



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 197-2015

Saskatchewan Human Rights Commission

January 11, 2016

Summary:

The Saskatchewan Human Rights Commission (SHRC) received an access to information request from one of its Complainant's for her entire file. SHRC released 827 pages to her but withheld 510 pages pursuant to subsections 15(1)(c), (f), (g), 17(1)(b)(i), 22(a), (b), (c), 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that subsections 15(1)(c), (f), (g), 17(1)(b)(i), 22(b), (c), 29(1) applied only to portions of the record and recommended release of the rest.

I BACKGROUND

- [1] On July 22, 2015, the Saskatchewan Human Rights Commission (SHRC) received an access to information request from the Applicant which stated "Please consider this e-mail an all-inclusive request for my Personal Information that is part of my complaint file within your office."
- [2] SHRC responded to the Applicant on October 9, 2015 by providing the Applicant with 827 pages of responsive records. It also indicated that other records would be withheld pursuant to subsections 15(1)(c), 15(1)(e), 17(1)(b)(i) and 22 of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [3] My office received a request for review from the Applicant on October 27, 2015. On October 29, 2015, my office provided notification to both the Applicant and SHRC of our intention to undertake this review.

II RECORDS AT ISSUE

[4] When SHRC provided my office with its submission and the responsive records, it indicated that subsections 15(1)(g) and (f) also applied to the record.

[5] SHRC organized the record as follows:

| Bundle | Number of Pages | Description | Exemptions Applied |
|---------------|------------------------|--|-------------------------------------|
| 1 | 118 | Mediation File | 15(1)(g), 17(1)(b)(i), 29(1) |
| 2 | 57 | Investigation File | 15(1)(c), (f), 17(1)(b)(i), 29(1) |
| 3 | 160 (158) | Internal emails, Memoranda and Notes (Pages 1 and 99 are placeholders) | 22(a), (b), (c), 17(1)(b)(i), 29(1) |
| 4 | 174 (172) | Correspondence with Respondent Counsel / Dispute Resolution Office (Pages 1 and 88 are placeholders) | 22(b), (c), 29(1) |
| 5 | 5 | Correspondence with Office of the Minister of Justice and Attorney General | 17(1)(b)(i), 22(a), (b), (c), 29(1) |

[6] SHRC provided each of these bundles to my office in the form of electronic PDF documents. The page numbers referred to in this report correlate to the page numbers in these electronic documents.

III DISCUSSION OF THE ISSUES

1. Did SHRC properly apply subsection 15(1)(c) to the record?

[7] Subsection 15(1)(c) of FOIP states:

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;

- [8] My office has established the following test for subsection 15(1)(c) of FOIP:
1. Does the public body's activity qualify as a "lawful investigation" under the Act
 2. One of the following must exist:
 - a. The release of information would interfere with a lawful investigation, or
 - b. The release of information would disclose information with respect to a lawful investigation.
- [9] SHRC has applied subsection 15(1)(c) to all of the 57 pages in Bundle #2.
- [10] In Report F-2004-006, my office determined that investigations undertaken by the SHRC under the Saskatchewan Human Rights Code qualify as a "lawful investigation" for the purposes of 15(1)(c) of FOIP.
- [11] SHRC's submission states that the records in Bundle #2 "were created or considered during [its] investigation." Upon review of the records, it is evident that the records were created or collected for that purpose. It is only necessary for SHRC to demonstrate that the information in the record is information with respect to a lawful investigation to meet this part of the test. Therefore subsection 15(1)(c) of FOIP applies to Bundle #2 in its entirety.
- [12] There is no need to consider whether subsections 15(1)(f), 17(1)(b)(i) or 29(1) of FOIP apply to Bundle #2.

2. Did SHRC properly apply subsection 15(1)(g) of FOIP to the record?

- [13] Subsection 15(1)(g) of FOIP states:
- 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;
- [14] SHRC applied subsection 15(1)(g) of FOIP to the 118 pages in bundle #1. SHRC explained that the Applicant's file is still active in the process. It has passed through the preliminary mediation steps and has been referred to the Court of Queen's Bench by the Chief Commissioner.

[15] SHRC's submission noted that both the Applicant and the Respondent to her complaint could qualify as a "person" in the meaning of subsection 15(1)(g) of FOIP.

[16] SHRC also submits that its process and the Court of Queen's Bench hearing would both qualify as a trial or adjudication in the meaning of 15(1)(g).

[17] In order for subsection 15(1)(g) to apply, SHRC must present specific examples of how and why disclosure of the information in question could deprive a person of the right to a fair trial or hearing. Order F12-04 of the Office of the Information and Privacy Commissioner for British Columbia stated "there must be a real and substantial prospect of harm that a person would be deprived of the right to a fair trial. The exemption is not available as a protection against remote and speculative dangers."

[18] SHRC submission explains that:

Parties to a complaint are told at the outset that the matter in which they are involved may proceed to case management where the Chief Commissioner will determine whether the complaint will move forward or be dismissed. This decision is an impartial and disinterested one, to be made only after consideration of the evidence, the facts, the applicable law and arguments from the parties. Release of the mediation file at early stages in the process could result in the Chief Commissioner becoming aware of information disclosed at mediation, and could affect his ability to act as an impartial decision maker.

[19] I note that this matter has been referred to the Court of Queen's Bench. SHRC also explained that confidentiality in the mediation process is important as such, the mediation process should be kept separate from later stages of the process.

[20] Upon review of the 118 pages in Bundle #1, I have categorized the pages as follows:

- 64 pages are handwritten or other notes by an SHRC mediator;
- 28 pages are correspondence between SHRC and the Applicant;
- 22 pages are correspondence between SHRC and the Respondent;
- 3 pages are an excerpt of an informational resource from the Alberta Human Rights Commission; and
- 1 page is an update between two SHRC employees.

- [21] The 64 pages of notes of the SHRC contain accounts of the mediation process including views of each party, SHRC legal counsel and other employees. Keeping in mind that the mediation process is to be kept confidential and the SHRC keeps it separate from the other steps in the process, I am persuaded the release of this information could affect the fairness of the process. Therefore, subsection 15(1)(g) of FOIP applies to these records.
- [22] I am not persuaded that release of the correspondence between SHRC and the Applicant would deprive anyone of a fair trial or impartial adjudication as the Applicant is already aware of the information contained in this part of the record. Subsection 15(1)(g) of FOIP does not apply to those 28 pages.
- [23] Regarding the correspondence between SHRC and the Respondent. I would describe the majority of the e-mails as discussion of the mediation process and timelines associated. Another e-mail directs the Respondent to public informational resources. As the mediation process is over, I am not persuaded that this correspondence would deprive either party of a fair trial. Subsection 15(1)(g) of FOIP does not apply to those e-mails. However, the e-mails between SHRC and the Respondent that are found on pages 64-66, 74, 75 and 96 reveal specific concerns of the Respondent. I believe the release of these records could have an impact on the Respondent's ability to obtain a fair trial. Subsection 15(1)(g) applies to these pages.
- [24] I am not persuaded that the excerpt of a public informational resource from the Alberta Human Rights Commission qualifies for exemption under subsection 15(1)(g) of FOIP.
- [25] Finally, I would describe the e-mail between the two SHRC employees (page 30) as an update of the mediation process. I am not persuaded it would qualify under subsection 15(1)(g) of FOIP.
- [26] After reviewing my office's draft report, SHRC indicated that it disagreed with my conclusions and again explained its concerns with sharing portions the mediation file. Pursuant to section 8 of FOIP, SHRC cannot apply an exemption to an entire file and must do a page-by-page, and sometimes line-by-line, review to demonstrate that subsection 15(1)(g) of FOIP applies.

3. Did SHRC properly apply subsection 22(b) of FOIP to the record?

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

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

...

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

[28] In order to qualify for this exemption, the following criteria must be met.

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

Bundle #3

[29] SHRC applied subsection 22(b) of FOIP to all of the Records in Bundle #3. The records can be described as follows:

- 86 pages of notes by lawyers who are staff of the SHRC;
- 8 pages of entries in SHRC’s internal tracking software;
- 64 pages of e-mails or records.

[30] Upon review of the 86 pages of notes, it appears they are all prepared by legal counsel for SHRC and relate to a matter that involves services by the legal counsel. Subsection 22(b) applies to these records as described in Appendix A.

[31] SHRC has applied subsection 22(b) of FOIP to portions of the 8 pages of entries into SHRC’s tracking software (pages 91-98). Upon review, some of the entries were made by non-legal personnel. Further, SHRC has not demonstrated that these entries are legal advice or related to the provision of a legal service with the exception of copies of e-mails from or to the Respondent. See Appendix A for specific details. Subsection 22(b) of FOIP does not apply to the rest of these pages.

[32] Subsection 22(b) of FOIP applies to the majority of the 64 pages of e-mails and memoranda. However, there are certain exceptions. Several of the e-mail chains contain e-mails to or from the Applicant. If SHRC has not already provided the Applicant with copies of this correspondence, it should do so. Further, some of the e-mails from the

Applicant were forwarded to various SHRC employees with little or no comment (pages 102-103, 107-111). Subsection 22(b) does not apply to these pages. Finally, some of the e-mails reflect internal management practices (page 104). Subsection 22(b) does not apply to these records.

Bundle #4

[33] SHRC has applied subsection 22(b) of FOIP to all of the records in Bundle #4. I have categorized the pages in Bundle #4 as follows:

- 4 pages of notes by lawyers who are staff of SHRC;
- 2 pages engaging the Dispute Resolution Office on the Applicant's complaint;
- 4 pages of an unexecuted agreement between the Applicant, the Respondent and a mediator from the Dispute Resolution Office;
- 76 pages of correspondence between the lawyers at SHRC and the mediator at the Dispute Resolution Office;
- 84 pages of correspondence between the lawyers at SHRC and the Respondent and his counsel; and
- 2 pages of letters to the lawyers of the Respondent and the Applicant.

[34] Subsection 22(b) of FOIP applies to the 4 pages of notes of the legal counsel at SHRC, the letter engaging the Dispute Resolution Office, the unexecuted agreement and the 84 pages of correspondence between the lawyers and the Respondent and his counsel. All were prepared for or by the legal counsel for SHRC and relate to a matter that involves services by the legal counsel.

[35] The majority of the 76 pages of correspondence between the lawyers at SHRC and the mediator at the Dispute Resolution Office would not qualify for exemption under subsection 22(b) of FOIP. The majority of the e-mails detail the arrangements of certain meetings. This would not qualify as legal advice or legal services for the purposes of subsection 22(b) of FOIP. Pursuant to section 8 of FOIP, SHRC should sever the parts that would qualify for exemption under subsection 22(b) of FOIP and release the rest as described in Appendix A.

[36] Finally, the two letters to the legal counsels of both the Applicant and Respondent should be released to the Applicant as she would already have knowledge of this information.

Bundle #5

- [37] SHRC has applied subsection 22(b) of FOIP to all 5 pages in Bundle #5. Two of the pages are correspondence from the Applicant to the Minister of Justice. Another page is a Government of Saskatchewan “Individual Record Information” form that summarizes the Applicant’s correspondence. Subsection 22(b) of FOIP does not apply to these three pages as it is either from the Applicant or has not been prepared for or by legal counsel.
- [38] The other two pages are a series of e-mails between legal counsel at SHRC and the Deputy Minister of Justice’s office. Only the e-mail dated September 3, 2015 would qualify for exemption pursuant to subsection 22(b) of FOIP. SHRC should sever the e-mail and release the remainder pursuant to section 8 of FOIP.
- [39] I do, however, have serious concerns about the SHRC disclosing the personal information of the Applicant to the Ministry of Justice. SHRC and the Ministry are two separate government institutions. SHRC needs to analyze whether it has the authority to disclose personal information to another government institution, including the Ministry of Justice. If it has the authority under FOIP or the FOIP Regulations, then it can disclose. If it does not have the authority, then it should not be disclosing personal information to any government institution. In its analysis, SHRC should also keep the data minimization principle in mind. I recommend SHRC that develop a policy regarding the disclosure of personal information to the Ministry of Justice and other government institutions.

4. Did SHRC properly apply subsection 17(1)(b)(i) of FOIP to the record?

- [40] Subsection 17(1)(b)(i) states:

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;

- [41] A consultation occurs when the views of one or more officers or employees of the public body are sought as to the appropriateness of a particular proposal or suggested action.

[42] A deliberation is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

[43] The provision is not meant to protect the recitation of facts, without anything further. The exemption does not generally apply to records or parts of records that in themselves reveal any of the following: a consultation or deliberation took place; particular persons were involved; a particular topic was involved or that the consultation or deliberation took place at a particular time.

Bundle #1

[44] SHRC applied subsection 17(1)(b)(i) of FOIP to all of Bundle #1. However, for this exemption to apply, the record must reflect consultations or deliberations among officers or employees of SHRC. Only page 30 and some of the mediators notes would qualify based on that criterion. I have already found that the notes qualify for exemption pursuant to subsection 15(1)(g), so I will not consider them here.

[45] Page 30 is an e-mail from one SHRC employee to another. I would describe it as an update of the mediation process. It does not contain deliberations or consultations as described above. Subsection 17(1)(b)(i) of FOIP does not apply to Bundle #1.

Bundle #3

[46] SHRC has applied subsection 17(1)(b)(i) of FOIP to all records in Bundle #3. There is no need to consider the records that are exempt pursuant to subsection 22(b) of FOIP as described above.

[47] Pages 91-98 are entries in to SHRC internal tracking system. The entries are notes and updates as various employees of SHRC worked on the file. These entries appear to be factual and do not qualify as deliberations or consultations as defined above. Subsection 17(1)(b)(i) of FOIP does not apply to these pages.

[48] The e-mails to and from the Applicant would not qualify as consultations or deliberations that involve employees or officers of SHRC. Subsection 17(1)(b)(i) of FOIP does not apply to these pages.

[49] Pages 102-103 and 107-111 are e-mails that shared correspondence from the Applicant through SHRC. There is only one sentence on page 107 that would qualify as a consultation pursuant to subsection 17(1)(b)(i) of FOIP. Pursuant to section 8, SHRC should sever this sentence and release the rest to the Applicant.

[50] Finally, page 104 of Bundle #3 is an e-mail which contains a direction from one employee to another. Subsection 17(1)(b)(i) of FOIP does not apply.

Bundle #5

[51] SHRC has applied subsection 17(1)(b)(i) of FOIP to all 5 pages in Bundle #5. Subsection 22(b) of FOIP applies to one of the e-mails.

[52] Two of the pages are correspondence from the Applicant to the Minister of Justice. Another page is a Government of Saskatchewan “Individual Record Information” form that summarizes the Applicant’s correspondence. Subsection 17(1)(b)(i) of FOIP does not apply to these three pages.

5. Did SHRC properly apply subsections 22(a) and (c) of FOIP to the record?

[53] Subsection 22 of FOIP states:

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

(a) contains information that is subject to solicitor-client privilege;

...

(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.

Bundles #3 and #5

[54] SHRC applied subsections 22(a) and (c) of FOIP to all of the records in Bundle #3 and #5. However, subsection 22(b) applies to most of the records. There is no need to consider these records any further. The outstanding pages are 91-98, 102-103, 104, 107-111 and correspondence to and from the Applicant for Bundle #1 and pages 2-5 for Bundle #5.

[55] These pages do not qualify for subsection 22(c) of FOIP for the same reason they did not qualify for subsection 22(b) as explained earlier in this Report. The pages do not relate to a matter involving the provision of advice or other services by legal counsel.

[56] The application of subsection 22(a) is determined through a three part test:

1. The record must be a communication between solicitor and client;
2. The communication must entail the seeking or giving of legal advice or legal assistance, and
3. The communication must be intended to be confidential.

[57] These pages do not meet the second part of the test as the pages do not entail the seeking or giving of legal advice. Subsection 22(a) of FOIP does not apply.

Bundle #4

[58] SHRC applied subsections 22(b) and (c) of FOIP to all of Bundle #4. However, the majority qualifies for exemption pursuant to subsection 22(b) of FOIP. I will consider the remainder.

[59] The majority of the 76 pages of correspondence between the lawyers at SHRC and the mediator at the Dispute Resolution Office would not qualify for exemption under subsection 22(c) of FOIP. The majority of the e-mails detail the arrangements of certain meetings. This would not qualify as legal advice or legal services for the purposes of subsection 22(c) of FOIP. Pursuant to section 8 of FOIP, SHRC should sever the parts

that would qualify for exemption under subsection 22(c) of FOIP and release the rest as described in Appendix A.

6. Did SHRC properly apply subsections 29(1) of FOIP to the record?

[60] Subsection 29(1) of FOIP states:

29(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[61] So far in this Report, I have recommended the release of approximately 150 of 510 pages of responsive record as well as e-mails between the Applicant and SHRC. The majority of the personal information identified by SHRC would be in the pages to which exemptions apply. However, there are some instances of personal information in the pages to be released which SHRC could sever pursuant to section 8 of FOIP.

[62] The personal information in question relates to identifiable individuals who are employees of the SHRC. It describes reasons the individuals were not at work on particular days which would be personal in nature.

IV FINDINGS

[63] I find subsections 15(1)(c), (g), 17(1)(b)(i), 22(b), (c) and 29(1) of FOIP applies to portions of the record.

V RECOMMENDATIONS

[64] I recommend SHRC release the pages listed in Appendix A severing only those portions that are subject to exemptions as discussed in this Report.

[65] I recommend the SHRC develop and implement a policy regarding disclosing personal information to the Ministry of Justice and other government institutions in accordance with Part IV of FOIP and provide a copy to our office.

Dated at Regina, in the Province of Saskatchewan, this 11th day of January, 2016.

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

Appendix A

Pages to be released to the Applicant with limited severing:

| Pages | Severing |
|-------------------|--|
| Bundle # 1 | |
| 1-2 | None |
| 6-7 | None |
| 9-20 | None |
| 23-24 | None |
| 31-32 | None |
| 37-47 | Pages 42-43 pursuant to subsection 29(1) of FOIP |
| 54-56 | None |
| 76-78 | Page 76 pursuant to subsection 29(1) of FOIP |
| 96 | None |
| 98-100 | None |
| 106-111 | None |

| Pages | Severing |
|---------------------------------------|---|
| Bundle #3 | |
| 91-98 | Severing of e-mails pursuant to subsection 17(1)(b) of FOIP |
| 102-104 | None |
| 107-110 | Page 107 pursuant to subsection 17(1)(b) of FOIP |
| Provide all e-mails to/from Applicant | |
| Bundle #4 | |
| 5-10 | None |
| 14-16 | None |
| 21-87 | Pages 32, 51, 58, 59, 66, 74, 80, 86 pursuant to subsection 22(b) of FOIP |
| Bundle #5 | |
| 1-5 | Pages 1-2 pursuant to subsection 22(b) of FOIP |