

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 082-2015

Sunrise Regional Health Authority

Summary: Sunrise Regional Health Authority (Sunrise) received a request for a Master Services Agreement (MSA) between two third parties. Sunrise did not have possession of the MSA but did identify a Costing Model Template (CMT) that was also responsive to the request. As a result of the review the Commissioner found that Sunrise had control over MSA. He found that subsections 18(1)(a), (b) and (c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) did not apply to the MSA or CMT. He recommended the MSA and CMT be released to the Applicant. He also recommended that Sunrise clarify its LA FOIP obligations in written agreements with 3sHealth.

I BACKGROUND

- [1] The Applicant made an access request to the Sunrise Regional Health Authority (Sunrise) on February 13, 2015 for “A copy of the Master Services Agreement (contract) signed by 3sHealth and K-Bro Linen Systems in December 2013”.
- [2] Sunrise did not have a copy of the Master Services Agreement (MSA) in question, but it did have a record entitled “Acute Care Facilities Costing Model Template” (CMT) which Sunrise identified as being responsive to the Applicant’s request.
- [3] 3sHealth is a third party in this review. Sunrise contacted 3sHealth on February 23, 2015 to request a copy of the MSA so it could respond to the request. On March 5, 2015, 3sHealth sent a memorandum to the access and privacy officials of all the regional health authorities (RHAs) indicating that a copy of the MSA had not been provided to the RHAs and suggesting how they should respond to access requests for this document.

- [4] On March 10, 2015, Sunrise wrote a letter to 3sHealth indicating that although it did not have possession of the MSA, it believed it did have control of the record. The letter also identified 3sHealth as an organization that may have third party interests in the MSA and the CMT. It indicated that Sunrise intended to release both the MSA and CMT pursuant to subsection 18(3) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Pursuant to section 33 of LA FOIP, Sunrise gave 3sHealth 20 days to raise any objections.
- [5] In response, on March 13, 2015, 3sHealth indicated to Sunrise that it objected to the release of both records and raised subsections 18(1)(a), (b) and (c) of LA FOIP.
- [6] On April 7, 2015, the Applicant received a letter from Sunrise stating that access to the MSA had been denied pursuant to subsection 18(1)(c) of LA FOIP. The letter also indicated that Sunrise has decided to provide access to the CMT, however, pursuant to subsection 36(2)(b), 3sHealth would have 20 days to request a review from my office.
- [7] On April 9, 2015, the Applicant requested a review by my office of Sunrise's decision to withhold the MSA.
- [8] On April 15, 2015, 3sHealth requested a review by my office of Sunrise's decision to release the CMT.
- [9] On April 17, 2015, 3sHealth provided a redacted version of the MSA to Sunrise. A copy was also provided to the Applicant. However, the Applicant still wished to continue with the review of the decision to withhold the severed portions of the MSA.
- [10] On April 23, 2015, my office provided notification to the Applicant, Sunrise and 3sHealth of our intention of undertaking these reviews. In addition, my office identified a second third party, K-Bro Linens (K-Bro). Notification of these reviews was provided to K-Bro.

[11] This Report is divided into two parts. The first addresses the review of Sunrise's decision to withhold the MSA. The second addresses the review of Sunrise's decision to release the CMT.

II RECORDS AT ISSUE

PART A – MSA

[12] The MSA is 264 pages. Portions of 61 pages have been severed.

[13] K-Bro has categorized the severed portions of the MSA as follows:

- Quality Assurance Standards (severed portions on pages 99-101, 103-105, 108-125)
- Transition procedure (severed portions on page 39)
- Soft landing procedures (severed portions on page 189)
- Pricing, terms, rates and adjustments (severed portions on pages 127-128, 131-133, 136-165)

[14] K-Bro has indicated it believes that subsections 18(1)(a), (b) and (c) of LA FOIP apply to the MSA.

PART B - CMT

[15] The CMT is 17 pages (a pdf version of a Microsoft Excel workbook). The Applicant has not received any part of the document. K-Bro has indicated it believes subsections 18(1)(a), (b) and (c) of LA FOIP apply to the CMT.

III DISCUSSION OF THE ISSUES

PART A – MSA

1. Does Sunrise have control of the record?

[16] Section 5 of LA FOIP states:

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.

[17] Section 5 is clear that access can be granted provided the records are in the possession or under the control of a local authority.

[18] My office has stated that 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 the local authority has the authority to manage the record, including restricting, regulating and administering its use, disclosure or disposition.

[19] In this case, Sunrise only has possession of the portions of the MSA that have not been severed. It does not have possession of the severed portions that are under review.

[20] 3sHealth has challenged whether the MSA is under the control of Sunrise.

[21] Before I can make a decision on whether section 18 of LA FOIP applies to the MSA, which could result in a recommendation that Sunrise release additional portions to the Applicant, I must first determine if Sunrise has control of the MSA.

[22] In the past, my office has used the following 15 criteria for determining any measure of control:

1. The record was created by a staff member, an officer, or a member of the public body in the course of his or her duties performed for the public body;
2. The record was created by an outside consultant for the public body;
3. The public body possesses the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory or statutory or employment requirement;
4. An employee of the public body possesses the record for the purposes of his or her duties performed for the public body;
5. The record is specified in a contract as being under the control of a public body and there is no understanding or agreement that the records are not to be disclosed;
6. The content of the record relates to the public body's mandate and core, central or basic functions;

7. The public body has a right of possession of the record;
8. The public body has the authority to regulate the record's use and disposition;
9. The public body paid for the creation of the records;
10. The public body has relied upon the record to a substantial extent;
11. The record is closely integrated with other records held by the public body;
12. A contract permits the public body to inspect, review and/or possess copies of the records the contractor has produced, received or acquired;
13. The public body's customary practice in relation to possession or control of records of this nature in similar circumstances;
14. 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
15. The owner of the records.

[23] All 15 criteria do not have to be met in order to find that a public body has a measure of control. In addition, this is a non-exhaustive list. In other words, there may be other criteria that could persuade me that Sunrise does or does not have control of the MSA.

Was the record created by an outside consultant for Sunrise?

[24] Sunrise qualifies as a local authority pursuant to subsection 2(f) of LA FOIP.

[25] Neither 3sHealth, nor K-Bro, qualify as local authorities pursuant to subsection 2(f) of LA FOIP. However, in the context of this review, they both qualify as third parties pursuant to subsection 2(k) of LA FOIP.

[26] It is unusual for my office to consider whether a local authority would have control over an agreement between two third parties. However, in this case, it appears that the MSA has significant implications for Sunrise. It appears that 3sHealth is acting as a contractor that has procured laundry services for Sunrise.

[27] 3sHealth is a corporation created by statute under *An Act to Incorporate Saskatchewan Health-Care Association*. Its mandate is to enhance shared services among RHAs and the Saskatchewan Cancer Agency. These functions were once part of the Saskatchewan Association of Health Organizations (SAHO), out of which 3sHealth was formed. One of 3sHealth's projects was to procure laundry services for the RHAs. Through a request for proposal (RFP) process, 3sHealth examined the appropriateness of different laundry

service providers for RHAs. This would be the role of an outside consultant or agent. 3sHealth also made the decision that K-Bro was the best laundry provider and has procured those services on behalf of the RHAs. Therefore, 3sHealth fills more than an outside consultant role for Sunrise and the other RHA, it fills a contractor role for Sunrise.

[28] With its submission which claimed Sunrise did not have control of the MSA, 3sHealth provided my office with a copy of a master services agreement between SAHO and Sunrise, dated September 27, 2007.

[29] 3sHealth's submission stated:

Typically, 3sHealth provides services to the Region pursuant to service schedules signed under a master services agreement between 3sHealth (formerly SAHO) and the Region, dated September 27, 2007.

In the case of the Provincial Linen Services Project, no service schedule was entered into between 3sHealth and the Region. Instead, a letter dated December 13, 2013 was provided to the Region that outlined 3sHealth's negotiations and agreement with K-Bro.

[30] Upon review of the above agreement, which Sunrise and 3sHealth accepts applies to their relationship, I note some of the more relevant clauses.

[31] Article 12.1 provides:

12.1 Compliance with Laws

Each Party agrees it will perform its responsibilities under this Agreement in accordance with all applicable statutes, regulations and other laws. In the event that a party discovers that it, or the other party, may be in contravention of its obligations pursuant to this Article 12, such party shall identify such contravention to the other party.

[32] LA FOIP is a law that Sunrise has obligations under. In this case, it has a duty to provide access to information where legally required. It cannot provide a record if it cannot get an unredacted copy. It cannot provide a contract which it has obligations under if it cannot get a copy of that contract. If there is a denial to provide an unredacted copy of a

contract by 3sHealth, it prevents Sunrise from complying with its obligations under FOIP.

[33] Clause 9.2(b) provides

The Parties agree that:

...

(b) use or disclosure of the Region Confidential Information or SAHO Confidential Information may be made by the other Party to the extent required by law, including without limitation, to the extent that it is necessary for either Party to comply with the ongoing reporting requirements of the Provincial Auditor.

[34] Use or disclosure can be made in accordance with the law. LA FOIP is part of Saskatchewan's law. This clause confirms for me that Sunrise can use or disclose the unredacted contract according to LA FOIP. 3sHealth has to provide an unredacted copy before Sunrise can complete its obligations under LA FOIP.

[35] Clause 13.4(b) provides:

(b) Each Party shall be given notice of the Third Party Contracts in the Service Schedule and have the right to review the Third Party Contracts of the other Party prior to executing a Service Schedule;

[36] Sunrise has not signed a Service Schedule but I would presume it would have to sign one prior to receiving service. Sunrise has a clear unambiguous right to review the contract. It is hard to review a contract without receiving an unredacted copy. I conclude, based on this agreement which Sunrise and 3sHealth agrees applies to their relationship, unquestionable gives Sunrise control over obtaining an unredacted copy of the MSA.

[37] I find the MSA is under the control of Sunrise. After my office shared the draft report, 3sHealth provided an unredacted copy of the MSA to Sunrise.

[38] My office has said in the past that a public body cannot contract out of access and privacy legislation. In other words, when contracting on a fee for service basis with some other organization, Sunrise should carefully consider how access to information and privacy should be addressed. That may require specific provisions in contracts to meet its obligations under LA FOIP. While I have found that Sunrise does have control of the

record, I would expect there to be more explicit language in an agreement between 3sHealth and Sunrise.

[39] Further, 3sHealth has also indicated the following:

In addition to the facts noted in the Draft Report, please note the following additional facts. 3sHealth is currently undertaking a partnership review to strengthen the existing relationship and governance between 3sHealth and all of the health regions. This review will include the establishment of a new partnership agreement and service schedules (including a specific schedule for the laundry services at issue in the above-noted matter) between 3sHealth and the health regions.

[40] I also note subsection 33.1(2) of *The Regional Health Services Act* which states:

33.1(2) No regional health authority shall make any payments or provide any funding to a health care organization mentioned in subsection (1) for health services provided by that health care organization unless the regional health authority has a written agreement with the health care organization.

[41] If 3sHealth were a health care organization, Sunrise would be obliged to have an agreement before it could make payments. In exploring ways to make the relationship between RHAs and 3sHealth more transparent and accountable, I will recommend to the Minister of Health that 3sHealth be made a health care organization for the purposes of *The Regional Health Services Act*.

[42] The current agreement between 3sHealth and Sunrise does not sufficiently recognize Sunrise's obligations under LA FOIP and that it has the right to require unredacted copies of records pertaining to it in the possession of 3sHealth. With the partnership review described by 3sHealth in mind, I will recommend that the agreement between 3sHealth and Sunrise be revised.

Other Criteria

[43] I have reviewed the other criteria in the context of this review. Most of the remaining criteria weigh in favour of finding the contact is under the control of Sunrise. However, I will not discuss them in this report because the issues discussed are enough to persuade me that the MSA is under the control of Sunrise.

2. Does subsection 18(1)(c) of LA FOIP apply to the withheld portions of the MSA?

[44] K-Bro has supplied my office with an unredacted copy of the MSA for use in this review.

[45] Subsection 18(1)(c) of LA FOIP states:

18(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(c) information, the disclosure of which could reasonably be expected to:

(i) result in financial loss or gain to;

(ii) prejudice the competitive position of; or

(iii) interfere with the contractual or other negotiations of;
a third party; or

[46] My office has stated that the phrase, “could reasonably be expected to” result in any loss or gain, prejudice or interfere with, requires the harms test to be applied. A harms test is a set of criteria used to determine whether disclosure of records or information could reasonably be expected to cause harm to a particular interest. The harms test is as follows:

1. There must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
2. The harm caused by the disclosure must be more than trivial or inconsequential;
and
3. The likelihood of harm must be genuine and conceivable.

[47] K-Bro has categorized the severed portions of the MSA as follows:

- Quality Assurance Standards
- Transition procedure
- Soft landing procedures
- Pricing, terms, rates and adjustments

[48] With respect to the Quality Assurance Standards, K-Bro’s submission stated that release of this information could reasonably be expected to interfere with contractual or other negotiations because future potential customers might “demand a similar quality assurance standard”. It also stated that its competitors might use these standards as benchmarks in future bids. However, its submission also stated that the “quality

assurance standard depends on the specific standard of the customer in each case and what has been negotiated with the particular customer.” It also stated: “The quality assurance standard guaranteed by K-Bro varies between contracts depending on factors such as the facilities available...” If multiple factors must come in to play for each negotiated contract, I see no cause and effect relationship between release of the information at issue and future negotiations. Therefore, the first part of the test is not met. Subsection 18(1)(c) does not apply to this category of information.

[49] With respect to the other types of information: transition period, soft landing and pricing, terms, rates and adjustments, K-Bro has indicated that it believes that release of this information could reasonably be expected to prejudice its competitive position or interfere with future negotiations. My office has found in the past that there is precedent from other jurisdictions that demonstrates that there is no clear cause and effect relationship between disclosures of contracts and the negotiation of future potential contracts. This office has also said that disclosure, not secrecy, is the default for records of this sort. K-Bro has not demonstrated that there are any extraordinary circumstances to cause me to deviate from this view in this case. Further, the Applicant’s submission pointed to an Order F10-28 from BC’s Office of the Information and Privacy Commissioner (OIPC). It considered a contract between K-Bro and an RHA in BC. The BC OIPC found that K-Bro did not demonstrate that the release of the contract could reasonably be expected to harm third party interests. The Order went to judicial review and the petition was dismissed.

[50] Finally, K-Bro specifically flagged an Annual Inflation Adjustment Formula and a price adjustment formula in the event of an order by a body such as the Saskatchewan Labour Relations Board or a court imposing a collective bargaining agreement on K-Bro. It specifically noted that release of this information could reasonably be expected to interfere with negotiations with trade unions. These formulas outline adjustments for labour related costs. I assume these formulas were developed to directly offset increases in labour costs. K-Bro has not explained how it would influence any negotiations. There is no clear cause and effect.

[51] Subsection 18(1)(c) of LA FOIP does not apply to the MSA.

3. Do subsections 18(1)(a) and (b) of LA FOIP apply to the withheld portions of the MSA?

[52] K-Bro's submission indicates that if subsection 18(1)(c) of LA FOIP did not apply to the MSA, it wanted the opportunity to make representations on subsections 18(1)(a) and (b) of LA FOIP to the withheld portions of the MSA.

[53] Subsections 18(1)(a) and (b) of LA FOIP state:

18(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

(a) trade secrets of a third party;

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

[54] My office has established a three part test for subsection 18(1)(b) of LA FOIP 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?

[55] Generally, my office has found in the past that similar information as to what has been withheld from the MSA would not meet the second part of the test. The contents of a contract involving the public body and a third party will not normally qualify as having been supplied by a third party. The provisions of a contract, in general, have been treated as *mutually generated*, rather than supplied by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.

[56] K-Bro's submission says that Sunrise had no part in negotiating this contract as it was negotiated through 3sHealth. However, as noted earlier, 3sHealth was acting as a contractor to procure laundry services for Sunrise. Therefore, 3sHealth was acting as an

extension of Sunrise. K-Bro did not “supply” the information to 3sHealth which was working on behalf of Sunrise, it was mutually generated. Therefore, the second part of the test is not met. Subsection 18(1)(b) of LA FOIP does not apply to the MSA.

[57] With respect to subsection 18(1)(a) of LA FOIP, my office has defined trade secret as information, including a formula, pattern, compilation, program, device, product, method, technique or process:

- i. that is used, or may be used, in business or for any commercial purpose;
- ii. that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use;
- iii. that is the subject of reasonable efforts to prevent it from becoming generally known; and
- iv. the disclosure of which would result in significant harm or undue financial loss or gain.

[58] The information must meet all of the above criteria to be considered a trade secret. Further, the third party must also be able to prove ownership or a proprietary interest in the trade secret or prove a claim of legal right to the information.

[59] Order 315-1999 from the BC OIPC found that information in a contract in that case could not be a trade secret. It stated:

In my view, the negotiated agreements do not constitute “trade secrets” within the meaning of the Act. Even if I accept that the information in the agreements is used or may be used in business or for commercial advantage, I am unable to conclude that the information derives independent economic value from not being generally known. The evidence fails to establish what actual or potential economic value the negotiated information has, or how someone would derive economic value from that information. In view of my conclusion on this branch of the test, it is not necessary to consider whether the information was the subject of reasonable efforts to prevent disclosure and whether disclosure would result in harm or improper benefit.

[60] I am of the same view and in this case the second part of this test is not met. Subsection 18(1)(b) does not apply to the withheld portions of the MSA.

PART B – CMT

4. Do subsections 18(1)(a), (b) and (c) of LA FOIP apply to the CMT?

[61] K-Bro has indicated that it believes that subsections 18(1)(a), (b) and (c) of LA FOIP also apply to the CMT. The tests for these subsections are outlined above.

[62] The information in the CMT is the same pricing, terms, rates and adjustments information found in the MSA that was either withheld from or provided to the Applicant. For the same reasons noted above, subsections 18(1)(a), (b) and (c) do not apply to this information.

IV FINDINGS

[63] I find that the MSA is under the control of Sunrise.

[64] I find that subsections 18(1)(a), (b) and (c) of LA FOIP do not apply to the MSA or the CMT.

V RECOMMENDATIONS

[65] I recommend that Sunrise provide a copy of the MSA to the Applicant. This should occur 30 days after Sunrise gives its written decision to the Third Party pursuant to sections 45 and 46 of LA FOIP.

[66] I recommend that Sunrise provide a copy of the CMT to the Applicant. This should occur 30 days after Sunrise gives its written decision to the Third Party pursuant to sections 45 and 46 of LA FOIP.

[67] I recommend that Sunrise and 3sHealth update the Master Service agreement between the health regions and SAHO dated September 27, 2007 to clarify that Sunrise has obligations under LA FOIP and that it has the right to require unredacted copies of records pertaining to it in the possession of 3sHealth.

[68] I recommend the Minister of Health consider designating 3sHealth as a health care organization for the purposes of *The Regional Health Services Act*.

Dated at Regina, in the Province of Saskatchewan, this 17th day of July, 2015.

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