



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 017-2023

SASKATCHEWAN HEALTH AUTHORITY

August 21, 2023

Summary:

The Applicant made an access to information request under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) to the Saskatchewan Health Authority (SHA). SHA extended the time for responding to the request. It subsequently issued a decision denying access to portions of the responsive records claiming that information was exempt pursuant to subsections 16(1)(a), (b), (c), (d), 18(1)(b), (c)(i), (ii), and 28(1) of LA FOIP. The Applicant asked the Commissioner to review the timeliness of SHA's response and its decision to apply exemptions. The Commissioner found that SHA did not respond to the Applicant within the time required by sections 7 and 12 of LA FOIP. He also found that SHA properly claimed that some information was not responsive to the request. He further found that SHA properly applied subsections 16(1)(a) and (b) of LA FOIP to some information but not all. Additionally, he also found that SHA properly applied subsection 28(1) of LA FOIP to some information but not all. With respect to some personal information, the Commissioner found that SHA did not properly exercise its discretion pursuant to subsection 28(2)(n)(i) of LA FOIP and subsection 10(g)(ii) of *The Local Authority Freedom of Information and Protection of Privacy Act Regulations* (LA FOIP Regulations). The Commissioner recommended that, within 30 days of the issuance of this Report, SHA release to the Applicant the information that he found was not exempt and continue to withhold information where the SHA properly applied an exemption. He also recommended that SHA consider releasing the non-responsive information subject to exemptions. Finally, he also recommended that, within 30 days of the issuance of this Report, SHA reconsider the exercise of its discretion pursuant to subsection 28(2)(n)(i) of LA FOIP and subsection 10(g)(ii) of the LA FOIP Regulations.

I BACKGROUND

[1] The Saskatchewan Health Authority (SHA) received an access to information request under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) from the Applicant on December 2, 2021. The Applicant sought access to the following information:

All correspondence between former SHA [title and name] and the following individuals:

- 1) SHA Board Chair [name redacted]
- 2) Health Minister [name redacted]
- 3) Deputy Health Minister [name redacted]

Date Range: November 1, 2021 to December 2, 2021

[2] On December 17, 2021, SHA sent the Applicant a notice of extension of the timeline for responding to the access to information request. The notice stated that the time for responding was being extended by 30 days pursuant to subsections 12(1)(a)(ii), (b) and (c) of LA FOIP.

[3] On January 3, 2023, the Applicant filed a request for a review with my office stating that the SHA should be deemed to have refused their request because it had not responded within the timeline required by LA FOIP. My office opened Review File 002-2023.

[4] On January 18, 2023, SHA issued its section 7 decision releasing portions of the responsive records and withholding portions pursuant to subsections 16(1)(a), (b), (c), (d), 18(1)(b), (c)(i), (ii) and 28(1) of LA FOIP.

[5] On January 23, 2023, the Applicant filed another request for a review with my office. The Applicant requested that the scope of the review include the claim that some information was exempt, the appropriateness of SHA's extension of time and the timeliness of its response. My office closed Review File 002-2023 because SHA had responded to the access to information request and was no longer in a deemed refusal position. This review file was opened to address the outstanding issues.

[6] On February 24, 2023, my office sent a notice of review to SHA and the Applicant. The notice invited the parties to provide a submission on the exemptions claimed to withhold the records or portions of records, the appropriateness of the extension of time and the timeliness of SHA's response. The notice also invited SHA to provide an explanation of its decision not to exercise its discretion to disclose some personal information pursuant to LA FOIP subsections 28(2)(n)(i) and 28(2)(s), together with subsection 10(g)(ii) of *The Local Authority Freedom of Information and Protection of Privacy Act Regulations* (LA FOIP Regulations).

[7] SHA provided its submission on May 12, 2023. The Applicant provided their submission on June 7, 2023.

II RECORDS AT ISSUE

[8] SHA identified 11 responsive records comprised of 57 pages of emails and attachments. Two records were released in full. Portions of one record were withheld on the basis that they were not responsive to the request. All or portions of the remaining records were withheld pursuant to subsections 16(1)(a), (b), (c), (d), 18(1)(b), (c)(i), (ii) and 28(1) of LA FOIP.

[9] The Applicant's submission asserted that they were not pursuing access to the information that was severed from Record 9, page 51 pursuant to subsections 18(1)(b), (c)(i) and (ii) of LA FOIP. As no other severances were made to Record 9, this record falls outside the scope of this review. As SHA did not claim these exemptions for any other severances, I will not be considering them in this review.

[10] The Applicant also asserted that they were not interested in obtaining access to any contact information, such as email addresses, mailing addresses or telephone numbers. Therefore, the contact information severed from the following pages is outside the scope of this review: Record 1, page 2; Record 2, page 6; Record 5, page 42; Record 7, page 46; and Record 8, page 48.

[11] Finally, the Applicant stated that they are not interested in obtaining access to the personal information about the employees’ leave of absence that was withheld from Record 3, pages 21 and 22. Therefore, this information is outside the scope of this review.

[12] The following table describes the eight records and 24 pages at issue, and the exemptions SHA applied to the pages in full or in part:

Record No.	Page No.	Description	LA FOIP Exemptions Applied
1	1	Email	16(1)(a)
1	2	Email	16(1)(a)
1	3-5	Email	16(1)(a)
2	7-8	Letter - attachment to email	16(1)(a)
3	9, 11-12, 14, 16-22	Email and attached COVID-19 Provincial Emergency Operations Centre Decision Item	16(1)(a), 16(1)(b), 16(1)(c), 16(1)(d)
5	41	Email	Non-responsive
6	43-44	Email	16(1)(a), 16(1)(b), 16(1)(c), 16(1)(d)
7	46	Letter – attachment to email	28(1)
8	48	Letter – attachment to email	28(1)
11	56	Email	16(1)(a), 16(1)(b)

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[13] The SHA qualifies as a “local authority” as defined by subsection 2(1)(f)(xiii) of LA FOIP. Therefore, I have jurisdiction to conduct this review.

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

[14] LA FOIP requires local authorities to respond to access to information requests within 30 days after the request is made. This requirement is set out in subsection 7(2) of LA FOIP which provides, in part:

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

[15] Section 12 of LA FOIP gives a local authority the right to extend this initial 30-day response deadline for a maximum of 30 more days in defined circumstances. This means 60 days in total. The circumstances where a local authority can extend the time are set out in subsection 12(1) of LA FOIP.

[16] Subsection 12(2) of LA FOIP states that a local authority must provide notice of its extension within 30 days after the access to information request is made. Under subsection 12(3) of LA FOIP, a local authority must give written notice to the applicant of its decision in accordance with section 7 of LA FOIP within the period of the extension.

[17] *The Legislation Act* (LA) establishes the rules that govern the interpretation of all statutory instruments in the province. According to section 2-28 of the LA, the timelines set out in LA FOIP are calculated as follows:

- The first day the access request is received is excluded in the calculation of time
- If the due date falls on a holiday, the time is extended to the next day that is not a holiday
- If the due date falls on a weekend, the time is extended to the next day the office is open and
- As LA FOIP expresses the time in a number of days, this is interpreted as 30 calendar days, not business days.

(*Guide to LA FOIP*, Chapter 3, “Access to Records”, updated June 29, 2021 [*Guide to LA FOIP*, Ch. 3], p.29).

[18] Applying LA FOIP and the LA, the due date for the delivery of the notice of extension under subsection 12(2) of LA FOIP and the extended due date for the decision under section 7 and subsection 12(3) of LA FOIP are calculated as follows:

- December 2, 2021 – the date of receipt of the access to information request
- December 3, 2021 – the first day for calculating the 30-day time period for responding to the access to information request under subsection 7(2) of LA FOIP
- January 4, 2022 – the due date for the written decision under subsection 7(2) of LA FOIP and/or the notice of extension under subsection 12(2) of LA FOIP
- January 5, 2022 – the first day for calculating the allowable 30-day extended time period under subsection 12(1) of LA FOIP
- February 3, 2022 – the due date for the decision under subsection 12(3) of LA FOIP where the extension is for the maximum allowable time period of 30 days

[19] SHA issued its notice of time extension on December 17, 2021. As the due date for the notice was January 4, 2022, its notice of time extension was issued within the time required under subsection 12(2) of LA FOIP.

[20] Subsection 12(3) of LA FOIP requires local authorities to issue decisions pursuant to subsection 7(2) of LA FOIP within the time period set out in the extension. In this case, SHA did not issue its decision until January 18, 2023 – approximately 11 months after the due date. Therefore, SHA did not comply with subsection 12(3) of LA FOIP, and I do not need to consider if it properly extended the time pursuant to subsections 12(1)(a)(ii), (b) and (c) of LA FOIP. As such, I find that SHA did not comply with sections 7 and 12 of LA FOIP.

[21] This is the third report issued this year where my office has found that SHA has failed to respond to an access to information request within the time required by LA FOIP. In my office's [Review Report 196-2022](#) and [Review Report 216-2022](#), I recommended that SHA review its policies and procedures for responding to access to information requests and make any changes necessary to ensure that it processes requests within the legislated

timelines. In response to these reports, the SHA agreed to comply with the recommendations.

[22] SHA acknowledged that its decision in this matter was not sent within the time required by LA FOIP. In its submission to my office, it apologized to the Applicant for the delay. It asserted that in December 2021, it had experienced a significant increase in the number of access to information requests. It added that it receives an average of seven access to information requests per month and in that month, it received 13 requests or a 53.8% increase in volume. It claimed that given the significant increase in requests, responding within the initial 30 days would have unreasonably interfered with the duties of the Privacy Office. SHA asserted that it took steps to address the increase in volume. Within a month of receiving these requests, it had filled two full time positions and was working to reduce a backlog created by the vacancies, and to train and orient the new team members.

[23] The delay of approximately 11 months in issuing the section 7 decision is significant. I appreciate that SHA has taken steps to address the issue. In future, SHA should be mindful of its obligations to respond to access to information requests within the time required by LA FOIP.

3. Did SHA properly withhold information as not responsive to the access to information request?

[24] When a local authority receives an access to information request, it must determine which information in the records is responsive to the request. “Responsive” means relevant or anything reasonably related to the request. Records that do not reasonably relate to an access to information request are called “non-responsive.” A local authority may treat portions of a record as non-responsive only if those portions are clearly separate and distinct, and not reasonably related to the request (*Guide to LA FOIP*, Ch. 3, p. 12).

[25] SHA severed two emails from page 41 of the records as not responsive. These emails are separate and distinct, and not reasonably related to the request because they were sent to and received by individuals other than those identified in the Applicant’s access to

information request. For these reasons, I find that the emails are not responsive to the Applicant's request.

[26] However, as I stated in my blog, [“What About the Non-Responsive Record?”](#), I recommend that public bodies consider releasing non-responsive emails, subject to exemptions found to apply. I will follow the same approach here and recommend that SHA consider releasing the non-responsive portions of page 41 subject to any exemptions found to apply.

4. Did SHA properly apply subsection 28(1) of LA FOIP?

[27] SHA severed information from pages 46 and 48 of the records claiming that the severed information was exempt pursuant to subsection 28(1) of LA FOIP. Subsection 28(1) of LA FOIP is a mandatory exemption that prohibits the disclosure of personal information unless the individual about whom the information pertains consents to its disclosure, or if the disclosure is authorized by one of the enumerated subsections of 28(2) or section 29 of LA FOIP (*Guide to LA FOIP*, Chapter 6, “Protection of Privacy”, updated February 27, 2023, [*Guide to LA FOIP*, Ch. 6], p. 163).

[28] Subsection 28(1) of LA FOIP provides:

28(1) No local authority 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 29.

[29] In order for subsection 28(1) of LA FOIP to apply, the information in question must qualify as “personal information.” Subsection 23(1) of LA FOIP defines “personal information” and provides some examples of the types of information that can be considered personal information. The following subsections are relevant in this review:

23(1) Subject to subsections (1.1) and (2), “personal information” means personal information about 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 or information relating to financial transactions in which the individual has been involved;

...

(d) any identifying number, symbol or other particular assigned to the individual;

...

[30] The list of examples in subsection 23(1) of LA FOIP is not exhaustive. Other types of information could qualify as personal information. To constitute personal information, two elements must be present. The information must be about an identifiable individual and the information must be personal in nature (*Guide to LA FOIP*, Ch. 6, p. 39).

[31] As to whether information is identifiable, my office's *Guide to LA FOIP*, Ch. 6, at pages 39-40 states:

Information is about an identifiable individual if:

- The individual can be identified from the information (e.g., name, where they live); or
- The information, when combined with information otherwise available, could reasonably be expected to allow the individual to be identified.

“About” means on the subject of or concerning. “About an identifiable individual” means the information is not just the subject of something but also relates to or concerns the subject.

“Identifiable” means that it must be reasonable to expect that an individual may be identified if the information were disclosed. The information must reasonably be capable of identifying particular individuals because it either directly identifies a person or enables an accurate inference to be made as to their identity when combined with other available sources of information (data linking) or due to the context of the information in the record.

[32] I now turn to consider if the information severed from pages 46 and 48 qualifies as personal information and if it is exempt pursuant to subsection 28(1) of LA FOIP.

Employment history

- [33] Previous reports issued by my office, including [Review Report 035-2019](#) and [Review Report 037-2021](#), have found that the term “employment history” as used in subsection 23(1)(b) of LA FOIP includes the type of information normally found in a personnel file such as performance reviews, evaluations, disciplinary actions taken, reasons for leaving a job or leave transactions. It could also include the start date and end date of employment.
- [34] SHA withheld the body of a letter dated November 24, 2021 from page 48. While I cannot reveal the contents of the letter, it contains information that would normally appear in a personnel file such as information surrounding the termination of an employment contract. This is consistent with findings made by my office in previous reports such as [Review Report LA-2007-001](#) and [Review Report 097-2017](#). Therefore, I find that the withheld information qualifies as personal information pursuant to subsection 23(1)(b) of LA FOIP. As there is no suggestion that SHA had consent to release the information, I find that SHA properly applied subsection 28(1) of LA FOIP. Below I will address SHA’s consideration of LA FOIP subsections 28(2)(n)(i), and 28(2)(s), together with subsection 10(g)(ii) of the LA FOIP Regulations. These provisions give SHA the discretion to disclose personal information in defined circumstances.
- [35] I note that page 46 is a resignation letter and that SHA decided to release the body of the letter to the Applicant. Some of the released information may qualify as the author’s personal information. SHA may have exercised its discretion to release this letter to the Applicant pursuant to subsection 28(2)(n)(i) of LA FOIP or subsection 10(g)(ii) of the LA FOIP Regulations. As the information from page 46 has been released, SHA’s exercise of discretion for that page is not at issue here.

Handwritten signatures

- [36] SHA also withheld two different authors’ handwritten signatures from the letters on pages 46 and 48. SHA asserted that the signatures qualify as personal information pursuant to subsection 23(1)(d) of LA FOIP.

- [37] Handwritten signatures may not constitute personal information where they appear in records that are generated as part of an individual's work product. See for example, my office's [Review Report 149-2019, 191-2019](#). In that report, I explained that work product is information generated by or otherwise associated with an individual in the normal course of performing their professional or employment responsibilities, whether in a public or private setting. Where the signature appears in a record that relates to a personal matter and was prepared in a personal context, the signature may qualify as the individual's personal information (see for example, my office's [Review Report 156-2015](#)).
- [38] In this case, while the two authors' handwritten signatures appear in letters that contain the authors' personal information, the letters were prepared in their professional capacity or context. For example, page 48 was written by a senior employee of SHA, in their capacity as a senior employee of SHA and relates to their ongoing employment responsibilities or role as a senior employee. Page 46 was written by a board member of SHA in their capacity as a board member or official of SHA and relates to their ongoing responsibilities or role as a board member. I find, therefore, that the signatures appear in letters generated in a professional context or capacity and do not qualify as personal information pursuant to subsection 23(1) of LA FOIP.
- [39] Further, I note at the time of the issuance of this Report, the signature of the senior SHA employee was available publicly on the internet.
- [40] Accordingly, I find that SHA did not properly apply subsection 28(1) of LA FOIP to the signatures on pages 46 and 48. I recommend that, within 30 days of issuance of this Report, SHA release to the Applicant the signatures on pages 46 and 48.
- [41] I turn to address SHA's discretion to disclose the text withheld from page 48. Although subsection 28(1) of LA FOIP indicates that consent of the data subject is required before disclosure may occur, subsection 28(2) of LA FOIP provides a local authority with the ability, in some circumstances, to exercise its discretion and disclose personal information without consent. As noted above, my office's notice of review invited SHA to make a

submission on whether it properly considered LA FOIP subsections 28(2)(n)(i), and 28(2)(s), together with subsection 10(g)(ii) of the LA FOIP Regulations.

Subsections 28(2)(n)(i) of LA FOIP and 10(g)(ii) of the LA FOIP Regulations

[42] Subsections 28(2)(n)(i) and (s) of LA FOIP state:

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; or

...

(s) as prescribed in the regulations.

[43] Subsection 28(2)(n)(i) of LA FOIP gives a local authority discretion to disclose personal information about an individual without consent for any purpose where the public interest in disclosure clearly outweighs any invasion of privacy that could result from disclosure. This provision requires the exercise of discretion by the “head” of the local authority. Disclosure can be for any purpose provided the criteria in subsection 28(2)(n)(i) of LA FOIP are met (*Guide to LA FOIP*, Ch. 6, p. 213).

[44] A local authority can use the following test to determine if it has discretion to disclose pursuant to subsection 28(2)(n)(i) of LA FOIP:

1. Is the information “personal information” as defined by LA FOIP?
2. Is there a public interest in the personal information?
3. Does the public interest clearly outweigh any invasion of privacy?

(*Guide to LA FOIP*, Ch. 6, p. 213)

[45] Public interest means the interest of the general public or of a group of individuals. It does not include the interest of only one individual. The criteria for assessing whether there is a public interest in information are as follows:

(1) Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it?

(2) Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public?

(3) If the records are about the process or functioning of the local authority, will they contribute to open, transparent, and accountable government?

(Guide to LA FOIP, Ch. 6, pp. 217-218)

[46] A public interest is not automatically established where the media is involved (*Guide to LA FOIP, Ch. 6, p. 215*).

[47] Regarding part three of the test, my office's *Guide to LA FOIP, Ch. 6*, at pp. 217-218 states that local authorities should apply the "invasion of privacy" test to determine the level of privacy risk in the disclosure. This involves a detailed review of three risk factors. The risk factors are the sensitivity of the information, the expectation of the individual to whom the information relates and the probability and degree of injury.

[48] Subsection 10(g)(ii) of the LA FOIP Regulations also creates an exception to the mandatory exemption in section 28(1) of LA FOIP. It gives discretion to disclose personal information in some circumstances. It states:

10 For the purposes of clause 28(2)(s) of the Act, personal information may be disclosed:

...

(g) to any person where the information pertains to:

...

(ii) the terms or circumstances under which a person ceased to be an employee of a local authority, including the terms of any settlement or award resulting from the termination of employment;

[49] For subsection 10(g)(ii) of the LA FOIP Regulations to apply, the personal information must either pertain to:

- i) the terms under which a person ceased to be an employee of a local authority; or
- ii) the circumstances under which a person ceased to be an employee of a local authority.

[50] The term “employee” is defined in subsection 2(1)(b.1) of LA FOIP which states:

2(1) In this Act:

...

(b.1) “employee” means an individual employed by a local authority and includes an individual retained under a contract to perform services for the local authority;

[51] My office’s [Investigation Report 296-2017](#) was the first time that it had the opportunity to consider subsection 10(g)(ii) of the LA FOIP Regulations. Relying on definitions in *Black’s Law Dictionary*, Tenth Edition, and *The Concise Oxford English Dictionary*, I stated:

[19] My office’s view is that in the context of subsection 10(g)(ii) of the Regulations, “terms” means any contractual obligation of the local authority or the individual related to a termination of employment. ...

[20] “Circumstances under which a person ceased to be an employee of a local authority” means something different. *The Concise Oxford English Dictionary* defines “circumstance” as “a fact or condition connected with or relevant to an event or action”. ...

[21] It is also important to note that this is a discretionary clause. In other words, even if the personal information in question meets the criteria set out in subsection 10(g)(ii) of the Regulations, the local authority is not obligated to disclose it.

[52] With respect to the discretion to disclose under these provisions, SHA asserted:

The head of the SHA considered section 28(2)(n)(i) and found that the public interest in the disclosure does not clearly outweigh any invasion of privacy that could result from the disclosure. The head further considered section 28(2)(s) and section 10(g)(ii) of the Regulations and decided not to exercise discretion to the release of these records as the records contained details about the terms and circumstances under which [title redacted] ceased to be an employee of the SHA.

The records withheld pursuant to section 28(1) were primarily related to the terms and circumstances under which [individual's title] ceased to be an employee of the SHA. While it could be argued that there is a public interest in the records given the multiple access to information requests received by the SHA surrounding this subject matter, the information responsive is the personal information of the former [title] who is entitled to the protection of their information. The former [title] departure from the SHA is public knowledge, however the terms and circumstances surrounding the departure qualify as personal information under 23(1)(b) as explained in the table above.

[53] The Applicant's submission addressed the public interest in disclosure of the information at issue. They asserted:

I believe the public's interest in the contents of this correspondence clearly outweighs any privacy considerations for [named individual] or the SHA...

I think it would be useful to establish the context of this correspondence.

At the time, [named individual] was one of the highest-paid public servants in Saskatchewan. [They were] also the [title] of the province's health authority during one of the worst health crises in the province's history. At the time, a wave of COVID-19 infections had overwhelmed Saskatchewan's health system. The province sent dozens of ICU patients to Ontario because it simply had no ability to care for them at home.

[The named individual's] resignation at this time signaled potential peril within the health system and raised the prospect of significant mismanagement or political interference. I would note the media, at the time, published reports citing high-level SHA executives saying [the named individual's] resignation was sparked in part by the Saskatchewan government's decision to appoint a political insider as a vice-president of the health authority. Such a move is a clear example of political interference in the health care system.

Because of this, the contents of [the named individual's] resignation letter and [their] correspondence with members of the Board is of public interest for which there are very few comparators.

There is clearly precedent for the contents of resignation letters to be published, an example of which is within the severed records themselves. [name redacted] issued [their] resignation from the SHA's Board in November. [Their] letter, while brief, is not redacted at all.

[54] If I find that subsections 28(2)(n)(i) of LA FOIP and subsection 10(g)(ii) of the LA FOIP Regulations apply to the circumstances here, my authority is limited to a review of SHA's exercise of discretion. However, I will not substitute my discretion for that of the head.

[55] Regarding the factors that should be taken into account when exercising discretion to release information, in my office's [Review Report 173-2018](#) I stated:

[31] A discretion conferred by statute must be exercised consistently with the purposes underlying its grant. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at [46]). Some factors that should be taken into account when exercising discretion include:

- the general purposes of the Act (i.e. government institutions should make information available to the public, and individuals should have access to personal information about themselves);
- the wording of the discretionary exemption and the interests which the exemption 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 government institution 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 government institution;
- whether the disclosure of the information will increase public confidence in the operation of the government institution;
- the age of the record;
- whether there is a definite and compelling need to release the record; and
- whether the Commissioner's recommendations have ruled that similar types of records or information should be released.

[32] The Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, (2010) SCC 23, 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 to the head of the government institution. The Court 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.

Analysis - Subsection 28(2)(n)(i)

[56] An analysis of subsection 28(2)(n)(i) of LA FOIP requires first a determination of whether the provision applies and then a review of the exercise of discretion under that section. In terms of the application of the provision, I have already found that the information at issue is personal information. Therefore, I only need to consider parts 2 and 3 of the test here.

[57] Having carefully considered the submissions of the Applicant and SHA, it appears that there is a public interest in the information withheld from page 48 because its release may shed some light on issues of concern to the public and on the activities of the local authority. In its submission, SHA appeared to agree that there may be a public interest in the information. For example, it stated: “While it could be argued that there is a public interest in the records given the multiple access to information requests received by the SHA surrounding this subject matter ...”. My office has received three requests for review that involve records that relate to the conclusion of the affected party’s employment. I also note that the circumstances surrounding the employment were the subject of discussion in many media outlets and in other public forums. For these reasons, I find that part two of the test has been met.

[58] Regarding the third part of the test, SHA asserted that the public interest does not outweigh any invasion of privacy that would result from the release. It added:

the information [...] is the personal information of the former [title] who is entitled to the protection of their information. The former [title] departure from the SHA is public knowledge, however the terms and circumstances surrounding the departure qualify as personal information under 23(1)(b) ...

[59] SHA provided little information about how it arrived at its conclusion. Therefore, it is not apparent if SHA considered factors such as the expectation of the individual to whom the

information relates and the probability and degree of injury that would result from release of the information. For these reasons, I find that SHA did not properly exercise its discretion to disclose the personal information withheld from page 48 pursuant to subsection 28(2)(n)(i) of LA FOIP. I recommend that, within 30 days of issuance of this Report, SHA reconsider the exercise of its discretion pursuant to subsection 28(2)(n)(i) of LA FOIP for information withheld from page 48 and consider if it can release additional information to the Applicant.

Analysis - Subsection 10(g)(ii) of the LA FOIP Regulations

- [60] The individual to whom the information on page 48 relates was an “employee” of SHA as that term is defined in subsection 2(1)(b.1) of LA FOIP. The information withheld from page 48 describes the circumstances under which they ceased to be an employee. As the criteria for the application of subsection 10(g)(ii) of the LA FOIP Regulations have been met, I find that SHA has discretion to disclose the information under subsection 10(g)(ii) of the LA FOIP Regulations.
- [61] I must now determine if SHA properly exercised its discretion when it decided not to release the information. Having considered the submission provided by the Applicant and the SHA and the nature of the information withheld, I am not persuaded that the SHA acted in bad faith or for an improper purpose.
- [62] I note that in considering the application of subsection 28(2)(n)(i) of LA FOIP and in exercising its discretion under subsection 10(g)(ii) of the LA FOIP Regulations, SHA balanced the public interest in disclosure of the information against the privacy interests of the author. However, SHA did not take into account all of the relevant factors such as the general purposes of LA FOIP; whether the Applicant’s request may be satisfied by severing the record; whether the disclosure will increase public confidence in the operation of SHA; and the age of the record.
- [63] I also note that it appears that no efforts were made by SHA to obtain the consent of the author to the release of their personal information on page 48. SHA’s failure to consider

the views of the author, whose privacy interests it aims to protect, also amounts to a failure to take into account relevant factors in its exercise of discretion.

- [64] For these reasons, I find that SHA did not properly exercise its discretion under subsection 10(g)(ii) of the LA FOIP Regulations. I recommend that, within 30 days of issuance of this Report, SHA reconsider the exercise of its discretion under subsection 10(g)(ii) of the LA FOIP Regulations to determine if it can release additional information from page 48 to the Applicant. I also recommend that SHA consider contacting the author of the letter to seek their views on the disclosure and take those views into account.

Alleged Conflict of Interest

- [65] The Applicant's submission appears to include a claim that the head of SHA had a conflict of interest in relation to this matter. The argument was made for the first time in the Applicant's submission and was not identified as an issue in this review previously. They asserted:

As CEO, [name redacted] reports directly to and serves at the pleasure of the SHA's Board, who in turn serve at the pleasure of Saskatchewan's government.

Both the Board and the Ministry of Health are involved parties in this affair. There is the real and considerable possibility that the contents of [name redacted]'s letter could cause embarrassment or reputational harm to [name redacted], Health Minister [name redacted] or members of the SHA's Board.

Some may take the position that such reputational harm could apply in any Freedom of Information request submitted to the SHA. However, I would argue this is an extraordinary and unique circumstance. [name redacted] and other members of the SHA Board are directly involved parties, and [name redacted] was resigning from the [position redacted] in the midst of a health care crisis.

To be clear, I do not have evidence that [name redacted] received direction from the SHA Board or from Minister [name redacted] on this request. But to leave this decision to [them] invites the appearance of a conflict of interest that is contrary to the central principle of the Act, which is that members of the public are entitled to public records within reasonable circumstances.

For those reasons, I would ask the Commissioner to disregard [name redacted]'s argument and release the redacted correspondence in its entirety.

[66] To determine if a conflict or perceived conflict exists, my office has followed the approach taken by the Ontario Information and Privacy Commissioner (ON IPC). In [Order MO-1285](#), the ON IPC stated that a determination as to whether a conflict of interest exists requires a consideration of two factors. The factors are (a) whether the decision-maker had a personal or special interest in the records, and (b) whether a well-informed person, considering all the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker. It is not necessary to provide proof of “actual bias.”

[67] In [Order MO-4101](#) at paragraph [77], the ON IPC further stated as follows:

[77] In administrative law, there is a presumption, in the absence of evidence to the contrary, that an administrative decision-maker will act fairly and impartially. The onus of demonstrating a conflict of interest or bias lies on the person who alleges it, and mere suspicion is not enough.

[68] In this case, there is insufficient information or evidence to support a finding that the head did not act fairly and impartially. I am not persuaded that the head had a personal or special interest in the records at issue in this review. Nor am I persuaded that a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the head. The Applicant’s suspicion regarding these matters is not enough to support the claim. For these reasons, I find that the Applicant has not met the onus of establishing a conflict of interest exists.

5. Did SHA properly apply subsection 16(1)(a) of LA FOIP?

[69] SHA applied subsection 16(1)(a) of LA FOIP to pages 1-5, 7-9, 11-12, 14, 16-22, 43-44 and 56 of the responsive records. This exemption 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 local authority.

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

16(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 the local authority;

[71] My office uses the following two-part test to determine if subsection 16(1)(a) of LA 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 the local authority?

(Guide to LA FOIP, Ch. 4, pp. 105-108)

[72] I now turn to consider whether this test has been met.

1) Does the information qualify as advice, proposals, recommendations, analyses or policy options?

[73] SHA's submission asserted that the severed information qualified as advice, recommendations or analyses.

[74] "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 (*Guide to LA FOIP, Ch. 4, pp. 105-106*).

[75] Advice includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take (*Guide to LA FOIP, Ch. 4, p. 106*).

[76] A "recommendation" is 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”. It can include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised. It includes suggestions for a course of action as well as the rationale or substance for a suggested course of action. A recommendation, whether express or inferable, is still a recommendation (*Guide to LA FOIP*, Ch. 4, pp. 106-107).

[77] “Analyses” (or analysis) is the detailed examination of the elements or structure of something; the process of separating something into its constituent elements (*Guide to LA FOIP*, Ch. 4, p. 107).

[78] With respect to any factual material in the records, I will follow the approach described in my office’s *Guide to LA FOIP*, Ch. 4, at pages 109-110 which states:

The provision is not meant to protect the bare recitation of facts, without anything further. The provision should be reserved for the opinion, policy or normative elements of advice, and should not be extended to the facts on which it is based. The exception is where the advice and facts may be so intertwined as to preclude release.

Factual material means a cohesive body of facts, which are distinct from advice, proposals, recommendations, analyses and/or policy options. It does not refer to isolated statements of fact, or to the analyses of the factual material. Factual material refers specifically to information that cannot be withheld under section 16(1) and which must be separated from advice, proposals, recommendations, analyses and/or policy options if those are being withheld. Where factual information is intertwined with advice or recommendations in a manner whereby no reasonable separation can be made, then the information is not factual material and can be withheld.

The exemption does not generally apply to records or parts of records that in themselves reveal only the following:

- that advice was sought or given;
- that particular persons were involved in the seeking or giving of advice; or
- that advice was sought or given on a particular topic or at a particular time.

Pages 1-8

[79] SHA’s submission asserted:

The SHA applied section 16(1)(a) to the email body and letter. The information qualifies as guidance and analysis of an issue for discussion to create an action plan. Further this included a recommendation for the proposed course of action to address concerns raised developed for our organization and health sector partner organizations.

[80] Page 1 to the top of page 2 are three emails involving SHA senior staff. The emails that follow on pages 2 to 6 and the letter on pages 7 and 8 were copied to SHA staff. The emails on pages 1 and the top of page 2 contain advice about how to manage the events or communications set out on pages 2 to 8. I will consider if part two of the test has been met for this information below.

[81] However, the emails and letter set out in pages 2 to 8 do not include advice, recommendations or analyses. They only reveal the topic or subject matter of the advice that was provided on pages 1 and 2. Part one of the test for the application of subsection 16(1)(a) of LA FOIP has not been met for the information at the bottom of pages 2 to 8. As such, it is not necessary for me to consider if part two has been met. As no other exemptions have been claimed for this information, I find that SHA did not properly apply subsection 16(1)(a) of LA FOIP to this information. SHA has not claimed any other exemptions for this information. Accordingly, I recommend that the emails and letter on pages 2 to 8 be released to the Applicant, within 30 days of the issuance of this Report, with the exception of the personal email addresses that fall outside the scope of this review.

Page 9

[82] With respect to the severance made on page 9, SHA asserted:

The information redacted under section 16(1)(a) is advice and analysis by the CEO of the SHA in discussion of a decision item for the Covid-19 Provincial Emergency Operations Centre (PEOC). The CEO was expressing their view of circumstances pertaining to a decision required by the PEOC. This information was developed for the SHA Board of Directors.

[83] I find that the information severed from page 9 qualifies as advice because it is a statement of opinion about the likelihood of specific events transpiring. Therefore, SHA has

established that part one of the test has been met and I will consider part two of the test on this information.

Page 11

[84] With respect to the severances made on page 11, SHA's submission asserted:

The SHA applied section 16(1)(a) to the recommendation section of the decision item. This information qualifies as recommendations as these are the official recommendations provided in the decision item that was developed for the PEOC comprised of both members of the SHA and the Ministry of Health. This information specifies the advice and suggest course of action.

[85] The information severed from page 11 qualifies as a recommendation because it is a specific piece of advice about actions to be taken. Therefore, SHA has met part one of the test for this information and I will consider part two of the test on this information.

Pages 12-22

[86] With respect to pages 12, 14, 16 to 22, SHA asserted:

The SHA has applied section 16(1)(a) throughout the PEOC decision item as this contains the supporting information as advice to the PEOC and detailed analysis compiled to inform and support the required decision making. This document was developed for the PEOC comprised of both SHA and Ministry of Health officials.

[87] The information withheld on pages 12 and 14, is a detailed analyses of information relied on to support the recommendations made on page 11. Detailed recommendations were also withheld from pages 16 to 19. Therefore, part one of the test has been met for this information and I will consider part two of the test on this information.

[88] Portions of a table were withheld from page 20. Information about disruption at the Herbert facility which was severed under the column "Current State," does not qualify as advice, recommendations or analyses. The severed portions are statements of fact about the operation of the facility. It is not necessary for me to consider if part two of the test has been met for this information. I find that SHA did not properly apply subsection 16(1)(a)

of LA FOIP here. As no other exemptions have been claimed for this information, I recommend SHA release it to the Applicant within 30 days of the issuance of this Report.

[89] The information withheld in the same column about the Lanigan facility does qualify as advice as it describes a recommended course of action. The other information also withheld from page 20 qualifies as advice and analyses as it includes an assessment about the pros and cons of a course of action and a detailed analysis of the proposed course of action. I will consider if this information meets part two of the test for the application of subsection 16(1)(a) of LA FOIP below.

[90] The information severed on pages 21 and 22 under the heading “Current State” does not qualify as advice and analyses as it is factual information. As no other exemptions have been claimed for this information, I find that SHA did not properly apply subsection 16(1)(a) of LA FOIP to this information. I recommend that SHA release this information to the Applicant within 30 days of the issuance of this Report. All the other information withheld on these pages qualifies as advice and recommendations. I will consider below if part two of the test has been met for this information.

Pages 43 to 44

[91] With respect to pages 43 and 44, SHA asserted:

The SHA applied section 16(1)(a) as the email communications contained advice, analysis, and a recommendation on staffing and budget issues.

[92] Pages 43 and 44 contain a series of emails between SHA staff about hiring, employment and related processes for obtaining approval. This is an exchange of information or discussion among staff. The severed information does not contain advice, recommendation or analyses. I find that SHA did not properly apply subsection 16(1)(a) of LA FOIP to these pages. As SHA also claimed that this information was exempt pursuant to subsections 16(1)(b), (c) and (d) of LA FOIP, I will consider how SHA applied those exemptions to these pages later in this Report.

Page 56

[93] Regarding the severances made on page 56, SHA asserted:

The SHA applied section 16(1)(a) to these records as the information was advice and a recommendation of the suggested course of action developed for the SHA and Ministry of Health. This was developed with the intent for the SHA and Ministry of Health officials making a decision on the course of action.

[94] Page 56 includes an email exchange. SHA redacted portions of one email which contain a detailed analyses of a course of action. They also contain an analysis of the pros and cons of the course of action and views and opinion of the author that qualify as advice and analysis. Therefore, part one of the test has been met for this information and I will consider this information under part two of the test.

2) Was the advice, proposals, recommendations, analyses and/or policy options developed by or for the local authority?

[95] I now turn to consider if the severances made on pages 1, top of page 2, 9, 11, 12, 14, 16 to 19, portions of page 20, 21, 22 and 56 meet part two of the test.

[96] “Developed by or for” means the advice, proposals, recommendations, analyses and/or policy options must have been created either: 1) within the local authority, or 2) outside the local authority but for the local authority (for example, by a service provider or stakeholder) (*Guide to LA FOIP*, Ch. 4, p. 108).

[97] For information to be developed by or for a local authority, the person developing the information should be an official, officer or employee of the local authority, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the local authority (*Guide to LA FOIP*, Ch. 4, p. 108).

[98] It is apparent from a review of the information severed from pages 1, top of page 2, 9, 11, 12, 14, 16 to 19, portions of page 20, 21, and 22, that the advice, recommendations and

analyses was developed by employees of SHA for consideration by other staff or employees of SHA. This information is set out in the portions of the records released to the Applicant. Therefore, I find that part two of the test for the application of subsection 16(1)(a) of LA FOIP has been met for this information and that SHA properly applied subsection 16(1)(a) of LA FOIP to it. I recommend SHA continue to withhold this information pursuant to subsection 16(1)(a) of LA FOIP.

[99] While the information severed from page 56 was prepared by someone who is not an official, officer or employee of SHA, it is apparent from the context and from the information released to the Applicant that the information was developed by an individual who was engaged in an advisory role in relation the matters under discussion. Therefore, I find that part two of the test has been met. I find that SHA properly applied subsection 16(1)(a) of LA FOIP to this information. I recommend that SHA continue to withhold this information pursuant to subsection 16(1)(a) of LA FOIP.

6. Did SHA properly apply subsection 16(1)(b) of LA FOIP?

[100] I now turn to consider the application of subsection 16(1)(b) of LA FOIP to pages 43 and 44. This is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose consultations or deliberations involving officers or employees of a local authority (*Guide to LA FOIP*, Ch. 4, p. 112).

[101] The provision is intended to allow persons having the responsibility to make decisions to freely discuss the issues before them in order 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 (*Guide to LA FOIP*, Ch. 4, p. 112).

[102] Subsection 16(1)(b) of LA FOIP provides:

16(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 officers or employees of the local authority;

[103] My office uses the following two-part test to determine if subsection 16(1)(b) of LA FOIP applies:

1. Does the record contain consultations or deliberations?

2. Do the consultations or deliberations involve officers or employees of the local authority?

(Guide to LA FOIP, Ch. 4, pp. 113-114)

[104] Following is an analysis to determine if the two-part test has been met.

1. Does the record contain consultations or deliberations?

[105] SHA asserted that it applied 16(1)(b) of LA FOIP because the email discussion was a consultation between SHA's executive team members and its Board of Directors.

[106] "Consultation" means the action of consulting or taking counsel together: deliberation, conference. It is a conference in which parties consult and deliberate. A consultation can occur when the views of one or more officers or employees of a local authority are sought as to the appropriateness of a particular proposal or suggested action. It can include consultations about prospective future actions and outcomes in response to a developing situation. It can also include past courses of action. For example, where an employer is considering what to do with an employee in the future, what has been done in the past can be summarized and would qualify as part of the consultation or deliberation (*Guide to LA FOIP, Ch. 4, p. 113*).

[107] As noted above, the severed information is about staffing or hiring decisions and approval processes. The discussion qualifies as a discussion or deliberation about these issues.

Therefore, part one of the test for the application of subsection 16(1)(b) of LA FOIP has been met.

2. Do the consultations or deliberations involve officers or employees of the local authority?

[108] “Involving” means including. There is nothing in the exemption that limits the exemption to participation only of officers or employees of a local authority. Collaboration with others is consistent with the concept of consultation (*Guide to LA FOIP*, Ch. 4, p. 114).

[109] “Officers or employees of a local authority” means an individual employed by a local authority and includes an individual retained under a contract to perform services for the local authority (*Guide to LA FOIP*, Ch. 4, p. 114).

[110] Based on a review of the emails on pages 43 and 44, it is apparent that the severed information qualifies as a consultation or deliberation among SHA staff and its Board of Directors about whether specific approvals were required to proceed with a staffing or hiring decision. The identities of the senders and recipients of the emails was released to the Applicant. As such, I find that the second part of the test is met. Accordingly, I find that SHA properly applied subsection 16(1)(b) of LA FOIP to pages 43 and 44. I recommend that SHA continue to withhold this information pursuant to subsection 16(1)(b) of LA FOIP.

[111] Given my findings above, it is not necessary for me to consider if SHA properly applied subsections 16(1)(c) and (d) of LA FOIP.

IV FINDINGS

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

[113] I find that SHA did not comply with sections 7 and 12 of LA FOIP.

[114] I find that SHA appropriately found that information on page 41 was not responsive to the Applicant's access to information request.

[115] I find that SHA did not properly apply subsection 28(1) to the signatures withheld from pages 46 and 48.

[116] I find that SHA properly applied subsection 28(1) of LA FOIP with the exception of the signatures on pages 46 and 48.

[117] I find that SHA did not properly exercise its discretion to disclose the personal information withheld from page 48 pursuant to subsection 28(2)(n)(i) of LA FOIP.

[118] I find that SHA did not properly exercise its discretion to disclose the personal information withheld from page 48 pursuant to subsection 10(g)(ii) of the LA FOIP Regulations.

[119] I find that there was no conflict of interest in this matter.

[120] I find that SHA properly applied subsection 16(1)(a) of LA FOIP to some information.

[121] I find that SHA did not properly apply subsection 16(1)(a) of LA FOIP to some information.

[122] I find that SHA properly applied subsection 16(1)(b) of LA FOIP to some information.

V RECOMMENDATIONS

[123] I recommend that, within 30 days of issuance of this Report, SHA consider releasing the non-responsive portions of page 41, subject to any exemptions that may apply.

[124] I recommend that, within 30 days of issuance of this Report, SHA reconsider the exercise of its discretion pursuant to subsection 28(2)(n)(i) of LA FOIP for information withheld from page 48 and consider if it can release additional information to the Applicant.

[125] I recommend that, within 30 days of issuance of this Report, SHA reconsider the exercise of its discretion pursuant to subsection 10(g)(ii) of the LA FOIP Regulations for information withheld from page 48 and consider if it can release additional information to the Applicant.

[126] I recommend that, within 30 days of issuance of this Report, SHA consider contacting the author of the letter on page 48 to seek their views on the disclosure of their personal information and take those views into account.

[127] I recommend that, within 30 days of the issuance of this Report, SHA release the following information to the Applicant:

- Emails and letter at the bottom of page 2 to page 8 except for the personal email address of an identifiable individual.
- Information severed from page 20 under the column “Current State” about the Herbert facility.
- Information severed from pages 21 and 22 under the column “Current State.”
- Handwritten signatures on pages 46 and 48.

[128] I recommend that SHA continue to withhold information with the exception of the information described in paragraphs [123], [124], [125] and [127].

Dated at Regina, in the Province of Saskatchewan, this 21st day of August 2023.

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