



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **REVIEW REPORT 148-2023**

### **Saskatchewan Legal Aid Commission**

**November 9, 2023**

#### **Summary:**

The Applicant submitted an access to information request to Saskatchewan Legal Aid Commission (SLAC). SLAC withheld portions of the records pursuant to subsections 17(1)(a), (b), (c), and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP) and subsection 27(1) of *The Health Information Protection Act* (HIPA). The Applicant was not satisfied with SLAC's response and requested the Commissioner undertake a review of the exemptions claimed, the manner of access and SLAC's decision to not respond within the legislated timeline. The Commissioner found that SLAC did not comply with section 7 of LA FOIP, and that it did provide access to the Crown disclosure records in an appropriate manner. The Commissioner also found that SLAC properly applied subsection 17(1)(a), (b) and (c) of FOIP to some portions of the record, but not others. The Commissioner found that SLAC did not properly apply subsection 29(1) of FOIP, and that some portions of the records contain the Applicant's personal information or information where withholding it would result in an absurd result. The Commissioner recommended that SLAC ensure its policies or procedures reflect its legal obligations to process access requests within the legislative timeline. The Commissioner also recommended that SLAC continue to withhold or release records within 30 days of the issuance of this Report, as outlined in the Appendix.

#### **I BACKGROUND**

- [1] On March 27, 2023, the Saskatchewan Legal Aid Commission (SLAC) received the Applicant's access to information request, which stated, "please send all records relating

to me. The known time of our interaction is between 2015 and the time this request is processed.”

- [2] In correspondence dated June 2, 2023, SLAC issued its section 7 decision letter to the Applicant, advising that portions of the responsive records were being withheld pursuant to subsections 17(1)(a), (b)(i), (c) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP) and subsections 2(1)(m)(i) and 5(2)(a) of *The Health Information Protection Act* (HIPA). SLAC’s response also noted that it “cannot provide [the Applicant] with any Crown disclosure that was forwarded to our office on trust conditions.”
- [3] On June 10, 2023, the Applicant confirmed with my office that they had received SLAC’s response and noted they were not satisfied with it.
- [4] On June 14, 2023, my office clarified that SLAC was relying on subsection 27(1) of HIPA to withhold portions of the record where the section 7 decision letter referenced subsections 2(1)(m)(i) and 5(2)(a) of HIPA. In addition, my office requested SLAC confirm what exemptions were applied to withhold the “Crown disclosure” records. SLAC advised that the Applicant could view the “Crown disclosure” records in-office. However, as per the trust conditions, it would not provide a copy to the Applicant.
- [5] On June 19, 2023, my office asked SLAC if the Applicant was advised of their ability to view the “Crown disclosure” records in-office. SLAC arranged for the Applicant to attend at its office on June 29, 2023, to view them in person. On June 30, 2023, SLAC updated my office and advised that the Applicant was 40 minutes late for their appointment and requested another appointment to continue their review. SLAC advised this was scheduled for July 4, 2023. SLAC’s submission indicates that the Applicant did attend this appointment and reviewed the disclosure records.
- [6] On July 10, 2023, the Applicant confirmed that the scope of their request for review included the application of subsections 17(1)(a), (b)(i), (c) and 29(1) of FOIP and

subsection 27(1) of HIPA, the manner of access, SLAC's section 7 decision deficiencies and its decision not to respond within the legislated timelines.

[7] On July 12, 2023, my office notified SLAC and the Applicant of my intention to undertake a review.

[8] On June 10, 2023, the Applicant provided their submission. On September 18, 2023, SLAC provided its submission.

## **II RECORDS AT ISSUE**

[9] At issue are 17 pages of records withheld in part. See the Appendix for descriptions of these records.

## **III DISCUSSION OF THE ISSUES**

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

[10] SLAC is a "government institution" as defined by subsection 2(1)(d)(ii) of FOIP and subsection 3(a) and Part I of *The Freedom of Information and Protection of Privacy Regulations*.

[11] SLAC also cited subsection 27(1) of HIPA to withhold information. For HIPA to be engaged, three elements must be present: 1) there must be personal health information; 2) there must be a trustee; and 3) the personal health information must be in the custody or control of the trustee.

[12] First, the information withheld pursuant to subsections 27(1) of HIPA would have to qualify as "personal health information" as defined by subsection 2(1)(m) of HIPA. Based on a review of the information, it appears SLAC withheld portions of pages 5 and 14 of the record that identify an individual and contain comments regarding the individual's health.

SLAC's submission indicates that the information at issue qualifies as personal health information pursuant to subsection 2(m)(i) of HIPA, which I agree with. Subsection 2(1)(m)(i) of HIPA provides as follows:

2(1) In this Act:

...

(m) "personal health information" means, with respect to an individual, where living or deceased:

(i) information with respect to the physical or mental health of the individual;

[13] Personal health information is present.

[14] Second, subsection 2(1)(t)(i) of HIPA defines "trustee" as follows:

2(1) In this Act:

...

(t) "trustee" means any of the following that have custody or control of personal health information:

(i) a government institution;

[15] SLAC, therefore, qualifies as a trustee pursuant to subsection 2(1)(t)(i) of HIPA.

[16] Third, since the personal health information includes records managed by SLAC, SLAC has custody or control of the personal health information.

[17] As FOIP and HIPA are engaged, I find I have jurisdiction to conduct this review.

## 2. Did SLAC comply with section 7 of FOIP?

[18] Section 7 of FOIP provides that an applicant must receive a response from the government institution. The response must be within 30 days and must contain certain elements, which are enumerated at subsections 7(2) and 7(3) of FOIP (*Guide to FOIP*, Chapter 3: "Access to Records", Updated 5 May 2023 [*Guide to FOIP*, Ch. 3], p. 47).

[19] Subsection 7(2) of FOIP provides as follows:

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

[20] SLAC's submission provided the following regarding the delay responding to the Applicant's request:

In this case, the Applicant had made [their] request to the Saskatoon City Area Office on March 27, 2023. At that time, the Applicant requested all records relating to [them].

SLAC did not provide the notice within the legislated timelines. The request was not made known to the Privacy Officer for SLAC, [name of Privacy Officer], until [the Privacy Officer] was contacted by the Office of the Privacy Commissioner on May 19, 2023.

[The Privacy Officer] was required to obtain and review the files prior to the notice being provided to the Applicant. [The Privacy Officer] contacted the Applicant on May 31, 2023 to advise that the response would be provided to [them] by June 2, 2023. [The Privacy Officer] also advised the Office of the Privacy Commissioner of this timeline on June 1, 2023.

[The Privacy Officer] provided the Section 7 response to the Applicant, along with the redacted record, on June 2, 2023.

[21] The 30-day timeline to respond to an access request begins when an Applicant submits their request to a government institution. SLAC received the Applicant's access to information request on March 27, 2023, and so, its response was due April 26, 2023. SLAC, however, issued its section 7 decision on June 2, 2023, which made it 37 days late. As such, I find it did not comply with section 7 of FOIP.

[22] In previous reports, I have said that it is up to the government institution to ensure it has policies and procedures in place to direct access requests to the appropriate staff to process them. I recommend SLAC ensure its policies and procedures reflect its legal obligations under FOIP to process access requests within the legislative timeline, and to ensure all access to information requests are directed to SLAC's Privacy Officer immediately upon receipt.

[23] I add that subsection 7(2)(a) of LA FOIP requires a government institution to state in its section 7 decision the manner in which access will be given, including if it is to be given in person. SLAC's section 7 decision to the Applicant did not include this, and so its section 7 decision was deficient. SLAC's section 7 decision should have also arranged for in-person access to occur within the legislated timeline. I recommend that if SLAC intends to provide access to a record in person, then in the future it outlines the manner it will do so in its section 7 decision.

**3. Did SLAC provide access to the record in the appropriate manner?**

[24] Section 10 of FOIP deals with how access to a record will be given to applicants. Depending on the type of record, the manner of access can include providing paper copies of records, providing electronic copies or allowing applicants to view a record (*Guide to FOIP*, Ch. 3, p. 87).

[25] SLAC's submission states as follows:

In its June 2nd (Section 7) response to the Applicant, SLAC advised, "please note that we cannot provide you with any Crown disclosure that was forwarded to our office on trust conditions".

SLAC is not seeking to deny access of the Applicant to the Crown disclosure but is seeking to limit how the Applicant accesses these records.

Crown disclosure in relation to criminal charges is forwarded to defense counsel, including SLAC, by Saskatchewan Public Prosecutions for the sole purpose of assisting an accused to make full answer and defence. Disclosure materials are not meant to be public documents as they contain private information.

The Crown requires that lawyers maintain the ability to control access to disclosure materials. In addition, the Crown most often imposes specific trust conditions with respect to witness statements.

...

The Applicant was invited to review the Crown disclosure on file at the Saskatoon City Area Office. [The Applicant] attended on June 29, 2023 to review the disclosure but arrived 40 minutes late. A new time was scheduled for [the Applicant] on July 4, 2023 at which time [the Applicant] did attend and reviewed the disclosure.

It is open for the Applicant to make further arrangements to attend and review the disclosure material at the Saskatoon City Office.

It is the position of SLAC that providing an electronic or physical copy of the Crown disclosure is not reasonable given SLAC's obligation to maintain custody and control over the disclosure materials.

[26] In a November 8, 2023 email, SLAC clarified the following regarding the Applicant's appointments to view the Crown disclosure records:

On June 29th, [the Applicant] started to view the disclosure, but [they] did not get it completed before the office closed.

[The Applicant] did attend on July 4th. [The Applicant] arranged this meeting when [the Applicant] was attending the office on June 29th. The arrangements were made verbally.

I have an email from [SLAC's Acting Legal Director] indicating that [the Applicant] attended the meeting. The meeting was terminated by [SLAC's Acting Legal Director] when [the Applicant] attempted to photograph the disclosure...

Additional disclosure (a recording of phone calls) was located after the July 4th meeting. [The Applicant] was advised of its existence on October 10, 2023 and advised to contact [SLAC's Interim Legal Director] to review the disclosure. [The Applicant] attended the office on October 31, 2023. [The Applicant] attempted to record the disclosure. [SLAC's Interim Legal Director] stopped the disclosure from playing. [The Applicant] asked for a copy of the disclosure. [The Applicant] was advised that we cannot provide [them] with a copy...

[27] SLAC cited subsection 10(4) of FOIP, which provides:

**10(4)** A head may give access to a record:

(a) by providing the applicant with a copy of the record; or

(b) if it is not reasonable to reproduce the record, by giving the applicant an opportunity to examine the record.

[28] Subsection 2(1)(i) of FOIP defines "record" as follows:

**2(1)** In this Act:

...

(i) “record” means a record of information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include computer programs or other mechanisms that produce records;

[29] Based on the information provided by SLAC, it appears the Applicant was able to view the records in person. Subsection 10(4)(b) of FOIP provides that a government institution, at its discretion, can arrange for a person to view a record in person, which is what SLAC did. SLAC was not obligated to provide a paper copy of the record to the Applicant. I find, therefore, that SLAC provided access to the record in the appropriate manner. As I noted in my discussion on whether SLAC complied with section 7 of FOIP, though, SLAC should have ensured it outlined the manner of access in its section 7 decision, setting out the terms of how the Applicant could access the record.

**4. Did SLAC properly apply subsections 27(1) of HIPA?**

[30] Subsection 27(1) of HIPA provides:

**27(1)** A trustee shall not disclose personal health information in the custody or control of the trustee except with the consent of the subject individual or in accordance with this section, section 28 or section 29.

[31] Previously in this Report, I found that the redaction on page 5 and portions of the withheld information on page 14 contain personal health information of an identifiable individual. The subject individual is not the Applicant. As SLAC does not have the consent of the subject individual to release this information, I find it properly applied subsection 27(1) of HIPA to this information and recommend it continue to withhold it pursuant to subsection 27(1) of HIPA (see Appendix for details).

**5. Did SLAC properly apply subsections 29(1) of FOIP and do the records also contain the Applicant’s personal information or information that would be within the Applicant’s knowledge?**

[32] 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.

[33] Section 29 of FOIP prohibits the disclosure of personal information unless the individual about whom the information pertains to, consents to its disclosure or if the disclosure without consent is authorized by one of the enumerated subsections of 29(2) or section 30 of FOIP (*Guide to FOIP*, Chapter 6, “Protection of Privacy”, updated February 27, 2023 [*Guide to FOIP*, Ch. 6], p. 186).

[34] To qualify as personal information as defined by subsection 24(1) of FOIP, the information must: 1) be about an identifiable individual; and 2) be personal in nature. Information is about an “identifiable individual” if the individual can be identified from the information (e.g., their name is provided) or if the information, when combined with information otherwise available, could reasonably allow the individual to be identified. To be “personal in nature” means the information provides something identifiable about the individual (*Guide to FOIP*, Ch. 6, pp. 32-33).

[35] Subsections 24(1)(a), (b), (e), (h) and (k) of FOIP defines “personal information” as follows:

**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;

...

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

...

(h) the views or opinions of another individual with respect to the individual;

...

(k) the name of the individual where:

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

(ii) the disclosure of the name itself would reveal personal information about the individual.

[36] SLAC's submission indicates that the information at issue qualifies as personal information pursuant to subsections 24(1)(e) and (k) of FOIP. SLAC described the information as the "unpublished" telephone numbers of two Crown Prosecutors. Based on the nature of the record, it appears that the Crown Prosecutors use these numbers in a professional and not a personal capacity. In my office's [Review Report 186-2019](#) and [Review Report 126-2022](#), I found that business contact information is not personal in nature and should be released. Because of this, I find SLAC did not properly apply subsection 29(1) of FOIP to this information and recommend it release this information. See Appendix for details.

[37] As stated in the background of this Report, the Applicant asked for records about themselves. SLAC did not identify if any portions of the records contain the Applicant's personal information. Subsection 31(1) of FOIP, provides:

**31(1)** Subject to Part III and subsection (2), an individual whose personal information is contained in a record in the possession or under the control of a government institution has a right to, and:

(a) on an application made in accordance with Part II; and

(b) on giving sufficient proof of his or her identity;

shall be given access to the record.

[38] Also, in past review reports (e.g., [Review Report 040-2023](#)), I stated it is an "absurd result" to withhold a record that contains information: 1) that is within a person's knowledge because they provided it; 2) that was provided when the individual was present; and/or 3) that is clearly within the person's knowledge.

[39] As noted above, an Applicant shall be given access to a record that contains their own personal information. SLAC withheld portions of the record pursuant to subsections 17(1)(a), (b) or (c) of FOIP. However, based on a review, there are portions of the records that appear to qualify as the Applicant's personal information as they contain information relating to the Applicant's age, criminal history and opinions others about them (which would be their own personal information as defined by subsections 24(1)(a), (b) and (h) of FOIP). These include:

- Page 14 - first five words of the first redaction; last sentence of the third redaction;
- Page 15 - first line and sixth line in the redaction;
- Page 19 - fifth sentence in the first redaction;
- Page 18 – the redacted portion;
- Page 21 - third redaction;
- Page 25 - first sentence in the redaction; and
- Page 61 - last 10 lines in third redaction.

[40] I find, therefore, the information described in the preceding paragraph is the Applicant's personal information and that they have a right of access to it pursuant to subsection 31(1) of FOIP. As such, I recommend SLAC release the information identified in the preceding paragraph to the Applicant within 30 days of the issuance of this Report. See the Appendix for details.

[41] Additionally, there are portions of the records SLAC withheld pursuant to subsection 17(1)(a) or (b) of FOIP that withholding would be considered an absurd result, I note the following:

- Page 50 - Notes relate to a conversation with the Applicant;
- Page 51 - Notes relate to a telephone conversation with the Applicant; and
- Page 61 - in first six lines of the third redaction, there are notes that appear to refer to a discussion with the Applicant.

[42] I find, therefore, it would be an absurd result to withhold the information described in the preceding paragraph from the Applicant because they were either present or would otherwise have knowledge of it. As such, I recommend SLAC release this information to the Applicant within 30 days of the issuance of this Report. See the Appendix for details.

**6. Did SLAC properly apply subsections 17(1)(a) of FOIP?**

[43] As I previously stated in this Report, I will not include any of the portions of the records where I recommended that SLAC release those portions to the Applicant because they either contain the Applicant's personal information or because it would be an absurd result to withhold that information from the Applicant. I will reflect this in my analysis of the exemptions that follow. For details on all my findings and recommendations, please refer to the Appendix.

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

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

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

[45] Subsection 17(1)(a) of FOIP is a discretionary class-based 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 (*Guide to FOIP*, Chapter 4: "Exemptions from the Right of Access", Updated: April 30, 2021, [*Guide to FOIP*, Ch. 4], p. 123).

[46] To determine if this exemption applies, my office applies the following two-part test:

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. 124 – 126)

- [47] SLAC's submission provides the following regarding the application of this exemption to the records:

The records redacted based on this exemption qualify as advice, recommendations or analysis involving employees of SLAC. They reveal more than the information was sought or given or that particular persons were involved in the seeking or giving of the advice. The records created were sought, expected or part of the responsibility of the persons preparing the record and were prepared for the purpose of doing something. The records were also developed within SLAC or for SLAC at its request.

- [48] SLAC stated the portions of these records contain advice, recommendations or analysis developed by or for SLAC. My office's *Guide to FOIP*, Ch. 4, pages 124 to 128, provides these definitions:

- "Advice" is guidance offered by one person to another. It can include the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice encompasses material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It can be an implied recommendation. The "pros and cons" of various options also qualify as advice. It should not be given a restricted meaning. Rather, it should be interpreted to include an opinion that involves exercising judgement and skill in weighing the significance of fact. It includes expert opinion on matters of fact on which a government institution must make a decision for future action.
- A "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.
- "Analyses" (or analysis) is the detailed examination of the elements or structure of something; the process of separating something into its constituent elements.

- “Factual material” means a cohesive body of facts, which are distinct from advice, proposals, recommendations, analyses and/or policy options. A government institution can only withhold factual material or assertions of fact under subsection 17(1) of FOIP if the factual information is sufficiently interwoven with other advice, proposals, recommendations, analyses and/or policy options so that it cannot reasonably be considered separate and distinct. In other words, 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.
- “Developed by or for” means the advice, proposals, recommendations, analyses and/or policy options must have been created either: 1) within the government institution, or 2) outside the government institution but *for* the government institution and at its request (for example, by a service provider or stakeholder).

***Pages 6 and 7***

[49] SLAC’s submission indicates that the portions of these records “includes advice...on how [sic] administer [their] private bar appointment.” Based on a review of the record, it appears that factual information about the process is being provided. I am not persuaded that the redacted portion of the record contains advice. As the first part of the test is not met, I find that SLAC did not properly apply subsection 17(1)(a) of FOIP to these pages. SLAC also applied subsection 17(1)(b) of FOIP to this information. As such, I will consider the application of this exemption later on.

***Pages 14 to 16***

[50] SLAC’s submission indicates that this record contains information about “the parties providing advice and making recommendations with respect to the Applicant’s file”. SLAC added they also contain a note “advising, consulting and providing [their] recommendation on the process” related to the Applicant’s file. Based on a review of the information, it does not appear that it would qualify as recommendations and advice. As such, I find that the first part of the test is not met and that SLAC has not properly applied subsection 17(1)(a) of FOIP to this information. I will also consider SLAC’s application of subsection 17(1)(b) of FOIP to the information later on.

*Pages 19 and 20*

[51] SLAC's submission states that the note contains advice relating to the Applicant. Upon review, I am not persuaded the information would qualify as advice. As the first part of the test is not met, I find that SLAC has not properly applied subsection 17(1)(a) of FOIP to this page. I will also consider SLAC's application of subsections 17(1)(b) and (c) of FOIP to these pages later on.

*Page 21*

[52] SLAC's submission states that this record (an email) contains information "advising and consulting on [their] communications with the Applicant as well as advice on [the Applicant's] outstanding criminal charges." Based on a review of the record, the information appears to relate to the Applicant's file. However, I am not persuaded the information qualifies as advice. As the first part of the test is not met, I find that SLAC has not properly applied subsection 17(1)(a) of FOIP to this page. I will also consider SLAC's application of subsection 17(1)(b) of FOIP to this page later on.

*Page 25*

[53] SLAC's submission indicates that the withheld portion of the record contains information "advising and consulting with [them] regarding [their] analysis of circumstances pertaining to the Applicant as well as [their] recommendations going forward." Based on a review of the record, with the exception of the first two sentences and the last sentence of the redacted portion, I agree that they contain the Legal Director's advice on how to handle the Applicant's file. As such, the first part of the test is met.

[54] Regarding the second part of the test, the portions that remain contain handwritten notes to an employee of SLAC from the Legal Director, which meets the second part of the test. I find, therefore, SLAC properly applied subsection 17(1)(a) of FOIP to page 25, except for

the portions noted in the preceding paragraph, and recommend it continue to withhold it pursuant to subsection 17(1)(a) of FOIP. See Appendix for details.

***Pages 61 (redactions 1 and 2) and 63***

[55] SLAC’s submission indicates that these pages of the record contain “notes from the private bar panel member... advising and consulting with SLAC of [their] representation of the Applicant, as well as [their] analysis of [the Applicant’s] circumstances.” Based on a review of the record, it appears that the withheld information contains notes relating to the Applicant’s case. I am not persuaded that the information would qualify as advice or analysis. As the first part of the test is not met, I find that SLAC has not properly applied subsection 17(1)(a) of FOIP to these pages. I will consider SLAC’s application of subsection 17(1)(b) of FOIP to these pages later on.

**7. Did SLAC properly apply subsection 17(1)(b) of FOIP?**

[56] Subsection 17(1)(b) of FOIP provides:

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

...

(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;

[57] Subsection 17(1)(b) of FOIP 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 government institution, a member of the Executive Council or the staff of a member of the Executive Council (*Guide to FOIP*, Ch. 4, p. 131).



[58] To determine if this exemption applies, my office applies the following two-part test:

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)

[59] SLAC's submission provides the following regarding the application of this exemption to the records:

The records redacted based on this exemption constitute consultations or deliberations involving employees of SLAC. The records include both consultations and deliberations and involve employees of SLAC.

[60] My office's *Guide to FOIP*, Ch. 4, pages 132 and 133, provides the following definitions:

- "Consultation" means:
  - the action of consulting or taking counsel together: deliberation, conference;
  - a conference in which the parties consult and deliberate.

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.

- "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.

A deliberation can occur when there is a discussion or consideration of the reasons for or against an action. It can refer to discussions conducted with a view towards making a decision.

- “Involving” means including. There is nothing in the exemption that limits the exemption to participation only of officers or employees of a government institution, a member of the Executive Council, or the staff of a member of the Executive Council. Collaboration with others is consistent with the concept of consultation.
- “Officers or employees of a government institution” means an individual employed by a government institution and includes an individual retained under a contract to perform services for the government institution.

***Pages 6 and 7***

[61] SLAC’s submission indicates that the information withheld would qualify as a consultation. Based on a review of the record, it appears that factual information about the process is being provided. I am not persuaded that the redacted portion of the record contains a consultation. As the first part of the test is not met, I find that SLAC has not properly applied subsection 17(1)(b) of FOIP. I will also consider SLAC’s application of subsection 17(1)(c) of FOIP to these pages later on.

***Pages 14 to 16***

[62] SLAC’s submission indicates that this portion of the record contains information where the parties were “providing advice and making recommendations with respect to the Applicant’s file.” Based on a review, it does appear the information would qualify as a consultation as the parties are consulting on the Applicant’s file. As such the first part of the test is met. The exception is the last redaction on page 16 and the last redaction on page 14, which I previously determined should be released to the Applicant (see the Appendix).

[63] Based on a review of the remaining portions of these pages, the consultations involve employees of SLAC. As such, the second part of the test is met and I find that SLAC properly applied subsection 17(1)(b) of FOIP to these portions and recommended that it

continue to withhold this information pursuant to subsection 17(1)(b) of FOIP. See Appendix for details.

*Pages 19 and 20*

[64] SLAC's submission states that the record constitutes "deliberations between SLAC staff and the Crown." Based on a review of the record, SLAC is requesting information from Public Prosecutions regarding the Applicant's file. I am not persuaded the information would qualify as deliberations. As the first part of the test is not met, I find that SLAC has not properly applied subsection 17(1)(b) of FOIP to this page. I will also consider SLAC's application of subsection 17(1)(c) of FOIP to these pages later on.

*Page 21*

[65] SLAC's submission states that the email contains information "advising and consulting on [their] communications with the Applicant as well as advice on [the Applicant's] outstanding criminal charges." Based on a review of the record, the information appears to relate to factual information regarding the Applicant's file. However, I am not persuaded the information qualifies as consultations. As the first part of the test is not met, I find that SLAC has not properly applied subsection 17(1)(b) of FOIP to this page. As there are no other exemptions for me to review on this page, I recommend SLAC release the information to the Applicant within 30 days of the issuance of this Report. See Appendix for details.

*Page 25*

[66] SLAC's submission indicates that the withheld portion of the record contains information where employees were "advising and consulting with [them] regarding [their] analysis of circumstances pertaining to the Applicant as well as [their] recommendations going forward." I have already found that the first sentence of the redaction is the Applicant's personal information and should be released. As well, I have found that subsection 17(1)(a)

of FOIP applies to the information, with the exception of the second sentence and the last sentence of the redaction, I will only consider the remaining two sentences for subsection 17(1)(b) of FOIP to these portions. Based on a review of the information, I am not persuaded that the information qualifies as a consultation. As the first part of the test is not met, I find that subsection 17(1)(b) of FOIP does not apply. As there are no other exemptions for me to review on this page, I recommend SLAC release the second and last sentence of the redaction to the Applicant within 30 days of the issuance of this Report. See Appendix for details.

***Pages 61 (redactions 1 and 2) and 63***

[67] SLAC's submission indicates that these pages of the record contain "notes from the private bar panel member... advising and consulting with SLAC of [their] representation of the Applicant, as well as [their] analysis of [the Applicant's] circumstances." Based on a review of the portions of these pages where SLAC is relying on subsection 17(1)(b) of FOIP, it does not appear that they contain a consultation. As the first part of the test is not met, I find that SLAC has not properly applied subsection 17(1)(b) of FOIP. As there are no other exemptions for me to review on this page, I recommend SLAC release the information to the Applicant within 30 days of the issuance of this Report. See Appendix for details.

**8. Did SLAC properly apply subsections 17(1)(c) of FOIP?**

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

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

...

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

[69] Subsection 17(1)(c) of FOIP is a discretionary class-based 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 (*Guide to FOIP*, Ch. 4, p. 136).

[70] To determine if this exemption applies, 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. 137 – 138)

[71] SLAC's submission provides the following regarding the application of this exemption to the records:

The two records redacted based on this exemption contain positions taken or instructions developed relating to contractual or other negotiations. The records were developed by or on behalf of SLAC.

[72] SLAC stated the portions of these records contain positions or instructions relating to negotiations. My office's *Guide to FOIP*, Ch. 4, pages 137 to 139, provides these definitions:

- A "position" is a point of view or attitude. An opinion; stand; a way of regarding situations or topics; an opinion that is held in opposition to another in an argument or dispute.
- "Instructions" are directions or orders.
- "Developed" means to start to exist, experience or possess.
- A "negotiation" is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings conducted between two or more parties for the purpose of reaching an understanding. It connotes a more robust relationship than "consultation". It

signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion.

The negotiations can be conducted by the government or on behalf of the government. The contractual or other negotiations can be concluded, ongoing or future negotiations.

***Pages 6 and 7***

[73] SLAC's submission indicates that the withheld information on these pages would qualify as a position. Based on a review of the record, it appears that factual information about the process is being provided. I am not persuaded that the redacted portion of the record contains information that qualifies as a position. As the first part of the test is not met, I find that SLAC has not properly applied subsection 17(1)(c) of FOIP. As there are no other exemptions for me to review on this page, I recommend SLAC release the information to the Applicant within 30 days of the issuance of this Report. See Appendix for details.

***Pages 19 and 20***

[74] I previously noted that the fifth sentence on the first redaction contains information that SLAC should release to the Applicant. Regarding the remaining information, SLAC's submission states it's a note containing information that would qualify as a position. Based on a review, it appears the remaining information in the first redaction on page 19 would qualify as a position as it contains the view of the prosecutor regarding the Applicant's charges, which meets the first part of the test. However, the second redaction on page 19 and the redaction on page 20 do not reveal any information regarding the position. As I am not persuaded that the information in these two redactions qualify as a position, I find that SLAC did not properly apply subsection 17(1)(c) of FOIP to the second redaction on page 19 and the redaction on page 20. As there are no other exemptions for me to review to these redactions, I recommend SLAC release the information to the Applicant within 30 days of the issuance of this Report. See Appendix for details.

[75] Regarding the second part of the test, the information in the first redaction on page 19 was contained in an email from the Ministry of Justice to SLAC. SLAC's submission indicates

that this information “forms the basis for future negotiations with respect to a potential resolution of the charges.” As such, the second part of the test has been met for the remaining information in the first redaction on page 19 and that SLAC properly applied subsection 17(1)(c) to it. I recommend SLAC continue to withhold this portion pursuant to subsection 17(1)(c) of FOIP. See Appendix for details.

#### **IV FINDINGS**

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

[77] I find that SLAC did not comply with section 7 of FOIP.

[78] I find that SLAC provided access to the record in the appropriate manner.

[79] I find that SLAC has not properly applied subsection 29(1) of FOIP.

[80] I find that portions of the record contain the Applicant’s personal information or where withholding it would result in an absurd result.

[81] I find that SLAC properly applied subsections 17(1)(a), 17(1)(b) and 17(1)(c) of FOIP and subsection 27(1) of HIPA to some portions of the record, but not others.

#### **V RECOMMENDATIONS**

[82] I recommend SLAC ensure its policies or procedures direct staff to ensure its policies and procedures reflect its legal obligations under FOIP to process access requests within the legislative timeline and ensure all access to information requests are directed to SLAC’s Privacy Officer immediately upon receipt.

[83] I recommend that if SLAC intends to provide access to a record in person, then in the future it outlines the manner in its section 7 decision letter.

[84] I recommend SLAC continue to withhold or to release within 30 days of the issuance of this Report the records as outlined in the Appendix.

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

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



Appendix

Page Number	Redaction number	Record Type	Exemption(s) applied	IPC Finding(s)	IPC Recommendation(s)
2	1	Note	Subsection 29(1) of FOIP	29(1) of FOIP does not apply	Release
5	1	Form	Subsection 27(1) of HIPA	27(1) of HIPA applies	Withhold
6 – 7	1 – 2	Letter	Subsections 17(1)(a), 17(1)(b) and 17(1)(c) of FOIP	17(1)(a), 17(1)(b) and 17(1)(c) of FOIP does not apply	Release
14	1 and 4	Email thread	Subsections 17(1)(a) and 17(1)(b) of FOIP	<p>17(1)(a) of FOIP does not apply</p> <p>17(1)(b) of FOIP applies, with the exception of the fourth redaction on page 14</p> <p>The first five words of the first redaction contain the Applicant's personal information</p>	Continue to withhold, with the exception of the first five words of the first redaction, the last sentence of the third redaction and the fourth redaction
	2 and 3		Subsections 17(1)(a) and (b) of FOIP; Subsection 27(1) of HIPA	<p>17(1)(a) of FOIP does not apply</p> <p>17(1)(b) of FOIP applies, with the exception of the fourth redaction on page 14</p> <p>27(1) of HIPA applies to the name of the staff member of</p>	Continue to withhold, with the exception of the first five words of the first redaction, the last sentence of the third redaction and the fourth redaction the fourth redaction on page 14

Page Number	Redaction number	Record Type	Exemption(s) applied	IPC Finding(s)	IPC Recommendation(s)
				the reference to their health  The last sentence of the third redaction contains the Applicant's personal information	
15	1	Note – Attachment to email thread on pages 14 and 16	Subsection 17(1)(a) and 17(1)(b) of FOIP	17(1)(a) and 17(1)(b) does not apply  The first and sixth line in this redaction contain the Applicant's personal information	Release
16	1 – 5	Email thread continued from page 14	Subsections 17(1)(a) and 17(1)(b) of FOIP	17(1)(a) of FOIP does not apply  17(1)(b) of FOIP applies with the exception of the last redaction on page 16	Withhold, with the exception of the last redaction on page 16
17	1	Note	Subsection 29(1) of FOIP	29(1) of FOIP does not apply	Release
18	1	Note	Subsections 17(1)(a) and 17(1)(b) of FOIP	The withheld information contains the Applicant's personal information.	Release
19 – 20	1 – 3	Email thread	Subsections 17(1)(a), 17(1)(b) and 17(1)(c) of FOIP	17(1)(a) of FOIP does not apply  17(1)(c) of FOIP applies to	Withhold the first redaction on page 19, with the exception of the fifth sentence.

Page Number	Redaction number	Record Type	Exemption(s) applied	IPC Finding(s)	IPC Recommendation(s)
				the first redaction on page 19, with the exception of the fifth sentence which contains the Applicant's personal information	Release the remaining information.
21	1 – 3	Email thread	Subsections 17(1)(a) and 17(1)(b) of FOIP	17(1)(a) and 17(1)(b) of FOIP does not apply  The third redaction contains the Applicant's personal information	Release
25	1	Notes (below an email thread)	Subsections 17(1)(a) and 17(1)(b) of FOIP	17(1)(a) of FOIP applies to the information, with the exception of the first two sentences  17(1)(b) of FOIP does not apply  The first sentence contains the Applicant's personal information.	Withhold – with the exception of the first two sentences and the last sentence
50	1	Notes	Subsections 17(1)(a) and 17(1)(b) of FOIP	Withholding this information would result in an absurd result	Release
51	1 – 2	Notes	Subsections 17(1)(a)	Withholding this information	Release

Page Number	Redaction number	Record Type	Exemption(s) applied	IPC Finding(s)	IPC Recommendation(s)
				would result in an absurd result	
61	1 – 3	Notes	Subsections 17(1)(a) and 17(1)(b) of FOIP	17(1)(a) and 17(1)(b) of FOIP do not apply  The third redaction contains the Applicant's personal information or withholding the information would result in an absurd result	Release
63	1	Notes	Subsections 17(1)(a) and 17(1)(b) of FOIP	17(1)(a) and 17(1)(b) of FOIP do not apply	Release