



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 334-2017

Saskatchewan Health Authority (formerly the Prairie North Regional Health Authority)

July 27, 2018

Summary:

The Applicant submitted an access to information request to the Prairie North Regional Health Authority (PNRHA), which is now a part of the Saskatchewan Health Authority (SHA). The Applicant was refused access to records so he requested a review by the Information and Privacy Commissioner. In the course of the review, the PNRHA/SHA indicated it was relying on subsections 13(1)(b), 13(2), 15(1)(a), 15(1)(b)(i), 16(1)(a), 16(1)(b), 16(1)(c), 16(1)(d), 16(1)(e), 17(1)(e), and section 21 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner found that PNRHA/SHA did not meet its obligations under section 8 of LA FOIP nor did it provide sufficient information to meet its obligation under section 51 of LA FOIP. Since it did not meet its obligation under section 51 of LA FOIP, he found that the PNRHA/SHA could not rely on the discretionary exemptions it claimed. Further, he found that the mandatory exemption claimed by PNRHA/SHA did not apply. He also found that the SHA did not demonstrate it conducted an adequate search for records. Finally, he found that the SHA did not follow its own delegation pursuant to section 50 of LA FOIP. He made a number of recommendations including releasing the records to the Applicant.

I BACKGROUND

[1] In a letter dated June 13, 2017, the Applicant requested the following from Prairie North Regional Health Authority (PNRHA):

I am requesting information pertaining to the proposed purchase of 338384 Alberta Ltd. operating as Lloydminster Emergency Care Services (LECS) by the Prairie North Health Region in September of 2007.

I am requesting copies of all emails, letters, appraisals, and any other relevant documents between the Prairie North Health Region, Ministry of Health and the Minister of Health regarding the authorization and proposed purchase of LECS by the Prairie North Health Region between January 1, 2007 and December 31, 2008.

I am requesting information pertaining to the proposed purchase of 338384 Alberta Ltd. operating as Lloydminster Emergency Care Services (LECS) by the Prairie North Health Region in June of 2009.

I am requesting copies of all emails, letters, appraisals, and any other relevant documents between the Prairie North Health Region, the Ministry of Health, Saskatchewan Minister of Health, Alberta Health Services and the Alberta Minister of Health regarding the authorization and proposed purchase of LECS by the Prairie North Health Region between January 1, 2009 and April 30, 2010.

- [2] In a letter dated September 29, 2017, PNRHA responded to the Applicant. The letter cites sections 13, 16, 17 and 21 of LA FOIP as its reasons for not providing the Applicant records. The letter provides as follows:

Prairie North is not prepared to produce the records requested but is prepared to advise of the records which are known to exist.

We attempted to search records dating back to 2007. We have not located any records for the period 2007-2008. This may be a result of personnel and computer changes. It would be unusual to maintain records for almost a decade in connection with a proposed transaction that was considered but ultimately did not happen. We have also attempted to find paper copies of any records satisfying your request but have not located any in existence for this time period.

We have located records in the 2009 time period including several draft business case scenarios, briefing papers, budget information, costing information, legal advice in that period, settlement discussions with LECS, a draft valuation as well as offers and counter offers and draft contracts between our client and LECS. We are not prepared to produce such records in accordance with sections 13, 16, 17, and 21 of the Act.

- [3] On December 4, 2017, PNRHA amalgamated with other former regional health authorities to form the Saskatchewan Health Authority (SHA). Even though PNRHA processed the access to information request, the SHA has inherited responsibility for this review.

- [4] On December 18, 2017, the Applicant appealed to my office. On January 15, 2018, my office notified both the Applicant and the SHA that it would be undertaking a review. On February 12, 2018, my office received the records at issue and the Index of Records.

[5] According to its Index of Records, the SHA is relying on subsections 13(1)(b), 13(2), 15(1)(a), 15(1)(b)(i), 16(1)(a), 16(1)(b), 16(1)(c), 16(1)(d), 16(1)(e), 17(1)(e), and section 21 of LA FOIP.

II RECORDS AT ISSUE

[6] At issue are 55 records.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction to review this matter?

[7] The SHA is a local authority as defined by subsection 2(f)(xiii) of LA FOIP. Therefore, I have jurisdiction to review this matter.

2. Did the PNRHA/SHA meet its obligations under section 8 of LA FOIP?

[8] Section 8 of LA FOIP provides as follows:

8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

[9] When a local authority receives an access to information request, it must complete a line-by-line analysis of the responsive records to comply with section 8 of LA FOIP. Through this analysis, the local authority is required to determine where a mandatory or discretionary exemption applies and sever those specific portions of the records. Then, it is to release the remainder of the record to the Applicant.

[10] The PNRHA did not disclose any of the 55 records at issue to the Applicant. The PNRHA took a blanket approach to withholding the records at issue. In other words, instead of conducting a line-by-line review of each record to apply exemptions to only portions of the records, SHA withheld records in full. This approach does not comply with section 8 of LA FOIP.

[11] The rule is exceptions to the right of access should be limited and specific. This is supported by a number of Supreme Court of Canada and Federal Court of Appeal decisions. In addition, the Saskatchewan Court of Appeal also took a similar approach in *General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance (1993)* which provides at paragraph [11]:

The Act's basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. That is not to say that statutory exemptions are of little or no significance. We recognize that they are intended to have a meaningful reach and application. The Act provides for specific exemptions to take care of potential abuses. There are legitimate privacy interests that could be harmed by release of certain types of information. Accordingly, specific exemptions have been delineated to achieve a workable balance between the competing interests. The Act's broad provisions for disclosure, coupled with specific exemptions, prescribe the "balance" struck between an individual's right to privacy and the basic policy of opening agency records and action to public scrutiny.

[12] Most of the records at issue are email exchanges, including some email exchanges between the PNRHA and the Applicant, which were withheld in full. This included headers, footers and the body of emails. If PNRHA had undertaken a line-by-line analysis that is required by section 8 of LA FOIP, it would have been able to protect what was necessary and yet make available to the Applicant a greater number of records that clearly do not qualify for exemption.

[13] I find that the PNRHA/SHA has not met its obligations under section 8 of LA FOIP.

3. Is the PNRHA/SHA able to rely on any discretionary exemptions?

[14] Discretionary exemptions are the exemptions introduced with the wording "A head may refuse..." in LA FOIP. This means that the local authority has the option to withhold or release information. The head of the local authority should exercise his or her discretion when deciding whether to apply the exemption. Some factors that should be taken into account when exercising discretion include:

- the general purposes of the Act (i.e. local authorities should make information available to the public, and individuals should have access to personal information about themselves);
- the wording of the discretionary exception and the interests which the exception attempts to protect or balance;
- whether the applicant's request may be satisfied by severing the record and providing the applicant with as much information as is reasonably practicable;
- the historical practice of the local authority with respect to the release of similar types of records;
- the nature of the record and the extent to which the record is significant or sensitive to the local authority;
- whether the disclosure of the information will increase public confidence in the operation of the local authority;
- the age of the record;
- whether there is a definite and compelling need to release the record; and
- whether the Commissioner's recommendations have ruled that similar types of records or information should be disclosed.

[15] Applying discretionary exemptions in a blanket approach suggests that the local authority has not exercised its discretion.

[16] PNRHA applied subsections 13(2), 15(1)(a), 15(1)(b)(i), 16(1)(a), 16(1)(b), 16(1)(c), 16(1)(d), 16(1)(e), 17(1)(e) and section 21 of LA FOIP. These discretionary exemptions appear to have been applied in a blanket fashion. In its submission, the SHA indicated that there is current litigation pending between it and the Applicant's client concerning a contractual dispute relating to ambulance services in Lloydminster. Previously there was a dispute between the former health region and the Applicant's client in approximately 2000. The SHA asserted that the Applicant's access to information requests are:

...aimed at gaining information pertaining to this dispute which is now scheduled to proceed by arbitration. An arbitrator has already been appointed. Many of the records that are sought were prepared in contemplation of this dispute or the previous one, to develop a position in regards to that dispute, to obtain legal advice, to engage in discussions with the Alberta provider and to help in contractual negotiations.

[17] SHA indicated that “the background that led to these FOIP requests” impacts the positions that it has taken in regards to the production of certain documents. Explaining the background that led to the Applicant making the access to information requests is not enough to fulfill its responsibility pursuant to section 51 of LA FOIP, which provides:

51 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[18] In a review, the SHA has the obligation to persuade the Commissioner to decide that an exemption applies to a record. In order to meet this obligation, the SHA should provide my office with evidence and arguments in an effort to prove that an exemption applies to a record.

[19] In a review, evidence may include the records at issue. The SHA has provided my office with the records at issue. However, it provided no arguments except for explaining that there is a contractual dispute between it and the Applicant’s client, which is summarized above.

[20] My office’s resource, *IPC Guide to Exemptions*, provides the tests that should be met in order for an exemption to apply. In an email dated January 15, 2018, my office sent a link to this resource to the SHA. To further assist the SHA, my office’s email also listed the specific page numbers that outlines the tests for each exemption that the SHA cited.

[21] The SHA did not provide any arguments as to how the test for each discretionary exemption was met. Without any information as to how these discretionary exemptions apply, I cannot find that any of these discretionary exemptions apply.

[22] My office needs sufficient information to make it clear what and why exemptions are applied in order for a review to be a reasonable exercise. I find that SHA has not provided sufficient information to meet its obligation under section 51 of LA FOIP.

4. Is the PNRHA/SHA able to rely on mandatory exemptions?

[23] Mandatory exemptions are introduced with the wording “A head shall refuse...”. This indicates that there is no option but to refuse access to the information if the legislative

criteria are met. The mandatory exemption that the SHA indicated it was relying on is subsection 13(1)(b) of LA FOIP. Since the SHA did not provide arguments about how this mandatory exemption applies, I must then determine, on the face of the records, if this mandatory exemption applies to the records.

[24] Subsection 13(1)(b) of LA FOIP provides as follows:

13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:

...
(b) the Government of Saskatchewan or a government institution

[25] This provision is meant to protect information received in confidence from the Government of Saskatchewan or a government institution unless the Government of Saskatchewan or government institution consented to the release of the information or made it public.

[26] The following two-part test must be met in order for subsection 13(1)(b) of LA FOIP to apply:

1. Was the information obtained from the government of Saskatchewan or a government institution?
2. Was the information obtained implicitly or explicitly in confidence?

[27] SHA applied subsection 13(1)(b) of LA FOIP to the following records:

- Ext CT1
- Ext CT2
- Ext CT3
- Ext CT4
- Internal CT31b
- Internal CT36
- Ext CT9
- Ext CT10
- Internal Binder CT7

[28] Based on a review of the records, I find that subsection 13(1)(b) of LA FOIP does not apply. This is because it appears that 1) the PNRHA/SHA is providing, not obtaining,

information and/or 2) on the face of the records, it is not evident that the information was obtained in confidence. Two examples are as follows:

- Record “Internal Binder CT7” is an email exchange between PNRHA employees. Attached to one of the emails is a briefing note by the PNRHA for the Ministry of Health. The PNRHA is providing, not obtaining, information from the Ministry of Health. I find that subsection 13(1)(b) of LA FOIP does not apply.
- Record “Internal CT36” is an email exchange among PNRHA employees. On the face of the record, there does not appear to be information obtained in confidence from the Government of Saskatchewan.

[29] I find that the SHA has not met its obligation under section 51 of LA FOIP. I find that subsection 13(1)(b) of LA FOIP does not apply to the records listed at paragraph [27].

5. Did the PNRHA/SHA conduct an adequate search?

[30] Section 5 of LA FOIP provides an Applicant the right of access in the possession or control of a government institution:

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.

[31] LA FOIP requires that a local authority demonstrate that it has conducted a reasonable search to locate the 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 of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances.

[32] When conducting a review of a local authority’s search efforts, details are requested that help my office understand the local authority’s search strategy and the level of effort made to locate the records responsive to the Applicant’s access to information request. The submission to my office should outline the search strategy conducted, which can include:

- For general requests – tie the subject matter of the request to the departments/divisions/branches 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 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 organizations 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 public body's control have been searched such as a contractor or information service provider.
 - Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Which folders within the records management system were searched and explain how these folders link back to the subject matter requested?
 - For electronic folders – indicate what key terms were used to search if applicable.
- On what dates did each employee search?
- How long did the search take for each employee?
- What were the results of 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 the IPC resource, Using Affidavits in a Review with the IPC available on our website.

[33] The above list is meant to be a guide. Providing the above details is not a guarantee that the IPC will find that the search efforts were reasonable. Each case will require different search strategies and details depending on the records requested.

[34] In its submission, SHA indicated the PNRHA searched the emails of six employees. It did not explain PNRHA's search strategy. For example, it did not explain who these six employees are and why they were chosen to conduct a search for records. Providing such information can help in persuading my office that the PNRHA conducted an adequate search for records.

[35] The SHA indicated that PNRHA used the following keywords to search emails:

- "Lloydminster Emergency Care Services" AND Sale,
- "338384 Alberta Ltd" AND Sale,
- LECS and Sale,
- LECS AND (purchase OR buy OR sell),
- LECS AND Acquisition,
- Lloyd Ambulance AND Acquisition,
- "Lloydminster Emergency Care Services" AND (purchase OR buy OR sell),
- LECS AND (Assign OR sell OR purchas [sic] OR Contract).

[36] When I consider the Applicant's request, I find that the above search terms to be appropriate.

[37] The SHA did not elaborate if PNRHA searched for any other electronic records such as records stored in an electronic document repository, case file management system, or stored locally on individual employees' hard drives. Therefore, I cannot find that the PNRHA conducted an adequate search for electronic records.

[38] The SHA then said PNRHA searched the hard copy files of eight employees. It did not elaborate on who the above individuals are and where each of them searched. Based on the Index of Records, it appears that paper records stored in binders were located by one employee. The Index of Records does not indicate whether or not other employees located paper records. It would have been helpful to explain how the records management system

is organized (both paper and electronic), how records are classified, which records were searched, and why it searched those particular records.

[39] The SHA also indicated that the PNRHA searched the “Regional Administration files” but it did not elaborate what these files are, how PNRHA searched through these files, and the outcome of PNRHA’s search.

[40] Finally, the SHA indicated that the PNRHA was unable to locate any emails prior to 2009 because its email server only went back to 2009. It said that some of the employees involved in the time period specified in the Applicant’s access request are no longer with the PNRHA/SHA.

[41] The PNRHA/SHA is responsible for emails from prior to 2009. These emails should be filed and classified within a records management system, retained in accordance with a records schedule, and then destroyed once its retention period expires. If emails have been destroyed, then a destruction certificate should exist to document the emails destruction.

[42] Further, employees leaving the PNRHA/SHA is not a sufficient reason for not locating records. Records (including emails) should not disappear when employees leave the SHA. The SHA is still responsible for the records. The SHA, however, did not provide my office with any policies or procedures as to how it (or PNRHA) manages records (including emails) of employees who leave the PNRHA/SHA, nor did it provide my office a copy of its record schedule or destruction certificates.

[43] Overall, based on the scant information provided to my office of its search for records, I cannot find that PNRHA conducted an adequate search for records.

6. Does the PNRHA/SHA have a delegation in place to ensure compliance with LA FOIP?

[44] The head of a local authority is responsible for making decisions under LA FOIP. The head may delegate its powers to one or more officers or employees of the local authority pursuant to section 50 of LA FOIP, which provides as follows:

50(1) A head may delegate to one or more officers or employees of the local authority a power granted to the head or a duty vested in the head.

(2) A delegation pursuant to subsection (1):

(a) is to be in writing; and

(b) may contain any limitations, restrictions, conditions or requirements that the head considers necessary.

[45] It is important that all delegated officers or employees know and understand their delegated responsibilities. It is also important that others in the organization understand that only those with delegated responsibilities under LA FOIP should be carrying out those duties and functions.

[46] The SHA has a written delegation pursuant to section 50 of LA FOIP, which came into effect on December 4, 2017. It indicates that the Vice President, Infrastructure, Information and Support is the head and lists the Privacy Officers who are responsible for carrying out duties and functions under LA FOIP. It does not appear that neither the head nor any of the officers or employees of the SHA with delegated responsibility was involved in preparing the records, index of records, or the submission for this review. I find that the SHA has not followed its own delegation pursuant to section 50 of LA FOIP.

IV FINDINGS

[47] I find that the PNRHA/SHA has not met its obligations under section 8 of LA FOIP.

[48] I find that the SHA has not provided sufficient information to meet its obligation under section 51 of LA FOIP.

[49] Because SHA has failed to meet the obligations under section 51 of LA FOIP, I find that SHA cannot rely on the discretionary exemptions claimed.

[50] I find that the SHA has not met its obligation under section 51 of LA FOIP. I find that subsection 13(1)(b) of LA FOIP does not apply to the records listed at paragraph [27].

[51] I find that the SHA has not provided my office with enough information to conclude that PNRHA conducted an adequate search for records.

[52] I find that the SHA has not followed its own delegation pursuant to section 50 of LA FOIP.

V RECOMMENDATIONS

[53] I recommend that the SHA release the records to the Applicant.

[54] I recommend that the SHA conduct another search for records, documenting its search strategy, efforts, and outcomes of this search and that it provide the Applicant with any additional records it locates.

[55] I recommend that the SHA ensure that it follows its own delegation pursuant to section 50 of LA FOIP and that either the head and/or its Privacy Officers are processing access to information requests under LA FOIP and preparing the records, index of records, and submissions in reviews with my office.

Dated at Regina, in the Province of Saskatchewan, this 27th day of July, 2018.

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