



REVIEW REPORT 077-2021

Ministry of Environment

June 21, 2022

Summary: The Ministry of Environment (Environment) received an access to information request from the Applicant under *The Freedom of Information and Protection of Privacy Act* (FOIP) for information regarding an investigation. Environment granted access to some records in full and in part claiming that the withheld information was exempt pursuant to sections 15(1)(c), (e), (f), (i), 17(1)(a), (b)(i), 22(a) and 29(1) of FOIP. The Applicant requested a review by the Commissioner. The Commissioner found that Environment had not responded to the Applicant's request within the timeline required by section 7(2) of FOIP. He also found that portions of the records were not exempt pursuant to sections 17(1)(a), (b)(i), 22(a) and 29(1) of FOIP. The Commissioner recommended that these portions be released to the Applicant and the remaining portions be withheld. He also recommended that Environment review its policies, procedures, and training programs to ensure that they comply with FOIP.

I BACKGROUND

[1] On April 3, 2020, the Ministry of Environment (Environment) received an access to information request from the Applicant under *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant sought access to, “results of the investigation of the environmental emergency in the down stream Maple Creek and Tenaille Lake area.” The Applicant specified that they were seeking access to records dated 2020 or the most recent investigation if no investigation occurred in 2020.

[2] Environment stated that it took steps to clarify the access to information request on April 4, 2020. On June 18, 2020, Environment responded to the Applicant releasing responsive

records and withholding portions pursuant to sections 15(1)(c), (e), (f), (i), 17(1)(a), (b)(i), 22(a) and 29(1) of FOIP.

- [3] On April 8, 2021, my office received a request for review from the Applicant.
- [4] On April 14, 2021, my office notified the Applicant and Environment of my intention to undertake a review and invited both parties to provide a submission. The notification advised the parties that the review would consider the application of sections 15(1)(c), (e), (f), (i), 17(1)(a), (b)(i), 22(a) and 29(1) of FOIP, and why Environment did not respond to the Applicant's access to information request within the legislated timeline set out in section 7 of FOIP.
- [5] Environment provided a submission to my office on June 26, 2021. The Applicant did not provide a submission.
- [6] On February 23, 2022, Environment sent a revised response to the Applicant advising that it was also applying section 15(1)(d) of FOIP to a portion of the records.
- [7] In reviewing this file, I noted a discrepancy between the page references and exemptions claimed in the redacted records provided to the Applicant, index of records, and Environment's submission. For example, the submission refers in parts to pages 74 to 75 and 76 to 80 of the records. However, Environment identified 65 pages of responsive records in its response to the Applicant and its index of records. As another example, Environment's index of records does not include a reference to page 54 which, according to the redacted records received by the Applicant, was severed pursuant to section 29(1) of FOIP. I believe that these inconsistencies are a result of clerical errors.
- [8] As the redacted records provided to the Applicant form the basis of Environment's decision, I will rely on the redacted records sent to the Applicant for the definitive statement of the number of responsive records and the exemptions being claimed by Environment.

II RECORDS AT ISSUE

[9] Of the 65 pages of records responsive to the Applicant's request, Environment withheld nine pages in full and 35 pages in part. The table below describes the records at issue here, the exemptions claimed and Environment's decision:

| Page | Description | Exemption(s) applied to the record | Withheld in full or in part |
|----------|-------------|---|-----------------------------|
| 1 | Note | Section 29(1) of FOIP | Withheld in part |
| 2 | Email | Sections 15(1)(c), (e), (i) of FOIP | Withheld in part |
| 3 | Email | Sections 15(1)(a), (c), (d), (e), (i), (f), 17(1)(b)(i), 22(a), 29(1) of FOIP | Withheld in part |
| 4 | Email | Sections 15(1)(c), (e), (i), 22(a) of FOIP | Withheld in part |
| 5 | Email | Section 22(a) of FOIP | Withheld in full |
| 6 | Email | Section 22(a) of FOIP | Withheld in part |
| 8 | Note | Sections 15(1)(c), (e), (i) of FOIP | Withheld in part |
| 9 to 11 | Note | Sections 15(1)(c), (e), (i), 22(a) (page 9 only) of FOIP | Withheld in part |
| 12 | Email | Sections 15(1)(c), (e), (f), (i), 29(1) of FOIP | Withheld in part |
| 15 to 16 | Note | Sections 15(1)(c), (e), (i), 17(1)(a), (b)(i), 22(a) of FOIP | Withheld in part |
| 18 | Note | Sections 15(1)(c), (e), (i), 17(1)(a), (b)(i) of FOIP | Withheld in part |
| 21 | Note | Sections 15(1)(c), 22(a) of FOIP | Withheld in part |
| 22 | Note | Sections 15(1)(c), (e), (i), 17(1)(a), (b)(i) of FOIP | Withheld in part |
| 23 | Note | Sections 15(1)(c), (e), (i) of FOIP | Withheld in part |
| 24 | Note | Sections 15(1)(c), 17(1)(a) of FOIP | Withheld in part |
| 26 | Note | Sections 15(1)(c), (e), (i), 17(1)(a), (b)(i) of FOIP | Withheld in part |
| 27 | Note | Sections 15(1)(c), (e), 17(1)(a) of FOIP | Withheld in part |
| 28 | Email | Sections 15(1)(c), (e), (i), 17(1)(b) of FOIP | Withheld in part |
| 29 | Email | Sections 15(1)(c), (e), 17(1)(a) of FOIP | Withheld in part |
| 30 | Email | Sections 15(1)(c), (e), (i), 17(1)(a) of FOIP | Withheld in part |
| 31 | Email | Sections 15(1)(c), (e), 17(1)(b)(i) of FOIP | Withheld in part |
| 33 | Note | Section 29(1) of FOIP | Withheld in part |
| 36 | Note | Sections 15(1)(c), 17(1)(a) of FOIP | Withheld in part |
| 37 | Note | Sections 15(1)(c), (e), (i), 17(1)(b)(i) of FOIP | Withheld in part |

| | | | |
|----------|---------------|--|------------------|
| 38 | Note | Sections 15(1)(c), (e), (i) of FOIP | Withheld in part |
| 43 | Email | Sections 15(1)(c), (e), (i), 17(1)(a) of FOIP | Withheld in part |
| 44 | Email | Sections 15(1)(c), (e), (i), 17(1)(a), 29(1) of FOIP | Withheld in part |
| 46 | Email | Sections 15(1)(c), (e), (i), 17(1)(a) of FOIP | Withheld in part |
| 49 | Email | Sections 15(1)(c), (e), (i), 17(1)(a) of FOIP | Withheld in part |
| 50 | Email | Sections 15(1)(c), (e), (i), 17(1)(a) of FOIP | Withheld in full |
| 51 | Email | Sections 17(1)(a), (b)(i) of FOIP | Withheld in part |
| 54 | Email | Section 29(1) of FOIP | Withheld in part |
| 56 | Briefing Note | Section 17(1)(a) of FOIP | Withheld in full |
| 57 | Briefing Note | Sections 17(1)(a), (b)(i), 22(a) of FOIP | Withheld in full |
| 58 to 61 | Briefing Note | Sections 17(1)(a), (b)(i) of FOIP | Withheld in full |
| 63 | Email | Sections 15(1)(c), (e), (i), 17(1)(a) of FOIP | Withheld in full |
| 64 | Note | Sections 15(1)(c), (e), (i), 17(1)(a) of FOIP | Withheld in part |
| 65 | Note | Sections 15(1)(c), (e), (i), 17(1)(a) of FOIP | Withheld in part |

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[10] Environment is a “government institution” pursuant to section 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did Environment respond to the Applicant within the legislated timelines?

[11] Section 7(1) of FOIP sets out how a government institution must respond to an access to information request. Section 7(1) of FOIP provides in part:

7(1) Where an application is made pursuant to this Act for access to a record, the head of the government institution to which the application is made shall:

(a) consider the application and give written notice to the applicant of the head's decision with respect to the application in accordance with subsection (2);

[12] Section 7(2) of FOIP requires a government institution to respond to an applicant within 30 days of receiving an access to information request. Section 7(2) provides, in part:

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

[13] In calculating the due date for a response required by section 7(2) of FOIP, *The Legislation Act* establishes general rules that govern the interpretation of all statutory instruments in the province, including rules relating to the computation of time. As noted in my office's [Review Report 014-2021](#), which applied section 2-28 of *The Legislation Act* to section 7(2) of FOIP, the due date for a response is 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.
- As FOIP expresses the time in number of days, this is interpreted as 30 calendar days, not business days.

[14] In its submission, Environment asserted that after the request was received on April 3, 2020, it consulted with the Ministry of Agriculture (Agriculture) and the Water Security Agency (WSA) and invited them to comment on the release of the records. Agriculture and the WSA responded after the 30-day period for responding to the request had passed.

[15] Following the approach to the calculation of the 30-day response time set out above, Environment's June 18, 2020 response was sent well beyond the 30 day time limit for responding set out in section 7(2) of FOIP. Therefore, I find that Environment did not comply with section 7(2) of FOIP.

[16] Section 7(5) of FOIP provides that if an institution fails to respond pursuant to section 7(2) of FOIP, it is deemed to have refused to provide access. Section 7(5) of FOIP provides:

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

[17] I find that Environment is deemed to have refused to provide access pursuant to section 7(5) of FOIP. I recommend that Environment review its policies, procedures, and training programs to ensure that they appropriately support compliance with FOIP.

3. Did Environment properly apply section 29(1) of FOIP to the records?

[18] Environment withheld portions of pages 1, 3, 12, 33, 44 and 54 pursuant to section 29(1) of FOIP.

[19] Section 29(1) of FOIP is a mandatory exemption that protects the privacy of individuals whose personal information may be contained in records that are responsive to a request made by someone else. Section 29(1) of FOIP requires a government institution to have the consent of the individual whose personal information is in the record prior to disclosing it (*Guide to FOIP*, Chapter 4: “Exemptions from the Right of Access”, updated: April 30, 2021 (*Guide to FOIP*, Ch. 4) at p. 281).

[20] Section 29(1) of FOIP provides:

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

[21] In order for section 29(1) of FOIP to apply, the withheld information must qualify as third party “personal information.”

[22] Section 24(1) of FOIP defines “personal information” and provides some examples of the types of information that can be considered personal information. To qualify as personal

information, the information must, 1) be about an identifiable individual, and 2) be personal in nature. The examples in sections 24(1)(b) and (d) of FOIP may apply here. These sections provide:

24(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, other than the individual’s health services number as defined in The Health Information Protection Act;

[23] The list of examples of personal information in section 24(1) of FOIP is not exhaustive.

[24] In its submission, Environment asserted that the withheld information fell within the definition of personal information, but it did not refer to the specific provisions in section 24(1) of FOIP that it was relying on. It stated:

The records contain information that is personal in nature. It reflects identifiable information of an officer in the form of a badge number which is uniquely assigned to every individual. Other information includes individual’s information, such as time away from work, reasons for being away, or specific working from home details.

[25] The information withheld from pages 1 and 33 is the badge numbers of two Environment employees. While the badge number is an identifying number as referred to in section 24(1)(d) of FOIP, it is assigned to these employees in their professional or work capacity. It is not personal in nature and does not reveal anything personal about them. Moreover, it appears in a record that was generated by the employees in their professional or work duties.

[26] Similar circumstances and information were involved in my office’s [Review Report 131-2019](#), where I found that a police officer’s badge number that appeared on a report generated in the course of their employment did not qualify as their personal information.

Following the same approach here, I find that Environment's employees' badge numbers on pages 1 and 33 do not qualify as personal information in the circumstances of this case and the exemption in section 29(1) of FOIP does not apply.

[27] The statements withheld from emails on pages 3, 44 and 54 qualify as personal information pursuant to section 24(1)(b) of FOIP as they are identifiable and personal in nature. The severed statements reveal information about individuals' employment history under section 24(1)(b) of FOIP, including information about employees' time away from work. I note that some of the information on page 3 does not directly identify the individuals, such as by name; however, I am satisfied that there is other information in the records that have been released that would render these individuals identifiable. As the individuals to whom the severed information relates have not consented to the release of their personal information, I find that this information is exempt pursuant to section 29(1) of FOIP.

[28] It is not necessary for me to consider whether the information withheld from page 12 qualifies as personal information given my findings below that this information is exempt pursuant to section 15(1)(c) of FOIP.

4. Did Environment properly apply section 15(1)(c) of FOIP to the records?

[29] Environment withheld information from pages 2 to 4, 8 to 12, 15 to 16, 18, 21 to 24, 26 to 31, 36 to 38, 43 to 44, 49 to 50, and 63 to 65 claiming that it was exempt pursuant to section 15(1)(c) of FOIP. I note that Environment did not claim section 15(1)(c) of FOIP for the information severed in the middle of page 9, and on the bottom of pages 21 and 26. It appears that this was an oversight as similar information was withheld based on this exemption elsewhere in the records. In the analysis that follows, I will also consider whether section 15(1)(c) of FOIP applies to this information.

[30] Section 15(1)(c) of FOIP provides:

15(1) A head may refuse to give access to a record, the release of which could:

...

(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;

[31] Section 15(1)(c) of FOIP permits refusal of access in situations where the release of a record could interfere with a lawful investigation or disclose information with respect to a lawful investigation. In determining if this exemption applies, my office considers the following two-part test:

1. Is there a lawful investigation involved?
2. Does one of the following exist?
 - (a) Could the release of information interfere with a lawful investigation?
 - (b) Could the release of information disclose information with respect to a lawful investigation?

(*Guide to FOIP*, Ch. 4, pp. 52 - 53)

1. Is there a lawful investigation involved?

[32] A lawful investigation is an investigation that is authorized or required and permitted by law. The investigation can be concluded, active and ongoing or be occurring in the future. The government institution must have authority to conduct the investigation and the investigation must lead or could lead to penalties or sanctions (i.e. fines, imprisonment, revocation of a license, an order to cease activities).

[33] Environment asserted that the information withheld pursuant to section 15(1)(c) of FOIP relates to an investigation under section 38(4) of *The Environmental Management and Protection Act, 2010* (EMPA). It explained that Environment's Conservation Officers were assisting the WSA with the investigation into a potentially illegal junction dam release of Maple Creek into Tenaille Lake. To determine if a full investigation was appropriate or necessary, the WSA and Environment were conducting preliminary analysis or investigation. Section 38(4) of the EMPA provides, in part:

38(4) Subject to subsections (5) and (6), no person shall directly or indirectly:

(a) alter or cause to be altered the configuration of the bed, bank or boundary of any river, stream, lake, creek, marsh or other watercourse or water body;

[34] Section 84(2) of the EMPA provides that it is an offence to contravene a provision of the EMPA. Section 84(2) of the EMPA states:

84(2) Subject to subsection (3), every person who contravenes a provision of this Act, the regulations or the code, for which no penalty is otherwise provided, is guilty of an offence and liable on summary conviction to:

(a) a fine not exceeding \$1,000,000 for each day or part of a day during which the offence continues;

(b) imprisonment not exceeding three years; or

(c) both that fine and imprisonment

[35] Environment also stated that another purpose of the investigation was to determine if there was an instance of failure to obtain approvals under *The Water Security Agency Act* (WSAA). Sections 90(1)(f), (h), and (2) of the WSAA provide:

90(1) No person shall:

...

(f) take or use water without having authority from the corporation to do so;

...

(h) construct, extend, alter or operate any works:

(i) without having secured the approval of the corporation;

(2) Every person who contravenes any provision of subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding \$1,000,000 for each day or part of a day during which the offence continues.

[36] Section 89(1) of the WSAA provides the WSA with broad authorities to enforce the WSA. Section 89(1) of the WSAA provides:

89(1) For the purpose of carrying out its duties or exercising its powers pursuant to this Act or the regulations, the corporation, or any persons authorized by the corporation, may:

(a) enter at any reasonable time and inspect any building, structure, machinery, vehicle, land or water;

(b) make or require to be made any survey, examination, investigation, test or inquiry that the corporation considers necessary; and

(c) make, take and remove, or require to be made, taken or removed, any sample, copy or extract.

[37] In correspondence with my office, Environment added that sections 74, and 76 to 78 of the EMPA give environment officers the authority to carry out the investigation. Those sections provide, in part:

74(1) The minister may appoint any persons or class of persons as environment officers for the purpose of enforcing or overseeing the enforcement of:

(a) this Act;

(b) *The Water Security Agency Act* ;

...

76 All environment officers have the powers of peace officers to enforce this Act, the regulations, the code and the Acts, regulations, permits, approvals, licences or orders mentioned in section 74 and are entitled, while performing their duties, to all the protection to which peace officers are entitled pursuant to the Criminal Code.

...

78(1) In this section and in section 78.2:

“property” includes computer software;

“record” includes any information that is recorded or stored in any medium or by means of any device, including a computer or electronic media.

(2) An environment officer may conduct an audit or inspection in accordance with this section.

(3) An audit may be conducted on any person who has been issued a permit pursuant to this Act or who engages in an activity that is governed by an accepted environmental protection plan or the code.

[38] In my office’s [Review Report 248-2020, 167-2021](#), I found that an inspection authorized by section 3-63(1) of *The Saskatchewan Employment Act* (SEA) qualified as a lawful

investigation pursuant to section 15(1)(c) of FOIP, because it had the potential to result in a penalty or sanction under the SEA. In arriving at this conclusion, I stated:

[48] In [Review Report 381-2019](#) at paragraph [20], I found that inspections under *The Northern Municipalities Act* qualifies as a lawful investigation. In Order 96-019, the Office of the Information and Privacy Commissioner of Alberta (AB IPC) found that the authority to inspect falls within the definition of “investigate” if the inspection has the potential to result in a penalty or sanction being imposed under the particular statute or regulation under consideration. AB IPC’s Order provided:

[15.] Black’s Law Dictionary defines “investigation” as follows:

To follow up step by step by patient inquiry or observation. To trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry.

[39] Following the same approach here, I find that the audit, inspection and investigation activities authorized by section 78 of the EMPA and section 89(1) of the WSAA qualify as lawful investigations. As the activities could lead to penalties or sanctions under section 84(2) of the EMPA, I find that they qualify as lawful investigations and part 1 of the test for the application of section 15(1)(c) of FOIP has been met.

2. *Could the release of information disclose information with respect to a lawful investigation?*

[40] I now turn to consider whether release of this information could disclose information with respect to a lawful investigation. It is only necessary for a government institution to demonstrate that the information in the record is information with respect to a lawful investigation to meet this part of the test. “With respect to” are words of the widest possible scope; the phrase is probably the widest of any expression intended to convey some connection between two related subject matters. However, records that existed before an investigation commenced, such as regular reporting information, may not qualify for the exemption (*Guide to FOIP*, Ch. 4, p. 53).

[41] Environment asserted the following:

The pages at issue include communications that were intended to establish the relevant facts and share data where necessary with all involved parties, including decision makers and legal counsel, to make and receive recommendations. Investigative notes are prepared for use in recalling places, events, incidents, or other pertinent facts. They are maintained in case files in both offices. The importance of these communication details are focused on the mission of the investigation – which in this case was to determine if any illegal activity pertaining to water was occurring. The Conservation Officer’s primary purpose was to locate information and potential evidence on this specific matter and determine if further action was required.

[42] The information withheld pursuant to section 15(1)(c) of FOIP consists of records of communications between the various WSA and Environment staff involved in the investigation about the investigation’s status, the applicable law, the parties to be involved and the process to be followed. They include reports on the progress of the investigation, and notes taken by WSA, and Environment staff involved with the investigation. I am satisfied that all the information withheld pursuant to section 15(1)(c) of FOIP is information with respect to the lawful investigation and release could disclose information related to the lawful investigation. Therefore, both parts of the test have been met and I find that Environment properly applied section 15(1)(c) of FOIP in all cases. For the same reasons, I also find that section 15(1)(c) of FOIP applies to information severed in the middle of page 9, and on the bottom of pages 21 and 26.

[43] In light of these findings, it is not necessary for me to decide whether the information exempt pursuant to section 15(1)(c) of FOIP is also exempt under the other exemptions claimed in the alternative for that information (see the table at paragraph [9] for details).

5. Did Environment properly apply section 17(1)(a) of FOIP to the records?

[44] Environment withheld information pursuant to section 17(1)(a) of FOIP from pages 15, 16, 18, 21 to 31, 36 to 38, 43, 44, 46, 49, 50, 51, 56 to 61, and 63 to 65. I will not be considering any information that I have already found is exempt pursuant to section 15(1)(c). Therefore, the information at issue here is found on pages 22 (portions), 43 (portions), 44 (top of page), 51 and 56 to 61.

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

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

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

[46] My office uses the following two-part test to determine if section 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?

(Guide to FOIP, Ch. 4, pp.123-130)

[47] As noted above, Environment asserted that its Conservation Officers were assisting the WSA with an investigation into a potentially illegal junction dam release of Maple Creek into Tenaille Lake. To determine if a full investigation was appropriate or necessary, the WSA and Environment were conducting a preliminary analysis. It also asserted that it was working with the WSA to determine if there was a failure to obtain approvals under the WSAA. On the face of the records, it was clear that both WSA and Environment staff were engaged in this work.

[48] In its submission, Environment asserted:

The draft briefing notes contain information that reflects analysis and intelligence developed for the public bodies decision makers to use when making decisions and setting precedent on how to address lawful water concerns.

...

The information drafted in the communications were developed by and for government use. Releasing this information could reasonably be expected to disclose analysis that

was gathered by and for government intelligence and therefore should remain exempt. During the drafting stage, narratives change as more details are unearthed and exchanged. The included communication of officer notes or email exchanges (16-17, 18, 22, 24, 26-27, 28, 30-31, 36-37, 43-44, 46, 49-50, 51). Such records display the ongoing process of considering and discussing details with the aim of reaching a conclusion and decision on behalf of the public body. At the time of drafting, the final outcome in this case was not known.

[49] Drafts and redrafts of the advice, proposals, recommendations, analyses and/or policy options may be protected by the exemption. All the information in earlier drafts informs the end result even if the content of any one draft is not included in the final version (*Guide to FOIP*, Ch. 4, p. 128).

[50] Environment's submission asserted that the severed information qualifies as analyses. I will also consider whether the information qualifies as advice. My office's *Guide to FOIP* sets out the following definitions of the terms advice and analyses:

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 option 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.

...

Analyses (or analysis) is the detailed examination of the elements or structure of something; the process of separating something into its consistent elements.

(*Guide to FOIP*, Ch. 4, pp. 124-125)

[51] "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. An example of this would be by a service provider or stakeholder (*Guide to FOIP*, Ch. 4, p. 126).

- [52] For information to be developed by or for a government institution, the person developing the information should be an official, officer or employee of the government institution, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the government institution (*Guide to FOIP*, Ch. 4, p. 127).
- [53] 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 to this would be when the facts and advice are so intertwined as to preclude the release.
- [54] The exemption does not generally apply to records or parts of records that reveal only the following:
- Advice was sought or given
 - Particular persons were involved in the seeking or giving of advice or
 - Advice was sought or given on a particular topic at a particular time.
- [55] I find that the information on pages 22 (bottom of page), 43 (bottom of page) and 44 (top of page) includes advice on next steps in the investigation, and analysis of steps taken to date and the compliance issues. The information on page 22 is reflected in notes taken during a meeting with WSA and Environment staff and qualifies as advice about the investigation provided to the investigation team. The information severed from pages 43 and 44 was provided by WSA staff by email to WSA and Environment staff. I find that this information qualifies as advice and analyses provided by WSA staff to the investigation team. Therefore, the first part of the test for the application of section 17(1)(a) of FOIP has been met in relation to these records.
- [56] The information severed from page 51 is an email exchange between WSA staff and Agriculture staff. The information includes the authors' views about specified work to be carried out on the Applicant's property. I find that the severed information qualifies as advice.

[57] The advice and analyses on pages 22, 43, and 44 was developed by staff within the WSA for other WSA and Environment staff who were working together on the investigation described above. In the case of page 22, the advice was provided by WSA to Environment staff and others during a meeting. In the case of pages 43 and 44, the analyses were initially provided by WSA staff to other WSA staff, and subsequently provided to Environment staff. I find that the second part of the test for the application of section 17(1)(a) of FOIP has been met for these pages because the advice and analyses were developed by the WSA for Environment, both of which are government institutions. Therefore, I find that section 17(1)(a) of FOIP was appropriately applied to pages 22, 43 and 44.

[58] With respect to the severances on page 51, it is not clear on the face of the record how the severed information is connected to the work being carried out by the WSA and Environment. Environment's submission does not address this record other than in a general way to claim that the information was developed by and for government use. I note that the advice in this record was provided by Agriculture to the WSA, and not Environment. While it was subsequently copied to Environment by the WSA, I am not satisfied that Agriculture was providing advice to Environment in the circumstances of this review. Therefore, I find that section 17(1)(a) of FOIP does not apply to the severances made on page 51. I will consider in the discussion below whether this information is exempt pursuant to section 17(1)(b)(i) of FOIP.

[59] Pages 56 and 57 comprise a draft of a briefing note. The draft consists of a series of heading and bullet points. The bullet points qualify as advice and analyses. They set out the regulatory background to the investigation, a summary of the status of the investigation and an analysis of the issues in the investigation. It is clear from the covering email that the draft was prepared by the WSA for senior staff within the WSA. A copy of the draft was provided to Environment staff, who were assisting with the investigation and who were invited to review and comment on the draft. Therefore, both parts of the test have been met and I find that the bullet points are exempt pursuant to section 17(1)(a) of FOIP.

[60] However, the headings in the draft briefing note do not reveal advice and analyses. Release of this information would only reveal that the briefing note existed, and the topics covered

in the briefing note. I am not persuaded that the headings in this draft briefing note qualify as advice and analyses under section 17(1)(a) of FOIP. Therefore, I find that section 17(1)(a) of FOIP does not apply to the headings. I will consider below whether the headings are exempt pursuant to sections 17(1)(b)(i) or 22(a) of FOIP.

[61] Finally, on pages 58 to 61 there is a draft briefing note prepared by WSA staff to a member of Executive Council. In the case of this briefing note, the headings have been released to the Applicant. The severed information includes background information and analyses relating to the issues in the investigation conducted by the WSA, with the assistance of Environment. Some of the information in the briefing note is a recitation of facts; however, I find that it is so intertwined with other information that it cannot be released.

[62] Other factual information describing actions taken by the Applicant or their legal counsel do not qualify as advice and analyses. Therefore, I find that the first part of the test has not been met in relation to this information and section 17(1)(a) of FOIP does not apply. This finding applies to the following information:

- Under the heading “Key Messages”:
Bullets 1 and 3 - the first sentences
- Under the heading “Background”:
Bullets 1, 7, 12, 26 – the first sentences
Bullets 13, 14, 15, 16, 22, 24, 28, and 29 – all the sentences
Bullet 27 – the first and second sentence

6. Did Environment properly apply section 17(1)(b)(i) of FOIP to the records?

[63] Environment claimed section 17(1)(b)(i) of FOIP for several severances. Considering my findings above, I need only decide if section 17(1)(b)(i) of FOIP applies to the severances made on pages 28 and 51, the headings on pages 56 to 57 and the factual information on pages 58 to 61.

[64] Section 17(1)(b)(i) of FOIP 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 government institution.

[65] The provision is intended to allow persons with decision-making responsibility to freely discuss the issues before them to arrive at well-reasoned decisions. The intent is to allow such persons to address an issue without fear of being wrong, looking bad, or appearing foolish if their frank deliberations were to be made public. However, the provision is not meant to protect the bare recitation of facts, without anything further.

[66] Section 17(1)(b)(i) of FOIP provides as follows:

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

...

(b) consultations or deliberations involving:

(i) officers or employees of a government institution;

[67] My office uses the following two-part test when deciding whether section 17(1)(b)(i) of FOIP applies:

1. Does the record contain consultations or deliberations?
2. Do the consultations or deliberations involve officers or employees of a government institution, a member of the Executive Council, or the staff of a member of the Executive Council?

(Guide to FOIP, Ch. 4, pp. 132-133)

[68] “Consultation” means:

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

[69] A consultation can occur when the views of one or more officers or employees of a government institution 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 FOIP*, Ch. 4, p. 132).

[70] “Deliberation” means:

- the action of deliberating (to deliberate: to weigh in mind; to consider carefully with a view to a decision; to think over); careful consideration with a view to a decision;
- the consideration and discussions of the reasons for and against a measure by a number of councillors.

[71] As noted above, factual material cannot be withheld under section 17(1)(b)(i) of FOIP, and it should be severed from information about consultations or deliberations if that is being withheld. “Factual material” means a cohesive body of facts, which are distinct from consultations or deliberations (*Guide to FOIP*, Ch. 4, p. 134).

[72] The information withheld from page 28 is a draft of an email about which the author is seeking advice and feedback from colleagues. The parties involved in the email exchange are employees of Environment and the WSA. I find that the severed information qualifies as a consultation involving employees of the two government institutions. Therefore, I find that both parts of the test for the application of section 17(1)(b)(i) of FOIP have been met for this information.

[73] As noted above, the information withheld from page 51 is the authors’ views about specified work to be carried out on the Applicant’s property. It qualifies as a consultation between the WSA staff and Agriculture staff regarding this work. However, as Environment was only copied on the emails after the consultation and was not a party to the consultation, part 2 of the test has not been met. Therefore, I find that section 17(1)(b)(i) of FOIP does not apply to page 51.

[74] The headings in the briefing note on pages 56 and 57 do not qualify under section 17(1)(b)(i) of FOIP because they do not reveal information about the consultations or deliberations. Release of the headings would only reveal that the consultation took place and the topics about which the employees were consulting.

[75] As section 17(1)(b)(i) of FOIP does not apply to factual material, I also find that the factual or background information set out in paragraph [54] above does not qualify for exemption under section 17(1)(b)(i) of FOIP.

7. Did Environment properly apply section 22(a) of FOIP?

[76] Environment applied section 22(a) of FOIP to pages 3 to 6, 9, 15, 21, and 57. As I have found that some of this information is exempt pursuant to sections 15(1)(c) and 17(1)(b)(i) of FOIP, I need only consider whether this exemption applies to pages 3 to 6, and the headings on page 57.

[77] Section 22(a) of FOIP provides as follows:

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

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

[78] Section 22(a) of FOIP is a discretionary, class-based exemption. It permits refusal of access in situations where a record contains information that is subject to solicitor-client privilege (*Guide to FOIP*, Ch. 4, p. 255).

[79] The purpose of solicitor-client privilege is to assure clients of confidentiality and enable them to speak honestly and candidly with their legal representatives. The privilege has long been recognized as “fundamental to the proper functioning of our legal system” and a cornerstone of access to justice. It has evolved from a rule of evidence to a substantive rule that is more nuanced than simply any communications between lawyer and client (*Guide to FOIP*, Ch. 4, p. 258).

[80] My office has established the following test for section 22(a) of FOIP:

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

(Guide to FOIP, Ch. 4, pp. 258 – 264)

[81] Environment submitted as follows:

These pages include communication between WSA officials and the ministry in regard to investigating illegal works or illegal use of water. These communications and officer notes detail investigation protocols and investigative details discussing the application of or request for legal advice. Public bodies must have the freedom to receive accurate and competent legal advice that includes and encourages full disclosure to Crown Counsel without fear that the information will be revealed to others. The nature of the records themselves imply confidentiality when advising legal counsel of concerns and existing circumstances and requesting advice on how to proceed.

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

[82] The privilege extends to all communications made “within the framework of the solicitor-client relationship.” 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. Communication can be written or verbal. *(Guide to FOIP, Ch. 4, p. 258)*. My office’s *Guide to FOIP*, at page 260 states:

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. This includes notes “to file” in which legal advice is quoted or discussed.

[83] For the purposes of the first part of the test, the WSA is the client, and the WSA has its own legal counsel. The records at issue on pages 3 to 6 are emails between WSA staff and legal counsel providing background information and seeking legal advice. The emails qualify as communications between WSA’s solicitors and their client. Therefore, I find that the first part of the test is met for pages 3 to 6.

[84] The information severed pursuant to section 22(a) from the draft briefing note on page 57 records legal advice provided by WSA legal counsel to WSA staff. The solicitor-client privilege extends to the headings and bullet points at the bottom of page 57. I find that the first part of the test is met for the information at issue on page 57. Environment staff were copied on the emails and the draft briefing note which raises an issue about possible waiver of privilege that I will address below.

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

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

[85] The scope of solicitor-client privilege exemption is broad. It applies to all communications made with a view of obtaining legal advice. If a communication falls somewhere within the continuum of that necessary exchange of information, the object of which is the giving or receiving of legal advice, it is protected by solicitor-client privilege (*Guide to FOIP*, Ch. 4, pp. 260-261).

[86] 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 (*Guide to FOIP*, Ch. 4, p. 261).

[87] There must be an expectation on the part of the government institution that the communication will be confidential. Not every aspect of relations between a lawyer and a client is necessarily confidential. (*Guide to FOIP*, Ch. 4, p. 262).

[88] Pages 3 to 6 consist of an email string that begins on page 7. Environment claimed that the subject lines of the emails on pages 3 to 6 were exempt pursuant to section 22(a) of FOIP. However, it did not claim section 22(a) for any part of page 7 because it is an email addressed to the Applicant. In my view, the subject lines were not intended to be confidential given that the same subject line appears in the email to the Applicant, a copy of which was released in response to their access to information request. Therefore, part 3

of the test has not been met for the subject line of the emails and section 22(a) of FOIP does not apply.

[89] I now turn to the other information severed from pages 3 to 6 and the information severed from page 57. This information qualifies as a communication between WSA, Environment and WSA's legal counsel for the purposes of seeking legal advice. Pages 3 to 6 provide an update to legal counsel on the investigation, include a discussion about next steps in the investigation and a request to legal counsel for a legal opinion. The information severed from page 57 summarizes the legal issues and advice in the investigation for WSA senior staff. Given the context and the role of legal counsel, I find that these communications entail the giving or seeking of legal advice, with the intent that the communications be treated confidentially, and therefore, I find that solicitor-client privilege would apply to these records.

[90] Given that the solicitor-client relationship was between the WSA and its legal counsel, I must determine if the privilege was waived when WSA staff copied Environment staff on these communications. Disclosure to outsiders of privileged information generally constitutes waiver of privilege. However, if there is a sharing of information between parties where the parties have a sufficient "common interest," then the privilege is preserved (or not waived) (*Guide to FOIP*, Ch. 4, p. 269). The privilege that exists when records are provided among parties is referred to as "common interest privilege."

[91] My office's [Review Report 298-2019](#) applied the following two-part test to determine if there was a common interest exception to waiver of privilege that is available under section 21(a) of *The Local Authority Freedom of Information and Protection of Privacy Act*, which is equivalent to section 22(a) of FOIP:

1. Does the record contain information that is subject to any privilege that is available at law, and
2. Do the parties who share that information have a "common interest," but not necessarily an identical interest, in the information.

[92] I have already found that the severed information is subject to solicitor-client privilege and, therefore, the first part of the “common interest” test has been met.

[93] Considering that Environment was an active participant in the investigation carried out by the WSA, it shared the WSA’s interest in ensuring that the investigation was conducted appropriately and in accordance with applicable laws. For these reasons, I find that the WSA and Environment shared a common interest in the communications with WSA legal counsel regarding the investigation.

[94] I find that the WSA and Environment had a common interest in the information severed from pages 3 to 6, and 57. Therefore, I find that common interest privilege applies. Also, I find that WSA’s sharing of the information with Environment did not constitute a waiver of the solicitor-client privilege. Environment properly applied section 22(a) of FOIP to the information at issue, other than the subject line of the emails on pages 3 to 6.

IV FINDINGS

[95] I find that Environment did not respond to the Applicant’s access to information request within the time required by section 7(2) of FOIP.

[96] I find that section 29(1) of FOIP does not apply to the information withheld from pages 1 and 33.

[97] I find that section 29(1) of FOIP does apply to the information withheld on pages 3 and 54.

[98] I find that section 15(1)(c) of FOIP applies to information withheld from pages 2 to 4, 8 to 12, 15, 16, 18, 21 to 24, 26 to 31, 36 to 38, 43, 44, 49, 50, and 63 to 65. It also applies to information withheld in the middle of page 9, and on the bottom of pages 21 and 26.

[99] I find that section 17(1)(a) of FOIP does not apply to the headings on pages 56, 57 and the following portions of pages 58 to 61:

- Under the heading “Key Messages”:
Bullets 1 and 3 - the first sentences
- Under the heading “Background”:
Bullets 1, 7, 12, 26 – the first sentences
Bullets 13, 14, 15, 16, 22, 24, 28, and 29 – all the sentences
Bullet 27 – the first and second sentence

[100] I find that section 17(1)(a) of FOIP applies to information withheld on pages 22, 43, 44, the bulleted points on pages 56 and 57, and the remaining portions of pages 58 to 61.

[101] I find that section 17(1)(b)(i) of FOIP does not apply to page 51 and the headings on pages 56 and 57.

[102] I find that section 22(a) of FOIP applies to pages 3 to 6, except for the subject line of the emails, and page 57.

V RECOMMENDATIONS

[103] I recommend that Environment review its policies, procedures, and training programs to ensure that they comply with FOIP, including section 7 of FOIP.

[104] I recommend that Environment release the badge numbers on pages 1 and 33.

[105] I recommend that Environment continue to withhold the information severed pursuant to section 29(1) of FOIP from pages 3, 44 and 54.

[106] I recommend that Environment continue to withhold the information severed pursuant to section 15(1)(c) of FOIP on pages 2 to 4, 8 to 12, 15, 16, 18, 21 to 24, 26 to 31, 36, 38, 43, 44, 49, 50, 63 to 65, and the information that I have found to be exempt pursuant to section 15(1)(c) of FOIP on pages 9, 22, and 26.

[107] I recommend that Environment release the headings on page 56 and the top of page 57, and the following portions of pages 58 to 61:

- Under the heading “Key Messages”:
Bullets 1 and 3 - the first sentences
- Under the heading “Background”:
Bullets 1, 7, 12, 26 – the first sentences
Bullets 13, 14, 15, 16, 22, 24, 28, and 29 – all the sentences
Bullet 27 – the first and second sentence

[108] I recommend that Environment continue to withhold the information severed pursuant to section 17(1)(a) of FOIP from pages 22, 43, 44, the bulleted points on pages 56 and 57, and the remaining portions of pages 58 to 61.

[109] I recommend that Environment release the information severed on page 51.

[110] I recommend that Environment continue to withhold the information severed pursuant to section 22(a) of FOIP from pages 3 to 6, except for the subject line of the emails, and page 57.

[111] I recommend that Environment release the subject line of the emails on pages 3 to 6.

Dated at Regina, in the Province of Saskatchewan, this 21st day of June, 2022.

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