



REVIEW REPORT 250-2022

Prince Albert Police Service

May 26, 2023

Summary:

The Applicant submitted an access to information request to the Prince Albert Police Service (PAPS). PAPS identified two records responsive to the access request. It provided the Applicant a copy of one of the records but withheld the other. PAPS cited subsections 13(1)(b), 14(1)(c), 19(a) and (b) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) as its reasons for refusing the Applicant access to the record. The Applicant appealed to the Commissioner. The Commissioner found that PAPS did not meet its burden of proof pursuant to section 51 of LA FOIP in demonstrating that subsections 13(1)(b), 14(1)(c), 19(a) and (b) of LA FOIP applied to the record. Therefore, the Commissioner recommended that PAPS release the record to the Applicant. He also recommended that PAPS provide details of its search effort to locate records responsive the Applicant's access request to his office and to the Applicant within 30 days.

I BACKGROUND

- [1] On November 14, 2022, the Prince Albert Police Service (PAPS) received the following access to information request:

Notice Served by the Saskatchewan Ministry of Corrections, Policing and Public Safety to Prince Albert Police Service and Prince Albert Police Service's Board of Police Commissioners.

The Saskatchewan Ministry of Corrections, Policing and Public Safety served the Prince Albert Police Service and the Prince Albert Police Service's Board of Police Commissioners notice during the week of November 7-11 2022 related to the independent, external review of the Prince Albert Police Service and its Board of Police Commissioners and the appointment of Rod Knecht and Associates who will be conducting the review.

Please provide copy of notices served.

[2] In a letter dated December 13, 2022, PAPS responded to the Applicant by saying it would provide one record to the Applicant but withhold another. PAPS said:

1. There has been no such notice served on the Prince Albert Police Service. We are therefore unable to provide you with such a document, as requested.
2. There has been no such notice served in respect of an independent, external review of the Prince Albert Board of Police Commissioners. We are therefore unable to provide you with such a document, as requested.
3. **In response to your request, attached please find a copy of a letter dated November 8, 2022 sent to the Prince Albert Board of Police Commissioners by the Minister of Corrections, Policing and Public Safety giving the Board notice of a special inquiry to be conducted pursuant to s. 88 of *The Police Act, 1990* pertaining to the operation and administration of the Prince Albert Police Service.**
4. **You will note the reference in the November 8, 2022 letter (attached per #3 above) to an “attached notice of special inquiry”. After some review of the content and terms upon which that document has been delivered to the Board of Police Commissioners, and consultation with third party officials from whom the document was received, we would report to you that we must decline access to this particular document at this time in that the LAFOIP legislation requires and authorizes that we refrain from disclosing its contents. In this regard we refer to and are governed by the following reasons and legislation:...**

[Emphasis added]

[3] PAPS then quoted subsections 13(1)(b), 14(1)(c), 19(a) and (b) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) as its reasons for withholding the record at issue in this review.

[4] On December 13, 2022, the Applicant requested a review by my office.

[5] On January 26, 2023, my office notified PAPS and the Applicant that my office would be undertaking a review of the reasons PAPS was withholding the record at issue as well as PAPS' efforts to search for records responsive to the access request.

[6] On February 28, 2023, PAPS provided a submission to my office. The Applicant did not provide a submission.

II RECORDS AT ISSUE

[7] As referenced in PAPS' letter dated December 13, 2022 to the Applicant, the record at issue is a "Notice of Special Inquiry". It is two pages in length. PAPS withheld these two pages in full. It cited subsections 13(1)(b), 14(1)(c), 19(a) and (b) of LA FOIP as its reasons for withholding.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[8] PAPS qualifies as a "local authority" as defined by subsection 2(f)(viii.1) of LA FOIP. Therefore, I find that I have jurisdiction to conduct this review.

2. Did PAPS properly apply subsection 13(1)(b) of LA FOIP?

[9] Subsection 13(1)(b) of LA FOIP provides as follows:

13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:

...

(b) the Government of Saskatchewan or a government institution;

[10] My office uses the following three-part test to determine if subsection 13(1)(b) of LA FOIP applies:

1. Was the information obtained from the Government of Saskatchewan or its agencies, Crown corporations or other institutions?
2. Was the information obtained implicitly or explicitly in confidence?

3. Is there consent to disclose the information or has the information been made public?

(*Guide to LA FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated April 29, 2021 [*Guide to LA FOIP*, Ch. 4], pp. 22-25)

- [11] All three parts of the test must be met in order for subsection 13(1)(b) of LA FOIP to apply. The following is an analysis to determine if the three-part test is met.

1. Was the information obtained from the Government of Saskatchewan or its agencies, Crown corporations or other institutions?

- [12] “Obtained” means to acquire in any way; to get possession of; to procure; or to get a hold of by effort. A local authority may obtain information either directly or indirectly from a government institution, but to obtain it implies that the local authority did not create the information (*Guide to LA FOIP*, Ch. 4, p. 22).

- [13] The Notice of Special Inquiry was signed by the Minister of Corrections, Policing and Public Safety. As such, it appears that a government institution created the record and that PAPS had “obtained” the information. I find that the first part of the test is met.

2. Was the information obtained implicitly or explicitly in confidence?

- [14] “In confidence” usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained in confidence means that the provider of the information has stipulated how the information can be disseminated. In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the local authority and the party that provided the information (*Guide to LA FOIP*, Ch. 4, p. 23).

- [15] In its submission, PAPS said:

Rationale pursuant to the exemptions and requirements under Sections 13(b), 14(1)(c), 19(a) & 19(b) of LA FOIP were cited on the bases outlined in our response to the Applicant, attached.

[16] In PAPS' letter dated December 13, 2022 to the Applicant, PAPS said:

The document and its contents were obtained and presented to the Board pursuant to section 13(1)(b) [sic] LAFOIP **with directions as to confidentiality and specific reference to section 13 LAFOIP.**

[Emphasis added]

[17] However, PAPS did not provide any further information regarding the “directions as to confidentiality”. Without further information, I cannot determine that PAPS obtained the information implicitly or explicitly in confidence. Section 51 of LA FOIP places the burden on the head of PAPS to establish that access to the records must be refused as follows:

51 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[18] The second part of the three-part test is not met. I find that PAPS has not met the burden of proof pursuant to section 51 of LA FOIP that subsection 13(1)(b) of LA FOIP applies to the records.

3. Did PAPS properly apply subsection 14(1)(c) of LA FOIP?

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

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

...

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

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

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

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

(*Guide to LA FOIP*, Ch. 4, pp. 52-53)

[21] Both parts of the two-part test must be met in order for subsection 14(1)(c) of LA FOIP to apply.

1. Does the activity qualify as a “lawful investigation”?

[22] A lawful investigation is an investigation that is authorized or required and permitted by law. The investigation can be concluded, active and ongoing or be occurring in the future. In order to meet this part of the test, the local authority should identify the legislation under which the investigation is occurring (*Guide to LA FOIP*, Ch. 4, at p. 52).

[23] In the record that was provided to the Applicant, PAPS said that the Minister of Corrections, Policing & Public Safety had ordered a special inquiry to be conducted pursuant to section 88 of *The Police Act, 1990*. Subsection 88(3) of *The Police Act, 1990* provides as follows:

88(3) Any persons appointed by the minister to conduct a special inquiry have all the powers conferred on a commission by sections 11, 15 and 25 of *The Public Inquiries Act, 2013*.

[24] I must consider if an “inquiry” can be considered a lawful investigation the purpose of subsection 14(1)(c) of LA FOIP.

[25] In my office’s [Review Report 030-2020, 050-2020](#), I had found that an inspection or inquiry under *The Northern Municipalities Act* (NMA) would qualify as a “lawful investigation” for the purposes of subsection 15(1)(c) of *The Freedom of Information and Protection of Privacy Act* (FOIP). This is because the person appointed to conduct the inquiry was provided powers set out in *The Public Inquiries Act, 2013*. I had found that *The Public Inquiries Act, 2013* provides powers that are consistent with those of an “investigation”. I said:

[100] *The Public Inquiries Act, 2013* provides powers that are consistent with those of an “investigation”. Sections 11, 12, 13 and 14 of the [sic] *Public Inquiries Act, 2013* give powers to compel evidence, power to inspect, power to search with a warrant and evidentiary privileges....

...

[101] Based upon the powers provided to an inspector or person of inquiry in the Public Inquiries Act, 2013, **I am satisfied that an inspection or inquiry under the NMA, qualifies as an investigation for purposes of section 15(1)(c) of FOIP.**

[Emphasis added]

[26] Similar to my finding at Review Report 030-2020, 050-2020, I find that an inquiry pursuant to section 88 of *The Police Act, 1990* qualifies as a lawful investigation the purposes of subsection 14(1)(c) of LA FOIP. I find that the first part of the two-part test is met.

2. Does one of the following exist?

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

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

[27] To meet the second part of the test, it is only necessary for the local authority to demonstrate that either the release of the information could interfere with a lawful investigation, or the release of information could disclose information with respect to a lawful investigation.

[28] In its submission, PAPS asserted that the release of the information could interfere with the lawful investigation. It said:

The notice of inquiry originates as a statutory document from the Government of Saskatchewan, Ministry of Corrections, Policing and Public Safety for the express purpose of initiating a formal statutory investigation pursuant to Section 88 of *The Police Act*, and outlines information specific to the conduct and objectives of the investigation that is still ongoing. Upon inquiry of the Ministry as to its position on the public release of the record during the investigation, no direction has been provided us as to the investigators’ response to the potential for investigation obstruction that public release might cause.

On this basis, it was determined upon legal advice that this document was subject to the inquiry’s investigative privilege and could not be released into public domain

during the special investigation without potentially compromising or interfering with the investigation in a manner that the investigators conducting the inquiry could consider obstructive and contrary to law.

[29] Section 14 of LA FOIP 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 (*Guide to LA FOIP*, Ch. 4, p. 52).

[30] “Interfere with” includes hindering or hampering an investigation and anything that would detract from an investigator’s ability to pursue the investigation. When there is a review by my office, the local authority is invited to provide a submission (arguments). The local authority should describe how and why disclosure of the information in question could interfere with a lawful investigation. Local authorities should not assume that the harm is self-evident on the face of the records (*Guide to LA FOIP*, Ch. 4, p. 53).

[31] Based on what PAPS provided in its submission (quoted above), PAPS has only asserted that the release of the record at issue could interfere with the lawful investigation. However, it has not described how and why the disclosure of the record at issue could interfere with the lawful investigation. As such, I find that PAPS has not met the burden of proof pursuant to section 51 of LA FOIP that subsection 14(1)(c) of LA FOIP applies.

4. Did PAPS properly apply subsections 19(a) of LA FOIP?

[32] Section 19 of LA FOIP provides as follows:

19 A head may refuse to give access to a record that contains information relating to:

(a) testing or auditing procedures or techniques;

...

if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

[33] My office uses the following test to determine if subsection 19(a) of LA FOIP applies:

1. Does the record contain information relating to testing or auditing procedures or techniques?
2. Could disclosure reasonably be expected to prejudice the use or results of particular tests or audits?

[34] The following is an analysis to determine if subsection 19(a) of LA FOIP applies:

- 1. *Does the record contain information relating to testing or auditing procedures or techniques?***

[35] “Relating to” should be given a plain but expansive meaning. The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as “substantial connection”) for its application, which would be inconsistent with the plain unambiguous meaning of the words of the statute. “Relating to” requires some connection between the information and the testing or auditing procedures or techniques (*Guide to LA FOIP*, Ch. 4, pp. 207-208).

[36] A “test” is a set of questions, exercises, or practical activities that measure either what someone knows or what someone or something is like or can do (*Guide to LA FOIP*, Ch. 4, p. 208).

[37] An “audit” is the formal examination of an individual’s or organization’s accounting records, financial situation, or compliance with some other set of standards. It is the systematic identification, evaluation, and assessment of an organization’s policies, procedures, acts, and practices against pre-defined standards (*Guide to LA FOIP*, Ch. 4, p. 208).

[38] “Procedures” are the manner of proceeding; a system of proceeding; conduct, behavior (*Guide to LA FOIP*, Ch. 4, p. 208).

[39] “Techniques” are the manner of execution or performance in relation to mechanical or formal details; a skillful or efficient way of doing or achieving something (*Guide to LA FOIP*, Ch. 4, p. 208).

[40] The terms “testing” and “auditing” cover a wide range of activities. Examples include environmental testing, language testing, personnel audits, financial audits, staffing examinations and program audits. The exemption applies to testing and auditing carried out by local authorities, consultants and contractors (*Guide to LA FOIP*, Ch. 4, p. 208).

[41] As quoted earlier, PAPS said the following regarding subsection 19(a) of FOIP:

Rationale pursuant to the exemptions and requirements under Sections 13(b), 14(1)(c), 19(a) & 19(b) of LA FOIP were cited on the bases outlined in our response to the Applicant, attached.

[42] In its letter dated December 13, 2022 to the Applicant, PAPS said:

Disclosure of the document could reasonably be expected to prejudice the use or results of techniques implemented by the designated officials conducting the s. 88 *Police Act* proceedings as are referenced in the document.

[43] Based on the above, as well as a review of the record at issue, I cannot determine there to be information relating to testing, auditing procedures or techniques. I find that the first part of the test is not met. There is no need to consider the second part of the two-part.

[44] I find that PAPS has not met the burden of proof pursuant to section 51 of LA FOIP that subsection 19(a) of LA FOIP applies.

5. Did PAPS properly apply subsections 19(b) of LA FOIP?

[45] Subsection 19(1)(b) of LA FOIP provides:

19 A head may refuse to give access to a record that contains information relating to:

...
(b) details of specific tests to be given or audits to be conducted;

if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

[46] My office uses the following test to determine if subsection 19(b) of LA FOIP applies:

1. Does the record contain information relating to details of specific tests to be given or audits to be conducted?
2. Could disclosure reasonably be expected to prejudice the use or results of particular tests or audits?

[47] The following is an analysis to determine if subsection 19(b) of LA FOIP applies.

- 1. *Does the record contain information relating to details of specific tests to be given or audits to be conducted?***

[48] Earlier, I had defined the phrase “relating to” as well as the terms “test” and “audit”.

[49] “Detail” means a number of particulars; an aggregate of small items (*Guide to LA FOIP*, Ch. 4, p. 212).

[50] In my analysis of subsection 19(a) of LA FOIP, I quoted what PAPS provided regarding arguments for its application of subsections 19(a) and (b) of LA FOIP.

[51] Based on its arguments and a review of the record at issue, I cannot determine there to be information relating to details of specific tests to be given or audits to be conducted. The first part of the two-part test is not met. There is no need to consider the second part of the test.

[52] I find that PAPS has not met the burden of proof pursuant to section 51 of LA FOIP that subsection 19(b) of LA FOIP applies.

[53] Since I have found that PAPS has not met the burden of proof pursuant to section 51 of LA FOIP for any of the four exemption it applied, then I recommend that PAPS release the record at issue to the Applicant.

6. Did PAPS conduct a reasonable search for records?

[54] When a local authority responds to an access to information request indicating that records do not exist, applicants have the right to request that my office review the efforts undertaken by the local authority to search for records.

[55] As quoted in the background of this Report, PAPS had indicated certain records requested by the Applicant did not exist as follows:

1. There has been no such notice served on the Prince Albert Police Service. We are therefore unable to provide you with such a document, as requested.
2. There has been no such notice served in respect of an independent, external review of the Prince Albert Board of Police Commissioners. We are therefore unable to provide you with such a document, as requested.

[56] 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.

[57] 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 (*Guide to LA FOIP*, Chapter 3, “Access to Records”, updated June 29, 2021 [*Guide to LA FOIP*, Ch. 3], p. 3).

[58] 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 effort 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 (*Guide to LA FOIP*, Ch. 3, p. 7).

[59] 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.

(*Guide to LA FOIP*, Ch. 3, pp. 9-10).

[60] In its submission, PAPS indicated the following:

1. The request relates to singular and very clearly identifiable delivery of documents from the named Provincial Ministry, within a defined timeframe.
2. The request clearly relates to only two records so delivered.

[61] While the above may be true, I find that PAPS has not demonstrated to my office how it conducted a reasonable search for records. For example, it did not provide my office with details regarding which employee (or employees) was involved in the search for the records, a description of the employee that supports they are experienced in the subject matter, and the effort they undertook to locate records reasonably related to the access request. Pages 7 to 8 of Chapter 3 of my office's *Guide to LA FOIP* provides as follows:

It is not reasonable for a local authority to rely on an employee's opinion that no records exist when deciding not to search. A local authority should not rely on anyone's memory as to whether records were created. It cannot know in advance of doing a search whether an individual will be right about whether records were created. All an

individual can say, with any reasonable certainty, is whether he or she personally created any records. Otherwise, the individual is merely expressing an opinion as to the likelihood of whether anyone else created records. A local authority cannot absolve itself of its duty to search based on an individual's opinion about whether records were created. If a local authority could forego its duty to search based on such an opinion, the Act would be frustrated.

(Guide to LA FOIP, Ch. 3, pp. 7-8)

[62] I recommend that PAPS provide details of its search efforts to locate records responsive to their access request to my office and to the Applicant within 30 days.

IV FINDINGS

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

[64] I find that PAPS has not met the burden of proof pursuant to section 51 of LA FOIP that subsection 13(1)(b) of LA FOIP applies to the records.

[65] I find that PAPS has not met the burden of proof pursuant to section 51 of LA FOIP that subsection 14(1)(c) of LA FOIP applies.

[66] I find that PAPS has not met the burden of proof pursuant to section 51 of LA FOIP that subsection 19(a) of LA FOIP applies.

[67] I find that PAPS has not met the burden of proof pursuant to section 51 of LA FOIP that subsection 19(b) of LA FOIP applies.

[68] I find that PAPS has not demonstrated to my office how it conducted a reasonable search for records.

V RECOMMENDATIONS

[69] I recommend that PAPS release the record at issue to the Applicant within 30 days of issuance of this Report.

[70] I recommend that PAPS provide details of its search efforts to locate records responsive to their access request to my office and to the Applicant within 30 days of issuance of this Report.

Dated at Regina, in the Province of Saskatchewan, this 26th day of May, 2023.

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