



REVIEW REPORT 011-2024

Saskatchewan Health Authority

July 26, 2024

Summary:

The Applicant submitted an access to information request to Saskatchewan Health Authority (SHA) requesting access to records related to a “Do Not Hire List/Cautious Hire List”. In its section 7 decision to the Applicant, the SHA indicated it was providing access to some but not all responsive records. The SHA withheld the “Do Not Hire List/Cautious Hire List” in full pursuant to subsection 30(2) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Applicant requested a review by the Commissioner. The Commissioner found that the SHA did not meet its burden of proof in demonstrating that subsection 30(2) of LA FOIP applied to the record and recommended the information requested be released to the Applicant within 30 days of the issuance of this Report.

I BACKGROUND

[1] On December 14, 2023, the Saskatchewan Health Authority (SHA) received the following access to information request from the Applicant:

I am requesting access to:

1. All Human Resource and Labour Relations documents pertaining to myself, [Applicant’s name], from March 2021 – present.
2. The information from the Saskatchewan health Authority’s Cautious Hire List pertaining to myself; [name of Applicant], from March 2021 – present day and the recorded reason(s) why I am on it and when I will be removed from the list(s).
3. The information from the Former Cypress Health Region’s [Do Not Hire List] pertaining to myself; [Applicant name], from March 2021 - present day; and
4. Since there has been no completed investigation by my regulatory body and absolutely no lawful evidence that the alleged accusations even happened, I request the recorded reason(s) why I am on it and when I will be removed from the list(s).

5. The categories/date and criteria of removal that exist on the former Cypress Health Region [Do Not Hire List].
6. The categories/date and criteria of removal that exist on the Saskatchewan Health Authority's Cautionary Hire List.
7. The policies, work standards and criteria used by the former Cypress Health Region to determine if and/or when someone should be placed on the [Do Not Hire List].
8. The policies, work standards and criteria used by the Saskatchewan Health Authority to determine if and/or when someone should be placed on the Cautionary Hire List.
9. The information from the former Cypress Health Region's [Do Not Hire List] pertaining to myself; [Applicant's name], and the recorded reason(s) why I am on it and when I will be removed from the list(s).
10. The criteria used when distributing names on the [Do Not Hire List] to other former health regions.

If, and only if the Former Cypress Health Region's documents, policies, procedures, work standards, etc have been incorporated into the SHA, I will accept and review all requested files from the SHA only.

- [2] In its section 7 decision dated January 12, 2024, the SHA responded to the Applicant indicating that it was withholding some information in full pursuant to subsection 30(2) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). It further indicated it was providing access in full to other records including Human Resource and Labour Relations documents and the Work Standard pertaining to the SHA Cautionary Hire List.
- [3] On January 12, 2024, my office received a request for review from the Applicant regarding the SHA's decision.
- [4] On February 23, 2024, my office sent notices to the SHA and the Applicant advising of my office's intent to undertake a review of the SHA's decision. My office requested that the SHA provide a copy of the record and an index of records to my office by March 25, 2024, and its submission by April 23, 2024. The Applicant was also invited to provide a submission by March 25, 2024.
- [5] After some confusion on what was required by my office, the SHA provided a copy of the record on May 10, 2024. Its submission was provided on March 22, 2024.

II RECORDS AT ISSUE

- [6] The record at issue is a spreadsheet called a Cautionary Hire List (or Do Not Hire List). The SHA applied subsection 30(2) of LA FOIP to the information on the list that was requested by the Applicant (i.e., information pertaining to the Applicant).

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

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

2. Did the SHA properly apply subsection 30(2) of LA FOIP?

- [8] The SHA applied subsection 30(2) of LA FOIP to information in the Cautionary Hire List that pertained to the Applicant.

- [9] Subsection 30(2) of LA FOIP provides:

30(2) A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual’s suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by the local authority, where the information is provided explicitly or implicitly in confidence.

- [10] The *Guide to LA FOIP*, Chapter 6, “Protection of Privacy”, updated February 27, 2023 (*Guide to LA FOIP*, Ch. 6) at page 252, provides that this provision attempts to address two competing interests: the right of an individual to have access to their personal information and the need to protect the flow of frank information to local authorities so that appropriate decisions can be made respecting the awarding of jobs, contracts, and other benefits.

[11] The *Guide to LA FOIP*, Ch. 6 at pages 253 to 255 also provides the following three-part test that must be met in order for the provision to be found to apply. All three parts of the test must be met:

1. Is the information personal information that is evaluative or opinion material?
2. Was the personal information compiled solely for one of the enumerated purposes?
3. Was the personal information provided explicitly or implicitly in confidence?

[12] The SHA provided a submission to my office along with a copy of its six-page Work Standard titled, *Cautionary Hire List Maintenance and Additions/Removals*. In its submission, the SHA provided the following arguments for why subsection 30(2) of LA FOIP applied:

Access to the list was refused subject to subsection 30(2) of LA FOIP. 30(2) permits the head to refuse to disclose to an individual personal information about that individual that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability for employment. The cautionary hire list provides a method for managers in the SHA to flag employees who, based on their previous working experience within the SHA, may not be suitable for future employment in the SHA. Whether or not an SHA employee is placed on the cautionary hire list as per the provided work standard is evaluative and based on the opinion of the employee's manager. As per the IPC's Guide to LA FOIP, "suitability" means the appropriateness for a particular person, purpose or situation. A manager can consider the fact that an individual is on the cautionary hire list to assist in their determination of their suitability for future employment. As per the work standard, the manager submits information to Human Resources to place the former employee on the cautionary hire list. **That information is provided by the manager to HR in confidence, implicitly.** Therefore, the SHA will not disclose to the employee whether or not their name was placed on the cautionary hire list.

[Emphasis added]

[13] Section 51 of LA FOIP provides that the burden of establishing that access to a record applied for may or must be refused or granted is on the head concerned. In other words, the SHA must establish that subsection 30(2) of LA FOIP applies. Based on the one paragraph argument and copy of the Work Standard that has been provided to my office, I am unable to find that subsection 30(2) of LA FOIP applies.

[14] For example, for the third part of the test, the SHA should be establishing how the personal information is provided implicitly in confidence. *Implicitly* means the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of understanding that the information be kept confidential (*Guide to LA FOIP*, Ch. 6, p. 252). Factors considered when determining whether a document was provided in confidence *implicitly* include (not exhaustive):

- What is the nature of the information. Would a reasonable person regard it as confidential. Would it ordinarily be kept confidential by the party providing it or by the local authority.
- Was the information treated consistently in a manner that indicated a concern for its protection by the party providing it and the local authority from the point at which it was provided until the present time.
- Is the information available from sources to which the public has access.
- Does the local authority have any internal policies or procedures that speak to how records or information such as that in question are to be handled confidentially.
- Was there a mutual understanding that the information would be held in confidence.

[15] Just stating that the information is “provided by the manager to HR in confidence, implicitly” is not sufficient to meet the burden of proof required by section 51 of LA FOIP. I would expect further arguments to support why this is so. The Work Standard was provided but if this was relevant to the statement made, the SHA did not point to anything in it to support its statement. Based on these points, I find that the burden of proof is not met, and the third part of the test is therefore not met.

[16] As all three parts of the test must be met, there is no need to go further in my analysis. In conclusion, I find that the SHA has not properly applied subsection 30(2) of LA FOIP to the information withheld in the Cautionary Hire List.

[17] This finding is consistent to that in my office’s [Review Report 142-2022](#) that considered the equivalent provision in *The Freedom of Information and Protection of Privacy Act*. In

that case, the Ministry of Social Services similarly stated that scores in an eligibility assessment report were confidential but failed to provide enough detail for my office to determine if confidentiality was explicitly or implicitly understood (see paragraph [37]). I found in that case that the third part of the test was not met, and the provision did not apply.

[18] Before concluding my review, I wish to note that I have concerns with the use of Cautionary Hire Lists. This is the third report I am issuing that relates to these types of lists (see Review Reports [100-2018](#) and [073-2020](#)) and there are at least two more in the queue that will be issued shortly. In all the cases involving the SHA, it has been resistant to provide my office with the record so I can conduct my review. It ultimately provides it but, in each file opened, I am faced with the same resistance. This is concerning.

[19] Further, the existence of these lists poses access and privacy issues that should be considered by the SHA. For example, the SHA's aforementioned Work Standard sets out the steps required to place someone on the list and the process regarding ongoing maintenance of the list. It states that all external resumes, including contractors, must be checked against the cautionary hire list prior to any offer being made. This step is done by employees in Workforce Planning & Employment Strategies. It also appears other departments may have access to the list. Who all has access to this list across the SHA is a privacy concern. How are potential breaches of privacy related to this list being caught and handled? If the SHA is reluctant to be transparent with individuals about being on the list and why, how are individuals supposed to challenge these decisions? I encourage the SHA to reconsider its use of these lists unless it can demonstrate that all access and privacy related concerns are adequately addressed.

IV FINDINGS

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

[21] I find that the SHA did not properly apply subsection 30(2) of LA FOIP to the Cautionary Hire List.

V RECOMMENDATION

[22] I recommend that the SHA release the information requested by the Applicant within 30 days from the issuance of this Report.

Dated at Regina, in the Province of Saskatchewan, this 26th day of July, 2024.

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