

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 063/2014

Sunrise Regional Health Authority

Summary: The Applicant requested 101 pages of e-mails that related to her missing medical chart from Sunrise Regional Health Authority (Sunrise). Sunrise withheld the e-mails pursuant to subsections 14(1)(c), 16(1)(a), 16(1)(b), 21(a) and 23(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner found that subsection 16(1)(b) of LA FOIP applied to certain portions. He also found that a portion constituted personal information pursuant to subsection 23(1)(h). He found that no other exemptions applied and recommended release of the rest of the record.

I BACKGROUND

[1] The applicant is an employee of Sunrise Regional Health Authority (Sunrise). On February 19, 2014, Sunrise received the applicant's request for e-mails related to her missing medical chart. It replied to the applicant in a letter dated May 5, 2014. Sunrise had released the responsive record to the applicant; however, it severed several portions. The letter indicated it was relying on subsections 14(1)(c), 16(1)(a), 16(1)(b), 21(a) and 23(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[2] The applicant requested a review in a letter received on May 16, 2014. My office sent notification letters to both Sunrise and the applicant on July 9, 2014. My office received a submission from Sunrise on October 7, 2014 and additional information on October 31, 2014.

II RECORDS AT ISSUE

[3] The record is 101 pages of e-mails and attachments. Severing occurs on 58 of those pages. Given the nature of e-mail strings, there is a lot of repetition within these 58 pages. In its submission, Sunrise clarified that it was relying on subsections 14(1)(c), 16(1)(a), 16(1)(b), 21(a) and 28(1) of LA FOIP to withhold the severed portions of the records.

[4] Sunrise severed two portions, on pages 20 and 93, pursuant to subsection 28(1) of LA FOIP as it was personal information of another individual. However, these were severed from e-mails that the applicant had written. Our office explained this to the applicant and she is no longer interested in a review of these portions.

[5] Sunrise applied subsection 16(1)(b) of LA FOIP to all of the remaining severed portions. Subsection 16(1)(a) was applied to ten of those severed portions. Subsection 14(1)(c) was applied to one of those portions and 21(a) was applied to two other portions.

III DISCUSSION OF THE ISSUES

1. Does subsection 16(1)(b) of LA FOIP apply to the record?

[6] Subsection 16(1)(b) of LA FOIP states:

16(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

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

[7] This subsection has been applied to all severed portions at issue in this review. The test for subsection 16(1)(b) is as follows:

- i. must qualify as a 'consultation' or 'deliberation';
- ii. either be sought or expected, or be part of the responsibility of the person from whom they are sought;

- iii. be sought for the purpose of doing something, such as taking an action or making a decision; and
- iv. involve someone who can take or implement the action.

i. Do the severed portions qualify as ‘consultations’ or ‘deliberations’?

[8] My office has defined ‘consultation’ and ‘deliberation’ as follows:

A consultation occurs when the views of one or more officers or employees of a government institution are sought as to the appropriateness of a particular proposal or suggested action.

A deliberation is a discussion of the reasons for and against an action by the persons described in this section.

[9] Sunrise’s submission did not go into detail on how the various severed portions of the record constitute consultations or deliberations. However, upon review of the record, some of the severed portions fit the definition of consultation or deliberation and many do not. Some of the passages would be described as follows:

- Describes a conversation or situation [Pages 1, 8, 9, 10, 34, 37, 52, 61, 72, 73, 74, 91, 95, 96, 101]
- A communication of a decision that has been made [Pages 25, 90]
- An instruction [Pages 25, 43 (second severed portion), 65, 75, 77, 80 (first severed portion), 97, 101]
- A communication about a meeting [Pages 5, 13, 38, 54]
- A question about a situation [Pages 15 (third severed portion), 22 (third severed portion), 30 (third severed portion), 43 (first severed portion), 71, 76 (second severed portion), 78 (second severed portion), 81, 82, 83, 84, 85, 87, 88, 89, 98 (second severed portion)]
- A draft communication to applicant without notes [Page 2]

[10] These severed portions withheld under subsection 16(1)(b) of LA FOIP do not meet this part of the test. The remaining portions do qualify as either ‘consultations’ or ‘deliberations’.

ii. Were the severed portions either sought or expected, or part of the responsibility of the person from whom they are sought?

[11] Sunrise's submission indicates that the e-mails "were sought or expected from individuals who were qualified to and tasked with providing such opinions as part of their position within Sunrise". Sunrise has supplied us with a list of titles of individuals involved in these e-mails as well as organizational charts for the region to demonstrate the decision making chain. From a review of this and the record, it appears that severed portions were either sought or expected from individuals with responsibility. As such, these severed portions would meet this part of the test.

iii. Were the severed portions of the record sought for the purpose of doing something, such as taking an action or making a decision?

[12] Upon review of the remaining severed portions, the deliberations and consultations appear to be for the purpose of taking an action or making a decision.

iv. Does the record involve someone who can take or implement the action?

[13] Again, upon review of the organization chart and information provided by Sunrise, the remaining severed portions appear to be between senior officers of Sunrise and its privacy officer that can take or implement action. This part of the test is met.

[14] To conclude, subsection 16(1)(b) of LA FOIP appears to apply to the following severed portions of the record: Pages 6, 15, 17, 22, 24, 30, 32, 35, 43 (third severed portion), 46, 47, 63, 64, 66, 69, 70, 76 (the first severed portion), 78 (the first severed portion), 80, 90, 94, 98 (the first severed portion).

2. Does subsection 16(1)(a) of LA FOIP apply to the record?

[15] There are six remaining pages with portions that have been severed pursuant to subsection 16(1)(a) of LA FOIP. Subsection 16(1)(a) of LA FOIP states:

16(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority;

[16] My office uses a two part test to determine the applicability of subsection 16(1)(a) of LA FOIP:

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

In addition, the advice, recommendations, analyses and/or policy options:

- a. must be sought or expected, or be part of the responsibility of a person by virtue of that person's position;
- b. must be directed towards taking an action, including making a decision; and
- c. must be made to someone who can take or implement the action.

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

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

[17] Sunrise indicated that the portions of the record severed under subsection 16(1)(a) of LA FOIP would either qualify as advice or recommendations. This office has previously defined these terms as follows:

Advice includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts.

Recommendations include suggestions for a course of action as well as the rationale for a suggested course of action.

[18] The portion severed on page 2 of the record is a suggestion for wording for communications with the applicant. It would not qualify as advice or recommendations as it does not contain an analysis of the situation or the rationale for a suggested course of action. My office has commented that this exemption is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice. As such, it doesn't meet this portion of the test.

[19] The severed portions on pages 10, 34, 37 and 52 would be characterized as describing a situation. They do not qualify as advice or recommendations.

[20] Finally, the severed portion on page 101 of the record is also a description of a situation. It also includes an instruction.

[21] None of the remaining portions of the record severed pursuant to 16(1)(a) of LA FOIP qualify as ‘advice’ or ‘recommendations’ to pass the first part of the test. There is no need to continue.

3. Does subsection 14(1)(c) of LA FOIP apply to the record?

[22] Sunrise applies subsection 14(1)(c) of LA FOIP to one page of the record. It is an e-mail between two Sunrise employees describing a conversation one of them had with an RCMP Constable regarding the applicant’s missing file. Subsection 14(1)(c) of LA FOIP states:

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;

[23] The test used for subsection 14(1)(c) of LA FOIP is as follows:

- i. Do the public body’s activities qualify as “lawful investigation” under the Act?
- ii. Would disclosure interfere with the lawful investigation?
- iii. Would the release of the information disclose information with respect to a lawful investigation?

i. Do the public body’s activities qualify as “lawful investigation” under the Act?

[24] My office has defined ‘lawful investigation’ as an investigation that is authorized or required and permitted by law. Sunrise’s submission indicates there are two investigations into the applicant’s missing personal health information which are authorized or permitted by law. The submission did not elaborate on either of these two topics.

- [25] From review of this file, it appears that the two investigations referred to is Sunrise's investigation in to the missing personal health information and the RCMP Constable's inquiry.
- [26] Sunrise's investigation is authorized by its *Lost or Stolen Client Records or Other Personal Health Information* policy and procedure. This is not a law. Therefore, this investigation does not meet this test.
- [27] From a review of the record itself, it appears that the RCMP did not initiate an investigation into the missing personal health information. Therefore, no other investigation exists.
- [28] As this part of the test has not been met, there is no need to continue with the other parts of the test.
- [29] However, the final sentence of this e-mail appears to be an opinion of a person. This would qualify as that person's personal information pursuant to subsection 23(1)(h) of LA FOIP and should be withheld.

4. Does subsection 21(a) of LA FOIP apply to the record?

- [30] Sunrise applied this exemption to two e-mails on one page discussing if a lawyer had been consulted on a particular subject.
- [31] Subsection 21(a) of LAFOIP states:
21 A head may refuse to give access to a record that:
(a) contains information that is subject to solicitor-client privilege
- [32] The test that this office has used for this exemption is as follows:
1. Must be a communication between solicitor and client.
2. Must entail the seeking or giving of legal advice.
3. Must be intended to be confidential by the parties.

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

[33] The e-mail at issue is between two of Sunrise's vice-presidents and a director. As such, it does not meet the test and there is no need to continue.

IV FINDINGS

[34] I find subsection 16(1)(b) of LA FOIP applies to the following severed portions of the record: Pages 6, 15, 17, 22, 24, 30, 32, 35, 43 (third severed portion), 46, 47, 63, 64, 66, 69, 70, 76 (the first severed portion), 78 (the first severed portion), 80, 90, 94, 98 (the first severed portion).

[35] I find subsections 16(1)(a), 14(1)(c) and 21(a) of LA FOIP do not apply to the remaining severed portions of the record.

[36] I find the last sentence on page 91 of the record would qualify as personal information pursuant to subsection 23(1)(h) of LA FOIP.

V RECOMMENDATIONS

[37] I recommend Sunrise release the following severed portions of the record: Pages 1, 2, 5, 8, 9, 10, 13, 15 (third severed portion), 22 (third severed portion), 25, 30 (third severed portion), 34, 37, 38, 43 (first and second severed portions), 52, 54, 61, 65, 71, 72, 73, 74, 75, 76 (second severed portion), 77, 78 (second severed portion), 80 (first severed portion), 81, 82, 83, 84, 85, 87, 88, 89, 90, 91 (except for the last sentence), 95, 96, 97, 98 (second severed portion) 101. A draft copy of this report was shared with Sunrise. In response, Sunrise indicated that it would comply with this recommendation except that it would not release the severed portion on page 1, one phrase found on pages 72, 73 and 96 and one phrase on page 95. I note the severed material on page 1 discusses the applicant.

Dated at Regina, in the Province of Saskatchewan, this 20th day of November, 2014.

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