



## **REVIEW REPORT 037-2018**

### **Saskatoon Police Service**

**November 20, 2018**

**Summary:** The Saskatoon Police Service (SPS) received an access to information request for information related to a specific incident. The Commissioner found that SPS completed a reasonable search for records. However, he found that there should be other records responsive to the Applicant's request. He found that subsections 14(1)(j), 14(1)(k) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) apply to parts of the record and that subsections 14(1)(m) and 21(c) of LA FOIP do not apply to the record. The Commissioner recommended that SPS release certain records to the Applicant. He also recommended SPS provide the Applicant with a new section 7 response addressing other responsive records within 30 days of the issuance of this report.

## **I BACKGROUND**

[1] On January 1, 2018, the Applicant made an access to information request to the Saskatoon Police Service (SPS) for records relating to a specific incident (the incident) that occurred in August 2012. The request covered several types of records such as:

- use of force reports for 5 specific officers and any other officers involved in the incident;
- audio and video recordings of the 10 police vehicles that attended to the incident;
- installation records for audio and video recording devices in the 10 police vehicles;
- records of CPIC queries and requests for other information made from the 10 police vehicles;
- audio recordings made in the detention cells between the Applicant, another individual and the Justice of the Peace that day;
- audio recording made of the Applicant and another individual at the booking desk that day;

- names, badge numbers and notes of all the officers that attended the incident;
- names and statements of witnesses of the incident;
- a copy of the notice of seizure and impound of the Applicant's car;
- the name and notes of the watch commander during the incident;
- other records collected or recorded by any officer of the Saskatoon Police Service about the incident or the prosecution related to the incident; and
- occurrence reports and detailed notes from two specific officers from a different the incident at the Court of Queen's Bench in March 2015.

- [2] On January 30, 2018, SPS responded to the request. It released many records to the Applicant. It indicated that records responsive to some of the items in the Applicant's request did not exist. Further, it withheld portions of the records pursuant to subsections 14(1)(j), 14(1)(m), 18(1)(b), 21(c), 22(3)(a.1) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) and subsection 8.1(f) of *The Local Authority Freedom of Information and Protection of Privacy Regulations* (the Regulations).
- [3] On February 28, 2018, my office received a request for review from the Applicant. The Applicant requested that I review both SPS' use of the exemptions as well as its search for records.
- [4] On March 15, 2018, my office sent notification to SPS, the Applicant and a third party indicating that my office would be conducting a review.
- [5] On March 27, 2018, the third party let my office and SPS know that it did not object to the release of the records withheld pursuant to subsection 18(1)(b) of LA FOIP. As a result, SPS indicated that it is no longer relying on subsection 18(1)(b) of LA FOIP to withhold records. SPS released more records to the Applicant on March 29, 2018.
- [6] On May 17, 2018, SPS informed my office that it discovered additional records responsive to the Applicant's access to information request. On the same day, the SPS notified the Applicant that further responsive records were discovered. SPS provided the additional responsive record to the Applicant, but withheld a portion pursuant to subsection 14(1)(j) of LA FOIP.

[7] On October 26, 2018, SPS also informed the Applicant that it was also relying on subsections 14(1)(k) and 14(1)(k.2) of LA FOIP to withhold the same records to which subsection 21(c) of LA FOIP was applied. It also released additional records to the Applicant, including a video recording.

## II RECORDS AT ISSUE

[8] SPS identified 242 pages and a video as records responsive to the Applicant's request. Of the 242 pages, SPS released 59 pages and a video in full. It severed portions of the remaining 183 pages pursuant to subsections 14(1)(j), 14(1)(m), 21(c), 22(3)(a.1) and 28(1) of LA FOIP and subsection 8.1(f) of the Regulations.

[9] For a detailed description of the record and the exemptions applied, see Appendix A of this report.

## III DISCUSSION OF THE ISSUES

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

[10] On January 1, 2018, amendments to LA FOIP came into force. This included the addition of subsection 2(f)(viii.1) of LA FOIP which provides:

2 In this Act:

...

(f) "local authority" means:

...

(viii.1) a police service or regional police service as defined in *The Police Act, 1990*;

[11] SPS is a police service as defined in *The Police Act, 1990*. The access request was received by SPS on January 1, 2018. Therefore, I have authority to proceed with this review.

**2. Did the SPS perform a reasonable search for records?**

[12] Section 5 of LA FOIP provides:

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.

[13] In the notification, my office requested that SPS describe its search efforts for the records in its possession or control that are responsive to the Applicant's request. Public bodies can provide the following information in describing its search efforts:

- Outline the search strategy conducted:
  - For general requests – tie the subject matter of the request to the departments/divisions/branches 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 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 organizations 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 public body's control have been searched such as a contractor or information service provider.

- Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Which folders within the records management system were searched and explain how these folders link back to the subject matter requested?
  - For electronic folders – indicate what key terms were used to search if applicable;
- On what dates did each employee search?
- How long did the search take for each employee?
- What were the results of 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 the OIPC resource, *Using Affidavits in a Review with the IPC* available on our website.

[14] 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. LA FOIP does not require the public body to prove with absolute certainty that records do not exist.

### ***Use of Force Reports***

[15] The Applicant was particularly interested in SPS’ search for records responsive to the first item in his access request. He requested “use of force” reports for the incident. SPS’ response to the Applicant indicated that responsive records did not exist. The Applicant provided my office with transcripts of testimonies given by two SPS officers in the Provincial Court of Saskatchewan on April 16, 2013. Both acknowledged that “use of force reports” related to the incident were filed.

[16] In its submission, SPS acknowledged the officers’ testimony and have indicated that the officers continue to assert that they filled out use of force reports regarding the incident.

- [17] SPS also explained that use of force reports are filed when certain events take place, such as a firearm being discharged or a vehicle pursuit. SPS indicated that none of the events in the criteria for a use of force report occurred during the incident.
- [18] SPS also explained the process for use of force reports. It provided copies of its policies and procedures. When an event occurs that triggers the use of force, officers must complete a use of force form before the end of their shift. SPS indicated that this is usually handwritten on a form. The original form is then passed to the Supervisor who may add comments. The original form is then passed to the Division or Section Head for additional comments. The original form is then to be passed to the East Division Inspector to prepare the form for the Use of Force Committee. The procedure indicates that it is not to be scanned into central records. The use of force committee then decides whether the use of force was justified in the circumstances.
- [19] SPS explained where use of force reports are filed and stored. It indicated that the reports are filed by occurrence number. On January 4, 2018, the East Division Inspector and support staff searched where use of force reports are kept. SPS' Access and Privacy Officer searched all 2012 occurrence reports again on October 3, 2012. Further, SPS indicated that the occurrence number was not found on the spreadsheet that the use of force committee maintains to track the reports.
- [20] SPS indicated that the watch commander on the date of the incident reviewed his notes from that day. No use of force report was noted.
- [21] As noted, a public body does not have to prove with absolute certainty that the records do not exist. Given that an event that would trigger the creation of such a report did not occur during the incident, and SPS' description of its search for responsive records, I am satisfied that responsive use of force reports do not exist.

*Video and Audio Recordings from in-car cameras*

- [22] The Applicant also specifically questioned SPS' search for the second item on his request which was for audio and video recordings of the 10 police vehicles that attended to the incident. In its response to the Applicant's request, SPS indicated that video footage from one car was found as a responsive record. It also indicated that no other records responsive to this item was found. The Applicant advised my office that he researched the equipment used by the SPS and each car should have recorded both audio and video recordings of the incident.
- [23] SPS' submission provided the dates that in-car camera systems (ICCS) were installed in each of the cars. One car had its ICCS installed before the date of the incident. Another car had its ICCS installed on the same day as the incident, but SPS indicated it was not yet activated at the time of the incident. All of the other cars were installed after the date of the incident. I am satisfied with SPS' explanation as to why no further records exist.
- [24] The Applicant also asked for the video from the rear facing ICCS cameras. SPS indicated that the rear facing cameras record the back seat of a police vehicle where individuals who have been arrested are transported. There are no cameras that record behind the police vehicle. SPS indicated that the only vehicle with ICCS installed and activated, that was present at the incident, is a vehicle used by the Traffic Unit of the SPS. There was no area in the back of this type of vehicle to transport arrested individuals. I accept this explanation as to why there are no rear facing videos responsive to this request.
- [25] The Applicant is also looking for audio recording related to the ICCS video. SPS does not dispute the Applicant's claim that the video equipment in the car can also capture audio recordings. SPS described its search for audio records as follows:
- Privacy Officer searched database on January 2, 2018 at approximately 1500 hours for audio and video. No audio and/or video attached to the database file.
  - On January 3, Privacy Officer forwarded request for audio/video records. Received explanation that audio/video files deleted after 400 days as per SPS policy at the time.
  - Privacy Officer reviewed audio/video disclosure file on January 4, 2018. Found video. Video does not have audio.

[26] SPS's submission indicated that the reason that the audio did not work for the ICCS is unknown. At the time of the incident involving the Applicant, the ICCS were being installed in various SPS vehicles. The officer who was driving the car with the working ICCS at the time of the incident testified in Court that the audio simply was not working that day. Given the description of SPS' search and the fact that the technology was so new at the time of the incident, I am persuaded that SPS has made a reasonable search for audio records and that no audio records exist.

*Other*

[27] In its response to the Applicant's access to information request, SPS indicated that certain responsive records did not exist for six other items in his request. The Applicant did not specifically ask for a review of SPS' search effort for each of these additional six items. In one instance, SPS identified responsive records for item 11 after this review had commenced and provided the Applicant with severed versions of these records on May 17, 2018. With respect to the remaining five items, the SPS described its search efforts for each one in its submission and provided reasons why responsive records did not exist. I have reviewed the details provided by the SPS and I am satisfied with its search efforts.

**3. Are there other records responsive to the Applicant's access request?**

[28] When a public body receives an access to information request, it must determine what information is responsive to the access request.

[29] Responsive means relevant. The term describes anything that is reasonably related to the request. The Applicant's access request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive. In this instance, the access request provided in part as follows:

other records collected or recorded by any officer of the Saskatoon Police Service about the incident or the prosecution related to the incident; and...



- [30] The purpose of LA FOIP is best served when a government institution or local authority adopts a liberal interpretation of a request. If a local authority has any doubts about its interpretation, it has a duty to assist the Applicant by clarifying or reformulating it.
- [31] As noted, part of the Applicant's request was for other records collected or recorded by any officer of the SPS about the incident or the prosecution related to the incident.
- [32] Through my office's conversations with SPS about the use of force reports, and from a review of the record, I learned of a specific type of record that SPS did not identify as responsive to the Applicant's request. This is a SP4-29 form, commonly known in the policing world as a McNeil disclosure report. SPS noted that these are separate from the use of force reports described above. A McNeil report is a report that lists any officer misconduct.
- [33] SPS referred to Supreme Court of Canada decision *R v. McNeil* [2009] 1 SCR 66, 2009 SCC 3 (CanLII). The decision discusses requirements of crown prosecutors to disclose information about misconduct of any officers involved which may impact a case. In its submission, SPS stated that while McNeil disclosure may be available concurrently with ordinary disclosure, its existence and availability are determined by incidents and investigative and hearing processes which are independent of the criminal proceedings before the court.
- [34] My office has stated in Review Reports 210-2017, 104-2016, 153-2015, H-2008-001 and LA-2007-001 that access to information under LA FOIP (or FOIP) are independent of any discovery or disclosure provisions in a legal proceeding. The Applicant's right to access to information under LA FOIP is not muted because there was a past prosecution or upcoming legal proceedings. The right of access under LA FOIP remains.
- [35] SPS also submitted that the McNeil reports were created outside of the prosecutorial process, and is not a component of the prosecution or investigation related to the incident.

[36] From a review of the record, it appears that McNeil reports would have been collected for the prosecution related to the incident. Therefore, they are related to the Applicant's request for records collected or recorded by any officer of the SPS about the incident or the prosecution related to the incident.

[37] As such, I find that the McNeil reports are responsive to the Applicant's request.

[38] Further, in the future, the Applicant could make a specific request for the McNeil reports. However, we are nearing the year mark since the original access request was made. In my opinion, requiring the Applicant to make a new request for the McNeil reports at this point delays the right to information and costs the Applicant an additional \$20.

[39] I recommend SPS provide the Applicant with a new section 7 response addressing the McNeil reports within 30 days of the issuance of this report.

**4. Did SPS properly apply subsection 14(1)(j) of LA FOIP to the withheld record in question?**

[40] SPS has applied subsection 14(1)(j) of LA FOIP to information on seven pages of the record. It applied this exemption to different "ten codes" in all cases. The codes are used by the SPS when dispatching officers. SPS indicated that the ten codes are used as a means of communication that conveys a specific message without publicly identifying its true meaning. It indicated that the specific codes are unique to the SPS.

[41] Subsection 14(1)(j) of LA FOIP provides:

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

...

(j) facilitate the commission of an offence or tend to impede the detection of an offence;

[42] My office has not had the opportunity to consider this exemption in a report in the past, or the equivalent in *The Freedom of Information and Protection of Privacy Act* (FOIP).

[43] SPS' submission pointed to an Order PO-1665 by the Information and Privacy Commissioner in Ontario which discusses ten codes. The order found that the:

...disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space.

[44] As such, the Order found that subsection 14(1)(l) of Ontario's *Freedom of Information and Protection of Privacy Act* applied to the codes. The wording of these Ontario and Alberta provisions are similar. The disclosure of the information must reasonably be expected to either facilitate the commission of an unlawful act or hamper the control of crime. However, these provisions are different than subsection 14(1)(j) of LA FOIP. In Saskatchewan, the local authority can withhold information if the release of information could:

- 1) facilitate the commission of an offence; or
- 2) tend to impede the detection of an offence.

[45] My office has not previously defined "offence" in a report. *The Dictionary of Canadian Law* (Fourth Edition) defines "offence" as "the contravention of an enactment". However, the Office of the Information and Privacy Commissioner of British Columbia considered the word "offence" in Order 290-1999. It considered British Columbia Court of Appeal decision *Matsqui Police Bd. v. Matsqui Policemen's Assn., Loc. 7*, 1987 CanLII 2802 (BC CA) which stated that "This absence of definition indicates legislative intent that the word "offence" is to be coloured differently from statute to statute, as to its precise meaning and connotation, by the context and nature of its use within the framework of the particular statute under review." For the purposes of subsection 14(1)(j) of LA FOIP in the context of this review, an offence can be any illegal activities in which the SPS has authority to investigate.

[46] Further, in my view, to facilitate the commission of an offence is similar to the other jurisdictions' wording to facilitate the commission of an unlawful act. However, the second

part of subsection 14(1)(j) of LA FOIP is different than the wording in Ontario and Alberta's legislation.

[47] The Ontario Order, to which SPS had pointed, agreed that disclosure of the ten codes could be withheld because it could facilitate the commission of an offence as described in the Ontario Order quoted above. I am persuaded that the SPS has appropriately applied subsection 14(1)(j) of LA FOIP to the record.

**5. Does subsection 14(1)(m) of LA FOIP apply to the record?**

[48] Subsection 14(1)(m) of LA FOIP provides:

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

...

(m) reveal the security arrangements of particular vehicles, buildings or other structures or systems, including computer or communication systems, or methods employed to protect those vehicles, buildings, structures or systems.

[49] The *IPC Guide to Exemptions* provides the following test for this exemption:

1. Does the information reveal security arrangements (of particular vehicles, buildings, other structures or systems)? or
2. Does the information reveal security methods employed to protect the particular vehicles, buildings, other structures or systems?

[50] SPS has applied subsection 14(1)(m) of LA FOIP to two pages of the record. The two pages are a note from an officer to the prosecutor. It advises that special arrangements may be required in the court room based on history of the individuals involved.

[51] In its submission, SPS indicated that the document reveals the security arrangements of the Court of Queen's Bench building because it advises what steps should be taken. It went further saying that it could reveal patterns of security personnel at the Court.

[52] Upon review, this document contains a substantial amount of personal information about the Applicant; primarily opinions about the Applicant. Further, the document only contains one suggestion about security for the Court of Queen's Bench. There is no evidence that the suggestion was relayed on to the Court or that the Court followed this suggestion. Finally, if the security measure had been followed, it would have been observable by those who attended at that time.

[53] I am not persuaded that subsection 14(1)(m) of LA FOIP applies to the record.

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

[54] 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.

[55] 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?

[56] SPS applied subsection 21(c) of LA FOIP to 52 pages of the record. All of the correspondence is between members of SPS and prosecutors for the Attorney General of Saskatchewan.

[57] I will consider the first part of the test for this exemption and determine if the records in question qualify as correspondence between the public body's legal counsel and any other person. I must explore the relationship between SPS and prosecutors for the Attorney General.

[58] I note that subsection 21(c) of LA FOIP is a provision that is unique among similar access to information legislation across Canada. Instead, most legislation allows various public bodies to withhold information that is subject to solicitor-client privilege in provisions similar to subsection 21(a) of LA FOIP. Decisions from other jurisdictions discuss whether there is a solicitor-client relationship between prosecutors for the Attorney General and police forces. Since there is no provision similar to subsection 21(c) of LA FOIP in legislation in Canada, I will use these discussions to evaluate whether the prosecutors involved were acting as legal counsel for the SPS in the context of these records.

[59] A recent Order from the Office of the Information and Privacy Commissioner of Alberta, Order F2017-57, discusses the relationships between police forces, and their members, and prosecutors for the Attorney General. The Order takes an in depth look in to the matter and considers many Commissioner and Court decisions from across Canada. The Order refers to cases that hold that the Attorney General, and its crown prosecutors, have an independent, quasi-judicial role and do not have a client in the traditional sense.

[60] On the other hand, the Order considers the Supreme Court decision *R. v. Campbell*, [1999] 1 SCR 565 contemplates situations where police and a crown prosecutor could form a solicitor-client privilege relationship. In this decision, a member of the Royal Canadian Mounted Police (RCMP) sought legal advice from a lawyer at the Department of Justice as to the legality of an undercover criminal investigation he was conducting and then acted on the advice. In that case, the Supreme Court found that the member sought legal advice as a client from an employee of the justice department in the employee's capacity as a lawyer. In arriving at this conclusion, the Court stated:

The solicitor-client privilege is based on the functional needs of the administration of justice. The legal system, complicated as it is, calls for professional expertise. Access to justice is compromised where legal advice is unavailable. It is of great importance, therefore, that the RCMP be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings.

[61] The Alberta Order sums up its deliberations by referring to an article “The Accidental Consistency: Extracting a Coherent Principle from the Jurisprudence Surrounding Solicitor Client Privilege between the Police and the Crown” by Marc S. Gorbet. The Order states:

The foregoing article contains a review of case law in which courts found, or did not find, that a Crown prosecutor and a police officer / service entered a solicitor-client relationship. The author arrives at the conclusion that when Crown counsel acts as a Crown prosecutor, he or she *cannot* enter a solicitor-client privileged relationship with a party, including the police, regarding the prosecution, for the reason that the Crown does not act as a solicitor in a prosecution, and because taking on a client in relation to a prosecution would conflict with the function and duties of Crown counsel. However, when the police seek legal advice in the course of a criminal investigation, and the matter is not being prosecuted, it is possible for Crown counsel to act as a solicitor, and the police and the Crown in such a case could enter a solicitor-client relationship. This analysis, is, in my view, consistent with what the Supreme Court of Canada held in *Campbell (supra)* and with the case law I have reviewed.

[62] I will adopt this conclusion in considering whether the prosecutors in this case was acting as a lawyer for SPS in the context of the application of subsection 21(c) of LA FOIP to these records.

[63] SPS’ submission indicates that information withheld pursuant to subsection 21(c) of LA FOIP constituted correspondence between prosecutors for the Attorney General and members of the SPS. Further, it indicated that the matters related to criminal proceedings involved the Applicant. I note that the correspondence was all created after the date of the incident where arrests were made.

[64] My office shared Alberta Order F2017-57 with SPS. In response, it stated that the relationship between the SPS and crown prosecutors is recognized as a solicitor-client relationship during the prosecution of a criminal offence. It did not provide any other information to support its position.

[65] Given the precedent discussed above and a review of the record, I am not persuaded that the prosecutors were acting as SPS’ legal counsel. The first part of the test is not met. Subsection 21(c) of LA FOIP does not apply to the record.

**7. Does subsection 14(1)(k) of LA FOIP apply to the records?**

[66] Subsection 14(1)(k) of LA FOIP provides:

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

...

(k) interfere with a law enforcement matter or disclose information respecting a law enforcement matter;

[67] SPS applied subsection 14(1)(k) of LA FOIP to the same records to which it applied subsection 21(c) of LA FOIP. In order to qualify for this exemption, the following test might be met.

1. Does the public body's activity qualify as a "law enforcement matter"?

2. Does one of the following exist?

a. The release of information would interfere with a law enforcement matter, or

b. The release of information would disclose information with respect to a law enforcement matter.

***Does the public body's activity qualify as a "law enforcement matter"?***

[68] My office has indicated that a law enforcement includes:

i) policing, including criminal intelligence operations, or

ii) investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which lead to or could lead to a penalty or sanction being imposed under the enactment.

[69] SPS indicated in its submission that, as a result of the incident, there was a charge laid of obstructing a peace officer pursuant to subsection 129(a) of the *Criminal Code* that can lead to a penalty or sanction being imposed, as set out in the *Criminal Code*. The records in question are communications between the Crown Prosecutors and members of the SPS regarding the court proceedings related to the offence.



[70] Therefore, I must consider if the prosecutor's activities qualifies as a "law enforcement matter".

[71] Service Alberta's *FOIP Guidelines and Practices (2009)* defines proceedings as an action or submission to any court, judge or other body having authority, by law or by consent, to make decisions concerning a person's rights. This includes administrative proceedings before agencies, boards and tribunals. (page 145).

[72] In this case, the Crown Prosecutors were preparing for Court to prosecute individuals regarding the charge related to subsection 129(a) of the *Criminal Code*. I am satisfied that these activities were proceedings conducted for the purpose of enforcing the *Criminal Code* which lead to or could lead to a penalty or sanction being imposed under the *Criminal Code*. The activities qualify as a law enforcement matter.

***Would the release of information interfere with a law enforcement matter or disclose information with respect to a law enforcement matter?***

[73] SPS submitted that the information contained in the written communications between members of the SPS and the Crown prosecutor that relate in some way to the investigation, charging or prosecution of the offence. It is only necessary for the public body to demonstrate that the information in the record is information with respect to a lawful investigation to meet this part of the test.

[74] A review of the records in question demonstrated that they were all related to the prosecution of the individuals charged with the offence. In some records, members of the SPS give details about the incident or opinions on actions the prosecutors could take. In other records, the prosecutors attempt to gather more information related to the incident or give instructions about disclosing information to those charged with the offence.

[75] I am persuaded that release of the records would disclose information with respect to a law enforcement matter. Subsection 14(1)(k) applies to the records in question. There is no need to consider subsection 14(1)(k.2) of LA FOIP.

[76] In Report 059-2017, I considered subsection 15(1)(k) of FOIP, a similar exemption. I suggested that the public body in question reconsider the use of its discretion in applying the exemption to ensure that it was not applying an overly broad interpretation and ensure it was keeping in the spirit of the Act. This is an important exercise in the application of discretionary exemptions. I also recommend that SPS reconsider the use of its discretion with respect to instructions regarding disclosure and gathering of certain information from its members.

**8. Did SPS properly apply subsection 28(1) of LA FOIP to the record in question?**

[77] 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.

[78] SPS applied subsection 28(1) of LA FOIP to information on 117 pages of the record. In most cases, SPS divided the personal information into three categories: personal information of an acquaintance of the Applicant, personal information of SPS members or employees and personal information of non-SPS employees.

[79] In order for subsection 28(1) of LA FOIP to apply, the information in the record must first qualify as “personal information” as defined by subsection 23(1) of LA FOIP; however, it is not an exhaustive list. Some relevant provisions include:

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:

(a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;

(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;

...

(d) any identifying number, symbol or other particular assigned to the individual;

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

...

(g) correspondence sent to a local authority by the individual that is implicitly or explicitly of a private or confidential nature, and replies to the correspondence that would reveal the content of the original correspondence, except where the correspondence contains the views or opinions of the individual with respect to another individual;

(h) the views or opinions of another individual with respect to the individual;

***Personal Information of the acquaintance***

[80] There was an individual involved in the incident that is an acquaintance of the Applicant. This individual was arrested and charged during the incident. SPS withheld information that relates to this acquaintance on the basis that it qualifies as the personal information of the acquaintance.

[81] Upon review of the information, it contains information that could be described as personal information pursuant to subsection 23(1) of LA FOIP such as race, colour, sex, age, nationality and opinions about the acquaintance.

[82] Much of the information was collected in relation to the incident in which members of SPS were also involved. In Investigation Report 028-2018, 049-2018, I indicated that personal information would include information about an individual's alleged criminal history or acts. In Investigation Report 319-2017, I indicated that criminal history could also include documents such as warrant reports, criminal history reports, risk assessments, program applications and reports, case management plans and notes, presentence reports, bail reports and breach/violation reports. Most of the information in the record relating to the acquaintance would qualify as his criminal history, pursuant to subsection 23(1)(b) of LA FOIP as it was about alleged criminal history or acts.

[83] Finally, there is correspondence between the acquaintance and the SPS that is implicitly or explicitly of a private or confidential nature. This qualifies as the acquaintance's personal information pursuant to subsection 23(1)(g) of LA FOIP.

[84] In its submission, SPS indicated that it had advised the Applicant to consider gathering written consent from the acquaintance and provide the consent to SPS. The purpose of the consent would be to grant permission to the SPS to release the acquaintance's personal information to the Applicant. No consent was received.

[85] I am satisfied that all of the information that SPS identified as information relating to the acquaintance qualifies as personal information and should be withheld pursuant to subsection 28(1) of LA FOIP.

***Personal Information SPS Members or Employees***

[86] SPS indicated that three pages of the record contain the employment history of members of the SPS. My office has defined employment history as the type of information normally found in a personnel file such as performance reviews, evaluations, disciplinary actions taken, reasons for leaving a job or leave transactions.

[87] The information is in the three pages of records describe when three SPS members are not available for Court. Two of the pages have an element that would qualify as employment history; the other does not.

[88] I am satisfied that the information severed on pages 44 and 50 qualify as employment history and personal information pursuant to subsection 23(1)(b) of LA FOIP and should be withheld pursuant to subsection 28(1) of LA FOIP.

***Personal Information of Non SPS Employees (VIN Information)***

[89] Part of the information that SPS severed from pages 145, 180 and 186 is information about a previous owner of a vehicle involved in the incident. It appears the record relates to the impoundment of the vehicle. The details of the licence of the vehicle had not been updated since the vehicle changed owners.

[90] In Review Report 063-2017, I reluctantly found that the details associated with a class LV Licence such as name, address and Vehicle Identification Number (VIN) does not qualify as personal information pursuant to subsection 24(2)(e) of FOIP which provides:

24(2) “Personal information” does not include information that discloses:

...

(e) details of a licence, permit or other similar discretionary benefit granted to an individual by a government institution;

[91] Recently, the Court of Queen’s Bench echoed this interpretation in *Shook Legal, Ltd v Saskatchewan (Government Insurance)*, 2018 SKQB 238 (CanLII).

[92] However, in both those cases, FOIP was the law that applied. FOIP describes a licence “granted to an individual by a government institution”. Saskatchewan Government Insurance (SGI) grants LV licences. SGI qualifies as a government institution pursuant to subsection 2(d)(ii) of FOIP.

[93] In this case, LA FOIP applies. Subsection 23(2)(d) of LA FOIP provides:

23(2) “Personal information” does not include information that discloses:

...

(d) details of a licence, permit or other similar discretionary benefit granted to an individual by a local authority;

[94] This subsection of LA FOIP describes a licence that is “granted to an individual by a local authority”. Again, it is a government institution that granted the LV licence, not a local authority. Therefore, the detail of the LV licence, granted by a government institute, does qualify as personal information under LA FOIP.

[95] I recommend that SPS continue to withhold the personal information found on pages 145, 180 and 186 of the record.

*Personal Information of Non SPS Employees (Work Product)*

- [96] On pages 35 and 205 of the record, SPS severed the names of employees of the Ministry of Justice and Attorney General from the record. These individuals' names were on records related to their work with the incident. Further, pages 233 to 240 of the record are installation records from a third party business that installed equipment in some of SPS' police cars. SPS severed the names and initials of employees of the third party business who are either the dealer or the person who installed the equipment.
- [97] In the past, I have defined work product as information generated by or otherwise associated with an individual in the normal course of performing his or her professional or employment responsibilities, whether in a public or private setting. Work product is not considered personal information. Further, my office has found that business card information is not personal in nature and would not qualify as personal information. Finally, in the past, my office has determined that signatures do not constitute personal information when made in a work-related capacity. However, a signature may be personal in nature outside of a professional context. In this case, all of the records were created in a professional context and constitute work product.
- [98] In its submission, SPS indicated that it is aware of the various decisions of this office in which it was found that the names of individuals in relation to their employment with a publicly-funded institution do not constitute personal information. However, it indicated that it would still not disclose the information it severed from these pages.
- [99] As noted above, past decisions have not only found that work product of employees of public bodies should be released, my office's decisions have also found that work product of employees of private organizations do not qualify as personal information.
- [100] The information severed from these records qualify as work product and not personal information. I recommend that SPS release this information.

#### **IV FINDINGS**

[101] I find the SPS performed a reasonable search for records.

[102] I find that the McNeil reports are responsive to the Applicant's request.

[103] I find subsections 14(1)(j), 14(1)(k) and 28(1) of LA FOIP apply to parts of the record.

[104] I find subsections 14(1)(m) and 21(c) of LA FOIP do not apply to the record.

#### **V RECOMMENDATIONS**

[105] I recommend SPS provide the Applicant with a new section 7 response addressing the McNeil reports within 30 days of the issuance of this report.

[106] I recommend that SPS release or withhold records as described in Appendix A.

[107] I recommend that SPS reconsider its use of discretion when applying subsection 14(1)(k) of LA FOIP to some of the records.

Dated at Regina, in the Province of Saskatchewan, this 20th day of November, 2018.

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

## APPENDIX A

Page Range	Record Title	Description	Exemption(s) – Applied by SPS	Finding	Recommendation
2-5	General Occurrence Information	Personal information of acquaintance	28(1)	Applies	Withhold
6	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
7	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
8	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
9-10	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
11-13	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
14-16	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
17-21	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
22-24	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
25-26	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
27	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
35	Narrative	Officer note regarding information request	28(1)	Does not apply	Release
42	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
44	Narrative	Personal information of SPS Member	28(1)	Applies	Withhold
45	Narrative	Information about SPS member's availability	28(1)	Does not apply	Release
46	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
47-48	Narrative	Member note to Prosecutor	14(1)(k), 14(1)(k.2), 14(1)(m), 21(c)	14(1)(m) does not apply 21(c) does not apply 14(1)(k) applies	Withhold
49	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
50	Narrative	Personal information of SPS Member	28(1)	Applies	Withhold
51	Narrative	Discretionary Order	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
52-53	Narrative	Correspondence from Prosecutor to SPS	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
54	Narrative	Note to Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold



<b>Page Range</b>	<b>Record Title</b>	<b>Description</b>	<b>Exemption(s) – Applied by SPS</b>	<b>Finding</b>	<b>Recommendation</b>
56	Narrative	Note to Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
58	Narrative	Note to Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
62	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
64	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
67-68	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
69	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
70	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
71-72	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
74	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
76	Narrative	Personal information of acquaintance	28(1)	Applies	Withhold
79-81	Follow Up Report	Follow up report assigned	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
82-83	Follow Up Report	Follow up report assigned	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
84-85	Follow Up Report	Follow up report assigned	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
86-87	Follow Up Report	Follow up report assigned	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
90-91	Follow Up Report	Equest from Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
92-93	Follow Up Report	Equest from Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
94-95	Follow Up Report	Equest from Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
96-97	Follow Up Report	Equest from Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
98-99	Follow Up Report	Equest from Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
100-101	Follow Up Report	Equest from Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold

<b>Page Range</b>	<b>Record Title</b>	<b>Description</b>	<b>Exemption(s) – Applied by SPS</b>	<b>Finding</b>	<b>Recommendation</b>
102-103	Follow Up Report	Equest from Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
104-105	Follow Up Report	Equest from Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
106-107	Follow Up Report	Equest from Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
108-109	Follow Up Report	Equest from Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
110-111	Follow Up Report	Equest from Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
112-113	Follow Up Report	Equest from Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
114-115	Follow Up Report	Equest from Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
116	Follow Up Report	Equest from Prosecutor	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
117-124	Related Property Report	Personal information of acquaintance	28(1)	Applies	Withhold
125	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
127	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
129-132	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
139-140	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
141-143	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
144-150	Related Attachment	Personal information of acquaintance Personal information of former owner	28(1)	Applies to all	Withhold
151-153	Related Attachment	Personal information of acquaintance	28(1), 14(1)(j)	Both exemptions apply	Withhold
154-156	Related Attachment	Personal information of acquaintance	28(1), 14(1)(j)	Both exemptions apply	Withhold
157-160	Related Attachment	Personal information of acquaintance	28(1), 14(1)(j)	Both exemptions apply	Withhold
161-164	Related Attachment	Personal information of acquaintance	28(1), 14(1)(j)	Both exemptions apply	Withhold
165-168	Related Attachment	Personal information of acquaintance	28(1), 14(1)(j)	Both exemptions apply	Withhold
170-171	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
176-177	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold

<b>Page Range</b>	<b>Record Title</b>	<b>Description</b>	<b>Exemption(s) – Applied by SPS</b>	<b>Finding</b>	<b>Recommendation</b>
179	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
180	Related Attachment	Personal Information of former owner	28(1)	Applies	Withhold
183-185	Related Attachment	Personal information of acquaintance	14(1)(j), 28(1)	14(1)(j) applies	Withhold
186	Related Attachment	Personal Information of former owner	28(1)	Applies	Withhold
187-192	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
193	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
195-196	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
197	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
198	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
200	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
201	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
202	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
203	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
204	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
205	Related Attachment	Personal information of acquaintance Information about employee of the Ministry of Justice	28(1)	Applies to personal information of acquaintance. Does not apply to information about employee.	Release employee information and withhold the rest
206		Personal information of acquaintance	28(1)	Applies	Withhold
207-210		Request	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
211-212	Related Attachment	Email to Crown	14(1)(k), 14(1)(k.2), 21(c)	21(c) does not apply 14(1)(k) applies	Withhold
215	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
216	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
217-221	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
222-223	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold
224-226	Related Attachment	Personal information of acquaintance	28(1)	Applies	Withhold

<b>Page Range</b>	<b>Record Title</b>	<b>Description</b>	<b>Exemption(s) – Applied by SPS</b>	<b>Finding</b>	<b>Recommendation</b>
233-240	Install Records	ICCS Install Records from third party business	28(1)	Does not apply	Release
242	Related Attachment	Officer Notes	14(1)(j)	14(1)(j) applies	Withhold