



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## REVIEW REPORT 004-2024

### Ministry of Social Services

April 10, 2024

#### Summary:

In [Review Report 142-2023](#), the Commissioner identified that 85 pages of records that the Ministry of Social Services (Social Services) had identified as “non-responsive” were “responsive”. The Commissioner had recommended that Social Services release the pages to the Applicant, subject to exemptions set out in *The Freedom of Information and Protection of Privacy Act* (FOIP). Social Services released the records to the Applicant but withheld portions pursuant to subsections 16(1), 17(1)(a), (c), 18(1)(e), 19(1)(c), and 22 of FOIP. The Applicant appealed to the Court of King’s Bench, which issued an endorsement for the Applicant to request a review by the Commissioner regarding the exemptions applied to the 85 pages of records. The Commissioner conducted a review and found that Social Services properly applied subsection 16(1) of FOIP to portions of the records. However, he did not find that Social Services properly applied subsections 17(1)(a), (c), 18(1)(e), 19(1)(c), or 22(a) of FOIP. The Commissioner summarized his findings and recommendations in the Appendix to the Report.

#### I BACKGROUND

[1] On October 19, 2023, I issued [Review Report 142-2023](#). At paragraph [63], I made the following recommendation to the Ministry of Social Services (Social Services):

[63] I recommend that Social Services release pages 9 to 19, 21 to 31, 49 to 58, 66 to 78, 81 to 90, 95 to 104, 106 to 115, and 152 to 161 of the Second Set of Non-responsive Records to the Applicant, subject to exemptions, within 30 days of issuance of this Report.

[2] On November 29, 2023, after not receiving a response regarding my recommendations from Social Services pursuant to section 56 of *The Freedom of Information and Protection of Privacy Act* (FOIP), the Applicant appealed to the Court of King's Bench.

[3] Then, in a letter dated December 21, 2023, Social Services provided a response to the Applicant pursuant to section 56 of FOIP, albeit not within 30 days after receiving my Review Report 142-2023. Regarding my recommendation at paragraph [63], Social Services said:

[63], the Ministry is releasing pages 9 to 19, 21 to 31, 49 to 58, 66 to 78, 81 to 90, 95 to 104, 106 to 115, and 152 to 161 and is providing partial access to the Second Set of Non-responsive Records. Sections 16(1), 17(1)(a), 17(1)(c), 18(1)(e), 19(1)(c), and 22 of FOIP have been relied on to deny access in part to the Second Set of Non-Responsive Records. Please find these records attached.

[4] An endorsement by Justice B. Scherman dated January 4, 2024, provided that the Applicant was to request a review by my office regarding the exemptions applied to the records.

...

This order at this stage does not encompass that additional category of documents in respect of which [name] has to request a review by the commissioners [sic] office. [name] is to make that review promptly, I and the counsel for the ministry have agreed upon that review request being received they will promptly and at the earliest possible opportunity file and provide to [name] and the commissioner their position in respect of that new request by [name] and that they will also to the extent that they are capable request the commissioner to deal with the matter on an expedited process. The intention of this separate direction is that on conclusion of commissioner's report that any remaining dispute between the ministries and [name] will be incorporated within the process already ordered.

[5] On January 6, 2024, the Applicant requested a review by my office of the redactions Social Services applied to the records at issue.

[6] On February 2, 2024, my office notified Social Services and the Applicant that my office would be undertaking a review. My office also notified third parties, Saskatoon Tribal Council, Salvation Army Crossroads, Saskatoon Housing Coalition, and the Saskatchewan Health Authority (SHA), of the review.

[7] On February 29, 2024, Salvation Army Crossroads provided a submission to my office.

[8] On April 1, 2024, Social Services provided my office with its submission. The Applicant did not provide a submission.

## **II RECORDS AT ISSUE**

[9] The records at issue are pages 9 to 19, 21 to 31, 49 to 58, 66 to 78, 81 to 90, 95 to 104, 106 to 115, and 152 to 161 of the records referenced as the “Second Set of Non-responsive Records”, which we withheld in full as described in Review Report 142-2023. In the Appendix, I have outlined which pages of the current record at issue corresponds with the page numbers from the “Second Set of Non-Responsive Records” in Review Report 142-2023. I note that pages 1 to 27 of the current record at issue were not in the “Second Set of Non-Responsive Records”. Nevertheless, I am including them in this review.

[10] In the course of the review, Social Services raised subsection 18(1)(d) of FOIP. Pursuant to section 2-4(3) of my office’s *Rules of Procedure*, my office does not consider discretionary exemptions not included in the head’s decision. In this case, Social Services did not raise subsection 18(1)(d) of FOIP in its letter dated December 21, 2023, to the Applicant. Therefore, I will not consider it in this review.

## **III DISCUSSION OF THE ISSUES**

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

[11] Social Services is a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I find that I have jurisdiction to conduct this review.

[12] For the purpose of this review, Saskatoon Tribal Council, Salvation Army Crossroads, Saskatoon Housing Coalition, and the SHA qualifies as “third parties” as defined by subsection 2(1)(j) of FOIP.

**2. Did Social Services properly apply subsection 16(1) of FOIP?**

[13] Social Services applied subsection 16(1) of FOIP to pages 7, 10, 15, 16, 35, 46, 56, 66, 79, 88, 99, and 109, in part.

[14] Subsection 16(1) of FOIP is a mandatory class-based provision. Subsections 16(1)(a) through (d) of FOIP are not an exhaustive list. Therefore, even if none of the subsections are found to apply, the introductory wording of subsection 16(1) of FOIP must still be considered. In other words, is the information a confidence of Executive Council? (*Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated October 18, 2023 [*Guide to FOIP*, Ch. 4], p. 95).

[15] Pages 96 to 98 of the *Guide to FOIP*, Ch. 4, provide the following definitions:

- “Cabinet confidences” are generally defined as, in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public.
- “Including” means that the list of examples of what could be considered a Cabinet confidence following the introductory wording at subsection 16(1) is non-exhaustive.

[16] Subsection 16(1)(a) of FOIP provides:

**16(1)** A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

(a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;

(b) agendas or minutes of the Executive Council or any of its committees, or records that record deliberations or decisions of the Executive Council or any of its committees;

(c) records of consultations among members of the Executive Council on matters that relate to the making of government decisions or the formulation of government policy, or records that reflect those consultations;

(d) records that contain briefings to members of the Executive Council in relation to matters that:

(i) are before, or are proposed to be brought before, the Executive Council or any of its committees; or

(ii) are the subject of consultations described in clause (c).

[17] “Cabinet confidences” are generally defined as, in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public (*Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated October 18, 2023 [ *Guide to FOIP*, Ch. 4], p. 98)

[18] The word “including” set out in subsection 16(1) means the list of the information that follows is non-exhaustive. The examples in the provision are the types of information that could be presumed to disclose a confidence of Executive Council (Cabinet) (*Guide to FOIP*, Ch. 4, p. 99).

[19] In its submission, Social Services described the information it redacted pursuant to subsection 16(1) of FOIP as topics and information that are intended to proceed to a committee of Executive Council (Treasury Board) or Executive Council itself. It said:

On page 7 (record 5), the information withheld discloses when an issue will proceed to Treasury Board, what it will encompass and who will author it. This information discloses confidences of a committee of Executive Council, Treasury Board.

Similar information as that found on page 7 is outlined in the proposed work plan on page 10. The information references that an issue will be brought to Treasury Board, when it will proceed and who will bring it. Another line identifies when the Cabinet Item will proceed. The information withheld on page 10 discloses confidences of the Executive Council because the information is proposed to be brought before a committee of the Executive Council and Executive Council itself.

On pages 15 and 16, the subject line of the email has been withheld because it discloses that there is a first draft of a Cabinet Decision Item regarding the Lighthouse. As a Cabinet Decision Item, the document is intended to proceed to Cabinet. Further, the subject line discloses what issue Cabinet will have to make a decision on (i.e., the Lighthouse).

Various iterations of the Ministry's work plan are found in the responsive records. The same information on pages 35, 46, 56, 66, 79, 89, 99 and 109 have been withheld pursuant to subsection 16(1). This information discloses that a Cabinet Decision Item is being prepared and what Cabinet will be asked to make a decision on (i.e., a permanent space for Saskatoon Tribal Council). As such, this information would disclose confidence of the Executive Council.

[20] In [\*Ontario \(Attorney General\) v. Ontario \(Information and Privacy Commissioner\), 2024 SCC 4 \(CanLII\)\*](#), the Supreme Court of Canada determined that deliberations by Cabinet would include "topics of deliberation":

[62] Such an approach reflects the opening words of s. 12(1), which mandate a substantive analysis of the requested record and its substance to determine whether disclosure of the record would shed light on Cabinet deliberations, rather than categorically excluding certain types of information from protection. **Thus, "deliberations" understood purposively can include outcomes or decisions of Cabinet's deliberative process, topics of deliberation, and priorities identified by the Premier, even if they do not ultimately result in government action.** And decision makers should always be attentive to what even generally phrased records could reveal about those deliberations to a sophisticated reader when placed in the broader context. The identification and discussion of policy priorities in communications among Cabinet members are more likely to reveal the substance of deliberations, especially when considered alongside other available information, including what Cabinet chooses to do.

[Emphasis added]

[21] Based on a review, my office noted that information redacted pursuant to subsection 16(1) of FOIP on pages 7, 10, 15, 16, 35, 46, 56, 66, 79, 88, 99, and 109, contain topics that will proceed to Treasury Board or Executive Council. I find that Social Services properly applied subsection 16(1) of FOIP to pages 7, 10, 15, 16, 35, 46, 56, 66, 79, 88, 99, and 109.

### **3. Did Social Services properly apply subsection 17(1)(a) of FOIP?**

[22] Social Services applied subsection 17(1)(a) of FOIP to pages 28, 33, 39, 44, 54, 64, 70, 72, 73, 77, 83, 87, 93, 97, and 107 in part.

[23] Subsection 17(1)(a) of FOIP provides:

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

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

[24] Pages 125 to 128 of the *Guide to FOIP*, Ch. 4, outlines 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?

[25] Pages 125 to 127 of *Guide to FOIP*, Ch. 4 provides the following definitions:

- “Advice” is guidance offered by one person to another. It can include the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice encompasses material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It can be an implied recommendation. The “pros and cons” of various options also qualify as advice. It should not be given a restricted meaning. Rather, it should be interpreted to include an opinion that involves exercising judgement and skill in weighing the significance of fact. It includes expert opinion on matters of fact on which a government institution must make a decision for future action.
- A “proposal” is something offered for consideration or acceptance.
- “Analyses” (or analysis) is the detailed examination of the elements or structure of something; the process of separating something into its constituent elements.
- “Policy options” are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant’s identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.
- “Developed by or for” means the advice, proposals, recommendations, analyses and/or policy options 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 (for example, by a service provider or stakeholder).

[26] In its submission, Social Services said:

The information that has been withheld on pages 28, 39, 73, 83 and 93 pursuant to clause 17(1)(a) is advice and analysis regarding the transition of a certain number of beds from the Lighthouse to a specific party. This analysis includes when the beds will be available, when notice will be provided and the plan for the remaining beds.

On pages 33, 44, 54, 64, 77, 87, 97 and 107 the Ministry's work plan details various risks. Two of these risks have been withheld pursuant to clause 17(1)(a) and fall under the category of advice. The advice outlines two potential negative consequences that may result from trying to secure shelter spaces and services from the Lighthouse by November 30, 2022 (i.e. a specific outcome).

On page 70, the exemption has been applied to advice and analysis about the plan and milestones for high intensity residential beds. The advice around milestones includes dates, what information is needed from parties and next steps. This information is essentially an analysis of the plan from a high level.

Clause 17(1)(a) applies to the information withheld on page 72 because it is advice on a proposal around the transition of a certain number of beds to various parties.

[27] Based on a review, my office noted that the portions of pages 28, 33, 39, 44, 54, 64, 70, 72, 73, 77, 83, 87, 93, 97, and 107, do not contain advice, proposals, recommendations, analyses or policy options. They appear to be sentences that summarize what has been done or will be done, or what third parties may do. These types of sentences do not qualify as advice, proposals, recommendations, analyses or policy options. The first part of the two-part test is not met. There is no need to consider the second part of the two-part test. I find that Social Services did not properly apply subsection 17(1)(a) of FOIP. My recommendations are set out in the Appendix.

#### **4. Did Social Services properly apply subsection 17(1)(c) of FOIP?**

[28] Social Services applied subsection 17(1)(c) of FOIP to pages 24, 28, 31, 32, 38, 39, 42, 43, 49, 51, 52, 59, 61, 62, 63, 69, 70, 71, 72, 73, 75, 76, 82, 83, 85, 86, 92, 93, 95, 96, 102, 104, 105, and 112, in part.

[29] Subsection 17(1)(c) of FOIP provides:



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

...

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

[30] Page 139 of the *Guide to FOIP*, Ch. 4, outlines the following two-part test to determine if subsection 17(1)(c) of FOIP applies:

1. Does the record contain positions, plans, procedures, criteria, or instructions?
  - a. Developed for the purpose of contractual or other negotiations.
  - b. By or on behalf of the government institution.
2. Or does the record contain considerations that relate to those negotiations?

[31] Pages 140 to 142 of my office's *Guide to FOIP*, Ch. 4, provides the following definitions:

- A “position” is a point of view or attitude. An opinion; stand; a way of regarding situations or topics; an opinion that is held in opposition to another in an argument or dispute.
- A “plan” is a formulated and especially detailed method by which a thing is to be done; a design or scheme. A detailed proposal for doing or achieving something; an intention or decision about what one is going to do.
- A “procedure” is an established or official way of doing something; a series of actions conducted in a certain order or manner.
- “Criteria” are standards, rules, or tests on which a judgement or decision can be based or compared; a reference point against which other things can be evaluated.
- “Instructions” are directions or orders.
- A “consideration” is a careful thought; a fact taken into account when making a decision. Thus, a record identifying the facts and circumstances connected to positions, plans, procedures, criteria or instructions could also fall within the scope of this provision.

- “Relate to” should be given a plain but expansive meaning. The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as “substantial connection”) for its application, which would be inconsistent with the plain unambiguous meaning of the words of the statute. “Relating to” requires some connection between the information and the negotiations.
- “Developed” means to start to exist, experience or possess.
- “For the purpose of” means intention; the immediate or initial purpose of something.
- “On behalf of” means “for the benefit of”. A person does something “on behalf of” another, when he or she does the thing in the interest of, or as a representative of, the other person.
- A “negotiation” is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings conducted between two or more parties for the purpose of reaching an understanding. It connotes a more robust relationship than “consultation”. It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion.

[32] In its submission, Social Services said:

The Ministry has applied this exemption to information that discloses an increase in operating grant (page 24), emergency shelter funding (page 24, 38, 49, 59, 69, 70, 82 and 92, 112), program funding based on the number of beds and the intensity of support the clients need (page 28, 32, 38, 39, 42, 43, 49, 52, 59, 62, 63, 69, 70, 71, 72, 73, 76, 82, 83, 86, 92, 93, 96, 105, 112), funding specific items (pages 28 and 39), funding amounts (pages 24, 32, 38, 43, 49, 52, 59, 63, 69, 70, 71, 72, 73, 76, 82, 83, 86, 92, 93, 96, 105 and 112), possible future funding commitments (pages 31, 42, 51, 61, 75, 85, 95 and 104), and the amount of loans that has been forgiven (page 32, 38, 43, 49, 52, 59, 62, 69, 70, 76, 82, 86, 92 and 96, 105 and 112).

The information in the records discuss the transition of services and programs offered by the Lighthouse to other service and program providers. These services and programs require special skills and staffing requirements and only are offered by a select number of organizations in Saskatoon. Negotiations with these organizations occur in a yearly cycle. This is evidenced in certain places within the document. For example, on page 24, the operating grant increase is for the 2022-2023 fiscal year. In the next paragraph on the same page, the emergency shelter funding is for October 1, 2022 to March 31, 2023. The records themselves demonstrate that the funding cycles are not uniform, nor do they start at the same period. This means the Ministry is constantly in negotiations with the organizations that provide these services and programs. The information withheld detail how funding will increase with an increase in the number of beds, the

amounts of emergency shelter funding, the amount of funding based on the number of beds and client needs, that the Ministry funds specific items or forgives a certain amount in loans. All these details fall under the definition of positions, plans and instructions that were used in the negotiating of the contract either contemplated or being contemplated. The loans being forgiven fall under a direction based on the circumstances of the third party. The information is a plan because it specifies that services or programs can receive a certain amount of funding based on the number of beds and services or programs offered. The same is true of the specific items that are funded. Taken together, the plans could be used to weaken the Ministry's negotiating power. The amount of loans forgiven or that certain items could be funded could incentivize other organizations in similar positions to make similar requests. The eventual impact is that if the information is released it would weaken the Ministry's position in any contract negotiations, which it enters on a yearly basis, with organizations who offer similar services and programs as the Lighthouse. It's important to note the number of organizations offering comparable services and programs as the Lighthouse is small.

[33] Based on a review, my office noted that Social Services applied subsection 17(1)(c) of FOIP to portions of records that appear to contain a dollar amount. As I have said in a past report, dollar amounts themselves do not equate to positions, plans, procedures, criteria, instructions or considerations related to negotiations (see paragraph [80] of [Review Report 141-2023](#)). The first part of the two-part test is not met, and so I do not need to consider the second part. I find that Social Services has not properly applied subsection 17(1)(c) of FOIP. My recommendations are set out in the Appendix.

## **5. Did Social Services properly apply subsection 18(1)(e) of FOIP?**

[34] Social Services applied subsection 18(1)(e) of FOIP to pages 24, 28, 31, 32, 38, 39, 42, 43, 49, 51, 52, 59, 61, 62, 63, 69, 70, 71, 72, 73, 75, 76, 82, 83, 85, 86, 92, 93, 95, 96, 102, 104, 105, and 112, in part.

[35] Subsection 18(1)(e) of FOIP provides:

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

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

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

[36] Pages 178 to 189 of the *Guide to FOIP*, Ch. 4 outlines the following two-part test to determine if subsection 18(1)(e) of FOIP applies:

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

[37] Earlier in this Report, I provided the definitions for key terms such as positions, plans, procedures, criteria, instructions, considerations, and negotiations.

[38] In its submission, Social Services offered similar arguments as it did for subsection 17(1)(c) of FOIP. It said:

The Ministry has applied this exemption to information that discloses an increase in operating grant (page 24), emergency shelter funding (pages 24, 38, 49, 59, 69, 70, 82 and 92), program funding based on the number of beds and the intensity of support the clients need (pages 28, 32, 38, 39, 43, 49, 52, 59, 62, 69 to 73, 76, 82, 83, 86, 92, 93, 96, 105 and 112), funding specific items (pages 28 and 39), funding amounts (pages 24, 32, 38, 43, 49, 52, 59, 63, 69 to 73, 76, 82, 83, 86, 92, 93, 96, 105 and 112), possible future funding commitments (pages 31, 42, 51, 61, 75, 85, 95 and 104), and the amount of loans that has been forgiven (pages 32, 38, 43, 49, 52, 59, 62, 69, 70, 76, 82, 86, 92 and 96, 105 and 112).

The information in the records discuss the transition of services and programs offered by the Lighthouse to other service and program providers. These services and programs require special skills and staffing requirements and only are offered by a select number of organizations in Saskatoon. Negotiations with these organizations occur in a yearly cycle. This is evidenced in certain places within the document. For example, on page 24, the operating grant increase is for the 2022-2023 fiscal year. In the next paragraph on the same page, the emergency shelter funding is for October 1, 2022 to March 31, 2023. The records themselves demonstrate that the funding cycles are not uniform, nor do they start at the same period. This means the Ministry is constantly in negotiations with the organizations that provide these services and programs. The information withheld detail how funding will increase with an increase in the number of beds, the amounts of emergency shelter funding, the amount of funding based on the number of beds and client needs, that the Ministry funds specific items or forgives a certain amount in loans. All these details fall under the definition of positions, plans and

instructions that were used in the negotiating of the contract either contemplated or being contemplated. The loans being forgiven fall under a direction based on the circumstances of the third party. The information is a plan because it specifies that services or programs can receive a certain amount of funding based on the number of beds and services or programs offered. The same is true of the specific items that are funded. Taken together, the plans could be used to weaken the Ministry's negotiating power. The amount of loans forgiven or that certain items could be funded could incentivize other organizations in similar positions to make similar requests. The eventual impact is that if the information is released it would weaken the Ministry's position in any contract negotiations, which it enters on a yearly basis, with organizations who offer similar services and programs as the Lighthouse. It's important to note the number of organizations offering comparable services and programs as the Lighthouse is small.

[39] Based on a review, it appears that wherever Social Services had applied subsection 17(1)(c) of FOIP, it also applied subsection 18(1)(e) of FOIP. That is, wherever a dollar amount appeared in the record, Social Services applied subsection 18(1)(e) of FOIP alongside subsection 17(1)(c) of FOIP. As I have said earlier, dollar amounts themselves do not equate to positions, plans, procedures, criteria, instructions or considerations related to negotiations. Therefore, I find that Social Services has not properly applied subsection 18(1)(e) of FOIP. My recommendations are set out in the Appendix.

**6. Did Social Services properly apply subsection 19(1)(c) of FOIP?**

[40] Social Services applied subsection 19(1)(c) of FOIP to pages 24, 28, 39, 73, 83, and 93, in part.

[41] Subsection 19(1)(c) of FOIP provides as follows:

**19(1)** Subject to Part V and this section, a head shall refuse to give access to a record that contains:

- ...
- (c) information, the disclosure of which could reasonably be expected to:
    - (i) result in financial loss or gain to;
    - (ii) prejudice the competitive position of; or
    - (iii) interfere with the contractual or other negotiations of;

a third party;

[42] In its submission, Social Services specified it was relying on subsection 19(1)(c)(iii) of FOIP. My office uses the following two-part test to determine if subsection 19(1)(c)(iii) of FOIP applies:

1. Are there contractual or other negotiations occurring involving a third party?
2. Could release of the record reasonably be expected to interfere with the contractual or other negotiations of a third party?

(*Guide to FOIP*, Ch. 4, pp. 223-224)

[43] Pages 223 to 224 of the *Guide to FOIP*, Ch. 4, provides the following definitions:

- “Could reasonably be expected to” means there must be a reasonable expectation that disclosure could result in the harm.
- A “negotiation” is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings conducted between two or more parties for the purpose of reaching an understanding. It connotes a more robust relationship than “consultation”. It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion.
- “Interfere” means to hinder or hamper.

[44] In its submission, Social Services said it did not identify the contractual or other negotiations that were occurring involving a third party. Instead, it discussed how it negotiates with third parties throughout the year. It said:

The Ministry has applied this exemption to information that discloses an increase in operating grant (page 24), emergency shelter funding (page 24), program funding based on the number of beds and the intensity of support the clients need (pages 28, 39, 73, 83 and 93), funding specific items (pages 28 and 39), funding amounts (pages 24, 73, 83 and 93). The grants, funding, programs, specific items, and loans that have been forgiven are between the Ministry and a third party. All this information has been the subject of negotiations between the Ministry and a third party as outlined earlier in this submission and these negotiations occur throughout the year given their [sic] sometimes one time nature and the nature of the funding cycles. Therefore, the Ministry argues it has established that there are negotiations occurring involving a third party.

[45] I have no doubt that Social Services, a large government ministry, is engaged in discussions with third parties on various topics throughout the year. However, to meet the burden of proof pursuant to subsection 61 of FOIP, Social Services needs to identify which negotiations the redacted information is related to in order to meet the first part of the two-part test. It has not done so; I do not need to consider the second part of the test. I find that Social Services did not properly apply subsection 19(1)(c)(iii) of FOIP. My recommendations are set out in the Appendix.

**7. Did Social Services make a *prima facie* case that subsection 22(a) applies?**

[46] Social Services applied subsection 22(a) of FOIP to pages 31 and 42, in part.

[47] Subsection 22(a) 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;

[48] Pages 260 to 265 of the *Guide to FOIP*, Ch. 4, outlines the following three-part test to determine if subsection 22(a) of FOIP applies:

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?

[49] Pages 260 to 263 of my offices *Guide to FOIP*, Ch. 4, provides the following definitions:

- A “communication” is 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.

- “Solicitor” means a lawyer who is duly admitted as a member and whose right to practice is not suspended.
- “Lawyer” means a member of the Law Society and includes a law student registered in the Society’s pre-call training program.
- “Client” means a person who consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or, having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf; and includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client’s work.
- “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.

[50] Subsection 9-1(1) of my office’s *Rules of Procedure* allows for the head of a government institution to provide my office with a copy of the records, or an affidavit of the records, schedule and redacted record over which solicitor-client privilege is claimed setting out the elements requested in Form B of the *Rules of Procedure*. In this case, Social Services has elected to make a prima facie case to my office by providing my office with an affidavit of records and a schedule of records. It also provided my office with a letter of explanation to explain its reliance on subsection 22(a) of FOIP to withhold portions of pages 31 and 42.

[51] Pages 31 and 42 are pages from a briefing note. Social Services redacted two lines from each page and claimed solicitor client privilege over those two lines. The majority of each page was released to the Applicant. However, the two lines that are redacted appear to be the second half of a sentence. The first half of the sentence (which was released to the Applicant) indicates that Social Services was developing a response letter. The second half of the sentence (which was redacted) appears to be the topic of the letter that was being developed.

[52] The topic of a letter in and of itself being developed is not communications between a solicitor or client. Nor is it the seeking or giving of legal advice. Therefore, the first and second part of the three part test appears to not be met.



[53] However, I note that written communications between officials or employees of a government institution, quoting the legal advice given orally by the government institution's solicitor, or employee's notes documenting the legal advice given orally by the solicitor, could qualify (*Guide to FOIP*, Ch. 4, p. 262). Therefore, I must determine if the redacted portion is a quote or an employee's note of legal advice given by Social Service's legal counsel.

[54] In its letter of explanation, Social Services explained the redacted portion indicates it had engaged legal counsel:

The same information in records 15 and 18 has been withheld. The document is a similar if not the same version of a Briefing Note. The entire Briefing Note but for the portion where the Ministry has claimed solicitor client privilege has been provided to your Office for review. The Briefing Notes do not indicate an author and are not dated. However, briefing notes are drafted for internal use and given the sensitivity of the issue (the transition of services from the Lighthouse to other organizations), it was one that would not have been shared outside of the Ministry. **The information withheld indicates that the Ministry has engaged legal in a review of specific items detailed in the draft letter that is discussed in the Briefing Note.**

There is no specific legal counsel mentioned, which is not unusual, as legal counsel, Ministry of Justice or Justice are terms often relied upon in briefing notes and emails to indicate the involvement of a lawyer(s) on an issue. Here, the Ministry is confident that the reference is to a lawyer within the Legal Services Division given the legislative mandate of the Ministry of Justice as outlined in The Ministry of Justice and Attorney General Act and that outside legal counsel was not engaged in this particular issue by the Ministry.

[Emphasis added]

[55] If the redacted portion merely reveals that Social Services engaged its legal counsel, that in itself is not the actual seeking or giving of legal advice. It is common for government institutions to seek legal advice from their legal counsel on various topics on a day-to-day basis. The practice of seeking or giving of legal advice is not privileged information. The actual communications that result from the seeking of or giving of legal advice is the privileged information.

[56] Based on the materials provided to my office and based on a review of the redacted versions of pages 31 and 42, I find that Social Services has not made a *prima facie* case that subsection 22(a) of FOIP applies. My recommendations are set out in the Appendix.

#### **IV FINDINGS**

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

[58] I find that Social Services properly applied subsection 16(1) of FOIP to pages 7, 10, 15, 16, 35, 46, 56, 66, 79, 88, 99, and 109.

[59] I find that Social Services has not properly applied subsection 17(1)(a) of FOIP.

[60] I find that Social Services has not properly applied subsection 17(1)(c) of FOIP.

[61] I find that Social Services has not properly applied subsection 18(1)(e) of FOIP.

[62] I find that Social Services has not properly applied subsection 19(1)(c)(iii) of FOIP.

[63] I find that Social Services has not made a *prima facie* case that subsection 22(a) of FOIP applies to pages 31 and 42.

#### **V RECOMMENDATION**

[64] Normally when I recommend release of information, I recommend that it be released within 30 days of the issuing of this Report. Because the Court of King's Bench wishes this matter to be dealt with expeditiously, I have recommended that the information be released within 20 days of this Report. I have done this to facilitate the matter being dealt with by the Court of King's Bench.

[65] I recommend that Social Services follow the recommendations set out in the Appendix. Where I have recommended the release of records, I recommend that they be released within 20 days of the issuance of this Report.

Dated at Regina, in the Province of Saskatchewan, this 10<sup>th</sup> day of April, 2024.

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

## Appendix

Page # in current review (004-2024)	Page # of records from 142-2023	Exemptions applied by Social Services	IPC Findings	IPC Recommendations
1		Released		
2		Released		
3		Released		
4		Released		
5		Released		
6		Released		
7		16(1) of FOIP	16(1) of FOIP applies.	Continue to withhold.
8		Released		
9		Released		
10		16(1) of FOIP	16(1) of FOIP applies.	Continue to withhold.
11		Released		
12		29(1) of FOIP	29(1) of FOIP does not apply.	Release.
13		Released		
14		Released		
15		16(1) of FOIP	16(1) of FOIP applies.	Continue to withhold.
16		16(1) of FOIP	16(1) of FOIP applies.	Continue to withhold.
17		Released		
18		Released		
19		Released		
20		Released		
21		Released		
22		Released		
23		Released		
24		19(1)(c); 18(1)(c); 17(1)(c) of FOIP	19(1)(c); 18(1)(c); 17(1)(c) of FOIP does not apply.	Release.
25		Released		
26		Released		
27		Released		
28	9	19(1)(c); 18(1)(e); 17(1)(a);	19(1)(c); 18(1)(e); 17(1)(a); 17(1)(c) of	Release.

		17(1)(c) of FOIP	FOIP does not apply.	
29	10	Released		
30	11	Released		
31	12	22(a); 18(1)(e); 17(1)(c) of FOIP	22(a); 18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
32	13	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
33	14	17(1)(a) of FOIP	17(1)(a) of FOIP does not apply.	Release.
34	15	Released		
35	16	16(1) of FOIP	16(1) of FOIP applies.	Continue to withhold.
36	17	Released		
37	18	Released		
38	19	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
39	21	19(1)(c); 18(1)(e); 17(1)(a); 17(1)(c) of FOIP	19(1)(c); 18(1)(e); 17(1)(a); 17(1)(c) of FOIP does not apply.	Release.
40	22	Released		
41	23	Released		
42	24	22(a); 18(1)(e); 17(1)(c) of FOIP	22(a); 18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
43	25	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
44	26	17(1)(a) of FOIP	17(1)(a) of FOIP does not apply.	Release.
45	27	Released		
46	28	16(1) of FOIP	16(1) of FOIP applies.	Continue to withhold.

47	29	Released		
48	30	Released		
49	31	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
50	49	Released		
51	50	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
52	51	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
53	52	Released		
54	53	17(1)(a) of FOIP	17(1)(a) of FOIP does not apply.	Release.
55	54	Released		
56	55	16(1) of FOIP	16(1) of FOIP applies.	Continue to withhold.
57	56	Released		
58	57	Released		
59	58	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
60	66	Released		
61	67	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
62	68	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
63	69	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
64	70	17(1)(a) of FOIP	17(1)(a) of FOIP does not apply.	Release.
65	71	Released		

66	72	16(1) of FOIP	16(1) of FOIP applies.	Continue to withhold.
67	73	Released		
68	74	Released		
69	75	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
70	76	18(1)(e); 17(1)(a); 17(1)(c) of FOIP	18(1)(e); 17(1)(a); 17(1)(c) of FOIP does not apply.	Release.
71	77	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
72	78	18(1)(e); 17(1)(a); 17(1)(c) of FOIP	18(1)(e); 17(1)(a); 17(1)(c) of FOIP does not apply.	Release.
73	81	19(1)(c); 18(1)(e); 17(1)(a); 17(1)(c) of FOIP	19(1)(c); 18(1)(e); 17(1)(a); 17(1)(c) of FOIP does not apply.	Release.
74	82	Released		
75	83	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
76	84	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
77	85	17(1)(a) of FOIP	17(1)(a) of FOIP does not apply.	Release.
78	86	Released		
79	87	16(1) of FOIP	16(1) of FOIP applies.	Continue to withhold.
80	88	Released		
81	89	Released		

82	90	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
83	95	19(1)(c); 18(1)(e); 17(1)(a); 17(1)(c) of FOIP	19(1)(c); 18(1)(e); 17(1)(a); 17(1)(c) of FOIP does not apply.	Release.
84	96	Released		
85	97	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
86	98	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
87	99	17(1)(a) of FOIP	17(1)(a) of FOIP does not apply.	Release.
88	100	16(1) of FOIP	16(1) of FOIP applies.	Continue to withhold.
89	101	Released		
90	102	Released		
91	103	Released		
92	104	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
93	106	19(1)(c); 18(1)(e); 17(1)(a); 17(1)(c) of FOIP	19(1)(c); 18(1)(e); 17(1)(a); 17(1)(c) of FOIP does not apply.	Release.
94	107	Released		
95	108	18(1)(e); 17(1)(1)(c) of FOIP	18(1)(e); 17(1)(1)(c) of FOIP does not apply.	Release.
96	109	18(1)(e); 17(1)(1)(c) of FOIP	18(1)(e); 17(1)(1)(c) of FOIP does not apply.	Release.



97	110	17(1)(a) of FOIP	17(1)(a) of FOIP does not apply.	Release.
98	111	Released		
99	112	16(1) of FOIP	16(1) of FOIP applies.	Continue to withhold.
100	113	Released		
101	114	Released		
102	115	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
103	152	Released		
104	153	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
105	154	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.
106	155	Released		
107	156	17(1)(a) of FOIP	17(1)(a) of FOIP does not apply.	Release.
108	157	Released		
109	158	16(1) of FOIP	16(1) of FOIP applies.	Continue to withhold.
110	159	Released		
111	160	Released		
112	161	18(1)(e); 17(1)(c) of FOIP	18(1)(e); 17(1)(c) of FOIP does not apply.	Release.