



REVIEW REPORT 004-2018

Ministry of Labour Relations and Workplace Safety

December 20, 2018

Summary: The Applicant submitted an access to information request to the Ministry of Labour Relations and Workplace Safety (LRWS). LRWS refused the Applicant access to the responsive records pursuant to subsections 16(1), 15(1)(a), 15(1)(d), 17(1)(a), 17(1)(b)(i), 17(1)(b)(ii), 17(1)(b)(iii), 18(1)(a), 18(1)(d) and section 22 of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that LRWS appropriately applied subsection 16(1) of FOIP to portions of the responsive records. The Commissioner also found that LRWS had not properly applied section 22 of FOIP to the responsive records. The Commissioner recommended that LRWS continue to withhold the portions of the records where subsection 16(1) of FOIP was found to apply and release the remaining portions of the records.

I BACKGROUND

- [1] On October 25, 2017, the Applicant submitted an access to information request to the Ministry of Labour Relation and Workplace Safety (LRWS) requesting all Deputy Minister emails “received from or sent to [a specified @saskparty.com email address] – or referencing [the specified @saskparty.com email address]” from January 1, 2014 to present.
- [2] On November 22, 2017, the Applicant received a response from LRWS applying subsection 6(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP) requesting further information before proceeding with processing the request.

- [3] On January 2, 2018, LRWS provided a second response to the Applicant advising access to the requested records was refused in full pursuant to subsections 15(1)(d), 17(1)(a), 17(1)(b)(i), 17(1)(b)(ii), 17(1)(b)(iii), 17(1)(d) and 18(1)(d) of FOIP.
- [4] On January 9, 2018, the Applicant submitted a request for review to my office for the denial of access.
- [5] On January 19, 2018, my office notified both LRWS and the Applicant of my intention to undertake a review of this matter.
- [6] LRWS' submission to my office provided arguments on the application of subsections 15(1)(a), 15(1)(d), 16(1), 17(1)(a), 17(1)(b)(i), 17(1)(b)(ii), 17(1)(b)(iii), 18(1)(a), 18(1)(d) and section 22 of FOIP to the responsive record. However, LRWS later chose to waive the claim of section 15 and 17 of FOIP. As well, LRWS did not apply any exemptions to page two of the responsive record and instead indicated it was non-responsive to the request.

II RECORDS AT ISSUE

- [7] The record consists of nine pages. Pages one and two are an email thread and pages three through nine are an attached PowerPoint presentation.

III DISCUSSION OF THE ISSUES

1. Does my office have jurisdiction in this matter?

- [8] LRWS is a "government institution" as defined at subsection 2(1)(d)(i) of FOIP. Thus, my office has jurisdiction to conduct this review.

2. Does subsection 16(1) of FOIP apply to the record?

- [9] Subsection 16(1) of FOIP provides:

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

(a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;

(b) agendas or minutes of the Executive Council or any of its committees, or records that record deliberations or decisions of the Executive Council or any of its committees;

(c) records of consultations among members of the Executive Council on matters that relate to the making of government decisions or the formulation of government policy, or records that reflect those consultations;

(d) records that contain briefings to members of the Executive Council in relation to matters that:

(i) are before, or are proposed to be brought before, the Executive Council or any of its committees; or

(ii) are the subject of consultations described in clause (c).

[10] Subsection 16(1) of FOIP is a mandatory exemption. Subsections 16(1)(a) through (d) of FOIP are not an exhaustive list. Therefore, even if none of the subsections are found to apply, the introductory wording of subsection 16(1) of FOIP must still be considered. In other words, is the information a confidence of Executive Council?

[11] *Executive Council* consists of the Premier and Cabinet Ministers. Executive Council is also referred to as “Cabinet” (Government of Saskatchewan, Cabinet Secretariat, Executive Council, *Executive Government Processes and Procedures in Saskatchewan: A Procedures Manual*, 2007, at p. 16). Treasury Board is a committee of the Executive Council and is therefore also captured by the exemption. (Review Report 041-2015 at paragraph [8])

[12] *Cabinet confidences* can generally be defined as:

...in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public.

(*Federal Access to Information and Privacy Legislation Annotated 2015* (Canada: Thomson Reuters Canada Limited, 2014) at page 1-644.4.)

- [13] The *IPC Guide to Exemptions* provides that subsection 16(1)(a) of FOIP applies to records that contain advice, proposals, recommendations, analyses or policy options developed from sources outside of the Executive Council for presentation to the Executive Council is intended to be covered by the provision.
- [14] *Advice* includes the analysis of a situation or issue that may require action and the presentation of options for future action. It includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.
- [15] *Recommendations* relate to a suggested course of action as well as the rationale for a suggested course of action. Recommendations are generally more explicit and pointed than advice.
- [16] *Proposals and analyses or policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages or disadvantages of particular courses of action.
- [17] Some examples are:
- an agenda, minute or other record that documents matters addressed by Cabinet (e.g. a list of issues tabled at Cabinet that reflects the priorities of Cabinet);
 - a letter from Cabinet or a Cabinet committee that relates to the discussion or consideration of an issue or problem, or that reflects a decision made but not made public (e.g. a letter from Treasury Board to a ministry executive stating a decision that affects the ministry's budget but which has not been announced);
 - a briefing note placed before Cabinet or one of its committees;
 - a memo from a deputy minister to an assistant deputy minister in a ministry that informs them when Cabinet will consider an issue;
 - a briefing note from a deputy minister to a minister concerning a matter that is or will be considered by Cabinet;
 - a draft or final Cabinet submission; and
 - draft legislation or regulations.

[18] LRWS' submission on the application of this exemption stated:

The attachment is seeking Cabinet's advice with respect to a certain issue. The attachment makes a recommendation, discusses the implications of the recommended approach, outlines outstanding issues that will require further direction from Cabinet and provides a plan on how to move forward.

...

The Ministry submits the attachment indicates it is a Cabinet document, the officials the attachment were sent to were provided the document to help inform their discussions to Cabinet about it. Most importantly, the attachment was intended for Cabinet.

[19] LRWS applied subsection 16(1) of FOIP to all pages of the responsive record, with the exception of page two which it identified as non-responsive. Page two is not a separate email or a separate communication from the email thread that LRWS found responsive to the Applicant's request. Page two is the continuation of the originating email from the email thread that LRWS identified as responsive to the Applicant's request. Page two is the remainder of the signature line, including confidentiality statement and file name of the attachment from this originating email.

[20] LRWS did not indicate in its submission how it arrived at the conclusion that this page of the record was non-responsive to the request. As subsection 16(1) of FOIP is a mandatory exemption, I will also consider the application of subsection 16(1) of FOIP to this page of the record.

[21] Pages three through nine of the record are the PowerPoint presentation that was attached to the email. Based on my review of these pages of the record, it includes the overall result that is hoping to be achieved, the recommendations to reach this result, implications of these recommendations, items to discuss and the proposed plan moving forward. The initial email forwarding the attachment was sent to members of Cabinet, however the email string also includes a number of other government employees in the email correspondence.

[22] In Order F2008-028, the Alberta Information and Privacy Commissioner provided the following regarding the application of cabinet confidence when individuals other than members of Cabinet are involved:

[para 103] The Public Body states that it “consulted with Executive Council on the records and confirmed that the records at issue were provided to Cabinet”. I am prepared to accept this assertion, even where the record itself does not indicate that members of Cabinet or its officials were recipients of it, or that the record was prepared for them. For example, some documents appear to have been prepared for, or arisen out of, meetings of a caucus. Although Cabinet members are members of the government caucus they are not the only members. A caucus is not a committee of the Executive Council. The reason I nonetheless accept the Public Body’s assertion that the records in question were sent to or prepared for Cabinet is that it is possible for documents prepared by or for, or given to, the government caucus to have also been provided to Cabinet for its information or consideration.

[23] Based on my review of the record, I find that LRWS has appropriately applied subsection 16(1) of FOIP to pages three through nine of the record, in full.

[24] I will next consider the application of subsection 16(1) of FOIP to pages one and two of the record.

[25] Pages one and two of the record are an email communication forwarding the attachment. Page one of the record includes the subject line of the emails and page two includes the file name of the attachment. Both the subject lines and the file name of the attachment would reveal the nature of the information in the attachment and therefore covered by subsection 16(1) of FOIP.

[26] The remained of the email communication on pages one and two of the record would not qualify as a confidence of executive council, nor would this information reveal any information that qualifies as a confidence of executive council.

[27] I find that LRWS has appropriately applied subsection 16(1) of FOIP to portions of the information on pages one and two of the record, namely the subject lines and the name of the attachment.

[28] I recommend that LRWS continue to withhold the email subject lines and the file name of the attachment on pages one and two of the record, as well as pages three through nine of the record, in full.

[29] LRWS raised the application of section 22 of FOIP to pages three through nine of the record, as well as subsections 18(1)(a) and 18(1)(d) of FOIP to some of these pages. However, as I have found that LRWS appropriately applied subsection 16(1) of FOIP to pages three through nine of the record in full, there is no need for me to consider the application of any other exemptions of these pages of the record.

[30] While I have found that LRWS has appropriately applied subsection 16(1) of FOIP to portions of pages one and two of record, LRWS has also raised the application of section 22 of FOIP. As such, I will consider the application of section 22 of FOIP to the remaining portions of pages one and two of the record, namely the email header, signature line and email content.

3. Does section 22 of FOIP apply to the record?

[31] Section 22 of FOIP provides:

22 A head may refuse to give access to a record that:

(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

(b) was prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel for a government institution in relation to a matter involving the provision of advice or other services by the agent or legal counsel; or

(c) contains correspondence between an agent of the Attorney General for Saskatchewan or legal counsel for a government institution and any other person in relation to a matter involving the provision of advice or other services by the agent or legal counsel.

[32] I will consider the application of each of the subsections of section 22 of FOIP.

Subsection 22(a) of FOIP

- [33] Subsection 22(a) of FOIP is meant to protect information that is subject to any privilege available at law, including solicitor-client privilege. In *Solosky v. Canada* (1980), Justice Dickson regarded the rule of solicitor-client privilege as a “fundamental civil and legal right” that guaranteed clients a right to privacy in their communications with their lawyers.
- [34] In its submission, LRWS stated “the record involves confidential documents that involve confidential conversation that were going to take place between solicitor and client necessary to provide legal services or record specific legal advice provided to the client...”
- [35] In order to qualify for this exemption, the withheld information must meet all three parts of the following test established in *Solosky v. Canada*, (1980):
1. Is the record a communication between solicitor and client?
 2. Does the communication entail the seeking or giving of legal advice?
 3. Was the communication intended to be confidential?
- [36] In LRWS’ submission it described the email as being between members of Cabinet and government employees. However, after the Draft Report was provided to LRWS, LRWS responded clarifying that one of the government employees included in the correspondence was the solicitor.
- [37] LRWS indicated that the individual was included on the communications to ensure the solicitor was “in a position to provide legal advice to its clients and to inform an [sic] discussion that was going to occur.” However, the discussions that were going to take place were regarding the attachment, the discussion was not about the content of the email. Further, while the solicitor was included on the email communication, the solicitor was not one of the parties that was corresponding in this email exchange.
- [38] In *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 it provides “it is not sufficient to speak to a lawyer or one of his associates for everything to become confidential from that point on. The communications must be made to the lawyer or his assistants in this

professional capacity; the relationship must be a professional one at the exact moment of the communication.” In *Foster Wheeler Power Co. v. SIGED Inc.*, 2004 SCC 18, it provides:

[para 36] We must also bear in mind that lawyers’ functions and professional qualifications have evolved dramatically... Lawyers still litigate, represent, advise and draft, but they must often assume other duties in areas where they find themselves competing with other professionals. The mandates themselves may include a variety of acts and duties that are not always normally associated with the activities of a lawyer in the traditional sense of the term, as pointed out by Binnie J. in *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 50:

It is, of course, **not everything done by a government (or other) lawyer that attracts solicitor-client privilege.** While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. **Advice given by lawyers on matters outside the solicitor-client relationship is not protected.**

However, as important as professional secrecy may be, it does have its limits. **Not every aspect of relations between a lawyer and a client is necessarily confidential...**

[emphasis added]

[39] In Review Report 204-2016, I considered the application of subsection 22(b) of FOIP to an email exchange and attached briefing note. In that report, Executive Council took the position that “emails headers should be withheld because releasing them would disclose that legal advice was sought by Executive Council; whom it was sought from and the date and topic upon which it was requested.” In response to Executive Council’s position for the severance of portions of the email, my office stated:

[26] ...Section 8 of FOIP provides for disclosure of any part of a record which can reasonably be severed from the material exempt from disclosure. *Blank v. Canada* (Minister of Justice), (2005) 1 FCR 403, 2004 FCA 287, deals with the federal *Access to Information Act* (ATIA), solicitor-client privilege and severance of records. Paragraph [66] of that decision states:

[66] An earlier contention of the respondent that a record that is subject to solicitor-client privilege is not subject to the severance provision in section 25 has been unequivocally rejected by this Court... Therefore, **general identifying information such as the description of the document, the name, title and address of the person to whom the communication was directed, the closing words of the communication and the signature block can be severed and disclosed.** As this Court pointed out in Blank, at paragraph 23, this kind of information enables the requester “to know that a communication occurred between certain persons at a certain time on a certain subject, but no more”.

[emphasis added]

[40] Simply because one of the government employees included on the email exchange is also a solicitor for the Government of Saskatchewan, is not sufficient for solicitor-client privilege to apply. The solicitor is not one of the individual corresponding in the email exchange and the email content does not contain legal advice, reference any legal advice obtained, nor do the comments contain any request to obtain legal advice. The email is simply to forward an attachment to a number of individuals to review prior to a discussion.

[41] I find that subsection 22(a) of FOIP does not apply to the remaining portions of the email on pages one and two of the record.

Subsection 22(b) of FOIP

[42] Subsection 22(b) of FOIP is broader than subsection 22(a) of FOIP and is meant to capture records prepared by or for legal counsel (or any agent of the Attorney General) for a public body in relation to the provision of advice or services by legal counsel (or agent of the Attorney General).

[43] In order for this exemption to apply, both parts of the following test must be met:

1. Were the records “prepared by or for” an agent or legal counsel for a public body?

The record must be “***prepared***”, as the term is understood, in relation to the advice or services or compiled or created for the purpose of providing the advice or services.

2. Were the records prepared in relation to a matter involving the provision of advice or other services by the agent or legal counsel?

Legal advice includes a legal opinion about a legal issue and a recommended course of action, based on legal consideration, regarding a matter with legal implications.

Legal service includes any law-related services performed by a person licensed to practice law.

The prepared record does not have to constitute legal advice or legal services to qualify for this part of the test. However, it must relate back to a matter that involves the provision of legal advice or services. The public body should explain how the record relates to a matter involving legal advice or legal services provided by its legal counsel.

[44] LRWS stated that “the record was prepared for legal counsel to a government institution and the matter involves the provision of legal advice about an issue proceeding to Cabinet.”

[45] In Review Report 204-2016, my office referred to Alberta IPC Order F2013-13 regarding the term “prepared for”:

[28] ...the Adjudicator held that **the term “prepared”** in subsection 27(1)(b) of the Alberta FOIP Act **was not intended to refer to information that was not substantive, such as dates, letterhead, names and business contact information of the sender and recipient of the information.** As such, these are not items of information that were “prepared” as the provision requires. Finally, the Adjudicator found that the provision **would only apply to this type of non-substantive information if it revealed the substantive content found elsewhere in the record.**

[29] Based on Blank and Alberta IPC Order F2013-13, I find that subsection 22(b) of FOIP does not apply to the email headers and signature line. I recommend this information be released to the Applicant.

[emphasis added]

[46] This analysis also applies to this case. As I found in my past report, I also find here that subsection 22(b) of FOIP does not apply to the email headers or signature lines found on pages one and two of the record.

[47] Further, the content of the email communications would not be considered substantive and would not reveal any substantive content found in other portions of the record. Additionally, the email does not contain, or relate back to, any advice or services rendered by the solicitor.

[48] I find that subsection 22(b) of FOIP does not apply to the remaining portions of the email on pages one and two of the record.

Subsection 22(c) of FOIP

[49] Subsection 22(c) of FOIP is broader than subsection 22(a) of FOIP and is meant to capture records that contain correspondence between the public body's legal counsel (or an agent of the Attorney General) and any other person in relation to a matter that involves the provision of advice or services by legal counsel (or agent of the Attorney General).

[50] In order for this exemption to apply, both parts of the following test must be met:

1. Is the record a correspondence between the public body's legal counsel (or an agent of the Attorney General for Saskatchewan) and any other person?

Correspondence, in this context, is an interchange of written communications.

2. Does the correspondence relate to a matter that involves the provision of advice or other services by the agent or legal counsel?

Legal advice includes a legal opinion about a legal issue and a recommended course of action, based on legal consideration, regarding a matter with legal implications.

Legal service includes any law-related services performed by a person licensed to practice law.

The correspondence does not have to constitute legal advice or legal services to qualify for this part of the test. However, it must relate back to a matter that involves the provision of legal advice or services. The public body should explain how the correspondence relates to a matter involving legal advice or legal services provided by its legal counsel.

[51] As discussed earlier in this report, while the solicitor is included in the email communication, the solicitor is not one of the parties corresponding in the responsive email thread. Additionally, the email header, signature lines and content of the email communications are not substantive in nature. Nor, does the information contain, or relate back to, any advice or services rendered by the solicitor.

[52] I find that subsection 22(c) of FOIP does not apply to the remaining portions of the email on pages one and two of the record.

IV FINDINGS

[53] I find that LRWS has appropriately applied subsection 16(1) of FOIP to pages three through nine in full.

[54] I find that LRWS has appropriately applied subsection 16(1) of FOIP to portions of the information, namely the subject lines and name of the attachment, on pages one and two of the record.

[55] I find that LRWS has not appropriately applied section 22 of FOIP to portions of pages one and two of the record.

V RECOMMENDATIONS

[56] I recommend that LRWS continue to withhold pages three through nine of the record in full.

[57] I recommend that LRWS release pages one and two of the record, with the exception of the email subject lines and file name of the attachment.

Dated at Regina, in the Province of Saskatchewan, this 20th day of December, 2018.

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