



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **REVIEW REPORT 171-2019**

### **Saskatchewan Human Rights Commission**

**May 29, 2020**

#### **Summary:**

The Applicant was dissatisfied with how the Saskatchewan Human Rights Commission (SHRC) responded to their access to information request under *The Freedom of Information and Protection of Privacy Act* (FOIP) so they requested a review by the Commissioner. The SHRC raised subsections 15(1)(b), 15(1)(c), 15(1)(f), 15(1)(g), 17(1)(a), 17(1)(b)(i), 17(1)(b)(ii), 17(1)(b)(iii), 18(1)(e), 22(a), 22(b), and 22(c) of FOIP as its reasons for withholding records from the Applicant. Further, it had invoked subsection 7(4) of FOIP to neither confirm nor deny the existence of records. The Commissioner made a number of findings including the SHRC did not meet the legislated timeline set out in subsection 7(2) of FOIP and that it had not met its obligation under section 8 of FOIP. The Commissioner found that while exemptions apply to some of the withheld records, the SHRC did not demonstrate that a number of the exemptions raised applied to other withheld records. Further, he found that SHRC cannot rely on subsection 7(4) of FOIP in this case. He did find that the SHRC made a reasonable effort to search for records. The Commissioner made several recommendations including that SHRC amend its procedures so that it recognizes access to information requests even when the requests are not received in the prescribed form, that the SHRC implement a practice of paginating and preparing records as required under section 8 of FOIP, and that the SHRC release records where it had not demonstrated that exemptions apply. The Commissioner also recommended that the SHRC reconsider its application of subsection 7(4) of FOIP. If the records exist, the Commissioner recommended that the SHRC release the records to the Applicant subject to limited and specific exemptions. The SHRC should prepared the records, if they exist, pursuant to section 8 of FOIP.

#### **I BACKGROUND**

- [1] On March 1, 2015, an incident occurred that involved the Applicant and two police officers of the Regina Police Service (RPS). Over a year later, on August 5, 2016, the Applicant filed a complaint against the Board of Police Commissioners of the City of Regina with the Saskatchewan Human Rights Commission (SHRC). *The Saskatchewan Human Rights Code* had set out a one-year limitation period for complaints. It should be noted that *The Saskatchewan Human Rights Code* has since been repealed and replaced by *The Saskatchewan Human Rights Code, 2018*. The Chief Commissioner of the SHRC refused to extend the limitation period.
- [2] As a result, the Applicant applied for a judicial review of the Chief Commissioner's decision. The Court of Queen's Bench set aside the SHRC's decision and it directed the SHRC to process the Applicant's complaint.
- [3] The SHRC re-opened the Applicant's file on November 18, 2016. The matter proceeded to mediation on August 28, 2017. Mediation was unsuccessful so the matter was assigned to investigation on October 19, 2017. In the course of the investigation, the SHRC made an application to the Court of Queen's Bench in May 2018 to require the Applicant to produce a video that they claimed to have in their possession. The Applicant provided the SHRC with a signed statement indicating the video did not exist.
- [4] On December 11, 2018, the Applicant's complaint was dismissed by the SHRC.
- [5] On December 14, 2018, the Applicant submitted an access to information request to the SHRC by email. The email said the following:
- Send me my complete file physically and digitally please. We'll see if it matched [sic] my records.
- [6] On December 18, 2018, the SHRC responded to the Applicant by email. The SHRC's email indicated that in order for the Applicant to submit an access request under FOIP, the Applicant must fill out the prescribed form pursuant to subsection 6(1) of FOIP. SHRC's email read as follows:

Good Morning,

Further to your email below, you have requested information from your file. In order to access this information, you are required to make application in the prescribed form pursuant to section 6(1) of The Freedom of Information and Protection of Privacy Act. The proper form is attached.

- [7] On January 8, 2019, the Applicant provided notice of their application to the Court of Queen's Bench for judicial review of the SHRC's decision to dismiss the Applicant's complaint. As a result, the SHRC received a Notice to Obtain Record of Proceedings under the Rules of Court dated February 1, 2019.
- [8] On February 25, 2019, the SHRC provided a letter to the Applicant. Enclosed with the letter was a Universal Serial Bus (USB) flash drive containing the SHRC's Certified Record of Proceedings.
- [9] The SHRC advised my office that the Court of Queen's Bench dismissed the Applicant's judicial review application in March of 2019.
- [10] Then, in a letter dated April 5, 2019, my office received a letter from an advocate for the Applicant. The advocate indicated that the Applicant submitted an access to information request to the SHRC on January 3, 2019, but still had not received a response. I note the error in the advocate's letter – the Applicant submitted an access request on December 14, 2018, not January 3, 2019.
- [11] Through my office's early resolution process, the SHRC responded to the Applicant's access request on May 2, 2019. The SHRC responded by providing the Applicant access to some of the records but it withheld others. It explained as follows:

Your application for access has been processed. You requested access to the entire file. The portion of the record that has been cleared for access is attached. The majority of the complaint file is exempt from production.

A number of the records have not been attached because they were provided by you or have already been provided to you in the course of the Commission's process. This includes the Certified Record of Proceedings in QBG 972/17, which was provided to

you in the form of a USB memory stick, and sent to you by registered mail on February 25, 2019. The majority of materials contained therein are excluded from production pursuant to FOIPP. The Commission is not exercising its discretion to provide these documents again. These materials may also be requested from the Court.

Some of the records have been withheld from release because they were generated during mediation, are confidential, and governed by confidentiality under section 31(1)(a) of *The Saskatchewan Human Rights Code, 2018*.

Some of the records have been withheld from release because release of the records could interfere with or disclose information with respect to a lawful investigation pursuant to section 15(1)(c) of FOIPP or because they could reveal investigative techniques or procedures pursuant to section 15(1)(e) of FOIPP.

Some of the records have been withheld from release because they would disclose internal consultations and deliberations pursuant to section 17(1)(b)(i) of FOIPP.

Some of the records have been withheld from release because they are covered by privilege pursuant to section 22 of FOIPP.

[12] On June 3, 2019, my office received a request from the Applicant to review the SHRC's response to their access request.

[13] During the intake stage of my office's review, an Early Resolution Officer made efforts to clarify the issues. As a result, on June 18, 2019, the SHRC sent an amended response to the Applicant. The amended response to the Applicant provides as follows:

Further to my letter of May 2, 2019, I confirm that documents previously provided to you by the Commission were provided in the May 2, 2019 release, except as follows:

- a) Records provided on the February 25, 2019 usb [sic]; and
- b) Records exempted under *The Freedom of Information and Protection of Privacy Act* ("FOIPP").

I add that records generated during mediation, in addition to being confidential under the mediation process and section 31(1)(a) of *The Saskatchewan Human Rights Code, 2018*, have been withheld from release pursuant to sections 15(1)(g), 17(1)(b)(i), 22(a) and 29(1) of FOIPP.

Records withheld from release pursuant to section 22 of FOIPP include records withheld under section 22(a)(b), and (c) of that section.

[14] On June 19, 2019, the Applicant confirmed that they still wish to move forward with the review.

[15] On June 20, 2019, my office notified both the Applicant and the SHRC that it would be undertaking a review.

[16] On August 7, 2019, the SHRC sent another letter to the Applicant indicating that in addition to the exemptions it has already cited in its previous letters, it is also relying on subsections 17(1)(a), 17(1)(b)(ii), 17(1)(b)(iii), 17(1)(c), and 18(1)(e) of FOIP. Further, the SHRC cited that it was relying on subsection 7(4) of FOIP, indicating that it, “refuses to confirm or deny the existence of such records”. The SHRC did not explain in its letter to the Applicant what records, if they existed, to which it was applying subsection 7(4) of FOIP. Its letter to the Applicant said:

Pursuant to section 7(4) of FOIP, the Commission is authorized to refuse production of certain records, and refuses to confirm or deny the existence of such records.

[17] Also, on August 7, 2019, the SHRC provided my office with its submission.

**II RECORDS AT ISSUE**

[18] The SHRC provided my office with a table describing the records at issue. Below is the table with minor edits.

<b>Bundle</b>	<b>Number of Pages</b>	<b>Description</b>	<b>Exemptions Applied</b>
A	78	Mediation File	15(1)(b), 15(1)(c), 15(1)(g), 22(a), 22(b), 22(c), 17(1)(a), 17(1)(b)(i)
B	240	Investigation File	15(1)(c), 17(1)(a), 17(1)(b), 15(1)(f), 22(a), 22(b), 22(c)

C	154	Internal e-mails, memoranda and notes	22(a), 22(b), 22(c), 17(1)(a), 17(1)(b)(i)
D	198	Court File	22(a), 22(b), 22(c), 17(1)(c), 18(1)(e)
E	20	Correspondence with Office of the Minister of Justice and Attorney General	17(1)(b)(i), 17(1)(b)(ii), 17(1)(b)(iii), 22(c)

[19] Further, since Bundles B, C, and D had many pages, the SHRC broke these bundles into parts: Bundle B was broken into eight parts; Bundle C was broken into four parts; and Bundle D was broken into six parts. Bundles A and E were not broken into parts. Therefore, this Report will refer to the letter of the Bundle and if the Bundle was broken down into parts, I will also reference the part number. For example, “Bundle D Part 3”. Finally, as it will be discussed later in this Report, the SHRC did not paginate the records. Therefore, when I refer to a page number of a Bundle (and Part, if applicable), I am referring to the page number of the portable document format (PDF) that each Bundle (and Part, if applicable) was sent to my office.

### III DISCUSSION OF THE ISSUES

#### 1. Do I have jurisdiction to review this matter?

[20] The SHRC qualifies as a “government institution” pursuant to subsection 2(1)(d)(ii) and section 3 and Part 1 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 respond within the legislated timeline?

[21] The SHRC received the Applicant's access to information request on December 14, 2018. The SHRC responded by way of a letter dated May 2, 2019. Therefore, 156 days elapsed before the SHRC responded to the Applicant's access request.

[22] Subsection 7(2) of FOIP requires that the government institution respond to an applicant within 30 days. Subsection 7(2) of FOIP provides:

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

[23] In its submission, the SHRC asserted that the Applicant never made a proper access to information request pursuant to FOIP, so FOIP wasn't engaged. The Applicant sent their access request by email. As outlined in the background section of this Report, the SHRC responded to the Applicant's email explaining the requirements of subsection 6(1) of FOIP on how to make an access request. Subsection 6(1) of FOIP provides as follows:

6(1) An applicant shall:

(a) make the application in the prescribed form to the government institution in which the record containing the information is kept; and

(b) specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject-matter to identify the record.

[24] The SHRC's email to the Applicant said:

Good Morning,

Further to your email below, you have requested information from your file. In order to access this information, you are required to make application in the prescribed form pursuant to section 6(1) of The Freedom of Information and Protection of Privacy Act. The proper form is attached.

[25] The SHRC asserted that it did not receive the access request on the prescribed form. Therefore, its position is that FOIP was not engaged, so there was no timeline with which to comply. The SHRC's submission provided:

The Commission complied with any statutory timeline in this case. There was no deadline for response because FOIP was not engaged until the Commission voluntarily provided the Applicant with access to [their] complaint file on May 2, 2019.

[26] At the time of the Applicant's email dated December 14, 2018, *The Interpretation Act, 1995* was in force. Subsection 26(1) of *The Interpretation Act, 1995*, provided that deviations from a prescribed form does not invalidate the form used. It read as follows:

**26(1)** When a form is prescribed by or pursuant to an enactment, deviations from it that do not affect the substance and are not calculated to mislead do not invalidate the form used.

[27] Since then, *The Interpretation Act, 1995*, has been repealed and replaced by *The Legislation Act*. Subsection 2-26 of *The Legislation Act*, provides that deviations from the form does not invalidate the form in certain cases. It reads as follows:

**2-26** If an enactment requires the use of a specified form, deviations from the form do not invalidate a form used if:

- (a) the deviations do not affect the substance;
- (b) the deviations are not likely to mislead; and
- (c) the form used is organized in the same way or substantially the same way as the form the use of which is required.

[28] When I review the Applicant's email dated December 14, 2018, I see that it has the elements of the prescribed form. The SHRC has not specified what information that the Applicant's email was missing that it could not process the Applicant's access to information request. Therefore, I find that the Applicant's email qualifies as an access request as if the SHRC received the access request on the prescribed form pursuant to subsection 6(1) of FOIP.

[29] Since 156 days elapsed before the SHRC responded to the Applicant's access request, I find that the SHRC did not meet the legislated timeline set out in subsection 7(2) of FOIP. I recommend that the SHRC amend its procedures so that it recognizes access to information requests even when the requests are not received in the prescribed form.



[30] Later in this Report, I will discuss the SHRC's reliance on subsection 7(4) of FOIP.

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

[31] 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.

[32] 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 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 redacted record with the exemption(s) cited may still provide valuable information to the applicant – for example, a redacted record shows that the requested information exists, how much information exists, and the cited exemption(s) may convey the nature of the information.

[33] As described at the records at issue section of this Report, the SHRC provided my office with bundles of records. Some of these bundles were sub-divided into parts. The records within each bundle are not paginated nor are they marked to indicate which portions of the records are being withheld and the exemption(s) being relied upon to withhold those portions of the record. For example, as noted in the records at issue section of this Report, SHRC indicated that Bundle A contains 78 pages of records and it is withholding all 78 pages in their entirety pursuant to eight exemptions. It has not indicated which portion of each page to which it is applying each of the eight exemptions. This implies that all eight exemptions apply equally to all 78 pages. In other words, SHRC took a blanket approach

in applying exemptions instead of a line-by-line analysis that is required by section 8 of FOIP. The same was done for Bundles B, C, D, and E. I find that SHRC has not met its obligation under section 8 of FOIP. I recommend that SHRC implement the practice of paginating and preparing records as required under section 8 of FOIP. For guidance on how to prepare records, it can refer to my office's resource *Modern Age Severing*, available at <https://oipc.sk.ca/resources/webinars/modern-age-severing/>.

**4. Did SHRC properly apply subsection 15(1)(b) of FOIP?**

[34] SHRC applied subsection 15(1)(b) of FOIP to Bundle A, which are records from SHRC's mediation file. Bundle A contains the following:

- emails between the RPS and SHRC,
- email forwards between SHRC employees,
- handwritten notes by the SHRC employee who was the mediator, and
- emails between the Applicant and SHRC.

[35] Based on a review of the records in Bundle A, I note that most of the records in Bundle A are correspondence that occurs before or after mediation. For example, records about setting up meeting times or booking rooms. There are also records that document correspondence from a party thanking the SHRC for facilitating the mediation. The handwritten notes is mostly illegible. The SHRC has not provided any explanation about the substance of the handwritten notes. Finally, there is correspondence submitted by the Applicant to the SHRC.

[36] Subsection 15(1)(b) of FOIP provides as follows:

**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;

[37] My office's *Guide to FOIP: Chapter 4* (updated February 4, 2020) (Guide to FOIP) at page 50 provides a two-part test for subsection 15(1)(b) of FOIP. The following two-part test can be applied:

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

[38] In its submission, the SHRC asserts that the Act or regulation being enforced is *The Saskatchewan Human Rights Code, 2018*. The SHRC then argued that "[it] is crucial for the integrity of the Code and the Commission's process that mediation files remain confidential, and the confidence of the parties and the public in the process be maintained." Its argument, in full, is as follows:

Pursuant to section 15(1)(b) of FOIP, [sic] release of the mediation file could be injurious to the enforcement of the Code. As explained above, mediation is central to the Commission's process and mandate. The Commission achieves many resolutions through mediation each year. It is crucial for the integrity of the Code and the Commission's process that mediation files remain confidential, and the confidence of the parties and the public in the process be maintained. Again, the Code is quasi-constitutional legislation; upholding the status of such legislation is of utmost importance.

[39] As noted in the background section of this Report, the Applicant's complaint to the SHRC has already gone through the mediation and investigation stages of the SHRC's complaint process. It has already been dismissed by SHRC's Chief Commissioner and the Applicant's judicial review application to the Court of Queen's Bench to appeal the SHRC's decision has also been dismissed. Therefore, the SHRC has not demonstrated how the release of the records in Bundle A could be injurious to the enforcement of *The Saskatchewan Human Rights Code, 2018* in this case. I find that the SHRC has not demonstrated how subsection 15(1)(b) of FOIP applies to Bundle A.

[40] SHRC provided further arguments about how the disclosure of any portion of the mediation file could be injurious to the enforcement of *The Saskatchewan Human Rights Code, 2018*. It said:

Releasing any part of the mediation file could be injurious to the enforcement of the Code for a number of reasons:

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 in original submissions). This is contrary to the Commission's mandate of promoting and pursuing alternative dispute resolution methods in resolving complaints.
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, such as this case, information is sometimes shared and/or concessions are made during the mediation process which should not be revisited or revealed at a later time.

[41] As described earlier, Bundle A contains records about what occurred before or after mediation (such as setting up meeting times or booking rooms, or a party thanking the SHRC for facilitating the mediation). These records are about pre-mediation and post-mediation but not the mediation itself. The SHRC has not demonstrated how the disclosure of such records would create a chilling effect on the mediation process and deter parties from participating in the mediation process in the future. Further, the handwritten notes is mostly illegible. The SHRC has not explained the contents of the handwritten notes. On the face of the records, my office cannot determine the contents of the handwritten notes. Without an explanation from the SHRC, I find that the SHRC has not met its obligation pursuant to section 61 of FOIP, which provides:

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

[42] I find that the SHRC has not demonstrated that subsection 15(1)(b) of FOIP applies to the records in Bundle A in this case.

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

[43] SHRC applied subsection 15(1)(c) of FOIP to Bundle A and Bundle B. The SHRC further provided my office with arguments that subsection 15(1)(c) of FOIP applies to parts of Bundle C as well.

**a. Bundle A**

[44] The SHRC applied subsection 15(1)(c) of FOIP to all of the 78 pages of Bundle A. The Applicant had submitted a complaint to the SHRC. The SHRC attempted to resolve the complaint through its mediation process. A description of the records in Bundle A was provided earlier.

[45] Subsection 15(1)(c) of LA FOIP provides 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;

[46] To help determine if subsection 15(1)(c) of LA FOIP applies, the following two-part test can be applied:

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?

[47] For the first part of the test, I must determine if SHRC's activity qualifies as a "lawful investigation". A "lawful investigation" is an investigation that is authorized or required and permitted by law. In its submission, the SHRC did not provide information to explain how the activities documented in the records in Bundle A qualify as a lawful investigation. SHRC provided information only for the second part of the test. On the face of the records, the records in Bundle A appears to deal with mediation, not an investigation. The SHRC's activity documented in the records does not qualify as a "lawful investigation". The first

part of the test is not met. Therefore, I find that subsection 15(1)(c) of FOIP does not apply to Bundle A.

**b. Bundle B**

[48] SHRC applied subsection 15(1)(c) of FOIP to all of the 240 pages of Bundle B. Bundle B are records from SHRC's investigation into the Applicant's complaint. As described in its submission by SHRC, the types of records in Bundle B include the following:

- Documents gathered by the Investigator,
- Correspondence between the Investigator and others,
- Investigator's interview notes, transcripts of interviews,
- Witness statements prepared by the Investigator,
- Handwritten notes by the Investigator,
- Internal correspondence with others at the SHRC,
- Interview room rental agreement,
- The Investigator's Case Report, and
- The Investigator's Case Memorandum.

[49] Earlier, I outlined the two-part test my office uses to determine if subsection 15(1)(c) of FOIP applies to a record. For the first part of the test, I must determine if SHRC's activity qualifies as a "lawful investigation". In previous reports F-2004-006 and 197-2015, my office had determined that investigations undertaken by the SHRC under *The Saskatchewan Human Rights Code, 2018* qualify as a "lawful investigation" for the purposes of subsection 15(1)(c) of FOIP. Based on a review of the records in Bundle B, I can determine that the activity undertaken by SHRC is indeed a lawful investigation under *The Saskatchewan Human Rights Code, 2018*. As such, I find that the first part of the test is met.

[50] 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 to my office, it is evident on the face of the records in Bundle B that they relate to the investigation it undertook. Based on a review of the records, I agree that the records relate to the

investigation undertaken by one of its investigators under *The Saskatchewan Human Rights Code, 2018*. Therefore, the second part of the test is met.

[51] Based on the above, I find that subsection 15(1)(c) of FOIP applies to Bundle B.

[52] While subsection 15(1)(c) of FOIP applies to the records in Bundle B, some of the records are unnecessarily withheld from the Applicant. For example, the transcript of the interview with the Applicant is withheld. It would be an absurd result to withhold from the Applicant the information they supplied. The purpose of FOIP is to facilitate open and accountable government, which is achieved by providing individuals with access to as much information as it can, especially information that is used to make decisions that affect the individual. I recommend that the SHRC release records it withheld under subsection 15(1)(c) of FOIP in Bundle B that contains information supplied by the Applicant to avoid an absurd result.

### **c. Bundle C**

[53] In its letter dated May 25, 2020 to my office, the SHRC drew my attention to pages 26 to 27 and pages 47 to 54 of Bundle C Part 1, indicating that these pages relate to SHRC's investigation. For the same reasons outlined above for the records in Bundle B, I find that subsection 15(1)(c) of FOIP applies to these particular pages of Bundle C Part 1. However, as I noted for Bundle B, it would be an absurd result to withhold from the Applicant information they supplied. Page 27 is an email provided by the Applicant. Similarly, a portion of page 54 is an email sent by the SHRC to the Applicant. I recommend that the SHRC release pages 27 and the portion of page 54 it has withheld under subsection 15(1)(c) of FOIP to avoid an absurd result.

## **6. Did the SHRC properly apply subsection 15(1)(g) of FOIP?**

[54] The SHRC applied subsection 15(1)(g) of FOIP to all 78 pages of Bundle A. Bundle A contains the records from the mediation stage of the SHRC's complaint process. 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;

[55] To determine if subsection 15(1)(g) of FOIP applies, the following three-part test can be used:

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?

[56] In its submission, the SHRC asserted that either party to a complaint could be prejudiced by disclosure of the mediation file. Then, it said that complaints that are not resolved proceed to investigation and may ultimately be referred to a hearing at the Court of Queen's Bench. It said that the Chief Commissioner must make a decision as to whether the complaint will move forward or be dismissed. It said that "this decision is an impartial and disinterested one". The SHRC argued that the release of the mediation file could result in the Chief Commissioner becoming aware of the information disclosed at mediation and could affect their ability to act as an impartial decision maker.

[57] However, as set out in the background of this Report, the complaint has gone through the mediation and investigation stages of the SHRC's complaint process. The SHRC's Chief Commissioner also made a decision to dismiss the Applicant's complaint. Further, the Court of Queen's Bench dismissed the Applicant's application for judicial review of the Chief Commissioner's decision. Therefore, I do not see how the disclosure of the mediation records that appear in Bundle A would deprive a person of a fair trial or impartial adjudication. I find that the SHRC has not demonstrated that subsection 15(1)(g) of FOIP applies to Bundle A.

## **7. Did SHRC properly apply subsection 17(1)(a) of FOIP?**



[58] SHRC applied subsection 17(1)(a) of FOIP to Bundles A, B, and C. Since I have already found that subsection 15(1)(c) of FOIP applies to Bundle B in its entirety, I will only consider if subsection 17(1)(a) of FOIP applies to Bundles A and C. Below is my analysis:

**a. Bundle A**

[59] Subsection 17(1)(a) of FOIP provides as follows:

**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;

[60] In order for subsection 17(1)(a) of FOIP to apply, the following two-part test should be met:

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?

[61] In its submission, the SHRC did not provide arguments as to how the records contain advice, proposals, recommendations, analyses or policy options. It asserted that the records contain “consultations” or “deliberations,” not any of the preceding terms. Also, since the SHRC did not mark the redactions of the record pursuant to section 8 of FOIP, it is difficult to determine whether it believes advice, proposals, recommendations, analyses or policy options exist in the record. On the face of the records, I do not see that the contents of the records contain advice, proposals, recommendations, analyses or policy options. As such, I find that the SHRC has not met its obligation under section 61 of FOIP.

[62] I find that the SHRC has not demonstrated that subsection 17(1)(a) of FOIP applies to Bundle A.

**b. Bundle C**

[63] In its submission, the SHRC asserted that the records contain advice, proposals, recommendations, analyses or policy options developed by or for a government institution. Its submission said the following:

Documents in this bundle also contain advice, proposals, recommendations, analyses or policy options developed by or for a government institution and are therefore exempt pursuant to section 17(1)(a) of *FOIP*.

[64] The SHRC did not offer any additional arguments to substantiate its assertion. Furthermore, since the SHRC did not mark the redactions on the records pursuant to section 8 of FOIP to indicate where it believed subsection 17(1)(a) of FOIP applies, it is difficult to determine where it believes advice, proposals, recommendations, analyses or policy options exist within the records. On the face of the records, I find that the “Recommendation” portion of a memo by an Intake Consultant to the Director of Resolution that appears on page 87 of Bundle C Part 1 would qualify for exemption under subsection 17(1)(a) of FOIP. Otherwise, I do not find that subsection 17(1)(a) of FOIP applies to the remainder of Bundle C.

**8. Did SHRC properly apply subsection 17(1)(b) of FOIP?**

[65] SHRC applied subsection 17(1)(b) of FOIP to Bundles A, B, C, and E. Since I have already found that subsection 15(1)(c) of FOIP applies to Bundle B in its entirety, I will only consider if subsection 17(1)(b) of FOIP applies to Bundles A, C, and E. Below is my analysis:

**a. Bundle A**

[66] Subsection 17(1)(b) of FOIP provides as follows:

**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;

[67] To determine if subsection 17(1)(b) of FOIP applies, the following two-part test can be met:

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?

[68] My office's Guide to FOIP at page 127 defines the terms "consultation" as follows:

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

[69] Further, the Guide to FOIP at page 128 explains "consultations" as follows:

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.

[70] My office's Guide to FOIP at page 128 defines the term "deliberation" 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.

[71] Further, the Guide to FOIP at page 128 explains "deliberations" as follows:

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.

[72] As noted earlier, SHRC provided arguments in its submission as to why the records in Bundle A contains “consultations” or “deliberations”. It said:

A number of the documents contained within the mediation file are exempt from production as they reveal consultations or deliberations involving officers or employees of a government institution, within the meaning of section 17 of FOIP.

Consultations on the file were held between [name of mediator, name of mediator’s supervisor, and name of general counsel]. These records reveal consultation or deliberation as to acceptable actions on the file. All of these individuals work for the Commission, and are officers or employees of a government institution within section 17 of FOIP.

[73] In its submission, the SHRC indicated that a “number of documents” contained in the mediation file in Bundle A contain consultations or deliberations involving officers or employees of a government institution. It indicated that the consultations on the file were held between the mediator, the mediator’s supervisor, and general counsel for the SHRC. It said that these records reveal “consultation or deliberation as to acceptable actions of the file”.

[74] Based on a review of the correspondence between the mediator, the mediator’s supervisor, and general counsel for the SHRC in Bundle A, the correspondence do not qualify as a “consultation” or “deliberation”. The correspondence appears to be the following:

- Mediator requesting a meeting (examples on pages 34 and 66),
- Mediator forwarding emails from the Applicant to their supervisor (examples on pages 36, 38, and 39), and
- Mediator’s supervisor providing direction to the mediator (page 43).

[75] In its letter dated May 25, 2020 to my office, the SHRC provided arguments indicating that emails sent by the mediator to the supervisor (i.e. the Director of Resolution) is to receive direction on prospective future actions. As such, the emails are part of the consultation and deliberation process. SHRC used the email on page 38 where the mediator forwarded

emails from the Applicant to the supervisor to support its case. The SHRC asserts this interaction on page 38 qualifies as a “consultation” as the mediator’s actions “is to receive direction of prospective future actions”. Based on a review of page 38, the mediator indicated that they are taking a particular action unless directed otherwise. The mediator has already taken an action. If the supervisor directed otherwise, then the mediator would need to take the direction. There is no “prospective future action” being considered. As such, there is no consultation or deliberation taking place.

[76] Since the records do not contain consultations or deliberations, then I find that subsection 17(1)(b) of FOIP does not apply to the records in Bundle A.

**b. Bundle C**

[77] In its submission, the SHRC asserted that a number of documents in Bundle C contains consultations or deliberations. It described that consultations are part of the SHRC’s regular and expected part of the SHRC’s process. However, it did not cite which particular records within Bundle C it believes contains consultations or deliberations. On the face of the records, I do not find that the records themselves contain consultations or deliberations. I find that the SHRC has not demonstrated that subsection 17(1)(b) of FOIP applies to the records in Bundle C.

[78] In its letter dated May 25, 2020 to my office, the SHRC clarified which pages of Bundle C Part 1 that it was applying subsection 17(1)(b)(i) of FOIP: pages 3-4, 5, 14, 15-17, 65-66, 68-72, 76, 77-78, and 87-89. Based on a review of these pages, I find that subsection 17(1)(b)(i) of FOIP does not apply to these pages as they do not contain consultations or deliberations. The contents of these pages involve direction being provided by the Director of Resolution to SHRC employees, SHRC employee providing documents to the Director of Resolution for their review, or an SHRC employee seeking direction from the Director. That is on pages 3-4, 14, 15-17, 65-66, 68-72, 77-78, and 88. Page 5 is mostly blank and indicates who attended a case conference and the decision made. It does not contain consultations or deliberations. I also note that a portion of page 66 includes an email

written by the Applicant and an email sent by the SHRC to the Applicant. Subsection 17(1)(b)(i) of FOIP would not apply to that portion (or any other portion) of page 66.

**c. Bundle E**

[79] Bundle E contains 20 pages of records. The Applicant had sent an email to the Minister of Justice. The Ministry of Justice (the Ministry) sought assistance from the SHRC to draft a response to the Applicant. The SHRC provided background on the matter and provided a draft response to the Ministry. The Ministry accepted the response. It sent a letter to the Applicant with the response provided to it by the SHRC.

[80] In its submission, the SHRC asserted that the Minister of Justice's office sought the views of officers or employees of the SHRC as to how to appropriately respond to inquiries by the Applicant. The SHRC said it suggested a course of action. As such, it asserts that such exchanges qualifies for exemption pursuant to subsections 17(1)(b)(ii) and 17(1)(b)(iii) of FOIP.

[81] Based on a review of the records in Bundle E, I do not see that the contents qualify as a "consultation" or "deliberation". The records do not contain discussions about the appropriateness of a particular proposal or suggested action, nor do they contain discussion or consideration of the reasons for or against an action. As such, I find that the SHRC has not demonstrated that subsections 17(1)(b)(ii) and 17(1)(b)(iii) of FOIP applies to Bundle E.

**9. Did the SHRC properly apply subsection 17(1)(c) of FOIP?**

[82] The SHRC applied subsection 17(1)(c) of FOIP to Bundle D. Subsection 17(1)(c) 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:

...

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of

Saskatchewan or a government institution, or considerations that relate to those negotiations;

[83] In order to determine if subsection 17(1)(c) of FOIP applies, the following test can be used:

1. Does the record contain positions, plans, procedures, criteria, instructions or considerations that relate to the negotiations?
2. Were the positions, plans, procedures, criteria, instructions or considerations developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution?

[84] In its submission, the SHRC indicated that Bundle D contains records between a legal assistant and a “process server”, which contains the criteria for setting up an account. Its submission says:

Documents in this bundle between Commission Legal Assistant [name of SHRC employee], and the process server are in relation to the criteria for setting up an account and fall under the above exemptions.

[85] According to my office’s Guide to FOIP at page 133, the term “criteria” means the standards, rules, or tests on which a judgement or decision can be based or compared; a reference point against which other things can be evaluated.

[86] The SHRC has not identified precisely to which pages and which portions of the pages of Bundle D it is applying subsection 17(1)(c) of FOIP. Based on a review of the records, I see that on page 1 of Bundle D Part 1, the SHRC legal assistant contacted a company by email regarding process serving. However, the content of the email does not contain a “criteria” as defined above. I find that the SHRC has not demonstrated that subsection 17(1)(c) of FOIP applies to Bundle D.

#### **10. Did the SHRC properly apply subsection 18(1)(e) of FOIP?**

[87] The SHRC applied subsection 18(1)(e) of FOIP to Bundle D. Subsection 18(1)(e) of FOIP provides as follows:

**18(1)** A head may refuse to give access to a record that could reasonably be expected to disclose:

...

(e) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution, or considerations that relate to those negotiations;

[88] In order to determine if subsection 18(1)(e) of FOIP applies, the following two-part test can be met:

1. Does the record contain positions, plans, procedures, criteria, instructions or considerations that relate to the negotiations?
2. Were the positions, plans, procedures, criteria, instructions or considerations developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution?

[89] The SHRC provided the same argument for subsection 18(1)(e) of FOIP as it did for subsection 17(1)(c) of FOIP. The argument was quoted earlier. For the same reason as I find that SHRC has not demonstrated that subsection 17(1)(c) of FOIP, I find that SHRC has not demonstrated that subsection 18(1)(e) of FOIP applies to Bundle D.

#### **11. Did the SHRC properly apply subsection 22(a) of FOIP?**

[90] SHRC applied subsection 22(a) of FOIP to Bundles A to D. Since I have already found that subsection 15(1)(c) of FOIP applies to Bundle B in its entirety, I will only consider if subsection 22(a) of FOIP applies to Bundles A, C, and D.

[91] Before I proceed with the analysis, I note that government institutions have three options when claiming subsection 22(a) of FOIP. These include: 1) providing the records to my office stating that the government institution is not waiving the privilege; 2) providing the records to my office with the portions severed where solicitor-client privilege is claimed; or 3) providing my office with an affidavit with a schedule of records. If I have a reasonable basis for questioning the content of an affidavit, I may exercise my formal powers, and only as necessary, request additional background information by affidavit or otherwise.



My office's resource *The Rules of Procedure* (June 10, 2019), provides further guidance to government institutions on this.

[92] In the matter before me, the SHRC has gone the route of the first option, which is providing my office with a copy of the records to which it is applying subsection 22(a) of FOIP. This approach by a government institution is always appreciated by my office.

**a. Bundle A**

[93] 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;

[94] In order for subsection 22(a) of FOIP to apply, the following three-part test can be applied:

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?

[95] My office's Guide to FOIP at page 247 defines "communication" as 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. The Guide to FOIP at page 248 defines "lawyer" as a member of the Law Society and includes a law student registered in the Law Society's pre-call training program. Finally, it defines "client" as 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 as agreed to render legal services on his or her behalf. When applying subsection 22(a) of FOIP, the government institution should make clear who the solicitor is and who the client is.

[96] In its submission, the SHRC identified its employees who are also lawyers. It then asserted that any documents prepared by these employees would be exempt under one or more subsections of section 22 of FOIP. Its submission said the following:

In this case, the mediator [name of mediator] is also a lawyer with the Commission, as are [name of mediator's supervisor] and [name of general counsel]. Any documents prepared by or for these lawyers in relation to this matter are exempt under one or more subsections of section 22.

Without sharing the contents of the mediation, it is common practice for Commission mediators to consult with Commission legal counsel on general legal principles and case management strategies that may apply to their files. As part of their role, it is expected that mediators will inform themselves about relevant legal principles.

Examples of documents falling under one or more of these exceptions include:

- [name of mediator] handwritten notes,
- Emails between [name of mediator, name of mediator's supervisor, name of general counsel],
- Emails between [name of mediator] and legal counsel for RPS.

[97] I find that the above assertion is inadequate to meet the first part of the three-part test. In order for subsection 22(a) of FOIP to apply to a record, the record must contain "communication" and not just "any document". Further, the communication must be between a solicitor and client. However, if it is written communications between officials or employees of a government institution, quoting legal advice given orally by the government institution's solicitor, or an employee's notes documenting the legal advice given orally by the solicitor could qualify.

[98] It should be noted that not all communication between a lawyer and another person would qualify to be communication between a solicitor and client. In *R. v Campbell*, [1999] 1 SCR 565 (*R v. Campbell*), the Supreme Court of Canada provides that not everything done by a government (or other) lawyer attracts the solicitor-client privilege. *R v. Campbell* provides as follows:

It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various

operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected.

[99] SHRC has not identified which of its lawyer is acting in the capacity of “legal counsel”. Based on a review of the records, the SHRC employees who are also lawyers may wear different hats, including being a director, a mediator, or investigator. Therefore, being a lawyer does not mean that any document created by the lawyer would qualify for exemption under section 22 of FOIP.

[100] As described earlier in this report, Bundle A contains the following types of records:

- emails between the RPS and SHRC,
- handwritten notes by the SHRC employee who was the mediator,
- email forwards between SHRC employees, and
- emails between the Applicant and SHRC.

[101] On the face of the records, the records are not communications between a solicitor and client. First, the emails between the RPS and SHRC include communication about booking meetings and not communication between a solicitor and client. Second, the handwritten notes by the mediator would not be a “communication” between solicitor and client. Third, an SHRC employee forwarded emails by the Applicant to other SHRC employees. The contents of the email forwards are not communications between solicitor and client. Finally, emails between the Applicant and the SHRC are not communications between solicitor and client. I find that SHRC has not demonstrated that subsection 22(a) of FOIP applies to Bundle A.

i. Case-by-case privilege and Mediation Privilege

[102] The SHRC asserted that Bundle A is exempt from disclosure by virtue of case-by-case privilege or mediation privilege. For case-by-case privilege, the SHRC cited Guide to FOIP at page 246 which says that in each case, the decision-maker must determine whether the public interest favours disclosure or non-disclosure of the record. It asserted that in

this case, the public interest does not favour disclosure. It cited the four-part Wigmore test that appears in *Union Carbide Canada Inc. v. Bombardier Inc. 2014 (CanLII), [2014] 1 SCR 800*. SHRC said the following:

In *Union Carbide* [TAB 1 in original submissions], the Supreme Court of Canada noted that confidentiality 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.

[103] The Alberta Office of the Information and Privacy Commissioner (AB IPC) considered case-by-case privilege in Order 96-020. The AB IPC provided that the case-by-case privilege can apply to two types of records: “private records” or “Crown records”. When determining whether case-by-case privilege applies to private records, the four-part Wigmore test should be applied. In order to determine if case-by-case privilege applies to Crown records, then the Crown must put forth a proper claim based on the criteria for public interest immunity. The AB IPC said:

[76.] The Court went on to say that for a case-by-case privilege to apply to private records, the party opposing disclosure must show that the private records meet the four criteria set out by Wigmore in *Evidence in Trials at Common Law*, Vol. 8 (McNaughton rev.) (Boston: Little, Brown & Co, 1961), and adopted by the Supreme Court of Canada in *Slavutych v. Baker* (1976), 55 D.L.R. (3d) 224 (S.C.C.):

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

...

[79.] For a case-by-case privilege to attach to Crown records, the Court in *Carey v. Ontario* said that the Crown must put forth a proper claim based on the criteria for public interest immunity. Those criteria, which have been adopted by *Leeds v. Alberta (Minister of the Environment)* (1990), 69D.L.R. (4th) 681 (Alta. Q.B.), are:

- (1) The nature of the policy concerned.
- (2) The particular contents of the documents.
- (3) The level of the decision-making process.
- (4) The time when a document or information is to be revealed.
- (5) The importance of producing the documents in the administration of justice, with particular consideration to:
  - (i) the importance of the case
  - (ii) the need or desirability of producing the documents to ensure that the case can be adequately and fairly represented
  - (iii) the ability to ensure that only the particular facts relating to the case are revealed.
- (6) Any allegation of improper conduct by the executive branch towards a citizen.

[104] In order to determine whether the records in Bundle A are “private records” or “Crown records”, the AB IPC said in Order 96-020 what matters is whose information it is, not necessarily who is in possession of the records. It said:

[83.] Consequently, in considering whether a case-by-case privilege applies to the information, I do not think it matters who has possession of the information. What matters is whose information it is.

[105] Based on AB IPC’s Order 96-020, then, in order to determine if case-by-case privilege applies, it must first be determined if the records at issue are “private records” or “Crown records”. Then, if the records at issue are “private records”, one must apply the Wigmore test to determine if the case-by-case privilege applies. If the records at issue are “Crown

records”, then one must apply the criteria for public interest immunity. I will adopt the AB IPC’s approach in determining whether case-by-case privilege applies.

[106] First, I must determine if the records at issue in Bundle A are “private records” or “Crown records.” At [74] of Order 96-020, AB IPC provides that “private records” are third party’s records not in the hands of the Crown (government). At [77] of Order 96-020, the AB IPC provides that “Crown records” are records containing information relating to government activities or operations, and decision at the highest level of government.

[107] Earlier, I described the records in Bundle A. There are emails by the SHRC and the RPS. Further, there are handwritten records by the SHRC mediator. Such records are “Crown records” as they originated from government organizations or contain information related to government activities or operations.

[108] Second, the criteria for public interest immunity should be applied to determine if the case-by-case privilege applies to Bundle A. However, the SHRC only provided arguments for the fourth part of the four-part Wigmore test, which is to be applied to determine if case-by-case privilege applies to “private records”. The SHRC cited paragraph [52] of *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 (CanLII), [2014] 1 SCR 800 that highlights Article 9 of the United Nations Commission on International Trade Law’s Model Law on International Commercial Conciliation, quoted above. The SHRC asserted that the “public interest” favours non-disclosure of the record.

[109] Based on section 61 of FOIP, I find that the SHRC has not provided arguments to show that the case-by-base privilege applies to the records in Bundle A.

[110] For mediation privilege, it cited paragraph 43 of *CB, HK & RK v Canadian Union of Public Employees, Local No. 21*, 2017 CanLII 68786 (SK LRB), which describes mediation privilege as follows:

Mediation privilege is closely related to settlement privilege. Settlement relates, in the main, to discussions and negotiations leading up to the settlement of a dispute which culminate in a final settlement agreement. Mediation privilege, on the other hand, relates to steps taken to resolve a dispute, typically, outside a traditional court or other

adjudicative process. Generally speaking, participation in mediation is voluntary, and this reality underlies the public policy rationale for maintaining confidentiality over mediation processes.

[111] The SHRC asserted that the parties in the mediation agreed to keep all information to the voluntary mediation confidential. Earlier in this Report, I have described that the records in Bundle A, which does not contain the contents of the mediation itself. The records do not describe the steps taken to resolve a dispute. I find that the SHRC has not demonstrated that mediation privilege applies to Bundle A.

**b. Bundle C**

[112] In its submission, the SHRC provided arguments for each part of the three-part test. It first identified the SHRC employees, who are also lawyers, and asserted they are the “solicitors”. Second, the SHRC asserted that the role of SHRC’s counsel is to make legal decisions and provide legal opinions to the SHRC. As such, records such as “memos, notes, and emails on the file are written for the purpose of advising the SHRC on how best to move the matter forward”. Third, the SHRC asserts that the information relates to legal matters and that the communications were intended to be only between “the lawyer and recipient”. Its submission said the following:

*1. The record must be a communication between solicitor and client*

In this case, the solicitors are: [name of seven SHRC employees]

*2. The communication must entail the seeking or giving of legal advice or legal assistance*

A number of the memos, notes, and emails on the file are written for the purpose of advising the Commission on how best to move the matter forward. A human rights complaint, by its very nature, is legal, and the nature of the advice is legal. It is the role of Commission counsel to make legal decisions and provide legal opinions to the Commission.

Some of the communications in the bundle are working drafts or notes created specifically for legal purposes, such as in contemplation of litigation, in preparation of court, in preparation of issuing a formal decision, or for negotiation or settlement purposes. Memos expressing legal opinions were prepared to address risks and

potential outcomes on the complaint. These opinions inform the position the Commission chooses to take on the file.

*3. The communication must be intended to be confidential*

...

In this case, the solicitor-client privileged information clearly relates to legal matters, including matters before the Court of Queen's Bench, and the Commission's complaint process. Email confidentiality clauses are included on email communications, providing further suggestion that they are intended to be only between the lawyer and recipient. The nature of the relationship between counsel and the Commission is one where confidential matters and advice are discussed as part of counsel's day to day duties. There is nothing to suggest any exception to privilege be made in this case.

[113] I find that the SHRC has not demonstrated how subsection 22(a) of FOIP applies to the records in Bundle C for the following reasons:

- Not all of the records contain "communications" as defined earlier. For example, Bundle C Part 2 contains handwritten notes and a draft of a decision.
- Emails between SHRC employees do not provide legal advice or opinion, but rather direction on next steps (such as pages 14, 15, 17, 40, 51, 68, and 88 of Bundle C Part 1) or an update of what has happened on the file (such as pages 12, 23, 29 of Bundle C Part 1).
- The draft decision in Bundle C Part 3 is not a communication between a solicitor and client.
- The draft of a letter to the Applicant and the draft of notice to respondents of complaints contains handwritten edits by the Director of Resolution. The handwritten edits do not appear to be communications between a solicitor and client but rather between a director and an employee.

**c. Bundle D**

[114] In its submission, the SHRC asserted that subsection 22(a) of FOIP applies to Bundle D. However, it only provided arguments for subsections 22(b) and 22(c) of FOIP. Its submission said:

The Commission maintains that certain documents in this bundle are protected by Solicitor-Client privilege under section 22(a) of FOIP. However, as sections 22(b) and (c) of FOIP provide broader exceptions to exemption, the Commission has focused its submissions on these sections.



[115] On the face of the records, there are no communications between a solicitor and client. For example, Bundle D Part 2 is a letter and enclosures from the Applicant's lawyer to the SHRC. The letter and enclosures are not communications between a solicitor and client. I therefore find that subsection 22(a) of FOIP does not apply to Bundle D.

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

[116] SHRC applied subsection 22(b) of FOIP to Bundle A, B, C and D. Since I have already found that subsection 15(1)(c) of FOIP applies to Bundle B in its entirety, I will only consider if subsection 22(b) of FOIP applies to Bundles A, C, and D. 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;

[117] According to my office's Guide to FOIP at page 261, subsection 22(b) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where a record was prepared by or for legal counsel (or an agent of the Attorney General) for a government institution in relation to the provision of advice or services by legal counsel (or an agent of the Attorney General). Subsection 22(b) of FOIP is broader in scope than subsection 22(a).

[118] The following two-part test can be applied when determining if subsection 22(b) of FOIP applies:

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?

[119] The record must be "prepared" in relation to the advice or services or compiled or created for the purpose of providing advice or services. In order to qualify, 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 (SK IPC Review Report 149-2019, 191-2019). My office's Guide to FOIP at page 262 provides that "legal advice" includes a legal opinion about a legal issue and recommended course of action, based on legal considerations, regarding a matter with legal implications. "Legal service" includes any law-related service performed by a person engaged by the government institution and who is licensed to practice law.

[120] Further, 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. That is, information such as letter or email headers, dates, the business contact information of senders and/or recipients of correspondence that does not reveal the substance of the legal advice or legal service does not fall within the scope of subsection 22(b) of FOIP. AB IPC said the following in Order F2008-021 regarding subsection 27(1)(b) of Alberta's AB FOIP:

[para 110] **In the context of "information in relation to a matter involving the provision of legal services", I read "matter involving the provision of the legal services" such that the "matter" is constituted by, or consists of, the provision of legal services. The other potential interpretation of this part of the provision – that the phrase is met for any matter to which legal services have been provided at some time – is implausible.** It would have the provision take into account a factor (that the matter happens to have involved the provision of legal services) that may be coincidental and have no relevance to the information that is being prepared and which requires the protection of the provision. **I interpret the phrase "information prepared in relation to" as referring to information compiled or created for the purpose of providing the services,** in contrast to merely touching or commenting upon the provision of the services. The use of the term "prepared" – which the Canadian Oxford Dictionary defines as "to make ready for use" - carries the suggestion that the information is necessary for the outcome that legal services be provided.

[para 111] It follows, then, that **the person contemplated by the provision who is preparing the information, is doing so for the purpose of providing legal services, and therefore must be either the person providing the legal service or a person**

**who is preparing the information on behalf of, or, at a minimum, for the use of, the provider of legal services.**

[para 112] It also follows that **section 27(1)(b) does not cover the situation where a person, even a person who is one of the persons listed in subclauses i – iii, creates information that is connected in some way with the provision of legal services but is not created for that purpose. For example, section 27(1)(b) does not apply to information that merely refers to or describes legal services without revealing their substance.**

[emphasis added]

[121] When applying subsection 22(b) of FOIP, the government institution should explain how the record relates to a matter involving legal advice or legal services provided by its legal counsel.

**a. Bundle A**

[122] For Bundle A, as mentioned earlier in this Report, the SHRC provided general arguments as to why the records would qualify for exemption under one or more of the subsections of section 22 of FOIP. The SHRC did not provide specific arguments for why subsection 22(b) of FOIP applies to the records in Bundle A. As quoted earlier, the SHRC asserted that any documents prepared by or for SHRC employees who are also lawyers are exempt under one or more subsections of section 22 of FOIP. It said that it is common practice for its mediators to consult with its legal counsel on general legal principles and case management strategies.

[123] As listed earlier in this Report, Bundle A consists of the following records:

- emails between the RPS and SHRC,
- handwritten notes by the SHRC employee who was the mediator,
- email forwards between SHRC employees, and
- emails between the Applicant and SHRC.

[124] First, the emails between the RPS and the SHRC appears to be about administrative matters such as booking meeting rooms, which is not legal advice or a legal service. Second, the handwritten notes are partially illegible and it is difficult to decipher if the contents of the

handwritten notes constitutes legal advice or a legal service. Third, the correspondence between the SHRC employees who are also lawyers do not appear to be related to a legal matter. They involve one of the SHRC employee/lawyer forwarding correspondence from the Applicant to the Director of Resolution, such as the email on pages 36, 38 and 39 of the PDF of Bundle A. The email forwards contains minimal text that does not appear to be legal advice or a legal service. Finally, within Bundle A, there are emails by the Applicant and the SHRC. Such emails would not qualify for exemption pursuant to subsection 22(b) of FOIP since the author of the emails is the Applicant and not SHRC legal counsel.

[125] I find that the SHRC has not demonstrated that subsection 22(b) of FOIP would apply to Bundle A.

**b. Bundle C**

[126] In its submission, SHRC identified some of its employees who are also lawyers. The SHRC asserted that these employees are SHRC's legal counsel. In its argument for Bundle C, the SHRC said the following:

The records in this bundle was prepared by or for legal counsel for a public body - the Commission. All of the handwritten notes and most of the email communications were authored and composed by or for one or more of [name of seven SHRC employees]. Remaining documents were most often directed at, and likewise "prepared for" one or more of these counsel.

[127] Further the SHRC asserted that the SHRC's process is a legal one and that the role of the SHRC lawyers is to provide legal services and advice to the SHRC. It asserts that the records in Bundle C were created in the context of the complaint process and the records were the result of the seeking of legal advice. The SHRC claimed that the SHRC's employees/lawyers provide legal services to the SHRC which includes consulting, drafting, and advising the Commissioner. Its submission provides:

The Commission's process, by its very nature, is a legal one. The role of Commission lawyers is to provide legal services and advice to the Commission. Whether relating to potential settlement, hearing, or file management, the records in this matter all relate

to a legal claim - the human rights complaint. In this case, many of the records also relate to Judicial Review proceedings or the Application Without Notice before the Court of Queen's Bench. The considerations, recommended actions, opinions, and discussions in this file all involve considerations of law. It is clear from counsel's inclusion in creating or receiving the documents that the records were all prepared by or for the Commission's legal counsel. The record was created at various points during the complaint process where obtaining legal advice is standard practice. Therefore, information in this record was created specifically in the context of, and as a result of the seeking of legal advice.

Commission lawyers provide legal services to the Commission in relation to the human rights complaint and to specific litigation. This includes researching consulting, drafting, and advising the Commission. As per paras 20-22 of IPC Review Report F-2014-003 [TAB 10], these types of services fit the definition of legal services. Bundle [C] includes many of the types of documents mentioned above, including email exchanges, draft decisions and pleadings, lawyers' notes, and materials used in research, consultation, drafting, and advising. In the Commission's submission, section 22(b) of FOIP has clear application to the record claimed.

[128] It is not sufficient to indicate that because a record was prepared by or for a SHRC employee who is also a lawyer is enough to find that subsection 22(b) of FOIP applies. This is similar to the *Campbell* decision (quoted above) where the Supreme Court of Canada indicated that government (or other) lawyers may take on multiple responsibilities and some of these responsibilities do not require legal training or expertise but draws on "departmental know-how". Nor is it sufficient to assert that the SHRC's complaint process is a legal process so that any record created by a SHRC employee who is also a lawyer within the context of the complaint process qualifies as either "legal advice" or a "legal service". The SHRC should be explaining how each SHRC employee/lawyer is taking on the role of legal counsel and that the records it is withholding under subsection 22(b) of FOIP contains information that was compiled or created for the purpose of providing the legal advice or legal service by its legal counsel.

[129] Based on a review of the records in Bundle C, I find that even though some records were prepared by a SHRC employee who is also a lawyer, the contents of the records would suggest that the SHRC employee/lawyer was not acting as legal counsel but fulfilling their other departmental duties. For example, pages 3, 10, 14, 15, 17, 26, 40, 47, 68 of Bundle C Part 1 is where the Director of Resolution is providing direction or instructions to SHRC employees and not legal advice or a legal service via email. Another example is on pages

31 and 32 of Bundle C Part 2, which contains an email sent by the Applicant to the SHRC. That email was forwarded twice by SHRC employees (some of whom are also lawyers) but the bodies of the email forwards contains no text. As such, I find that the emails do not contain legal advice or legal service provided by SHRC's legal counsel.

[130] I find that the SHRC has not demonstrated that subsection 22(b) of FOIP applies to the records in Bundle C. I note that in SHRC's arguments for Bundle C (quoted above), the SHRC mentions the "Application Without Notice". Based on a review of the records, the "Application Without Notice" appears in Bundle D (not Bundle C), which I will discuss below.

[131] For Bundle C part 3, the SHRC argued that its legal counsel prepared a draft decision which was prepared by or for legal counsel in relation to a matter involving the provision of advice or other services by legal counsel. Based on a review of the records responsive to the Applicant's access request, I can see that the SHRC lawyer who prepared this draft decision had also acted in the capacity of legal counsel in the course of SHRC investigating the Applicant's complaint. Certainly, it is conceivable that they were acting in the capacity of legal counsel when preparing the draft decision as well. I find that subsection 22(b) of FOIP applies to Bundle C Part 3.

[132] SHRC re-asserted that subsection 22(b) of FOIP applies to pages 5, 8-11, 41-42, 34, and 46 of Bundle C Part 1, and to pages 29 and 30 of Bundle C Part 2. It did not provide any further arguments or provide context to the records other than to assert that the records were prepared by legal counsel in relation to a matter involving the provision of legal services, or that the records were prepared by legal counsel in relation to a matter involving the provision of advice. Based on a review of the records, I do not find that subsection 22(b) of FOIP applies for the reasons outlined at paragraph [129].

[133] For Bundle C Part 4, the SHRC explained that the records are related to the amending of "NRG" letter and complaint forms. The amendments are made by the Director of Resolution. The SHRC explained that the Chief Commissioner delegates authority to make legally binding decisions in relation to "NRG" letters and complaint forms pursuant to

section 28 of *The Saskatchewan Human Rights Code, 2018*. Further, it asserts that the Director of Resolutions acts in a supervisory legal capacity and is responsible for making preliminary binding decisions. These decisions include whether there are reasonable grounds to file a complaint form and, if so, the substance of the complaint form. They also include the substance of “NRG” letters. Based on a review of the records, I find that the Director of Resolution in this case is acting in her capacity as the Director of Resolution, not as legal counsel. Pursuant to *R. v Campbell*, the Director of Resolution is drawing on their departmental know-how when amending the “NRG” letters and complaint forms. I find that subsection 22(b) of FOIP does not apply to Bundle C Part 4.

### **c. Bundle D**

[134] For Bundle D, the SHRC asserted that the records were generated by the SHRC’s legal counsel in the course of the counsel’s provision of legal services. However, it seems as though the basis for SHRC’s arguments is that its employees who are lawyers are also its counsel regardless of context and that any document created by these employees would qualify as a legal service. Its submission is as follows:

Section 22(b) of FOIP captures records prepared by or for Commission legal counsel in relation to matters involving the provision of advice or services by legal counsel. As discussed, this exemption is broader than Solicitor-client privilege as set out in section 22(a). Correspondence and documents prepared by Commission counsel are exempt under section 22(b), as the records were generated by Commission legal counsel in the course of Counsel's provision of legal services to the Commission. The records relate to the file for which legal counsel is representing the Commission. IPC Report F-2012-003 [TAB 11] provides that legal services include “any law-related service performed by a person licensed to practice law.” Here, drafting of documents, recommendations and correspondence with regard to Judicial Review proceedings and a Court Application clearly qualify as legal services.

Similarly, the emails with Applicant and Respondent counsel are records prepared by or for Commission legal counsel on the topic of the Complaint, Judicial Review Proceedings, and/or Court Application, and relate to counsel's provision of services. The relationship is direct, and the records are exempt from production pursuant to section 22(b) of FOIP.

[135] Based on a review of the records in Bundle D, I find that subsection 22(b) of FOIP does not apply to all of the records because not all the records were prepared by or for SHRC’s

counsel related to legal advice or a legal service. However, I find that subsection 22(b) of FOIP applies to records on the following pages of Bundle D:

- Page 15 of Bundle D Part 1 – handwritten notes by SHRC’s counsel which relate to a judicial review where SHRC counsel provided legal advice or a legal service.
- The substantive portions of the letters and enclosures that are on pages 9, 26, 27 and 28 of Bundle D Part 3. Subsection 22(b) of FOIP does not apply to the non-substantive portions of these letters and enclosures including headers, data, and business contact information of senders and/or recipients of correspondence.
- Pages 10 and 11 of Bundle D Part 3 – document schedule and handwritten notes of SHRC counsel about materials filed in court.
- Page 33 of Bundle D Part 5 – draft statement prepared by or for SHRC counsel.

[136] The SHRC also later asserted that subsection 22(b) of FOIP would apply to page 25 of Bundle D Part 3. SHRC said the “records contain in page 25 of Part 3 were also prepared for legal counsel in relation to a matter involving the provision of advice or other services by legal counsel”. When I review this page, I find that it is a Bill of Lading. I do not find that subsection 22(b) of FOIP applies to page 25 of Bundle D Part 3.

**13. Did SHRC properly apply subsection 22(c) of FOIP?**

[137] SHRC applied subsection 22(c) of FOIP to Bundles A to E. Since I have already found that subsection 15(1)(c) of FOIP applies to Bundle B in its entirety, I will only consider if subsection 22(c) of FOIP applies to Bundles A, C, D, and E. 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.

[138] According to my office’s Guide to FOIP at pages 262 and 263, subsection 22(c) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where a



record contains correspondence between the government institution's legal counsel and any other person in relation to a matter that involves the provision of advice or services by legal counsel. Subsection 22(c) of FOIP is broader in scope than subsection 22(a), and it is intended to allow parties to correspond freely in relation to matters about which they need to speak in order to allow the lawyer's advice or services to be provided.

[139] In determining whether or not subsection 22(c) of FOIP applies, the following two-part test can be applied:

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

“Correspondence” means an interchange of written communications. “Any other person” is an inclusive phrase to mean just that – any other person. Government institutions must make it sufficiently clear as to what the nature of the other person's role is in the correspondence.

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

[140] In order for the second part of the test to be met, the correspondence must be in relation to a matter in which involves the provision of advice or services by the lawyer. Subsection 27(1)(c) of Alberta's *Freedom of Information and Protection of Privacy Act* (AB FOIP) is similar to subsection 22(c) of FOIP. In its Order F2015-22, the AB IPC provided that in order for subsection 27(1)(c) of AB FOIP to apply, the correspondence must contain content that enables the public body's lawyer to provide legal advice or a legal service to the public body. Further, in that Order, the AB IPC asserts that subsection 27(1)(c) of AB's FOIP is not meant to protect information that is publicly available, including court documents. Relevant excerpts from that order are as follows:

[para 115] As stated above, section 27(1)(c)(iii) contemplates information in correspondence between a public body's lawyer and any other person; **the correspondence must be in relation to a matter in which involves the provision of advice or services by the lawyer.**

[para 116] Here, the correspondence in question was between the Third Party and the Public Body's lawyer. The correspondence was in relation to a matter, and the

matter, from the perspective of the Public Body, involved the provision of legal services to the Public Body.

[para 117] However, the correspondence was itself not in relation to the provision of advice or other services by the lawyer; the correspondence was in relation to the legal status of certain organizations and what the correspondent thought the significance of that status might be. **Nothing in the content of the emails suggests that the correspondence was prepared for the purpose of directing how the lawyer might use the information to provide advice to the public body, or that this was even contemplated.** If there were a prior exchange of information which could lead me to conclude that the correspondence was prepared for this purpose, then this was not stated or explained to me.

[para 118] To put this another way, **I believe that the understanding of both parties to the correspondence must be that there is a matter involving the provision of advice or other services by the lawyer, and the correspondence is intended, if not to advance the matter, then to relate to that matter.** For example, if a party were to send an offer of settlement to the lawyer of a public body, then such correspondence would be “in relation to a matter involving the provision of advice or other services” by the public body’s lawyer. However, **if a third party sends correspondence to a public body’s lawyer and the third party does not contemplate that there is a matter involving the provision of a lawyer’s advice or services, then the correspondence cannot be said to be in relation to such a matter.**

[para 119] That is not to say that a lawyer cannot obtain information on a confidential basis from a third party that the lawyer requires in order to provide advice or services. (Such information is typically covered by litigation privilege when it is obtained for the dominant purpose of preparing for litigation.) Rather, **I mean that section 27(1)(c) is intended to allow parties to correspond freely in relation to matters about which they need to speak in order to allow the lawyer’s advice or services to be provided.**

[para 120] In my view, the fact that a “matter” within the terms of section 27(1)(c) is one “involving the provision of advice or other services” by a lawyer, indicates that the legislature is referring to a “legal matter”, as this is the type of matter for which a lawyer might provide advice or services. The Canadian Oxford Dictionary offers the following definition of “matter,” where that term is used in a legal context: “Law: a thing which is to be tried or proved”.

[para 121] **It also seems to me that section 27(1)(c) is intended to address correspondence in which at least one of the parties is in a position to require that the information in the correspondence be kept in confidence, or certainly, not to be entered into evidence in court. I say this because section 27(1)(c) would serve little purpose if the information in question(i.e. the information in the correspondence) is publicly available, or the sender has the power to disclose the information unilaterally and the fact that it was sent. The purpose of allowing a public body’s lawyers or agents to correspond freely without fear of interference (discussed above) would not be met if the sender could make the correspondence**

**generally known. Again, here, there were no requests for, or assurances or expectations of confidentiality, or certainly, none that have been provided to me.**

[emphasis added]

[141] In its arguments for subsection 22(c) of FOIP, the SHRC took a similar approach to its arguments for subsections 22(a) and 22(b). That is, its employees who are also lawyers are also acting in the capacity of legal counsel. However, similar to my analysis for subsections 22(a) and 22(b) of FOIP, it is not enough that an employee that is a lawyer for me to find that the person is acting in the capacity as legal counsel. As mentioned earlier, based on a review of the records, the SHRC employees who are also lawyers take on many departmental responsibilities other than legal counsel, including director, mediator, or investigator.

[142] Earlier, I found that SHRC has not demonstrated subsection 22(b) of FOIP applies to Bundle A. I also find that SHRC has not demonstrated that subsection 22(c) of FOIP applies to Bundle A because it has not demonstrated that the records relate to a matter involving the provision of legal advice or other legal services by SHRC counsel.

[143] For Bundle C Part 1, the SHRC also indicated that subsection 22(c) of FOIP would apply to pages 34, 41-42, and 46. For pages 41-42, it said that, “[t]hese records contain correspondence prepared for legal counsel in relation to a matter involving the provision of advice by legal counsel.” When I review these two pages, I see two emails. The first email is by the SHRC investigator to SHRC’s legal counsel and the Director of Resolution that describes a possible course of action to be taken in the investigation. The second email is by SHRC’s legal counsel which provides their advice. I find that subsection 22(c) of FOIP applies to pages 41-42 of Bundle C Part 1. For pages 34 and 46, SHRC provided the argument, “[t]his record contains correspondence prepared by and for legal counsel in relation to a matter involving the provision of legal services”. These two pages contains the request that SHRC’s legal counsel review a document. Neither of these two pages contains the document or SHRC’s legal counsel’s response. I find that subsection 22(c) of FOIP does not apply to pages 34 and 46 of Bundle C Part 1.

[144] For Bundle C Part 2, the SHRC further indicated that subsection 22(c) of FOIP would apply to pages 29 and 30. It said, “[t]hese records contain correspondence between legal counsel which relate to the provision of legal services.” Based on a review of these two pages, I find that they contain correspondence between SHRC’s legal counsel and other SHRC employees and it relates to a matter that involves the provision of legal advice or legal services by SHRC’s legal counsel. I find that subsection 22(c) of FOIP applies to pages 29 and 30 of Bundle C Part 2.

[145] For Bundle D, the SHRC provided the following arguments as to why subsection 22(c) of FOIP applies to Bundle D:

The wording of this section is broad, and captures the correspondence included in the bundle between any Commission Counsel and any other person.

...

The correspondence with Respondent and Applicant Counsel and the Court relate to the complaint, and judicial review proceedings, which are the reason legal counsel are providing 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 relevant legal processes involved.

[146] Based on a review of the records, I do not find that subsection 22(c) of FOIP applies to all the records in Bundle D for the following reasons:

- some of the records were not “correspondence,” but they were other types of documents such as handwritten notes. Such records would not qualify for exemption under subsection. 22(c) of FOIP.
- some of the correspondence is written by employees in their capacity other than legal counsel. For example, correspondence in Bundle D Part 6 was written by a SHRC employee in their capacity as a Director of Resolution rather than as legal counsel.
- while some of the correspondence is by SHRC counsel, the correspondence is not in relation to a matter that involves the provision of legal advice or a legal service by SHRC counsel.

[147] However, I find that subsection 22(c) of FOIP applies to some of the records such as pages 3, 6 to 14 of Bundle D Part 1. These pages contain correspondence between SHRC counsel with the Applicant’s counsel that relate to a matter involving the provision of legal advice

or legal services by SHRC counsel, including judicial review and potential appeal of a court decision. Even though I find that subsection 22(c) of FOIP applies to these, it would be an absurd result to withhold from the Applicant since the Applicant is likely to have a copy of these pages. I recommend that the SHRC release these pages to the Applicant.

[148] I also find that subsection 22(c) of FOIP applies to pages 16 to 24 of Bundle D Part 1. SHRC counsel faxed a letter to the Local Registrar at the Court of Queen's Bench and carbon copied both the RPS and the Applicant's counsel that relates to a matter involving the provision of legal advice or legal services by SHRC counsel. Even though subsection 22(c) of FOIP applies to these carbon copies, it would be an absurd result to withhold these pages from the Applicant since correspondence to the Local Registrar is likely to be public. I recommend that the SHRC release these pages to the Applicant.

[149] I find that subsection 22(c) of FOIP applies to page 25 of Bundle D Part 1. It is a letter by the Applicant's lawyer to the Local Registrar. The SHRC was sent a carbon copy of the letter. Even though subsection 22(c) of FOIP applies to this carbon copy, it would be an absurd result to withhold this page from the Applicant since correspondence to the Local Registrar is likely to be public. Further, the Applicant's lawyer is representing the Applicant. Therefore, it is likely that the Applicant has a copy of this letter already. I recommend that the SHRC release page 25 of Bundle D Part 1 to the Applicant.

[150] I find that subsection 22(c) of FOIP applies to pages 26 to 28 of Bundle D Part 1. It is a letter and enclosures by SHRC's legal counsel to the Registrar. Even though subsection 22(c) of FOIP applies to these pages, it would be an absurd result to withhold these pages from the Applicant since correspondence to the Registrar is likely to be public. I recommend that the SHRC release pages 26 to 28 of Bundle D Part 1 to the Applicant.

[151] I find that subsection 22(c) of FOIP applies to pages 1 to 16 of Bundle D Part 2. It is a letter and enclosures by the Applicant's counsel to SHRC counsel. The letter and enclosures relate to a matter that involves the provision of legal advice or legal services by the SHRC counsel. However, I note that the enclosures are copies of court documents. As such, I recommend that the SHRC release this letter and enclosures to the Applicant.

- [152] I find that subsection 22(c) of FOIP applies to page 2 of Bundle D Part 3. It is a letter between SHRC counsel and the RPS' counsel and is related to a matter involving the provision of legal services by SHRC counsel.
- [153] I find that subsection 22(c) of FOIP applies to page 5 of Bundle D Part 3. It is a letter by SHRC counsel to the Local Registrar. Even though subsection 22(c) of FOIP applies to this page, it would be an absurd result to withhold this page from the Applicant since correspondence to the Local Registrar is likely to be public. I recommend that the SHRC release page 5 of Bundle D Part 3 to the Applicant.
- [154] I find that subsection 22(c) of FOIP applies to page 9 of Bundle D Part 3 as it is correspondence between SHRC counsel and a SHRC employee and relates to a matter involving the provision of a legal service by the SHRC counsel.
- [155] I find that subsection 22(c) of FOIP applies to page 12 of Bundle D Part 3 as it is correspondence sent by a SHRC Legal Assistant on behalf of SHRC counsel to RPS's counsel, which relates to a matter involving the provision of legal advice or legal service by the SHRC counsel. Since the contents of this page does not reveal the legal advice or legal service, I recommend that the SHRC reconsider its discretion and release this page to the Applicant.
- [156] I find that subsection 22(c) of FOIP applies to pages 13 to 14 of Bundle D Part 3. They are fax cover sheets from SHRC's counsel to the Local Registrar. Even though subsection 22(c) of FOIP applies to these pages, it would be an absurd result to withhold these pages from the Applicant since correspondence to the Registrar is likely to be public. I recommend that the SHRC release pages 13 to 14 of Bundle D Part 3 to the Applicant.
- [157] I find that subsection 22(c) of FOIP applies to pages 15 to 18 of Bundle D Part 3. These pages are the fax cover sheet, fax receipt, and the fax enclosure. The fax is correspondence between counsel for the SHRC and the RPS and it relates to a matter involving the provision of legal advice or a legal service by the SHRC counsel.

[158] I find that subsection 22(c) of FOIP applies to pages 31 to 36 of Bundle D Part 3. These pages involve correspondence between counsel for SHRC, the RPS and/or the Applicant that relate to a matter involving the provision of legal advice or a legal service by SHRC counsel.

[159] I find that subsection 22(c) of FOIP applies to page 37 of Bundle D Part 3. It is a letter by SHRC counsel to the Registrar. Even though subsection 22(c) of FOIP applies to this page, it would be an absurd result to withhold this page from the Applicant since correspondence to the Registrar is likely public. I recommend that SHRC release page 37 of Bundle D Part 3 to the Applicant.

[160] I find that subsection 22(c) of FOIP does not apply to Bundle E. Bundle E contains correspondence where SHRC employees are responding to inquiries from the Ministry of Justice. When I review the correspondence, the SHRC employees are not acting in their capacity as legal counsel but as SHRC employees fulfilling departmental duties.

#### **14. Can SHRC rely on subsection 7(4) of FOIP?**

[161] Pursuant to subsection 7(4) of FOIP, if the government institution is refusing access to the record and the reason for the refusal is an exemption described in sections 15, 16, 21, 22 or subsection 29(1) of FOIP, the government institution may also refuse to confirm or deny that the records exist or ever did exist. Subsection 7(4) of FOIP provides:

7(4) If an application is made with respect to a record that is exempt from access pursuant to section 15, 16, 21 or 22 or subsection 29(1), the head may refuse to confirm or deny that the record exists or ever did exist.

[162] In order for subsection 7(4) of FOIP to be found to apply, there must be specific exemption(s) that could be relied upon to withhold the records if they existed. Given that subsection 7(4) of FOIP has been invoked, I will be careful and avoid confirming or denying the existence of records. Further, I will lay out the reasons for my findings in very general terms.

[163] By invoking subsection 7(4) of FOIP, SHRC is denying the Applicant the right to know whether a record exists. This subsection provides government institutions with a significant discretionary power that should be exercised only in rare cases. In my opinion this provision is meant to protect highly sensitive records where confirming or denying the mere existence of a record would in itself impose significant risk. The types of risks could include risks to national security, an individual causing physical harm to others or risks to others or by revealing a law enforcement investigation is underway. Although there are exemptions to protect records that fall into these categories, this provision enables the government institution to address risks that could occur just by revealing a record exists. It is not meant to protect a government institution from a possible lawsuit, embarrassment or negative public scrutiny. It should be invoked in only extreme circumstances.

[164] In order for a government institution to be able to show it properly refused to confirm or deny the existence of a record pursuant to subsection 7(4) of FOIP, the government institution must be able to:

1. Demonstrate that the records (if they existed) would qualify for exemption under the particular exemption(s) it is citing; and
2. Explain how disclosing the existence of records (if they existed) could reasonably compromise what it is protecting.

[165] The SHRC has indicated that if the records existed, it could rely on subsections 15(1)(a), 15(1)(b), 15(1)(c), 15(1)(f), 15(1)(k.1), 21, 17(1)(b)(i), 22(a), 22(b), and 22(c) of FOIP. I note that a government institution cannot exempt records, if they exist, from access pursuant to section 17 of FOIP when it is relying on subsection 7(4) of FOIP. Therefore, I will not consider the SHRC's arguments for subsection 17(1)(b)(i) of FOIP here. I will consider its arguments for the other exemptions it has cited.

[166] The SHRC provided arguments to demonstrate that if records exist, that the exemptions it cited would apply to the records. However, it did not cite what it is protecting nor did it explain or present evidence to my office of how disclosing the existence of records (if they



existed) could reasonably compromise what it is protecting. Therefore, I find that subsection 7(4) of FOIP cannot be relied on by the SHRC in this case.

[167] Towards the end of my office's review, SHRC asserted that my office did not appropriately consider the issue of subsection 7(4) of FOIP. Earlier, I mentioned that I must lay out the reason for my findings in very general terms to avoid confirming or denying the existence of records. The SHRC has only provided me with arguments of why exemptions would apply to records, if they exist. It has not provided me arguments as to why it must neither confirm nor deny the existence. Based on a review of its submission, it is not clear to me why the SHRC cannot simply rely on exemptions set out in Part III and Part IV of FOIP to withhold records, if they exist.

[168] I recommend that the SHRC reconsider its application of subsection 7(4) of FOIP. I recommend that, if records exist, that the SHRC release the records to the Applicant. The SHRC should apply limited and specific exemptions to the records, if they exist, pursuant to section 8 of FOIP.

**15. Did the SHRC conduct an adequate search for records?**

[169] Section 5 of FOIP provides an individual's right to records that are in the possession or control of a government institution. This section is clear that access to records must be given if they are in the possession or control of a government institution subject to any exemptions under Part III of FOIP. 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.

[170] FOIP does not require a government institution to prove with absolute certainty that records responsive to an access to information request do not exist. However, it must demonstrate that it has conducted a reasonable search in order to locate the 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.

[171] When a government institution is demonstrating its search efforts, the following can be included in the submission to outline its search strategy:

- For personal information requests – explain how the individual is involved with the public body (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 organizations record schedule and screen shots of the electronic directory (folders & subfolders). If the record has been destroyed, provide copies of record schedules and/or destruction certificates.
  - Explain how you have considered records stored off-site.
  - Explain how records that may be in the possession of a third party but in the public body's control have been searched such as a contractor or information service provider.
  - Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).

- Which folders within the records management system were searched and explain how these folders link back to the subject matter requested?
  - For electronic folders – indicate what key terms were used to search if applicable.
- On what dates did each employee search?
- How long did the search take for each employee?
- What were the results of each employee’s search?
  - Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided. For more on this, see the IPC resource, Using Affidavits in a Review with the Information and Privacy Commissioner available on our website.

[172] 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 the IPC will find that the search efforts were reasonable. Each case will require different search strategies and details depending on the records requested.

[173] The Applicant requested a copy of their complete file. In its submission, the SHRC described its records management practices when it opens a file. When a file is opened by the SHRC, a physical file is created, labelled and contains the hard copies of file materials. The physical file is stored in SHRC’s filing cabinets, according to file number. An electronic file is opened on its electronic case file management system as well. Telephone notes, file updates, copies of email correspondence, and electronic documents created by SHRC employees are filed into the case file management system. In its search for records, the SHRC printed the document list from its case file management system and cross-referenced it with the physical file to ensure it included all the records.

[174] To ensure it had captured all the records, the SHRC also requested that any SHRC employee who had worked on the Applicant’s file to complete a search of its email accounts to determine if there were any responsive records. It had also had another employee search the email account of a SHRC employee who had retired to determine if there were any responsive records. Through this search of email accounts, the SHRC were

able to locate a small number of emails that was not located in the case file management system.

[175] Further, SHRC searched its computer network's common drive using the Applicant's last name. All records that were related to the Applicant's file was included in its processing of the access request.

[176] Finally, the SHRC's head office is located in Saskatoon. The SHRC notes that the Applicant's file was kept in its satellite office in Regina while the Applicant's complaint was investigated. The SHRC indicated that the Applicant's file was transferred back to the Saskatoon office on May 30, 2018. However, to be thorough, the SHRC requested that an investigator at its satellite office in Regina complete a search for records. There were no records located at the satellite office.

[177] The SHRC has provided my office with an explanation of how it manages its records and where it has searched. I do not have a reason to believe that it has not conducted an adequate search for records. Therefore, based on the above, I find that the SHRC has made a reasonable effort to search for records responsive to the Applicant's access to information request.

#### **IV FINDINGS**

[178] I find that the SHRC did not meet the legislated timeline set out in subsection 7(2) of FOIP.

[179] I find that the SHRC has not met its obligation under section 8 of FOIP.

[180] I find that the SHRC has not demonstrated how subsection 15(1)(b) of FOIP applies to Bundle A.

[181] I find that subsection 15(1)(c) of FOIP does not apply to Bundle A.

[182] I find that subsection 15(1)(c) of FOIP applies to Bundle B.

- [183] I find that subsection 15(1)(c) of FOIP applies to pages 26 to 27 and pages 47 to 54 of Bundle C Part 1.
- [184] I find that the SHRC has not demonstrated that subsection 15(1)(g) of FOIP applies to Bundle A.
- [185] I find that the SHRC has not demonstrated that subsection 17(1)(a) of FOIP applies to Bundle A.
- [186] I find that the recommendation portion of a memo by an Intake Consultant at SHRC that appears on page 87 of Bundle C Part 1 would qualify for exemption under subsection 17(1)(a) of FOIP but I do not find that subsection 17(1)(a) of FOIP applies to the remainder of Bundle C.
- [187] I find that subsection 17(1)(b) of FOIP does not apply to the records in Bundle A.
- [188] I find that the SHRC has not demonstrated that subsection 17(1)(b) of FOIP applies to the records in Bundle C.
- [189] I find that the SHRC has not demonstrated that subsections 17(1)(b)(ii) and 17(1)(b)(iii) of FOIP applies to Bundle E.
- [190] I find that the SHRC has not demonstrated that subsection 17(1)(c) of FOIP applies to Bundle D.
- [191] I find that SHRC has not demonstrated that subsection 18(1)(e) of FOIP applies to Bundle D.
- [192] I find that SHRC has not demonstrated that subsection 22(a) of FOIP applies to Bundle A.
- [193] I find that the SHRC has not demonstrated how subsection 22(a) of FOIP applies to the records in Bundle C.

[194] I find that subsection 22(a) of FOIP does not apply to Bundle D.

[195] I find that the SHRC has not demonstrated that subsection 22(b) of FOIP applies to Bundle A.

[196] I find that subsection 22(b) of FOIP applies to Bundle C Part 3.

[197] I find that the SHRC has not demonstrated that subsection 22(b) of FOIP applies to the records in Bundle C Parts 1, 2, and 4.

[198] I find that subsection 22(b) of FOIP does not apply to all of Bundle D. However, I find that subsection 22(b) of FOIP applies to records on the following pages of Bundle D:

- Page 15 of Bundle D Part 1,
- Pages 9, 26, 27 and 28 of Bundle D Part 3,
- Pages 10 and 11 of Bundle D Part 3, and
- Page 33 of Bundle D Part 5.

[199] I find that SHRC has not demonstrated that subsection 22(c) of FOIP applies to Bundle A.

[200] I find that subsection 22(c) of FOIP applies to pages 41-42 of Bundle C Part 1.

[201] I find that subsection 22(c) of FOIP does not apply to pages 34 and 46 of Bundle C Part 1.

[202] I find that subsection 22(c) of FOIP applies to pages 29 and 30 of Bundle C Part 2.

[203] I find that subsection 22(c) of FOIP applies to pages 3, 6 to 14, and 16 to 24, 25, 26 to 28 of Bundle D Part 1.

[204] I find that subsection 22(c) of FOIP applies to pages 1 to 16 of Bundle D Part 2.

[205] I find that subsection 22(c) of FOIP applies to pages 2, 5, 9, 12, 13, 14, 15 to 18, and 31 to 36, 37 of Bundle D Part 3.

[206] I find that subsection 22(c) of FOIP does not apply to Bundle E.

[207] I find that subsection 7(4) of FOIP cannot be relied on by the SHRC in this case.

[208] I find that the SHRC has made a reasonable effort to search for records responsive to the Applicant's access to information request.

## **V RECOMMENDATIONS**

[209] I recommend that the SHRC amend its procedures so that it recognizes access to information requests even when the requests are not received in the prescribed form.

[210] I recommend that SHRC implement the practice of paginating and preparing records as required under section 8 of FOIP. For guidance on how to prepare records, it can refer to my office's resource *Modern Age Severing*, available at <https://oipc.sk.ca/resources/webinars/modern-age-severing/>.

[211] I recommend that SHRC release Bundle A to the Applicant.

[212] I recommend that the SHRC release records it withheld under subsection 15(1)(c) of FOIP in Bundle B that contains information supplied by the Applicant to avoid an absurd result.

[213] I recommend that the SHRC release page 27 and page 54 of Bundle C Part 1 to the Applicant to avoid an absurd result.

[214] I recommend that the SHRC withhold the recommendation portion of a memo an Intake Consultant that appears on page 87 of Bundle C Part 1 pursuant to subsection 17(1)(a) but then release the remainder of Bundle C Part 1 to the Applicant.

[215] I recommend that the SHRC release all of Bundle D except for the following pages to which I found subsection 22(b) of FOIP applies:

- Page 15 of Bundle D Part 1
- Substantive portions of pages 9, 26, 27 and 28
- Pages 10 and 11 of Bundle D Part 3
- Page 33 of Bundle D Part 5

[216] I recommend that SHRC release all of Bundle D except for the following pages to which I found subsection 22(c) of FOIP applies:

- Page 2 of Bundle D Part 3
- Page 9 of Bundle D Part 3
- Pages 15 to 18 of Bundle D Part 3
- Pages 31 to 36 of Bundle D Part 3

[217] Even though I found that subsection 22(c) of FOIP applies, I recommend that the SHRC release the following records because withholding these pages would be an absurd result:

- Pages 3, 6 to 14 of Bundle D Part 1
- Pages 16 to 24 of Bundle D Part 1
- Page 25 of Bundle D Part 1
- Pages 26 to 28
- Pages 1 to 16 of Bundle D Part 2
- Page 5 of Bundle D Part 3
- Pages 13 to 14 of Bundle D Part 3
- Page 37 of Bundle D Part 3

[218] Even though I found that subsection 22(c) of FOIP applies to page 12 of Bundle D Part 3, I recommend that the SHRC release this page to the Applicant.

[219] I recommend that the SHRC release Bundle E to the Applicant.

[220] I recommend that the SHRC reconsider its application of subsection 7(4) of FOIP. I recommend that, if records exist, that the SHRC release the records to the Applicant. The SHRC should apply limited and specific exemptions to the records, if they exist, pursuant to section 8 of FOIP.



Dated at Regina, in the Province of Saskatchewan, this 29<sup>th</sup> day of May, 2020.

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