



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 204-2023

Town of Fort Qu'Appelle

December 28, 2023

Summary:

The Applicant submitted an access to information request to the Town of Fort Qu'Appelle (Town). The Town withheld one of the responsive records pursuant to subsection 16(1)(a) and section 20 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Applicant was not satisfied and requested that the Commissioner undertake a review of the exemptions claimed and a review of the Town's search efforts. The Town identified additional responsive records and advised it would be withholding them pursuant to subsection 21(a) of LA FOIP. The Commissioner found that the town had conducted a reasonable search for records. The Commissioner found that the Town made a *prima facie* case that subsection 21(a) of LA FOIP applies with some exceptions. The Commissioner also found that subsection 16(1)(a) of LA FOIP was properly applied. The Commissioner recommend that the Town take no further action regarding the search for responsive records. The Commissioner also recommend that the Town continue to withhold the records, with the exception of the headers, footers, subject lines and confidentiality statements in the emails which should be released to the Applicant within 30 days of issuance of this Report.

I BACKGROUND

- [1] On June 14, 2023, the Town of Fort Qu'Appelle (Town) received the Applicant's access to information request for "Business License Petition Documents" and described the requested records as follows:

Any and all documents relating to the evaluation and review of the Business License Petition that was received by the Town of Fort Qu'Appelle on May 8th, 2023. This

would include but is not limited to a list of all the petitioner names that were removed from the Petition signature count or a copy of the Petition showing the crossed out names.

[2] On July 4, 2023, the legal counsel for the Town responded to the Applicant request stating as follows:

The following are the only records in the Town's possession that relate to your Request:

1. "Information Report: Determination of Sufficient or Non-Sufficient of Petition – Referendum Regarding Business License Bylaw" dated May 25, 2023, prepared by CAO [Chief Administrator Officer] [name of CAO] and presented to Council (the "**Sufficiency Report**").
2. A copy of the Petition with signatures (the "**Petition**").
3. A copy of the Petition with handwritten notes containing CAO [name of CAO] analyses of the sufficiency of the Petition (the "**Petition Analysis**").

There is no "list of all the petitioner names that were removed from the Petition signature count" as you have requested.

The Sufficiency Report has previously been made public pursuant to section 117 of *The Municipalities Act* and a copy is appended hereto as **Appendix A**.

A copy of the Petition is appended hereto as **Appendix B**.

Your request for a copy of the Petition Analysis is denied on the following grounds:

1. The Petition Analysis consists of analyses developed by or for the local authority pursuant to section 16(1)(a) of LA FOIP [*The Local Authority Freedom of Information and Protection of Privacy Act*]. It is impossible to redact the Petition Analysis without implicitly disclosing the analyses contained therein and in any event, redaction of the analyses will leave behind only the Petition, which has been disclosed. As such, severance pursuant to section 8 of LA FOIP is not possible and access to the record in its entirety is refused.
2. Disclosure of the Petition Analysis could threaten the safety or the physical or mental health of individuals pursuant to section 20 of LA FOIP. This includes individuals whose signatures are commented on in the Petition Analysis as well as members of Council and the CAO. Yourself and other proponents of the Petition have demonstrated a pattern of harassment and bullying of Council members, Town employees including the CAO, and potential signatories to the Petition. The Town is of the view that disclosure of the Petition Analysis could

lead to further bullying and harassment, which is a clear threat to the safety and/or physical or mental health of the targeted individuals.

- [3] On August 31, 2023, the Applicant's legal counsel requested that my office undertake a review of the Town's decision to withhold some of the responsive records. On September 7, 2023, the Applicant's legal counsel clarified that the Applicant was requesting a review of the Town's decision to refuse access to the Petition Analysis and the Town's conclusion that no further responsive records exist.

- [4] On September 20, 2023, the Town provided my office a letter explaining the scope of the Town's search and consented to sharing the letter with the Applicant. On September 27, 2023, the Applicant's legal counsel advised my office that the Applicant was not satisfied with the Town's response and would like to proceed with the review of the Town's search efforts. The Applicant is of the belief that more records should exist.

- [5] On October 19, 2023, my office notified the Applicant's legal counsel and the Town that my office would be undertaking a review.

- [6] On November 2, 2023, the Town advised that upon further review, it had identified emails responsive to the Applicant's request and advised that they would not be disclosed as they are subject to solicitor-client privilege.

- [7] On November 20, 2023, the Town sent correspondence to the Applicant advising that the Town had identified additional records in the form of five emails. The Town advised the Applicant of its position that the emails were subject to solicitor-client privilege and as such, withheld in full pursuant to subsection 21(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

- [8] On November 20, 2023, the Town submitted an affidavit and schedule of records to make a *prima facie* case for solicitor-client privilege for the five emails. Then on December 12, 2023, the Town provided the remainder of its submission to my office. Neither the Applicant nor their legal counsel provided a submission.

II RECORDS AT ISSUE

- [9] The records at issue are a Petition Analysis and emails.
- [10] The 64-page Petition Analysis was withheld in full pursuant to subsection 16(1)(a) and section 20 of LA FOIP. The Town has noted that the Petition Analysis performed by the Chief Administrator Officer (CAO) are handwritten notes and other marking on a copy of the Petition. The Petition has already been released to the Applicant in full.
- [11] The Town has also withheld five emails in full pursuant to subsection 21(a) of LA FOIP. The Town has not supplied my office with copies of these emails as it is making a *prima facie* case for solicitor-client privilege.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

- [12] The Town qualifies as a “local authority” pursuant to subsection 2(1)(f)(i) of LA FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did the Town conduct a reasonable search for records?

- [13] Section 5 of LA FOIP provides as follows:

5 Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the possession or under the control of a local authority.

- [14] The *Guide to LA FOIP*, Chapter 3, “Access to Records” (*Guide to LA FOIP*, Ch. 3) at page 3, provides that section 5 of LA FOIP establishes a right of access by any person to records in the possession or control of a local authority subject to limited and specific exemptions, which are set out in LA FOIP.

[15] Page 7 of the *Guide to LA FOIP*, Ch. 3, provides that subsection 5.1(1) of LA FOIP requires a local authority to respond to an applicant's access to information request openly, accurately and completely. This means that local authorities should make reasonable efforts to not only identify and seek out records responsive to an applicant's access to information request, but to explain the steps in the process. The threshold that must be met is one of "reasonableness." In other words, it is not a standard of perfection, but rather what a fair and rational person would expect to be done or consider acceptable.

[16] The *Guide to LA FOIP*, Ch. 3 at pages 9 and 10, provides that the focus of a search review, including when a local authority states no records exist, is whether the local authority conducted a reasonable search. A reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records reasonably related to the access to information request. A reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances. Examples of information to support its search efforts that local authorities can provide to my office include the following:

- For personal information requests – explain how the individual is involved with the local authority (i.e., client, employee, former employee etc.) and why certain departments/divisions/branches/committees/boards were included in the search.
- For general requests – tie the subject matter of the request to the departments/divisions/branches/committees/boards included in the search. In other words, explain why certain areas were searched and not others.
- Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
- Explain how the records management system is organized (both paper & electronic) in the departments/divisions/branches/committees/boards included in the search.
- Describe how records are classified within the records management system. For example, are the records classified by:
 - Alphabet
 - Year
 - Function

- Subject
- Consider providing a copy of your organization's record schedule and screen shots of the electronic directory (folders & subfolders).
- If the record has been destroyed, provide copies of record schedules and/or destruction certificates.
- Explain how you have considered records stored off-site.
- Explain how records that may be in the possession of a third party but in the local authority's control have been searched such as a contractor or information management service provider.
- Explain how a search of mobile electronic devices was conducted (i.e., laptops, smart phones, cell phones, tablets).
- Explain which folders within the records management system were searched and how these folders link back to the subject matter requested. For electronic folders – indicate what key terms were used to search if applicable.
- Indicate the calendar dates each employee searched.
- Indicate how long the search took for each employee.
- Indicate what the results were for each employee's search.
- Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided. For more on this, see *Using Affidavits in a Review with the IPC*.

The above list is meant to be a guide. Each case will require different search strategies and details depending on the records requested.

[17] In an email dated October 10, 2023, the Applicant's legal counsel stated:

... the reason that my client wants a review of the Town's search for responsive records is because they have concerns about whether there was any correspondence relating to the petition analysis or other documents relied on in forming the petition analysis that ought to have been provided. Any documents relied on by the CAO or correspondence regarding the petition analysis would be informative as to how they made their determinations to invalidate certain signatories to the petition.

[18] The Town's submission provided as follows:

The "Petition" in question was a petition for referendum pursuant to section 132 of the Municipalities Act.

Pursuant to section 134(1) of the Municipalities Act, the CAO is solely responsible for determining if a petition for a referendum is sufficient once submitted to the Town...

When the Petition was received by the Town, it was provided directly to the CAO, who undertook an analysis of its sufficiency.

The CAO scanned the Petition and printed one copy of it and conducted [their] analysis into the sufficiency of the signatures and the Petition itself directly on that copy. This is the Petition Analysis.

Once [they] completed [their] sufficiency analysis, [they] prepared a report to Town Council, which is the Sufficiency Report, which was presented to Council and reviewed by Council in a Council meeting.

Being the only person involved in the sufficiency analysis, the CAO was aware of every document produced in relation to the "*evaluation and review of the Business License Petition that was received by the Town of Fort Qu'Appelle on May 8th 2023*".

The CAO did not initially consider solicitor-client privileged records to be responsive to the request and so they were not included in the initial response, however, after providing the Index of Records, the CAO identified the solicitor-client privileged emails as also potentially responsive and notice was provided to the OIPC of their existence. The OIPC requested that notice similarly be provided to the Applicant, which was done.

Given that there was only one person within the Town involved in the "*evaluation and review of the Business License Petition that was received by the Town of Fort Qu'Appelle on May 8th 2023*", it was not necessary [sic] search further than [their] records. The CAO searched [their] records and did not locate any further documents related to the Applicant's Request.

...

The "*list of all the petitioners names that were removed from the Petition signature count...*" did not exist because the CAO, who was solely responsible for, and the only individual to undertake, the analysis into the sufficiency of the Petition, did not create one. The only documents created by the CAO, apart from the solicitor-client privileged emails, the Petition Analysis and the Sufficiency Report.

[19] The threshold for search is what is reasonable in the circumstances. A local authority does not need to prove beyond a reasonable doubt that a record exists, but it needs to be able to

demonstrate its efforts to search for it. In other review reports (e.g., [Review Report 043-2022](#), [Review Report 004-2022](#)), I have also considered if public bodies have provided reasonable explanations for why records would not exist. The Applicant's request focuses on the "evaluation and review" of the petition. As noted above, the Town's submission explains how the CAO undertook the evaluation and review of the petition, by taking a copy of the petition and conducting their analysis of the sufficiency of the petition. As referred to in the Town's submission, section 134(1) of *The Municipalities Act* provides that the administrator is responsible for determining the sufficiency of a petition for a referendum. This provision supports the Town's assertions that the CAO would have the experience and knowledge of the records at issue to conduct the search for responsive records. The CAO's search for records resulted in the Petition Analysis, which the Town identified as a responsive record and withheld in full. Additionally, when the CAO later realized that the emails should have been considered responsive to the Applicant's request, the Town advised my office and the Applicant of the existence of these records.

[20] I find that the Town's search efforts were reasonable. I recommend that the Town take no further action regarding the search for responsive records.

3. Did the Town establish a *prima facie* case that subsection 21(a) of LA FOIP applies to the records withheld in full?

[21] To support its claim of solicitor-client privilege, the Town provided my office with an affidavit along with the schedule of records. As the Town is making a *prima facie* claim that subsection 21(a) of LA FOIP applies, it has not provided my office with a copy of the records to review.

[22] 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;

[23] My office's *Guide to LA FOIP*, Chapter 4, "Exemptions from the Right of Access" (*Guide to LA FOIP*, Ch. 4) at page 230, provides that subsection 21(a) of LA FOIP is a discretionary, class-based exemption. It permits refusal of access in situations where a record contains information that is subject to any legal privilege, including solicitor-client privilege.

[24] Pages 232 to 237 of the *Guide to LA FOIP*, Ch. 4, provide that the purpose of solicitor-client privilege is to assure clients of confidentiality and enable them to speak honestly and candidly with their legal representatives. The following three-part test can be applied:

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

[25] I will consider each part of the test.

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

[26] The *Guide to LA FOIP*, Ch. 4 at page 233, provides the following definitions:

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

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

This provision ensures that a local authority, as the client, has the same protection for its legal documents as persons in the private sector.

- [27] The Town's schedule of records identifies three records containing five emails, which are forms of communication, between the Town's CAO and partners/lawyers at a law firm. In this matter, based on the information provided, I am satisfied that the Town is the client. Additionally, the partners/lawyers are members of the Law Society of Saskatchewan. As such, I find the first part of the test is met.

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

- [28] The *Guide to LA FOIP*, Ch. 4 at page 235, provides that "legal advice" means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.
- [29] In my office's [Review Report 188-2022](#), I noted that, "I am not satisfied that the headers, footers, subject lines and confidentiality statements in the emails at issue would contain communications (or the substance of communications) where legal advice was sought or given." As such, these portions of the records would not meet the second part of the test and I will not consider the third part of the test to this information. I recommend, therefore, that the Town release the headers, footers, subject lines and confidentiality statements to the Applicant within 30 days of the issuance of this Report.
- [30] In the Town's affidavit, it notes that some of the emails at issue were exchanged prior to the Town receiving the Petition. The CAO indicates they became aware of a petition for referendum that would be submitted through an announcement in the local newspaper. In anticipation of the forthcoming petition, the CAO sought legal advice. The affidavit indicates that the emails "consist entirely of requests from [the CAO] for legal advice with respect to the interpretation of *The Municipalities Act*, and a response from the local authority's solicitors in those inquiries." Based on a review of the details provided by the Town, I am satisfied that the second part of the test is met for the remaining portions of the emails.

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

[31] Page 237 of the *Guide to LA FOIP*, Ch. 4, provides that there must be an expectation on the part of the local authority that the communication will be confidential. “Not every aspect of relations between a lawyer and a client is necessarily confidential.” Conduct which is inconsistent with an expectation of confidentiality can constitute a waiver of privilege. Confidentiality is the *sine qua non* of privilege. Without confidentiality there can be no privilege and when confidentiality ends so too should the privilege. As a general rule, the client (usually a local authority) must not have disclosed the legal advice (either verbally or in writing) to parties who are outside of the solicitor-client relationship.

[32] In its affidavit, the Town submitted that the emails were intended to be kept confidential and have been consistently treated as confidential. Given the details provided by the Town regarding the nature of the records, it appears that the parties intended the emails to be treated confidentially. As the third part of the test is met for the remaining portions of the emails, I find that the Town made a *prima facie* case that subsection 21(a) of LA FOIP applies to these remaining portions (that is the portions excluding the headers, footers, subject lines and confidentiality statements). I recommend that the Town continue to withhold these remaining portions pursuant to subsection 21(a) of LA FOIP.

4. Did the Town properly apply subsection 16(1)(a) of LA FOIP?

[33] As noted earlier, the Town applied subsection 16(1)(a) to the Petition Analysis in full.

[34] 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;

[35] The *Guide to LA FOIP*, Ch. 4 at pages 110 to 114, provide that subsection 16(1)(a) of LA FOIP is a discretionary class-based exemption. It permits refusal of access in situations

where release of a record could reasonably be expected to disclose advice, proposals, recommendations, analyses or policy options developed by or for a local authority. The following two-part test can be 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?

[36] I will consider each part of the test.

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

[37] In its submission, the Town's provides as follows:

The handwritten notes on the Petition Analysis clearly consist of analyses developed by or for the local authority.

...

In Review Report 037-2022, the Commissioner distinguishes between information that is "the result of analyses" and "analyses itself" (at para. 43). In that case the local authority was seeking to withhold access to certain columns in spreadsheets prepared by the local authority to submit to the Saskatchewan Assessment Management Agency pursuant to section 22.1(4) of *The Assessment Management Agency Act*, which requires a local authority to provide certain information not SAMA for the purposes of an audit.

The Commissioner noted that the local authority had undertaken an analysis to arrive at the information recorded in the columns in question. As such the information in question was the result of analyses, and not analyses itself.

...

In order to determine the sufficiency of the Petition, the CAO was required to review each individual signature and its associated information and ensure it complied with section 134(3) of the *Municipalities Act*, which states:

(3) In counting the number of petitioners on a petition, the administrator shall exclude the name of any person:

(a) whose signature is not witnessed;

- (b) whose signature appears on a page of the petition that does not have the same purpose statement that is contained on all the other pages of the petition;
- (c) whose printed name is not included or is incorrect;
- (d) whose street or road address or legal description of land is not included or is incorrect;
- (e) whose signature is not accompanied by the date on which the person signed the petition or the date is incomplete; or
- (f) who signed the petition before the date mentioned in clause 133(4)(c).

In doing so, [they were] undertaking a detailed examination of the elements or structure of the Petition, being the signatures and accompanying information. [They] separated the Petition into its constituent elements by doing a page-by-page and line-by-line analysis into whether each of the requirements of the *Municipalities Act* was met.

The CAO's handwriting on the Petition constitute [their] written analysis and reasoning regarding the sufficiency of each constituent element of the Petition. Where there are check marks, or crossed out portions, that is the handwritten evidence of the CAO's analysis of the sufficiency of the signature for the purposes of determining whether or not it will be counted towards the petition.

Once [their] analysis was complete, the CAO was able to tally up [their] findings and determine whether or not the Petition was successful, which decision is the *conclusion* of [their] analysis. [They] summarized [their] methods and conclusions in the Sufficiency Report, which has been disclosed pursuant to section 117 of the *Municipalities Act*, along with the full copy of the Petition itself.

...The Town states that redacting the handwriting from the Petition Analysis will effectively disclose the CAO's analysis. It will be easy to determine by reviewing the nature of the redactions whether there is a check mark versus a wholly crossed out line item. As a result, the entirety of the document must be held pursuant to section 16(1)(a).

The Applicant is not deprived of any information [they are] entitled to by the Town not providing a redacted version of the Petition Analysis and instead withholding the document in its entirety because the Applicant is already in possession of the Petition. It is the handwriting, and its location on the document, that form the analysis in the Petition Analysis. All other information has been disclosed by the Town's production of the Petition.

[Emphasis added]

[38] As noted above, the Town is asserting that the “Petition Analysis clearly consist of analyses.” The *Guide to LA FOIP*, Ch. 4 at page 112, 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.

[39] Pages 115 to 117 of the *Guide to LA FOIP*, Ch. 4, further clarifies what type of information is captured by this exemption:

The provision is not meant to protect the bare recitation of facts, without anything further. The provision should be reserved for the opinion, policy, or normative elements of advice, and should not be extended to the facts on which it is based. The exception is where the advice and facts may be so intertwined as to preclude release.

- “Factual material” means a cohesive body of facts, which are distinct from advice, proposals, recommendations, analyses and/or policy options. It does not refer to isolated statements of fact, or to the analyses of the factual material. Factual material refers specifically to information that cannot be withheld under section 16(1) of LA FOIP and which must be separated from advice, proposals, recommendations, analyses and/or policy options if those are being withheld. Where factual information is intertwined with advice or recommendations in a manner whereby no reasonable separation can be made, then the information is not factual material and can be withheld.

If releasing this information reveals the substance of the advice, recommendations, proposals, analyses and/or policy options, the local authority can withhold this information. Where a review by the IPC occurs and this is the exception, the local authority should demonstrate how and why release of this type of information would reveal the substance of the advice, recommendations, proposals, analyses and/or policy options.

Advice, proposals, recommendations, analyses, or policy options can be revealed in two ways:

1. The information itself consists of advice, proposals, recommendations, analyses, or policy options.
2. The information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice, proposals, recommendations, analyses or policy options.

[40] In my office's [Review Report 017-2018](#), it was stated that "analyses refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals, and policy options as to a course of action."

[41] In that report, my office also refers to an Alberta Information and Privacy Commissioner (Alberta IPC) Order in which the application of subsection 24(1)(a) of Alberta's *Freedom of Information and Protection of Privacy Act* (FOIP Act) which uses similar language found at subsection 16(1)(a) of LA FOIP and discusses what is contemplated as "analyses" in its similar provision:

[39] The documents also contain assessment of the results of the scientific testing combining information found in the proposal and other sources. Orders from both the Information and Privacy Commissioners of Alberta and Ontario have found that this type of assessment would not qualify as advice, proposals, recommendations, policy options or analyses in the context of similar provisions in those jurisdictions. Order F-2012-06 from Alberta states:

However, in my view, the scientific analysis or evaluation of physical data by the application of professional knowledge reaches what are in essence conclusions about physical facts, which in my view are not advice within the terms of [sections of Alberta's FOIP similar to section 17(1)(a)]. Even if the conclusions might vary based on the knowledge of the analyst, they are still conclusions about physical facts. In my view, **the "analysis" contemplated by section 24(1)(a) refers to the analysis of options or potential courses of action or decisions that have a subjective or opinion element, not to the application of scientific principles to physical data.**

[40] This is also supported by Ontario Order PO-1993 that made a distinction between professional or technical opinions and the advice of a public servant making recommendations to the government with respect to a proposed policy initiative. This Order from the Information and Privacy Commissioner of Ontario was upheld by the Ontario Divisional Court.

[Emphasis added]

[42] Northwest Territories Information and Privacy Commissioner Review Report 20-219 references the following Alberta IPC Orders regarding its similar provision:

Regarding factual information, including opinions about factual situations, the adjudicator in Alberta Order F2012 10 found the following commencing at paragraph 44:

That an employee offers an opinion regarding a factual situation does not, in and of itself, support a finding that the information is subject to either section 24(1)(a) or (b). Recently, in Order F2012 06, I rejected the argument that an objective evaluation or assessment of factual information constitutes information that is subject to section 24(1)(a), if that information reveals only a state of affairs, rather than advice or analysis directed at taking an action.

Similarly, in Order 97 007, **former Commissioner Clark rejected the argument that a collection of facts, without evidence that the facts were collected and presented in order to influence a decision, is subject to section 24(1)(a).**

Upon reviewing the briefing notes, I note that there is no reference to a possible course of action for the Minister. In short, the briefing notes appear to be a narration or a status report. The authors of the briefing notes were not advising the Minister as to what he should do or not do, nor were they providing an analyses of the events using their expertise. "Analyses" is defined in the Concise Oxford Dictionary, 9th edition, (New York: Oxford, 1995) as:

a detailed examination of the elements or structure of a substance etc.; a statement of the result of this.

While there is some discretion exercised in choosing which facts are gathered, without more, a compilation of facts is not an [analysis].

Gathering pertinent factual information is only the first step that forms the basis of an [analysis]. It is also the common thread of "advice, proposals, recommendations, or policy options" because they all require, as a base, a compilation of pertinent facts.

In Order 96 012, I stated that I took section 23(1)(a) to **contemplate the protection of information generated during the decision making process.**

[Emphasis added]

- [43] The Town has released the Petition in full to the Applicant. The Petition Analysis is a copy of the Petition in which the CAO made handwritten notes and other markings that outline whether or not the signatures complied with the requirements set out in section 134(3) of *The Municipalities Act*. The information in the Petition Analysis is not the bare recitation of facts, without anything further. The handwritten notes and other markings made in the Petition Analysis reveal the CAO's analysis of the validity of the petition signatures and whether or not they complied with the requirements outlined in *The Municipalities Act*. The handwritten notes indicate reasons why they were found not to comply. This exercise

was done in order to analyze the information submitted and was used to influence the Town's decision regarding the submitted petition.

- [44] Based on the above, I find that this information would qualify as analyses. As such, I find that the first part of the test is met.

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

- [45] The *Guide to LA FOIP*, Ch. 4 at page 114, provides that “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.

- [46] As noted in the Town's submission, the analyses was created by the Town's CAO. As such, I find that the analysis was developed by the local authority, which meets the second part of the test.

- [47] However, before I move on to my finding and recommendation, I note that legal counsel for the Applicant submitted a letter to my office along with their request for review which stated:

In the Town's Response letter, the solicitors for the Town took the position that the Petition Analysis should be withheld pursuant to section 16(1)(a) of LA FOIP...

...

Even if the Petition Analysis is found to be “analyses” created by the municipality, the Applicant submits that it must be disclosed nonetheless as the exemption provided for by section 16 of LA FOIP does not apply to the Petition Analysis pursuant to subsection 16(2)(b), given that it is an official record that contains a statement of the reasons for a decision that is made in the exercise of a discretionary power.

...

The Petition Analysis is precisely the type of document referenced in subsection 16(2)(b) – it is an official record that consists of the reasons or facts leading to a decision in the exercise of a discretionary power, being power given to the administrator to determine if a petition for a referendum is sufficient pursuant to section 134 of *The Municipalities Act*.

[48] Subsection 16(2)(b) of LA FOIP provides:

16(2) This section does not apply to a record that:

...

(b) is an official record that contains a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;

[49] The *Guide to LA FOIP*, Ch. 4 at page 137 provides that this provision makes it clear that subsection 16(1) of LA FOIP cannot be used to withhold formal judgments, including reasons for reaching those judgments. The provision applies when the decision has already been made and is not merely contemplated.

[50] Pages 137 and 138 of the *Guide to LA FOIP*, Ch. 4, provide the following definitions:

- “Reasons for decision” means the motive, rationale, justification, or facts leading to a decision.
- “Exercise of discretionary power” refers to making a decision that cannot be determined to be right or wrong in an objective sense.
- “Adjudicative function” means a function conferred upon an administrative tribunal, board or other non-judicial body or individual that has the power to hear and rule on issues involving the rights of people and organizations. Examples would be a school board hearing an appeal under Part V of *The Education Act, 1995*, or a hearing by a review board.

Reasons for decisions of this type cannot be withheld under subsection 16(1) of LA FOIP despite the fact that the decisions may contain advice or recommendations prepared by or for a local authority.

[51] The Alberta Information and Privacy Commissioner’s (Alberta IPC) in [Order F2008-021](#) considered the application of subsection 24(2)(b) of Alberta’s FOIP Act which uses similar language found at subsection 16(2)(b) of LA FOIP. Subsection 24(2)(b) of Alberta’s FOIP Act provides as follows:

24(2) This section does not apply to information that

(b) is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function,

[52] Alberta IPC Order F2008-021 discusses this provision in more depth as follows:

[para 57] While not binding on me, I note that the *Freedom of Information and Protection of Privacy Guidelines and Practices Manual 2005*, published by the Government of Alberta, states on page 174 that **section 24(2)(b) applies when a decision has already been made and is not merely contemplated**. It suggests that “reasons for a decision” means the motive, rationale, justification or facts leading to a decision, while “exercise of discretionary power” is considered to refer to making a decision that cannot be determined to be right or wrong in an objective sense. Further, it suggests that “adjudicative function” means a function conferred upon an administrative tribunal, board or other non-judicial body or individual that has the power to hear and rule on issues involving the rights of people and organizations. I find that **this analysis is a reasonable interpretation of section 24(2)(b) and is in keeping with the purpose of the provision, which is to ensure transparency in decision-making and accountability of individuals when they make decisions in the exercise of statutory or discretionary authority.**

...

[para 65] **The decision to dismiss the complaint on the basis of the time limit was not automatic or a simple matter of “screening” the complaint, but required as assessment and weighing of the facts of the case and the application of legal principles to those facts. The decision to dismiss the complaint decided the rights of individuals, in particular, the members who were the subject of the complaint. It also decided the right of EPS to proceed with the complaint.** The discussion of the employees that took place subsequent to the decision to dismiss the complaint, documented in emails 3 – 10, and referred to by both EPS and the Public Body in their submissions, indicates that more than one theory of the application of section 43(11) to the facts had been possible. Further, *Engel v. da Costa*, 2008 ABCA 152 indicates that there was uncertainty as to how section 43(11) applied to misconduct taking place prior to the coming into force of the legislation and uncertainty as to whether discoverability was a factor to be considered in the application of section 43(11). I therefore find that **the Chief was also required to interpret section 43(11) and make factual findings when applying it. For these reasons, I find that the decision to dismiss the complaint under section 43(11) was an adjudicative decision, as discussed above, and that the information severed by the Public Body as “advice and recommendations” is a statement for the reasons for a decision made in the exercise of an adjudicative function under section 24(2)(b). Consequently, this information cannot be withheld under section 24(1).**

...

[para 70] There is no evidence that the Public Body requested clarification for the purpose of making a decision or taking an action, as the Chief, and not the employee of the Public Body who sought clarification, had the statutory authority to apply section 43(11). **The emails in response to the request clarify the reasons for a decision that had already been made, as does the letter that forms records 1 and 2. Further, the responses from the EPS are effectively a statement of reasons made in the exercise**

of a discretionary power or adjudicative function within the meaning of section 24(2)(b), as they explain the reasons for determining that section 43(11) of the *Police Act* applied. For these reasons, I find that section 24(1)(a) or (b) does not apply to the responses from the EPS staff sergeant contained in records 3 and 5, as I find that section 24(2)(b) applies to this information.

[Emphasis added]

[53] The Sufficiency Report, which the Town released to the Applicant, included a breakdown of the number of signatures on the petition when it was submitted, and the number of signatures that were not valid and the reason why they were found not valid. The Petition Analysis shows the CAO's analysis that was used to determine whether or not the petition was valid; however, a decision on the petition had not yet been made. Once the analysis was complete, the CAO prepared the Sufficiency Report which reflected the decision that had been reached and outlined the reasons for the decision. This aligns with the reasoning adopted by the AB IPC in Order F2008-021, and which I will also adopt in considering if subsection 16(2)(b) of LA FOIP has application in this matter. Based on the Town's arguments, as well as the AB IPC decision, I am not persuaded that the Petition Analysis qualifies as a decision that is made in the exercise of a discretionary power or an adjudicative function.

[54] As such, I find that the Town properly applied subsection 16(1)(a) of LA FOIP, and I recommend it continue to withhold the Petition Analysis pursuant to subsection 16(1)(a) of LA FOIP.

[55] As I have found that subsection 16(1)(a) of LA FOIP applies there is no need to consider the application of section 20 of LA FOIP.

IV FINDINGS

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

[57] I find that the Town has conducted a reasonable search for records.

[58] I find that the Town has properly applied subsection 16(1)(a) of LA FOIP.

[59] I find that the Town has made a *prima facie* case that subsection 21(a) of LA FOIP applies to the records, with the exception of the headers, footers, subject lines and confidentiality statements in the emails.

V RECOMMENDATIONS

[60] I recommend that the Town take no further action regarding the search for responsive records.

[61] I recommend the Town continue to withhold the redacted records, with the exception of the headers, footers, subject lines and confidentiality statements in the emails which should be released to the Applicant within 30 days of issuance of this Report.

Dated at Regina, in the Province of Saskatchewan, this 28th day of December, 2023.

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