



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## REVIEW REPORT 333-2023

### Ministry of Health

July 24, 2024

#### Summary:

The Applicant submitted an access to information request to the Ministry of Health (Health). In its section 7 decision to the Applicant, Health indicated it was providing access to some but not all portions of the responsive record. Health withheld the records in full or in part pursuant to subsections 16(1), 17(1)(a), (b)(i), 22(a), (b), (c), and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Health also said it redacted portions of the record because those portions were not responsive to the access request. The Commissioner found the information redacted as non-responsive to be responsive to the Applicant's access request. The Commissioner also found that subsection 16(1) of FOIP was not properly applied to the withheld information. Further, the Commissioner found that subsection 17(1)(a) of FOIP was properly applied to some of the information withheld in the record but not others. The Commissioner also found that subsections 17(1)(b)(i) of FOIP, 22(b) and 22(c) of FOIP were not properly applied. In addition, the Commissioner found that Health made a *prima facie* case that subsection 22(a) of FOIP applied to some information withheld but not all. Finally, the Commissioner found that Health improperly applied subsection 29(1) of FOIP to the information it withheld in the record. The Commissioner recommended that subject to exemptions, Health release the information it described as non-responsive to the Applicant within 30 days from the issuance of this Report. The Commissioner also recommended that Health release the information it improperly withheld within 30 days from the issuance of this Report but continue to withhold the rest of the information as outlined in the Appendix.

#### I BACKGROUND

[1] On March 30, 2023, the Ministry of Health (Health) received the following access to information request from the Applicant:

I'm requesting any and all email and memos from, and all briefing notes from or shared by, [Executive Director – COVID Response Unit, Ministry of Health], [Director – COVID-19 Response Unit, Ministry of Health] and [Assistant Deputy Minister – Ministry of Health] regarding the provincial government and the SHA providing COVID-19 vaccinations in schools.

November 25, 2021 to December 7, 2021

- [2] In its section 7 decision dated December 13, 2023, Health responded to the Applicant indicating that it was withholding the record in part pursuant to subsections 22(a), (b), (c), 16(1)(a), 17(1)(a), (b)(i), and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [3] On December 18, 2023, my office received a request for review from the Applicant regarding Health's decision.
- [4] On January 3, 2024, my office sent notices to Health and the Applicant advising of my office's intent to undertake a review of Health's decision. My office requested that Health provide a copy of the record and an index of records to my office by February 2, 2024, and its submission by March 4, 2024. The Applicant was also invited to provide a submission by March 4, 2024.
- [5] On February 2, 2024, Health provided my office with a copy of the records and an index of records.
- [6] On March 1, 2024, the Applicant provided my office with their submission. On March 4, 2024, Health provided my office with the following documents:
- Submission,
  - Affidavit of records (affidavit) to support the claim of solicitor-client privilege,
  - Letter of explanation (letter dated March 4, 2024) regarding Health's application of section 22 of FOIP; and
  - A schedule indicating Health is claiming solicitor-client privilege to pages 49-52 and 107 of the record at issue.

[7] On April 12, 2024, my office asked Health additional questions about its application of “non-responsive”, and subsections 17(1)(a) and 24(1) of FOIP to some of the redacted information. My office’s questions to Health and Health’s responses are as follows:

- **Question:** Pages [corrected to 62 and 64] of the Record have both “Non-Responsive” and 17(1)(a) applied to the same information. Please verify which one I should consider in my analysis.
- **Health’s response:** 17(1)(a)
- **Question:** For each information that was redacted pursuant to section 29(1) of FOIP, please indicate which of the FOIP definitions of personal information that you described in your submission applies – subsections 24(1)(k)(i), 24(1)(k)(ii) or 24(1)(e).
- **Health’s response:** All of them apply – Personal information includes an individual’s name when combined with other information (subs. 24(1)(k)). An individual’s email address may contain their name (sub. 24(1)(k)(i)(ii)) and is also akin to an individual’s business address or telephone number as it is contact information by which they can be reached (subs. 24(1)(e)). Section 29(1) of FOIP has been applied to the following personal information in the responsive records on the pages listed: pages [see the Appendix of this Report for clarification] contain the names and email addresses of individuals not employed by the Government of Saskatchewan.

## II RECORDS AT ISSUE

[8] Health provided a 143-page record to the Applicant and my office. However, most of the page numbering on the version of the record provided to my office is different from that provided to the Applicant. On the version of the record provided to my office, page 141 is a blank page on which Health neither applied any exemptions nor identified it as a record at issue. On the version of the record provided to the Applicant, the numbering sequence from pages 1 to 143 appears to omit page 21. Also, on the record Health sent to the Applicant, page 142 is a blank page on which Health neither applied any exemptions nor identified it as a record at issue. On both versions of the record, it appears at issue is 28 pages withheld either in part or in full pursuant to subsections 16(1), 17(1)(a), (b)(i), 22(a), (b), (c), and 29(1) of FOIP. Health has also described 10 pages of the record as non-

responsive. The remaining 105 pages of the record were provided to the Applicant in full. I have attempted to capture the discrepancies in the Appendix to this Report. In future, Health should avoid this type of confusion when preparing the record for release to the Applicant and in presentation to my office in the course of a review.

### III DISCUSSION OF THE ISSUES

#### 1. Do I have jurisdiction?

[9] Health qualifies as a “government institution” as defined by subsection 2(1)(d)(i) of FOIP. Therefore, I find that I have jurisdiction to conduct this review.

#### 2. Is there information that is not responsive to the access request?

[10] Health redacted information on pages 22, 29, 54, 55, 57, 58, 60, 61, 119 and 120, as Health regarded it as “non-responsive” to the Applicant’s access request. Health initially also withheld information on pages 62 and 64 as non-responsive but later changed its position and relied on subsection 17(1)(a) of FOIP for these pages (see above at paragraph [7]). Because of this clarification, I will also not be considering the application of subsection 17(1)(b)(i) of FOIP to these pages. In its submission to my office, Health stated the following:

In the current access request, information on pages 22, 29, 54, 55, 57, 58, 60, 61, 119, and 120 of the records are outside the scope of the access request. The Applicant specifically requested records for “...any and all emails and memos from, and all briefing notes from or shared by, [Executive Director – COVID-19 Response Unit, Ministry of Health], [Director – COVID-19 Response Unit, Ministry of Health] and [Assistant Deputy Minister, Ministry of Health] regarding the provincial government and the SHA providing COVID-19 vaccinations in schools. **The information on these pages contains different subject matter for review or discussion than what was requested and therefore, is clearly separate and distinct from the access request.** It is submitted that this information is non-responsive to the access request and therefore exempt from disclosure on that basis.

...

[Emphasis added]

[11] As per my office's *Guide to FOIP*, Chapter 3, "Access to Records", updated May 5, 2023, (*Guide to FOIP*, Ch. 3) at page 26, when a government institution receives an access to information request, it must determine what information is responsive to the access request. "Responsive" means relevant. The term describes anything that is reasonably related to the request. It follows that any information or records that do not reasonably relate to an applicant's request will be considered "not responsive".

[12] My office's *Guide to FOIP*, Ch. 3 at pages 26 and 27, when determining what information is responsive, considered the following:

- The request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive.
- A government institution can remove information as not responsive only if the applicant has requested specific information, such as the applicant's own personal information.
- The government institution may treat portions of a record as not responsive if they are clearly separate and distinct and entirely unrelated to the access request. However, use it sparingly and only where necessary.
- If it is just as easy to release the information as it is to claim not responsive, the information should be released (i.e., releasing the information will not involve time consuming consultations nor considerable time weighing discretionary exemptions).
- The purpose of FOIP is best served when a government institution adopts a liberal interpretation of a request. If it is unclear what the applicant wants, a government institution should contact the applicant for clarification. Generally, ambiguity in the request should be resolved in the applicant's favour.

[13] In my office's [Review Report 142-2023](#) and [Review Report 229-2017, 031-2017 – PART II](#), I found in both cases that the public bodies incorrectly withheld portions of the records as non-responsive because the information severed were not separate and distinct from the access request.

[14] Based on a review of the record in this case, my office finds, similar to Review Report 142-2023, and Review Report 299-2017, 031-2017 – PART II, that the information withheld is

not clearly separate and distinct and entirely unrelated to the access request. As noted above, Health argues that “the information on these pages contains different subject matter for review or discussion than what was requested and therefore, is clearly separate and distinct from the access request.” I disagree. This is because the information withheld includes references and background information related to COVID-19 vaccinations in schools, and the access request is for information related to the provision of COVID-19 vaccinations in schools. I find the information withheld to be responsive to the Applicant’s access request. I recommend that Health release the information to the Applicant, subject to exemptions, within 30 days from the issuance of this Report as outlined in the Appendix.

### 3. Did Health make a *prima facie* case that subsection 22(a) of FOIP applies?

[15] My office’s [Rules of Procedure, Part 9: Solicitor-Client or Litigation Privilege](#), (revised August 16, 2023) at page 39, outlines the process when a government institution is claiming solicitor-client or litigation privilege. Section 9-1 provides:

#### **9-1 Claiming solicitor-client or litigation privilege**

(1) Where solicitor-client or litigation privilege is being claimed as an exemption by the head or delegate, the commissioner’s office will request the head or delegate to provide a copy of the records, or an affidavit of records, schedule and redacted record over which solicitor-client or litigation privilege is claimed setting out elements requested in Form B.

[16] Health withheld information in full on pages 49 to 52 of the record, and in part on page 107. Health is making a *prima facie* claim that subsection 22(a) of FOIP applies, and thus, provided my office with a letter dated March 4, 2024, affidavit, schedule and severed portions of the record (4 blank pages and one page partially redacted), rather than a fully unredacted copy of it. According to its letter dated March 4, 2024, Health indicated that pages 49 to 52 is an email thread in which:

The initial email on pages 50-52 of the email thread forms the basis of the request for the legal opinion. The next email in the thread is a request from a Ministry of Health official for legal advice and is followed by an email from [lawyer’s name removed] providing a legal opinion in response to the request.

[17] Subsection 22(a) of FOIP provides:

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

(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

[18] As per the *Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access” (*Guide to FOIP*, Ch. 4) at page 257, subsection 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 any legal privilege, including solicitor-client privilege.

[19] My office has determined, as set out in the *Guide to FOIP*, Ch. 4 at pages 260 to 267, when determining whether subsection 22(a) of FOIP applies to records, the following three-part test can be applied as follows:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Did the parties intend for the communication to be treated confidentially?

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

[20] In its affidavit, Health stated the following:

In respect of those records, or portions of records, claimed to be protected by solicitor-client privilege, I have knowledge of, or believe, that the records relate to communications and information shared:

i) **Between solicitor and client, and/or third party, with sufficient common interest in the same transactions;**

...

[Emphasis added]

[21] I note that in an email to my office dated June 13, 2024, Health confirmed that two individuals outside of its ministry were included in the email exchanges (pages 49-52). Based upon the foregoing, it appears that Health may be attempting to argue that common interest privilege applies.

[22] Pages 263 to 264 of Ch. 4 of the *Guide to FOIP*, defines solicitor and client as follows:

- **Solicitor** means a lawyer who is duly admitted as a member and whose right to practice is not suspended. Lawyer means a member of the Law Society and includes a law student registered in the Society’s pre-call training program.
- **Client** means a person who:
  - Consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
  - Having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf;

and includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client’s work.

[23] Health provided the name of the solicitor involved in the communications. The solicitor involved is currently a member of the Law Society of Saskatchewan and licensed to practice law in Saskatchewan; therefore, I find that the solicitor noted qualifies as the solicitor in this matter.

[24] Further, in its March 4, 2024 letter, Health indicated the following:

[Name of Crown Counsel] is Crown Counsel in the Legal Services Division of the Ministry of Justice and Attorney General.

The Legal Services Division of the Ministry of Justice and Attorney General provides legal services to government Ministries. ... The Division acts in the same fashion as a private law firm does with a private client.

[25] Health explained that the emails in question (pages 49-52) involves a request for legal advice from a Health official to and a response from Crown Counsel providing a legal opinion. Therefore, in terms of records in this matter, Health is the client.

[26] According to my office’s *Guide to FOIP*, Ch. 4 at page 263, “communication” is defined as follows:



- A **communication** is the process of bringing an idea to another’s perception; the message or ideas so expressed or exchanged; the interchange or messages or ideas by speech, writing, gestures or conduct.

[27] In my office’s [Review Report 204-2023](#) at paragraph [27], I found that emails are communications.

***Pages 49, 50, 51, 52***

[28] From Health’s evidence, I am satisfied that the information on pages 49, 50, 51, and 52 involve communications (email threads) between a solicitor and a client, which meets the first part of the test for these pages.

***Page 107***

[29] In an email to my office on April 25, 2024, a Senior Policy Analyst with Health indicated that, “page 107 of the record is an email thread amongst employees in the Ministry of Health.” Further, I note that the name of the lawyer who provided the opinion is not stated, what is redacted is a legal opinion received.

[30] In my office’s [Review Report 004-2017, 153-2015 – PART II](#), I found communications that are not between a solicitor and client as being within the continuum of legal advice as follows:

[18] As noted, the first test for subsection 21(a) of LA FOIP requires that a communication be between a solicitor and a client. However, past decisions of Commissioners from across the country have considered records in the “continuum” of giving legal advice.

[19] A resource from Alberta’s Office of the Information and Privacy Commissioner (Alberta OIPC) entitled *The Basics of Solicitor-client Privilege* provides the following:

Documents that are not actually passed between the solicitor and client may be part of the continuum of legal advice, or reveal information subject to solicitor-client privilege.

More examples of records found to be part of the continuum of legal advice:

- a discussion between two public officials about how to frame the question that is to be asked of the lawyer (Order F2007-008 at para. 12)
- written communications between officials or employees of a public body, in which they quote or discuss the legal advice given by the public body's solicitor (Order 99-013 at paras. 62-63; Order 2001-005 at para. 67)
- communications discussing the application of legal advice given by a solicitor (Order 96-020 at para. 133)
- an employee's notes regarding a solicitor's legal advice, and comments on that advice (Order 99-027 at para. 95)
- notes "to file" in which legal advice is quoted or discussed (Order F2005-008 at para. 42)
- solicitors' briefing notes and working papers that are directly related to the seeking or giving of legal advice (96-017 at para. 30)

[20] In the affidavits provided to my office, the U of S indicated that these records contain legal advice from its legal counsel. It noted that the advice was being shared with appropriate U of S employees/agents involved with addressing legal issues. The U of S also identified the legal counsel who provided the advice.

[21] I am satisfied that the records are within the continuum of solicitor-client privilege.  
...

[31] In review of the released portion of the record and considering the explanations provided by Health, I find that the above applies in this case. In this regard, I am satisfied that the information withheld on page 107 meets the first part of the test.

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

[32] For the second part of the test, I need to consider the contents of the affidavit. The affidavit asserted that the communication entails the seeking or obtaining of legal advice that was intended to be kept confidential and have been consistently treated as confidential.

[33] The *Guide to FOIP*, Ch. 4 at page 266, describes "legal advice" as a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. The second part of the test is satisfied where the person seeking advice has a reasonable concern that a particular decision or course of action may have legal implications and turns to their legal advisor to determine what those legal implications might be. The privilege applies not only to the records that actually give the legal advice but also to those that seek it and that provide factual information relative to

which advice is given. Background information can be included as part of the definition of legal advice because it forms part of the “*continuum of communication*” between a solicitor and his or her client. Statements of fact are not themselves privileged. It is the communication of those facts between a client and a lawyer that is privileged.

[34] Health indicated that the information on pages 50, 51, and 52 form the basis of the request for the legal opinion. It also indicated that the information on page 49 is a request from a Health official for legal advice and is followed by an email from the solicitor providing a legal opinion in response to the request. Health also indicated in its submission that the information on page 107 quotes a legal opinion received by Health. This is supported by what I have reviewed in terms of the released contents of page 107.

[35] Based on the description and supporting arguments, I find that the communications involved entail the seeking or giving of legal advice. Therefore, the second part of the test has been met for all.

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

[36] According to the *Guide to FOIP*, Ch. 4 at pages 267 to 268, there must be an expectation on the part of the government institution that the communication will be confidential. Conduct which is inconsistent with an expectation of confidentiality can constitute a waiver of privilege. Without confidentiality there can be no privilege and when confidentiality ends so too should the privilege. As a general rule, the client (usually a government institution) must not have disclosed the legal advice (either verbally or in writing) to parties who are outside of the solicitor-client relationship. With respect to pages 49 to 52, Health offered no explanation as to why individuals outside of it were included in the email exchange as well as provided no arguments around the possible application of common interest privilege. As such, I cannot find that the parties intended for their communication to be treated confidentially.

[37] Further, the *Guide to FOIP*, Ch. 4 at page 269, also indicates that an applicant is entitled to general identifying information, such as the description of the document (for example,

the “memorandum” heading and internal file identification), the name, title, and address of the person to whom the communication was directed, the subject line, the generally innocuous opening words and closing words of the communication and the signature block.

[38] Health provided to my office four blank pages for pages 49 to 52 of the record. Health indicated the information on those pages are email threads. Email threads may include headers, footers, confidentiality statements and subject lines. In my office’s [Review Report 188-2022](#) at paragraph [69], I found that the Rural Municipality of Rosthern No. 403 did not make a *prima facie* case for withholding headers, footers, subject lines and confidentiality statements in emails because this type of information is not considered a communication (or the substance of any communications) where legal advice was sought or given. I note that on page 107, Health released the confidentiality statements, header, footer, and subject lines to the Applicant.

[39] I find that Health has not made a *prima facie* case that subsection 22(a) of FOIP applies to pages 49 to 52 but has for page 107 which can continue to be withheld. I note that Health also applied subsections 22(b) and 22(c) of FOIP to pages 49 to 52. As those pages were not provided, I cannot find that those exemptions apply. I note, my office gave Health an opportunity to reconsider providing these records to my office on April 24, 2024. It chose not to do so. I therefore recommend that Health release pages 49 to 52, as outlined in the Appendix, to the Applicant within 30 days from the issuance of this Report and continue to withhold the severed portion of page 107 pursuant to subsection 22(a) of FOIP.

#### **4. Did Health properly apply subsection 16(1) of FOIP?**

[40] Health indicated that it applied subsection 16(1)(a) of FOIP to certain records in its section 7 decision provided to the Applicant, index of records and on copies of the withheld records in question, but in its submission to my office, Health argued that it appropriately applied subsection 16(1) of FOIP. Therefore, I will be considering the application of subsection 16(1) of FOIP to the following: pages 2 to 4, 10 to 11, 30 to 32, 82, 83, and 123 to 124. These pages were withheld in full which are, to a certain extent, duplicates. For details, see the Appendix of this Report.

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

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

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

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

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

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

(i) the President of the Executive Council for which, or with respect to which, the record has been prepared; or

(ii) in the absence or inability to act of the President, by the next senior member of the Executive Council who is present and able to act.

[42] According to my office's *Guide to FOIP*, Ch. 4 at page 94, subsection 16(1) of FOIP is a mandatory class-based provision. Subsections 16(1)(a) through (d) of FOIP are not an exhaustive list. Therefore, even if none of the subsections are found to apply, the introductory wording of subsection 16(1) of FOIP must still be considered. In other words, is the information a confidence of Executive Council?

[43] Page 100 of the *Guide to FOIP*, Ch. 4, provides the following definitions:

- “Cabinet confidences” are generally defined as, in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public.
- “Including” means that the list of information that follows is not complete (non-exhaustive). The examples in the provision are the types of information that could be presumed to disclose a confidence of the Executive Council (Cabinet).

[44] Health's submission to my office provides as follows:

...

Subsection 16(1) provides that "A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including...". In *O'Connor v Nova Scotia*, 2001 NSCA 132, the Nova Scotia Court of Appeal considered a similar Cabinet confidence provision in its access to information legislation and indicated that the words that follow "including" are "simply added so as to provide specific examples of 'information', thus removing any ambiguity as to whether such things are in fact included." The same is true with respect to section 16(1) of FOIP. Paragraphs (a) to (d) in subsection 16(1) are simply examples of records that would disclose a Cabinet confidence. These paragraphs do not provide an exhaustive list, so there may be other types of records that, if disclosed, would reveal a confidence of the Executive Council.

In Review Report F-2012-004, the Commissioner quoted former Chief Justice E.M. Culliton's report titled, *Report of the Honourable E.M. Culliton, Former Chief Justice of Saskatchewan, on the Matter of Freedom of Information and Protection of Privacy in the Province of Saskatchewan* regarding the types of records that should be protected as cabinet confidences:

The solidarity of cabinet can be maintained only by complete confidentiality in respect to all records relevant to its administration and operation. I recommend that the legislation provide for such complete confidentiality and without in any way restricting that wide protection, should provide specifically that access shall not be granted to:

- (a) memoranda the purpose of which is to present proposals or recommendations to the executive council;
- (b) discussion papers, the purpose of which is to present background, explanation, analysis of problems or political options to the executive council for consideration by the council in making decisions;
- (c) agenda of executive council or minister or records disclosing deliberations or decisions of the executive council;
- (d) records used for or reflecting conclusions or discussions by the members of the executive council on matters relating to the making of government decisions or the formulation of government policy;
- (e) records the purpose of which is to brief members of the executive council in relation to matters that are before or are proposed to be brought before the executive council; and
- (f) draft legislation.

The legislation also should recognize the anonymity of public servants by providing that access shall not be granted to records which:

- (a) would disclose legal opinions or advice provided to a person or government institution by a law officer of the Crown or privileged information between solicitor and client in a matter of government institution business;
- (b) would disclose opinions or recommendations by public servants for a member of the executive council or for the executive council;
- (c) would disclose the substance of proposed legislation or regulations; and
- (d) would disclose information received on a confidential basis.

The information redacted on pages 2 to 4, 30 to 32 and 123 to 124 is an item for review dated November 25, 2021. The item for review contains recommendations and analyses as well as background information in relation to an issue or topic. This document was prepared by employees within the Ministry for the purpose of providing it to Executive Council to make a decision and provide direction.

The information redacted on pages 10 to 11 is a draft version of the item for review dated November 25, 2021. The document contains draft versions of recommendation and analyses as well as background information in relation to an issue or topic. This document was prepared by employees within the Ministry for the purpose of providing it to Executive Council to make a decision and provide direction. This document is an earlier version of the item for review that was presented to Executive Council and its release would disclose a confidence of Executive Council.

The information redacted on pages 82 to 83 is an item for review dated December 2021. The document contains recommendations, background information and analyses regarding the implications of a specific issue. This document was prepared by employees within the Ministry for the purpose of providing it to Executive Council to make a decision and provide direction.

The Ministry submits the above-mentioned information meets the requirements for an exemption from disclosure pursuant to section 16(1) and was withheld appropriately.

[45] Health has indicated that the items for review were prepared by its employees for the purpose of providing it to the Executive Council. However, from a review of the record (released and withheld portions), different individuals from Health, the Ministry of Education, the Saskatchewan Public Safety Agency and employees of the Saskatchewan Health Authority (SHA) appear to have been involved in reviewing and discussing issues pertaining to these documents and possibly even in drafting them.

[46] In my office's [Review Report 311-2016](#), I noted the following: “[10] In order for subsection 16(1) of FOIP to apply, Justice must demonstrate that this report was intended for Executive Council (Cabinet) or one of its committees.”

[47] In my office's [Review Report 004-2024](#) at paragraphs [19] and [21], I found that records that contained topics that will proceed to Treasury Board or Executive Council were intended for Cabinet as follows:

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

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

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

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

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

...

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

[48] However, from a review of the records, there is nothing to indicate that these were intended for Cabinet, nor do the emails these documents were attached to reveal this. I find therefore that Health did not properly apply subsection 16(1) of FOIP to pages 2 to 4, 10 to 11, 30 to 32, 82 to 83, and 123 to 124 of the record. I recommend that Health release those pages



as outline in the Appendix to the Applicant within 30 days of the issuance of this Report, except pages 10 and 11 as Health has also applied subsections 17(1)(a) and (b)(i) of FOIP to those records. I will review those pages under those subsections next.

**5. Did Health properly apply subsection 17(1)(a) of FOIP?**

[49] In terms of the records left to consider, Health applied subsection 17(1)(a) of FOIP to pages 10, 11, 62, and 64 of the record.

[50] In its submission to my office, Health described the information withheld on pages 10, 11, 62 and 64 as follows:

***Pages 10 and 11***

The information withheld on pages 10 to 11 is a draft version of an item for review. The item for review sets out recommendations, analyses, and implications regarding an issue. Background information is also included in the document, which if released would allow for the drawing of accurate inferences as to the nature of the recommendations and analyses. These recommendations and analyses were developed by Ministry employees whose roles and responsibilities include preparing items for review and decisions. The information is a draft version of the item for review and contains advice, proposals, and recommendations between Ministry employees in order to finalize the document before presenting it to Executive Council to make a decision and provide direction.

***Pages 62 and 64***

The information withheld on pages 62 and 64 is part of an email thread. The redacted information contains updates that if released would allow for the drawing of accurate inferences as to the nature of the analysis, advice, proposals, and recommendations provided by the Ministry employees to Ministry Officials for briefing Executive Council.

[51] 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?

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

[52] Pages 128 to 130 of the *Guide to FOIP*, Ch. 4, provides the following definitions:

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

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

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”.

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

***Pages 62 and 64***

[53] The information redacted on page 62 is the same information redacted on page 64.

[54] Pages 133 to 134 of the *Guide to FOIP*, Ch. 4, provides the following definitions:

“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.

“Process notes” are brief descriptions of next steps that result from a decision, or directions regarding who should attend meetings or review documents. Processes are established and simply followed and generally contain no advice or recommendations.

[55] In my office’s [Review Report 081-2018](#) at paragraph [48], I found that information that is factual in nature or directions to be followed would not qualify for exemption under subsection 17(1)(a) of FOIP.

[56] Based on a review of the withheld records, I find that the severances on pages 62 and 64 are factual in nature, provide updates, and others appear to be directives. I find that the first part of the test has not been met for the information redacted pursuant to subsection 17(1)(a) of FOIP on pages 62 and 64. Since both parts of the test must be met, I find that Health did not properly apply subsection 17(1)(a) of FOIP to this part of the record. I recommend release of pages 62 and 64 as outlined in the Appendix.

***Pages 10 and 11***

[57] In review of the released records, pages 10 and 11 appear to have been an attachment to emails on the topic, pediatric vaccine school based plan. This item for review appears to be a draft version and includes questions of a reviewer of the document captured as comments. Generic questions do not qualify as advice, proposals, recommendations, analyses and/or policy options; therefore, I do not find that the exemption applies to those comments. However, subsection 17(1)(b) of FOIP is also applied to this information, so I will revisit these withheld portions of the record later in this Report. Everything else also appears to have been withheld on these two pages including the document header, dates, topic, purpose of item for review and decision and other background/factual information. This information also does not qualify as advice, proposals, recommendations, analyses, or policy options; therefore, again, the first part of the test is not met. I find that Health did not properly apply subsection 17(1)(a) of FOIP to the rest of pages 10 and 11 with one exception on page 10. Since Health also applied subsection 17(1)(b)(i) of FOIP to this information, I will review it under that subsection also. The only portion that constitutes

recommendations is the portion withheld under that heading on page 10. However, as it appears the first bullet under that heading was publicly available, I do not find that the exemption applies to it. I find that the first part of the test is only met for bullets 2, 3 and 4 under that heading on page 10. I will now consider if the second part of the test applies to these three bullets.

***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?***

[58] As per my office's *Guide to FOIP*, Ch. 4 at pages 131 and 132, the advice, proposals, recommendations, analyses, and/or policy options can be developed by a government institution or for a government institution including one not relying on the exemption. This is supported by the use of "a government institution" and not "the government institution" in the provision. Further, "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 a government institution and at its request (for example, by a service provider or stakeholder). For more on "developed by or for," see my office's [Review Report 166-2018](#) at paragraphs [54] to [56].

[59] In its submission to my office, Health indicated the following:

...These recommendations and analyses were developed by Ministry employees whose roles and responsibilities include preparing items for review and decisions. The information is a draft version of the item for review and contains advice, proposals, and recommendations between Ministry employees in order to finalize the document before presenting it to Executive Council to make a decision and provide direction.

[60] In its submission, Health states that the recommendations and analyses were developed by Ministry employees. However, emails released to the Applicant appear to suggest that the attachment (pages 10 and 11) was at one point forwarded by an employee of the SHA to others including the Assistant Deputy Minister of Health that indicated, "I have some questions, which I'll send back to the group via comments and track changes." It appears that the recommendations on page 10 were therefore developed for a government institution and the second part of the test has been met. I find that Health properly applied

subsection 17(1)(a) of FOIP to the recommendations portion only (bullets 2, 3 and 4) on page 10 of the record. I recommend that Health continue to withhold this information as detailed in the Appendix.

**6. Did Health properly apply subsection 17(1)(b)(i) of FOIP?**

[61] I still need to consider the application of subsection 17(1)(b)(i) of FOIP to pages 10 and 11 of the record, except for the recommendation section (bullets 2, 3 and 4).

[62] Subsection 17(1)(b)(i) 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;

[63] According to the *Guide to FOIP*, Ch. 4 at page 136, 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. The provision is intended to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is to allow such persons to address an issue without fear of being wrong, looking bad or appearing foolish if their frank deliberations were to be made public.

[64] The *Guide to FOIP*, Ch. 4 at pages 136 to 138, outlines the following two-part test my office uses to determine if this exemption 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?

***1. Does the record contain consultations or deliberations?***

[65] As per the *Guide to FOIP*, Ch. 4 at pages 136 to 138, “consultation” and “deliberation” are defined as follows:

**Consultation** means:

- The act 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 act 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.

[66] In its submission to my office, Health indicated the following:

The information withheld on pages 10 and 11 is a draft version of an item for review. The draft item for review includes comments and questions made by an employee of the Ministry about the contents of the document. Disclosure of these comments would reveal the topic of the consultations and deliberations made between Ministry employees prior to finalizing the document to provide to Executive Council.

[67] In past reports such as [Review Report 168-2023](#) at paragraph [34], I breakdown further what can be considered as deliberations and consultations as follows:

[34] ... There appears to be confusion as to what constitutes a “consultation” or “deliberation”. In past reports, I have quoted [Order F2013-13](#) by an adjudicator from Alberta’s Office of the Information and Privacy Commissioner (AB IPC) that speaks to subsections 24(1)(a) and (b) of Alberta’s *Freedom of Information and Protection of Privacy Act* (AB FOIP), which is very similar to subsections 17(1)(a) and (b) of FOIP. The Order clarifies what a consultation and deliberation are:

[para 146] I agree with the interpretation Commissioner Clark assigned to the terms “consultation” and “deliberation” generally. However, as I stated in Order F2012-10, section 24(1)(b) differs from section 24(1)(a) in that section. 24(1)(a) is intended to protect communications developed for a public body by an advisor, while **section 24(1)(b) protects communications involving decision makers.** That this is so is supported by the use of the word deliberation: **only a person charged with making a decision can be said to deliberate that decision.** Moreover, **“consultation” typically refers to the act of seeking advice regarding an action one is considering taking,** but not to giving advice in relation to it. Information that is the subject of section 24(1)(a) may be voluntarily or spontaneously provided to a decision maker for the decision maker’s use because it is the responsibility of an employee to provide information of this kind; however, such information cannot be described as a “consultation” or a “deliberation”. Put simply, section 24(1)(a) is concerned with the situation where advice is given, **section 24(1)(b) is concerned with the situation where advice is sought or considered.**

[Emphasis in original]

[68] As noted earlier, most of pages 10 and 11 of the record consists of background/factual information, including a header, dates, topic, and purpose of item for review, none of which can be described as “consultations” or “deliberations.” Further, I noted the track changes comments are questions asked. In this case, clarification is sought, not advice. Therefore, the first part of the test has not been met. Since both parts of the test must be met, I find that Health did not properly apply subsection 17(1)(b)(i) of FOIP to the any portions of these two pages. I recommend that Health release pages 10 and 11 (except for the 3 bullets noted earlier on page 10) to the Applicant within 30 days of the issuance of this Report (see the Appendix).

**7. Did Health properly apply subsection 29(1) of FOIP?**

[69] Health applied subsection 29(1) of FOIP to portions of certain pages of the record as outlined in the Appendix.

[70] 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.

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

[72] In order to withhold information pursuant to subsection 29(1) of FOIP, the information must qualify as “personal information” as defined by subsection 24(1) of FOIP. According to the *Guide to FOIP*, Ch. 6 at pages 32 to 33, 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.

[73] In its submission to my office, Health stated the following:

The Ministry is aware of IPC’s position that business card information is not personal in nature and therefore, is not personal information.

However, in view of the clear words in section 24(e) of FOIP that business address and business number are personal information of an individual and the name of an



individual where it appears with other personal information that relates to the individual is personal information (e.g. an individual's name where it appears with their business address or place of employment), the Ministry feels compelled to redact the names of individuals who are not officers or employees of a government institution in order to protect their personal information.

[74] "Personal information" is described in subsection 24(1) of FOIP 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:

...

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

[75] From a review of the record, the information Health redacted pursuant to subsection 29(1) of FOIP includes the name and part of an email address of a Government of Canada employee. Other information redacted includes the name and email address of a Saskatchewan public school division employee.

[76] As indicated in my office's [Review Report 205-2019, 255-2019](#), I noted the following:

[43] This type of information is commonly referred to as "business card information". I have looked at the issue of business card information not qualifying as personal information in several reports in the past. Recently, I noted the following in Review Report 186-2019 at paragraph [26]:

[26] Business card information is the type of information found on a business card (name, job, title, work address, work phone numbers and work email address). This type of information is generally not personal in nature and therefore would not be considered personal information....

[44] From a review of the record, the individuals whose contact information has been included in the records are in their capacity as employees of the organization in which

they represent and are not in their personal capacity. Therefore, the contact information that has been severed is business card information and not personal information.

[77] I find the same applies in this case. Therefore, I find that Health did not properly apply subsection 29(1) of FOIP to the information redacted as outlined in the Appendix. I recommend that within 30 days from the issuance of this Report, Health release this information to the Applicant.

#### **IV FINDINGS**

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

[79] I find the information redacted as non-responsive to be responsive to the Applicant's access request.

[80] I find Health has made a *prima facie* case that subsection 22(a) of FOIP applies to the portion withheld on page 107 of the record but not pages 49 to 52. See the Appendix for more details.

[81] I find that Health did not properly apply subsection 16(1) of FOIP to any portions of the record. See the Appendix for more details.

[82] I find that Health did not properly apply subsection 17(1)(a) of FOIP to some portions of the record. See the Appendix for more details.

[83] I find that Health did not properly apply subsections 17(1)(b)(i), 22(b) or 22(c) of FOIP to the record. See the Appendix for more details.

[84] I find that Health did not properly apply subsection 29(1) of FOIP to the record. See the Appendix for more details.

**V RECOMMENDATIONS**

[85] I recommend that Health release, subject to exemptions, the information it withheld as non-responsive as described in the Appendix, to the Applicant, within 30 days from the issuance of this Report.

[86] I recommend that Health continue to withhold or release records as described in the Appendix of this Report, within 30 days of the issuance of this Report.

Dated at Regina, in the Province of Saskatchewan, this 24th day of July, 2024.

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

## Appendix

Record type	Page Number – Record provided to Applicant	Page Number – Record provided to my office	FOIP Exemption(s) Applied	IPC Finding(s)	IPC Recommendation(s)
Item for review – November 25, 2021	2	2	16(1)(a) on record; 16(1) in submission	16(1) does not apply	Release
	3	3	16(1)(a) on record; 16(1) in submission  29(1) was on page 3 of Applicant’s version but Health confirmed in an email to my office that 29(1) did not apply to page 3	16(1) does not apply	Release
	4	4	16(1)(a) on record; 16(1) in submission	16(1) does not apply	Release
Draft version item for review and decision – November 25, 2021	10	10	16(1)(a) on record; 16(1) in submission  17(1)(a), 17(1)(b)(i)	16(1) does not apply  17(1)(a) applies to recommendations (2 <sup>nd</sup> , 3 <sup>rd</sup> and 4 <sup>th</sup> bullet only); 17(1)(b)(i) does not apply	Release all except 2 <sup>nd</sup> , 3 <sup>rd</sup> and 4 <sup>th</sup> bullet under recommendation heading
	11	11	16(1)(a) on record; 16(1) in submission 17(1)(a), 17(1)(b)(i)	16(1), 17(1)(a) and 17(1)(b)(i) do not apply	Release

Email	22	21	Non-responsive	Information withheld is responsive	Release subject to any exemptions
Agenda	29	28	Non-responsive	Information withheld is responsive	Release subject to any exemptions
Item for review and decision – November 25, 2021	30	29	16(1)(a) on record; 16(1) in submission	16(1) does not apply	Release
	31	30	16(1)(a) on record; 16(1) in submission	16(1) does not apply	Release
	32	31	16(1)(a) on record; 16(1) in submission	16(1) does not apply	Release
Records not provided	49	48	22(a), 22(b), 22(c)	22(a), 22(b) and 22(c) do not apply	Release
	50	49	22(a), 22(b), 22(c)	22(a), 22(b) and 22(c) do not apply	Release
	51	50	22(a), 22(b), 22(c)	22(a), 22(b) and 22(c) do not apply	Release
	52	51	22(a), 22(b), 22(c)	22(a), 22(b) and 22(c) do not apply	Release
Pending briefing item	54	53	Non-responsive	Information withheld is responsive	Release subject to any exemptions
Other briefing items	55	54	Non-responsive	Information withheld is responsive	Release subject to any exemptions
Pending briefing items	57	56	Non-responsive	Information withheld is responsive	Release subject to any exemptions
Pending briefing items	58	57	Non-responsive	Information withheld is responsive	Release subject to any exemptions
Other briefing items	60	59	Non-responsive	Information withheld is responsive	Release subject to any exemptions

	61	60	Non-responsive	Information withheld is responsive	Release subject to any exemptions
Email thread	62	61	17(1)(a)	17(1)(a) does not apply	Release
Email thread	64	63	17(1)(a)	17(1)(a) does not apply	Release
Item for review and decision – December 2021	82	81	16(1)(a) on record; 16(1) in submission	16(1) does not apply	Release
	83	82	16(1)(a) on record; 16(1) in submission	16(1) does not apply	Release
Email thread	107	106	17(1)(a), 17(1)(b)(i), 22(a), 22(c)	22(a) applies  Did not have to consider 17(1)(a), 17(1)(b)(i) and 22(c)	Withhold
Email thread	116	115	29(1)	29(1) does not apply	Release
	117	116	29(1)	29(1) does not apply	Release
Pending briefing item	119	118	Non-responsive	Information withheld is responsive	Release subject to any exemptions
Other briefing item	120	119	Non-responsive	Information withheld is responsive	Release subject to any exemptions
Email thread	121	120	29(1)	29(1) does not apply	Release
	122	121	29(1)	29(1) does not apply	Release
Item for review and decision – November 25, 2021	123	122	16(1)(a) on record; 16(1) in submission	16(1) does not apply	Release
	124	123	16(1)(a) on record; 16(1) in submission	16(1) does not apply	Release
Email thread	133	132	29(1)	29(1) does not apply	Release

Email thread	135	134	29(1)	29(1) does not apply	Release
	136	135	29(1)	29(1) does not apply	Release
Email thread	138	137	29(1)	29(1) does not apply	Release
	139	138	29(1)	29(1) does not apply	Release