



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 179-2015

Ministry of Health

November 24, 2015

Summary: The Applicant made an access to information request for two audit reports to the Ministry of Health. The Ministry denied access to the records pursuant to subsections 13(2), 19(1)(b) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that subsection 13(2) and 19(1)(b) did not apply and subsection 29(1) applied to portions of the record.

I BACKGROUND

- [1] On June 22, 2015, the Ministry of Health (Health) received the following access to information request: “Two audit reports: since mid Aug 2, 2012 and mid Feb 2013”.
- [2] In a letter dated July 21, 2015, Health responded to the Applicant by stating that it would be withholding the requested records in their entirety pursuant to subsections 13(2), 19(1)(b), and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [3] On September 22, 2015, my office received a request for review from the Applicant. On September 24, 2015, my office notified the Applicant and Health that it would be undertaking a review.

II RECORDS AT ISSUE

- [4] The records at issue are two audit reports contracted by the Mamawetan Churchill River Regional Health Authority (MCRRHA). One of the audit reports was a forensic audit of the health centre in MCRRHA completed by a consulting firm on the request of Health. It focused on a nurse, who is referred to as “Nurse in Question” throughout the report. Other employees of the health centered were interviewed for the purposes of the forensic audit.
- [5] The second audit report was an internal audit conducted by another consulting firm. This internal report was focused on MCRRHA’s overtime and call-back payment processes for nurses.
- [6] Health identified MCRRHA as the Third Party.

III DISCUSSION OF THE ISSUES

1. Did Health properly apply subsection 13(2) of FOIP?

- [7] Subsections 13(2) of FOIP provides as follows:
- 13(2) A head may refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from a local authority as defined in the regulations.
- [8] In order for subsection 13(2) of FOIP to apply, the following test must be met:
1. Was the information obtained from a local authority?
 2. Was the information obtained implicitly or explicitly in confidence?
- [9] For the first part of the test, I find that Health obtained the two reports from MCRRHA. MCRRHA qualifies as a local authority as defined in the FOIP Regulations.
- [10] For the second part of the test, Health argues that the information was obtained implicitly in confidence from MCRRHA. My office’s *IPC Guide to Exemptions* provides a non-exhaustive list of factors that are to guide public bodies when forming arguments to

support assertions that information was obtained in confidence. Not all parts of the test need to be met in order for subsection 13(2) of FOIP to apply.

Factors to consider when determining whether information was obtained in confidence implicitly include (not exhaustive):

- What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the local authority or the public body?
- Was the information treated consistently in a manner that indicated a concern for its protection by the local authority and the public body from the point it was obtained until the present time?
- Is the information available from sources to which the public has access?
- Does the public body have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially?
- Was there a mutual understanding that the information would be held in confidence? Mutual understanding means that the public body and the party providing the information both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist in addition.

[11] The above is not a test but rather guidance on factors to consider. It is not an exhaustive list. Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled.

[12] In its submission, Health provided the following four arguments to support its position that the information was obtained in confidence:

1. Both documents were clearly marked as “confidential” and MCRHA did not, at any time, indicate to Health that these were not to be held in confidence. In fact, in consultations with MCRHA for the purposes of this Access to Information request, MCRHA requested that the information not be released, which is an explicit statement of confidentiality.
2. MCRHA has, on multiple occasions, denied access to these documents. Health has also denied access to these documents on multiple occasions, indicating that both the local authority and Health handled the documents in a consistent manner.

3. Neither of these documents were disclosed or made available from sources to which the public had access.
4. Given the sensitive nature of the information contained in both documents for the purposes of auditing the potential wrong-doing of employees, neither document was prepared for a purpose that would entail disclosure.

[13] None of the above arguments speaks to the purposes and the circumstances in which Health obtained the information. When I review the records, it appears that the consulting firms had noted that the audit reports were to be confidential between the consulting firm and MCRRHA, not between MCRRHA and Health. If this is the case, it would seem that MCRRHA did not treat this information in confidence by sharing it with Health.

[14] Based on the above, I find that Health has not demonstrated that it obtained the information implicitly in confidence. I find that two-part test for subsection 13(2) of FOIP is not met.

2. Did Health properly apply subsection 19(1)(b) of FOIP?

[15] Subsection 19(1) of FOIP provides:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;

[16] The three part test that must be met is as follows:

1. Is the information financial, commercial, scientific, technical or labour relations information?
2. Was the information supplied by the third party to a public body?
3. Was the information supplied in confidence implicitly or explicitly?

[17] All three parts for the test must be met in order for subsection 19(1)(b) of FOIP to apply. For the third part of the above test, Health refers to its “in confidence” arguments it provided for subsection 13(2) of FOIP. Since I already found that Health’s “in

confidence” arguments are not sufficient earlier, I also find that Health has not met the third part of the test for subsection 19(1)(b) of FOIP. Therefore, I find that subsection 19(1)(b) of FOIP does not apply.

3. Did Health properly apply subsection 29(1) of FOIP?

[18] Health asserts that the information in the audit reports qualifies as employment history of the employees at a health center. It applied subsection 29(1) of FOIP to the entirety of both audit reports.

[19] Subsection 29(1) of FOIP provides as follows:

29(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[20] In order to qualify as personal information that can be withheld pursuant to subsection 29(1) of FOIP, the information must have the following two qualities:

1. The information must identify an individual,
2. The information must be personal in nature.

[21] First, I will determine if the information in the two audit reports identify individuals.

[22] For one of the audit reports, Health acknowledges that it does not name any of the employees. However, it asserts there is enough information in the report to identify the employees. For example, the report names the health center. The name of the health center reveals the village in which the health center is located. The population of the village is just over a thousand people. Further, the reports are about five nurses and there are only ten nurses that work within this particular health center. I agree with Health that there is enough information contained within the one audit report to identify the employees.

[23] The other audit report named employees. The employees are identifiable.

- [24] Next, I need to determine if the information within the two audit reports is personal in nature. Health asserts that the information qualifies as employment history because the audit reports are about the employees facing allegations of wrongdoing in the workplace.
- [25] My office has defined employment history as the type of information that is normally found in a personnel file which includes disciplinary actions taken. Such information would qualify as personal information as defined by subsection 24(1)(b) of FOIP, which provides:
- 24(1) Subject to subsections (1.1) and (2), “personal information” means personal information about an identifiable individual that is recorded in any form, and includes:
- ...
- b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
- [26] It should be noted that the definition of personal information does not include work product. Work product is information generated by or otherwise associated with an individual in the normal course of performing his or her professional or employment responsibilities.
- [27] When I review the forensic audit report, I find that there is indeed information about the employment history of the “Nurse in Question”. However, there is information within the forensic audit report that is not personal information. For example, the recommendations made by the consulting firm to MCRRHA would not qualify as personal information.
- [28] When I review the internal audit report, I find there is indeed information about the employment history of a nurse. However, there is information within this internal audit report that is not personal information. For example, the findings and recommendations made by the consulting firm would not qualify as personal information.
- [29] I recommend that Health conduct a line-by-line review of the two reports pursuant to section 8 of FOIP. It should only apply subsection 29(1) of FOIP to the information that qualifies as personal information.

IV FINDINGS

[30] I find that subsection 13(2) of FOIP does not apply to the record.

[31] I find that that subsection 19(1)(b) of FOIP does not apply to the record.

[32] I find that subsection 29(1) of FOIP applies to some but not all of the information in the records.

V RECOMMENDATION

[33] I recommend that Health conduct a line-by-line review of the records and release portions of the record that do not qualify as personal information pursuant to subsection 29(1) of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 24th day of November, 2015.

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