



REVIEW REPORT 127-2018

University of Saskatchewan

August 27, 2019

Summary:

The Applicant made an access to information request to the University of Saskatchewan (U of S). The U of S responded indicating further clarification was required to identify the records they were seeking pursuant to subsection 6(3) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) and suggested limiting search to two areas of the U of S. After agreeing to the limited search areas and receiving records, the Applicant was notified of additional records in a separate area of the U of S. The Applicant requested a review of the U of S' duty to assist and how it developed its search strategy to recommend the two areas of the U of S that the search was limited to. Upon notification of the review, the U of S raised concerns with the Commissioner's jurisdiction to conduct this review and raised concerns that the request was frivolous and vexatious. The Commissioner found that there was jurisdiction to review the matter and that the request was not frivolous or vexatious. The Commissioner also found that clarification pursuant to section 6 of LA FOIP was not necessary. The Commissioner recommended the U of S develop and implement policies and procedures for clarifying or narrowing requests.

I BACKGROUND

[1] On June 27, 2017, the University of Saskatchewan (U of S) received an access to information request:

...documentation outlining the parameters and conditions of funding/contracts and any other monies or gifts-in-kind given/donated to the University of Saskatchewan or its centres and employees, by the following corporations:

- [list of five third party corporations]

including any agreements, correspondence, memoranda, e-mails, memoranda of understanding or contracts with regard to research, research chairs, partnerships, collaborations, sponsorships, conferences, naming rights, scholarships, bursaries or awards at the University of Saskatchewan.

[2] On June 28, 2017, the U of S emailed the Applicant stating:

Your request has not provided sufficient details or particularity to allow us to identify the records you are seeking. Most agreements relating to funding, sponsorships or donations would be held at or known to the Research Services and Ethics Office and University Relations Development office. As with your previous request of a similar nature ([file number of previous request]), I propose that we further define your request and limit the search to those agreements held by these two units. Please provide a date range for your request.

Once you provide our office with the details enabling us to clarify the request, we will proceed with processing your request. This notification has been provided pursuant to subsection 6(3) of *The Local Authority Freedom of Information and Protection of Privacy Act...*

[3] On June 30, 2017, the Applicant replied to the U of S by email agreeing to the suggestion from the U of S to limit the search for responsive records to the Research Services and Ethics Office and the University Relations Development office. The Applicant also further clarified that they were seeking any records from January 1, 2000 to present (June 30, 2017).

[4] On July 21, 2017, the U of S sent a fee estimate to the Applicant. On August 4, 2017, the U of S received a deposit from the Applicant and sent a letter to the Applicant on August 8, 2017 acknowledging receipt of the deposit. This letter also noted that the U of S may require a 30 day extension if third party notice is required.

[5] On August 14, 2017, the U of S responded to the Applicant releasing portions of some of the responsive records. The U of S noted an extension would be needed to allow the U of S to respond to the remainder of the request. The U of S relied on subsections 17(1) and 18(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) for the partial denial of access and subsections 12(1)(a) and 12(1)(b) of LA FOIP for the extension of time.

[6] On September 13, 2017, the U of S released additional responsive records. The U of S again notified the Applicant that an additional extension would be needed to respond to the remainder of the Applicant's request. The U of S relied on subsections 17(1) and 18(1) LA FOIP for the partial denial of access and subsection 12(1)(c) of LA FOIP for the extension of time.

[7] On October 2, 2017, the U of S provided its final response to the Applicant releasing the remaining responsive records. The U of S relied on sections 17, 18 and 28 of LA FOIP for the partial denial of access.

[8] On July 8, 2018, the Applicant submitted a request for review to my office. The Applicant stated as follows:

...I received three responses from [name of U of S Access and Privacy Officer]...At the time of receipt, I had no reason to doubt that the University's responses were both comprehensive and transparent.

However, just recently I was made aware of the existence of at least one document within the administrative control of the University of Saskatchewan, which they failed to disclose under the terms of my FOI/ATI request last year... I have included a copy of an e-mail written by [name of U of S Professor] in the College of Agriculture and Bioresources... clearly indicating that a close funding relationship existed in December 2016 between [the U of S Professor]/The University and both [names of two third party corporations] relating to support for the research chair that [name of U of S Professor] occupied in the College...

I am sorry to say that this lack of transparency demonstrates that either (a) the University did not exercise due diligence in making a thorough search for the documentation requested; or (b) that documentation suppressed by [name of U of S Professor], by the College, or even perhaps by the institution as a whole...

[9] On July 13, 2018, my office notified the Applicant and the U of S that I would be undertaking a review of the U of S' application of subsection 6(3) of LA FOIP and their duty to assist the Applicant pursuant to Part VI of LA FOIP.

II RECORDS AT ISSUE

[10] The Applicant has requested my office review the U of S' application of subsection 6(3) of LA FOIP and its duty to assist the Applicant. The Applicant has not requested my office review any exemptions applied by the U of S to the responsive records. As such, there are no records at issue in this review.

III DISCUSSION OF THE ISSUES

1. Does my office have jurisdiction in this matter?

[11] The U of S is defined as a local authority pursuant to subsection 2(f)(xi) of LA FOIP. Therefore, I have the authority to conduct this review.

[12] The U of S, however, has questioned my office's jurisdiction to undertake this particular review as follows:

The university respectfully submits that **the Commissioner does not have jurisdiction to review this matter** and that the Review must be refused or discontinued. Jurisdiction to conduct a review is found in section 39(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), which provides that the Commissioner has authority to review a matter where there are reasonable grounds to review any matter set out in an application pursuant to section 38...

...

"The decision" subject to be reviewed pursuant to 38(1)(a) is that decision pursuant 7(1); i.e. whether to provide access or not, where an application has been made. The university submits that in this case the actions that are purported to be under review occurred prior to an application being made or a decision being made pursuant to that application, and therefore cannot be reviewed. Firstly, **prior to an application crystalizing, an application has not been made and therefore any response or interaction prior to that point is not subject to review.** Further, this is not a request for review of the university's decision to provide access or not.

...

The university submits that it is clear on the face of the Request that there were insufficient particulars...pursuant to section 6(3), [the U of S] invited the applicant to provide further information. It wasn't until this information was received and the university was able to identify the records requested that the application crystalized.

Actions until this point, including providing suggestions as to the scope of the request, are not subject to review as the right to request a review of a section 7 response only arises where an application has crystalized.

In support of this interpretation of the Act, it should be noted that federal and several provincial access to information acts expressly provide that a commissioner or ombudsperson may review *any* decision, act or failure to act as it related to a request – broad jurisdiction to review that is absent in the Saskatchewan legislation.

[emphasis added]

[13] Subsection 39(1) of LA FOIP provides:

39(1) Where the commissioner is satisfied that there are reasonable grounds to review any matter set out in an application pursuant to section 38, the commissioner shall review the matter.

[14] Subsection 38(1)(a) of LA FOIP provides:

38(1) Where:

(a) an applicant is not satisfied with the decision of a head pursuant to section 7, 12 or 36;

...

[15] Subsections 6(4) and 7(2) of LA FOIP provides:

6(4) Where additional details are invited to be supplied pursuant to subsection (3), the application is deemed to be made when the record is identified.

...

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

...

[16] Pursuant to subsection 7(2) of LA FOIP, public bodies have an obligation to respond to an Applicant's access to information request within 30 days. In this case, the U of S raised the application of subsection 6(3) of LA FOIP to the Applicant's request, indicating it required further clarification to process the request. I must determine if it was necessary for the U of S to require additional clarification before the request could be deemed to have been made pursuant to subsection 6(4) of LA FOIP. Determining when the application

was deemed to be made directly influences whether or not the U of S would be in compliance with responding to the Applicant within the legislated timeframe.

[17] It is clear my office has the authority to undertake a review of a decision made by a public body pursuant to section 7 of LA FOIP. When a public body requests clarification pursuant to section 6 of LA FOIP, it could have an effect on the rights of the individual to request access to the local authority's records pursuant to section 5 of LA FOIP and the local authority's obligation to respond to the Applicant's request pursuant to section 7. In order for my office to determine if a public body has appropriately responded to an Applicant's access to information request pursuant to section 7 of LA FOIP, my office also must consider if a request for clarification pursuant to section 6 was appropriate.

[18] As such, I find that I have jurisdiction to undertake this review.

2. Did the Applicant request this review on grounds that are frivolous or vexatious?

[19] The U of S took the position that this request for review submitted by the Applicant is "frivolous, vexatious and an abuse of process and should be refused or discontinued" pursuant to subsection 39(2)(a) of LA FOIP.

[20] Subsection 39(2)(a) of LA FOIP provides:

39(2) The commissioner may refuse to conduct a review or may discontinue a review if, in the opinion of the commissioner, the application for review:

(a) is frivolous or vexatious;

...

[21] The *IPC Guide to Exemptions* provides the following definitions:

Frivolous is typically associated with matters that are trivial or without merit, lacking a legal or factual basis or factual merit; nor serious; not reasonably purposeful; or little weight or importance.

Vexatious means without reasonable or probable cause or excuse. A request is vexatious when the primary purpose of the request is not to gain access to information

but to continually or repeatedly harass a public body in order to obstruct or grind a public body to a standstill. It is usually taken to mean with intent to annoy, harass, embarrass, or cause discomfort.

When considering whether a request for review was made on grounds that are frivolous, vexatious or not in good faith, the Commissioner is determining whether there is a pattern or type of conduct that amounts to an abuse of the right of access. The following factors are considered. Depending on the nature of the case, one factor alone or multiple factors in concert with each other can lead to a finding that a request is an abuse of the right of access:

- *Number of requests*: is the number excessive?
- *Nature and scope of the requests*: are they excessively broad and varied in scope or unusually detailed? Are they identical to or similar to previous requests?
- *Purpose of the requests*: are the requests intended to accomplish some objective other than to gain access? For example, are they made for “nuisance” value, or is the applicant’s aim to harass the public body or to break or burden the system?
- *Timing of the requests*: is the timing of the requests connected to the occurrence of some other related event, such as a court or tribunal proceeding?
- *Wording of the request*: are the requests or subsequent communications in their nature offensive, vulgar, derogatory or contain unfounded allegations?

[22] The U of S’ submission raised concerns about the number of months that had passed before the Applicant submitted the request for review to my office, and that the review was only submitted after the Applicant learned of additional records outside of the scope of the search agreed to between the parties. Additionally, the U of S noted that the Applicant had submitted another access to information request for responsive records in the other area identified, and it had responded to that request. The U of S stated that:

This Request for Review is not reasonably purposeful and the primary purpose is not to gain access to information since the applicant has gained access to the records [they] wished to gain access to. The review process is intended to ensure applicants obtain timely, affordable access to all that they are entitled to... This applicant’s concern is not with our response to his access to information request, but with university policies and procedures, research and industry engagement. Applicants are certainly entitled to request access to records to investigate wrong-doings, but that does not entitle them to abuse the review processes (and public resources) for improper purposes. The request for review process is not meant for maligning the research activities and operations and policies of the university. Again, this applicant has received the records requested and

is not seeking a review for the purpose of obtaining access. For these reasons, the university submits the Commissioner should and must discontinue this review.

[23] It does not appear that there were a large number of requests received by the U of S from this Applicant or that they were overly broad. It appears the Applicant submitted one request, the Applicant agreed to narrow their request for a more focused search. When it was found that additional records existed in another area of the U of S, the Applicant submitted an additional request for records in that area. As far as the timing of this request for review, subsection 7(3) of LA FOIP provides Applicant's with the right to "request a review by the commissioner within one year after the notice is given."

[24] With regard to the purpose of the review, the Applicant submitted an access to information request, and based on a suggestion from the U of S, the Applicant agreed to focus the search for responsive records to two areas. How a public body conducts a search or determines which areas of the organization to search in a search strategy is necessary to ensure a public body is appropriately processing requests and meeting their duty to assist by responding openly, accurately and completely. Finally, it does not appear the Applicant was offensive, vulgar or derogatory in the correspondence between the parties.

[25] I find that the Applicant's request for review was not frivolous or vexatious.

3. Did the U of S appropriately apply subsection 6(3) of LA FOIP to the Applicant's access to information request?

[26] When the U of S initially received the Applicant's access to information request, in June of 2017, the U of S took the position that sufficient details had not been provided and requested the Applicant provide clarification pursuant to subsection 6(3) of LA FOIP.

[27] Subsection 6(3) of LA FOIP provides:

6(3) Where a head is unable to identify the record requested, the head shall advise the applicant, and shall invite the applicant to supply additional details that might lead to identification of the record.

- [28] The U of S indicated that in 2016 the Applicant had submitted a request that was similar to this request in which the U of S and Applicant agreed on a focused search area within the U of S. The U of S again suggested that this request focus on the same two areas within the U of S indicating this is where “most” of the records would be held and proposed that it focus solely on “agreements”. The U of S also requested the Applicant provide a date range for the records they were seeking. The Applicant responded providing a date range and stated they “agree with [the U of S] suggestion that the search for requested documentation be confined at present to the records from the Research Services and Ethics Office and the University Relations Development Office.”
- [29] However, later the Applicant became aware of an agreement that they believed should have been responsive to their request. As this agreement was in an area of the U of S it had not proposed searching, the Applicant questioned how the U of S had reached the conclusion that focusing its search efforts on the two areas of the U of S was appropriate.
- [30] The U of S’ submission provided the following regarding its position for requesting clarification from the Applicant:

Section 6(1)(b) requires an application to specify the subject matter of the record with sufficient particularity as to time, place and event to enable an individual familiar with the subject-matter to identify the record... the request sought all documentation relating to a broad topic without any direction as to time, place or event. The applicant did not identify a record or any record. As [the Applicant] admits, [they] identified a range of research interest. LA FOIP does not require a local authority to conduct research or respond to a fishing expedition on behalf of an applicant. It’s clear on the face of the Request that the applicant did not specify time, place and that a particular record could not be identified.

It is trite to say that the university is a large, diverse organization with activities and operations across the province and beyond. On any given day, there are over 8,200 active employees. There are 17 college and schools. Several of these colleges have numerous departments. The College of Arts and Science, as an example, has 21 departments. There are dozens of administrative units under three vice-presidents... In short, there are at least 31 high level administrative units within these three vice-presidential portfolios, with several divisions below them.

It can be assumed that each of these employees in each of these academic and administrative units across geographic locations has university records of some form in their possession. In these circumstances, when an applicant requests “all

documentation” without an indication as to time, place or event, or record holder or unit, or format, it is not unreasonable to conclude that a particular record cannot be identified.

[31] The U of S has taken the position that clarification pursuant to subsection 6(3) of LA FOIP was necessary to identify records. However, in that same piece of correspondence stating that it could not continue without additional details, they were able to identify two offices where most of the records the Applicant was seeking would be located, based on a similar request from the Applicant in 2016.

[32] In a January 2017 blog developed by my office, *Clarifying Access Request vs. Narrowing the Scope: What they mean vs. What they want*, discusses the difference between clarifying and narrowing the scope:

If an access request is vague, the public body or trustee will generally **need** the applicant to provide additional details in order to identify the records they wish to obtain, which we refer to as **clarifying**. A request is only officially deemed to have been received once the necessary clarification has been provided. If the request is detailed enough to identify the records sought but there is a large volume of records, the public body or trustee **may** engage the applicant in an effort to identify the specific information they are seeking, this is referred to as **narrowing the scope** and doing so is entirely at the applicant’s discretion...

[33] In that blog, our office considers two examples of requests that may be received and when clarifying versus narrowing may be appropriate. Clarifying a request pursuant to section 6 of LA FOIP may be necessary if the public body is not clear on what information or record the Applicant is seeking based on the description provided. Whereas, requests that appear overly broad or would require a large undertaking to search, such as all contracts a public body has entered into, may benefit from a discussion with the Applicant to determine if there is an opportunity to narrow the scope.

[34] While the communication to the Applicant to clarify the request appeared to indicate the U of S required clarification to process the request, it appears the intent was to narrow the request, rather than gain clarification needed to identify the records.

[35] As the U of S already had enough information about the nature of records to suggest to the Applicant that two areas of the U of S would hold the majority of the records they were seeking, it does not appear the U of S required the clarification to process the request. Had the Applicant chose not to narrow the request, the U of S would have been tasked with identifying all of the areas within the U of S where it would be reasonable to search for responsive records, not just the areas that would hold most of the records. Depending on the number of areas of the U of S and the volume of records that would have to be searched, this possibly would have resulted in a fee estimate for the Applicant, however it does not appear the request could not have been processed without the Applicant's clarification. As such, it does not appear that clarification pursuant to subsection 6(3) of LA FOIP was necessary to proceed.

[36] I find that the U of S did not appropriately apply subsection 6(3) of LA FOIP.

[37] As noted earlier, my office has resources on our website that discuss the differences between requesting clarification and narrowing the scope of a request.

[38] My office's resource, *Understanding the Duty to Assist* provides:

The duty to assist requires a public body to make every 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 legislative timeframes. If the access to information request received seems overly broad, it may be because the individual does not have a sophisticated understanding of the public body's mandate and record holdings. Communicating with the applicant at an early stage and throughout the process, will not only help to clarify the request, but also hopefully streamline the search and preparation of records for release. Most importantly, meeting the duty to assist may result in a more satisfactory experience for all involved and perhaps, result in fewer complaints to this office.

[39] In this case, the Applicant's initial access to information request was seeking a variety of different types of records related to five different third party corporations that outlined parameters and conditions for funding, sponsorship or donations. In the U of S' request for clarification pursuant to subsection 6(3) of LA FOIP, the U of S proposed the Applicant

focus their request to agreements held in the two areas where most would be held, the Research Services and Ethics Office and University Relations Development Office.

- [40] The U of S indicated that the suggestions to the Applicant to clarify their request was based on an earlier request from the Applicant of a similar nature, that they believed had been processed in a manner that was satisfactory to the Applicant:

The suggestions in response to the 2016 request were made because the Applicant made an overly broad request, seeking a variety of records relating to the broad topics of funding with a list of corporations and an individual... At the time of the 2016 request, the Access and Privacy Officer had been employed at the [U of S] for seven years, and held a position in Corporate Administration – a centralized business office of the [U of S] with a diverse mandate and broad connections across the [U of S]. The Access and Privacy Officer would have used their knowledge of university organization, administration and operations, and consulted within Corporate Administration and externally as necessary, to identify likely holders of these types of records...

- [41] The U of S took the position that “it is not unreasonable for the university to have assumed the Applicant recalled the basis for narrowing the 2016 request, and that the Applicant knew the plain meaning of ‘most.’”

- [42] When the U of S initially received the request from the Applicant, the Access and Privacy Officer took steps in a timely manner to communicate with the Applicant to determine what records the Applicant was interested in obtaining. In this case, the Applicant did provide a timeframe for the records they were seeking and acknowledges that they did agreed to the proposed narrowing of their request, but indicated this was done based on advice from the U of S and without a full understanding of how it could limit access to records they were seeking. Additionally, the Applicant agreed to narrow their request based on the position of the U of S that it could not process the request without this information. While there are cases where clarification is required pursuant to section 6 of LA FOIP, as noted earlier I have found that the U of S’ request for clarification pursuant to subsection 6(3) of LA FOIP was not necessary for this request.

- [43] However, I do encourage public bodies to communicate with Applicant’s when a request appears overly broad to determine if there is an opportunity to narrow or focus a request to

assist the Applicant in obtaining the records they are seeking. However, this should be presented as an option to the Applicant, not a requirement for processing a request and should not prevent the public body from processing the request if the Applicant does not agree to narrow or focus their request.

[44] While the Applicant expressed concerns about how the U of S reached the conclusion that the search for responsive records be focused on the two suggested areas of the U of S, it appears the Access and Privacy Officer has established a process for determining where it would be reasonable to search for responsive records. The Access and Privacy Officer advised that when processing access to information requests, they would rely on their own knowledge of the university's record holding, based on their experience in a central office and consult others both within their department and in other areas of the U of S to determine where it would be reasonable to search for records.

[45] In this case, the Access and Privacy Officer noted that those considerations would have been made when processing the Applicant's earlier request, the 2016 request, which is not at issue in this review, to make the suggestions to focus the Applicant's 2017 request. As the consultations would have taken place in 2016 to determine where it was reasonable to search for responsive records, the Access and Privacy Officer could not recall exact details of those consultations due to the amount of time that had passed. However, they noted that the Research Services and Ethics Office is "the unit responsible for handling research contracts" and the University Relations Development Office is the area "responsible for fostering and administering sponsorships and donations."

[46] While I have found that clarification pursuant to subsection 6(3) of LA FOIP was not necessary for this request, the actions taken by the U of S appear to have been in an effort to process the request in a manner that would produce the records the Applicant was seeking. Additionally, the U of S' has a process established for determining which areas of the U of S are reasonable to search when processing a request and suggested the Applicant focus its request based on a similar request from the Applicant that it believed had been processed in a satisfactory manner.

[47] The U of S' actions appear to have been in an effort to assist the Applicant in obtaining records they were seeking, while reducing associated fees. Further communication with the Applicant to ensure they understood how the U of S was proposing the request be narrowed and why the U of S was proposing focusing search to specific areas of the U of S may have assisted to ensure both parties fully understood the scope of the modified request.

[48] I recommend that the U of S develop and implement a policy or procedure that defines the difference between clarifying or narrowing the scope of a request in an effort to assist applicants and when clarification is required to identify records pursuant to section 6 of LA FOIP. The U of S should ensure it engages applicants in sufficient communication when taking any action to clarify or narrow a request to ensure both parties understand the scope of the modified request.

[49] I recommend that the U of S develop and implement a policy to reflect the process they have established for determining where it would be reasonable to search for responsive records and ensure their efforts and consultations to develop their search strategy in response to requests are sufficiently documented.

IV FINDINGS

[50] I find that LA FOIP applies and as such, I have jurisdiction to review these matters.

[51] I find that the Applicant's request for review was not frivolous or vexatious.

[52] I find that the U of S did not appropriately apply subsection 6(3) of LA FOIP.

V RECOMMENDATIONS

[53] I recommend that the U of S develop and implement a policy or procedure that defines the difference between clarifying or narrowing the scope of a request in an effort to assist applicants and when clarification is required to identify records pursuant to section 6 of LA

FOIP. The U of S should ensure it engages applicants in sufficient communication when taking any action to clarify or narrow a request to ensure both parties understand the scope of the modified request.

[54] I recommend that the U of S develop and implement a policy to reflect the process they have established for determining where it would be reasonable to search for responsive records and ensure their efforts and consultations to develop their search strategy in response to requests are sufficiently documented.

Dated at Regina, in the Province of Saskatchewan, this 27th day of August, 2019.

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