



REVIEW REPORT 318-2023

Ministry of Education

January 29, 2024

Summary:

The Applicant submitted an access to information request to the Ministry of Education (Education). Education extended the time for responding to the request. The Applicant requested a review by the Commissioner when Education failed to respond within the extended time period. During the review, Education issued its section 7 decision claiming that portions of the records were exempt pursuant to subsections 29(1), 22(a), (b), (c), 17(1)(a) and 17(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that Education failed to comply with subsections 7(2) and 12(3) of FOIP. He also found that Education properly applied subsection 17(1)(a) of FOIP but did not properly apply subsections 17(1)(b) and 22(a) of FOIP in some cases. The Commissioner recommended that Education, within 30 days of the issuance of this Report, review its policies and procedures for processing access to information requests and make any necessary changes. He also recommended that Education, also within 30 days of issuance of this Report, continue to withhold the information he found to be exempt and release the information that he found was not exempt.

I BACKGROUND

- [1] This Report relates to a decision made by the government on August 22, 2023, to implement a new education policy that requires parental permission if a child under the age of 16 wants to use a different name or pronoun from that initially provided to school administrators. The Ministry of Education (Education) stated that it received a large number of access to information requests under *The Freedom of Information and Protection of Privacy Act* (FOIP) relating to the new policy.

[2] Education received an access to information request from the Applicant on August 25, 2023. The Applicant sought access to the following information, dated from May 1, 2023, to the date of the request:

All correspondence (including emails and attachments) between (to and from, including cc'd) Minister Duncan, his staff and senior leadership (DM, ADMs, Special Advisors and EDs) of the Ministry of Education regarding the "Use of Preferred First Name Pronouns by Students" that was released on Aug 23rd, 2023.

[3] On September 22, 2023, Education sent a letter to the Applicant by email advising that it had extended the timeline for responding to the request by 30 days to October 27, 2023. The extension was made pursuant to subsection 12(1)(a)(ii) of FOIP.

[4] On November 22, 2023, the Applicant filed a request for a review with my office. The Applicant stated that they had not received a response to the access to information request. The Applicant also disputed Education's right to claim an extension of time to respond.

[5] On November 29, 2023, my office wrote to Education requesting that it provide its section 7 decision to the Applicant by December 6, 2023.

[6] Education failed to provide the section 7 decision and my office sent a notice to it on December 14, 2023, stating that we would be undertaking a review pursuant to Part VII of FOIP.

[7] Education issued its section 7 decision on December 20, 2023, releasing portions of 227 pages of records. Education provided my office with a copy of the section 7 decision and copies of the records released to the Applicant. It subsequently provided its submission, index of records and redlined versions of all but three records.

[8] There are some discrepancies between the copies of the records that were provided to the Applicant and the redlined versions of the records provided to my office. On page 51 of the records provided to the Applicant, Education claimed that severance 2 was exempt pursuant to subsection 22(a) of FOIP and subsection 17(1)(b) of FOIP. However,

subsection 22(a) was not claimed for this severance in the redlined version of the records, the index of records or in Education's submission.

[9] Two other discrepancies exist. On pages 53 and 176 of the records released to the Applicant, Education did not claim subsection 22(a) of FOIP. However, those claims were made in the submission, index of records and redlined version of the records.

[10] Later, Education provided my office with an affidavit setting out a *prima facie* claim that pages 53, 176 and 199 were exempt in full pursuant to subsections 22(a), (b) and (c) of FOIP.

[11] Following discussions with my office, Education decided to withdraw its claim to subsections 22(b) and (c) of FOIP for all of the records and it provided my office with partial copies of pages 53, 176 and 199.

[12] Also, during this review, Education changed its position that pages 53 and 176 were exempt pursuant to subsection 22(a) of FOIP. It stated that it claimed subsection 22(a) of FOIP only for portions of those pages. The portions withheld from pages 53, 176 and 199 pursuant to subsection 22(a) of FOIP were not provided to my office.

[13] During this review, the Applicant stated that they are not seeking access to the information that Education withheld pursuant to subsection 29(1) of FOIP. Therefore, that exemption is no longer at issue.

[14] The Applicant did not provide a submission.

II RECORDS AT ISSUE

[15] Education identified 227 pages of responsive records. It released 174 pages in full and withheld all or portions of 53 pages. The Appendix to this Report sets out a description of the records and the exemptions claimed by Education for each severance in its section 7 decision.

[16] As noted in the background, Education raised the application of subsection 22(a) of FOIP in relation to pages 53 and 176 for the first time during this review and not in its section 7 decision. Part 2-4(3) of my office's [Rules of Procedure](#) provides, at page 5, that any discretionary exemption not included in the head's decision under FOIP will not be considered by my office. It states:

2-4(3) The notice of review will indicate that the public body should in its representation (submission) address every exemption claimed in the head's decision. Discretionary exemptions, not included in the head's decision under FOIP/LAFOIP, will not be considered by the commissioner's office unless there are exceptional circumstances.

[17] Applying this provision of *The Rules of Procedure*, I will not be considering Education's claim that portions of pages 53 and 176 are subject to subsection 22(a) of FOIP. As Education claimed that this information is exempt pursuant to subsection 17(1)(b) of FOIP the version of records released to the Applicant, I will consider if that exemption applies below.

[18] I will be considering Education's claim that subsection 22(a) of FOIP applies to page 51 severance 2 given that it was raised by Education in the copies of the records provided with the section 7 decision.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[19] Education qualifies as a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, it is subject to FOIP.

2. Did Education comply with sections 7 and 12 of FOIP?

[20] Subsection 7(2) of FOIP requires institutions to respond to an access to information request within 30 days. That subsection states:

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

[21] Section 12 of FOIP gives government institutions the right to extend the time for responding to an access to information request by 30 days. Once properly extended, a government institution must provide the applicant with its section 7 decision within the extended deadline. Education extended the time for its response by 30 days pursuant to subsection 12(1)(a)(ii) of FOIP. The relevant provisions in section 12 state:

12(1) The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

(a) where:

...
(ii) there is a large number of requests;

and completing the work within the original period would unreasonably interfere with the operations of the government institution;

(2) A head who extends a period pursuant to subsection (1) shall give notice of the extension to the applicant within 30 days after the application is made.

(3) Within the period of extension, the head shall give written notice to the applicant in accordance with section 7.

[22] The *Guide to FOIP*, Chapter 3, “Access to Records”, updated May 5, 2023 (*Guide to FOIP*, Ch. 3) at page 50, explains that the timelines under FOIP are calculated in accordance with *The Legislation Act* (LA) section 2-28. When section 2-28 of the LA is applied to the 30-day time period for responding to an access to information request, the time is calculated as follows:

- The first day of the access request is excluded in the calculation of time [s. 2-28(2)].
- If the due date falls on a holiday, the time is extended to the next day that is not a holiday [2-28(2)].
- If the due date falls on a weekend, the time is extended to the next day the office is open [2-28(6)].
- As FOIP expresses the time in a number of days, this is interpreted as 30 calendar days, not business days.

[23] Subsection 7(5) of FOIP sets out the consequences for a failure to respond within the time required by subsection 7(2) of FOIP. Subsection 7(5) of FOIP states:

7(5) A head who fails to give notice pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record.

[24] Applying those rules, the first date for counting the due date for responding to the Applicant's request was August 26, 2023. Therefore, the initial due date was September 25, 2023, and the notice of extension (sent on September 22, 2023) was sent within the first 30 days. However, the time extension was limited to 30 days from September 25, 2023, and therefore Education's section 7 decision was due on October 25, 2023 – not October 27, 2023.

[25] Education did not issue its section 7 decision until December 20, 2023, which was well beyond the extended due date. Therefore, Education did not comply with subsection 12(3) of FOIP which requires that a government institution provide its section 7 decision to the applicant within the extended 30-day deadline. Given my finding, it is not necessary for me to consider if Education was permitted to extend the time pursuant to subsection 12(1)(a)(ii) of FOIP.

[26] Education's failure to comply with subsection 12(3) of FOIP meant that it was in a deemed refusal position pursuant to subsection 7(5) of FOIP.

[27] Therefore, I find that Education did not comply with subsections 7(2) and 12(3) of FOIP.

[28] In its submission, Education acknowledged that its response did not meet the timelines in FOIP. It explained that this request was one of 31 that were submitted in August and September 2023 relating to Education's new policy. It added that this volume was unprecedented and that many of the requests were similar, but they were not identical.

[29] Education also advised that as a result of this experience, changes were made to the process for access to information requests to enable quicker responses. Additional staff have been

hired and trained to assist should similar situations arise in the future. An additional temporary full time equivalent role has been added to staff compliment in the unit for the next fiscal year.

[30] I am satisfied that Education has taken steps to address its failure to meet the timelines in this case, but more could be done. I recommend that Education review and amend, if necessary, its policies and procedures relating to the timelines for processing access to information requests.

3. Did Education properly apply subsection 22(a) of FOIP?

[31] In this review, Education elected to make a *prima facie* case that subsection 22(a) of FOIP applied to portions of page 199. The decision was made in accordance with my office's [*The Rules of Procedure*](#), Part 9 (updated August 2023), subsection 9-1(1) which states:

9-1(1) Where solicitor-client or litigation privilege is being claimed as an exemption by the head or delegate, the commissioner's office will request the head or delegate to provide a copy of the records, or an affidavit of records, schedule and redacted record over which solicitor-client or litigation privilege is claimed setting out the elements requested in Form B.

[32] Education provided my office with a copy of the information withheld pursuant to subsection 22(a) of FOIP on page 51 severance 2. Therefore, in relation to this severance, it did not elect to make a *prima facie*.

[33] 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;

[34] As set out in my office's *Guide to FOIP*, Chapter 4, "Exemptions from the Right of Access", updated October 18, 2023 (*Guide to FOIP*, Ch. 4) at page 257, subsection 22(a) of FOIP is a discretionary exemption. It permits refusal of access in situations where a

record contains information that is subject to any legal privilege, including solicitor-client privilege.

[35] My office uses a three-part test to determine if records contain solicitor-client privileged information that is exempt pursuant to subsection 22(a) of FOIP. The test is set out in the *Guide to FOIP*, Ch. 4, at pages 260 to 265, and is as follows:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Did the parties intend for the communication to be treated confidentially?

[36] I now turn to consider each part of the three-part test.

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

[37] The *Guide to FOIP*, Ch. 4 at page 260, 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.

[38] The *Guide to FOIP*, Ch. 4 at pages 260 to 261, defines “client” as a person who consults with a legal counsel and on whose behalf the legal counsel renders or agrees to render legal services; or, having consulted the legal counsel, reasonably concludes that the lawyer has agreed to render legal services on their behalf. It defines “lawyer” as a member of the Law Society.

[39] Education’s submission does not address the claim to subsection 22(a) of FOIP for page 51 severance 2 which is a portion of a draft policy. There is no evidence or information that would suggest that this portion of the policy relates to a communication between Education’s lawyers and Education staff. I find that the first part of the test has not been met.

[40] Education asserted that page 199 is an email to the Chief of Staff for the Minister from the Assistant Deputy Minister (ADM). It asserted that the withheld information qualifies as legal advice provided by the Ministry's legal branch to the ADM which the ADM repeated in the email for the Chief of Staff. Its assertion was supported by the Affidavit provided under subsection 9-1(1) of *The Rules of Procedure*.

[41] As the withheld information records the legal advice provided by Education's lawyers to Education's staff, I am satisfied the records involve communications between legal counsel and a client, which meets the first part of the test. I will now assess the other two parts of the test.

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

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

[42] My office's *Guide to FOIP*, Ch. 4 at page 261, defines "legal advice" as a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. The second part of the test is satisfied where the person seeking advice has a reasonable concern that a particular decision or course of action may have legal implications and turns to their legal advisor to determine what those legal implications might be.

[43] Education's Director of Legislative Services and Privacy's Affidavit attested that the information withheld from page 199 was legal advice provided to Education staff regarding the draft policy. They also attested that the communications were intended to be kept confidential and have been consistently treated as confidential.

[44] Based on the preceding, all three parts of the test have been met for page 199. I find that Education has made a *prima facie* case that subsection 22(a) of FOIP applies to the withheld portions of page 199. I recommend that Education continue to withhold this information. See the Appendix for details.

[45] Education did not explain how the information withheld from page 51 qualifies as legal advice. Nor has it explained how this information was intended to be kept confidential. Education has not met the test in relation to page 51 severance 2. I find that Education did not properly apply subsection 22(a) of FOIP to this information. As Education has also claimed that this information is exempt pursuant to subsection 17(1)(b) of FOIP, I will consider that exemption in relation to this page in the analysis that follows.

4. Did Education properly apply subsection 17(1)(a) of FOIP?

[46] Education withheld two portions of page 1 pursuant to subsection 17(1)(a) of FOIP. It asserted that one portion was “analysis”, and the other portion was a “recommendation.”

[47] Subsection 17(1)(a) of FOIP is a discretionary exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council. It provides:

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

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

[48] My office’s *Guide to FOIP*, Ch. 4 at pages 125 to 128, sets out the following two-part test to determine if subsection 17(1)(a) of FOIP applies:

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

[49] The *Guide to FOIP*, Ch. 4 at pages 126 to 127, defines “recommendation” as a specific piece of advice about what to do, especially when given officially; it is a suggestion that someone should choose a particular thing or person that one thinks particularly good or

meritorious. Recommendations relate to a suggested course of action more explicitly and pointedly than “advice.”

[50] The *Guide to FOIP*, Ch. 4 at page 127, defines “analysis” as the detailed examination of the elements or structure of something; the process of separating something into its constituent elements.

[51] “Developed by or for” is defined in the *Guide to FOIP*, Ch. 4 at page 128, to mean the advice, proposals, recommendations, and/or analyses must have been created either: 1) within the government institution, or 2) outside the government institution, but for the government institution and at its request.

[52] In other words, to be developed by or for the government institution, the recommendations, and analyses should:

- be either sought, be expected, or be part of the responsibility of the person who prepared the record;
- be prepared for the purpose of doing something, for example, taking an action or making a decision; and
- involve or be intended for someone who can take or implement the action.

[53] Page one is an email from the ADM to the Minister’s Chief of Staff. Education’s submission asserted that the information in the email was intended for the Minister of Education.

[54] The ADM was a government employee whose role was to provide advice, recommendations, analysis and policy options to the Minister. The withheld information was an examination of a study and its conclusions. I find that the withheld information qualified as analysis. I also find that the withheld information was prepared by an employee of Education for the Chief of Staff. Therefore, both parts of the test for the application of subsection 17(1)(a) of FOIP have been met.

[55] The second severance was information about how to communicate a government position. It qualifies as a recommendation made based on the study. I find that the recommendation was developed by staff within Education for the Chief of Staff. Therefore, both parts of the test for the application of subsection 17(1)(a) of FOIP have been met.

[56] I find that Education properly applied subsection 17(1)(a) of FOIP.

[57] I recommend that Education continue to withhold the information. See the Appendix for details.

5. Did Education properly apply subsection 17(1)(b) of FOIP?

[58] Education applied subsection 17(1)(b) of FOIP to a number of severances on pages 5 to 7, 9 to 11, 29, 40, 42, 45, 49, 51, 53, 54, 70 to 73, 107, 109, 126 to 129, 162, 163, 175, 176, 177 to 180, 184, 196 to 198, 211 to 216, and 218 to 226. It claimed that the severed information met the criteria in subsection 17(1)(b)(ii) of FOIP.

[59] 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;

[60] As described in the *Guide to FOIP*, Ch. 4 at page 133, subsection 17(1)(b) of FOIP is a discretionary exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose consultations or deliberations involving a member of the Executive Council.

[61] The provision is intended to allow persons having the responsibility to make decisions to freely discuss the issues before them to arrive at well-reasoned decisions. The intent is to allow such persons to address an issue without fear of being wrong, looking bad, or appearing foolish if their frank deliberations were to be made public.

[62] My office uses the following two-part test to determine if the provision has been properly applied:

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?

[63] The definitions of the following key terms are set out in my office's *Guide to FOIP*, Ch. 4 at pages 133 to 135:

“Consultation” means:

- The act of consulting or taking counsel together; deliberation, conference.
- A conference in which the parties consult and deliberate.

A consultation can occur when the view of one or more officers or employees of a government institution are sought as to the appropriateness of a particular proposal or suggested action.

“Deliberation” means:

- The act 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 councilors.

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.

- [64] Subsection 17(1)(b) of FOIP is an exemption that protects communications involving decision makers. Like the approach I took in [Review Report 141-2023](#), for the purposes of the analysis that follows, I will consider a communication that involves the seeking of advice as a consultation. Where a person is charged with making a decision, the process of decision making or considering that advice is a deliberation.
- [65] Consultations and deliberations can be revealed in two ways: 1. The information itself consists of consultations or deliberations. 2. The information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual consultations or deliberations.
- [66] As set out in my office's *Guide to FOIP*, Ch. 4 at p. 136, the provision is not meant to protect the bare recitation of facts, without anything further, unless it is so intertwined that reasonable separation cannot be made. The exemption does not generally apply to records or parts of records that in themselves reveal only that a consultation took place at a particular time, particular persons were involved, or a particular topic was involved. However, if releasing this information reveals the substance of the consultation or deliberations, the government institution can withhold this information.
- [67] Education provided a submission on each of the severances. In summary, Education asserted that the withheld portions of the records contain information that qualifies as consultation and deliberations on matters such as changes needed to the Registrar's Handbook; a "Question and Answer" document; a draft of the pronoun policy; appendix to be attached to the draft policy; draft media packages and announcements; draft letters; and draft social media releases. The records include draft documents, emails, and letters. Some of the withheld information appears in version history information relating to draft policies.
- [68] Education asserted that the consultations and deliberations involved employees of Education's Deputy Minister's Office and the Minister's Office. In relation to some severances, it claimed that the information was submitted to the ADM "for consultation and deliberation with the Minister". I now turn to a page-by-page analysis of the severances.

[69] The following information qualifies as factual information which is not exempt pursuant to subsection 17(1)(b) of FOIP:

- Page 5 (severance 1) is a statement about website location and how links will be added to a new policy.
- Page 10 (severances 1 to 3) and page 11 are factual information about the current rules involving official and unofficial name changes.
- Page 29 (severances 1 and 2) are statements about format changes to a document.
- Page 45 is a statement about the version of a policy document and a request for feedback. Pages 52, 53, 162, 175 and 176 are version histories of a policy document which only reveal the dates changes were made and the staff involved.
- Page 54 (duplicate on page 109) three severances reference file names which is factual information. The location of an electronic file is embedded using links. Education did not provide any information as to whether the links were active and could be used by someone outside the organization.
- Page 162 (severance 2), page 184 (severances 1 and 2) are status updates on specific work.
- Page 216 (severances 1 to 3), which are duplicated on pages 219 (severances 2 to 3), 220, 222 (severances 2 to 3), 223, 225 (severance 2), and 226, are statements or questions about the status of work.

[70] I find that Education did not properly apply subsection 17(1)(b) of FOIP to this information. I recommend that Education release the factual information within 30 days of issuance of this Report. See the Appendix for details.

[71] In the following discussion, I will consider if Education met the two-part test for the remaining information.

1. Does the record contain consultations or deliberations?

[72] Education's submission did not specifically address how the withheld portions of information qualify as consultations or deliberations.

- [73] Information withheld from pages 6 and 7 are draft changes to the “Registrar’s Handbook.” Education states that the information was “from a government employee,” submitted to the ADM for consultation and deliberation with the Minister. However, the email to which these documents were attached was between two Education employees and did not involve the ADM. The withheld information does not qualify as a consultation because it does not involve the seeking of advice. Nor does the information qualify as a deliberation because it does not reveal the process of decision making or considering of advice.
- [74] Severed portions of pages 8 and 9 are changes made to a “question-and-answer” document that was attached to an email at page 10. Education submits that pages 9 to 11 contain information from a government employee that was intended for the Minister’s Office and the information “highlights consultations and deliberations through draft language.” The email on pages 10 and 11 is addressed to the ADM. It includes information that I have found above to be factual. The draft language on page 9 does not qualify as a consultation because it does not appear to involve the seeking of advice. Nor does the information qualify as a deliberation because it does not reveal the process of decision making by a decision maker.
- [75] Severances on pages 40 and 42 are recommendations for changes to a draft administrative procedure. They do not reveal a consultation because they do not appear to involve the seeking of advice. Nor do they involve a deliberation because they do not reveal the process of decision making.
- [76] Similarly, the information withheld from pages 49, 51, 53, 70, 71, 73, 107, 126 to 129, 163, 175, 176, 177 to 180, 196 to 198, and 211 to 213 are draft changes to policies, media releases and other documents which do not involve the seeking of advice or reveal the process of decision making. Therefore, these severances do not qualify as consultations or deliberations.
- [77] Information severed from pages 214, 215, 218, 219 (severance 1), 222 (severance 1), 224, and 225 (severance 1) reveal that advice was sought and obtained from the Chief of Staff

of the Minister from the ADM and their staff, the subject matter of the advice and the nature of the resolution. This information qualifies as a consultation.

[78] As noted in my office's *Guide to FOIP*, Ch. 4 at page 138, there is often confusion among government institutions as to when to apply subsection 17(1)(a) of FOIP versus subsection 17(1)(b) of FOIP. This may have been the case here.

[79] Subsection 17(1)(a) of FOIP is intended to protect communications developed for a government institution by an advisor, while subsection 17(1)(b) of FOIP protects communications involving decision makers. This is supported by the use of the word "deliberation": only a person charged with making a decision can be said to deliberate that decision. Moreover, "consultation" typically refers to the act of seeking advice regarding an action one is considering taking, but not to giving advice in relation to it.

[80] On the same page, the *Guide to FOIP*, Ch. 4, states that information that is the subject of subsection 17(1)(a) of FOIP may be voluntarily or spontaneously provided to a decision maker for the decision makers' use because it is the responsibility of an employee to provide information of this kind; however, such information cannot be described as a "consultation" or a "deliberation." Put simply, subsection 17(1)(a) of FOIP is concerned with the situation where advice is given, subsection 17(1)(b) of FOIP is concerned with the situation where advice is sought or considered.

[81] Finally, it is important to remember that draft documents that do not explain the pros or cons of adopting the draft and do not involve the seeking of advice and the consideration of the advice do not qualify as consultations or deliberations – see Review Reports [086-2019](#) and [187-2019](#). More recently, in [Review Report 141-2023](#), I explained that the mere fact that a record is a draft does not transform the contents into consultations or deliberations. I now turn to part two of the test.

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?

- [82] As Education is relying on subsection 17(1)(b) of FOIP to withhold information it must also establish that the consultations or deliberations at issue involved officers or employees of a government institution, a member of Executive Council or the staff of a member of Executive Council. “Executive Council” is defined in my office’s *Guide to FOIP*, Ch. 4 at page 135, as the Executive Council appointed pursuant to *The Executive Government Administration Act*. It consists of the Premier and Cabinet Ministers.
- [83] According to my office’s *Guide to FOIP*, Ch. 4 at page 135, the phrase “the staff of a member of the Executive Council” includes staff in a Minister’s office, such as the Chief of Staff.
- [84] In light of my findings above regarding the first part of the test, I need only consider if part two of the test has been met in relation to the following severances: pages 214, 215, 218, 219 (severance 1), 222 (severance 1), 224, and 225 (severance 1).
- [85] Education’s submission asserted in places that the consultations or deliberations involved the Minister or the Minister’s staff. In relation to other severances, it asserted that the information was provided “to the ADM for consultation and deliberation with the Minister.” In other places it asserted that “the information was intended for the Minister” or “intended for the Minister’s consultation and deliberation.”
- [86] From a review of the records at issue, it appears that they did not directly involve the Minister. However, as they did involve the Minister’s Chief of Staff, the criteria in subsection 17(1)(b)(iii) of FOIP has been met and therefore part two of the test has been met.
- [87] Therefore, as both parts of the test must be met for subsection 17(1)(b) of FOIP to apply, I find that Education did not properly apply the exemption with some exceptions. Education

properly applied the exemption in relation to the following severances: page 214, 215, 218, 219 (severance 1), 222 (severance 1), 224, and 225 (severance 1).

[88] I recommend that Education continue to withhold the following information: page 214, 215, 218, 219 (severance 1), 222 (severance 1), 224, and 225 (severance 1).

[89] I recommend that Education release the remaining information for which it claimed subsection 17(1)(b) of FOIP within 30 days of issuance of this Report. See the Appendix for details.

IV FINDINGS

[90] I find that I have jurisdiction to conduct this review.

[91] I find that Education did not comply with subsections 7(2) and 12(3) of FOIP.

[92] I find that Education is deemed to have refused the Applicant access to the information requested.

[93] I find that Education made a *prima facie* case that subsection 22(a) of FOIP applies to the withheld portions of page 199.

[94] I find that Education did not properly apply subsection 22(a) of FOIP to page 51 severance 2.

[95] I find that Education properly applied subsection 17(1)(a) of FOIP.

[96] I find that Education did not properly apply subsection 17(1)(b) of FOIP in some cases.

[97] I find that Education properly applied subsection 17(1)(b) of FOIP in other cases.

V RECOMMENDATIONS

[98] I recommend that Education, within 30 days of issuance of this Report, review and amend, if necessary, its policies and procedures relating to the timelines for processing access to information requests.

[99] I recommend that Education, within 30 days of issuance of this Report, continue to withhold or release the records or portions of records as outlined in the Appendix.

Dated at Regina, in the Province of Saskatchewan, this 29th day of January 2024.

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

Appendix

Page No.	Severance No.	FOIP Exemption	Description	Release or Withhold
1	1	17(1)(a)	Email	Withhold
	2	17(1)(a)		Withhold
5	1	17(1)(b)	Email	Release
	2	17(1)(b)		Release
6	1	17(1)(b)	Draft appendix	Release
	2	17(1)(b)		Release
	3	17(1)(b)		Release
	4	17(1)(b)		Release
7	1	17(1)(b)	Draft appendix	Release
	2	17(1)(b)		Release
9	1	17(1)(b)	Draft appendix	Release
10	1	17(1)(b)	Email	Release
	2	17(1)(b)		Release
	3	17(1)(b)		Release
11	1	17(1)(b)	Email	Release
29	1	17(1)(b)	Email	Release
	2	17(1)(b)		Release
40	1	17(1)(b)	Email	Release
	2	17(1)(b)		Release
42	1	17(1)(b)	Email	Release
	2	17(1)(b)		Release
45	1	17(1)(b)	Email	Release
49	1	17(1)(b)	Draft policy	Release
	2	17(1)(b)		Release
	3	17(1)(b)		Release
	4	17(1)(b)		Release
51	1	17(1)(b)	Draft policy	Release
	2	17(1)(b), 22(a)		Release
	3	17(1)(b)		Release
52	1	17(1)(b)	Draft policy	Release
53	1	17(1)(b)	Chart with comments on policy	Release
	2	17(1)(b)		Release
	3	17(1)(b)		Release
	4	17(1)(b)		Release
54	1	17(1)(b)	Email	Release
70	1	17(1)(b)	Draft Qs and As	Release
71	1	17(1)(b)	Draft Qs and As	Release
72	1	17(1)(b)	Draft Qs and As	Release
73	1	17(1)(b)	Draft Qs and As	Release
107	1	17(1)(b)	Draft letter	Release

	2	17(1)(b)		Release
	3	17(1)(b)		Release
109	1	17(1)(b)	Draft media package	Release
126	1	17(1)(b)	Draft Qs and As	Release
127	1	17(1)(b)	Draft Qs and As	Release
128	1	17(1)(b)	Draft Qs and As	Release
129	1	17(1)(b)	Draft Qs and As	Release
162	1	17(1)(b)	Email	Release
	2	17(1)(b)		Release
163	1	17(1)(b)	Email	Release
	2	29(1)		Withhold
175	1	17(1)(b)	Draft policy	Release
176	1	17(1)(b)	Chart with comments on policy	Release
	2	17(1)(b)		Release
	3	17(1)(b)		Release
	4	17(1)(b)		Release
177	1	17(1)(b)	Draft Qs and As	Release
178	1	17(1)(b)	Draft Qs and As	Release
179	1	17(1)(b)	Draft Qs and As	Release
180	1	17(1)(b)	Draft Qs and As	Release
184	1	17(1)(b)	Email	Release
	2	17(1)(b)		Release
196	1	17(1)(b)	Draft Qs and As	Release
197	1	17(1)(b)	Draft Qs and As	Release
198	1	17(1)(b)	Draft Qs and As	Release
199	1	22(a)	Email	Withhold
211	1	17(1)(b)	Draft Qs and As	Release
212	1	17(1)(b)	Draft Qs and As	Release
213	1	17(1)(b)	Draft Qs and As	Release
214	1	17(1)(b)	Draft press release	Withhold
	2	17(1)(b)		Withhold
	3	17(1)(b)		Withhold
215	1	17(1)(b)	Draft press release	Withhold
216	1	17(1)(b)	Draft press release	Release
	2	17(1)(b)		Release
	3	17(1)(b)		Release
218	1	17(1)(b)	Draft press release	Withhold
	2	17(1)(b)		Withhold
219	1	17(1)(b)	Draft press release	Withhold
	2	17(1)(b)		Release
	3	17(1)(b)		Release
220	1	17(1)(b)	Draft press release	Release
222	1	17(1)(b)	Draft press release	Withhold
	2	17(1)(b)		Release
	3	17(1)(b)		Release

223	1	17(1)(b)	Draft press release	Release
224	1	17(1)(b)	Draft press release	Withhold
	2	17(1)(b)		Withhold
225	1	17(1)(b)	Draft press release	Withhold
	2	17(1)(b)		Release
226	1	17(1)(b)	Draft press release	Release
	2	17(1)(b)		Release