



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 051-2024

Saskatchewan Health Authority

October 7, 2024

Summary:

The Applicant submitted a seven-part access to information request to the Saskatchewan Health Authority (SHA) requesting access to records related to various matters involving SHA senior staff. The SHA withheld some information pursuant to subsections 14(1)(c), (d), 21(a), (b), (c) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). It released in full records responsive to part three of the request and stated that other records do not exist. The Applicant requested a review by the Commissioner. During the review, the Applicant removed some information from the scope of the review. The A/Commissioner found that the SHA properly applied subsection 14(1)(c) of LA FOIP to some information, but not all. The A/Commissioner also found that the SHA properly applied subsections 21(a) (settlement privilege) and 28(1) of LA FOIP. He further found that the SHA made a *prima facie* case that subsection 21(a) (solicitor-client privilege) of LA FOIP applied. Finally, the A/Commissioner found that there was no conflict of interest or perceived conflict of interest on the part of the decision-maker in this matter. The A/Commissioner recommended that the SHA continue to withhold the information as set out in the Appendix.

I BACKGROUND

[1] The Applicant made an access to information request under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) to the Saskatchewan Health Authority (SHA). The Applicant sought access to the following information:

Part one - Documentation and communication records (including emails and text messages) from SHA CEO [name redacted] regarding allegations of

racist/discriminatory behaviour by [name redacted] and [name redacted] towards foreign-trained internal medicine specialists at Regina General Hospital who have filed a complaint with the Saskatchewan Human Rights Commission. Time period: January 1, 2023 – December 13, 2023.

Part two - Documentation and communication records (including emails and text messages) from SHA CEO [name redacted] regarding the delay in releasing the SHA 2022-2023 Annual Report that listed \$425,000 in severance pay to former SHA CEO [name redacted] until after the August 10, 2023 Saskatchewan by-elections. Time period: January 1, 2023 – September 30, 2023.

Part three - Documentation showing that SHA CEO [name redacted] has received education on retaining his records (including text messages) in compliance with LA FOIP and any auditing done of his compliance. Time period: January 1, 2022 – December 13, 2023.

Part four - Documentation and communication records (including emails and text messages) from SHA CEO [name redacted] regarding severance payments to former SHA CEO [name redacted]. Please include the record that approved the \$425,000 severance payment to [name redacted]. Time period: November 24, 2021 – September 30, 2023.

Part five - Records showing that SHA CEO [name redacted] has apologized on behalf of the SHA to employees who suffered in any way, up to and including termination, for their choice not to receive some or any COVID-19 vaccinations. Time period: January 1, 2022 – December 13, 2023.

Part six - SHA communication with legal counsel (both internal and external counsel) discussing compliance with the Privacy Commissioner's recommendations in Review Reports 017-2023, 022-2023 and 028-2023. Time period: January 1, 2023 – December 13, 2023.

Part seven - Former SHA CEO [name redacted] letter of resignation. Time period: November 1, 2021 – December 2, 2021.

[2] Based on the information provided by the Applicant, it appears that they mailed the request on December 14, 2023. The SHA advised that it received the request on December 15, 2023.

[3] On January 10, 2024, the SHA wrote to the Applicant extending the time to respond to the request relying on subsection 12(1)(a)(ii) of LA FOIP. It stated that the response would be sent no later than February 15, 2024.

- [4] The SHA responded to the request on February 15, 2024, stating that the records responsive to parts two and five do not exist and cited subsection 7(2) of LA FOIP. It released in full the records responsive to part three. It denied access to portions of the records responsive to parts one, four, six and seven pursuant to subsections 14(1)(c), (d), 21(a), (b), (c) and 28(1) of LA FOIP.
- [5] The Applicant filed a request for a review of the decision with my office on February 27, 2024.
- [6] Following my office's attempts at early resolution and discussions with the parties, the Applicant advised that parts two, three and five of the request were no longer at issue in this review.
- [7] On April 17, 2024, my office sent a notice of review to the Applicant and the SHA inviting them to provide my office with a submission.
- [8] On May 3, 2024, the Applicant provided their submission to my office.
- [9] On May 17, 2024, the SHA provided my office with an index of records and some of the records at issue.
- [10] On May 24, 2024, the SHA provided my office with an affidavit (first affidavit) with attached "updated Index of Records" in lieu of providing my office with copies of some of the records. It stated:

Given that the records or portions of the records are subject to solicitor-client privilege or settlement privilege, the SHA declines to provide those responsive records without exemptions applied.

- [11] On the same day, the SHA also provided my office with copies of pages 7 to 12 of the records stating that those pages did not include any information to which a privilege was applied.
- [12] On June 17, 2024, the SHA provided a submission to my office. On July 26, 2024, the SHA provided my office with a redacted version of all of the responsive records. It redacted or blacked out the portions of the records for which it claimed solicitor-client and settlement privilege electing to make a *prima facie* case that this information was exempt.
- [13] In July 2024, SHA released its [Annual Report](#) for 2023-2024. In July 2023, it released its 2022-2023 [Annual Report](#). Those reports set out the amounts paid by the SHA to its former CEO in the applicable time periods.
- [14] On August 29, 2024, my office wrote to the SHA reminding it of its requirement to provide my office with redlined or an unredacted version of the records and that the option of providing my office with an affidavit, schedule of records and redacted versions of the records only applies where solicitor-client privilege or litigation privilege (protected under subsection 21(a) of LA FOIP) is claimed. My office also asked the SHA to clarify the exemptions claimed and provide more detailed information about the records for which it claimed solicitor-client privilege or litigation privilege.
- [15] On September 6, 2024, the SHA provided my office with a second affidavit and attached index of records.
- [16] In response to a request from my office that the SHA provide my office with a schedule in accordance with my office's [Rules of Procedure](#), Part 9, the SHA sent on September 17, 2024 the third affidavit with an attached schedule. It also provided my office with the copies of withheld information to which it applied exemptions other than subsection 21(a) of LA FOIP, as it relates to solicitor-client privilege, including a copy of a document that it claimed was subject to settlement privilege. Further, the SHA clarified that it did not claim litigation privilege for any of the records.

II RECORDS AT ISSUE

[17] The SHA identified 128 pages of responsive records. It released 8 pages in full, 43 pages in part and withheld the remaining pages in full. Therefore, there are 120 pages under review. A description of the records, exemptions applied, and my findings and recommendations appear in the Appendix to this Report.

[18] During this review, the Applicant stated that they were not interested in gaining access to a “cell phone number” withheld from a number of emails. Therefore, that information is outside the scope of the review, and I will not comment on it further in this Report.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[19] The SHA qualifies as a “local authority” pursuant to 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 28(1) of LA FOIP?

[20] The SHA applied subsection 28(1) of LA FOIP to the body of an email which appears on Part one, pages 2 to 5, an email address and body of the email that appear on Part one, page 12 and information in a letter that appears on Part seven, page 128.

[21] Section 28 of LA FOIP prohibits the disclosure of personal information unless the individual about whom the information pertains consents to its disclosure or disclosure without consent is authorized by one of the enumerated exceptions in subsection 28(2) or section 29 of LA FOIP (*Guide to LA FOIP*, Chapter 6, “Protection of Privacy”, updated February 27, 2023 [*Guide to LA FOIP*, Ch. 6], p. 163).

[22] Subsection 28(1) of LA FOIP provides:

28(1) No local authority 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 29.

[23] In order for subsection 28(1) of LA FOIP to apply, the information in question must qualify as “personal information.” Subsection 23(1) of LA FOIP defines personal information and provides a list of examples of the type of information that can be considered personal information. The list is not exhaustive. To qualify as personal information two elements must be present. The information must be about an identifiable individual and the information must be personal in nature (*Guide to LA FOIP*, Ch. 6, p. 39).

[24] In its submission, the SHA stated that it applied subsection 28(1) of LA FOIP to information in the body of emails that was about the author’s family status and their personal opinions and views that are not about other individuals. It stated that this information qualified as personal information pursuant to subsections 23(1)(a) and (f) of LA FOIP.

[25] The SHA also stated that it applied subsection 28(1) of LA FOIP to the home address, personal telephone number and personal email address of an individual that qualified as their personal information pursuant to subsection 23(1)(e) of LA FOIP. It also applied this exemption to the body of the letter on Part seven, page 128, claiming that it was personal information pursuant to subsection 23(1)(b) of LA FOIP because it contained the terms and circumstances of the individual’s departure from the SHA.

[26] In light of the SHA’s submission, the following subsections of section 23 of LA FOIP, which defines personal information, may be relevant here:

23(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, fingerprints or blood type of the individual;

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

[27] I now turn to consider if the information withheld by the SHA qualifies as personal information and if the SHA properly applied subsection 28(1) of LA FOIP.

Part one, pages 2 to 5 and the body of the email on page 12

[28] The body of emails on Part one, pages 2 to 5 and 12 were withheld. The emails are from an SHA employee to other SHA employees. The body of the emails include the author's personal opinions or views about their experiences as an employee of SHA. They also include some information about the author's family members and their education. It includes the author's observations and concerns about events that occurred inside and outside the workplace. I note that this is the type of correspondence that would normally appear in a personnel file.

[29] Previous reports issued by my office, including [Review Report 017-2023](#), have found that the term "employment history" as used in subsection 23(1)(b) of LA FOIP includes the type of information normally found in a personnel file, such as performance reviews, evaluations, disciplinary actions taken, reasons for leaving a job or leave transactions.

[30] I note that the SHA released the name of the author of the email on these pages. I find that the body of the emails qualify as the author's personal information because they include information about their family status (subsection 23(1)(a) of LA FOIP), education and employment history (subsection 23(1)(b) of LA FOIP) and their personal opinions and

views (subsection 23(1)(f) of LA FOIP). As there is no suggestion that the author of the email consented to the release of this information, I find that the SHA properly applied subsection 28(1) of LA FOIP to it. I will make a recommendation after I have considered the Applicant's argument about the SHA's discretion to release this information.

Part one, page 12

[31] The SHA applied subsection 28(1) of LA FOIP to an email address on Part one, page 12 of the records. Its submission did not address this information. However, from a review of the email, it is apparent that this is the personal email address of the author of the email. It qualifies as their personal information pursuant to subsection 23(1)(e) of LA FOIP. This approach is consistent with the finding made in relation to a personal email address in my office's [Review Report 161-2023](#).

[32] As there is no suggestion that the author of the email consented to the release of this information, I find that the SHA properly applied subsection 28(1) of LA FOIP. I will make a recommendation after I have considered the Applicant's argument about the SHA's discretion to release this information.

Part seven, page 128

[33] Part seven, page 128 of the records contains a letter. The SHA withheld the author's residential address, telephone number and email address claiming that the information qualified as the author's personal contact details. It is apparent that this information qualifies as the author's personal contact details, and it appears in a personal context. Similar information was found to qualify as personal information in my office's [Review Report 103-2024](#) and I will follow the same approach here. Therefore, I find that this information qualifies as the author's personal information pursuant to subsection 23(1)(e) of LA FOIP.

- [34] The SHA also withheld the body of the letter. Like the emails on Part one, pages 2 to 5 and 12, the body of the letter is the type of information one might find in a personnel file. Therefore, it qualifies as the author's employment history information pursuant to subsection 23(1)(b) of LA FOIP.
- [35] As there is no suggestion that the author consented to the release of the information on Part seven, page 128, I find that SHA properly applied subsection 28(1) of LA FOIP to this page. I will make a recommendation after I have considered the Applicant's argument about the SHA's discretion to release this information.
- [36] The Applicant's submission raised an issue about the SHA's discretion to release the withheld personal information under LA FOIP's subsections 28(2)(n)(i), and 28(2)(s), together with subsection 10(g)(ii) of *The Local Authority Freedom of Information and Protection of Privacy Act Regulations* (LA FOIP Regulations). As the Applicant was not clear as to what personal information they thought should be released by the SHA, I will consider if these provisions apply to all of the personal information referred to above.

Subsections 28(2)(n)(i) of LA FOIP and 10(g)(ii) of the LA FOIP Regulations

- [37] Subsection 28(2)(n)(i) of LA FOIP gives a local authority discretion to disclose personal information about an individual without consent for any purpose where the public interest in disclosure clearly outweighs any invasion of privacy that could result from disclosure. This provision requires the exercise of discretion by the "head" of the local authority. Disclosure can be for any purpose provided the criteria in subsection 28(2)(n)(i) of LA FOIP are met (*Guide to LA FOIP*, Ch. 6, p. 213).
- [38] Subsections 28(2)(n)(i) and (s) of LA FOIP state:

28(2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:

...
(n) for any purpose where, in the opinion of the head:

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or

...

(s) as prescribed in the regulations

[39] A local authority can use the following test to determine if it has discretion to disclose pursuant to subsection 28(2)(n)(i) of LA FOIP:

1. Is the information “personal information” as defined by LA FOIP?
2. Is there a public interest in the personal information?
3. Does the public interest clearly outweigh any invasion of privacy?

(*Guide to LA FOIP*, Ch. 6, p. 213)

[40] “Public interest” means the interest of the general public or of a group of individuals. It does not include the interest of only one individual. The criteria for assessing whether there is a public interest in information are as follows:

1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it?
2. Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public?
3. If the records are about the process or functioning of the local authority, will they contribute to open, transparent, and accountable government?

(*Guide to LA FOIP*, Ch. 6, pp. 217 to 218).

[41] Regarding part three of the test, my office’s *Guide to LA FOIP*, Ch. 6 at pages 217 to 218, states that local authorities should apply the “invasion of privacy” test to determine the level of privacy risk in the disclosure. This involves a detailed review of three risk factors namely, the sensitivity of the information, the expectation of the individual to whom the information relates and the probability and degree of injury.

[42] Subsection 10(g)(ii) of the LA FOIP Regulations also creates an exception to the mandatory exemption in subsection 28(1) of LA FOIP. It gives discretion to disclose personal information in some circumstances. It states:

10 For the purposes of clause 28(2)(s) of the Act, personal information may be disclosed:

...
(g) to any person where the information pertains to:

...
(ii) the terms or circumstances under which a person ceased to be an employee of a local authority, including the terms of any settlement or award resulting from the termination of employment.

[43] For subsection 10(g)(ii) of the LA FOIP Regulations to apply, the personal information must either pertain to:

1. the terms under which a person ceased to be an employee of a local authority; or
2. the circumstances under which a person ceased to be an employee of a local authority.

[44] The term “employee” is defined in subsection 2(1)(b.1) of LA FOIP which states:

2(1) In this Act:

...
(b.1) “employee” means an individual employed by a local authority and includes an individual retained under a contract to perform services for the local authority;

[45] If I find that subsections 28(2)(n)(i) of LA FOIP or subsection 10(g)(ii) of the LA FOIP Regulations apply to the circumstances here, my authority is limited to a review of SHA’s exercise of discretion. But I will not substitute my discretion for that of the head.

[46] Regarding the factors that should be taken into account when exercising discretion to release information, in my office’s [Review Report 173-2018](#), I stated:

[31] A discretion conferred by statute must be exercised consistently with the purposes underlying its grant. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010 SCC 23](#) at [46]). Some factors that should be taken into account when exercising discretion include:

- the general purposes of the Act (i.e. government institutions should make information available to the public, and individuals should have access to personal information about themselves);
- the wording of the discretionary exemption and the interests which the exemption attempts to protect or balance;
- whether the applicant's request may be satisfied by severing the record and providing the applicant with as much information as is reasonably practicable;
- the historical practice of the government institution with respect to the release of similar types of records;
- the nature of the record and the extent to which the record is significant or sensitive to the government institution;
- whether the disclosure of the information will increase public confidence in the operation of the government institution;
- the age of the record;
- whether there is a definite and compelling need to release the record; and
- whether the Commissioner's recommendations have ruled that similar types of records or information should be released.

[32] The Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, (2010) SCC 23, confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exemption and to return the matter for reconsideration to the head of the government institution. The Court also considered the following factors to be relevant to the review of discretion:

- the decision was made in bad faith;
- the decision was made for an improper purpose;
- the decision took into account irrelevant considerations; or

- the decision failed to take into account relevant considerations.

[47] The SHA's submission did not address the issue of its discretion to disclose this information. The Applicant asserted that during the COVID pandemic, the former CEO of the SHA commanded a great deal of power over the lives of everyone in Saskatchewan and then they suddenly quit their job. Given the demands from the SHA to comply with numerous strict measures during COVID, the former CEO's departure undermined the public trust in the SHA leadership structure. The Applicant added:

The SHA has refused to be transparent on this issue despite previous IPC reports recommending the release of records as per section 10(g)(ii) of LA FOIP Regulations.

...

The SHA needs to be transparent with their decision making to so flagrantly disregard the Commissioner's recommendations on denying access to these records.

[48] Regarding the public interest in the issues involved, the Applicant stated:

Prior to the formation of the SHA, this scenario could have been a textbook example for an education session of when 10(g)(ii) would apply to providing access to records. The educational example would imagine one of the most powerful CEO positions ever created in Saskatchewan, an unprecedented public health event (COVID) leading to the most restrictive public measures ever authorized by a CEO, law enforcement used to implement these health measures but then the CEO without explanation suddenly quits. All this happened and didn't need to be imagined for the sake of illustration. The SHA needs to be transparent with their decision making to so flagrantly disregard the Commissioner's recommendations on denying access to these records.

...

With this cloud hanging over the office of the SHA's CEO, it leads to speculation as to much time and SHA resources are being devoted to senior executives acquiring and profiting from their positions. The cost of this type of activity affects the entire organization and it leads to questions how much actual time is being devoted to the serious issues within the SHA such as the human rights complaints from leading physicians at the Regina General Hospital. This is an issue that the SHA CEO should be publically [sic] leading and it truly should not have happened in the first place. The public deserves access to records on this topic and advocate for change if necessary.

Analysis - Subsection 28(1)(n)(i) of LA FOIP

- [49] I will begin with an analysis of the discretion to disclose personal information pursuant to subsection 28(1)(n)(i) of LA FOIP. The first part of the applicable test requires that the information at issue qualify as personal information. I have already found that the following pages contain personal information: Part one, pages 2 to 5 and 12; and Part seven, page 128. Therefore, the first part of the test has been met for this information. For the second part of the test, I must determine if there is a public interest in the withheld information.
- [50] Regarding the information withheld from Part one, pages 2 to 5 and 12, I note that the withheld personal information is highly sensitive and relates primarily to what the SHA described as a “counter concern” that is the subject of ongoing investigations. In contrast, the Applicant’s “public interest argument” relates to the circumstances surrounding the conclusion of the former CEO’s employment. Therefore, the emails do not relate to the Applicant’s “public interest argument” and the release of the emails would not shed any light or bring transparency to those concerns. Further, given the sensitive nature of the information, the privacy interests of the individual involved would prevail over any public interest in the detailed information withheld from these pages. I find that subsection 28(2)(n)(i) of LA FOIP does not apply to this information.
- [51] Regarding the information withheld from Part seven, page 128, I note that this record was at issue in Review Reports [017-2023](#) and [022-2023, 028-2023](#). In those reports, I recommended that the SHA reconsider its exercise of discretion to disclose some personal information from the record.
- [52] In response to those recommendations, the SHA indicated that it reviewed and reconsidered its exercise of discretion. It added that the public interest in the financial terms of the matter was addressed by the SHA by information that was made publicly available. It took the position that as a result, the public interest in the disclosure does not outweigh the invasion

of privacy that could result from disclosure. It added that upon review, the SHA has reconfirmed its decision, and no additional information will be released.

[53] As noted above, I will not substitute my discretion for that of the head. The SHA indicated that it reconsidered the exercise of its discretion to release in relation to this information. Based on the information provided by the parties, I do not have concerns that the four factors set out by the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, (2010) SCC 23, played a role in the SHA's exercise of discretion. I also note that the public interest in the financial aspects of the former CEO's departure were satisfied by the release of information about payments made to the former CEO as described in the background section of this Report. Therefore, I find that subsection 28(2)(n)(i) of LA FOIP does not apply to this record.

Analysis – Subsection 10(g)(ii) of the LA FOIP Regulations

[54] The individuals to whom the personal information relates on Part one, pages 2 to 5 and page 12 and Part seven, page 128 qualified as “employee(s)” of the SHA as that term is defined in subsection 2(1)(b.1) of LA FOIP.

[55] However, the personal information withheld from Part one, pages 2 to 5 and page 12 does not describe the terms of the individual's employment and the circumstances under which they ceased to be an employee. Therefore, the criteria for the application of subsection 10(g)(ii) of the LA FOIP Regulations have not been met for these pages. For these reasons, I find that subsection 10(g)(ii) of the LA FOIP Regulations does not apply to this information.

[56] In contrast, portions of the information in Part seven, page 128 do reveal the circumstances under which they ceased to be an employee. However, I am satisfied that the SHA has reconsidered its exercise of discretion in compliance with recommendations made in Review Reports 017-2023 and 022-2023, 028-2023. I do not have the authority to substitute my decision for the decision of the head.

[57] Before I conclude this analysis, I note that the Applicant alleged that the SHA has not complied with my previous recommendations regarding the release of records. They describe its response to my office's recommendations as a "flagrant disregard" of my recommendations.

[58] To be clear, in Review Reports 017-2023 and 022-2023, 028-2023, I recommended that the SHA reconsider its exercise of discretion pursuant to subsection 28(2)(n)(i) of LA FOIP and subsection 10(g)(ii) of LA FOIP Regulations. I did not recommend that the SHA release the information.

3. Is there a conflict of interest or perceived conflict of interest?

[59] The Applicant alleged that SHA's current CEO was the decision-maker in this access to information request and that they had a conflict or perceived conflict of interest. In particular, the Applicant suggested that the current CEO of the SHA profited from the departure of senior staff within the SHA and therefore, is in a conflict of interest in relation to this access to information request that involves records about that incident.

[60] As I have stated in previous reports, including my office's [Review Report 023-2020, 027-2020](#), followed in Review Report 017-2023, an employee with a personal or special interest in whether records are released should not normally be the person who decides the issue about the release.

[61] In this matter, the current CEO was not the decision-maker. SHA's section 7 decision was issued by an SHA privacy officer pursuant to a written delegation of authority, a copy of which was provided to my office. The delegation was prepared pursuant to section 50 of LA FOIP which states:

50(1) A head may delegate to one or more officers or employees of the local authority a power granted to the head or a duty vested in the head.

(2) A delegation pursuant to subsection (1):

(a) is to be in writing; and

(b) may contain any limitations, restrictions, conditions or requirements that the head considers necessary.

[62] It is not necessary for me to decide if the current CEO had a personal interest in this matter. As they were not the decision-maker, I find that there was no conflict of interest or perceived conflict of interest involved in the processing of the Applicant's access to information request.

4. Did the SHA properly apply subsection 14(1)(c) of LA FOIP?

[63] The SHA applied subsection 14(1)(c) of LA FOIP to Part one, pages 1 (severances 1 to 5), page 2 (severances 1 and 2), pages 3 to 5, page 7 (severances 1 to 8), page 8 (severances 1 and 2), page 9 (severances 1 and 2), page 10 (severances 1 to 4), and page 12 (severances 1, 2, 4 and 5).

[64] I have already found that the following information is exempt pursuant to subsection 28(1) of LA FOIP: Part one, page 2 (severance 2), pages 3 to 5 and page 12 (severance 5). Consequently, I will not need to consider if this information is exempt pursuant to subsections 14(1)(c) and (d) of LA FOIP and I will not be discussing it further in this Report.

[65] I also note that I have not been provided with the unredacted or redlined version of the information withheld from Part one, page 1 (severances 4 and 5) and therefore any ruling I make must be based on the submissions provided by the parties. The SHA declined to provide the information even after my office explained that to complete a review of the application of exemptions, other than solicitor-client and litigation privilege protected under subsection 21(a) of LA FOIP, my office requires copies of the records.

[66] As I have not been provided with unredacted versions of the severed information, I am unable to complete a review to determine if the exemption was properly applied. In these circumstances, I find that the SHA did not properly apply subsection 14(1)(c) of LA FOIP to Part one, page 1 (severances 4 and 5). I will consider later in this Report if the SHA made a *prima facie* case that subsection 21(a) of LA FOIP applies to these severances along with other information before I make a recommendation regarding if SHA should release or withhold them.

[67] I now turn to an analysis of the application of subsection 14(1)(c) of LA FOIP to Part one, page 1 (severances 1 to 3), page 2 (severance 1), page 7 (severances 1 to 8), page 8 (severances 1 and 2), page 9 (severances 1 and 2), page 10 (severances 1 to 4) and page 12 (severances 1, 2 and 4).

[68] Subsection 14(1)(c) of LA FOIP provides:

14(1) A head may refuse to give access to a record, the release of which could:

...

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

[69] Subsection 14(1)(c) of LA FOIP is a discretionary exemption. It permits refusal of access in situations where the release of a record could interfere with a lawful investigation or disclose information with respect to a lawful investigation (*Guide to LA FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated April 29, 2021 [*Guide to LA FOIP*, Ch. 4], p. 52).

[70] My office uses the following two-part test to determine if subsection 14(1)(c) of LA FOIP applies:

1. Does the local authority’s activity qualify as a “lawful investigation”?
2. Does one of the following exist?

a) Could release of the following information interfere with a lawful investigation?
or

b) Could release disclose information with respect to a lawful investigation?

(*Guide to LA FOIP*, Ch. 4, pages 52 to 54).

[71] The following is an analysis to determine if the two-part test has been met.

1. Does the local authority's activity qualify as a "lawful investigation"?

[72] A "lawful investigation" is an investigation that is authorized or required and permitted by law. The local authority should identify the legislation under which the investigation is occurring. The investigation can be concluded, active and ongoing or be occurring in the future. It is not limited to investigations that are conducted by a local authority. In other words, it can include investigations conducted by other organizations (e.g., a police investigation) (*Guide to LA FOIP*, Ch. 4, p. 52).

[73] The Applicant's submission did not address this exemption. The SHA asserted as follows:

The SHA applied section 14(1)(c) to the body and subject lines of the emails responsive to Part 1 of this access to information request. The SHA brought in an external agency to investigate a human rights complaint. Aspects of the investigation have been completed and the investigation of other issues related to the concern are ongoing. This investigation is being conducted under *The Occupational Health and Safety Regulations, 2020*, *The Saskatchewan Employment Act*, and *The Saskatchewan Human Rights Code, 2018*.

The release of the information redacted could interfere with the concluded portions of the investigation as well as interfering with the ongoing investigation. These records detail information relevant to the initial human rights complaint as well as a counter concern that was raised for investigation.

[74] The SHA added that the records set out information relevant to the initial human rights complaint as well as "a counter concern" that was raised for further investigation.

[75] SHA subsequently advised my office that it was relying on the following provisions in these laws: *The Saskatchewan Employment Act* (SEA), *The Occupational Health and Safety Regulations, 2020* (OHSR), and *The Saskatchewan Human Rights Code, 2018* (SHRC).

[76] The SHA provided my office with the specific provisions in the legislation referred to above that it relied on to support its claim that there was a lawful investigation. I am not able to identify the specific provisions applicable to the withheld information in this Report as to do so would reveal the nature of the withheld information. Based on a review of the records and the relevant statutory authorities, I am satisfied that there is a lawfully authorized investigation into a “counter concern” alleged by an employee of the SHA. I am also satisfied that this investigation is authorized pursuant to the laws identified by the SHA.

[77] The records also include some information relating to an investigation conducted under the SHRC. Previous reports of my office including [Review Report 140-2022, 141-2022](#) have found that investigations conducted by the Saskatchewan Human Rights Commissioner under the SHRC, qualify as investigations pursuant to subsection 15(1)(c) of *The Freedom of Information and Protection of Privacy Act* (the provincial equivalent to subsection 14(1)(c) of LA FOIP). Therefore, I find that the SHA’s activities to which these records relate qualify as “lawful investigations” and part one of the test has been met.

2. Does one of the following exist?

a) Could release of the information interfere with a lawful investigation? or

b) Could release disclose information with respect to a lawful investigation?

[78] For the second part of the test, I must determine if the release could interfere with a lawful investigation or could disclose information with respect to a lawful investigation.

[79] My office’s *Guide to LA FOIP*, Ch. 4, states at page 54:

“With respect to” are words of the widest possible scope; the phrase is probably the widest of any expression intended to convey some connection between two related subject matters.

Section 14 uses the word “could” versus “could reasonably be expected to” as seen in other provisions of FOIP. The threshold for could is somewhat lower than a reasonable expectation. The requirement for could is simply that the release of the information could have the specified result. There would still have to be a basis for asserting the outcome could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.

[80] The subject line of the emails on Part one, pages 1 and 2 was withheld pursuant to subsection 14(1)(c) of LA FOIP. The SHA submitted that the release of the withheld information could interfere with the concluded portions of the investigation as well as interfere with the ongoing investigation. However, it did not explain how this would occur.

[81] Despite that, based on a review of the information, it is apparent that release of this information would *disclose* information with respect to a lawful investigation including about the parties involved. Therefore, part two of the test has been met.

[82] I am also satisfied that the release of the information withheld from the emails on Part one, pages 7 to 12 would disclose information with respect to a lawful investigation because they include discussions among SHA employees about the progress of the investigation and the role of related parties and organizations. Therefore, part two of the test has been met in relation to this information.

[83] Accordingly, I find that the SHA properly applied subsection 14(1)(c) of LA FOIP to the subject line of emails on Part one, pages 1 and 2 and to pages 7 to 12. I recommend that the SHA continue to withhold this information pursuant to subsection 14(1)(c) of LA FOIP.

5. Did the SHA make a *prima facie* case that subsection 21(a) of LA FOIP applies?

[84] The SHA applied subsection 21(a) (solicitor-client privilege) of LA FOIP to pages and portions of pages as set out in the Appendix. It applied subsection 21(a) (settlement privilege) to a “document” at Part four, pages 20 to 26.

[85] As noted above, initially, the SHA did not provide my office with copies of the withheld information, and it elected to make a *prima facie* case pursuant to my office's *Rules of Procedure*. The SHA subsequently provided my office with a copy of the "document" for which it claimed settlement privilege, but continued to withhold copies of the records for which it claimed solicitor-client privilege.

[86] Subsection 21(a) of LA FOIP provides:

21 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;

[87] This is a discretionary exemption. It permits refusal of access in situations where a record contains information that is subject to any legal privilege, including solicitor-client privilege and settlement privilege (*Guide to LA FOIP*, Ch. 4, p. 219).

[88] I will consider its claim that records were subject to solicitor-client privilege first.

Solicitor-client privilege

[89] The purpose of the exemption for solicitor-client privileged information in subsection 21(a) of LA FOIP is to assure clients of confidentiality and enable them to speak honestly and candidly with their legal representatives. My office applies the following three-part test in determining if this exemption was properly applied:

1. Is the record a communication between a 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?

(*Guide to LA FOIP*, Ch. 4, pp. 221-225)

[90] My office's *Rules of Procedure*, at page 34, outline the process a local authority must follow when claiming solicitor-client privilege:

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 the elements requested in Form B.

[91] To support its position, it provided my office with three affidavits. The third affidavit included an attached schedule. It also provided my office with a submission. The SHA's submission on solicitor-client privilege stated:

Part 1

The SHA applied section 21(a) to part of the responsive records where the contents are subject to solicitor-client privilege. The SHA sought legal advice from our retained internal and external legal counsel on the confidential matter being discussed in the responsive emails. The matter being discussed is strictly confidential as it pertains to an investigation into an allegation and a counter-complaint by the other party. The SHA maintains that these communications must remain confidential given the subject discussed being limited to the parties involved in the correspondence.

Part 4

The email correspondence has been redacted under subsection 21(a) as these records are correspondence between SHA staff and our legal counsel. In these emails the SHA staff were seeking the advice of our legal counsel and our internal counsel provided advice to SHA Executive Team and SHA Communications. There was explicit direction that the correspondence be kept confidential and was not to be shared with parties outside the solicitor-client relationship.

...

Part 6

The SHA applied section 21(a) to the responsive records as the contents are subject to solicitor-client privilege. The records have been redacted where the SHA has sought legal advice and where counsel provided legal advice to the SHA. The information redacted included email correspondence between employees of the SHA and our internal legal counsel. The correspondence is considered confidential consultation for legal advice regarding how the SHA respond to an external review of an access to information request.

[92] The affidavits were sworn by the Chief Legal Counsel for the SHA who attested to the following:

- She had knowledge of the records or portions of records for which solicitor-client privilege was claimed.
- The records “relate to communications and information shared” between solicitor and client for the purpose of seeking or obtaining legal advice and were intended to be kept confidential and have been consistently treated as confidential.

[93] I note that the SHA released to the Applicant the headers (except the subject line) and footers of the emails to which it applied subsection 21(a) (solicitor-client privilege) of LA FOIP. My office defines “headers” in an email as the “to, from, cc, bcc, date and subject line.” My office defines “footers” in an email as the information that appears after the closing statement such as “Sincerely.” Therefore, in some cases the footer may include the author’s name, title, contact details and confidentiality statement.

[94] The SHA also released the header, date, subject matter and list of attendees that appear on the two meeting notes.

[95] As the headers (minus the subject line) and footers of the emails and meeting notes were released, I need only consider if the subject line and the body of the emails and body of the meeting notes are exempt.

[96] The SHA also applied subsection 21(a) of LA FOIP to the attachments to emails found on: Part six, pages 29 (attached records responsive to an access to information request), 102 (attached briefing note) and 115 (attached draft response).

[97] As set out in the *Guide to LA FOIP*, Ch. 4 at page 227, solicitor-client privilege does not necessarily apply to attachments to documents (e.g., attachments to emails) even those attached to genuine legal advice. On the other hand, an attachment that is an integral part of a legal opinion in the covering email or document could be privileged. For example, if the attachment would provide some basis for a reader to determine some or all of the

opinion or advice. The party claiming privilege over an attachment must provide some basis for the claim. The point is that it is the content of the communication and who is communicating, not the form of the communication that determines privilege and confidentiality.

[98] I now turn to the first part of the test.

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

[99] A “communication” is the process of bringing an idea to another’s perception; the message or ideas so expressed or exchanged; the interchange of messages or ideas by speech, writing, gestures or conduct (*Guide to LA FOIP*, Ch. 4, p. 221).

[100] A “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 their behalf. It includes a client of the law firm in which the lawyer is a partner or associate, whether the lawyer handles the client’s work (*Guide to LA FOIP*, Ch. 4, p. 222).

[101] A “lawyer” means a member of the Law Society and includes a law student registered in the Society’s pre-call program (*Guide to LA FOIP*, Ch. 4, p. 222).

[102] The local authority should make it clear who the solicitor is and who the client is.

[103] The SHA provided my office with information about the title and roles of the senders and recipients of the emails at issue. I am satisfied that the SHA legal counsel and its external counsel were parties to the email communications with staff of the SHA who is the client.

[104] In addition, all legal counsel involved were members of the Law Society of Saskatchewan and were licensed to practice law in this province. This includes the Director of Regulatory Affairs who is a licensed legal practitioner and whose role, according to the job description

provided to my office by the SHA, includes the provision of legal advice. As the emails and notes of meetings contain information that was communicated between those involved, the records at issue are communications between a 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?

[105] For context, I note that the Part six of the Applicant's request was for "SHA communications with legal counsel (both internal and external counsel) discussing compliance with the Privacy Commissioner's recommendations in Review Reports 017-2023, and 022-2023, 028-2023." On their face, therefore, the responsive records should include communications between SHA staff and SHA's legal counsel.

[106] I am satisfied, based on the information provided by the SHA in its submission and in the affidavits sworn by its Chief Legal Counsel that the email correspondence and the notes of meetings between SHA legal counsel and its staff entailed the seeking or giving of legal advice. I am also satisfied that the SHA employees involved, and their legal counsel, intended that the communications be treated confidentially. For these reasons, parts two and three of the test have been met for all of the emails and the two meeting notes. Therefore, I find that the SHA has made a *prima facie* case that subsection 21(a) of LA FOIP applies to this information. I recommend that the SHA continue to withhold the information. Details are set out in the Appendix.

[107] Regarding the attachments to the emails, I note that the briefing note attached on Part six, page 103 was prepared by SHA's Chief Legal Counsel and was submitted to the CEO of SHA, who was the client. Based on the information provided by the SHA, I find that this briefing note entailed the giving of legal advice and that the parties intended that it be treated confidentially.

[108] I make a similar finding regarding the draft response attached to an email that appears on Part six, page 115 and the draft response and "responsive records" that were provided as

an attachment to an email on Part six, page 27. The SHA asserted that the draft responses were related to “an external review of an access to information request.” Based on a review of the submission, affidavit and the redacted version of the records, I am satisfied that the draft responses were provided to legal counsel for the purpose of seeking legal advice about them. I find that the draft responses are integral to the seeking or giving of legal advice. I am also satisfied that it was intended that the draft responses be kept confidential. Therefore, I find that the SHA has made a *prima facie* case that subsection 21(a) of LA FOIP applies to this information. I recommend that the SHA continue to withhold the information. Details are set out in the Appendix.

[109] Regarding the attachment that was described as the “responsive records,” I note that these were also provided to legal counsel by the SHA’s privacy office. Based on the information provided by the SHA, including the portions of the emails that were released, it appears that the SHA’s privacy office was seeking legal advice. Based on the information provided, I find that the SHA has made a *prima facie* case that subsection 21(a) of LA FOIP applies to this information. I recommend that the SHA continue to withhold the “responsive records.” Details are set out in the Appendix.

Settlement Privilege

[110] As noted above, the SHA claimed settlement privilege for the “document” withheld in full on Part four, pages 20 to 26.

[111] The purpose of settlement privilege is to promote settlement by allowing parties to negotiate without fear that the concessions they offer, and the information they provide, will be used against them in subsequent proceedings. The rule is that communications and documents exchanged by parties as they try to settle a dispute cannot be used in subsequent proceedings, whether or not a settlement is reached. The privilege applies not only to communications involving offers of settlement, but also to communications that are reasonably connected to the parties’ negotiations (*Guide to LA FOIP*, Ch. 4, at pp. 247 to 248).

[112] The Supreme Court of Canada (SCC) has found that settlement privilege extends to communications that are in the nature of negotiations leading to the concluded agreement and to the “content of the successful negotiations” (see *Sable Offshore Energy Inc. v. Ameron International*, [2013 SCC 37](#) [*Sable*]). This finding was followed by the Saskatchewan Court of Appeal (SKCA) in *Manderscheid v Humboldt Smiles Dental Studio Inc.*, [2021 SKCA 42 \(Can LII\)](#) where the court found that settlement privilege applied to a final settlement agreement between the College of Dental Surgeons of Saskatchewan and a dentist. The SKCA stated:

[39] The general principles that apply to the determination of settlement privilege are not in dispute. The Chambers judge correctly set out the three basic conditions from *Hollinger* that must be satisfied for settlement discussions to remain confidential:

[16] It is well established that in order to foster the public policy favouring the settlement of litigation, the law will protect from disclosure communications made where (1) there is a litigious dispute; (2) the communication has been made “with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed”; and (3) the purpose of the communication is to attempt to effect a settlement ...

[40] While the wording of the three requirements described in *Hollinger* refers to communications for the purposes of settlement, settlement privilege also attaches to a final settlement agreement reached as a result of those communications: *Sable Offshore Energy Inc. v Ameron International Corporation*, 2013 SCC 37 at paras 14–18, [2013] 2 SCR 623, and *Union Carbide Canada Inc. v Bombardier Inc.*, 2014 SCC 35 at para 34, [2004] 1 SCR 800 [*Union Carbide*].

[113] *Sable* was cited recently with approval by the Alberta Information and Privacy Commissioner (Alberta IPC) in [Order F2021-23](#). In that order, the Alberta IPC found that the public body properly claimed settlement privilege for a settlement agreement that resolved an existing legal conflict and included a clause stating that the parties intended that it be kept confidential.

[114] The Ontario Information and Privacy Commissioner recently found in [Order MO-4528](#) that an agreement between a municipality and a company was exempt because settlement privilege applied. In their analysis, the adjudicator found that legal action was within the

contemplation of the parties, the agreement was an attempt to effect settlement of the issues and the parties intended that the agreement should be kept confidential.

[115] The *Guide to LA FOIP*, Ch. 4 at page 248 sets out the following three-part test that my office uses to determine if a local authority has properly claimed settlement privilege:

1. Is there the existence or contemplation of a litigious dispute?
2. Were the communications made with the intention they remain confidential if negotiations failed?
3. Was the purpose of the communications to achieve a settlement?

[116] The SHA's submission on settlement privilege did not address the three parts of the test.

[117] I am unable to provide a description of the contents of the document because to do so would reveal the information that has been withheld. However, based on a review of the "document" and other records at issue, it is apparent that all three parts of the test for the application of settlement privilege have been met. It appears that litigation between the parties was contemplated. It is also apparent that the communication was made with the intent that it remains confidential and that the purpose of the communication was to achieve a settlement.

[118] Therefore, I find that all three parts of the test for the application of settlement privilege have been met in relation to this document. I find that the SHA properly applied subsection 21(a) (settlement privilege) of LA FOIP to the document. I recommend that the SHA continue to withhold the document pursuant to subsection 21(a) of LA FOIP.

[119] In light of the findings made above, it is not necessary for me to determine if the SHA properly applied subsections 14(1)(d), 21(b) and (c) of LA FOIP.

IV FINDINGS

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

[121] I find that the SHA properly applied subsection 28(1) of LA FOIP.

[122] I find that no conflict of interest or perceived conflict of interest existed.

[123] I find that the SHA properly applied subsection 14(1)(c) of LA FOIP to some information but not all.

[124] I find that the SHA made a *prima facie* case that subsection 21(a) (solicitor-client privilege) of LA FOIP applies.

[125] I find that the SHA properly applied subsection 21(a) (settlement privilege) of LA FOIP.

V RECOMMENDATION

[126] I recommend that the SHA continue to withhold information as set out in the Appendix.

Dated at Regina, in the Province of Saskatchewan, this 7th day of October, 2024.

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

Appendix

Part and Page No.	Request Part No.	LA FOIP Exemption Applied	Description	Commissioner's Findings and Recommendations
Part one, 1 to 5	1	14(1)(c), 14(1)(d), 21(a), 28(1)	Email dated November 6, 2023	14(1)(c) applies to page 1 (severances 1, 2 and 3), page 2 (severance 1); 14(1)(c) does not apply to page 1 (severances 4 and 5); 28(1) applies to page 2 (severance 2), page 3; 21(a) applies to page 1 (severances 4 and 5) and the remaining information; continue to withhold
Part one, 7 to 11	1	14(1)(c), 14(1)(d)	Email dated November 17, 2023	14(1)(c) applies; continue to withhold
Part one, 12	1	14(1)(c), 14(1)(d), 28(1)	Email dated December 9, 2023	28(1) applies to personal email address and body of the email dated December 4, 2023 and time stamped 4:42 PM; 14(1)(c) applies to remaining information; continue to withhold
Part four, 14 to 19	4	21(a), 21(b), 21(c)	Email dated September 27, 2023	21(a) applies; continue to withhold
Part four, 20 to 26	4	21(a) settlement privilege	Document	21(a) applies; continue to withhold
Part six, 27 to 90	6	21(a), 21(b), 21(c)	Email and Attached Draft response to IPC, and responsive records from previous access to information request dated September 6, 2023	21(a) applies; continue to withhold
Part six, 91	6	21(a), 21(b), 21(c)	Email dated September 7, 2023	21(a) applies; continue to withhold
Part six, 92	6	21(a), 21(b), 21(c)	Meeting notes from Legal dated September 13, 2023	21(a) applies; continue to withhold

Part six, 93	6	21(a), 21(b), 21(c)	Email dated September 11, 2023	21(a) applies, continue to withhold
Part six, 94	6	21(a), 21(b), 21(c)	Meeting notes from Legal dated September 14, 2023	21(a) applies; continue to withhold
Part six, 95 to 97	6	21(a), 21(b), 21(c)	Email dated September 15, 2023	21(a) applies; continue to withhold
Part six, 99 to 100	6	21(a), 21(b), 21(c) d)	Email dated September 15, 2023	21(a) applies; continue to withhold
Part six, 101	6	21(a), 21(b), 21(c)	Meeting notes from Legal dated September 15, 2023	21(a) applies; continue to withhold
Part six, 102 to 109	6	21(a), 21(b), 21(c)	Email with attached briefing note dated September 15, 2022	21(a) applies; continue to withhold
Part six, 110 to 112	6	21(a), 21(b), 21(c)	Email with attached letter dated November 4, 2022	21(a) applies; continue to withhold
Part six, 114 to 117	6	21(a), 21(b), 21(c)	Email with attached draft response dated September 19, 2023	21(a) applies; continue to withhold
Part six, 119 to 122		21(a), 21(b), 21(c)	Draft response	21(a) applies; continue to withhold
Part six, 123 to 124	6	21(a), 21(b), 21(c)	Email dated September 21, 2023	21(a) applies; continue to withhold
Part six, 125 to 126	6	21(a), 21(b), 21(c)	Email dated September 25, 2023	21(a) applies; continue to withhold
Part seven, 128	7	28(1)	Letter dated November 24, 2021	28(1) applies; continue to withhold