



## REVIEW REPORT 158-2019

### Ministry of Justice

December 14, 2020

**Summary:** The Applicant made an access request to the Ministry of Justice (Justice). Justice withheld the record under subsection 22(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Later, Justice also added subsection 22(a) of FOIP to the withheld record. The Commissioner found that Justice had not made a *prima facie* case that subsection 22(a) of FOIP applied to the record and that subsection 22(b) of FOIP did not apply to the record. The Commissioner recommended that Justice release the record.

### I BACKGROUND

[1] The Applicant submitted an access to information request that was received by the Ministry of Justice (Justice) on March 18, 2019, requesting access to:

Training Materials for Sask. Domestic Violence Court including for Judges, prosecutors, police other involved agencies.

[2] On April 16, 2019, Justice responded to the request indicating that it was denying access to the records pursuant to subsection 22(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP), as the records were prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel.

[3] Justice also, at that time, notified the Applicant that it did not have access to records held by police or other associated agencies and therefore, the Applicant would need to request those records directly from those agencies.

- [4] On May 1, 2019, my office received a request from the Applicant that our office review Justice's decision to deny access to the records.
- [5] On May 5, 2019, my office notified both the Applicant and Justice of its intention to undertake a review and requested both parties provide my office with submissions.
- [6] On January 2, 2020, the Ministry provided my office with a Statement of Records and an Affidavit sworn by the Director of Access to Information, Access and Privacy Branch for Justice certified by its legal counsel. No records were provided.
- [7] On August 13, 2020, my office contacted Justice regarding its refusal to provide records to my office for my review of its decision to withhold the records under subsection 22(b) of FOIP. At this time, Justice advised it was also relying on subsection 22(a) of FOIP and would provide further information to my office regarding its reliance on this exemption and thus its decision to refuse to provide my office with a copy of the records.
- [8] On August 14, 2020, the Ministry provided my office with a copy of its letter to the Applicant advising them of its addition of subsection 22(a) of FOIP applied to the responsive records.

## **II RECORDS AT ISSUE**

- [9] Justice advised that the responsive record was a document totaling four pages.

## **III DISCUSSION OF THE ISSUES**

### **1. Do I have jurisdiction?**

- [10] Justice is a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to conduct this review.

**2. Does subsection 22(a) of FOIP apply to the record?**

[11] Subsection 22(a) of FOIP provides:

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

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

[12] Justice has claimed solicitor-client privilege to the record. My office will consider if the Ministry has made its *prima facie* case regarding the four pages it is claiming solicitor-client privilege pursuant to subsection 22(a) of FOIP.

[13] On May 16, 2018, the Court of Appeal for Saskatchewan determined whether my office had authority to require local authorities to produce records that may be subject to solicitor-client privilege. *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 concluded that my office should follow the “absolutely necessary” principle. As a result, it suggested that my office follow a process to gather information about records and consider whether a *prima facie* case for solicitor-client privilege has been made before requiring a record.

[14] My office has established a process to consider a claim of solicitor-client privilege. When considering claiming solicitor-client privilege, public bodies have three options when preparing records for review with the Information and Privacy Commissioner (IPC):

1. Provide the documents to the IPC with a cover letter stating the public body is not waiving the privilege;
2. Provide the documents to the IPC with the portions severed where solicitor-client privilege is claimed; or
3. Provide the IPC with an affidavit with a schedule of records (see sample in the IPC’s *Rules of Procedure*).

[15] My office has established the following test for subsection 22(a) of FOIP:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Was the communication intended to be confidential?

[16] I will now assess the first part of the test.

***1. Is the record a communication between solicitor and client?***

[17] In its submission, Justice indicated that:

The responsive record that is being withheld was created by Barbara Herder, Crown Prosecutor, Public Prosecutions, Ministry of Justice and Attorney General. Barbara Herder is a Crown Prosecutor in the Saskatoon Prosecutions Office with the Ministry of Justice and Attorney General.

Public Prosecutions of the Ministry of Justice and Attorney General conducts prosecutions primarily under the *Criminal Code of Canada* and the *Youth Criminal Justice Act*. Public Prosecutions acts in the same fashion as a private law firm.

[18] A communication is the process of bringing an idea to another's perception; the message or ideas so expressed or exchanged; the interchange of messages or ideas by speech, writing, gestures or conduct (*Guide to FOIP, Chapter 4*, at page 247) (Guide to FOIP).

[19] The four pages in this case are responsive to a request for training material. Generally, training material can involve the communicating of ideas or messages and could therefore be considered communication.

[20] Justice can act as legal advisors for all departments of government. Solicitor-client privilege can apply in the context of an in-house government lawyer providing legal advice to the government. However, owing to the nature of the work of in-house counsel (i.e. having both legal and non-legal responsibilities), each situation must be assessed on a case-by-case basis to determine if the privilege arises in the circumstances.

[21] Although an employee of Justice can also act as legal advisors by providing legal advice to Justice, the solicitor and client relationship must exist.

[22] Client means a person who:

- consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
- having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf;

and includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. (Guide to FOIP, page 247)

[23] Justice provided that:

The responsive record was created by one Saskatoon prosecutor who, at the time, had been assigned Domestic Violence court docket work. It was intended for internal advice for any other prosecutor covering Domestic Violence docket court (i.e. a prosecutor who did not normally attend Domestic Violence docket court).

[24] In their submission to my office, the Applicant stated:

...Just to clarify that I am looking for training materials which should not have any effect [sic on an individual or group such as their privacy or privilege. It is important for me to know the approach, the philosophy, etc. that was/is taken when implementing and running the DV courts. Surely there is no reason to keep that secret from the general public.

[25] In this instance, the lawyer was not consulted to provide legal advice to Justice. From its submission, it appears that, in this case the lawyer was documenting work related responsibilities so that the lawyer and other prosecutors would be better able to perform their work responsibilities. In this case, it does not appear there is a communication between solicitor and client. Rather, it appears to be training material shared amongst colleagues.

[26] I find that the Ministry has not provided sufficient evidence to determine that the record meets the first part of the test. As all three parts of the test must be met, there is no need to consider the remaining parts. Although I have not reviewed the record, I find that Justice has not made a *prima facie* case that subsection 22(a) of FOIP applies. Therefore, I will now consider subsection 22(b) of FOIP.

**3. Does subsection 22(b) of FOIP apply to the record?**

[27] Subsection 22(b) of FOIP provides:

**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;

[28] My office has established the following test for subsection 22(b) of FOIP:

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?

[29] I will now assess the first part of the test.

***1. Were the records “prepared by or for” an agent or legal counsel for a government institution?***

[30] *By or for* means the person preparing the record must be either the person providing the legal advice or legal service or a person who is preparing the record in question on behalf of, or, for the use of, the provider of legal advice or legal related services.

[31] As demonstrated above, in this capacity, the lawyer was not providing legal advice to Justice, but merely preparing a training manual to share with any other staff in that role. In addition, as Justice has refused to provide my office with a copy of the record, I am unable to assess the record against each part of the test. Given this, I am unable to determine that the test has been met.

[32] Justice did not provide sufficient arguments alone with a copy of the record to support its application of subsection 22(b) of FOIP. I remind Justice that the burden of establishing

that a record should be withheld is on Justice pursuant to section 61 of FOIP. Therefore, I find that Justice has not appropriately applied subsection 22(b) of FOIP to the four page record.

#### **IV FINDINGS**

[33] I find Justice has not made a *prima facie* case that subsection 22(a) of FOIP applies to the record.

[34] I find that subsection 22(b) of FOIP does not apply to the record.

#### **V RECOMMENDATION**

[35] I recommend that the Ministry release the record.

Dated at Regina, in the Province of Saskatchewan, this 14<sup>th</sup> day of December, 2020.

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