Email communication with attachment	Withheld in Part	Subsections 16(1)(a) and 30(2) of LA FOIP
005	6	Email communication with attachment	Withheld in Part	Subsections 16(1)(a) and 30(2) of LA FOIP

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[9] The SHA qualifies as a local authority pursuant to subsection 2(f)(xiii) of LA FOIP. As such, I have jurisdiction to undertake this review.

[10] The SHA did question if the Commissioner should exercise his power to discontinue this review pursuant to section 39 of LA FOIP. However, the SHA has not provided me with anything persuasive to support this position. Therefore, I have proceeded with this review.

2. Did the SHA respond to the Applicant's access to information request?

[11] Along with their request for review, the Applicant included supporting documentation to my office. However, the Applicant did not forward a copy of the SHA's response to their access to information request. My office followed up with the Applicant to determine if they had received a response from the SHA. The Applicant responded indicating they had not received a response letter along with the package of documents that the SHA had released.

[12] Section 7 of LA FOIP requires local authorities provide a response to an applicant within 30 days of receiving a request. If a local authority fails to respond within 30 days, it would be considered a deemed refusal, as per section 7 of LA FOIP:

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

...

(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;

(e) stating that access is refused for the reason that the record does not 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.

[13] My office followed up with the SHA to determine if a response, pursuant to section 7 of LA FOIP had been issued to the Applicant. The SHA's position was that a response had

been provided, along with the package of records it had released. The SHA forwarded my office a copy of their section 7 response letter dated February 2, 2018. The SHA provided permission for my office to share this response with the Applicant, as they indicated that the Applicant should already be in possession of a copy. Upon receipt of a copy of this letter, my office followed up with the Applicant to determine if they had received a copy of that response along with the records released by the SHA. The Applicant continued to take the position that they had not received a copy of the section 7 response letter and requested my office review if the SHA had met their section 7 requirement.

[14] In my office's notification email to the SHA, my office requested the SHA provide any information or material supporting the SHA's position that a letter pursuant to section 7 of LA FOIP had been provided to the Applicant with the copies of the responsive records.

[15] The SHA responded indicating that it had a scanned copy of the signed response letter to the Applicant. The Access and Privacy Officer advised they had also conducted a search of their filing cabinet and office and verified they did not have the original signed version of the letter. The SHA indicated they could not provide absolute evidence that the letter had been sent to the Applicant, but that they had no reason to believe that it had not been sent.

[16] Based on this information, I find that the SHA has provided a reasonable explanation to support its position that it met its section 7 requirement of providing a response to the Applicant within 30 days of the request.

3. Did the SHA perform a reasonable search for the "Do Not Hire" list?

[17] The SHA's response to the Applicant stated, "there is no Do Not Hire List by that name or any other name neither within the former Regina Qu'Appelle Health Region nor in the current Saskatchewan Health Authority – Regina Qu'Appelle area."

[18] The Applicant has indicated that during previous employment with a different health region, they were employed in a human resources department that referred to such a list,

although the Applicant was not sure it had a formal name. Based on their knowledge of the existence of a list in another health region, the Applicant submitted a request to determine if the RQRHA area of the SHA also maintained a similar list.

- [19] In the notification email to the SHA, my office requested the SHA show that it made a reasonable effort to identify and locate responsive records. In response, the SHA provided the following in its submission to my office:

...an internal email was issued to the responsive areas asking for a search to be conducted for all responsive records to be completed. It is acknowledged that in order to properly conduct the search for responsive records the Applicant was required to be identified to the responsive areas...

[The A/VP of People and Safety], a 30 year career employee... and [Manager Human Resources], provided me with information that there is no Do Not Hire List, black list or any other listing otherwise by the name or any other neither in the former RQHR nor in the current SHA.

[emphasis added]

- [20] The *IPC Guide to Exemptions* (updated June 21, 2019) provides the following regarding a reasonable search for responsive records:

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 any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances.

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. FOIP and LA FOIP do not require the public body to prove with absolute certainty that records do not exist.

- [21] At my office’s request, the SHA further clarified that the “responsive areas” were the areas of the former RQRHA where the Applicant had been employed, as well as the Human Resources and Labour Relations departments.

[22] My office also asked the SHA to clarify how it had developed its search strategy to focus solely on those areas or units since the SHA acknowledged that there may have been informal practices in other units.

[23] At the SHA's request, my office met with the Access and Privacy Officer and Legal Counsel to discuss this file. In the letter submitted to my office following that meeting, the SHA stated:

...the former RQHR did not have a DNHL by that, or any other name, at the time of the request, and therefore, the Applicant was not on a DNHL by that, or any other name, at the time of the request, and therefore, the Applicant was not on a DNHL at the time of her request. The Applicant worked in 2 areas within the former RQHR, [names of areas Applicant was employed in]. Both areas, along with Human Resources and Labour Relations were asked for documentation on the Applicant. To ask [sic] unit or area outside of [their] past employment sites within the former RQHR is effectively an inferred identifier that the Applicant should not be hired...

[24] In order to determine if it would be reasonable to consider if other areas in the SHA, RQRHA area, maintain a "do not hire" list, I am not convinced this would require the Applicant to be identified. If the Access and Privacy Officer needed to consult with employees in other areas, they could simply ask if those areas maintain a "do not hire" list. I do not see why the Applicant would need to be identified to determine if there are other areas that it would be reasonable to include in its search strategy.

[25] I find that the SHA did not perform a reasonable search for the "do not hire" list in the RQRHA area of the SHA.

[26] I recommend the SHA perform a search for the "do not hire" list, as of the date of the access request, in the RQRHA area of the SHA.

4. Did the SHA appropriately apply subsection 16(1)(a) of LA FOIP to the withheld portions of the record?

[27] Subsection 16(1)(a) of LA FOIP provides:

16(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority;

[28] The SHA applied subsection 16(1)(a) of LA FOIP to the withheld portions of records 001, 004 and 005. These records are email communications between SHA employees discussing the approach to take regarding discussions about the employee's performance. Records 004 and 005 also include draft versions of the letter issued to the Applicant (record 002).

[29] SHA's submission provided the following regarding the application of subsection 16(1)(a) of LA FOIP:

[Names and positions of SHA employees], engaged [name of SHA employee], Manager, Labour Relations, for [their] professional advice on how to best proceed with corrective measure related to an out of scope employee, the Applicant. [The SHA employee] was asked to provide [their] professional recommendations, options and advice in [their] capacity as a Manager. [The SHA employee] is a recognized subject matter expert in Labour Relations practice and advises on out-of-scope employee concerns... at the time of any Labour Relations advisement, it is processed by the management team and that advice can be accepted in whole, in part or disregarded.

Drafts of the recommendations were created, shared and reviewed and discarded until the final product was accepted, finalized and issued to the employee. The drafts were redacted from the responsive records as advice pursuant to clause 16(1)(a) of the Act...

[30] Subsection 16(1)(a) of LA FOIP is an exemption that is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice. The test is as follows:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?

2. Was the advice, recommendations, analyses and/or policy options developed by or for the local authority?

[31] *Advice* is guidance offered by one person to another. It can include the analysis of a situation or issue that may require action and the presentation of options for future action,

- but not the presentation of facts. Advice encompasses material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It can be an implied recommendation. The “pros and cons” of various options also qualify as advice. It should not be given a restricted meaning. Rather, it should be interpreted to include an opinion that involves exercising judgement and skill in weighing the significance of fact. It includes expert opinion on matters of fact on which a government institution must make a decision for future action.
- [32] Advice includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.
- [33] *Recommendations* relate to a suggested course of action as well as the rationale for a suggested course of action. Recommendations are generally more explicit and pointed than advice.
- [34] *Analysis* and *policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.
- [35] The severed portions of the email communications between the SHA employees are seeking advice from the Manager, Labour Relations regarding how to address inquiries from the Applicant and how to prepare for a meeting with the Applicant regarding their performance. The redacted portions of the emails would qualify as advice.
- [36] Records 004 and 005 also contain attachments of draft versions of the final version of the letter released to the Applicant (Record 002).
- [37] The Office of the Information and Privacy Commissioner for British Columbia (BC IPC) in its Order F 15-33 involving the City of Vancouver stated, “the applicant is a former City employee seeking information relating to disciplinary actions taken against him by the City and the City’s response to grievances filed on behalf of the applicant by his Union.” In this

Order, the BC IPC considered their equivalent of Saskatchewan's subsection 16(1)(a) of LA FOIP:

[19] The City submits that the emails and draft letters it is withholding under s. 13 contain advice and recommendations passed between City employees relating to the disciplinary and grievance actions taken involving the applicant...

...

[23] Some of the withheld information comprises draft letters attached to an email, where the email author is seeking comment on the draft from fellow employees. In one case the author of the draft is the decision maker, as his name appears as the author of the letter. In this context, the request and the draft letter do not contain advice or recommendations because the decision maker is *requesting* advice or recommendations, not providing the draft letter as advice or recommendations. However, despite this, disclosing the draft letter would enable it to be compared with the final version of the letter that was disclosed to the applicant. This would enable the applicant to draw accurate inferences about advice or recommendations based on changes to the letters from the draft to the final version. Therefore s. 13(1) applies to this information.

[24] A small amount of information withheld under s. 13 does not comprise advice or recommendations. Some of this information does not fall within the scope of s. 13(1) because it is a request for advice or recommendations. Section 13(1) does not typically apply to information that merely discloses that a public body is soliciting advice and information, even when the request for advice discloses the scope of advice or recommendations requested. The request would need to reveal or allow an accurate inference about advice or recommendations to fall within the scope of s. 13, and there is no evidence that the information in issue does this. Therefore, the withheld information comprising requests for advice falls outside the scope of s. 13.

[38] I agree with the BC IPC interpretation that drafts of a letter would enable the Applicant to draw accurate inferences about the advice and recommendations based on changes to the letters from draft to the final version.

[39] This advice was developed by the SHA for the purpose of addressing concerns with the employee's suitability for their position.

[40] As such, I find that both parts of the test have been met.

[41] I find the SHA has appropriately applied subsection 16(1)(a) of LA FOIP to the redacted portions of records 001, 004 and 005.

[42] I recommend the SHA continue to withhold the redacted portions of records 001, 004 and 005.

5. Did the SHA appropriately apply subsection 30(2) of LA FOIP to the withheld portions of the record?

[43] This provision enables the head to refuse to disclose individual's personal information that is evaluative or opinion material compiled for the purpose of determining suitability, eligibility or qualifications for employment. The purpose and intent of the provision is to allow individuals to provide frank feedback where there is an evaluation process occurring. In addition, evaluating suitability for employment can take place not only during the hiring process, but also during an employee's tenure.

[44] Record 003 is described by the SHA as the Manager of Labour Relations' notes from a January 6, 2012 meeting that the Applicant was present at and is regarding concerns with the Applicant's performance when they were employed by the SHA. Record 003 is a total of nine pages and was withheld pursuant to subsection 30(2) of LA FOIP, with the exception of the former RQRHA's header and the first two lines of page 1 where the date is recorded and the individuals in attendance at the meeting are identified. I note the Applicant was in attendance at this meeting.

[45] However, upon review of Record 003, the content was, for the most part, unreadable. The notes appear to indicate a first name of one of the individuals in attendance at the meeting, or their initials, followed by, what my office assumes, the individual discussed at that meeting. With the exception of the odd word throughout the nine pages, our office could not determine what the shorthand notes said.

[46] My office provided a Draft Review Report regarding this file to the SHA to review for any factual errors. Following a review of my office's findings and recommendations in the Draft Review Report, the SHA chose to release this record in full to the Applicant in a letter dated October 29, 2019. Therefore, the application of subsection 30(2) of LA FOIP is no longer at issue for this review.

[47] I recommend the SHA establish policies and procedures to ensure all records in their possession or under their control be retained in a format that is readable.

IV FINDINGS

[48] I find that the SHA has provided a reasonable explanation to support its position that it met its section 7 requirement of providing a response to the Applicant within 30 days of the request.

[49] I find that the SHA did not perform a reasonable search for the “do not hire” list, as of the date of the access request, in the RQRHA area of the SHA.

[50] I find the SHA appropriately applied subsection 16(1)(a) of LA FOIP to the redacted portions of records 001, 004 and 005.

V RECOMMENDATIONS

[51] I recommend the SHA perform a search for the “do not hire” list, as of the date of the access request, in the SHA’s RQRHA area.

[52] I recommend the SHA continue to withhold the redacted portions of records 001, 004 and 005.

[53] I recommend the SHA establish policies and procedures to ensure all records in their possession or under their control be retained in a format that is readable.

Dated at Regina, in the Province of Saskatchewan, this 5th day of November, 2019.

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