



REVIEW REPORT 099-2024

City of Regina

October 24, 2024

Summary:

The Applicant made an access to information request to the City of Regina (City) requesting access to records. The City withheld some information from the responsive records pursuant to subsections 14(1)(d), 16(1)(a), (b), 21(a), (b), (c) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Applicant requested a review by the Commissioner of the City's decision to withhold information. The A/Commissioner found that the City properly treated some information as not responsive to the request. The A/Commissioner also found that the City properly applied subsections 14(1)(d), 16(1)(a), (b) and 28(1) of LA FOIP to some information but not all. He also found that the City made a *prima facie* case that subsection 21(a) (solicitor-client and litigation privilege) of LA FOIP applied. With respect to the personal information, the A/Commissioner found that subsection 28(2)(n)(i) of LA FOIP does not apply to the personal information found to be exempt. The A/Commissioner recommended that the City, within 30 days of issuance of this Report, release some and continue to withhold other information as set out in the Appendix to this Report. He also recommended that the City, within 30 days of the issuance of this Report, release information that it withheld as non-responsive, subject to any exemptions that may apply.

I BACKGROUND

- [1] On February 24, 2024, the City of Regina (City) received the Applicant's access to information request and application fee under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).
- [2] The Applicant sought access to the following information:

All records, emails, and briefing notes to the Director of Transit & Fleet regarding an incident on December 30, 2023, about a man who got off a bus, fell, and later died in the cold.

- [3] The Applicant requested access to records dated between December 30, 2023 and February 1, 2024.
- [4] The City responded to the request by letter dated March 24, 2024, granting access to some pages in full, and withholding other pages in full or in part relying on subsections 14(1)(d), 16(1)(a), (b), 21(a) (solicitor-client privilege), (b), (c) and 28(1) of LA FOIP.
- [5] On April 2, 2024, the Applicant filed a request for a review with my office.
- [6] On April 17, 2024, my office sent a notice of review to the Applicant and the City. The notice stated that my office would be reviewing the City's decision to withhold information pursuant to subsections 14(1)(d), 16(1)(a), 16(1)(b), 21(a) (solicitor-client privilege), (b), (c) and 28(1) of LA FOIP.
- [7] My office also advised the City that the Applicant had asserted that it was in the public interest to release the information. My office asked the City if it considered subsection 28(2)(n)(i) of LA FOIP when denying access to personal information and what factors it took into account.
- [8] On May 16, 2024, the City provided my office with an index of records. It also provided an affidavit of records which included information about its claims to solicitor-client and litigation privilege which is exempt pursuant to subsection 21(a) of LA FOIP. However, the attached schedule did not identify the litigation privilege records.
- [9] The City also provided my office with copies of the redacted version of the records where it claimed subsection 21(a) of LA FOIP. In relation to all other exemptions, the City provided an unredacted version of the records.

[10] On July 4, 2024, the City provided my office with a revised version of the affidavit and schedule. In this version of the schedule, the City identified the records for which it claimed solicitor-client and litigation privilege.

[11] On July 8, 2024, the City provided my office with its submission. The Applicant did not provide a submission.

II RECORDS AT ISSUE

[12] There are 74 pages of records at issue in this review. Of those, the City released eight pages in full and withheld 21 pages in full. It withheld portions of the remaining 45 pages.

[13] The Appendix to this Report sets out a description of the records, the exemptions claimed and a summary of my findings and recommendations.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[14] The City qualifies as a “local authority” as defined in subsection 2(1)(f)(i) of LA FOIP. Therefore, I have jurisdiction to conduct this review.

2. Do the records contain information that is not responsive to the Applicant’s access to information request?

[15] The City withheld some information from pages 5, 7, 32, 49, 63 and 67 claiming that it was not responsive to the Applicant’s access to information request.

[16] Page 26 of my office’s *Guide to LA FOIP*, Chapter 3: “Access to Records”, updated May 5, 2023 [*Guide to LA FOIP*, Ch. 3] provides that “responsive” means relevant. The term describes anything that is reasonably related to the access request. It follows that any

information or records that do not reasonably relate to a request will be considered “non-responsive.”

[17] When determining what information is responsive, the local authority should consider the following:

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

(Guide to LA FOIP, Ch. 3, pp. 26 to 27)

[18] For ease of reference, the request at issue here was for “all records, emails, and briefing notes to the Director of Transit & Fleet regarding an incident on December 30, 2023.” [Emphasis added] It is apparent from a review of the copies of the records provided to my office, that the City claimed that any emails that were not addressed “to the Director of Transit & Fleet” are not responsive to the request. Therefore, I find that the City properly treated the information at issue as non-responsive.

[19] Despite my finding of non-responsiveness, in previous reports such as [Review Report 156-2024](#), I have stated that it is best practice to release records or information even where they are non-responsive, subject to any exemptions that may apply. Unnecessary severing wastes the local authority’s valuable resources and may cause applicants to be suspicious.

In 2017, I published a blog titled, “[What about the Non-Responsive Record?](#)” where I stated that if a public body believes that the non-responsive record or information is also subject to an exemption, it should state that in its section 7 decision.

[20] I recommend that the City, within 30 days of the issuance of this Report, release the non-responsive portions of the records to the Applicant, subject to any exemptions found to apply. See the Appendix for details.

3. Did the City make a *prima facie* case that subsection 21(a) (solicitor-client privilege or litigation privilege) applies?

[21] The City applied subsection 21(a) (solicitor-client privilege and litigation privilege) of LA FOIP to pages and portions of pages as set out in the Appendix.

[22] As noted above, the City did not provide my office with copies of the withheld information, and it elected to make a *prima facie* case pursuant to section 9-1 of my office’s [Rules of Procedure](#). Section 9-1 is set out on page 34 of the *Rules of Procedure*, and it states:

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.

[23] 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;

[24] 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, litigation privilege and settlement privilege (*Guide to LA FOIP*, Chapter 4,

“Exemptions from the Right of Access”, updated October 18, 2023 [*Guide to LA FOIP*, Ch. 4], p. 223).

[25] I will first consider the City’s claim that records are subject to solicitor-client privilege.

Solicitor-client privilege

[26] The purpose of the exemption for solicitor-client privileged information 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. 225 to 232)

[27] To support its position, the City provided my office with an affidavit with attached schedule. The affidavit was sworn by the City Clerk who attested that the records relate to communications and information shared:

- Between solicitor and client and/or third party with sufficient common interest in the same transaction;
- For the purposes of the seeking or obtaining of legal advice or legal services; and
- Intended to be kept confidential and have been consistently treated as confidential.

[28] In its submission, the City stated that upon learning of the death of a customer from media reports, it immediately formed the opinion that litigation could be reasonably expected. It added that the media articles gave the impression that the City was responsible for the incident.

[29] The City stated that the communications were with and between the City's legal department, transit department and its executive leadership, including communications staff and Service Regina and Tourism. The communications were about the City becoming aware of allegations, internal consultation on the allegations, investigations into the allegations and deliberations on the results of the investigation. They also include internal communications about the allegations, investigation and legal risks associated with the events. It stated that investigating and analyzing the events and accusations required the involvement of a broad range of employees given that the media was the City's initial source of information about the events.

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

[30] I note that all of the records at issue are emails. The City released the headers and footers of all of the emails to the Applicant. The redacted versions of the email records were provided to my office but as noted above, it did not provide my office with the information it withheld pursuant to subsection 21(a) of LA FOIP opting to provide an affidavit and schedule.

[31] As I stated in [Review Report 051-2024](#), 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.

[32] I commend the City for its approach to severing the emails. This means that the only information at issue here is in the body of the emails.

[33] 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. 225).

- [34] A “solicitor” means a lawyer who is duly admitted as a member and whose right to practice is not suspended. A “lawyer” means a member of the Law Society and includes a law student registered in the Law Society’s pre-call program (*Guide to LA FOIP*, Ch. 4, p. 226).
- [35] 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. 226).
- [36] The local authority should make it clear who the solicitor is and who the client is. In this case, the City’s submission included a list of the individuals who were parties to the emails and their role and title.
- [37] All of the records for which the City claimed solicitor-client privilege contained emails and in some cases the emails had attachments. As the emails contain information that was communicated between the parties to the emails, they are communications.
- [38] The City Solicitor and the City’s senior legal counsel, who are members of the Law Society of Saskatchewan and are licensed to practice law in this province, were parties to the communications, with some exceptions. The other parties to the emails were staff of the City, which qualifies as the client. Therefore, part one of the test has been met for the emails that involved the City Solicitor and the City’s senior legal counsel.
- [39] The emails that did not involve the City Solicitor and/or its senior legal counsel do not meet part one of the test because they are not communications between a solicitor and their client. They are contained in the following pages: The information withheld from pages 9 (severance 2), 10, 17, 18, 33 (severance 1 and 2), 42 (severance 3), 43, 44, 51 (severance 2), 52 (severance 2), 53 and 73. For this information, there is no need for me to consider parts two and three of the test. I find that the City did not properly apply subsection 21(a) of LA FOIP as it relates to solicitor-client privilege to these pages. Before I make a

recommendation, I will consider later in this Report if litigation privilege also protected under subsection 21(a) of LA FOIP applies to this information.

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

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

[40] With one exception, I am satisfied, based on the information provided by the City in its submission and in the affidavit sworn by the City's Clerk, that the email correspondence to which the City applied subsection 21(a) of LA FOIP entailed the seeking or giving of legal advice. I am also satisfied that the City employees involved, and legal counsel, intended that the communications be treated confidentially.

[41] The exception relates to the emails on page 72. As stated in my office's *Guide to LA FOIP*, Ch. 4 at page 229:

Not every record dropped off, funneled through, or otherwise given to a local authority's solicitor has been given in confidence for the purpose of giving or seeking legal advice. Just because a solicitor may have been involved is not enough to find that privilege applies to records. For example, copying the solicitor in emails does not automatically make them subject to solicitor-client privilege.

[42] I recognize that I have a sworn statement that speaks to the three parts of the test for the application of subsection 21(a) (solicitor-client privilege) of LA FOIP to this page. However, given that legal counsel was only copied on these emails, in the absence of further information about the content of the emails, I find that the City has not established that the emails entailed the seeking or giving of legal advice. Therefore, the City has not met part two of the test. I find that the City has not made a *prima facie* case that subsection 21(a) (solicitor-client privilege) of LA FOIP applies to page 72. Before I make a recommendation regarding release, I must consider if these emails are exempt pursuant to litigation privilege under subsection 21(a) of LA FOIP.

[43] Turning to the attachments to the emails that appear on pages 22 to 25, 36 to 39, 48, 65 to 66 and 69 to 71, I note that the City's affidavit and schedule provided little information about the contents of the attachments. However, further information about the attachments

is in the City's submission on the alternative claim that subsection 14(1)(d) of LA FOIP applied. The City stated:

The nature of the information in the responsive records are the identification, investigation and analysis of a source of legal risk, for the purposes of consulting with legal counsel and preparing for reasonably expected legal action. While most of the content is likewise protected by s. 21 of the Act, and therefore the details of that content will not be disclosed to preserve solicitor-client privilege, that this is the nature of the conversations recorded in the records is apparent from the information that has been disclosed to the IPC.

[44] My office's *Guide to LA FOIP*, Ch. 4 at page 227, states the following with respect to attachments to emails:

The 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.

[45] A bald assertion that a record was attached to an email that may be subject to solicitor-client privilege is not normally sufficient to establish a *prima facie* case that solicitor-client privilege applies because there is insufficient information to support a finding that the attachment entailed the seeking or giving of legal advice. However, in this case, the City's submission on the nature of the withheld information sheds further light on the content of the attachments – that is, they contain information about the identification, investigation and analysis of the source of the legal risk. In light of the City's sworn statement and based on the information provided in the submission, I am satisfied that the attachments entailed the seeking or giving of legal advice. For the same reasons, including the circumstances surrounding the preparation of the records, I am also satisfied that the City employees involved, and legal counsel, intended that the communications be treated confidentially. Therefore, the City has met part two of the test.

[46] With the exception of the emails on pages 72, 9 (severance 2), 10, 17, 18, 33 (severances 1 and 2), 42 (severance 3), 43, 44, 51 (severance 2), 52 (severance 2), 53 and 73, I find that the City has made a *prima facie* case that subsection 21(a) of LA FOIP applies to the emails and attachments. I recommend that the City continue to withhold this information pursuant to subsection 21(a) of LA FOIP. Details are set out in the Appendix.

Litigation privilege

[47] “Litigation privilege” applies to records which come into existence after litigation is commenced or in contemplation of litigation, and where they have been made or developed with a view to such litigation. The Supreme Court of Canada (SCC) in *Blank v. Canada (Minister of Justice)*, [2006 SCC 39](#) at paragraphs [27] stated that the object of the privilege is to ensure the effectiveness of the adversarial process. To achieve this purpose, the SCC stated that parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure. Later in its decision, at paragraph [34], the SCC stated that the purpose of litigation privilege is to create a “zone of privacy” in relation to pending or apprehended litigation.

[48] To determine if a record is subject to litigation privilege, my office considers the following two-part test:

1. Has the record or information been prepared for the dominant purpose of litigation?
2. Is the litigation ongoing or anticipated?

(*Guide to LA FOIP*, Ch. 4, at pp. 241-243)

[49] In support of its application of litigation privilege, the City’s Clerk attested as follows:

In respect of those records, or portions of records, claimed to be protected by litigation privilege, I have knowledge of, or believe, that the records were created for the dominant purpose of litigation, existing or anticipated, and litigation, including any closely related proceedings, has not concluded.

[50] In light of my findings on the application of solicitor-client privilege, I need only consider the application of litigation privilege to the emails on page 72, and the following other emails: pages 9 (severance 2), 10, 17, 18, 33 (severances 1 and 2), 42 (severance 3), 43, 44, 51 (severance 2), 52 (severance 2), 53 and 73.

[51] I will now consider each part of the test.

1. Has the record or information been prepared for the dominant purpose of litigation?

[52] The dominant purpose for creating or obtaining the record must be to decide whether to initiate, or to prepare for, litigation. It cannot be a standard operational procedure to prepare such records for various reasons, only one of which is to prepare for litigation (*Guide to LA FOIP*, Ch. 4, p. 241).

[53] Examples of records for which litigation privilege was properly applied include:

- correspondence between counsel and the client(s);
- documents relevant to the issues pleaded in the lawsuit that were produced by the parties;
- witness statements;
- letters retaining experts or commenting on their reports;
- research memoranda and legal authorities;
- annotations on records written by the litigator; and
- miscellaneous public documents such as newspaper clippings, press releases and investigator's reports.

(*Guide to LA FOIP*, Ch. 4, p. 242).

[54] Based on the information provided by the City in its affidavit and the surrounding circumstances or context, I find that the information or records were prepared for the dominant purpose of litigation. Part one of the test has been met.

2) *Is the litigation ongoing or anticipated?*

[55] Regarding part two of the test, the City stated that upon learning of the news of the accident involving a customer, it immediately formed the opinion that litigation against it should be reasonably expected because the media reports suggested that the City was responsible for the accident. Twenty-four days after the accident occurred, the City was contacted by legal counsel for the individual involved in the accident. The City described the withheld information as follows:

They are communications about the City becoming aware of allegations that the transit service was perceived to bear responsibility for the customer's death, consulting internally on the allegations, investigating the allegations, deliberating on the results of the investigation, communicating internally about the allegation and investigation and consulting regarding legal risks associated with the events.

[56] Additional information was provided by the City to my office to support its position that litigation was ongoing or anticipated. Based on a review of the City's affidavit, the records and portions of records provided to my office and the City's submission, it is apparent that litigation is ongoing or anticipated. Therefore, both parts of the test have been met for this information. I find that the City made a *prima facie* case that subsection 21(a) (litigation privilege) of LA FOIP applied to the emails on page 72, and the following other emails: pages 9 (severance 2), 10, 17, 18, 33 (severances 1 and 2), 42 (severance 3), 43, 44, 51 (severance 2), 52 (severance 2), 53 and 73. I recommend that the City continue to withhold this information pursuant to subsection 21(a) of LA FOIP. Details are set out in the Appendix.

4. Did the City properly apply subsection 28(1) of LA FOIP?

[57] Where the records contain information about individuals other than the requester, a local authority must consider if section 28 of LA FOIP, which is a mandatory exemption, applies.

[58] Section 28 of LA FOIP prohibits the disclosure of personal information of individuals other than the requester unless the individual about whom the information pertains consents to its disclosure or if 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).

[59] 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.

[60] When deciding if subsection 28(1) of LA FOIP was properly applied, I must first determine if the withheld information about other individuals qualifies as their personal information pursuant to subsection 23(1) of LA FOIP. Subsection 23(1) of LA FOIP states that to qualify as personal information, the information must be about an identifiable individual and personal in nature. It also provides a list of examples of information that would qualify as personal information.

[61] My office’s *Guide to LA FOIP*, Ch. 6 at page 39, states that information is about an “identifiable individual” if:

- The individual can be identified from the information (e.g., name, where they live); or
- The information, when combined with information otherwise available, could reasonably be expected to allow the individual to be identified.

[62] The *Guide to LA FOIP*, Ch. 6 at page 40, includes the following definition of “identifiable”:

“Identifiable” means that it must be reasonable to expect that an individual may be identified if the information were disclosed. The information must reasonably be capable of identifying particular individuals because it either directly identifies a person or enables an accurate inference to be made as to their identity when combined with other available sources of information (data linking) or due to the context of the information in the record.

[63] According to the *Guide to LA FOIP*, Ch. 6 at page 41:

- “Personal in nature” requires that the information reveal something personal about the identifiable individual.

- “Personal” means of, affecting or belonging to a particular person; of or concerning a person’s private rather than professional life.

Therefore, information that relates to an individual in a professional, official, or business capacity could only qualify if the information revealed something personal about the individual for example, information that fits the definition of employment history.

[64] The City applied subsection 28(1) of LA FOIP to a number of pages. Given my findings above, I need only consider its application to pages 32 (severance 2), 50 (severance 1), 59, (severance 1) and 60 (severances 4 and 5).

[65] The City submitted that information withheld from the emails qualified as personal information under the following subsections of LA FOIP: employment history information pursuant to subsection 23(1)(b); health information pursuant to subsection 23(1)(c); the home or business phone number and home address under subsection 23(1)(e); and an individual’s name, where it was associated with other personal information about them, pursuant to subsection 23(1)(k).

[66] Therefore, the following paragraphs in subsection 23(1) of LA FOIP 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:

...

(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;

(c) information that relates to health care that has been received by the individual or to the health history of the individual;

...

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

...

(k) the name of the individual where:

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

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

[67] I now turn to consider if the information withheld pursuant to subsection 28(1) of LA FOIP qualified as personal information.

[68] Page 50 (severance 1, the first paragraph) contains an email with a written summary of images captured on video surveillance on the date of the incident. Given the amount of information publicly available about the incident, I accept that the identity of the individual whose image is captured in the video and described in the email could be determined. Release of the first paragraph would reveal information of a personal nature about the individual such as their location at a given time, and their behaviour and experiences. Therefore, this information is about an identifiable individual and is personal in nature. It qualifies as the individual's personal information pursuant to subsection 23(1) of LA FOIP.

[69] Page 60 is an email from a member of the public. The City withheld their name and their email address but released the body of the email. I am satisfied that in the context of this email, release of the author's name and email address would reveal personal information about them pursuant to subsection 23(1)(k)(i) of LA FOIP.

[70] As there is no indication that the individuals or their representatives to whom the information on pages 50 (severance 1, paragraph 1) and 60 relates consented to the release of their personal information, I find that the City properly applied subsection 28(1) of LA FOIP to these pages. Before I make a recommendation regarding this information, later in this Report I will consider the Applicant's argument regarding the public interest in this information.

[71] I arrive at a different conclusion regarding the cell phone number withheld from page 59 (severance 1) which is an email from a member of the media. The cell phone number appears in an email written in a professional or work-related context. It is the sort of information that would appear on a business card.

- [72] My office's *Guide to LA FOIP*, Ch. 6 at page 43, defines business card information as the type of information found on a business card (name, job title, work address, work telephone numbers and work email address). This type of information is generally not personal in nature and therefore would not be considered personal information. This is considered "business contact information" and not personal information. I find that the City did not properly apply subsection 28(1) of LA FOIP to this information. As no other exemptions have been claimed for this information, I recommend that the City release it to the Applicant within 30 days of issuance of this Report. Details are set out in the Appendix.
- [73] Further, the information withheld from page 50 (severance 1, paragraph 2) does not include personal information of other individuals. It is about the actions taken by an individual relating to the City's investigation. I will consider below if this information is exempt pursuant to any other exemptions claimed by the City in the alternative.
- [74] The City did not identify the portions of the email on page 32 that qualified as personal information. However, in its submission, it stated that the severed information qualified as the employment history of an identifiable individual who operated a transit vehicle pursuant to subsection 23(1)(b) of LA FOIP. It explained that the information related to their tenure as an employee with the City and other information about them. This is the kind of information that one would find in a personnel file. I find that it qualifies as personal information pursuant to subsection 23(1)(b) of LA FOIP and the City properly applied subsection 28(1) of LA FOIP to that information. I will consider later in this Report if the remaining information on page 32 is exempt pursuant to subsection 16(1)(a) of LA FOIP.
- [75] The Applicant raised an issue about the City's discretion to release the withheld personal information under LA FOIP's subsection 28(2)(n)(i). As the Applicant was not clear as to what personal information they thought should be released by the City, I will consider if these provisions apply to all of the personal information referred to above namely, pages 50 (severance 1, paragraph 1) and the email address and name withheld from page 60.

Subsections 28(2)(n)(i) of LA FOIP

[76] 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).

[77] Subsection 28(2)(n)(i) of LA FOIP states:

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

[78] As set out in my office’s [Investigation Report 043-2023, 044-2023](#) paragraph [31] and my office’s *Guide to LA FOIP*, Ch. 6 at page 213, 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?

[79] “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).

[80] As set out in paragraph [35] of my office’s Investigation Report 043-2023, 044-2023, in determining whether the third requirement has been met, my office will consider if there is a relationship between the record and LA FOIP’s central purpose of shedding light on government operations. In addition, 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.

[81] If I find that subsection 28(2)(n)(i) of LA FOIP applies to the circumstances here, my authority is limited to a review of the City’s exercise of discretion. But I will not substitute my discretion for that of the head.

[82] The City stated that it has given “proper consideration” to whether subsection 28(2)(n)(i) of LA FOIP applies and determined that no public interest would be served by the release of the personal information. The City stated that the public interest consideration in subsection 28(2)(n)(i) of LA FOIP does not override information protected by exemptions other than section 28 of LA FOIP. This is accurate. Therefore, I need only consider the information that I have found to be exempt on pages 50 and 60 pursuant to subsection 28(1) of LA FOIP.

[83] I find that there is no public interest in the name and email address of a member of the public whose information appears on page 60 because it will not contribute to the public’s understanding of, or to debate on a matter of concern to the public or shed light on the operations of the City. Further, there is no relationship between this information and LA

FOIP's central purpose of shedding light on government operations. Therefore, part two of the test for the application of subsection 28(2)(n)(i) of LA FOIP has not been met.

[84] Regarding the information withheld from page 50 (severance 1, paragraph 1), I note that this information is highly sensitive information about an individual involved in the incident. If there is a public interest in the information, the public interest does not outweigh their privacy interest in the information. There is a high degree of risk that injury would result from the release of this information. I also note that the City claimed, in the alternative, that this information was exempt under other provisions in LA FOIP. If I had not found that the information qualified as personal information, I would likely have found it to be exempt under other provisions.

[85] Therefore, I find that subsection 28(2)(n)(i) of LA FOIP does not apply to the personal information I have found to be exempt on pages 50 and 60. I recommend that the City continue to withhold this information pursuant to subsection 28(1) of LA FOIP. Details are set out in the Appendix.

[86] I now turn to consider if the City properly applied subsections 16(1)(a) of LA FOIP.

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

[87] The City applied subsection 16(1)(a) of LA FOIP to portions of the emails at issue. In light of my findings above, I need only consider the application of this exemption to pages 11, 14 (severance 1), 19, 27 to 31, 32 (severance 2), 45 (severance 1), 50 (severance 1, paragraph 2), 54 (severance 1) and 60 (severance 3).

[88] This is a discretionary exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose advice, proposals, recommendations, analyses or policy options developed by or for a local authority.

[89] Subsection 16(1)(a) of LA FOIP states:

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;

[90] As set out in the *Guide to LA FOIP*, Ch. 4 at pages 107 to 113, my office uses the following two-part test to determine if a local authority properly applied this exemption:

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?

[91] I now turn to an analysis to determine if the two-part test is met.

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

[92] The City submitted that all of the information to which it applied subsection 16(1)(a) of LA FOIP are communications developed by and for the City.

[93] Regarding the severances on pages 11, 19, 45, 54, the City stated:

This record contains background information collected and internally shared for the purpose of analyzing whether an event as reported in media had occurred and to thereafter seek advice and made recommendations as to further investigation, reporting and response.

[94] Regarding pages 27 to 31, the City stated that the pages included information collected and shared for the purpose of investigating, analyzing and seeking advice about events.

[95] Regarding pages 14 and 32, the City stated:

This information is investigational information collected and internally shared for the purpose of [name redacted] (Director, Transit & Fleet) analyzing the events and seeking advice from the City's legal counsel and members of the executive leadership team.

[96] Regarding page 50, the City stated that record contains analyses with respect to the City's investigation.

[97] Regarding page 60 (severance 3), the City stated that the email qualified as a recommendation because the author recommended a course of action.

[98] Before I turn to a page-by-page analysis, I will address an argument raised by the City regarding the interpretation of subsection 16(1)(a) and (b) of LA FOIP. Relying on the decision of the Supreme Court of Canada (SCC) in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2024 SCC 4](#) (CanLII) (*Ontario*), the City stated:

31. The City appreciates the opinions expressed by the IPC in the Guide to Exemptions about the correct interpretation and application of s. 16(1)(a) and (b) but, respectfully, says the interpretations of the terms contained in the Guide are too narrow to give effect to the purpose of the exemption. **For example, in relation to s. 16(1)(a), the Guide suggests only the advice or recommendation itself, and not the facts upon which that advice or recommendation are based, are exempt pursuant to s. 16(1)(a). That interpretation is too narrow and not purposive.** As demonstrated by *Ontario*, supra., a purposive approach to the interpretation and application of provisions such as s. 16(1)(a) (and s. 16(1)(b)) results in the background information (including the “facts” or assumptions and other material which informs the basis and scope of the work) being exempt to achieve the purpose of the exemption – the candid flow of information to enable effective decision-making. As stated at para. 62 of *Ontario*, supra. “. . . decision makers should always be attentive to what even generally phrased records could reveal about those deliberations to a sophisticated reader when placed in the broader context.” [Emphasis added]

[99] First, the City's articulation of my office's approach to “the facts upon which that advice or recommendations are based” is not entirely accurate. My office's *Guide to LA FOIP*, Ch. 4 at page 111, includes a recognition that subsection 16(1)(a) of LA FOIP may apply to factual information where it is so intertwined as to preclude release.

[100] Second, the City's argument overlooks the fact that the SCC decision in *Ontario* considered the scope of the exemption in Ontario's *Freedom of Information and Protection of Privacy Act* (ON FIPPA) that applies to cabinet records. The SCC findings were based on the function of Cabinet within our system of government, the SCC's view of the bounds of

confidentiality necessary to discharge the function effectively and its impact on the meaning of the words “substance of deliberations” as used in that exemption.

[101] With respect, these findings are not relevant here. The SCC findings relate to a different exemption – the cabinet records exemption, which is in some limited respects, similar to the exemption for cabinet records found in section 16 of *The Freedom of Information and Protection of Privacy Act* (FOIP). Neither section 16 of FOIP nor subsections 16(1)(a) and (b) of LA FOIP use the phrase “substance of deliberations” as it is used in subsection 12(1) of ON FIPPA which states, in part:

12(1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

[102] I am not persuaded that my office’s approach to the interpretation to subsections 16(1)(a) or (b) of LA FOIP as set out in the *Guide to LA FOIP* is wrong or too narrow.

[103] Turning to subsection 16(1)(a) of LA FOIP, the *Guide to LA FOIP*, Ch. 4 at pages 107 to 109, of provides definitions of terms used in that subsection. In light of the City’s submission and based on a review of the records, the following definitions are relevant to the analysis that follows:

- “Advice” is guidance offered by one person to another. It can include the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts.
- A “recommendation” is a specific piece of advice about what to do, especially when given officially; it is a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious. Recommendations relate to a suggested course of action more explicitly and pointedly than “advice”. It can include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised. It includes suggestions for a course of action as well as the rationale or substance for a suggested course of action. A recommendation, whether express or inferable, is still a recommendation.
- A “proposal” is something offered for consideration or acceptance.
- “Analyses” (or analysis) is the detailed examination of the elements or structure of something; the process of separating something into its constituent elements.

- [104] The information withheld from page 14 (severance 1) and page 50 (severance 1, paragraph 2) does not qualify as an analysis as is claimed by the City. This is a summary of factual information that was gathered in the course of the City’s investigation and an update on the status of the investigation. According to the City’s own submission, it is “information” that was collected and shared for the **purpose** of analyzing events and seeking advice. It does not by itself qualify as analyses. I find that the City did not properly apply subsection 16(1)(a) of LA FOIP to this information. I will consider later in this Report if this information is exempt pursuant to subsections 16(1)(b) and 14(1)(d) of LA FOIP.
- [105] Pages 27 to 31 contain a City policy that appears to have been in place at the time of the incident. It does not qualify as analysis or advice. I find that the City did not properly apply subsection 16(1)(a) of LA FOIP to the policy. I will consider later in this Report if this policy is exempt pursuant to subsections 16(1)(b) and 14(1)(d) of LA FOIP.
- [106] The information withheld from page 60 (severance 3) does not qualify as a recommendation because it is a direction or instructions to take specific actions and not a suggestion that the course of action be followed. In my office’s [Review Report 315-2023](#) at paragraph [58] and [Review Report 189-2019](#) at paragraph [68], I found that an instruction regarding a course of action did not qualify as a recommendation. I will follow the same approach here. Therefore, I find that the City did not properly apply subsection 16(1)(a) of LA FOIP to this page. I will consider later in this Report if this information is exempt pursuant to subsections 16(1)(b) and 14(1)(d) of LA FOIP.
- [107] Page 32 (severance 2) contains a draft media response. As I have said in previous reports, including [Review Report 007-2024](#) at paragraph [18], followed in [Review Report 314-2023](#) at paragraph [36] (issued on June 26, 2024), simply because a document is in draft form does not make the document advice, recommendations, proposals, analysis or policy options. The information itself in the draft document must still qualify as advice, recommendations, proposals, analysis or policy options. Based on a review of the draft response and the context in which it appears, it is apparent that the draft response was submitted for discussion purposes and for consideration by others within the City. I find that it qualifies as a “proposal” because it was offered for consideration or acceptance.

[108] The information withheld from pages 11, 19, 45 (severance 1) and page 54 (severance 1) are copies of the same email. Based on a review of the email, it is apparent that it qualifies as analyses because it is a detailed examination of events. While it does contain some information that is an analysis of factual information, any factual information is so intertwined that it cannot reasonably be severed.

[109] I now turn to consider part two of the test.

2) *Was the advice, proposals, recommendations, analyses and/or policy options developed by or for the local authority?*

[110] Page 110 of the *Guide to LA FOIP*, Ch. 4 defines the phrase “developed by or for” as follows:

“Developed by or for” means the advice, proposals, recommendations, analyses and/or policy options must have been created either: 1) within the local authority, or 2) outside the local authority but for the local authority (for example, by a service provider or stakeholder).

[111] As I said in [Review Report 039-2021](#), which dealt with subsection 17(1)(a) of FOIP (the equivalent to subsection 16(1)(a) of LA FOIP) for information to be *developed by or for* a local authority or government institution, the person developing the information should be an official, officer or employee of the organization, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the organization. To put it another way, in order to be *developed by or for* the local authority, the advice, proposals, recommendations, analyses and/or policy options should: i) be either sought, be expected, or be part of the responsibility of the person who prepared the record; and, ii) be prepared for the purpose of doing something, for example, taking an action or making a decision; and, iii) involve or be intended for someone who can take or implement the action.

[112] In previous reports such as [Review Report 292-2017, 348-2017](#) at paragraph [49], I have also reminded local authorities that they should explain the roles of the individuals involved

in the development of the advice, proposals, recommendations, analyses and/or policy options in the submissions provided to my office.

[113] The City provided my office with a list of all of the individuals who were involved in the email communications and their title or role. It also stated that these employees were “fulfilling their duties as officers or employees of the local authority in their creation and receipt of the information.” It is apparent from a review of the employees’ roles, the general context of the emails and the information at issue that the withheld information was sought, would be expected, or was provided by individuals who were responsible for providing it.

[114] For these reasons, I find that the information severed from pages 11, 19, 32 (severance 2), 45 (severance 1) and page 54 (severance 1) was developed by or for the City. Therefore, both parts of the test have been met for this information. Accordingly, I find that the City properly applied subsection 16(1)(a) of LA FOIP to this information. I recommend that the City continue to withhold it pursuant to subsection 16(1)(a) of LA FOIP. Details of my recommendations are set out in the Appendix.

6. Did the City properly apply subsection 16(1)(b) of LA FOIP?

[115] Given my findings above, I need only consider if the City properly applied subsection 16(1)(b) of LA FOIP to the following pages:

5 (severances 2 and 3), 7 (severances 2 and 3), 12 (severances 1 and 2), 14 (severances 1 and 2), 15 (severance 1), 20 (severances 1 and 2), 26 (severances 1 and 2), 27 to 31, 40 (severance 1), 42 (severances 1 and 2), 43 (severance 2), 46 (severances 1 and 2), 49 (severance 2 and 3), 50 (severance 1, second paragraph and severance 2), 51 (severance 1), 52 (severance 1), 55 (severances 1 and 2), 60 (severances 1, 2 and 3), 63 (severances 2 and 3) and 67 (severances 2, 3 and 4).

[116] Subsection 16(1)(b) 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:

...

(b) consultations or deliberations involving officers or employees of the local authority;

[117] My office uses the following two-part test to determine if subsection 16(1)(b) of LA FOIP applies:

1. Does the record contain consultations or deliberations?
2. Do the consultations or deliberations involve officers or employees of the local authority?

(*Guide to LA FOIP*, Ch. 4, pp. 115-116)

[118] I now turn to consider if the City met the test in this case.

[119] Pages 115 to 116 of the *Guide to LA FOIP*, Ch. 4, provides the following definitions:

- “Consultation” means the act of consulting or taking counsel together; deliberation, conference; a conference in which the parties consult and deliberation. A consultation can occur when the views of one or more officers or employees of a local authority are sought as to the appropriateness of a particular proposal or suggested action.
- “Deliberation” means the act of deliberating (to deliberate: to weigh in mind; to consider carefully with a view to a decision; to think over); careful consideration with a view to a decision. A deliberation can occur when there is a discussion or consideration of the reasons for or against an action. It can refer to discussions conducted with a view towards making a decision.

[120] As I said in [Review Report 119-2022](#), subsection 16(1)(a) of LA FOIP is intended to protect communications developed for the local authority by an advisor whereas subsection 16(1)(b) of LA FOIP protects communication involving decision makers. “Consultations” involve the seeking of advice, but not the giving of advice.

[121] With respect to the withheld information, the City’s submission included a claim that the information qualified as a consultation and deliberation. It also described the subject matter, and, in some cases, the purpose of the consultation and deliberation and the parties involved. However, it did not explain how the information qualified as a consultation and deliberation.

[122] Based on a review of the records, I find that the withheld information from the following pages qualifies as a consultation because it is apparent that the author of the emails was seeking the advice of other City staff about an aspect of the incident or its investigation of the incident: page 5 (severance 3), page 12 (severance 2), 20 (severance 2), 42 (severance 2), 43 (severance 2), 46 (severance 2), 49 (severance 3), 51 (severance 1), 52 (severance 1) and 55 (severance 2). It is also apparent that the consultations involve officers or employees of the City and the individuals consulting qualified as decision-makers given their roles within the City administration. For example, all of these emails were communications to the Director, Transit and Fleet – a role that is responsible for leadership in the Department of Transit.

[123] Therefore, both parts of the test have been met for this information. I find that the City properly applied this exemption to this information. I recommend that the City continue to withhold it pursuant to subsection 16(1)(b) of LA FOIP. Details of my findings and recommendations are set out in the Appendix.

[124] In contrast, the remaining information includes emails that forward information or policy documents, involve an exchange of information about scheduling, report on or request information about the status of the investigation or media response, provide or seek instructions on actions to be taken, or provide advice. Information of this nature does not qualify as a consultation because the author of the email is not seeking advice on a proposed course of action.

[125] I also find that the remaining information does not qualify as a deliberation because it does not involve the weighing of options, factors or information by a decision-maker with a view to arriving at a decision. Nor does it reveal the process of decision-making. Therefore, I find that the City has not properly applied subsection 16(1)(b) of LA FOIP to the following information:

5 (severance 2), 7 (severances 2 and 3), 12 (severance 1), 14 (severances 1 and 2), 15 (severance 1), 20 (severance 1), 26 (severances 1 and 2), 27 to 31, 40 (severance 1), 42 (severance 1), 46 (severance 1), 49 (severance 2), 50 (severance 1, second paragraph and severance 2), 55 (severance 1), 60 (severances 1, 2 and 3), 63 (severances 2 and 3) and 67 (severances 2, 3 and 4).

[126] Before I make a recommendation, I will consider below if the information is exempt pursuant to subsection 14(1)(d) of LA FOIP.

7. Did the City properly apply subsection 14(1)(d) of LA FOIP?

[127] The City applied subsection 14(1)(d) of LA FOIP to a number of pages. Details are set out in the Appendix. In light of my findings above, I need only consider the City's application of this exemption to the following pages:

5 (severance 2), 7 (severances 2 and 3), 12 (severance 1), 14 (severances 1 and 2), 15 (severance 1), 20 (severance 1), 26 (severances 1 and 2), 27 to 31, 40 (severance 1), 42 (severance 1), 46 (severance 1), 49 (severance 2), 50 (severance 1, second paragraph), 50 (severance 2), 55 (severance 1), 60 (severances 1, 2 and 3), 63 (severances 2 and 3) and 67 (severance 2, 3 and 4).

[128] Subsection 14(1)(d) of LA FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where release of a record could be injurious to the local authority in the conduct of existing or anticipated legal proceedings. It provides:

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

...

(d) be injurious to the local authority in the conduct of existing or anticipated legal proceedings;

[129] My office uses the following two-part test to determine if this exemption was properly applied:

1. Do the proceedings qualify as existing or anticipated legal proceedings?
2. Could the disclosure of the record be injurious to the local authority in the conduct of the legal proceedings?

[130] My office's *Guide to LA FOIP*, Ch. 4 at page 56, provides definitions for the following terms. "Legal proceedings" are any civil or criminal proceeding or inquiry in which evidence is or may be given and includes an arbitration. Regarding the second part of the test, my office's *Guide to LA FOIP*, Ch. 4 at page 57 states:

“Injury” implies damage or detriment. The exemption is designed to protect the local authority from harm in its existing or anticipated legal proceedings.

...

The local authority should describe the harm in detail to support the application of the provision. Local authorities should not assume that the harm is self-evident on the face of the records.

[131] Part one of the test for the application of this exemption has been met as the records relate to a civil proceeding that was anticipated by the City at the time that the records were prepared.

[132] Regarding the injury to the City that could result from release of the records in the conduct of the legal proceeding, the City stated:

21. On the second prong of the test, it is inherently injurious to the City to have information about its investigation and assessment of the transit passenger’s death released to the media when litigation is anticipated.

[133] It added that the “Applicant’s stated purpose in seeking out this information is to publish a story – exactly the type of premature disclosure of a legal case the exemption is intended to guard against.”

[134] The City asserted that the court in *Britto v. University of Saskatchewan*, [2017 SKQB 259](#) at paras. [32] to [36] (*Britto #1*) and *Britto v. University of Saskatchewan*, [2018 SKQB 92](#) (*Britto #2*) at para. 30 and 41-71 stated that the purpose of subsection 14(1)(d) of LA FOIP was the same as the purpose of the litigation privilege which is protected by subsection 21(a) of LA FOIP. The City then set out its view about the purpose of litigation privilege quoting passages from the SCC’s decision in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39. Finally, it stated:

25. Like litigation privilege more generally, the purpose of the exemption in s. 14(1)(d) of the Act is to serve the legitimate interests of the administration of justice by ensuring litigants and potential litigants have a zone of privacy to investigate and prepare their legal cases, free from the inherent prejudices of premature disclosure of their evidence and positions outside the proper adjudicative forum. The Applicant’s stated purpose in

seeking out this information is to publish a story – exactly the type of premature disclosure of a legal case the exemption is intended to guard against.

[135] Before I turn to the City’s argument on part two of the test, I want to point out that *Britto #1* does not stand for the proposition for which the City cited it. In that case, the court was dealing with an argument that section 21 only applied to solicitor-client privilege. It found that subsections 21(a), (b) and (c) of LA FOIP extend beyond matters of pure solicitor-client or litigation privilege. In that context, the court stated that subsection 14(1)(d) of LA FOIP was “distinct from pure solicitor-client privilege.” It stated, at paragraphs [33] and [34]:

[33] Section 21 extends beyond matters of pure solicitor-client or litigation privilege. The wording of subsection (b) connotes an intention that privilege claims be broadly captured in the exemption provisions of the *Act*. I do not accept Mr. Britto’s argument that the legislative exemption is strictly limited to solicitor-client privilege. If that was the case, the section would end after subsection (a), and there would be no need to include subsections (b) and (c) unless the provision was intended to cover something more than strict solicitor-client privilege.

[34] Augmenting this analysis is s. 14(1)(d), which the University has specifically relied upon from the outset. This provision of the *Act* states that a head may refuse to release a record where same could be “injurious to the local authority in the conduct of existing or anticipated legal proceedings”. I agree with University counsel that this provision is also distinct from “pure” solicitor-client privilege. I also agree the record shows there are matters in issue between these parties, including litigation both extant and anticipated.

...

[36] So, it is my conclusion that the *Act* recognizes and protects numerous types of legal privilege and is not limited to pure solicitor-client communications.

[136] In *Britto #2*, the court considered the harms component of subsection 14(1)(d) of LA FOIP and found that the exemption also protects against any potential use and abuse of the disclosed information before any admissibility ruling in the proceeding. It added that there is also a problem of the “undercutting of free communications essential to seeking and obtaining legal advice.”

[137] I understand that the City’s argument on part two of the test is that the release will violate the “zone of privacy” the protection of which is the purpose of the exemption and is

therefore “inherently injurious.” It also claimed that release to the Applicant will result in “premature disclosure” via publication of an article in the media.

[138] The *Britto* decisions do not support the City’s argument that release of the withheld information is “inherently injurious.” Further, the City is required to do a case-by-case analysis of each record or portion of record to determine whether part two of the test has been met. The City’s assertion that the release is “inherently injurious” amounts to no more than a bald assertion that harm would result. Nor is it sufficient to claim that release will result in “premature disclosure.”

[139] As I have said in previous reports, including [Review Report 020-2023](#), to meet part two of the test, there must be objective grounds for believing that disclosing the information could result in injury. The exemption uses the word “could” versus “could reasonably be expected to” as seen in other provisions of LA 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 harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.

[140] In [Review Report 223-2015 and 224-2015](#) and [Review Report 146-2017](#), my office upheld a decision to apply subsection 14(1)(d) of LA FOIP (and its provincial equivalent subsection 15(1)(d) of FOIP) where release of the records could result in the potential swaying of jury members prior to the trial date being set. Recently, in [Review Report 221-2021](#) my office upheld the application of subsection 14(1)(d) of LA FOIP to records for which a claim to privilege was made.

[141] I turn to a page-by-page analysis of the withheld information. The information withheld from the following pages is about processes such as sharing of information, scheduling meetings, forwarding information and attachments: page 5 (severance 2), 7 (severances 2 and 3), 12 (severance 1), 14 (severance 2), 15 (severance 1), 20 (severance 1), 26 (severance 1 and 2), 40 (severance 1), 42 (severance 1), 46 (severance 1), 50 (severance 2), 55 (severance 1), 60 (severances 1, 2 and 3), 63 (severances 2 and 3) and 67 (severances

2, 3 and 4). I am not persuaded that the release of this information could be injurious to the City in the conduct of its legal proceedings. Therefore, I find that the City did not meet part two of the test for this information.

[142] Pages 27 to 31 contain a City policy. LA FOIP recognizes the importance of transparency of local authorities' policies. Subsection 53.1(1) of LA FOIP states that a local authority should make efforts to make its policies and procedures available online. However, subsection 53.1(2) of LA FOIP also authorizes a local authority to withhold portions or information from disclosure if an exemption applies.

[143] Section 53.1 of LA FOIP provides as follows:

53.1(1) Every local authority shall make reasonable efforts to:

(a) make available on its website all manuals, policies, guidelines or procedures that are used in decision-making processes that affect the public by employees of the local authority in administering or carrying out programs or activities of the local authority; or

(b) provide those documents when requested in electronic or paper form.

(2) Any information in a record that a head would be authorized to refuse to give access to access to pursuant to this Act or the regulations may be excluded from manuals, policies, guidelines or procedures that are made available or provided pursuant to subsection (1).

[144] The City has not provided sufficient information or evidence to support its claim that release of this policy could be injurious in the conduct of its legal proceedings. Therefore, part two of the test has not been met in relation to the policy.

[145] I arrive at a different conclusion in relation to page 14 (severance 1), 49 (severance 2) and 50 (severance 1, second paragraph). I cannot reveal the contents of the withheld information. However, I am satisfied that release of this information could be injurious to the City in the conduct of the legal proceeding. The City has met part two of the test.

[146] Therefore, I find that the City properly applied subsection 14(1)(d) of LA FOIP to some information but not all. My findings and recommendations are set out in the Appendix.

IV FINDINGS

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

[148] I find that there is non-responsive information in the records.

[149] I find that the City properly applied subsection 28(1) of LA FOIP to some information but not all.

[150] I find that subsection 28(2)(n)(i) of LA FOIP does not apply to the personal information found to be exempt.

[151] I find that the City made a *prima facie* case that subsection 21(a) of LA FOIP applies.

[152] I find that the City properly applied subsection 16(1)(a) of LA FOIP to some information but not all.

[153] I find that the City properly applied subsection 16(1)(b) of LA FOIP to some information but not all.

[154] I find that the City properly applied subsection 14(1)(d) of LA FOIP to some information but not all.

V RECOMMENDATIONS

[155] I recommend that the City, within 30 days of the issuance of this Report, release the non-responsive portions of the records to the Applicant, subject to any exemptions found to apply. See the Appendix for details.

[156] I recommend that the City, within 30 days of the issuance of this Report, release to the Applicant and continue to withhold information, as set out in the Appendix to this Report.

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

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

Appendix

Page No.	Redaction No.(s)	LA FOIP Exemption(s) Applied	Description	LA FOIP Findings and Recommendations
1	1	14(1)(d), 21(a)(b)(c), 16(1)(b)	Email	21(a) solicitor-client privilege applies, continue to withhold
1	2	14(1)(d), 21(a), 21(c), 16(1)(b)	Email	21(a) solicitor-client privilege applies, continue to withhold
2	1	14(1)(d), 16(1)(a)(b), 21(a)(b)(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
2	2	14(1)(d), 21(a), 21(c), 16(1)(b)	Email	21(a) solicitor-client privilege applies, continue to withhold
3	1	14(1)(d), 16(1)(a)(b), 21(a), 21(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
5	1	Non-responsive	Email	Non-responsive, release subject to any exemptions that may apply
5	2	14(1)(d), 16(1)(b)	Email	14(1)(d) and 16(1)(b) do not apply, release
5	3	14(1)(d), 16(1)(b)	Email	16(1)(b) applies, continue to withhold
5	4	14(1)(d), 16(1)(a)(b), 21(a)(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
6	1	14(1)(d), 16(1)(a)(b), 21(a), 21(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
7	1	Non-responsive	Email	Non-responsive, release subject to any exemptions that may apply
7	2 to 3	14(1)(d), 16(1)(b)	Email	14(1)(d) and 16(1)(b) do not apply, release
7	4	14(1)(d), 16(1)(a)(b), 21(a)(b)(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
8	1	14(1)(d), 16(1)(a)(b), 21(a)(b)(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
8	2	14(1)(d), 21(a), 21(c), 16(1)(b)	Email	21(a) solicitor-client privilege applies, continue to withhold

9	1	14(1)(d), 16(1)(a)(b), 21(a), 21(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
9	2	14(1)(d), 16(1)(a)(b), 21(a), 28(1)	Email	21(a) litigation privilege applies, continue to withhold
10	Withheld in full	14(1)(d), 16(1)(a)(b), 21(a), 28(1)	Email	21(a) litigation privilege applies, continue to withhold
11	1	14(1)(d), 16(1)(a)(b),	Email	16(1)(a) applies, continue to withhold
12	1 and 2	14(1)(d), 16(1)(b)	Email	16(1)(b) applies to severance 2, continue to withhold; 14(1)(d) and 16(1)(b) do not apply to severance 1, release
12	3	14(1)(d), 16(1)(a)(b), 21(a), 21(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
13	1	14(1)(d), 16(1)(a)(b), 21(a), 21(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
14	1	14(1)(d), 16(1)(a)(b)	Email	14(1)(d) applies, continue to withhold
14	2	14(1)(d), 16(1)(b)	Email	14(1)(d) and 16(1)(b) do not apply, release
15	1	14(1)(d), 16(1)(b)	Email	14(1)(d) and 16(1)(b) do not apply, release
15	2	14(1)(d), 16(1)(a)(b), 21(a)(b)(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
16	1 and 2	14(1)(d), 16(1)(a)(b), 21(a)(b)(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
16	3	14(1)(d), 21(a), 21(c), 16(1)(b)	Email	21(a) solicitor-client privilege applies, continue to withhold
16	4	14(1)(d), 16(1)(a)(b), 21(a), 21(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
17	1	14(1)(d), 16(1)(a)(b), 21(a), 28(1)	Email	21(a) litigation privilege applies, continue to withhold
18	1	14(1)(d), 16(1)(a)(b), 21(a), 28(1)	Email	21(a) litigation privilege applies, continue to withhold
19	1	14(1)(d), 16(1)(a)(b)	Email	16(1)(a) applies, continue to withhold

20	1 and 2	14(1)(d), 16(1)(b)	Email	16(1)(b) applies to severance 2, continue to withhold, 14(1)(d) does not apply to severance 1, release
20	3	14(1)(d), 16(1)(a)(b), 21(a), 21(b)	Email	21(a) solicitor-client privilege applies, continue to withhold
22 to 25	Withheld in full	14(1)(d), 16(1)(a), 21(a), 16(1)(b), 28(1)	Email	21(a) solicitor-client privilege applies, continue to withhold
26	1 and 2	14(1)(d), 16(1)(b)	Email	14(1)(d) and 16(1)(b) do not apply, release)
27 to 31	Withheld in full	14(1)(d), 16(1)(a)(b)	Attachment	14(1)(d), 16(1)(a) and (b) do not apply, release
32	1	Non- responsive	Email	Non-responsive, release subject to any exemptions that may apply
32	2	14(1)(d), 16(1)(a)(b), 28(1)	Email	28(1) applies to portions, 16(1)(a) applies to remaining information, continue to withhold
33	1	14(1)(d), 16(1)(a), (b), 21(a), 28(1)	Email	21(a) litigation privilege applies, continue to withhold
33	2	14(1)(d), 16(1)(a)(b), 21(a)	Email	21(a) litigation privilege applies, continue to withhold
33	3	14(1)(d), 16(1)(b), 21(a)(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
34	1	14(1)(d), 16(1)(b), 21(a)(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
34	2	14(1)(d), 16(1)(a)(b), 21(a)(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
36 to 39	Withheld in full	14(1)(d), 16(1)(a), 21(a), 16(1)(b), 28(1)	Attachment	21(a) solicitor-client privilege applies, continue to withhold
40	1	14(1)(d), 16(1)(b)	Email	14(1)(d) and 16(1)(b) do not apply, release
40	2	14(1)(d), 21(a), 21(c), 16(1)(b)	Email	21(a) solicitor-client privilege applies, continue to withhold

40	3	14(1)(d), 16(1)(a)(b), 21(a), 21(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
41	1	14(1)(d), 16(1)(a)(b), 21(a), 21(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
42	1 and 2	14(1)(d), 16(1)(b)	Email	16(1)(b) applies to severance 2, continue to withhold, 14(1)(d) and 16(1)(b) do not apply to severance 1, release
42	3	14(1)(d), 16(1)(a)(b), 21(a), 28(1)	Email	21(a) litigation privilege applies, continue to withhold
43	1 and 3	14(1)(d), 16(1)(a)(b), 21(a), 28(1)	Email	21(a) litigation privilege applies, continue to withhold
43	2	14(1)(d), 16(1)(b)	Email	16(1)(b) applies, continue to withhold
44	Withheld in full	14(1)(d), 16(1)(a)(b), 21(a), 28(1)	Email	21(a) litigation privilege applies, continue to withhold
45	1	14(1)(d), 16(1)(a)(b)	Email	16(1)(a) applies, continue to withhold
46	1 and 2	14(1)(d), 16(1)(b)	Email	16(1)(b) applies to severance 2, 14(1)(d) and 16(1)(b) do not apply to severance 1, release
46	3	14(1)(d), 16(1)(a)(b), 21(a), 21(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
47	1	14(1)(d), 16(1)(a)(b), 21(a), 21(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
48	Withheld in full	14(1)(d), 16(1)(a)(b), 21(a), 28(1)	Attachment	21(a) solicitor-client privilege applies, continue to withhold
49	1	Non-responsive	Email	Non-responsive, release subject to any exemptions that may apply
49	2 and 3	14(1)(d), 16(1)(b)	Email	14(1)(d) applies to severance 2, continue to withhold; 16(1)(b) applies to severance 3, continue to withhold
50	1	14(1)(d), 16(1)(a)(b), 28(1)	Email	28(1) applies to first paragraph, continue to withhold; 14(1)(d) applies to paragraph 2, continue to withhold
50	2	14(1)(d), 16(1)(b)	Email	14(1)(d) and 16(1)(b) do not apply, release
51	1	14(1)(d), 16(1)(b)	Email	16(1)(b) applies, continue to withhold

51	2	14(1)(d), 16(1)(a)(b), 21(a), 28(1)	Email	21(a) litigation privilege applies, continue to withhold
52	1	14(1)(d), 16(1)(b)	Email	16(1)(b) applies, continue to withhold
52	2	14(1)(d), 16(1)(a)(b), 21(a), 28(1)	Email	21(a) litigation privilege applies, continue to withhold
53	1	14(1)(d), 16(1)(a)(b), 21(a), 28(1)	Email	21(a) litigation privilege applies, continue to withhold
54	1	14(1)(d), 16(1)(a)(b)	Email	16(1)(a) applies, continue to withhold
55	1 and 2	14(1)(d), 16(1)(b)	Email	16(1)(b) applies to severance 2, continue to withhold; 14(1)(d) and 16(1)(b) do not apply to severance 1, release
55	3	14(1)(d), 16(1)(a)(b), 21(a), 21(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
57	1	14(1)(d), 16(1)(a)(b), 21(a)(b)(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
57	2	14(1)(d), 21(a), 21(c), 16(1)(a)(b)	Email	21(a) solicitor-client privilege applies, continue to withhold
58	1	14(1)(d), 16(1)(a)(b), 21(a), 21(c)	Email	21(a) solicitor-client privilege applies, continue to withhold
59	1	28(1)	Email	28(1) does not apply, release
60	1 and 2	14(1)(d), 16(1)(b)	Email	14(1)(d) and 16(1)(b) do not apply, release
60	3	14(1)(d), 16(1)(a)(b)	Email	14(1)(d), 16(1)(a) and 16(1)(b) do not apply, release
60	4 and 5	28(1)	Email	28(1) applies, continue to withhold
63	1	Non- responsive	Email	Non-responsive, release subject to any exemptions that may apply
63	2 and 3	14(1)(d), 16(1)(b)	Email	14(1)(d) and 16(1)(b) do not apply, release
63	4	14(1)(d), 16(1)(a)(b), 21(a)(b)(c), 28(1)	Email	21(a) solicitor-client privilege applies, continue to withhold
64	1	14(1)(d), 16(1)(a)(b), 21(a)(b)(c)	Email	21(a) solicitor-client privilege applies, continue to withhold

65	Withheld in full	14(1)(d), 21(a), 16(1)(a)(b), 28(1), 21(c)	Attachment	21(a) solicitor-client privilege applies, continue to withhold
66	Withheld in full	21(a), 14(1)(d), 16(1)(a)(b), 21(c)	Attachment	21(a) solicitor-client privilege applies, continue to withhold
67	1	Non-responsive	Email	Non-responsive, release subject to any exemptions that may apply
67	2, 3 and 4	14(1)(d), 16(1)(b)	Email	14(1)(d) and 16(1)(b) do not apply, release
69	Withheld in full	14(1)(d), 21(a), 16(1)(a), 16(1)(b)	Attachment	21(a) solicitor-client privilege applies, continue to withhold
70 to 71	Withheld in full	14(1)(d), 21(a), 16(1)(a), 28(1), 16(1)(b)	Attachment	21(a) solicitor-client privilege applies, continue to withhold
72	1 and 2	14(1)(d), 16(1)(b), 21(a), 21(c)	Email	21(a) litigation privilege applies, continue to withhold
73	1	14(1)(d), 16(1)(a)(b), 21(a), 28(1)	Email	21(a) litigation privilege applies, continue to withhold