



REVIEW REPORT 087-2024

Saskatchewan Health Authority

September 11, 2024

Summary:

The Applicant submitted an access to information request to the Saskatchewan Health Authority (SHA) requesting access to records related to a “Do Not Hire List/Cautious Hire List”. The SHA, in its section 7 decision to the Applicant, withheld the records in part, pursuant to subsections 14(1)(c), 16(1)(a) and 30(2) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Applicant requested a review of the SHA’s decision. The A/Commissioner found that the SHA did not properly apply subsections 14(1)(c), 16(1)(a) and 30(2) of LA FOIP and recommended that the withheld information be released to the Applicant within 30 days of the issuance of this Report.

I BACKGROUND

[1] On January 5, 2024, the Applicant submitted the following access to information request to the Saskatchewan Health Authority (SHA):

1. I am wanting to see if my name is on the SHA Cautionary Hire List. If it is I would like to know the date my name was added to the list, who added me to the list and for what reasons.
2. The former Sunrise Health Region had a Do not Hire List which up until 2017 was kept in a hard copy binder called The Star Binder. I would like to search this binder/document to see if my name was added to this list as well.
3. The categories that exist on these lists.
4. The policies, standards of work and criteria used to determine if/when someone should be placed on either the SHA list or the former sunrise health regions list.
5. I would like a copy of my human resources files and labour relations records from the former sunrise health region and the SHA (Regina) and SHA (Saskatoon).

- [2] In its section 7 decision dated February 2, 2024, the SHA responded to the Applicant indicating that it was withholding information “related to the Do Not Hire list / Cautionary Hire List” 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 denying access in part to the records requested related to the Applicant’s Human Resources and Labour Relations files, pursuant to subsections 14(1)(c), 16(1)(a) and 30(2) of LA FOIP. The SHA provided access in full to the Work Standard pertaining to its Cautionary Hire List.
- [3] On March 24, 2024, my office received a request from the Applicant to review the SHA’s decision to withhold the records in part and in full.
- [4] On April 25, 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 (index) to my office by May 27, 2024, and its submission by June 24, 2024. The Applicant was also invited to provide a submission by June 24, 2024.
- [5] In correspondence on May 24, 2024, the SHA provided my office with copies of the records at issue and an index. The SHA added that there was no responsive record for the Applicant’s request to access the SHA Cautionary Hire List.
- [6] On June 7, 2024, the SHA provided a submission to my office. No submission was received from the Applicant.
- [7] Upon review of the materials provided by the SHA, it was clear that I required a copy of the Cautionary Hire List for two reasons: 1. The Applicant was requesting access to the categories on the list which the SHA did not address; and 2. I would need to determine if subsection 30(2) of LA FOIP applies to whether the Applicant was or was not on the list which the SHA did not answer for the Applicant. My office requested the SHA send a copy of the list to my office by noon on August 30, 2024, and advised it was a record under review. However, the SHA did not provide it and wanted reasons why I would need it for

my review as the SHA deemed it not responsive. My office reminded the SHA of my powers for production of records under section 43 of LA FOIP and advised that if my office did not receive the record by end of day September 3, 2024, a Notice to Produce may be issued. The record was not received by that timeline and a Notice to Produce was issued to the SHA on September 4, 2024, indicating that if the record was not received by end of day a summons would be issued. On September 4, 2024, the SHA provided a copy of the record to my office. As this pattern of refusal to provide the Cautionary Hire List has repeated across several files now, I wish to remind the SHA that for all files going forward that involve the Cautionary Hire List, my office will expect a full copy of the record along with any other records under review within the first 30 days of my office's notification email being received. If the SHA does not comply voluntarily, I will accelerate the issuing of a Notice to Produce or Summons.

II RECORDS AT ISSUE

[8] The records at issue are six pages of human resources records for the Applicant from former Regina and Saskatoon health regions. Information was withheld in part by the SHA on these pages pursuant to subsections 14(1)(c), 16(1)(a) and 30(2) of LA FOIP. Also at issue are the categories or headings on a Cautionary Hire List and whether the Applicant is on said list. The SHA withheld this information pursuant to subsection 30(2) of LA FOIP. For more details see the Appendix at the end of this Report.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[9] 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. Are there any records not responsive to the Applicant's access to information request?

[10] The SHA, in email correspondence with my office on May 24, 2024, submitted that no responsive records exist for the Applicant's request for access to the SHA's Cautionary Hire List as the Applicant was not on the list.

[11] The *Guide to LA FOIP*, Chapter 3, "Access to Records", updated May 5, 2023, (*Guide to LA FOIP*, Ch. 3), at page 26 provides that when a local authority 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] In this case, the Applicant is seeking information related to the SHA's Cautionary Hire List. For instance, I note that the Applicant is wanting to know if their name is on the list and the categories that exist on the Cautionary Hire list. A request for the categories in and of itself makes the list responsive to the Applicant's request regardless of whether their name is on it.

[13] I would also want to remind the SHA of my office's procedures regarding records withheld as being not responsive to an access request. Where any portion of a record is being withheld as not responsive, copies must be provided to my office and the record captured on the index of records and submission. The SHA cannot decline to provide my office with records required for a review on the basis that it views the records as non-responsive to an access request. What my office requires in such situations is spelled out in my office's notification email sent to the SHA on April 25, 2024.

[14] In conclusion, I find that the Cautionary Hire List is responsive to the Applicant's access to information request. I note that the SHA did not address the categories on the Cautionary Hire List in its submission. As no exemptions were applied and no arguments provided, I find that the burden of proof in demonstrating this information should be withheld under

section 51 of LA FOIP has not been met. I recommend the SHA release the categories to the Applicant. I will address the arguments of the SHA that subsection 30(2) of LA FOIP applies to whether or not the Applicant is on the list later in this Report.

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

[15] The SHA applied subsection 30(2) of LA FOIP to information included in emails on pages 3 and 9 of the Applicant's Human Resources and Labour Relations files from former Regina and Saskatoon health regions respectively.

[16] The SHA also applied subsection 30(2) of LA FOIP in refusing access to records related to the "Do Not Hire list / Cautionary Hire List".

[17] 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.

[18] 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.

[19] 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?

[20] In its submission to my office, the SHA's asserted subsection 30(2) of LA FOIP applied to the information on pages 3 and 9 of the record stating as follows:

The SHA applied 30(2) as it qualifies as personal information and identifies the individual. It contains the opinion of the manager that was compiled solely for determining the suitability for employment for a particular position. **This information was provided implicitly in confidence.**

[Emphasis added]

[21] Further, the SHA in refusing access to the Cautionary Hire List and in refusing to disclose whether or not the Applicant was on this list pursuant to subsection 30(2) of LA FOIP argued:

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 REVIEW REPORT 010-2024 8 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]

[22] The SHA also added that the Cautionary Hire List contains names of former and current employees and could not be reasonably severed pursuant to section 8 of LA FOIP. Therefore, the list was not disclosed, at all. It argued that disclosing the severed list may lead the Applicant to make wrong assumptions about whether or not their name was on the list, a fact the SHA has decided not to disclose pursuant to subsection 30(2) of LA FOIP.

[23] 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 SHA's arguments 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.

[24] For example, for the third part of the test, the SHA should be establishing how the personal information is provided implicitly in confidence. As per page 255 of the *Guide to LA FOIP*, Ch. 6, *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. 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.

[25] By simply providing that the information is "provided in confidence implicitly", the SHA has not met the burden of proof required by section 51 of LA FOIP. I would have expected 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. As all three parts of the test must be met, there is no need to proceed further in my analysis.

[26] I find that the SHA did not properly apply subsection 30(2) of LA FOIP to the information on pages 3 and 9 of the records. Further, the SHA did not properly apply subsection 30(2) of LA FOIP to whether or not the Applicant's name is on the list. This finding is consistent with my office's Review Reports [011-2024](#) and [010-2024](#) that considered the SHA's application of subsection 30(2) of LA FOIP to the Cautionary Hire List in response to other access to information requests.

[27] Therefore, I recommend that the SHA release the information on pages 3 and 9 of the record and whether the Applicant is on the Cautionary Hire List within 30 days from the issuance of this Report.

[28] In my office's [Review Report 050-2024](#), issued less than a month ago, where it determined the Applicant was not named on the Cautionary Hire List, the SHA responded indicating to the Applicant that no responsive records exist relating to the reasons and communications to list them on the Cautionary Hire List. I am then baffled as to why the SHA has decided to take a different approach in this case. Individuals should know whether they are on the list or not. This is the only way for individuals to challenge compliance with LA FOIP, accuracy of personal information, and access to one's own personal information. These are only some of the fair information principles that underly all access and privacy laws in Canada. Upon request, an individual, should at minimum, be informed of the existence of their personal information in a record.

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

[29] The SHA withheld portions of pages 3, 4, 5 and 6 of the record pursuant to subsection 14(1)(c) of LA FOIP. For more details, see the Appendix.

[30] 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;

[31] My office's *Guide to LA FOIP*, Chapter 4, "Exemptions from the Right of Access," updated October 18, 2023 (*Guide to LA FOIP*, Ch. 4), at pages 53 and 54, states that subsection 14(1)(c) is a discretionary class-based and harm-based exemption. Meaning it contains both a class and harm-based component. 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. The following two-part test can be applied:

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

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

[32] Page 53 of the *Guide to LA FOIP*, Ch. 4, explains that 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).

[33] In its submission to my office, the SHA asserted that:

The SHA applied 14(1)(c) as it qualifies as a lawful investigation of the employee by the SHA regarding an allegation of fraud concerning the employee. The SHA interprets a Labour Relation investigation to be a lawful investigation. Releasing this information would disclose information with respect to the lawful investigation.

[34] I note that the SHA did not identify the legislation under which the investigation occurred or is occurring. Further, my review of the emails reveals that it was determined by an SHA employee that there was not sufficient information to proceed with an investigation of the allegation brought forward. Therefore, it appears there was no lawful investigation as defined by subsection 14(1)(c) of LA FOIP.

[35] In my office's [Review Report 239-2023](#) I stated:

[18] *Black's Law Dictionary*, 11th Edition, 2019 defines "investigation" as:

The activity of trying to find out the truth about something, such as a crime, accident, or historical issue; esp., either an authoritative inquiry into certain facts, as by a legislative committee, or a systematic examination of some intellectual problem or empirical question, as by mathematical or use of the scientific method.

[19] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at page 1425 defines "investigation" as:

1. The action or process of investigating; systematic examination; careful research.
2. An instant of this: as systematic inquiry; a careful study of a particular subject.

[23] Given the information above and, that it does not appear the SPS has investigated or intends to investigate this incident, I find that the information withheld ...does not meet the first part of the test and therefore, there is no need to assess the second part of the test. I find that SPS did not properly apply subsection 14(1)(c) of LA FOIP to the withheld parts of pages 1 and 2 of the call summary and the telephone audio recording.

[36] I find the same in this case. It does not appear the SHA has investigated or intends to investigate the allegations against the Applicant, therefore the information withheld does not meet the first part of the test and there is no need to assess the second part of the test.

[37] I find that the SHA did not properly apply subsection 14(1)(c) of LA FOIP to the information on pages 3, 4, 5 and 6 of the record.

[38] I recommend that within 30 days of the issuance of this Report, the SHA release this information, with the exception of the information on page 3 of the Saskatoon human resources records also withheld pursuant to subsection 16(1)(a) of LA FOIP.

5. Did the SHA properly apply subsection 16(1)(a) of LA FOIP?

[39] The SHA applied subsection 16(1)(a) of LA FOIP to information on page 3 of the Saskatoon human resources records.

[40] Subsection 16(1)(a) of LA FOIP provides:

16(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority;

[41] As stated on pages 107 to 113 of the office's *Guide to LA FOIP*, Ch. 4, my office uses the following two-part test to determine if this exemption was properly applied:

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 the local authority?

[42] I first must consider whether the information on page 3 qualifies as advice, proposals, recommendations, analyses or policy options.

[43] In its submission, the SHA explained that it applied subsection 16(1)(a) of LA FOIP as the redacted information qualifies as analysis of the situation and a recommended course of action relating to an investigation by the local authority.

[44] The *Guide to LA FOIP*, Ch. 4 at page 108, describes a "recommendation" as a specific piece of advice about what to do, especially when given officially; it is a suggestion that someone should choose a particular thing or person that one thinks particularly good or

meritorious. Recommendations relate to a suggested course of action more explicitly and pointedly than “advice”. It can include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised. It includes suggestions for a course of action as well as the rationale or substance for a suggested course of action. A recommendation, whether express or inferable, is still a recommendation.

[45] My office’s *Guide to LA FOIP*, Ch. 4 at page 109, also provides that analyses (or analysis) is the detailed examination of the elements or structure of something; the process of separating something into its constituent elements.

[46] From a review of the information severed it appears to be communicating a determination that had been made. It appears there is some finality to the communication, which can be differentiated from a recommendation. Also, it does not appear to disclose a detailed examination of the complaint under consideration which is required to qualify as analysis. As the first part of the test has not been met, I will not assess the second part.

[47] Therefore, I find that SHA did not properly apply subsection 16(1)(a) of LA FOIP. I recommend that SHA release the information on page 3 of the Saskatoon human resources records.

IV FINDINGS

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

[49] I find that the Cautionary Hire List is responsive to the Applicant’s access to information request.

[50] I find that the SHA did not properly apply subsections 14(1)(c), 16(1)(a) and 30(2) of LA FOIP to the records.

V RECOMMENDATIONS

[51] I recommend that the SHA release to the Applicant the categories on the Cautionary Hire List and whether the Applicant is on the list within 30 days from the issuance of this Report.

[52] I recommend that the SHA release to the Applicant the information withheld in the human resources records pursuant to subsections 14(1)(c), 16(1)(a) and 30(2) of LA FOIP within 30 days from the issuance of this Report.

Dated at Regina, in the Province of Saskatchewan, this 11th day of September, 2024.

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

Appendix

Document	Page Number	Record Type	Exemption applied	IPC Finding(s)	IPC Recommendation(s)
Former Regina Health Region Human Resources records	3		30(2) of LA FOIP	30(2) of LA FOIP does not apply	Release
Former Saskatoon Health Region Human Resources records	3	email	14(1)(c), 16(1)(a) of LA FOIP	14(1)(c), 16(1)(a) of LA FOIP does not apply	Release
	4	email	14(1)(c) of LA FOIP	14(1)(c) of LA FOIP does not apply	Release
	5	audit responses	14(1)(c) of LA FOIP	14(1)(c) of LA FOIP does not apply	Release
	6	audit responses	14(1)(c) of LA FOIP	14(1)(c) of LA FOIP does not apply	Release
	9	email	30(2) of LA FOIP	30(2) of LA FOIP does not apply	Release
Cautionary Hire List	Column headings & whether name is on the list	spreadsheet	30(2) of LA FOIP	30(2) of LA FOIP does not apply	Release