



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **REVIEW REPORT 004-2017, 153-2015 – PART II**

**University of Saskatchewan**

**October 25, 2018**

**Summary:**

The Commissioner considered whether subsection 21(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) applied to records. The University of Saskatchewan (U of S) described the records using affidavits. The Commissioner was satisfied that the U of S has made a *prima facie* case that subsection 21(a) of LA FOIP applied to the records. He also found that subsection 21(c) of LA FOIP applied to part of the record. He recommended the U of S take no further action.

### **I BACKGROUND**

[1] On April 27, 2015, the University of Saskatchewan (U of S) received the following access to information request:

All correspondence in electronic form sent or received (including those deleted from her e-mail mailbox) by [name of Dean of the University of Saskatchewan Library] (Dean of the University of Saskatchewan Library) that includes a reference to me by name (i.e.: “[full name of Applicant]”, or “[first name of Applicant]”, and/or “[last name of Applicant]”), and/or a reference to my employment history (including changes to my employment positions held by me with the University of Saskatchewan), and/or a reference to the harassment complaint filed by me” (sic) for the time period of March 1, 2014 – April 24, 2015.

- [2] The U of S responded to the Applicant's request on July 24, 2015. It was withholding records in full or in part pursuant to subsections 14(1)(d), 16(1)(a), 16(1)(b), 21(a), 21(b), 21(c), 28(1), and 30(2) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).
- [3] On July 30, 2015, the Applicant requested a review by my office of the application of the exemptions. On August 14, 2015, my office notified the Applicant and the U of S of our intention to undertake the review.
- [4] I dealt with the records to which the U of S applied subsections 14(1)(d), 16(1)(a), 16(1)(b), 28(1), and 30(2) of LA FOIP in Review Report 153-2015 – Part I.
- [5] On May 16, 2018, the Court of Appeal for Saskatchewan considered whether I had authority to require local authorities to produce records that may be subject to solicitor-client privilege. *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 concluded that my office should follow the "absolutely necessary" principle. As a result, it suggested that my office follow a process to gather information about records and consider whether a *prima facie* case for solicitor-client privilege has been made before requiring a record.
- [6] My office has established a process to consider a claim of solicitor-client privilege which is detailed in the *Rules of Procedure* available on my office's website. My office will request an affidavit of records over which the solicitor-client privilege is claimed which includes a form that describes the records as well as a submission providing further information as to why solicitor-client privilege is claimed. The *Rules of Procedure* also includes a sample schedule that should be included in the affidavit. If sufficient information is not provided for me to conclude that the use of subsection 21(a) of LA FOIP is justified, I will request further particulars which can be provided to my office by affidavit.
- [7] The U of S provided my office with an affidavit signed by a U of S employee on August 23, 2018. My office requested further particulars on September 6, 2018. The U of S

provided further particulars by affidavit about some of the records on September 12, 2018. My office requested particulars about the remaining records on September 21, 2018. The U of S responded on September 27, 2018 by affidavit.

[8] I will now review the U of S' application of subsections 21(a) and (c) of LA FOIP to the remaining 17 records.

## **II RECORDS AT ISSUE**

[9] The U of S applied subsection 21(a) of LA FOIP to 15 records totalling 25 pages.

[10] Further, after preparing the records, the U of S decided that it would not withhold two additional records pursuant to subsection 21(a) of LA FOIP. However, it has applied subsection 21(c) of LA FOIP to these records. It provided the two additional records, one page each, to my office for review.

## **III DISCUSSION OF THE ISSUES**

### **1. Does my office have jurisdiction in this matter?**

[11] The U of S qualifies as a local authority pursuant to subsection 2(f)(xi) of LA FOIP. Therefore my office has jurisdiction in this matter.

### **2. Does subsection 21(a) of LA FOIP apply to the record?**

[12] 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;

[13] My office has established the following test for subsection 21(a) of LA FOIP:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Was the communication intended to be confidential?

*Communications between employees of the U of S and legal counsel*

- [14] The U of S withheld six records that qualify as communications between employees of the U of S and legal counsel. In its affidavit, the U of S identified the legal counsel. I am satisfied that these communications are between the U of S and its solicitor. The first test is met.
- [15] In the original affidavit requested by my office, the U of S did not indicate specifically if the communications involved legal advice. My office requested further particulars from the U of S. It confirmed in a second affidavit provided on September 12, 2018 that the six records contain legal advice. The second test is met. I am also satisfied that the communication was intended to be confidential.
- [16] I have not examined these records. However, I am satisfied that the U of S has made a *prima facie* case that subsection 21(a) of LA FOIP applies to these six records.

*Communications between employees of the U of S and legal counsel*

- [17] The U of S withheld nine records, pursuant to subsection 21(a) of LA FOIP, that are communications between employees of the University.
- [18] As noted, the first test for subsection 21(a) of LA FOIP requires that a communication be between a solicitor and a client. However, past decisions of Commissioners from across the country have considered records in the “continuum” of giving legal advice.
- [19] A resource from Alberta’s Office of the Information and Privacy Commissioner (Alberta OIPC) entitled *The Basics of Solicitor-client Privilege* provides the following:

Documents that are not actually passed between the solicitor and client may be part of the continuum of legal advice, or reveal information subject to solicitor-client privilege.

More examples of records found to be part of the continuum of legal advice:

- a discussion between two public officials about how to frame the question that is to be asked of the lawyer (Order F2007-008 at para. 12)
- written communications between officials or employees of a public body, in which they quote or discuss the legal advice given by the public body's solicitor (Order 99-013 at paras. 62-63; Order 2001-025 at para. 67)
- communications discussing the application of legal advice given by a solicitor (Order 96-020 at para. 133)
- an employee's notes regarding a solicitor's legal advice, and comments on that advice (Order 99-027 at para. 95)
- notes "to file" in which legal advice is quoted or discussed (Order F2005-008 at para. 42)
- solicitors' briefing notes and working papers that are directly related to the seeking or giving of legal advice (96-017 at para. 30)

[20] In the affidavits provided to my office, the U of S indicated that these records contain legal advice from its legal counsel. It noted that the advice was being shared with appropriate U of S employees/agents involved with addressing legal issues. The U of S also identified the legal counsel who provided the advice.

[21] I am satisfied that the records are within the continuum of solicitor-client privilege. I have not examined these records. However, I am satisfied that the U of S has made a *prima facie* case that subsection 21(a) of LA FOIP applies to these nine records.

**3. Does subsection 21(c) of LA FOIP apply to the record?**

[22] Subsection 21(c) of LA FOIP provides:

21 A head may refuse to give access to a record that:

...

(c) contains correspondence between legal counsel for the local authority and any other person in relation to a matter involving the provision of advice or other services by legal counsel.

[23] The U of S applied this exemption to two of the records (11 and 14 – both emails).

[24] My office has established the following test for subsection 21(c) of LA FOIP:

1. Is the record a correspondence between the public body's legal counsel and any other person?
2. Does the correspondence relate to a matter that involves the provision of advice or other services by the agent or legal counsel?

[25] The U of S provided my office with copies of these emails.

[26] The e-mails are correspondence between the U of S' legal counsel and another person. The first part of the test is met.

[27] As discussed in Review Reports 204-2016, 205-2016, 295-2016, 307-2016 and 056-2017, the prepared record does not have to constitute legal advice or legal services to qualify. However, it must relate to a matter involving the provision of advice or other services. The correspondence in question relates to a matter that involves the provision of advice or other services by legal counsel. The second test is met.

[28] Subsection 21(c) of LA FOIP applies to records 11 and 14.

#### **IV FINDINGS**

[29] I find that the U of S has made a *prima facie* case that subsection 21(a) of LA FOIP applies to fifteen records.

[30] I find subsection 21(c) of LA FOIP applies to records 11 and 14.

**V RECOMMENDATION**

[31] I recommend that the U of S take no further action.

Dated at Regina, in the Province of Saskatchewan, this 25th day of October, 2018.

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