



REVIEW REPORT 145-2022

Saskatchewan Human Rights Commission

January 9, 2023

Summary:

The Saskatchewan Human Rights Commission (SHRC) issued a decision pursuant to section 7 of *The Freedom of Information and Protection of Privacy Act* (FOIP) in compliance with a recommendation made by the Commissioner in Review Report 091-2021. SHRC's decision denied access to two records relying on subsections 17(1)(a), (b), (g), 18(1), 19(1), 22(b), (c) and 29(1) of FOIP. The Applicant asked the Commissioner to review SHRC's decision. The Commissioner found that SHRC did not properly apply subsections 17(1)(a), (b), (g) and 18(1)(e) of FOIP. He also found that SHRC properly applied subsection 29(1) of FOIP to some portions of Record 2 and not other portions. The Commissioner also found that SHRC did not comply with section 8 of FOIP. The Commissioner recommended that SHRC release the records except for the information he found exempt pursuant to subsection 29(1) of FOIP. Finally, he recommended that SHRC ensure that its policies and procedures require a line-by-line review of responsive records and identification of the exemptions claimed on the redlined version of records provided to applicants and his office.

I BACKGROUND

[1] In [Review Report 091-2021](#), issued on December 13, 2021, I made the following recommendation to the Saskatchewan Human Rights Commission (SHRC):

[57] I recommend that, within 30 days of the issuance of this Report, the SHRC review Records 2 and 5, with the exception of page 129 of Record 5, and issue a new section 7 response to the Applicant treating Records 2 and 5 as responsive, and setting out its decision regarding release or applying applicable exemptions to withhold.

- [2] On January 24, 2022, SHRC followed the recommendation and issued a decision under section 7 of *The Freedom of Information and Protection of Privacy Act* (FOIP). SHRC's decision released portions of the records and withheld portions pursuant to subsections 17(1)(a), (b), (g), 18(1), 19(1), 22(b), (c) and 29(1) of FOIP.
- [3] On June 30, 2022, the Applicant filed a request for a review of SHRC's decision with my office.
- [4] On September 26, 2022, my office notified the Applicant and SHRC of my office's intention to conduct a review and invited them to provide a submission.
- [5] My office received an Index of Records and a redlined version of the records from SHRC on October 26, 2022.
- [6] My office received a submission from SHRC on November 25, 2022. SHRC confirmed that it was no longer claiming that subsection 19(1) of FOIP applied. It also stated that its Index of Records should have included its claim that subsection 29(1) of FOIP applies.
- [7] SHRC's submission reasserted its claim that Record 5 (Record 2 in this review), was not responsive to the Applicant's request. As I have already found that this Record was responsive in Review Report 091-2021, I will not consider this claim in this Report.
- [8] SHRC advised my office on December 20, 2022, that it was no longer relying on subsections 22(b) and (c) of FOIP.

II RECORDS AT ISSUE

- [9] SHRC released page 26 of Record 1 and page 117 of Record 2 in full. It also released portions of page 91, Record 2. Therefore, there are 313 pages at issue in this review. The following table describes the two records at issue and the exemptions claimed:

Record No.	Description	Page No.*	Released/ Withheld	Exemptions
1 (referred to as Record 2 in Review Report 091-2021)	Email dated February 8, 2021 with attached Draft Deaf, deaf and Hard of Hearing Report dated January 18, 2021	1 to 25	Withheld	FOIP subsections 17(1)(a), (b), (g), and 18(1)(e)
2 (referred to as Record 5 in Review Report 091-2021)	Systemic Operations Package dated February 8, 2021	27 to 116	Page 91 - Portions released, remainder withheld	FOIP subsections 17(1)(a), (b) and (g) FOIP subsection 29(1) applied to pages 31, 62 and 86
2	As above	118 to 315	Withheld	FOIP subsections 17(1)(a), (b) and (g) FOIP subsection 29(1) applied to pages 192 and 219 to 221

*The page numbers refer to the page numbers used by SHRC in the copies of the records provided to my office.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[10] SHRC qualifies as a “government institution” pursuant to subsection 2(1)(d)(ii) of FOIP and section 3 and Part I of the Appendix to *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Therefore, I have jurisdiction to review this matter.

2. Did SHRC properly apply subsections 17(1)(a), (b) and (g) of FOIP?

[11] SHRC claimed that Record 1 (pages 1 to 25) and Record 2 (pages 27 to 90, portions of page 91, 92 to 116, and 118 to 315) are exempt pursuant to the discretionary exemptions in subsections 17(1)(a), (b) and (g) of FOIP.

[12] Subsection 17(1)(a) of FOIP 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.

[13] Subsection 17(1)(b) 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, a member of the Executive Council or the staff of a member of the Executive Council. The provision is intended to permit public bodies to consider options and act without constant public scrutiny.

[14] Subsection 17(1)(g) of FOIP permits refusal of access in situations where release of a record could reasonably be expected to disclose information, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

[15] Subsections 17(1)(a), (b) and (g) of FOIP provide:

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;

(b) consultations or deliberations involving:

(i) officers or employees of a government institution;

(ii) a member of the Executive Council; or

(iii) the staff of a member of the Executive Council;

...

(g) information, including the proposed plans, policies or projects of a government institution, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

[16] My office uses the following two-part test to determine if subsection 17(1)(a) of FOIP applies:

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

2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

(*Guide to FOIP*, Chapter 4: “Exemptions from the Right of Access”, updated April 30, 2021, [*Guide to FOIP*, Ch. 4], pp.124 to 126)

[17] My office’s *Guide to FOIP* sets out the following definitions:

“Advice” is guidance offered by one person to another. It can include the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice encompasses material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It can be an implied recommendation. The “pros and cons” of various options also qualify as advice. It should not be given a restricted meaning. Rather, it should be interpreted to include an 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.

...

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.

A “proposal” is something offered for consideration or acceptance.

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

“Policy options” are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant’s identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.

...

“Developed by or for” means the advice, proposals, recommendations, and/or analyses must have been created either: 1) within the government institution, or 2) outside the

government institution, but *for* the government institution and at its request (for example, by a service provider or stakeholder).

...

To put it another way, in order to be “developed by or for” the government institution, the advice, proposals, recommendations, analyses and/or policy options should:

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

(*Guide to FOIP*, Ch. 4, pp. 124-127)

[18] Subsection 17(1)(a) of FOIP 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 (*Guide to FOIP*, Ch. 4, p.128).

[19] 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.

(*Guide to FOIP*, Ch. 4, pp. 128-129)

[20] The following two-part test is applied in relation to subsection 17(1)(b) of FOIP:

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)

[21] The following two-part test is applied in relation to subsection 17(1)(g) of FOIP:

1. Is it the information of a government institution?
2. Could disclosure reasonably be expected to result in disclosure of a pending policy or budgetary decision?

(Guide to FOIP, Ch. 4, pp.150-151)

[22] SHRC's submission did not address the tests for the application of subsections 17(1)(a), (b) and (g) of FOIP. Nor did its submission explain how or why these exemptions apply.

[23] With respect to Record 1, SHRC asserted:

[Record 1] is exempt from disclosure in its entirety as being advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive council subject to section 17(1)(a) of FOIP, and as being consultation or deliberations involving officers or employees of a government institution subject to 17(1)(b) of FOIP.

[Record 1] is further exempt from disclosure as it contains information including proposed plans, policies or projects of a government institution, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision subject to section 17(1)(g) of FOIP.

[24] SHRC's submission in relation to Record 2 repeated its claim that the information is exempt pursuant to subsections 17(1)(a), (b) and (g) of FOIP.

[25] Record 1 is a draft version of a report. The final version of this report was released to the public on October 28, 2021, and is available on SHRC's website. Record 1 includes background information about the role of SHRC, a description of applicable laws, a summary of work done to date, and work in progress. Much of the report consists of statements of fact, such as information about work completed, and public announcements made by the Saskatchewan government and others.

[26] Record 2 contains information such as factual information, headers of emails and reports, updates on ongoing projects, excerpts from legislation and references to publicly available

information. It also contains information about who was involved in discussions and projects, and general topics to be discussed at the systemic advisory meeting.

[27] SHRC's submission makes a bald assertion that Records 1 and 2, in their entirety, are exempt. As noted above, SHRC did not explain why or how the exemptions apply to the records or portions of the records.

[28] Section 61 of FOIP places the burden of establishing that an exemption applies on the government institution. It provides:

61 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[29] SHRC has not met its obligation under section 61 of FOIP to establish that access to Records 1 and 2 may or must be refused pursuant to subsections 17(1)(a), (b) or (g) of FOIP. As such, I find that SHRC did not properly apply subsections 17(1)(a), (b) and (g) of FOIP to Records 1 and 2.

[30] SHRC claimed that portions of Record 2 are exempt pursuant to subsection 29(1) of FOIP. I will consider whether SHRC properly applied subsection 29(1) of FOIP below.

[31] SHRC also claimed that portions of Record 1 are exempt pursuant to subsection 18(1)(e) of FOIP. I now turn to consider if SHRC properly applied this exemption to Record 1.

3. Did SHRC properly apply subsection 18(1)(e) of FOIP?

[32] SHRC applied subsection 18(1)(e) of FOIP to pages 1 to 25 of Record 1. Subsection 18(1)(e) of FOIP is a discretionary exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of a government institution. It also covers considerations related to the negotiations.

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

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

...

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

[34] My office applies the following two-part test:

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

(Guide to FOIP, Ch. 4, pp. 178-180)

[35] SHRC asserted:

[Record 1] is further exempt from disclosure as it could be reasonably expected to disclose positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution or considerations that relate to those negotiations, pursuant to section 18(1)(e) of FOIP.

[36] SHRC did not provide any other information or explanation as to how this exemption applies to Record 1. I have provided some examples of the type of information that is contained in Record 1 in paragraph [25] above. This information would not qualify for exemption pursuant to subsection 18(1)(e) of FOIP because it is not positions, plans, procedures, criteria, instructions or considerations that relate to contractual or other negotiations.

[37] I find that subsection 18(1)(e) of FOIP does not apply. Accordingly, I find that SHRC did not properly apply subsection 18(1)(e) of FOIP to pages 1 to 25 of Record 1. As no other

exemptions have been claimed for Record 1, I recommend that SHRC release it to the Applicant.

[38] SHRC is a sophisticated institution with experience providing submissions to my office. However, this is not the first time that it has failed to meet its burden of proof as required by section 61 of FOIP. In my office's [Review Report 171-2019](#), I found that SHRC had not met the burden in relation to a claim that information was exempt pursuant to subsection 17(1)(a) of FOIP. The circumstances of that review are similar to those here.

[39] SHRC should explain why information is exempt and identify the specific portions of a record for which an exemption has been claimed. When preparing a submission, I encourage SHRC to consult the tests set out in my office's [Guide to FOIP, Chapter 4](#) and provide a sufficiently detailed submission as recommended in my office's [A Guide to Submissions](#).

4. Did the SHRC properly apply subsection 29(1) of FOIP?

[40] SHRC claimed that portions of Record 2 are exempt pursuant to subsection 29(1) of FOIP. Subsection 29(1) of FOIP is a mandatory exemption that protects the privacy of individuals whose personal information is contained in records that are responsive to a request made by someone else. This information is referred to as third party "personal information". Under subsection 29(1) of FOIP, a government institution must have the third party's consent prior to disclosing their personal information unless one of the provisions in subsection 29(2) of FOIP permits the disclosure (*Guide to FOIP*, Ch. 4, p. 255).

[41] Subsection 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.

[42] For this exemption to apply, the information must qualify as third party “personal information” which is defined in subsection 24(1) of FOIP. In this review, the relevant subsections are:

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:

(a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;

(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;

...

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

...

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual;
or

[43] Subsection 24(1) of FOIP does not provide an exhaustive list of what qualifies as personal information. Other information may qualify as personal information if the information is:
1. about an identifiable individual; and 2. personal in nature.

[44] SHRC claimed that information about stakeholders and other named individuals that appears in Record 2, pages 31, 62, 86, 192, and 219 to 221 qualifies as their personal information. SHRC asserted:

Portions of these documents are further exempt from disclosure pursuant to section 29(1) of FOIP as they contain personal information of identifiable individuals. A spreadsheet identifying the portions of the documents that contain personal information and are therefore exempt is attached to this Submission as Appendix “C”.

[45] Appendix “C” to SHRC’s submission helpfully identifies the pages of Record 2 that SHRC claims contain personal information. However, it does not identify the information on those

pages that is subject to subsection 29(1) of FOIP. SHRC's submission does not include an explanation of how the information qualifies as personal information.

Pages 31, 192, and 219 to 221

- [46] The names of SHRC complainants, and in some cases the names of their children or grandchildren, appear on pages 31, 192, and 219 to 221. In addition to revealing their identity as SHRC complainants, the records reveal information about their family status, education, their personal opinions or views, and other personal information about them. This information qualifies as their personal information pursuant to subsections 24(1)(a), (b), (f) and (k) of FOIP. Severance of the names of these individuals, along with the names of their children and/or grandchildren, would render the information non-identifiable. Therefore, I find that SHRC properly applied subsection 29(1) of FOIP to the names of complainants, their children and/or grandchildren on pages 31, 192, and 219 to 221 of Record 2. I recommend SHRC continue to withhold this information pursuant to subsection 29(1) of FOIP.
- [47] Two professors (page 219) and one person identified as a senior psychologist (page 192) appear to have been consulted by the SHRC in their personal capacity and not on behalf of an organization.
- [48] My office dealt with a claim that stakeholder submissions provided during a consultation process included personal information in my office's [Review Report F-2010-001](#). In that case, the Ministry of Health (MOH) withheld names, job titles and contact details of the submissions' authors. For those submissions that were provided to MOH by individuals who represented private or public sector organizations, my office found that the names of the individuals, their contact details and their views did not constitute personal information because it was not information about them. For those individuals who provided submissions as private citizens, my office found that it was appropriate to withhold their names and personal email addresses which fell within the definition of personal information.

- [49] Following the same approach here, I find that the names of the two professors and senior psychologist, their personal opinions or views and the fact that they were consulted by SHRC qualify as personal information pursuant to subsections 24(1)(b), (f) and (k) of FOIP. Therefore, I find that SHRC properly applied subsection 29(1) of FOIP to the names of these three individuals. I recommend SHRC continue to withhold their names pursuant to subsection 29(1) of FOIP.
- [50] If individuals' names are properly severed from these pages, the remaining information about them would not qualify as personal information because it would not be identifiable.
- [51] These pages also include the names of SHRC, Elections Saskatchewan, Dyslexia Canada, Saskatchewan Health Authority, Saskatchewan School Boards Association, Learning Disabilities Association of Saskatchewan, and Ministry of Education staff. These names appear in a professional or business context as the individuals were consulted or engaged on behalf of the organizations they are affiliated with. Therefore, the information about these individuals is not personal in nature. Following the approach taken in Review Report F-2010-001, I find that the names of these individuals do not qualify as personal information. I recommend SHRC release this information.

Pages 62 and 86

- [52] Record 5, pages 62 and 86, are lists of stakeholders that were consulted by SHRC. In all cases, the names appear with the name of an organization that the individuals are associated with. However, page 62 also includes the names of three organizations under the heading "Vacancies" and no individuals are associated with these organizations.
- [53] My office asked SHRC to provide information about the capacity in which the listed individuals were consulted. SHRC stated the individuals listed on these pages were consulted on behalf of their organizations, with one exception, that I will consider below.

[54] With the exception of one individual, the individuals listed on pages 62 and 86 were consulted in a professional or business capacity. Following the same approach taken in my office's Review Report F-2010-001, I find that SHRC did not properly apply subsection 29(1) of FOIP to these individuals' names and the organizations that they are affiliated with. I also find that SHRC did not properly apply subsection 29(1) of FOIP to the names of three organizations listed on page 62 under the heading "Vacancies." I recommend SHRC release this information.

[55] SHRC stated that one individual, whose name appears on pages 62 and 86 under the heading "Public," did not participate on behalf of the organization they are affiliated with. Therefore, their name qualifies as personal information. However, SHRC advised my office that this individual's name was released in the final version of the related report that was published on SHRC's website. Therefore, even though the individual's name would qualify as personal information, I find that SHRC did not properly apply subsection 29(1) of FOIP to the information as it would be absurd to do so. I recommend that SHRC release the individual's name to the Applicant.

5. Did SHRC meet its obligation under section 8 of FOIP?

[56] Section 8 of FOIP provides as follows:

8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

[57] This provision requires government institutions to conduct a line-by-line review of responsive records to determine if any exemptions apply to the records and what information can be reasonably severed. The government institution is required to sever the portions that it claims are exempt, cite the exemption relied on to sever each portion of the record and release the remaining information.

[58] SHRC did not take a line-by-line approach to applying the exemptions in this case. For example, it applied three exemptions, subsections 17(1)(a), (b), and (g) of FOIP, to 313 pages.

[59] In other words, SHRC took a blanket approach in applying these exemptions instead of a line-by-line analysis required by section 8 of FOIP. For these reasons, I find that SHRC did not meet its obligation under section 8 of FOIP. I recommend that SHRC ensure that its policies and procedures require a line-by-line review of records. I also recommend that its policies require staff to specifically identify the exemptions that it is applying on the redlined version of the copies of records provided to applicants and my office. For guidance, SHRC should view my office's webinar, "[Modern Age Severing Made A Lot Easier](#)" and [Review Report F-2006-003](#).

[60] I made a similar recommendation to SHRC in my office's Review Reports [171-2019](#), [002-2020](#) and [065-2020](#). It is in SHRC's interest to comply with this recommendation because doing so will help it meet the burden of proof set out in section 61 of FOIP.

IV FINDINGS

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

[62] I find that SHRC did not properly apply subsections 17(1)(a), (b), and (g) of FOIP to Records 1 and 2.

[63] I find that SHRC did not properly apply subsection 18(1)(e) of FOIP to Record 1.

[64] I find that SHRC properly applied subsection 29(1) of FOIP to individuals' names described in paragraphs [46] and [49] above.

[65] I find that SHRC did not properly apply subsection 29(1) of FOIP to the name of the individual described in paragraph [55] above.

[66] I find that SHRC did not properly apply subsection 29(1) of FOIP to other information in Record 2.

[67] I find that SHRC did not meet its obligation under section 8 of FOIP.

V RECOMMENDATIONS

[68] I recommend that SHRC release Record 1 to the Applicant within 30 days of issuance of this Report.

[69] I recommend that SHRC continue to withhold individuals' names from Record 2 as described in paragraphs [46] and [49] above.

[70] I recommend that SHRC release Record 2, other than the information described in paragraphs [46] and [49] above, within 30 days of issuance of this Report.

[71] I recommend that, within 30 days of issuance of this Report, SHRC ensure that its policies and procedures require a line-by-line review of records responsive to access to information requests.

[72] I recommend that, within 30 days of issuance of the Report, SHRC ensure that its policies and procedures require its staff to specifically identify the exemptions that SHRC is applying on the redlined version of the copies of records provided to applicants and my office.

Dated at Regina, in the Province of Saskatchewan, this 9th day of January, 2023.

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