



REVIEW REPORT 205-2016

Executive Council

August 17, 2017

Summary: The Applicant requested records from Executive Council. Executive Council released some information and withheld other information citing subsections 22(a), (b), (c) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Upon review, the Commissioner found that subsection 22(a) of FOIP did not apply. Further, the Commissioner was not convinced with Executive Council's arguments that it did not have possession with a measure of control over some of the records. Finally, he found that subsections 22(b) and 29(1) of FOIP were appropriately applied to some information but not to other information. The Commissioner recommended that some information be withheld and other information be released.

I BACKGROUND

[1] On March 8, 2016, Executive Council received the following access to information request from the Applicant:

Provide all internal and external correspondence including but not limited to texts and emails related to [name] and comments he made in CBC stories about land transactions along the West Regina Bypass near the GTH from February 3, 2016 until March 5, 2016 – including but not limited to correspondence with [name].

[2] By letter dated May 9, 2016, Executive Council provided its response to the Applicant indicating that access was partially granted. In addition, Executive Council advised that some of the information was being withheld pursuant to subsections 22(a), (b), (c) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [3] On August 17, 2016, my office received a Request for Review from the Applicant in which he disagreed with Executive Council's application of the above provisions.
- [4] On August 23, 2016, my office notified Executive Council and the Applicant of my office's intent to undertake a review and invited all parties to provide submissions.
- [5] On October 25, 2016, Executive Council provided my office with its submission and a copy of the records at issue. Submissions were received from the Applicant on August 30, 2016 and December 9, 2016.

II RECORDS AT ISSUE

- [6] The record consists of two documents totalling five pages. The documents are emails and a draft letter.

III DISCUSSION OF THE ISSUES

- [7] Executive Council is a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP.

1. Did Executive Council properly apply subsection 22(a) of FOIP?

- [8] Subsection 22(a) of FOIP is a discretionary exemption and provides:

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

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

- [9] Subsection 22(a) of FOIP is meant to protect information that is subject to solicitor-client privilege. In *Solosky v. Canada* (1980), Justice Dickson regarded the rule of solicitor-client privilege as a "fundamental civil and legal right" that guaranteed clients a right to privacy in their communications with their lawyers.

[10] In *Descoteaux et al. v. Mierzwinski*, (1982), Justice Lamer outlined a very liberal approach to the scope of the privilege by extending it to include all communications made “within the framework of the solicitor-client relationship.” The protection is very strong, as long as the person claiming the privilege is within the framework.

[11] In order to qualify for this exemption, the withheld information must meet all three parts of the following test established in *Solosky v. Canada*, (1980):

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

[12] Executive Council applied subsection 22(a) of FOIP to pages 1 through 3. Pages 1 and 2 constitute an email chain. Page 3 is an attachment that is a draft letter.

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

[13] In its submission, Executive Council asserted that the emails were between legal counsel for a member of government and legal counsel for another party. Further, it asserted that counsel communicating with the member of government was personal counsel for that individual as a private citizen and not as a member of government.

[14] I find that the first email between a Minister and the then Deputy Minister to the Premier does not constitute a communication between solicitor and client. However, the remaining email chain does because the solicitor is forwarding an email chain to the client. In *Stevens v. Canada (Prime Minister)*, (1998), Justice Linden, speaking for the Court, noted that any communication between a lawyer and a client in the course of obtaining, formulating or giving legal advice is privileged and may not be disclosed without the client’s consent. Attachments to communications between a solicitor and client could qualify when the attachments are part of the continuum of the legal advice. The attachment itself does not have to contain legal advice to fall within the privilege. Therefore, even though some of the emails in this case are not directly between solicitor

and client, they are still part of the continuum of legal advice and are within the framework of the solicitor-client relationship.

[15] I find that the first part of the test has been met for the email chain that starts with the email dated February 4, 2016 at 5:18:56 pm. The email chain is a complete communication being sent from solicitor to client.

2. Does the communication entail the seeking or giving of legal advice?

[16] *Legal advice* means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.

[17] In the case before me, the communication between solicitor and client includes a string of emails containing information that the solicitor wants the client to review and gives his legal opinion on the information provided. I find that the information meets the second part of the test.

3. Was the communication intended to be confidential?

[18] In *Descoteaux et al. v. Mierzwinski*, (1982), Justice Lamer set out the substantive rule of confidentiality:

1. The confidentiality of communications between solicitor and client may be raised in any circumstance where such communications are likely to be disclosed without the client's consent.
2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

[19] Further, the nature of the records themselves can imply confidentiality. In its submission, Executive Council asserted that the communication was made in confidence and that specific reference to the confidence can be found in the email which indicates there is no intention of public release of the content of the email.

[20] Upon review of pages 1 through 3, it is between two solicitors with reference only to limiting distribution of the attachment. I further note there are no confidentiality clauses at the end of any of the emails. Further, it is clear that the entire communication between all of the parties has been shared outside of the solicitor-client relationship with no apparent expectation of confidentiality with the outside party. Based on this, the third part of the test has not been met. Accordingly, I find that subsection 22(a) of FOIP does not apply to pages 1 through 3.

[21] I received arguments from the Applicant that asserted there was a waiver of privilege. Executive Council argued there was no waiver. However, as I have found that the third part of the test has not been met there is no need to consider the issue of waiver further.

[22] Executive Council also asserted that subsection 19(1)(b) of FOIP would apply as the information in the emails and attachment would constitute third party technical information. However, I do not see the information qualifying as third party technical information based on the definition defined on page 24 of my office's resource, *IPC Guide to Exemptions*, so there is no need to consider this provision further.

[23] Executive Council also asserted that FOIP did not apply to pages 1 through 3 because of the personal nature of the records. This is a question of whether Executive Council has possession and/or control of pages 1 through 3. I will address this argument next.

2. Does Executive Council have possession or control of the emails?

[24] Section 5 of FOIP states:

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.

[emphasis added]

[25] Section 5 is clear that access can be granted provided the records are in the possession or under the control of the government institution. Possession and control are different things. It is conceivable that a public body might have possession but not control of a record or that it might have control but not possession.

[26] *Possession* is physical possession plus a measure of control over a record.

[27] *Control* connotes authority. A record is under the control of a public body when the public body has the authority to manage the record including restricting, regulating and administering its use, disclosure or disposition.

[28] In its submission, Executive Council asserted that pages 1 through 3 are the personal records of the client and as such, FOIP does not apply. Executive Council pointed to my office's Review Report F-2014-007 in support of its position. In that case, an applicant made a request for his own personal information from a government institution. The applicant was a member of a government employee's family. The records containing the applicant's personal information were located in the employee's records on the government system. Executive Council submitted that the outcome of the review was that the records were personal ones of the employee, and that even though they were in the possession of the government, they were not subject to FOIP.

[29] In this case, it is clear that Executive Council has physical possession of the email chain. However, it must also have a measure of control. To determine whether a public body has a measure of control over a record(s), the following two questions can be asked:

1. Do the contents of the document relate to a public body matter? and
2. Can the public body reasonably expect to obtain a copy of the document upon request?

[30] If both questions can be answered in the affirmative, the document is under the control of the public body (*Canada (Information Commissioner) v. Canada (Minister of Defence)*, (2011)). In answering these two questions, the following factors can be considered:

- a) The record was created by a staff member, an officer, or a member of the public body in the course of his or her duties performed for the public body;
- b) The record was created by an outside consultant for the public body;
- c) The public body possesses the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory, statutory or employment requirement;
- d) An employee of the public body possesses the record for the purposes of his or her duties performed for the public body;
- e) The record is specified in a contract as being under the control of a public body and there is no understanding or agreement that the records are not to be disclosed;
- f) The content of the record relates to the public body's mandate and core, central or basic functions;
- g) The public body has a right of possession of the record;
- h) The public body has the authority to regulate the record's use and disposition;
- i) The public body paid for the creation of the records;
- j) The public body has relied upon the record to a substantial extent;
- k) The record is closely integrated with other records held by the public body;
- l) A contract permits the public body to inspect, review and/or possess copies of the records the contractor produced, received or acquired;
- m) The public body's customary practice in relation to possession or control of records of this nature in similar circumstances;
- n) The customary practice of other bodies in a similar trade, calling or profession in relation to possession or control of records of this nature in similar circumstances; and
- o) The owner of the records.

a) Was the email chain and attachment created by a staff member, an officer, or a member of Executive Council in the course of his or her duties performed for Executive Council?

[31] Executive Council submits that pages 1 through 3 were not created in the course of the government member's duties. It further argued that while the matter underlying the record relates to a government institution activity, the record itself involves the personal activities of the government member arising from those matters.

[32] I note on page 1 that the email chain was shared between two government email accounts.

b) Were the emails created by an outside consultant for Executive Council?

[33] Executive Council submits that pages 1 through 3 were prepared by outside parties but not for Executive Council, rather for a government member personally.

[34] For the next three factors, Executive Council did not specifically address them. This includes the following:

c) Does Executive Council possess the emails, either because they have been voluntarily provided by the creator or pursuant to a mandatory, statutory or employment requirement?

d) Does an employee of Executive Council possess the emails for the purposes of his or her duties performed for Executive Council?

e) Are the emails specified in a contract as being under the control of Executive Council and there is no understanding or agreement that the emails are not to be disclosed?

f) Does the content of the emails relate to Executive Council's mandate and core, central or basic functions?

[35] Executive Council submits that the content of pages 1 through 3 is not part of Executive Council's functions. Further, it asserted that the issue which generated the news story arose out of them but the content of pages 1 through 3 is personal.

[36] I note that the attachment makes reference to both the government member in his official capacity and to the Government of Saskatchewan.

g) Does Executive Council have a right of possession of the emails?

[37] Executive Council submits that it has no right of possession of the emails and the emails are from the government member's personal counsel.

[38] It is not clear why Executive Council retained a copy of the email chain if it had no right of possession.

h) Does Executive Council have the authority to regulate the use and disposition of the emails?

[39] Executive Council did not specifically address this factor.

i) Did Executive Council pay for the creation of the emails?

[40] Executive Council submits that it has not paid for the creation of the emails.

[41] As noted, the email chain was sent from and to government email accounts. Therefore, it has paid for its creation.

[42] For the remaining six factors, Executive Council did not specifically address them. This includes the following:

j) Has Executive Council relied on the emails to a substantial extent?

k) Are the emails closely integrated with other records held by Executive Council?

l) Is there a contract that permits Executive Council to inspect, review and/or possess copies of the emails (which the contractor produced, received or acquired)?

m) What is Executive Council's customary practice in relation to possession or control of records of this nature in similar circumstances?

- n) What is the customary practice of other bodies in a similar trade, calling or profession in relation to possession or control of records of this nature in similar circumstances?
- o) Is Executive Council the owner of the emails?

[43] After considering the 15 factors and the submission from Executive Council, there are a number of questions that remain unanswered. It should also be noted that Executive Council did not identify at the time it processed the access request that pages 1 through 3 were not in its possession and/or control. It also did not indicate that in its section 7 response to the Applicant.

[44] Further, Executive Council made submissions to the extent that subsections 22(a) and 29(1) of FOIP apply. One only makes argument that an exemption applies or that personal information should not be released when one has accepted that one has possession with a measure of control. Otherwise, one would argue that there is no possession or control and thus, FOIP does not apply. In making these arguments, Executive Council has implicitly accepted that it had possession with a measure of control.

[45] Section 61 of FOIP provides as follows:

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.

[46] Therefore, I am not persuaded that Executive Council does not have possession with a measure of control over the emails and attachment.

[47] Executive Council also applied subsection 29(1) of FOIP to the information in the emails and attachment on pages 1 through 3. I will address that next.

3. Did Executive Council properly apply subsection 29(1) of FOIP?

[48] When dealing with information in a record that appears to be personal information, the first step is to confirm the information indeed qualifies as personal information pursuant to subsection 24(1) of FOIP. Part of that consideration involves assessing if the information has the following two elements:

1. An identifiable individual; and
2. Information that is personal in nature.

[49] *Personal in nature* means that the information reveals something personal about the individual. Information that relates to an individual in a professional, official or business capacity does not generally qualify unless it revealed something personal about the individual for example, information that fits the definition of employment history.

[50] Once identified as personal information, the public body needs to consider subsection 29(1) of FOIP which provides:

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

[51] Executive Council withheld most of the information on pages 1 through 3 citing subsection 29(1) of FOIP.

[52] In its submission, Executive Council asserted that pages 1 through 3 contained personal information because the content related to a personal matter of an individual. It further asserted that, while the matter which underlies the record relates to a government institution activity, the record itself involves the personal activities of an individual arising from those matters. Accordingly, it submitted the information within the email is the personal information of that individual. In addition, Executive Council asserted that the content of the record and its attachment also contain the personal information of the writer of the attachment.

[53] Upon review of the record, I find that some information on pages 1 through 3 qualifies as personal information of more than one identifiable individual. However, some does not. Further, my office notes that some information related to this matter is already publicly available.

[54] In conclusion, I find that Executive Council appropriately applied subsection 29(1) of FOIP to some of the information in the record. I also find that it did not appropriately apply subsection 29(1) of FOIP to other information.

[55] Consistent with section 8 of FOIP, I have recommended to Executive Council which portions of pages 1 through 3 should be withheld pursuant to subsection 29(1) of FOIP. This includes a portion of pages 1 and 2 and all of page 3. My recommended redactions have been provided to Executive Council separate from this report so that the provisions of subsection 29(1) of FOIP could be respected. I will now turn my attention to pages 4 and 5 of the record.

4. Did Executive Council properly apply subsection 22(b) of FOIP?

[56] Subsection 22(b) of FOIP is a discretionary exemption and provides:

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

...

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

[57] This exemption is meant to capture records prepared by or for legal counsel (or an agent of the Attorney General) for a public body in relation to the provision of advice or services by legal counsel.

[58] In order for subsection 22(b) of FOIP to apply, there are two criteria that must be met.

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

[59] Executive Council applied subsection 22(b) of FOIP to information on pages 4 and 5. Executive Council withheld most of the information on these pages but released a name at the top of the page and a portion of the email header (i.e. “to”, “from”, “sent”). Pages 4 and 5 constitute emails.

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

[60] In its submission, Executive Council asserted that the record was prepared by officials of the Ministry of Justice in relation to matters on which they are providing services to the government. The Ministry of Justice was involved in retaining the firm in question to provide legal services both for government and for SaskBuilds, a treasury board crown corporation which the Ministry also provides legal services to.

[61] From a review of pages 4 and 5 they are an email chain which the then Deputy Minister to the Premier printed off from his email account which is why his name appears at the top of the page. Below his name is an email header. A portion of that email header was released. The remainder of the header, along with all others in the email chain were withheld which included the “to” and “from” lines, “cc” line, “sent” line, “subject” and “attachment” lines.

[62] Alberta has a similarly worded provision in its FOIP Act. Section 27(1)(b) of Alberta’s FOIP Act provides:

27(1) The head of a public body may refuse to disclose to an applicant

...

(b) information prepared by or for

(i) the Minister of Justice and Solicitor General,

(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or

(iii) an agent or lawyer of a public body,

in relation to a matter involving the provision of legal services, or

[63] In Alberta IPC Order F2013-13, the Adjudicator held that the term “prepared” in subsection 27(1)(b) of the Alberta FOIP Act was not intended to refer to information that was not substantive, such as dates, letterhead, names and business contact information of

the sender and recipient of the information. As such, these are not items of information that were “prepared” as the provision requires. Finally, the Adjudicator found that the provision would only apply to this type of non-substantive information if it revealed the substantive content found elsewhere in the record.

[64] My office takes a similar approach to that of the Alberta IPC. Subsection 22(b) of FOIP does not apply to information that is non-substantive such as dates, letterhead, names and business contact information unless disclosure of this information reveals substantive information. Executive Council did not present any arguments to suggest that release of the email headers would reveal substantive information. Therefore, I find that subsection 22(b) of FOIP was not appropriately applied to this information in the emails. I recommend this information be released to the Applicant.

[65] In addition, *Blank v. Canada (Minister of Justice)*, (2005), deals with the federal *Access to Information Act* (ATIA), solicitor-client privilege and severance of records. Paragraph [66] of that decision states:

An earlier contention of the respondent that a record that is subject to solicitor-client privilege is not subject to the severance provision in section 25 has been unequivocally rejected by this Court in *Blank v. Canada (Minister of the Environment)* (2001), 2001 FCA 374 (CanLII), 41 C.E.L.R. (N.S.) 59 (F.C.A.), at paragraph 13: see also *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), [2003] 2 W.W.R. 279 (B.C.C.A.), at paragraphs 65-68. The words “[n]otwithstanding any other provision of this Act” employed in section 25 make it a paramount section: see *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, 1988 CanLII 5656 (FCA), [1989] 1 F.C. 265 (C.A.), at page 271. Therefore, general identifying information such as the description of the document, the name, title and address of the person to whom the communication was directed, the closing words of the communication and the signature block can be severed and disclosed. As this Court pointed out in *Blank*, at paragraph 23, this kind of information enables the requester “to know that a communication occurred between certain persons at a certain time on a certain subject, but no more”.

[66] The remainder of the information on pages 4 and 5 was also withheld. From a review of the information it is clear, based on the individuals involved, that the records were

prepared by legal counsel and provided to Executive Council. Therefore, the first part of the test has been met for the remainder of the information withheld on pages 4 and 5.

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

[67] In its submission, Executive Council asserted that the records were prepared in relation to the services which the Ministry of Justice provided in retaining the firm to provide legal services to the government and SaskBuilds.

[68] *Legal advice* includes a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.

[69] *Legal service* includes any law-related service performed by a person licensed to practice law.

[70] The prepared record does not have to constitute legal advice or legal services to qualify. However, it must relate back “to a matter involving the provision of advice or services”.

[71] Based on the content of the emails and in consideration of Executive Council’s submission, I find that the second part of the test is met. The emails do relate to a matter involving the provision of legal advice and legal services. As such, I find that subsection 22(b) of FOIP was appropriately applied to the remainder of the information in pages 4 and 5. I recommend Executive Council continue to withhold the information.

[72] As I have found that subsection 22(b) of FOIP applies, there is no need to consider subsection 22(c) of FOIP.

IV FINDINGS

[73] I find that subsection 22(a) of FOIP does not apply to the information on pages 1 through 3.

[74] I find Executive Council has possession with a measure of control over pages 1 through 3.

[75] I find that subsection 29(1) of FOIP was appropriately applied to some information and not appropriately applied to other information on pages 1 through 3.

[76] I find that subsection 22(b) of FOIP was appropriately applied to some of the information and not appropriately applied to other information on pages 4 and 5.

V RECOMMENDATIONS

[77] I recommend that Executive Council continue to withhold the information on pages 1, 2 and 3 that has been found to qualify as personal information and release the remainder of the record to the Applicant.

[78] I recommend that Executive Council release the email headers on pages 4 and 5 and withhold the remainder of the record.

Dated at Regina, in the Province of Saskatchewan, this 17th day of August, 2017.

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