



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **REVIEW REPORT 381-2019**

### **Ministry of Government Relations**

**June 7, 2021**

#### **Summary:**

The Applicant submitted an access to information request to the Ministry of Government Relations (Government Relations) requesting access to records relating to the Supervisor that the Minister of Government Relations appointed to the Northern Village of Pinehouse. Government Relations advised the Applicant that some of the requested records were being withheld pursuant to subsection 15(1)(c) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant requested a review of the decision to withhold the records. After the commencement of the review, Government Relations advised it was relying on subsections 15(1)(c), (k), 17(1)(a), (b)(i), (b)(ii), 22(a), (b) and (c) of FOIP to withhold the records at issue. The Commissioner found that Government Relations made a *prima facie* case that subsection 22(a) of FOIP applied to some of the withheld records and recommended Government Relations continue to withhold those portions of the records. The Commissioner also found that subsection 15(1)(c) of FOIP applied to the remaining portions of the records at issue. However, as subsection 15(1)(c) of FOIP is a discretionary exemption, the Commissioner recommended Government Relations reconsider its exercise of discretion in applying subsection 15(1)(c) of FOIP. In this reconsideration of the exercise of discretion, the Commissioner also urged Government Relations to ensure that it continues to withhold any personal information.

#### **I BACKGROUND**

[1] On October 23, 2019, the Ministry of Government Relations (Government Relations) received an access to information request from the Applicant as follows:

On 28 Mar 2019, the Minister of Government Relations announced appointment of [name of individual appointed] as Supervisor of the Northern Village of Pinehouse. I am requesting copies of (1) the ministerial order to [name of individual appointed] for

that appointment; (2) any subsequent updates or amendments to that order; (3) any management directives regarding the ordered supervision; and (4) all written reports, formal or informal, regarding Pinehouse from [name of individual appointed] to [their] superiors in the Ministry, from March 2019 to date.

- [2] On November 27, 2019, Government Relations responded to the Applicant's request stating portions of the requested records were being refused pursuant to subsection 15(1)(c) of *The Freedom of Information and Protection of Privacy Act* (FOIP):

I am writing to notify you that full access has been provided to the following records you requested: "...the ministerial order to [name of individual appointed] for that appointment and any subsequent updates or amendments to that order".

In addition, this is to inform you that access to the following records you requested: "any management directives regarding the ordered supervision; and... all written reports, formal or informal, regarding Pinehouse from [name of individual appointed] to [their] superiors in the Ministry from March 2019 to date", is refused pursuant to clause 15(1)(c) of [FOIP]. These records have been refused because they relate to an ongoing formal inquiry...

- [3] On November 28, 2019, the Applicant submitted a request for review to my office. On December 4, 2019, Government Relations and the Applicant were notified of my intentions to undertake a review.

- [4] In Government Relations' submission, it noted that it was relying on subsections 15(1)(c), (k), 17(1)(a), (b)(i), (b)(ii), 22(a), (b) and (c) of FOIP to deny access to the withheld portions of the records, as well it identified a portion as non-responsive to the Applicant's request.

## **II RECORDS AT ISSUE**

- [5] Government Relations released some portions of the records it had identified as responsive to the Applicant's request. Records 1 to 4 and 21 were released in full to the Applicant and as such, are not subject to review in this Report. The remaining portions of the record that were withheld in full or in part are as follows:

<b>Record</b>	<b>Page Range</b>	<b>Description</b>	<b>Withheld in Full or in Part</b>	<b>Exemption applied</b>
5	6-8	Email thread	Withheld in full	15(1)(c), 15(1)(k) and 17(1)(b)(i) of FOIP.
6	9-12	Email Thread	Withheld in full	15(1)(c), 15(1)(k) and 17(1)(b)(i) of FOIP
7	13	Email Thread	Withheld in full	15(1)(c), 15(1)(k) of FOIP and non-responsive
8	14	Email	Withheld in full	15(1)(c), 15(1)(k), 17(1)(a), 17(1)(b)(i) and 17(1)(b)(ii) of FOIP
9	15-17	Attachment to May 21, 2019 email (page 14), briefing note	Withheld in full	15(1)(c), 15(1)(k), 17(1)(a), 17(1)(b)(i) and 17(1)(b)(ii) of FOIP
10	18-21	Email Thread	Withheld in full	15(1)(c), 15(1)(k), 17(1)(a) and 22(a) of FOIP
11	22	Email	Withheld in full	15(1)(c), 15(1)(k) and 17(1)(b)(i) of FOIP
12	23-28	Email Thread	Withheld in full	15(1)(c), 15(1)(k), 17(1)(a), 17(1)(b)(i), 22(a), 22(b) and 22(c) of FOIP
13	29-32	April 2019 Supervisor Report	Withheld in full	15(1)(c), 15(1)(k), 17(1)(a) and 22(a) of FOIP
14	33-36	May 2019 Supervisor Report	Withheld in full	15(1)(c), 15(1)(k) and 17(1)(a) of FOIP
15	37-39	June 2019 Supervisor Report	Withheld in full	15(1)(c), 15(1)(k) and 17(1)(a) of FOIP
16	40-44	July 2019 Supervisor Report	Withheld in full	15(1)(c), 15(1)(k), 17(1)(a) and 22(a) of FOIP
17	45-49	August 2019 Supervisor Report	Withheld in full	15(1)(c), 15(1)(k) and 17(1)(a) of FOIP
18	50-55	September 2019 Supervisor Report	Withheld in full	15(1)(c) and 15(1)(k) of FOIP

<b>Record</b>	<b>Page Range</b>	<b>Description</b>	<b>Withheld in Full or in Part</b>	<b>Exemption applied</b>
19	56	Attachment to email record #5 (page 6)	Withheld in full	15(1)(c), 15(1)(k), 17(1)(a), 17(1)(b)(i) and 29(1) of FOIP
20	57-76	Attachments to email record #10 (page 18)	Withheld in full	15(1)(c), 15(1)(k) and 17(1)(a) of FOIP
22	78-89	Eight documents attached to email record #5 (page 8)	Withheld in full	15(1)(c) of FOIP
23	90-102	Four documents attached to email in record 12 (page 23)	Withheld in full	22(a) of FOIP

[6] Records 19, 20, 22 and 23 are email attachments that Government Relations had not identified as responsive records in its submission package to my office. It is important that when public bodies are identifying records responsive to a request, it also identify any attachments to emails. When my office is reviewing records, it can be straight-forward to identify attachments to emails when it is a single email or the most recent email in an email thread as the attachment information is often visible in the email header. However, any other emails within the email thread may be more of a challenge unless there is very clear reference in the body of the email that there are attachments to those emails.

### **III DISCUSSION OF THE ISSUES**

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

[7] Government Relations is a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to conduct this review.

**2. Is there information non-responsive to the Applicant's access to information request?**

[8] When a government institution receives an access to information request, it must determine what information is responsive to the access to information request.

[9] *Responsive* means relevant. The term describes anything that is reasonably related to the request. It follows that any information or records that do not reasonably relate to the Applicant's request will be considered "non-responsive". An applicant's access to information request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive.

[10] A government institution can sever information as non-responsive only if an applicant has requested specific information, such as their own personal information. The government institution may treat portions of a record as non-responsive if they are clearly separate and distinct and not reasonably related to the access to information request.

[11] The purpose of FOIP is best served when a government institution adopts a liberal interpretation of a request. If a government institution has any doubts about its interpretation, it has a duty to assist an applicant by clarifying or reformulating the request.

[12] Government Relations identified a portion on page 13 of the record as non-responsive to the request. Government Relations reasons for concluding these records were non-responsive are as follows:

While the email is within the time period of the request, it does not meet criteria 1, 2, and 4. We considered criteria 3. The email does come from 'management', [name of Assistant Deputy Minister], who is the Assistant Deputy Minister for the area in which [name of Supervisor] works. This email mentions the supervision – but this email was not sent to the Supervisor ([name of Supervisor]) and the contents of the email are not directing the Supervisor's actions regarding the order. Therefore, it was concluded this email does not meet criteria 3 and was deemed not responsive.

[13] Upon review, the portion of the record at issue is part of an email thread. While that particular email did not include the Supervisor, it was forwarded to the Supervisor in the

subsequent email requesting an update. It would be reasonable to conclude that this information is responsive to the Applicant's request as this email was forwarded to the Supervisor in order for them to respond with an update. As I have concluded it is responsive, I will consider the exemptions raised by Government Relations.

**3. Did Government Relations properly apply subsection 15(1)(c) of FOIP?**

[14] Subsection 15(1)(c) of FOIP provides:

**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;

[15] Government Relations applied subsection 15(1)(c) of FOIP to withhold all records at issue in full, with the exception of record 23.

[16] Subsection 15(1)(c) of FOIP is both a discretionary class-based and harm-based exemption. Meaning it contains both a class and harm based component. It permits refusal of access in situations where the release of a record could interfere with a lawful investigation or disclose information with respect to a lawful investigation.

[17] The following two-part test can be applied when considering if subsection 15(1)(c) of FOIP applies:

1. Does the government institution's activity qualify as a "lawful investigation"?
2. Does one of the following conditions exist?
  - a. Could the release of the information interfere with a lawful investigation?
  - b. Could release disclose information with respect to a lawful investigation?

[18] The Guide to FOIP at page 52 provides the following regarding a lawful investigation:

A **lawful investigation** is an investigation that is authorized or required and permitted by law.

The government institution should identify the legislation under which the investigation is occurring.

The investigation can be concluded, active and ongoing or be occurring in the future.

It is not limited to investigations that are conducted by a government institution. In other words, it can include investigations conducted by other organizations (e.g. a police investigation).

[19] *The Northern Municipalities Act, 2010* (NMA) provides the following regarding an inspection and inquiry:

**417(1)** The minister may require any matter connected with the management, administration or operation of any municipality, any committee or other body established by a council or any controlled corporation, municipal development corporation, public utility board or service district to be inspected:

- (a) if the minister considers the inspection to be necessary; or
- (b) on the request of the council.

(2) The minister may appoint one or more persons as inspectors or the Saskatchewan Municipal Board as an inspector for the purposes of carrying out inspections pursuant to this section.

(3) An inspector:

- (a) may require the attendance of any officer of the municipality or of any other person whose presence the inspector considers necessary during the course of the inspection; and
- (b) has the same powers, privileges and immunities conferred on a commission by sections 11, 15, 25 and 26 of *The Public Inquiries Act, 2013*.

...

**418(1)** The minister may order an inquiry described in subsection (2):

- (a) if the minister considers the inquiry to be necessary; or
- (b) on the request of the council;

...

(2) An inquiry may be conducted into all or any of the following:

(a) the affairs of the municipality, a committee or other body established by the council or a controlled corporation, municipal development corporation, public utility board or service district;

(b) the conduct of a member of council, including conduct in relation to a conflict of interest pursuant to Part VII;

(c) the conduct of an employee or agent of the municipality, a committee or other body established by the council or a controlled corporation.

(3) The minister may appoint an individual to conduct the inquiry, or may request the Saskatchewan Municipal Board to conduct the inquiry.

(4) Any persons appointed to conduct an inquiry have the same powers, privileges and immunities conferred on a commission by sections 11, 15, 25 and 26 of *The Public Inquiries Act, 2013*.

[20] I find that the inquiry and inspection conducted pursuant to the NMA qualifies as a lawful investigation. As such, the first part of the test is met.

[21] In order for subsection 15(1)(c) of FOIP to apply, it also has to meet the second part. For the second part of the test to be met involving disclosing information with respect to a lawful investigation, the Guide to FOIP starting at page 53 provides the following:

It is only necessary for the government institution to demonstrate that the information in the record is information with respect to a lawful investigation to meet this part of the test.

**With respect to** are words of the widest possible scope; the phrase is probably the widest of any expression intended to convey some connection between two related subject matters.

Section 15 uses the word **could** versus “*could reasonably be expected to*” as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for asserting the outcome could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.

Records that existed before an investigation commenced, such as regular reporting information, may not qualify for the exemption.

A government institution cannot rely on subsection 15(1)(c) for a record that:



- a) provides a general outline of the structure or programs of a law enforcement agency; or
- b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

[22] Government Relations' submission on subsection 15(1)(c) of FOIP provides as follows:

The records that are responsive to this request that were withheld based on clause 15(1)(c) were created as a result of the ministerial-appointed inspector recommending the inspection be expanded into an inquiry and that a Supervisor also be appointed pursuant to section 422 of the NMA during said inquiry. The Supervisor was appointed on April 1, 2019, until March 31, 2020. The Inquiry was conducted from April 2, 2019, until December 20, 2019. During the Supervisor's appointment, the Supervisor oversaw the general operation of the municipality and monitored the municipality's progress among other duties (as stated in Appendix D). The records that have been withheld based on clause 15(1)(c) of FOIP were considered within the scope of the inquiry as evidence.

[23] The Applicant's submission provided the following regarding the records requested:

...I find it difficult to understand how my obtaining documentation of the Ministry of Government Relations' day-to-day supervision of village administration would [sic] any way interfere with [name of individual conducting inquiry] investigation. [Name of Supervisor]'s duties in providing current administrative supervision are quite distinct from the investigation of past practices within the village administration, I should think. So it is my opinion that the Ministry has purposely conflated the two roles outlined in the Minister's Order in an attempt to thwart public access to information on current practice since the time the Ministry has become directly involved in the administration (i.e. March 2019), which I presume is NOT under investigation because the Ministry itself has taken over that function.

[24] The Supervisor was appointed as a result of the inspection to follow up on progress of recommendations, as well Government Relations' submission states that the records at issue were considered in the inquiry as evidence. Part two of the test for subsection 15(1)(c) of FOIP provides that a government institution only needs to show that the records are with respect to an investigation and could reveal information related to the investigation. As part of the Supervisor's responsibility to follow up on progress of recommendations made in the inspection and the records were considered as evidence in the inquiry, I find that the release could disclose information with respect to a lawful investigation. Therefore, the

second part of the test is met and subsection 15(1)(c) of FOIP applies to records 5 through 20 and record 22 in full.

[25] While the second part of the test is met, Government Relations did indicate in its submission that the inspection, inquiry and special financial audit reports were released to the public on February 19, 2020. As such, if any of the information in these records is already publically available, Government Relations should consider releasing those portions of the records.

### *Exercise of Discretion*

[26] Subsection 15(1)(c) of FOIP is a discretionary exemption which means a government institution can decide whether to withhold or release information to which the exemption applies. When applying any discretionary exemption, the government institution must first determine if the circumstances meet the test, as discussed above. The head then should exercise their discretion when deciding whether to withhold records pursuant to a discretionary exemption or to instead, release them.

[27] The Guide to FOIP summarizes some factors that should be taken into account when exercising discretion as follows:

- the general purposes of the Act (i.e. public bodies should make information available to the public, and individuals should have access to personal information about themselves);
- the wording of the discretionary exception and the interests which the exception attempts to protect or balance;
- whether the applicant's request may be satisfied by severing the record and providing the applicant with as much information as is reasonably practicable;
- the historical practice of the public body with respect to the release of similar types of records;
- the nature of the record and the extent to which the record is significant or sensitive to the public body;

- whether the disclosure of the information will increase public confidence in the operation of the public body;
- the age of the record;
- whether there is a definite and compelling need to release the record; and
- whether Commissioner's Orders have ruled that similar types of records or information should or should not be disclosed.

[28] The Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exemption and to return the matter for reconsideration by the head of a public body.

[29] The Supreme Court, in the same decision, also considered the following factors to be relevant to the review of discretion:

- the decision was made in bad faith;
- the decision was made for an improper purpose;
- the decision took into account irrelevant considerations; or
- the decision failed to take into account relevant considerations.

[30] During a review of a discretionary exemption, I may recommend that the head of the government institution reconsider its exercise of discretion. However, I will not substitute my discretion for that of the head.

[31] In this case, I do not have concerns with any of the four factors playing a role in the exercise of discretion. As Government Relations' submission indicated that reports related to these investigations had been publically released, I encourage the Ministry to ensure that it has considered all of these factors before it withholds information pursuant to subsection 15(1)(c) of FOIP.

*Personal Information Exemption*

[32] In Government Relations' reconsideration of their exercise of discretion of the application of subsection 15(1)(c) of FOIP, I would also urge Government Relations to ensure that any personal information in the records is protected. Subsection 29(1) of FOIP provides as follows:

**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.

[33] Subsection 29(1) of FOIP protects the privacy of individuals whose personal information may be contained within records responsive to an access to information request made by someone else.

[34] Subsection 29(1) of FOIP requires a government institution to have the consent of the individual whose personal information is in the record prior to disclosing it.

[35] In order for subsection 29(1) of FOIP to apply, the information in the record must first qualify as "personal information" as defined by subsection 24(1) of FOIP, which provides in part:

**24(1)** Subject to subsections (1.1) and (2), "personal information" means personal information and an identifiable individual that is recorded in any form, and includes:

...

(b) information that relates to the education or the criminal or employment history of the individual;

...

(e) the home or business address, home or business telephone number or fingerprints of the individual;

(f) the personal opinions or views of the individual except where they are about another individual;

[36] While subsection 24(1) of FOIP provides examples of the type of information that qualifies as personal information, this is not an exhaustive list. There may be other information that qualifies as personal information, if the following two elements exist:

1. Is there an identifiable individual? and
2. Is the information personal in nature?

[37] Government Relations had applied subsection 29(1) of FOIP to the first redaction on page 56 of the record, which is a telephone number for a Government Relations employee. The telephone number appears to be a business telephone number for the employee as it is also listed on the Government of Saskatchewan Directory website. (<https://www.saskatchewan.ca/government/directory>) In this case, there is an identifiable individual, as it identifies who the telephone number belongs to.

[38] In Review Report 301-2019, my office found that business card information does not qualify as personal information, as defined by subsection 24(1) of FOIP. As such subsection 29(1) of FOIP would not apply to the redacted portion of page 56 of the record.

[39] While Government Relations did not apply subsection 29(1) of FOIP to any other portion of the record, it is a mandatory exemption and as such it must be considered if it appears to apply to any other portion of the record. Examples of instances where personal information appears in the records that Government Relations should withhold are discussed below.

[40] On pages 57 and 64 of the record are payroll payment vouchers for two Northern Village of Pinehouse (Pinehouse) employees. This includes their name, personal mailing address, number of hours worked during the pay period, rate of pay, payroll deductions, gross and net pay. Page 65 appears to be a timesheet detailing hours worked each day for a two-week period.

[41] In Review Report 082-2017 my office considered records relating to compensation for an employee of a Rural Municipality:

[16] The RM reported that the former Employee was an independent contractor and had contracts with other rural municipalities. There is a contract between the RM and the former Employee. She would submit invoices to the RM at regular intervals for compensation for her work. The RM has provided the Applicant access to parts of these invoices.

[17] By providing access to portions of the 11 invoices, the RM has released general information about the compensation it paid to the former Employee. In past reports, my office has said that, in general when not dealing with a public body, an individual's name and salary information could qualify as personal information pursuant to subsections 23(1)(b) or (j) of LA FOIP. However, subsection 23(2)(e) of LA FOIP states that details of a discretionary benefit of a financial nature granted to an individual by a local authority is not personal information.

[18] In Review Report LA-2009-001, my office adopted a definition of benefit as a favorable or helpful factor or circumstance, an advantage, compensation, an indemnity paid in money or financial assistance or services. I have indicated that discretionary means that a decision-maker has a choice as to whether, or how, to exercise a power. It was the RM's discretion to agree to the compensation terms described in the contract. The compensation paid to the former Employee by the RM is not personal information pursuant to subsection 23(2)(e) of LA FOIP.

...

[23] Next, the RM withheld details on the invoices that relate to deductions taken from the former Employee's invoice for her insurance and pension. The RM provided my office with a copy of its contract with the former Employee. The contract indicates that the former Employee was responsible for payment of insurance premiums and fifty percent of a contribution to her pension. I note that the Applicant already has access to the contract.

[24] The information regarding these types of deductions qualify as personal information of the former Employee pursuant to subsection 23(1)(b) of LA FOIP because they are information relating to financial transactions in which the former Employee has been involved.

[25] However, these financial transactions occurred through the RM. In other words, somewhere in the RM's office should be records that demonstrate that it paid these expenses. Further, as noted above, the former Employee's contract indicates that the RM was not responsible for those costs. Therefore, I must consider whether the release of the personal information is in the public interest pursuant to subsection 28(2)(n)(i) of LA FOIP. The subsection provides:

**28(2)** Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:

...

(n) for any purpose where, in the opinion of the head:

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure;

...

[38] I recommend that the RM consider whether disclosure of this personal information is in the public interest and outweighs any invasion of privacy that could result from the disclosure and consider disclosing the personal information pursuant to subsection 28(2)(n)(i) of LA FOIP.

...

[41] Finally, the RM has severed the subtotal, GST amount and balance due on each of the 11 invoices. As mentioned above, the RM has already released details on the invoices that demonstrate how the former Employee's compensation is calculated and the "base" amount of compensation owed before the deductions described above. As noted, details of those deductions qualify as personal information. Although the subtotal, GST amount and balance due, may reflect how much has been deducted from the "base" amount, it does not reveal the details of the deductions themselves. The subtotal, GST amount and balance due reflect details of a discretionary benefit of a financial nature granted to the former Employee by the RM and do not qualify as personal information pursuant to subsection 23(2)(e) of LA FOIP.

...

[44] The last four pages are calendar pages that depict the hours worked by two students in certain months. They are responsive to the second part of the Applicant's request. They were withheld in full.

[45] In Review Report LA-2012-002, my office cited the Supreme Court of Canada decision *Dagg v. Canada* (Minister of Finance), [1997] 2 SCR 403 which concluded that hours of work pertain more to the job description of an individual than personal information. As such, I find the information on these calendar sheets do not qualify as personal information.

[42] Some of the details on pages 57 and 64, such as the personal mailing address of the employees, would qualify as personal information as defined by subsection 24(1)(e) of FOIP. For the other payroll information on these pages, some information could qualify as financial information pursuant to subsection 24(1)(b) of FOIP. However, as discussed in Review Report 082-2017, Government Relations should consider whether or not the disclosure of the personal information is in the public interest and outweighs any invasion of privacy that could result from the disclosure.

[43] Pages 58 through 63 and pages 66 and 67 are copies of publically available legislation and guidance documents relating to payroll. On some of these pages are some handwritten

notes about a payroll discrepancy based on this information and in some cases identifies the individual this relates to. There are also instances in the monthly Supervisor Reports that mention this payroll discrepancy, including the first bullet point on page 32, and the first two paragraphs on page 46. Once Government Relations makes a decision on whether or not to withhold any of these details, it should ensure its severing is done in a consistent manner.

[44] For the timesheet on page 65, as found in Review Report 082-2017 quoted above, the hours worked each day for the two-week period would not qualify as personal information. However, there are instances that identify the reason an employee was not working during certain hours that would be personal in nature. As the individual is identified on the timesheet, this information would qualify as personal information pursuant to subsection 24(1) of FOIP.

[45] Page 70 is a list of outstanding cheques and pages 71 through 76 is a List of Accounts for Approval report. Both documents list the amount of the cheque or payment amount and the name of the organization or individual it is payable to. Many appear to be payments to employees of Pinehouse. However, for some, it is unclear what the payment relates to. If any of these could reveal personal information of an identifiable individual, Government Relations should consider withholding any details necessary pursuant to subsection 29(1) of FOIP.

[46] On page 6, the last sentence in the first email of the email thread contains a statement the Supervisor made that contains information about themselves that is personal in nature. As well, on page 9, the fourth sentence of the fourth paragraph of the email on this page also contains a statement the Supervisor made that contains information about themselves that is personal in nature. As such, both of these portions of the record would qualify as personal information pursuant to subsection 24(1) of FOIP. These portions of the record should be withheld pursuant to subsection 29(1) of FOIP.

[47] The third bullet point on page 31 and the last three sentences of the third paragraph on page 46 contain the opinions of the Supervisor, which relate to another individual. This



information is the personal opinion or view of another individual and would qualify as personal information pursuant to subsection 24(1)(f) of FOIP.

[48] On page 29, of the April 2019 Supervisor Report, the third bullet and the second and third sentences contain opinions that the Supervisor has about the conduct of another individual. This would qualify as the personal information of that individual pursuant to subsection 24(1)(f) of FOIP.

[49] The second bullet point on page 35 of the record contains an opinion the Supervisor had about an individual that would also qualify as personal information. The first three bullet points of information on page 36 contain the Supervisor's opinions about an individual. The three bullets of information below the "Recommendation" heading on page 39 are opinions of the Supervisor regarding an individual. The three bullets of information below the recommendation heading on page 44 are opinions of the Supervisor regarding an individual. On page 53, the second paragraph contains information relating to an employee's education. These details would be considered personal information pursuant to subsection 24(1)(b) of FOIP.

[50] As noted earlier in this section, I have already found that subsection 15(1)(c) of FOIP applies to records 5 through 20 and record 22 in full. However, I am also encouraging Government Relations to reconsider its exercise of discretion before it withholds information pursuant to subsection 15(1)(c) of FOIP. When making these considerations, Government Relations should also ensure that all personal information, such as the instances discussed above, continue to be withheld.

#### **4. Did Government Relations properly apply section 22 of FOIP?**

[51] Section 22 of FOIP provides:

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

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

(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; or

(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.

[52] Section 22 of FOIP is a discretionary class-based provision. It is intended to protect records that contain:

- information subject to any privilege available at law, including solicitor-client privilege (22(a));
- information that relates to the provision of legal advice or services and was prepared for specified individuals (22(b)); or
- information relating to the provision of legal advice or services contained in correspondence between specified individuals (22(c)).

[53] My office's *Guide to FOIP, Chapter 4: Exemptions from the Right of Access*, Updated: April 30, 2021, starting at page 258 (Guide to FOIP) outlines a three-part test that was established by the Supreme Court of Canada in *Solosky v. The Queen*, (1980) to determine if solicitor-client privilege applies to records. The three part test 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?

[54] Government Relations prepared an affidavit of record that identified four email attachments it was claiming solicitor-client privilege over (record 23). Government Relations did not provide record 23 to my office for review.

[55] The letter accompanying the affidavit of record indicated that the attachments were provided by Government Relations to its legal counsel as part of the request to provide legal advice. Based on my review of the email thread, record 12, which included these

attachments, it appears there were also attachments to earlier emails in the email thread. These earlier attachments were likely one of the attachments forwarded on by Government Relations to its legal counsel. The earlier emails that appear to refer to attachments begin with an attachment provided to Pinehouse by its legal counsel that was then forwarded to the Supervisor. Based on the content of the email thread, it is my presumption that the attachments in the earlier emails are included in the email Government Relations forwarded to its legal counsel, therefore, identified in its affidavit of record. In the future, Government Relations should ensure it identifies every attachment to each email within an email thread, not just the most recent attachments.

[56] Record 12, the email thread that I have already found subsection 15(1)(c) of FOIP applies to, is the email thread that contained emails with the attachments in record 23 and relate to an invoice for legal counsel. Legal counsel is not included in each email in the email thread, however, it appears the Supervisor had initially contacted the Administrator for Pinehouse regarding an invoice for legal fees. The thread included discussions between the Administrator and their legal counsel, discussion between the Administrator and the Supervisor and the Supervisor and their superiors within Government Relations. The email thread was finally forwarded to Government Relations' legal counsel in order to obtain legal advice.

[57] In Review Report 118-2019, my office discussed the continuum of solicitor-client privilege:

In Review Report 005-2017; 214-2015 – PART II and Review Report 079-2018, I discussed the continuum of legal advice. I noted that documents that are not actually a communication between a solicitor and a client may be part of the continuum of legal advice, or reveal information subject to solicitor-client privilege. I listed the following examples that could qualify as part of the continuum:

- A discussion between two public officials about how to frame the question that is to be asked of the lawyer;
- Written communications between officials or employees of a public body, in which they quote or discuss the legal advice given by the public body's solicitor;

- Communications discussing the application of legal advice given by a solicitor;
- An employee's notes regarding a solicitor's legal advice, and comments on that advice;
- Notes "to file" in which legal advice is quoted or discussed; and
- Solicitors' briefing notes and working papers that are directly related to the seeking or giving of legal advice.

[58] As such, I find the email attachments (record 23), are communications between solicitor and client.

[59] As discussed above, the email that record 23 was attached to and the purpose of the email and attachments were for legal advice related to the payment of an invoice for Pinehouse's legal counsel. Review Report 117-2019 found that invoices between a Rural Municipality and its legal counsel were subject to solicitor-client privilege.

[60] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)* 2021 BCSC 266, provided the following regarding the continuum of communications relating to email threads and attachments.

[64] ... "continuum of communications". This appears to be used frequently in cases before the IPC involving emails. For example, there can be a dispute when an email is privileged but attachments to the email may not be privileged. The reverse can also become an issue...

[65] As I understand it, the idea behind the application of the continuum of communications is to counter the suggestion that one record can be severed from a series of records when they are a piece for the purposes of solicitor-client privilege. The Court of Appeal has stated that "[a] common way of expressing the breadth of the privilege once the context of the solicitor-client relationship has been established is that the privilege attaches to the continuum of communications in which the solicitor provides advice". With respect to emails the continuum of communication applies where disclosure of an email exchange would "disclose the legal advice itself and cannot be severed from the protected whole".

...

[67] The Court of Appeal found that the entire email exchange was privileged because "disclosure of the excised portions would reveal the legal advice contained in what all agree was a privileged communication". Severance could not be reconciled with the

protection of passages that fell within the framework of the solicitor-client relationship. The court concluded that “once the solicitor-client has been established, it applied to all communications within the framework of the solicitor-client relationship and that severance of some of these communications can only occur when there is not risk of revealing legal advice provided by the solicitor”.

[61] Based on the content of the emails it was attached to, and the details provided in the affidavit of record, I am satisfied that record 23 entails the seeking of legal advice and the parties intended for the communication to be treated as confidential. Although I have not reviewed this portion of the record, I find that Government Relations has made a *prima facie* case that subsection 22(a) of FOIP applies to record 23.

[62] Government Relations also applied subsections 15(1)(k), 17(1)(a), 17(1)(b), 22(b) and 22(c) of FOIP to some portions of the record, as identified in the Records at Issue section of this Report. Government Relations provided arguments for the application of subsections 17(1)(a) and 17(1)(b) of FOIP, however, it did not provide any arguments in its submission to support the application of subsections 15(1)(k), 22(b) or 22(c) of FOIP. However, as I have found subsection 15(1)(c) and 22(a) of FOIP apply to all of the records at issue in full, there is no need to consider the application of any other exemptions raised by Government Relations.

#### **IV FINDINGS**

[63] I find that a portion of the record that Government Relations identified as non-responsive was responsive to the Applicant’s access to information request.

[64] I find that subsection 15(1)(c) of FOIP applies to records 5 through 20 and record 22 in full.

[65] Although I have not reviewed this portion of the record, I find that Government Relations has made a *prima facie* case that subsection 22(a) of FOIP applies to record 23 in full.

**V RECOMMENDATIONS**

[66] I recommend Government Relations reconsider its exercise of discretion in applying subsection 15(1)(c) of FOIP. In this reconsideration of the exercise of discretion, I urge Government Relations to ensure that it continues to withhold any personal information.

[67] I recommend Government Relations withhold record 23 in full pursuant to subsection 22(a) of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 7th day of June, 2021.

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