



REVIEW REPORT 065-2020

Saskatchewan Human Rights Commission

February 2, 2021

Summary: The Applicant submitted an access to information request under *The Freedom of Information and Protection of Privacy Act* (FOIP) to the Saskatchewan Human Rights Commission (SHRC). The SHRC provided the Applicant access to some records, but refused the Applicant access to other records. The SHRC relied on the exemptions set out in subsections 15(1)(b), (c), (e), (g), 17(1)(a), (b), 22(a), (b), (c), and 29(1) of FOIP as its reasons for refusal. The Applicant appealed to the Commissioner. The Commissioner found that the SHRC properly applied exemptions to some of the records, but not all. Further, he found that the SHRC was not in compliance with section 8 of FOIP. The Commissioner made a number of recommendations including that the SHRC release some of the records it withheld from the Applicant.

I BACKGROUND

[1] On January 17, 2020, the Saskatchewan Human Rights Commission (SHRC) received an access to information request under *The Freedom of Information and Protection of Privacy Act* (FOIP). The request was for the following:

I am requesting my full file of my SHRC complaint [SHRC file number]

[2] In a letter dated February 10, 2020, the SHRC responded to the Applicant. It provided the Applicant with access to some of the records but withheld other records. In its letter, the SHRC explained it was enclosing records that have been “cleared for access”. It then said that, “a number of records have not been attached because they have already been provided to you or were provided by you in the course of the Commission’s process”. It then listed

subsections 15(1)(c), (e), 17(1)(b)(i) and section 22 of FOIP as its reasons for withholding records. The SHRC did not indicate in its letter the number of pages it was withholding in its entirety from the Applicant. As such, the Applicant was unaware of how many pages were being withheld from them.

- [3] On February 27, 2020, the Applicant requested a review by my office.
- [4] On April 3, 2020, my office notified both the SHRC and the Applicant that it would be undertaking a review.
- [5] On May 4, 2020, the SHRC contacted my office asking if additional records could be released to the Applicant along with a letter that advised the Applicant of new exemptions it was relying on. The SHRC also asked if my office would need a copy of the letter and the additional records. On the same day, my office responded indicating that additional records could be released to the Applicant. My office indicated that if no exemptions were being applied to the additional documents, then my office would not require a copy of the records. However, if exemptions were being applied, then such documents would need to be provided to my office.
- [6] Enclosed in a letter dated May 14, 2020, the SHRC provided the Applicant with an additional 317 pages of records. The letter indicated that in addition to the exemptions claimed in its letter dated February 10, 2020, the SHRC was also relying on subsections 15(1)(b) and (g) of FOIP.
- [7] Once my office received the SHRC's submission, my office noticed that the SHRC was also relying on subsection 29(1) of FOIP. The SHRC's submission indicated the following:

To be compliant with section 8, the Commission severed parts of documents where appropriate. In cases where documents could be redacted and partially provided to the Applicant, this has been done. If personal information appeared in any of the documents that were released, section 29(1) and mandatory exemptions were applied so that personal information was not disclosed without consent.

[8] However, based on a review of the records provided, my office could not identify the records to which it was applying subsection 29(1) of FOIP. On October 21, 2020, my office requested clarification from the SHRC and requested a copy of the records that showed where redactions had been applied.

[9] On November 5, 2020, my office received 76 pages of records from the SHRC. These 76 pages of records were part of the 317 pages of records that were provided to the Applicant on May 14, 2020. Portions of some of the 76 pages of records were severed pursuant to subsection 29(1) of FOIP.

II RECORDS AT ISSUE

[10] The SHRC provided my office with an Index of Records, which has been reproduced below.

Index of Records Saskatchewan Human Rights Commission Our File: 18-19-109, OIPC File: 065-2020 Prepared on May 20, 2020			
Page Range	Description	Status	Exemptions Applied
Mediation File (92 pages)			
001-043	Email Correspondence regarding Potential Conflict of Interest October 26, 2018 to October 30, 2018 Between: Commission Mediator, Commission Director of Resolution and Commission Intake Officer	Withheld in full	15(1)(b), 17(1)(b), 22(a).
044-092	Email Correspondence and Mediator Notes to File October 30, 2018 to December 18, 2018 Between: Commission Mediator, Commission Director of Resolution and Respondent Counsel	Withheld in full	15(1)(b), 15(1)(g), 17(1)(b), 22(a).
Legal and Intake Correspondence File (71 pages) [sic]			
093 – 103	Draft Decision	Withheld in full	17(1)(b), 22(a), 22(b).

	January 10, 2020 Between: Commission Counsel and Chief Commissioner		
158-163	Correspondence regarding Complaint Form September 17, 2018 to October 15, 2018 Between: Commission Intake Officer and Commission Director of Resolution	Withheld in full	17(1)(b), 22(a), 22(b), 22(c).
Investigation File (78 pages) [sic]			
104 – 113	Correspondence with Medical Practitioners July 9, 2019 to July 22, 2019 From: Commission Investigator To: Various Medical Professionals	Withheld in full	15(1)(c)
114-157	Correspondence January 11, 2019 to June 13, 2019 Between: Commission Investigator, Commission Director of Resolution, Respondent Counsel and Witnesses.	Withheld in full	15(1)(c)
164-166	Investigation Plan January 11, 2019 From: Commission Investigator To: Commission Director of Resolution	Withheld in full	15(1)(c), 17(1)(b)
167-173	Documents Gathered During Investigation	Withheld in full	15(1)(c)
174-208	Witness Statements May 1, 2019 to June 3, 2019 Between: Commission Investigator and Witnesses (5)	Withheld in full	15(1)(c)
209-235	Case Report July 11, 2019 From: Commission Investigator	Withheld in full	15(1)(c), 17(1)(a), 17(1)(b)

	To: Chief Commissioner, Commission Executive Director, Commission Director of Resolution, Commission Senior Counsel and Commission Legal Team.		
236-240, 241	Case Report Memorandum and Case Management Decision of Chief Commissioner July 11, 2019 and July 29, 2019 From: Commission Investigator To: Chief Commissioner, Commission Executive Director, Commission Director of Resolution, Commission Senior Counsel and Commission Legal Team.	Withheld in full	15(1)(c), 17(1)(a), 17(1)(b)
Directed Mediation File (108 pages)			
242-251	Summary of Applicant's Submissions Not Dated By: Commission Counsel	Withheld in full	15(1)(b), 15(1)(g), 22(a), 22(b), 22(c)
252, 259-260	Notes from Telephone Calls with Respondent Counsel September 12, 2019 and October 23, 2019 By: Commission Counsel	Withheld in full	15(1)(b), 15(1)(g), 22(a), 22(b), 22(c)
253-257	Notes from Directed Mediation September 16, 2019 By: Commission Counsel	Withheld in full	15(1)(b), 15(1)(g), 22(a), 22(b), 22(c)
258, 261-264	Notes prepared for Directed Mediation By: Commission Counsel	Withheld in full	15(1)(b), 15(1)(g), 22(a), 22(b), 22(c)
265-349	Correspondence from Directed Mediation July 29, 2019 to May 13, 2020 Between: Commission Counsel, Respondent Counsel, Mediator, Applicant Counsel	Withheld in full	15(1)(b), 15(1)(g), 22(a), 22(b), 22(c)
Other Documents (27 pages)			
350-376	Email Correspondence regarding OIPC review April 3, 2015	Withheld in full	Records not Responsive

	Between: Commission Counsel, OIPC Early Resolution Officer and OIPC Analyst		
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[11] In its submission, SHRC indicated that some of the correspondence in the records were directly sent by or to the Applicant. It indicated that those correspondence (and any enclosed documents) were not withheld from the Applicant. In an email dated December 3, 2020, the SHRC clarified to my office that correspondence directly sent by or to the Applicant with any enclosed documents were released to the Applicant on either February 10, 2020 and/or May 14, 2020.

[12] As noted in the background of this Report, after my office began its review, the SHRC provided another 317 pages of records to the Applicant. Within those 317 pages of records, portions of some of the 76 pages were partially redacted pursuant to subsection 29(1) of FOIP. I will also be analyzing this matter in this review.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[13] The SHRC qualifies as a “government institution” pursuant to subsection 2(1)(d)(ii) of FOIP and section 3 and Part I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Therefore, I have jurisdiction to review this matter.

2. Did the SHRC make a reasonable effort to search for records?

[14] Section 5 of FOIP provides an applicant the right of access to records in the possession or under the control of a government institution. Section 5 of FOIP provides:

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 government institution.

[15] Section 5 of FOIP is clear that access to records must be granted if the records are in the possession or under the control of the government institution subject to any exemptions under Part III of FOIP. However, a government institution cannot provide access to records that do not exist. Subsection 7(2)(e) of FOIP contemplates such situations. This provision provides:

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

...

(e) stating that access is refused for the reason that the record does not exist;

[16] FOIP does not require a government institution to provide with absolute certainty that records responsive to an access to information request do not exist. However, the government institution must demonstrate that it has conducted a reasonable search in order to locate records. The focus of my office's review of search efforts is whether or not the government institution conducted a reasonable search. A reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records related to the access 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. Examples of information that can be provided to my office to support a government institution's search efforts include the following:

- For personal information requests – explain how the individual is involved with the government institution (i.e. client, employee, former employee etc.) and why certain departments/divisions/branches were included in the search.
- 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 organization's 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 government institution's control have been searched such as a contractor or information management service provider.
- Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Explain which folders within the records management system were searched and how these folders link back to the subject matter requested. For electronic folders – indicate what key terms were used to search if applicable.
- Indicate the calendar dates each employee searched.
- Indicate how long the search took for each employee.
- Indicate what the results were for 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 my office's resource, *Using Affidavits in a Review with the IPC* available on my office's website.

[17] The above list is meant to be a guide. It is not an exhaustive list of what could be considered by my office in a review. Providing the above details is not a guarantee that my office will find that the government institution's search efforts were reasonable. Each case will require different search strategies and details depending on the records requested.

- [18] In its submission, the SHRC described that when a file with the SHRC is opened, a physical file is created to contain hard copies of file materials. Also, an electronic file is opened on the SHRC's case management system.
- [19] In terms of a physical file, the SHRC explained that the Applicant's file was closed on March 19, 2019. The closed physical file remained in the SHRC's filing cabinet. It indicated that no records from the Applicant's file have ever been stored offsite. It explained that active and closed files are stored securely on site until they are sent to archives. It indicated that file information is not stored on its employees' personal drives or devices or in employee offices.
- [20] In terms of an electronic file, the SHRC indicated that files can be searched using the file number or the complainant's (or, in my office's terms, the Applicant's) last name on its case file management system.
- [21] When the SHRC received the Applicant's access request, the SHRC conducted a search for records to respond to the Applicant's access request. Based on information provided to my office by the Applicant, the SHRC provided the Applicant with 89 pages of records, which were enclosed in its February 10, 2020 letter to the Applicant. While its letter dated February 10, 2020 indicated that the SHRC was withholding 'some' records from the Applicant, it did not indicate the precise number of pages it was withholding in full from the Applicant.
- [22] Then, after the Applicant requested a review by my office, the SHRC conducted another search for records with SHRC employees who were involved with the Applicant's file. This included the Director of Resolution, Commission Counsel, Intake Consultant, two mediators, and the investigator. As noted in the background, the SHRC provided the Applicant with an additional 317 pages of records.
- [23] Based on a review of the additional 317 pages of records provided to the Applicant, some of them appear to be duplicates of the 376 pages of records that the SHRC initially withheld

from the Applicant. For example, the SHRC withheld pages 158 and 159 and cited subsections 17(1)(b), 22(a), (b), and (c) of FOIP as its reasons for withholding these pages. However, these pages were included in the 317 pages of records that were released to the Applicant. It is confusing why the SHRC would make a decision to initially withhold these records from the Applicant based on its February 10, 2020 letter, but then make a decision to release them based on its May 14, 2020 letter.

[24] I find that the SHRC did not make a reasonable effort to locate records responsive to the Applicant's access request, as required by FOIP, when it first received the Applicant's access request. Had the Applicant not requested a review by my office, then the SHRC would not have conducted another search for records and the Applicant would not have received the 317 pages of records. Such a practice provided grounds for the Applicant to believe that the SHRC is not being transparent. I recommend that the SHRC amend its procedures so that it conducts a thorough and complete search for records when it receives formal access to information requests under FOIP.

[25] After the SHRC provided the 317 pages of records to the Applicant, my office received the SHRC's submission for this review on May 21, 2020. The SHRC's submission contained a caveat which read as follows:

Caveat: As noted above, some of the correspondence in the Records at Issue were directly sent by or to the Applicant. Access to those correspondence and any enclosed documents was not withheld.

[26] Because of the caveat, in the relevant issues discussed below, I will be listing the pages of the records at issue that contains correspondence between the SHRC and the Applicant and recommending that the SHRC release such records to the Applicant. Not only will this help achieve transparency but this will enable my office to narrow the focus of the review to the pages of the records at issue to the pages that do not contain the correspondence between the SHRC and the Applicant.

3. Did the SHRC meet its obligation under section 8 of FOIP?

[27] Section 8 of 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.

[28] FOIP allows for government institutions to refuse access to applicants based on the limited and specific exemptions in Parts III and IV of FOIP. Where an exemption applies to a record, section 8 of FOIP requires government institutions to sever only the portions of the records to which the exemption applies, but to release the remainder of the record to the applicant. In order to fulfill this obligation, government institutions must conduct a line-by-line review of the records. Where it does sever portions of the record, the government institution should cite the exemption it is relying on to sever that particular portion of the record. While it may not be the ideal outcome hoped for by an applicant, receiving a severed record with the exemption(s) cited may still provide valuable information to the applicant. For example, a severed record shows that the requested information exists, how much information exists, and the cited exemption(s) may convey the nature of the information.

[29] As described in the background of this Report, the Applicant was provided 89 pages of records on February 10, 2020. The SHRC withheld the remainder of records in their entirety. It did not even specify the number of pages the SHRC was withholding in their entirety in its letter dated February 10, 2020 to the Applicant. As such, I find that the SHRC is not in compliance with section 8 of FOIP.

[30] In its submission, the SHRC asserted that it complied with section 8 of FOIP. It also indicated it applied subsection 29(1) of FOIP to records even though it did not communicate that to the Applicant in its letter dated February 10, 2020 or May 14, 2020. Its submission said:

To be compliant with section 8, the Commission severed parts of documents where appropriate. In cases where documents could be redacted and partially provided to the Applicant, this has been done. If personal information appeared in any of the documents that were released, section 29(1) and mandatory exemptions were applied so that personal information was not disclosed without consent.

[31] On October 21, 2020, my office requested that the SHRC provide my office with a copy of the severed records that were provided to the Applicant. The SHRC provided my office with a 76-page PDF document. These 76 pages of records were a part of the 317 pages of records provided to the Applicant on May 14, 2020 – which was when my office’s review was already underway. Some of the pages had names and contact information such as email addresses redacted. Presumably, the SHRC was withholding such information pursuant to subsection 29(1) of FOIP. However, neither of SHRC’s letters dated February 10, 2020 or May 14, 2020, to the Applicant indicated that the SHRC was relying on subsection 29(1) of FOIP to withhold portions of the responsive records from the Applicant.

[32] I recommend that the SHRC amend its procedures when responding to access requests. The SHRC should be citing all the reasons it is withholding information from the Applicant, including subsection 29(1) of FOIP. That would enable the Applicant to request a review by my office of all the reasons the SHRC is withholding information. I will be analyzing the SHRC’s application of subsection 29(1) of FOIP to these 76 pages later in this Report.

4. Did the SHRC properly apply subsection 22(a) of FOIP?

[33] The SHRC applied subsection 22(a) of FOIP to pages 1 to 92 (“mediation file”), pages 93 to 103, pages 158 to 163 (“legal and intake correspondence file”), and pages 242 to 349 (“Directed Mediation file”).

[34] Subsection 22(a) of FOIP provides as follows:

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;

[35] Specifically, the SHRC is claiming mediation privilege or case-by-case privilege to the mediation file (pages 1 to 92) and the Directed Mediation file (pages 242 to 349). The

SHRC is claiming solicitor-client privilege for the legal and intake correspondence file (pages 93 to 103 and 158 to 163).

[36] I will first analyze the SHRC's claim of mediation privilege or case-by-case privilege to the mediation file (pages 1 to 92) and the Directed Mediation file (pages 242 to 349). Then, I will analyze the SHRC's claim of solicitor-client privilege.

Mediation or case-by-case privilege for the mediation file (pages 1 to 92) and the Directed Mediation file (pages 242 to 349)

[37] The SHRC claimed that the mediation file and the Directed Mediation file were subject to mediation privilege or case-by-case privilege. As such, it claimed that subsection 22(a) of FOIP applied to pages 1 to 92 and pages 242 to 349.

[38] Order FI-09-005 by the Office of the Information and Privacy Commissioner for Prince Edward Island (PEI IPC) summarized what the Ontario Superior Court of Justice Divisional Court and the Supreme Court have said on mediation privilege and how it is to be considered on a case-by-case basis:

In *Rudd v. Trossacs Investments Inc.* 2006 CanLII 7034 (Ont. S.A.), Swinton, J. reviewed the case law in respect of mediation privilege. At pp. 25-30, the justice says:

[26] Common law principles have recognized a privilege for confidential communications in certain important societal relationships. In *Slavuytych v. Baker* (1975), 1975 CanLII 5 (SCC), 55 D.L.R. (3d) 224, **the Supreme Court of Canada held that the four conditions from Wigmore on Evidence should be applied to determine whether communications are privileged (at 228):**

(1) The communications must originate in a confidence that they will not be disclosed.

(2) The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose.

(3) The relationship must be one which, in the opinion of the community, ought to be "sedulously fostered".

(4) The injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.

[27] In *Slavuytych*, the Court held that a document submitted in a university tenure process was privileged – in part because the document was labeled “confidential”, and in part because of the importance of confidentiality in the tenure process, where individuals are asked to give their frank opinion of colleagues.

Swinton, J. also refers to a more recent case from the Supreme Court of Canada, saying:

[28] In *M.(A.) v. Ryan* 1197 CanLII 403 (S.C.C.), (1997), 1997 CanLII 403 (SCC), 143 D.L.R. (4th) 1 (S.C.C.), **the Supreme Court reaffirmed the approach in *Slavuytych*, making it clear that privilege is to be determined on a case by case basis** (at para. 20).

...

In my opinion, the Supreme Court of Canada’s views on the existence of legal privilege, outside of solicitor-client privilege or parliamentary privilege, still prevails. Thus, it is a matter of determining whether, on the facts of the case, the conditions set out in Wigmore on Evidence have been met.

[Emphasis added]

[39] In my Review Report 171-2019, I referred to Alberta’s Office of the Information and Privacy Commissioner’s (AB IPC) Order 96-020 where the AB IPC indicated that case-by-case privilege can apply to two-types of records: 1) private records; or 2) Crown records. Different criteria will apply to each type of record in determining whether case-by-case privilege applies.

[40] AB IPC indicated that when determining whether records are “private records” or “Crown records”, what matters is whose information it is, not necessarily who is in possession of the records. Private records are records of third parties not in the hands of the Crown. Crown records are records containing information relating to government activities or operations, and decisions at the highest level of government. I adopted the AB IPC’s approach to case-by-case privilege as it relates to the mediation context in Review Report 171-2019. I will do the same here.

[41] When I consider the contents of the mediation file and the Directed Mediation file, the pages that reflect the substance of the mediation appear to be that of third parties and not the Crown. Therefore, unlike the records at issue in Review Report 171-2019 where I found the records at issue to be “Crown records”, I find the records at issue would be “private records”. For private records, to determine if mediation privilege or case-by-case privilege applies, the Wigmore criteria is to be applied (which is quoted above in PEI IPC Order FI-09-005).

[42] I will use the Wigmore test to determine if mediation privilege or case-by-case privilege applies. I must keep in mind that the mediation file (pages 1 to 92) is a process separate from the Directed Mediation file (pages 242 to 349). Below, I will separate my analysis of the mediation file from the Directed Mediation file.

Mediation file (pages 1 to 92)

[43] In its submission, the SHRC argued that the first three criteria for the Wigmore test is “redundant”. The SHRC cited *Union Carbide Canada Inc. V. Bombardier Inc.*, 2014 SCC 35 (CanLII), [2014] 1 SCR 800 (“*Union Carbide*”) where Justice Wagner indicated that where parties opt for a confidential dispute resolution process, then the first three-parts of the Wigmore test are redundant. For the fourth part of the Wigmore test, the SHRC argued that the public interest favours non-disclosure of “the record”. The SHRC said:

In *Union Carbide* [TAB 1], the Supreme Court of Canada noted that confidentially [sic] encourages free and frank discussion without worry that adversaries could use their communications against them later. The four-part test from *Wigmore* was referred to and Justice Wagner found that the first three criteria are “redundant” where parties opt for a confidential dispute resolution process and sign a confidentiality agreement. At para 52, the Court states:

[52] I would note that there has been some international agreement on this approach to confidentiality in the mediation context. Jurisdictions in 14 countries with both common law and civil law systems, including Ontario (S.O. 2010, c. 16, Sch. 3) and Nova Scotia (S.N.S. 2005, c. 36), have adopted the United Nations Commission on International Trade Law’s Model Law on International Commercial Conciliation. Article 9 of the Model Law states:

Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement...
[emphasis in original]

The parties agreed to keep all information relating to the voluntary mediation confidential and the public interest favours non-disclosure of the record.

[44] Based on a review of *Union Carbide*, Justice Wagner at paragraph [44] indicated where they found the first three conditions of the Wigmore test to be redundant:

[44] The intervener Attorney General of British Columbia, on the other hand, suggests that the plain meaning of an unambiguous confidentiality agreement should prevail, barring extreme circumstances. As for the respondents, they say that courts should look beyond the plain meaning to account for the wishes of the parties. I agree with these approaches. In principle, there is relatively little that can displace the intent of the parties once it is clearly established. Only the fourth step of the Wigmore test — the balancing of interests — is potentially relevant in this case. **In my view, the first three steps of the Wigmore test are redundant where parties have not only opted for a confidential dispute resolution process, but have also signed a confidentiality agreement.**

[Emphasis added]

[45] Therefore, based on the *Union Carbide*, I must consider if the first three conditions of the Wigmore test are redundant.

[46] In its submission, the SHRC explained that mediation is conducted by a SHRC mediator. The mediation process is understood to be confidential, without prejudice, and is typically governed by a mediation agreement signed by the parties. A mediation file is opened and not disclosed to the investigator, other decision makers, or the Chief Commissioner. It explained that this is done to ensure fair and impartial adjudication and decision making for the parties. The SHRC explained that the parties are not to use or disclose any information obtained within mediation for any purpose. The parties are also assured that the mediator will not disclose information from the mediation to an investigator conducting an investigation of the complaint. It said that the mediation is held on a “without prejudice” basis, meaning neither party will be able to use or rely upon any of the contents of the mediation within the complaint process or in any other proceeding.

[47] On October 22, 2020, my office requested a copy of the mediation agreement signed by the parties for the mediation. The relevant portions of the mediation agreement is as follows:

1. **Good Faith and Full Disclosure** - The parties agree to act in good faith, and participate directly and sincerely in Mediation with a view to resolving the dispute. Each party agrees to fully and honestly disclose to the Mediator all information requested by the Mediator to aid in achieving a resolution. The parties agree to be respectful of each other throughout the Mediation.

...

5. **Confidentiality by Parties** - The parties agree to treat as confidential, all communications and documentation or other records disclosed within the mediation process. The parties shall not use or disclose any information obtained within Mediation for any purpose. The parties further agree that the terms of any settlement achieved through Mediation shall be held in confidence. Nothing herein shall prevent a party from disclosing contents of Mediation where compelled to do so by law or by court order.

6. **Confidentiality by Mediator** - The Mediator will not disclose information from Mediation to an investigator conducting an investigation of the Complaint. The Mediator will disclose to Commission personnel whether a settlement has been reached and the terms of any such settlement. The Mediator may seek advice from legal counsel regarding issues arising within Mediation if the Mediator believes that obtaining such advice will assist in resolution of the dispute. Nothing herein shall prevent the Mediator from disclosing contents of Mediation where compelled to do so by law or by court order.

...

8. **Without Prejudice** - The parties agree that the contents of the Mediation will be considered without prejudice. Neither party will be able to use or rely upon any of the contents of the Mediation within the Complaint process or in any other proceeding. Nothing within this section shall prevent a party from relying upon and/or enforcing a settlement agreement achieved through Mediation.

[48] Based on the above, I agree that the parties to the mediation did opt for a confidential dispute resolution process and have signed a confidentiality agreement. Therefore, I find that the first three conditions of the Wigmore test are redundant in this case.

[49] To understand what is required by the fourth part of the Wigmore test, I look to PEI IPC's Order FI-09-005. In PEI IPC's Order FI-09-005, mediation occurred between an applicant and a public body. A mediation committee was established. The applicant did not meet

with the mediation committee at the same time as the public body. After the mediation, the applicant submitted an access to information request for documents related to the mediation. PEI IPC made it clear that the procedure of the mediation is irrelevant to a freedom of information request. What was relevant to the review was the application of Prince Edward Island's *Freedom of Information and Protection of Privacy Act* (PEI FOIP) to mediation related documents.

It should be noted that a mediation committee established under the Minister's Directive determines its own procedure and its decision is final. It is clear that the Applicant did not meet with the Mediation Committee at the same time as the Public Body. It is not within my jurisdiction to question or look into the conduct of the mediation or whether information that arose from it should have been made available to the Applicant by the Mediation Committee. The procedure of the mediation is irrelevant to a FOIPP request; only the application of the FOIPP Act to mediation related documents is relevant to this review.

...

To summarize the conditions as they apply to this case:

...

Wigmore's fourth condition – the injury to the relationship of the parties to the mediation caused by disclosure must be greater than the benefit gained by disclosure (i.e., through an access to information request). **This kind of mediation would not be successful if there were any question of the release of the confidential information involved in the mediation. It is clear that candid and detailed information would not be available to the mediation panel if the information gathered by the mediation panel was subject to disclosure. This meets the premises of Wigmore's fourth condition.**

[Emphasis added]

[50] I note that the mediation procedure described in PEI IPC's order FI-09-005 is different from the SHRC's mediation procedure. SHRC's mediation procedure involves the Applicant and the Respondent meeting with the mediator at the same time. Therefore, the Applicant would have been privy to information disclosed during mediation. However, I note there are documents that contain the substance of the mediation to which the Applicant would not have been privy. Such records would be correspondence between the mediator and the Respondent's counsel. Based on a review of such records, I find that mediation privilege or case-by-case privilege would apply to such records for similar reasons set out in PEI IPC's Order F-09-005. Mediation conducted by the SHRC would not be successful

if there were any question of the release of confidential information involved in the mediation. Certain types of information would not be available to the mediator if information gathered by the mediator was subject to disclosure. Therefore, within the mediation file, I find that mediation privilege or case-by-case privilege applies to pages 50, 51, 52, 84, 88, 89, 90, 91, and 92. These records contain the substance of the mediation that are either correspondence between the Respondent's counsel and the mediator or they are handwritten notes by the mediator – records to which the Applicant was not privy to during the mediation. Therefore, I recommend that the SHRC continue to withhold pages 50, 51, 52, 84, 88, 89, 90, 91, and 92 pursuant to subsection 22(a) of FOIP.

[51] However, I do not find that mediation privilege applies to any of the other pages in the mediation file as they do not contain the substance of the mediation. This includes records about setting up the date and time of the mediation.

[52] Further, many of these pages in the mediation file contain correspondence directly sent by or to the Applicant. As mentioned earlier, the SHRC inserted a caveat in its submission indicating such correspondence “were not withheld” within the records at issue from the Applicant. While some of these records may have been enclosed with its letter dated May 14, 2020 to the Applicant, for the sake of transparency, I recommend that the SHRC release the portions of the following pages of the records at issue that contain correspondence exchanged between the SHRC and the Applicant: 1, 4, 5, 6, 10, 11, 14, 15, 17, 18, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 35, 36, 37, 38, 39, 40, 46, 47, 49, 53, 56, 59, 60, 63, 64, 65, 66, 67, 68, 70, 73, 79, 80, 81, 82, 83, and 85.

Directed Mediation file (pages 242 to 349)

[53] Before a hearing takes place, the Chief Commissioner may exercise their discretion to direct parties to participate in Directed Mediation pursuant to subsection 33(1) of *The Saskatchewan Human Rights Code, 2018*. The SHRC explained that Directed Mediation is a facilitated discussion conducted by the SHRC. The goal of Directed Mediation is to achieve settlement of the complaint and to avoid the necessity of a hearing. SHRC counsel may participate but is not there to represent the complainant or the respondent. SHRC

counsel is there to represent the SHRC and may provide the SHRC's position on the appropriateness of any settlement offer in light of the strengths and weaknesses of the case and the potential range of likely outcomes at a hearing. The SHRC explained that Directed Mediation occurs on a "without prejudice" and confidential basis, which means that information provided by the parties during settlement discussions cannot be used against them in the hearing of the complaint or within another legal proceeding.

[54] In its submission, the SHRC indicated it was relying on the same arguments it provided for claiming mediation or case-by-case privilege to the mediation file (pages 1 to 92) to claim mediation or case-by-case privilege to the Directed Mediation file (pages 242 to 349).

[55] As described earlier, a mediation agreement was signed prior to the mediation. On December 7, 2020, my office asked the SHRC if the parties signed an agreement prior to the Directed Mediation. The SHRC provided my office with a copy of the agreement signed by the parties prior to the Directed Mediation. The terms of this agreement are similar to that of the terms of the agreement for the mediation. The relevant terms of the agreement for the Directed Mediation are as follows:

1. **Good Faith and Full Disclosure** - The parties agree to act in good faith, and participate directly and sincerely in Directed Mediation with a view to resolving the dispute. Each party agrees to fully and honestly disclose to the Mediator information requested by the Mediator to aid in achieving a resolution. The parties agree to be respectful of each other throughout the Directed Mediation.

...

6. **Confidentiality by Parties** - The parties agree to treat as confidential, all communications and documentation, or other records, disclosed within the mediation process. The parties shall not use or disclose any information obtained with Directed Mediation for any purpose. The parties further agree that the terms of any settlement achieved through Directed Mediation shall be held in confidence. It is understood that the contents of the Directed Mediation may be communicated to the Chief Commissioner as part of the Chief Commissioner's process of assessing a Final Offer of Settlement. Nothing herein shall prevent a party from disclosing contents of Directed Mediation where compelled to do so by law or by court order.

7. **Confidentiality by Mediator** - The Mediator will not disclose information from Directed Mediation to anyone not involved in the complaint. The Mediator will disclose to Commission personnel whether a settlement has been reached and the terms of any such settlement. Nothing herein shall prevent the Mediator from disclosing contents of Directed Mediation where compelled to do so by law or by court order.

...

9. **Without prejudice** - The parties agree that the contents of the Directed Mediation will be considered without prejudice to the adjudication of the complaint. Neither party will be able to use or rely upon any of the contents of the Directed Mediation at an adjudication hearing of the complaint, or in any other proceeding. Notwithstanding the foregoing, it is understood that the contents of Directed Mediation may be considered by the Chief Commissioner in assessing a Final Offer of Settlement.

[56] As stated earlier, the Supreme Court of Canada in *Union Carbide* said that the first three parts of the Wigmore test are redundant not only when parties have opted for a confidential dispute resolution process, but have also signed a confidentiality agreement. Therefore, I must consider if the fourth part of the Wigmore test is satisfied to determine if mediation privilege or case-by-case privilege applies. Based on a review of the agreement signed by the parties for the Directed Mediation, I find the fourth part of the Wigmore test is satisfied. Directed Mediation would not be successful if there was any question of the release of the confidential information involved in the mediation. Similar to that of mediation, it appears that the Applicant and the Respondent would have met with the mediator during Directed Mediation at the same time. Therefore, the Applicant would have been privy to some information disclosed during Directed Mediation. However, based on a review of the pages in the Directed Mediation file there are records containing the substance of the Directed Mediation that the Applicant would not have been privy to during the mediation. Therefore, I find that mediation privilege or case-by-case privilege applies to pages 242 to 264, 268, 296, 297, 339, 340, and 347. These records contain the substance of the Directed Mediation that are either correspondence between the Respondent's counsel and Commission counsel or they are handwritten notes by the Commission counsel – records to which the Applicant was not privy to during the Directed Mediation. Therefore, I recommend that the SHRC continue to withhold pages 242 to 264, 268, 296, 297, 339, 340, and 347 pursuant to subsection 22(a) of FOIP.

[57] However, I do not find that mediation privilege or case-by-case privilege applies to any of the other pages in the mediation file as they do not contain the substance of the mediation. This includes records about setting up the date and time of the mediation.

[58] Finally, many of the pages in the Directed Mediation file contain correspondence directly sent by or to the Applicant. As mentioned earlier, the SHRC inserted a caveat in its submission indicating such correspondence “were not withheld” within the records at issue from the Applicant. While some of these records may have been enclosed with its letter dated May 14, 2020 to the Applicant, for the sake of transparency, I recommend that the SHRC release the portions of the following pages of the records at issue that contain correspondence exchanged between the SHRC and the Applicant: 269, 270, 271, 272, 273, 274, 275, 276, 278, 280, 310, 341, 342, 343, 344, and 345.

Solicitor-client privilege for the legal and intake correspondence file (pages 93 to 103 and pages 158 to 163)

[59] The SHRC claimed solicitor-client privilege applied to pages 93 to 103 and 158 to 163 and therefore withheld these pages pursuant to subsection 22(a) of FOIP. However, I will consider pages 93 to 103 in my analysis of subsection 22(b) of FOIP later in this Report.

[60] My office has established a process to consider a claim of solicitor-client privilege. When claiming solicitor-client privilege, government institutions have three options when preparing records for review with my office:

1. Provide the records to my office with a cover letter stating that the government institution is not waiving the privilege;
2. Provide the records to my office with the portions severed where solicitor-client is claimed; or
3. Provide my office with an affidavit with a schedule of records.

[61] In this case, the SHRC provided my office with the records. I commend the SHRC for doing so.

[62] Page 247 of Chapter 4 of my office’s *Guide to FOIP* (Guide to FOIP) outlines a three-part test that was established by the Supreme Court of Canada in *Solosky v. The Queen*, (1980) to determine if solicitor-client privilege applied to records. The three part test is as follows:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?

3. Did the parties intend for the communication to be treated confidentially?

[63] Pages 158 to 163 are correspondence by the SHRC Intake Consultant to the Director of Resolution. In its submission, the SHRC indicated that the Director of Resolution is the solicitor. The SHRC argued that the communication entails the Intake Consultant seeking legal advice from the Director of Resolution.

[64] Based on a review of the records, the Intake Consultant is either requesting approval from the Director of Resolution or is providing the status of a file. Later on, I will summarize the SHRC's arguments for its application of subsection 17(1)(b) of FOIP to these pages. However, I note in the SHRC's arguments for subsection 17(1)(b) of FOIP, the SHRC described how the Intake Consultant is seeking approval from the Director of Resolution which is as follows:

...he prepares a Complaint Form for the Director of Resolution's review and approval.

[65] Therefore, it appears that the Director of Resolution is acting in their capacity as a director and not a solicitor. I find that the communication between the Intake Consultant and the Director of Resolution does not entail the seeking or giving of legal advice; rather, the Intake Consultant is seeking approval from the Director of Resolution. This is consistent with my findings in Review Report 002-2020 at paragraph [34]. As such, I find that subsection 22(a) of FOIP does not apply to pages 158 to 163.

[66] Moreover, I note that pages 158 and 159 were released to the Applicant in the additional 317 pages that were released to the Applicant on May 14, 2020. The provision of these pages to the Applicant makes it unnecessary to consider the SHRC's arguments to withhold these pages.

5. Did the SHRC properly apply subsection 22(b) of FOIP?

[67] The SHRC applied subsection 22(b) of FOIP to the following pages 93 to 103, 158 to 163, 242 to 349.

[68] Earlier, I found that subsection 22(a) of FOIP applied to pages 242 to 264, 268, 296, 297, 339, 340, and 347. I also recommended that the SHRC release portions of pages 269, 270, 271, 272, 273, 274, 275, 276, 278, 280, 310, 341, 342, 343, 344, and 345 that contain correspondence between the SHRC and the Applicant. Therefore, I will not be considering these pages (or portions of) when determining if subsection 22(b) of FOIP applies or not.

[69] Subsection 22(b) of FOIP provides as follows:

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

...

(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;

[70] My office uses the following two-part test when determining if subsection 22(b) of FOIP applies to records:

1. Were the records “prepared by or for” an agent or legal counsel for a government institution?
2. Were the records prepared in relation to a matter involving the provision of advice or other services by the agent or legal counsel?

[71] Page 262 of Chapter 4 of the Guide to FOIP defines “legal advice” as a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. It also defines “legal service” as any law-related service performed by a person licensed to practice law.

[72] Below I will determine if subsection 22(b) of FOIP applies to the records.

Legal and Intake Correspondence file (pages 93 to 103 and 158 to 163)

[73] Pages 93 to 103 is a draft decision that was prepared by legal counsel for the SHRC. In its submission, the SHRC asserted that the draft decision was prepared in relation to a matter involving the provision of advice or other services by legal counsel.

- [74] Based on a review of these pages, I see that this draft decision was prepared by legal counsel for the SHRC. The drafting of the decision would be in relation to a matter involving the provision of services by legal counsel. In Review Report 171-2019, I had found that subsection 22(b) of FOIP applied to draft decisions prepared by SHRC. Similarly, I find that subsection 22(b) of FOIP applies to pages 93 to 103.
- [75] Pages 158 to 163 are correspondence by the SHRC Intake Consultant to the Director of Resolution. Earlier in this Report, I found that the Director of Resolution was acting in their capacity of a director providing approval to work completed by the Intake Consultant. Therefore, pages 158 to 163 are not records prepared by or for an agent or legal counsel for the SHRC. I find that subsection 22(b) of FOIP does not apply to pages 158 to 163.
- [76] Pages 265 to 267 and pages 302 to 338 contain correspondence between SHRC's counsel and either the Respondent counsel, the Dispute Resolution Office, or mediator (from the Dispute Resolution Office) regarding setting up the date and/or time for the Directed Mediation. As provided in paragraph [120] of my Review Report 171-2019, subsection 22(b) of FOIP applies to records that contains information compiled or created for the purpose of providing legal advice or legal services by an agent or legal counsel for a government institution. I had said:
- ...the prepared record does not have to constitute legal advice or legal services to qualify for the second part of the test. However, the record must relate to a matter such that the matter is constituted by, or consists of, the provision of legal advice or services. The portion(s) of the record to which the government institution applies subsection 22(b) of FOIP should be substantive and not merely referencing the advice or service provided.
- [77] I find that setting up the date and time for Directed Mediation does not qualify as legal advice or legal services. As such, I find that subsection 22(b) of FOIP does not apply to pages 265 to 267 and pages 302 to 338.
- [78] Pages 277 and 279 contain correspondence between SHRC counsel and the Applicant's former counsel. Based on a review of these two pages, the contents do not contain

information that was compiled or created for the purpose of providing legal advice or legal services by an agent or counsel for the SHRC. I find that subsection 22(b) of FOIP does not apply to pages 277 and 279.

[79] Page 295 contains an internal SHRC email. Based on a review, the contents do not contain information that relate to the provision of legal advice or other services by the SHRC lawyer. I find that subsection 22(b) of FOIP does not apply to page 295.

[80] A portion of page 348 contains telephone notes between the SHRC and the Applicant. The telephone notes do not contain information that was compiled or created for the purpose of providing legal advice or legal services by an agent or counsel for the SHRC. I find that subsection 22(b) of FOIP does not apply to the telephone notes between the SHRC and the Applicant on page 348. Moreover, I note that this portion of page 348 was released to the Applicant in the additional 317 pages of records that was released on May 14, 2020. Therefore, there is no reason to continue to withhold this portion of page 348.

[81] The remainder of pages 348 and 349 appear to contain telephone notes between SHRC counsel and a third party. The SHRC clarified with my office that the third party is a representative of the Applicant's insurer. The contents of the telephone notes contain information that was compiled or created for the purpose of providing legal advice or legal services by an agent or counsel for the SHRC. I find that subsection 22(b) of FOIP does not apply to pages 348 and 349. The SHRC noted that these notes were created after January 17, 2020 (or, in other words, created after it received the Applicant's access request). Based on a review, I find that these notes are indeed outside the scope of the Applicant's access request. However, it unclear why the SHRC would include these telephone notes as a part of the records at issue in this review, provide arguments as to why exemptions apply to them, but then assert they are outside of the scope of the access request. This suggests to me that the SHRC does not have established processes in place to process access requests nor manage reviews with my office. Later on in this Report, at Issue 13, I discuss how the SHRC included records that are outside the scope of the Applicant's access request but I recommend that the SHRC release the records anyway. Similarly, since the SHRC included pages 348 and 349 in this review and applied multiple exemptions to them.

If I find that the exemptions do not apply, then I will recommend that the SHRC release pages 348 to 349 to the Applicant anyway. Going forward, to avoid this outcome, the SHRC should not be providing my office with records that were created after the Applicant submitted an access request. One way of doing this is to paginate the records at issue it has gathered in the course of processing an access request. This will enable the SHRC, my office, and the Applicant to have one set of records to reference in a review. The SHRC should not be gathering records for the first time in the course of a review.

[82] Even though the SHRC applied subsection 22(b) of FOIP to pages 281 to 294, 298 to 301, and 346, it also applied subsection 22(c) of FOIP to these pages. I will consider these pages in my analysis of subsection 22(c) of FOIP below.

6. Did the SHRC properly apply subsection 22(c) of FOIP?

[83] The SHRC applied subsection 22(c) of FOIP to pages 158 to 163 and pages 242 and 349. I have already found that subsection 22(a) of FOIP applies to pages 242 to 264, 268, 296, 297, 339, 340, and 347. I have also already recommended that the SHRC release portions of the following pages, because they contain correspondence between the SHRC and the Applicant: 269, 270, 271, 272, 273, 274, 275, 276, 278, 280, 310, 341, 342, 343, 344, and 345. Therefore, I will only consider if subsection 22(c) of FOIP applies to pages 158 to 163 and 265 to 267, 277, 279, 281 to 295, 298 to 309, 311 to 338, 346, and 348 to 349.

[84] Subsection 22(c) of FOIP provides as follows:

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

...

(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.

[85] My office uses the following two-part test to determine if subsection 22(c) of FOIP applies to records:

1. Is the record a correspondence between the government institution's legal counsel (or an agent of the Attorney General) and any other person?
2. Does the correspondence relate to a matter that involves the provision of advice or other services by the agent or legal counsel?

Pages 158 to 163

[86] As described earlier, pages 158 to 163 are correspondence between an Intake Consultant and the Director of Resolution. The Intake Consultant is either seeking approval from the Director or letting the Director of Resolution know the status of a file. Earlier, I found that based on the contents of the records, the Director of Resolution is acting in their capacity as a director and not as a solicitor. I find the same here. As such, the first part of the test for subsection 22(c) of FOIP is not met. I find that subsection 22(c) of FOIP does not apply to pages 158 to 163.

Directed Mediation file (pages 158 to 163 and 265 to 267, 277, 279, 281 to 295, 298 to 309, 311 to 338, 346, and 348 to 349)

[87] In order for subsection 22(c) of FOIP to apply, the two-part test set out above must be met. In its submission, the SHRC provided the following arguments as to why subsection 22(c) of FOIP applied to pages within its Directed Mediation file:

As noted in the OIPC *Guide to FOIP*, correspondence in this category does not have to constitute legal advice or services to qualify for this exemption. Legal services are explained in the OIPC *Guide to FOIP* as:

any law-related service 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 correspondence in this bundle relates, by its very nature, to a matter involving the provision of advice or services by legal counsel. Correspondence with Applicant Counsel and Respondent Counsel relates to the complaint/Directed Mediation – the basis for Commission Counsel's provision of advice and services on the file. The relationship between the legal services and the correspondence is direct. Commission counsel acted in a legal capacity in communicating with the parties to navigate the Directed Mediation and reasonable offer process. The records contain correspondence between the government institution's legal counsel and "any other person" and they

relate to a matter that involves the provision of advice or other services by legal counsel. All of the emails and notes contained in the “Correspondence from Directed Mediation” heading (265-349) relate to a matter involving the provision of legal services.

- [88] I agree with the SHRC that the correspondence that would be exempt under subsection 22(c) of FOIP does not have to constitute legal advice or services; however, the correspondence itself must relate to the provision of legal advice or other services. In my Review Report 171-2019, I cited paragraph [117] of Order F2015-22 by AB IPC. AB IPC provided that the correspondence must contain content that enables the public body’s lawyer to provide legal advice or a legal service to the public body.
- [89] Pages 265 to 267 and pages 302 to 338 contain correspondence between SHRC’s counsel with either the Respondent counsel, the Dispute Resolution Office, or the mediator (from the Dispute Resolution Office) regarding setting up a date and/or time for mediation. Earlier in this Report, I summarized the SHRC explanation that the SHRC counsel’s role at Directed Mediation is to represent the SHRC and may provide the SHRC’s position on the appropriateness of any settlement offer in light of the strengths and weaknesses of the case and the potential range of likely outcomes at a hearing. Therefore, while the correspondence on pages 265 to 267, 302 to 309, and 311 to 338 may involve the SHRC’s counsel with any other person, the correspondence does not relate to the provision of legal advice or other services by the SHRC lawyer. I find that subsection 22(c) of FOIP does not apply to pages 265 to 267, 302 to 309, and 311 to 338.
- [90] Pages 277 and 279 contain correspondence between the SHRC counsel and the Applicant’s former counsel. Based on a review of these two pages, I do not find that the contents of these two pages relate to the provision of legal advice or other services by the SHRC lawyer. I find that subsection 22(c) of FOIP does not apply to pages 277 and 279.
- [91] Page 295 contains an internal SHRC email. Based on a review, I do not find that the contents of this page relate to the provision of legal advice or other services by the SHRC lawyer. I find that subsection 22(c) of FOIP does not apply to page 295.

[92] Pages 281 to 294, 298 to 301, and 346 contain correspondence between SHRC counsel and the respondent counsel regarding either a settlement or the Directed Mediation process. Such correspondence relates to the provision of legal services by SHRC counsel. As such, I find that subsection 22(c) of FOIP applies to pages 281 to 294, 298 to 301, and 346.

[93] A portion of page 348 contains telephone notes between the SHRC and the Applicant. Based on a review of these telephone notes, the contents does not relate to the provision of legal services by SHRC counsel in the Directed Mediation. Moreover, as I found earlier, this portion of page 348 was released to the Applicant in the additional 317 pages of records that was released on May 14, 2020. Therefore, there is no reason to continue to withhold this portion of page 348. I recommend that the SHRC release the telephone notes between the SHRC and the Applicant on page 348.

[94] The remainder of pages 348 and 349 appear to contain telephone notes between SHRC counsel and a third party. The third party appears to be a representative of the Applicant's insurer. I do not find that the contents of these telephone notes relate to the provision of legal advice or legal services by the SHRC in the Directed Mediation. I find that subsection 22(c) of FOIP does not apply to pages 348 and 349.

7. Did the SHRC properly apply subsection 15(1)(b) of FOIP?

[95] The SHRC applied subsection 15(1)(b) of FOIP to pages 1 to 92 (the mediation file) and 242 to 349 (the Directed Mediation file).

[96] In terms of the mediation file, I found that subsection 22(a) of FOIP applied to pages 50 to 52, 84, and 88 to 92. In terms of the Directed Mediation file, I found that subsection 22(a) of FOIP applies to pages 242 to 264, 268, 296 to 297, 339 to 340, and 347. Therefore, I will not consider these pages in my analysis of whether subsection 15(1)(b) of FOIP applies to these pages.

[97] Further, I have already recommended that the SHRC release portions of the following pages that contain correspondence between the SHRC and the Applicant: 1, 4, 5, 6, 10, 11,

14, 15, 17, 18, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 35, 36, 37, 38, 39, 40, 46, 47, 49, 53, 56, 59, 60, 63, 64, 65, 66, 67, 68, 70, 73, 79, 80, 81, 82, 83, 85, 269, 270, 271, 272, 273, 274, 275, 276, 278, 280, 310, 341, 342, 343, 344, and 345.

[98] Therefore, I will only consider pages 2 to 3, 7 to 9, 12 to 13, 16, 19, 22, 23, 30 to 34, 40 to 45, 48, 49, 54 to 55, 57 to 58, 61 to 62, 66, 69, 71 to 72, 73 to 78, 86 to 87, 265 to 267, 277, 279, 295, 302 to 338, and 348 to 349 when determining if subsection 15(1)(b) of FOIP applies.

[99] Subsection 15(1)(b) of FOIP provides:

15(1) A head may refuse to give access to a record, the release of which could:

...

(b) be injurious to the enforcement of:

(i) an Act or a regulation; or

...

[100] My office uses the following two-part test when determining if subsection 15(1)(b) of FOIP applies:

1. Which Act or regulation is being enforced?
2. Could release of the record injure enforcement of the Act or regulation?

Pages 1 to 92 – Mediation file

[101] For the first of the two-part test for subsection 15(1)(b) of FOIP, the SHRC indicated that the Act or regulation being enforced is *The Saskatchewan Human Rights Code, 2018* (the Code).

[102] For the second part of the test, the SHRC explained that the mediation process is understood to be confidential, without prejudice, and is typically governed by a mediation agreement signed by the parties to the complaint. It indicated that the mediation file is not disclosed to the investigator, other decision makers, or the Chief Commissioner. It says this is to

ensure fair and impartial adjudication and decision for the parties. It explained that the terms of the SHRC's mediations include that the parties to the complaint agree to keep confidential all communications and records disclosed within the mediation process. The parties are not to use or disclose any information obtained within mediation for any purpose. The SHRC explained:

The duties of the Commission are set out in section 24 of the Code, and explicitly include promoting and pursuing alternative dispute resolution methods in resolving complaints. The conduct of the mediation fulfils the Commission's mandate pursuant to section 24 of the Code.

Confidentiality ensures and maintains the integrity of the mediation system. The nature of the mediation process requires that parties are assured of confidentiality, in order to negotiate openly and make progress toward resolution using an alternative method to litigation. During mediation, parties may take positions and make without prejudice settlement offers towards the goal of achieving settlement, that could otherwise prejudice them should the matter proceed forward through investigation and hearing. Often, the matters discussed at the mediation stage are exactly the matters at issue as the file proceeds to later stages in the Commission's process. Release of confidential information would threaten the sanctity of the mediation process, as parties would be unlikely to be candid and open with mediators in the face of pending litigation.

Parties have an expectation of confidentiality when they communicate with a Mediator. In the civil court process, the SCC has recognized that confidentiality is inherent in mediation (See: *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, [2014] 1 SCR 800 [Union Carbide] [TAB 1]).

The Commission could not effectively conduct mediations if confidentiality was not ensured. Inability to ensure the confidentiality of information would effectively prevent the Commission from mediating complaints between parties in accordance with its legislative mandate. The Commission respectfully submits that the intent of FOIP is not to limit or preclude possibilities for early and appropriate case resolution in human rights matters.

[103] The SHRC then set out the following four arguments as to why the disclosure of the mediation file (pages 1 to 92) could be injurious to the enforcement of the Code:

1. Disclosing information that was never intended to be shared would create a chilling effect on the mediation process. Parties are unlikely to participate in the future if the information they share is subject to disclosure (See paragraph 31 of Union Carbide [TAB 1]);

2. Compelling disclosure of any portion of the mediation file is contrary to the mediation framework and its principles. Mediation is meant to be without prejudice and the parties enter into mediation with the understanding that it constitutes a proverbial “black hole” in the legal process;
3. Even where a matter is dismissed or proceeds to hearing, information is sometimes shared and/or concessions are made during the mediation process which should not be revisited or revealed at a later time; and
4. The Chief Commissioner’s decision to conditionally dismiss this complaint could be revisited. The Applicant has indicated that she is considering pursuing judicial review of the decision....

[104] Earlier, I said I would consider pages 2 to 3, 7 to 9, 12 to 13, 16, 19, 22, 23, 30 to 34, 40 to 45, 48, 49, 54 to 55, 57 to 58, 61 to 62, 66, 69, 71 to 72, 73 to 78, and 86 to 87 of the mediation file to determine if subsection 15(1)(b) of FOIP applied. I find that these pages do not contain the substance of the mediation. For example, pages 40 to 45 contain correspondence between the Director of Resolution and a mediator that occurred prior to the mediation and is about arrangements for the mediation. Another example are pages 73 to 78. They contain correspondence between SHRC and the respondent’s counsel about setting up a date for mediation. These pages do not contain the substance of the mediation. As such, I find that subsection 15(1)(b) of FOIP does not apply to pages 2 to 3, 7 to 9, 12 to 13, 16, 19, 22, 23, 30 to 34, 40 to 45, 48, 49, 54 to 55, 57 to 58, 61 to 62, 66, 69, 71 to 72, 73 to 78, and 86 to 87 of the mediation file.

[105] Earlier, I said I would consider pages 265 to 267, 277, 279, 295, 302 to 338, and 348 to 349 of the Directed Mediation file to determine if subsection 15(1)(b) of FOIP applied. In its submission, the SHRC indicated it is relying on its same arguments it provided for withholding of the mediation file (pages 1 to 92) pursuant to subsection 15(1)(b) of FOIP, which is summarized above. It said that the release of any documents or correspondence related to a Directed Mediation could injure enforcement of *The Saskatchewan Human Rights Code, 2018*. It argued that parties will be less inclined to participate in Directed Mediation if information related to the same is released or releasable. It also said that the disclosure of the information could deprive the respondent of a trial or adjudication in the future. It highlighted pages 252, 259 to 260 and 242 to 251, 253 to 257, 258, and 261 to 264. I have already determined earlier that subsection 22(a) of FOIP applied to these pages

highlighted by the SHRC. Therefore, there is no need to reconsider them for exemption pursuant to subsection 15(1)(b) of FOIP.

[106] In terms of pages 265 to 267, 277, 279, 295, 302 to 338, and 348 to 349 of the Directed Mediation file, I find that subsection 15(1)(b) of FOIP does not apply to any of these pages for the following reasons:

- Pages 265 to 267 and pages 302 to 338 are about setting up the date and/or time for the Directed Mediation. It does not contain the substance of the Directed Mediation.
- Pages 277 and 279 contain correspondence between SHRC counsel and the Applicant's former counsel. It does not contain the substance of the Directed Mediation.
- Page 295 contains an internal SHRC email. It does not contain the substance of the Directed Mediation.
- A portion of page 348 contains telephone notes between the SHRC and the Applicant. These telephone notes were already released to the Applicant in the additional 317 pages of records on May 14, 2020. The remainder of page 348 and page 349 contains telephone notes between SHRC counsel and a third party. The third party appears to be a representative of the Applicant's insurer. The contents do not appear to contain the substance of the Directed Mediation.

8. Did the SHRC properly apply subsection 15(1)(c) of FOIP?

[107] The SHRC applied subsection 15(1)(c) of FOIP to pages 104 to 157, and 164 to 241 (the Investigation file).

[108] Subsection 15(1)(c) of FOIP provide as follows:

15(1) A head may refuse to give access to a record, the release of which could:

...

(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;

[109] My office uses the following two-part test when determining if subsection 15(1)(c) of FOIP applies:

1. Does the SHRC's activity qualify as a "lawful investigation"?

2. Does one of the following exist?
 - i. Could the release of the information interfere with a lawful investigation?
 - ii. Could the release disclose information with respect to a lawful investigation?

[110] For the first part of the test, I must determine if SHRC's activity qualifies as a "lawful investigation". Based on a review of the records, I find that pages 104 to 157 and pages 164 to 240 are related to an investigation undertaken by the SHRC under *The Saskatchewan Human Rights Code, 2018*. As such, I find that SHRC's activity qualifies as a "lawful investigation". Therefore, the first part of the test is met for pages 104 to 157 and pages 164 to 240.

[111] For the second part of the test, I must determine if the release of the information could interfere with a lawful investigation, or I must determine if the release of the information could disclose information with respect to a lawful investigation. In its submission, the SHRC asserted that the pages relate to a lawful investigation. Based on a review of the records, I agree that pages 104 to 157 and pages 164 to 240 relate to a lawful investigation.

[112] Based on the above, I find that subsection 15(1)(c) of FOIP applies to pages 104 to 157 and 164 to 240.

[113] I should note that the SHRC also applied subsection 15(1)(c) of FOIP to page 241. Page 241 is an email by the Director of Resolution indicating that the file is assigned to Directed Mediation. Based on a review, the contents of the email is not about the investigation undertaken by the SHRC. As such, I find that subsection 15(1)(c) of FOIP does not apply to page 241.

9. Did the SHRC properly apply subsection 15(1)(g) of FOIP?

[114] The SHRC applied subsection 15(1)(g) of FOIP to pages 44 to 92 (the mediation file), pages 242 to 251, 252, 253 to 257, 258, 259-260, 261 to 264, and 265 to 349 (the Directed Mediation file).

[115] Earlier in this Report, I found that subsection 22(a) of FOIP applied to pages 50 to 52, 84, 88 to 92, 242 to 264, 268, 296 to 297, 339 to 340, and 347. I also found that subsection 22(c) of FOIP applied to pages 281 to 294, 298 to 301, and 346.

[116] Further, I have already recommended that the SHRC release portions of the following pages that contain correspondence between the SHRC and the Applicant: 46 to 47, 49, 53, 56, 59, 60, 63 to 68, 70, 73, 79 to 83, 85, 269, 270, 271, 272, 273, 274, 275, 276, 278, 280, 310, 341, 342, 343, 344, and 345.

[117] Therefore, I will only consider pages 44, 45, 48, 49, 54, 55, 57 to 58, 61 to 62, 66, 69, 71 to 72, 73 to 78, 86 to 87, 265 to 267, 277, 279, 295, 302 to 338, and 348 to 349 when determining if subsection 15(1)(g) of FOIP applies.

[118] Subsection 15(1)(g) of FOIP provides:

15(1) A head may refuse to give access to a record, the release of which could:
...
(g) deprive a person of a fair trial or impartial adjudication;

[119] My office uses the following three-part test to determine if subsection 15(1)(g) of FOIP applies to records:

1. Who is the “person” impacted by possible disclosure?
2. Is there a trial or adjudication occurring now or in the future?
3. Could disclosure of the information deprive the person of a fair trial or impartial adjudication?

[120] In terms of the pages within its mediation file, the SHRC argued that the Respondent would be impacted by possible disclosure. It asserted that the Applicant has indicated that they want to appeal the Chief Commissioner’s decision. Further, it indicated that it had been contacted by a lawyer acting for the Applicant’s insurer. Therefore, the SHRC asserted it is reasonable to conclude that an adjudication or trial will occur in the future. Finally, the SHRC argued that the disclosure of the information in the mediation file could deprive the

Respondent of the right to a fair trial or hearing by disclosing information that was never intended to be shared between parties, including admissions and/or concessions.

[121] I have already found that subsection 22(a) of FOIP applies to some of the pages in the mediation file. More specifically, I had found that subsection 22(a) of FOIP applies to records that contain the substance of the mediation. Of the pages in the mediation file that I am considering if subsection 15(1)(g) of FOIP applies – pages 44, 45, 48, 49, 54, 55, 57 to 58, 61 to 62, 66, 69, 71 to 72, 73 to 78, and 86 to 87 – I find that they do not contain the substance of the mediation. The records contain information such as setting up a date for the mediation. I find that the disclosure of such information would not deprive the Respondent of a fair trial or impartial adjudication in the future.

[122] In terms of the pages within its Directed Mediation file, the SHRC argued that the disclosure of the information could deprive the Respondent of a fair trial or an impartial adjudication in the future.

[123] I have already found that subsections 22(a) and 22(c) of FOIP apply to some of the pages in the Directed Mediation file. Of the pages in the Directed Mediation file that I am considering under subsection 15(1)(g) of FOIP – pages 265 to 267, 277, 279, 295, 302 to 338, and 348 to 349 – I find that they do not contain the substance of the Directed Mediation. The records contain information such as setting up a date and time for the Directed Mediation. I find that the disclosure of such information would not deprive the Respondent of a fair trial or impartial adjudication.

[124] I find that the SHRC has not demonstrated that subsection 15(1)(g) of FOIP applies.

10. Did the SHRC properly apply subsection 17(1)(a) of FOIP?

[125] The SHRC applied subsection 17(1)(a) of FOIP to pages 209 to 241. Earlier, I found that subsection 15(1)(c) of FOIP applied to pages 209 to 240. Therefore, I do not need to determine if subsection 17(1)(a) of FOIP applies to these pages. I will need to determine if subsection 17(1)(a) of FOIP applies to page 241.

[126] Subsection 17(1)(a) of FOIP provides:

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;

[127] My office uses the following two-part test to determine if subsection 17(1)(a) of FOIP applies:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

[128] As described earlier in this Report, page 241 is an email by the Director of Resolution indicating that the file is assigned to Directed Mediation. Based on a review, the content of the email does not contain advice, proposals, recommendations, analyses or policy options. As such, I find that subsection 17(1)(a) of FOIP does not apply to page 241.

11. Did the SHRC properly apply subsection 17(1)(b) of FOIP?

[129] The SHRC applied subsection 17(1)(b) of FOIP to pages 1 to 92 (the mediation file), 93 to 103, 158 to 163 (legal and intake correspondence file), and 164 to 166, 209 to 235, 236 to 240, and 241 (the investigation file).

[130] Earlier, I already found that subsection 22(a) of FOIP applied to pages 50 to 52, 84, and 88 to 92. I also found that subsection 22(b) of FOIP applied to pages 93 to 103. Finally, I found that subsection 15(1)(c) of FOIP applied to pages 164 to 166, 209 to 235 and 236 to 240.

[131] I also have recommended that the SHRC release the portions of the following pages that contain correspondence between the SHRC and the Applicant: 1, 4, 5, 6, 10, 11, 14, 15, 17, 18, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 35, 36, 37, 38, 39, 40, 46, 47, 49, 53, 56, 59, 60, 63, 64, 65, 66, 67, 68, 70, 73, 79, 80, 81, 82, 83, and 85.

[132] Therefore, I will only consider pages 1 to 3, 7, to 9, 12 to 13, 16, 19, 22 to 23, 30 to 34, 40 to 45, 48 to 49, 54 to 55, 57 to 58, 61 to 62, 66, 69, 71 to 72, 73 to 78, 85 to 87, 158 to 163, and 241 when determining if subsection 17(1)(b) of FOIP applies.

[133] Subsection 17(1)(b) of FOIP provides:

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(b) consultations or deliberations involving:

- (i) officers or employees of a government institution;
- (ii) a member of the Executive Council; or
- (iii) the staff of a member of the Executive Council;

[134] My office uses the following two-part test to determine if subsection 17(1)(b) of FOIP applies:

1. Does the record contain consultations or deliberations?
2. Do the consultations or deliberations involve officers or employees of a government institution, a member of the Executive Council, or the staff of a member of the Executive Council?

[135] Pages 127 to 128 of the Guide to FOIP defines the term “consultation” and explains it as follows:

- the action of consulting or taking counsel together: deliberation, conference;
- a conference in which the parties consult and deliberate.

A consultation can occur when the views of one or more officers or employees of a government institution are sought as to the appropriateness of a particular proposal or suggested action. It can include consultations about prospective future actions and outcomes in response to a developing situation. It can also include past courses of action. For example, where an employer is considering what to do with an employee in the future, what has been done in the past can be summarized and would qualify as part of the consultation or deliberation.

[136] Page 128 of the Guide to FOIP defines the term “deliberation” and explains it as follows:

- the action of deliberating (to deliberate: to weigh in mind; to consider carefully with a view to a decision; to think over); careful consideration with a view to a decision;
- the consideration and discussions of the reasons for and against a measure by a number of councillors.

A deliberation can occur when there is a discussion or consideration of the reasons for or against an action. It can refer to discussions conducted with a view towards making a decision.

[137] In its submission, the SHRC asserted that pages 1 to 43 contained consultations or deliberations between a mediator and the Director of Resolution regarding a potential conflict of interest. The SHRC asserted that the mediator sought the Director of Resolution’s view on the appropriateness of a suggested action, and after deliberation, a decision was made. The SHRC also asserted that consultations and deliberations occurred between an Intake Consultant and the Director of Resolution with respect to reassigning the mediation. The SHRC asserted that after consultation and deliberation, the Director of Resolution found it appropriate to reassign the mediation to a different mediator. The SHRC indicated that all three individuals (the mediator, the Intake Consultant and the Director of Resolution) are officers or employees of a government institution.

[138] Based on a review of pages 1 to 3, 7, to 9, 12 to 13, 16, 19, 22 to 23, 30 to 34, 40 to 45, 48 to 49, 54 to 55, 57 to 58, 61 to 62, 66, 69, 71 to 72, 73 to 78, and 85 to 87, I find that they do not contain consultations or deliberations. They contain employees (the mediator or the Intake Consultant) seeking direction from their Director and their Director providing direction to the employees. I find that subsection 17(1)(b) of FOIP does not apply to pages

1 to 3, 7, to 9, 12 to 13, 16, 19, 22 to 23, 30 to 34, 40 to 45, 48 to 49, 54 to 55, 57 to 58, 61 to 62, 66, 69, 71 to 72, 73 to 78, and 85 to 87.

[139] For pages 158 to 163, the SHRC asserted that they contained consultations or deliberations between the Intake Consultant and the Director of Resolution. Based on a review of these pages, I find that the Intake Consultant is seeking approval of their work from the Director of Resolution. These pages do not contain consultations or deliberations. I find that subsection 17(1)(b) of FOIP does not apply to pages 158 to 163.

[140] Page 241 is an email by the Director of Resolution indicating that the file is assigned to Directed Mediation. This page does not contain consultations or deliberations. I find that subsection 17(1)(b) of FOIP does not apply to page 241.

12. Did the SHRC properly apply subsection 29(1) of FOIP?

[141] As described in the background section of this Report, the SHRC provided the Applicant with 317 pages of records on May 14, 2020. Portions of some of the 76 pages were severed pursuant to subsection 29(1) of FOIP. Since these 76 pages were not a part of the original 376 pages provided to my office, they were not paginated. Therefore, I cannot reference page numbers in my analysis.

[142] Subsection 29(1) of FOIP protects the privacy of individuals whose personal information may be contained within records responsive to an access to information request made by someone else. Subsection 29(1) requires a government institution to have the consent of the individual whose personal information is in the record prior to disclosing it unless it has authority to disclose without consent pursuant to subsection 29(2) or section 30 of FOIP. Subsection 29(1) of FOIP provides:

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.

[143] When dealing with information in a record that appears to be personal, the first step is to confirm the information indeed qualifies as “personal information” pursuant to subsection 24(1) of FOIP. Subsections 24(1)(f) and (k) of FOIP provide:

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:

...

(f) the personal opinions or views of the individual except where they are about another individual;

...

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual;
or

(ii) the disclosure of the name itself would reveal personal information about the individual.

[144] Based on a review of the pages within the 76 pages that contained severing, it appears that the SHRC redacted the names of the following: 1) business card information of employees of the Respondent organization, and 2) the names of clients of the Respondent organization.

Business card information

[145] “Business card information” is information that appears on an employee’s business card. For example, a person’s name, their job title, the name of their company, and their business contact information. In my Review Reports 186-2019 and 301-2019, I explained that business card information is generally not personal in nature and therefore, not considered personal information. Within the 76 pages, the SHRC severed information that appears to be business card information. I find that such information does not qualify as personal information as defined by subsection 24(1) of FOIP. This includes information that appears in email headers and email signatures. I recommend that the SHRC release the business card information.

Names of clients of the Respondent organization

[146] Based on a review of the 76 pages, the SHRC also severed the names of clients of the Respondent organization. Such information qualifies as personal information as defined by subsection 24(1)(k)(i) and (ii) of FOIP. I find that SHRC properly withheld such information pursuant to subsection 29(1) of FOIP. I recommend that the SHRC continue to withhold the names of clients of the Respondent organization.

13. Are there records that are not responsive to the Applicant's access to information request?

[147] The SHRC identified pages 350 to 376 as not responsive to the Applicant's access to information request. These pages are correspondence between my office and the SHRC and it is in regards to my office's review.

[148] In past reports, I have said that an applicant's access to information request itself sets the boundaries of relevance and circumscribes the records or information that will ultimately be identified as being responsive.

[149] In this case, the Applicant's access request was received by the SHRC on January 17, 2020. As such, any records created on or after January 17, 2020, would be outside the scope of the access to information request. The records on pages 350 to 376 were dated April 3, 2020 and onwards. They did not exist at the time the SHRC received the access to information request. Therefore, I find that the records on pages 350 to 376 would be outside the scope of the access to information request. While they are outside the scope of the access to information request, these records were included in the SHRC's index of records. The index of records was reproduced earlier in this Report. I see no reason to withhold these records from the Applicant. As such, I recommend that the SHRC release pages 350 to 376 to the Applicant.

[150] In the future, I recommend that the SHRC paginate records it has gathered in the processing of access to information requests rather than paginating them for the first time in the course of my office's review. This will enable my office, the SHRC, and the Applicant to have one set of records to reference in a review.

IV FINDINGS

[151] I find that the SHRC did not make a reasonable effort to search and locate records responsive to the Applicant's access request, as required by FOIP, when it first received the Applicant's access request.

[152] I find that the SHRC is not in compliance with section 8 of FOIP.

[153] I find that mediation privilege or case-by-case privilege pursuant to subsection 22(a) of FOIP applies to pages 50, 51, 52, 84, 88, 89, 90, 91, 92, 242 to 264, 268, 296, 297, 339, 340, and 347.

[154] I find that subsection 22(a) of FOIP does not apply to pages 158 to 163.

[155] I find that subsection 22(b) of FOIP applies to pages 93 to 103.

[156] I find that subsection 22(b) of FOIP does not apply to pages 158 to 163, 265 to 267, 277, 279, 295, 302 to 338, 348, and 349.

[157] I find that subsection 22(c) of FOIP does not apply to pages 158 to 163, 265 to 267, 277, 279, 295, 302 to 309, 311 to 338, 348, and 349.

[158] I find that subsection 22(c) of FOIP applies to pages 281 to 294, 298 to 301, and 346.

[159] I find that subsection 15(1)(b) of FOIP does not apply to pages 2 to 3, 7 to 9, 12 to 13, 16, 19, 22, 23, 30 to 34, 40 to 45, 48, 49, 54 to 55, 57 to 58, 61 to 62, 66, 69, 71 to 72, 73 to 78, and 86 to 87 of the mediation file.

[160] I find that subsection 15(1)(b) of FOIP does not apply to pages 265 to 267, 277, 279, 295, 302 to 338, and 348 to 349 of the Directed Mediation file.

[161] I find that subsection 15(1)(c) of FOIP applies to pages 104 to 157 and 164 to 240.

[162] I find that subsection 15(1)(c) of FOIP does not apply to page 241.

[163] I find that subsection 15(1)(g) of FOIP does not apply to pages 44, 45, 48, 49, 54, 55, 57 to 58, 61 to 62, 66, 69, 71 to 72, 73 to 78, 86 to 87, 265 to 267, 277, 279, 295, 302 to 338, and 348 to 349.

[164] I find that subsection 17(1)(a) of FOIP does not apply to page 241.

[165] I find that subsection 17(1)(b) of FOIP does not apply to pages 1 to 3, 7, to 9, 12 to 13, 16, 19, 22 to 23, 30 to 34, 40 to 45, 48 to 49, 54 to 55, 57 to 58, 61 to 62, 66, 69, 71 to 72, 73 to 78, and 85 to 87.

[166] I find that subsection 17(1)(b) of FOIP does not apply to pages 158 to 163, and 241

[167] I find that subsection 29(1) of FOIP does not apply to the business card information that appears in the redacted records released to the Applicant on May 14, 2020.

[168] I find that subsection 29(1) of FOIP applies to the client information that appears in the redacted records released to the Applicant on May 14, 2020.

[169] I find that the information on pages 350 to 376 would be outside the scope of the access to information request.

V RECOMMENDATIONS

[170] I recommend that the SHRC amend its procedures so that it conducts a thorough and complete search for records when it receives formal access to information requests under FOIP.

- [171] I recommend that the SHRC amend its procedures when responding to access requests. The SHRC should be citing all the reasons it is withholding information from the Applicant, including subsection 29(1) of FOIP. That would enable the Applicant to request a review by my office of all the reasons the SHRC is withholding information.
- [172] I recommend that the SHRC continue to withhold pages 50, 51, 52, 84, 88, 89, 90, 91, 92, 242 to 264, 268, 296, 297, 339, 340, and 347 pursuant to subsection 22(a) of FOIP.
- [173] I recommend that the SHRC release the portions of the following pages that contain correspondence exchanged between the SHRC and the Applicant: 1, 4, 5, 6, 10, 11, 14, 15, 17, 18, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 35, 36, 37, 38, 39, 40, 46, 47, 49, 53, 56, 59, 60, 63, 64, 65, 66, 67, 68, 70, 73, 79, 80, 81, 82, 83, 85, 269, 270, 271, 272, 273, 274, 275, 276, 278, 280, 310, 341, 342, 343, 344, and 345.
- [174] I recommend that the SHRC release the telephone notes between the SHRC and the Applicant on page 348.
- [175] I recommend that the SHRC release the business card information that appears in the 317 pages of records released to the Applicant on May 14, 2020.
- [176] I recommend that the SHRC continue to withhold the names of clients of the Respondent organization pursuant to subsection 29(1) of FOIP.
- [177] I recommend that the SHRC release the following pages to the Applicant since I found that exemptions do not apply to them: 2, 3, 7 to 9, 12 to 13, 16, 19, 22 to 23, 30 to 34, 40 to 49, 54 to 55, 57 to 58, 61 to 62, 66, 69, 71 to 78, 86 to 87, 158 to 163, 241, 265 to 267, 269 to 280, 295, 302 to 338, and 348 to 349.
- [178] I recommend that the SHRC release pages 350 to 376 to the Applicant even though they are outside the scope of the Applicant's access to information request.

[179] I recommend that, in the future, the SHRC paginate records it has gathered in the processing of access requests rather than paginating them for the first time in the course of my office's review. This will enable my office, the SHRC, and the Applicant to have one set of records to reference in a review.

Dated at Regina, in the Province of Saskatchewan, this 2nd day of February, 2021.

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