



REVIEW REPORT 158-2018

University of Regina

April 1, 2020

Summary:

The Applicant submitted an access to information request to the University of Regina (U of R). The U of R withheld portions of the records from the Applicant pursuant to subsections 16(1)(e), 17(1)(f), 18(1)(c)(ii), 23(1)(b), 23(1)(d) and 23(1)(j) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner found that the U of R did not conduct an adequate search for records but found that its fee estimate was reasonable. The Commissioner further found that the U of R did not appropriately apply subsections 16(1)(e), 17(1)(f) and 18(1)(c)(ii) of LA FOIP to the records, and that it did appropriately apply subsections 23(1)(b) and 23(1)(d) of LA FOIP to the records. The Commissioner also found that the U of R appropriately applied subsection 23(1)(j) of LA FOIP to some parts of the records, but not to other parts. The Commissioner recommended that the U of R: continue to withhold personal information in the records pursuant to subsection 28(1) of LA FOIP; to release or continue to withhold other information in the records according to his findings; and to conduct a further search for records.

I BACKGROUND

- [1] On May 2, 2018, the University of Regina (U of R) received an access to information request regarding “the decision made by the University of Regina to drop varsity athletic programs, alternatives to dropping varsity athletic programs, and the potential cost savings that may be realized from dropping varsity athletic programs”.
- [2] The U of R provided the Applicant a fee estimate on June 4, 2018, an index of records on July 24, 2018, and responsive records on August 3, 2018. On August 9, 2018, the Applicant asked my office to review the U of R’s response.

[3] On September 20, 2018, my office provided notification to the U of R, asking it to provide a submission that addressed the following: 1) Search efforts for the records as the Applicant did not believe all records responsive to his request were located by the U of R; 2) Fee estimate of \$335; and 3) The U of R's section 7 response to deny access to the part of the record pursuant to subsections 23(1)(d), 23(1)(j), 23(1)(b), 17(1)(f), 16(1)(3), 16(1)(e) and 18(1)(c)(ii) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). My office provided notification to the Applicant on the same date.

II RECORDS AT ISSUE

[4] The U of R included with its submission an index of records with identified redactions. I have modified the index of records for ease of reference as follows:

Title and Document Grouping Numbers	LA FOIP Exemptions Applied	Notes on Various Pages Included in Section
Emails: 1, 1A, 2, 3, 3A, 4-6, 6A, 7 to 13	17(1)(f) 23(1)(d) 23(1)(j)	Redactions applied on various pages to third-party donor information, employee ID numbers, fees paid by individual players; emails correspond to announcement documents
Presentations: 21 and 22	16(1)(e) 17(1)(f) 18(1)(c)(ii)	Redactions applied to different plans/scenarios as well as employee ID numbers.
Budget Documents: 23 to 26	17(1)(f) 18(1)(c)(ii) 23(1)(d) 23(1)(j)	Redactions applied to information about 4-team elimination scenario, employee and student IDs and fees paid by individual players.
Review Documents: 27 to 46	23(1)(d) 23(1)(b) 23(1)(j)	Redactions applied to employee ID numbers, scholarship amounts received by students, student credit hours, notes on student activities, third-party donor information.
U of R Executive Team: 47 to 53	16(1)(e) 23(1)(j) Non-responsive items removed	Redactions to pending policy/budgetary decisions, fees paid by individual players.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[5] The U of R is a local authority pursuant to subsection 2(f)(xii) of LA FOIP. Thus, I have jurisdiction to conduct this review.

2. Were the U of R's search efforts reasonable?

[6] Section 5 of LA FOIP establishes an individual's right to access records of a local authority; it 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.

[7] In their access request, the Applicant stated the parameters of their request as, "any document, both physical and electronic, including but not limited to any email, correspondence, report, or memorandum generated by University of Regina employees, contractors, or agents since August 1, 2017 to May 1, 2018 regarding, with respect to, or concerning, the decision made by the University..."

[8] The threshold for granting access is one of "reasonableness". 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 local authority to prove with absolute certainty that records do not exist; however, it must demonstrate it has conducted a reasonable search.

[9] A reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to search records that are reasonably related to the request. A level of effort is the level of effort you would expect of any fair, sensible person searching areas where records may exist. What is reasonable depends on the request and related circumstances.

- [10] In the notification, my office asked the U of R to describe its search efforts based on the Applicant's following response of August 3, 2018, to the U of R:

I had a preliminary review of the documents and noted that the earliest document was from January of 2018. As I'm sure you're aware, the date range in my request was from August 1, 2017 to May 1, 2018.

I just want to confirm that what I received was the full package (nothing missing) and that the U of R is of the position that there are no responsive records to my request prior to January of 2018.

- [11] Search efforts and the identification of responsive records go hand-in-hand. If a local authority's search efforts do not appear thorough or adequate, or if a local authority does not provide satisfactory evidence to support its search efforts, then it makes it difficult for my office to conclude that its search efforts were "reasonable" and that all responsive records appear to have been located.

- [12] In terms of its submission, the U of R provided affidavits prepared by Glenys Sylvestre, Executive Director, University Governance and University Secretary, and Lisa Robertson, Director of Sport, Community Engagement and Athlete Development. In addition to their affidavits, the U of R also provided a submission.

- [13] In their affidavit, Glenys Sylvestre stated that in addition to Lisa Robertson, they also identified the following individuals who may hold records: the Dean of Kinesiology, the University Provost and Vice President, Senior Advisor to the University President, Associate Vice President of External Relations and a Faculty Administrator in Kinesiology. These individuals were contacted by email by Glenys Sylvestre, who provided copies of these emails, but not the responses, to my office.

- [14] Lisa Robertson, in their affidavit, stated they were hired into their position effective September 1, 2017. Their hiring came after a recommendation made in a review report, dated January 4, 2017, about the U of R's athletic department. They also stated that one of their initial tasks was to assess the "state of affairs of athletics" at the U of R, which they

undertook between October 2017 and January 2018. In their affidavit, they provided a list of documents they created, which were provided to the Applicant with some redactions.

- [15] My office contacted the U of R to seek further detail of its search efforts for documents generated between May 1, 2017 and August 1, 2017. In an email response dated December 20, 2019, the U of R stated:

The decision involved a very small number of people at the University, all of which I contacted for documents. As noted above, the decision was made in discussions among the relevant persons. Given the sensitivity related to, and confidentiality surrounding, these matters, I would not have expected there to be emails relating to it. I have attached the emails I sent to the five identified individuals on May 3, 2018 as well as the email sent to [XXXX] on June 1, 2018 when [they] was also identified as an employee who might possess responsive information. You will note that I have included in both emails the verbatim requests for information that was received in my office for “any document, both physical and electronic, including by not limited to any email, correspondence, report, or memorandum generated.” Further, as I attested to in my Affidavit, there were also in-person meetings with [XXXX] and [XXXX] to review their responsive records and to ensure that all relevant documents had been assembled.

- [16] In addition, my office asked the U of R about records pertaining to internal discussions had by the decision makers with respect to the elimination of athletic programs. In its email response dated December 20, 2019, the U of R added:

We have produced all the information used by the decision-makers at the University to come to the decision. There are no “records relating to internal discussions” – they were just that – discussions among the responsible individuals in Kinesiology/Athletics, and members of the University Executive Team (UET). No records were created in respect of those discussions – the (disclosed) background material and analysis were discussed, and a decision made. The decision was then implemented. As we have advised, there are no minutes of UET meetings. The one set of handwritten notes that one individual made at a meeting have been disclosed. No other individuals at these meetings took notes – I personally inquired with each of them.

- [17] As I noted in Review Report 063-2019, search efforts can include, among other efforts, identifying the employees or third parties involved who may hold records. The U of R has provided this information and has supported it by providing my office with copies of the emails it sent to the individuals involved; it did not, however, provide the individuals’ direct

responses to the request emails. The recipients' direct responses could support what records they may have identified as responsive to the access request.

[18] Besides this, I also note what appears to me to be some of the following inconsistencies which, to an outsider, would likely seem questionable:

1. The Applicant has questioned why the earliest emails provided to them by the U of R is dated January 2018. Further, the Applicant questioned why no emails exist, for example, between the U of R and any of the sports teams programs that the U of R eliminated. Upon review of the records, I note that they contained four emails between Lisa Robertson, the Director of KHS Operations and the Dean with draft PowerPoint attachments or Excel spreadsheets regarding the elimination decision, but contain no discussion of substance regarding either the attachments or the elimination decision. It does seem unusual that, as the Applicant questions, there were no other emails located by the U of R that included discussions, notations, advisements, etc., regarding the elimination decision.
2. In the affidavit provided by Glenys Sylvestre, it is noted that, "...in the meetings where the Program Elimination Decision was discussed... input and advice was provided to Dr. Harold Riemer, the Dean of the Faculty of Kinesiology..." They stated that minutes are not taken at UET meetings, which is concerning as it provides no formal record of the discussions made or, in this case, how Dr. Riemer, or others, might have been advised by members of the UET on the program elimination decision. If the UET is involved in any sort of decision making process, it is also concerning that no minutes are taken because then there is no formal record of the decision made, the rationale for the decision, or what type of support there was for the decision. Again, to an outsider, this would seem unusual, and would appear to lack transparency.

[19] Based on what I outline at paragraph [18], two conclusions come to mind: 1) that more records may exist as questioned by the Applicant, but that the U of R is not being forthcoming; and 2) there is a possibility that the U of R may not be documenting all decisions, such as those that occur at the UET meetings where no minutes appear to be taken. Regarding the latter, although LA FOIP does not carry a duty to document, my office has in the past recommended that the government include in its access and privacy legislation a duty to document as a way to enhance transparency. Regardless, in the matter before me, either conclusion can give rise to the appearance that the U of R is avoiding accountability to the public.

[20] Although the U of R has provided the Applicant with a number of documents responsive to their request, including the emails noted, I am not persuaded that the U of R has conducted an adequate search and located all records that may be responsive to the Applicant's request, or has not sufficiently demonstrated that such records do not exist.

[21] I recommend a further search be conducted.

3. Was the U of R's fee estimate reasonable?

[22] Subsection 9(1) of LA FOIP provides:

9(1) An applicant who is given notice pursuant to clause 7(2)(a) of LA FOIP is entitled to obtain access to the record on payment of the prescribed fee.

[23] Subsections 6(2) and 6(3) of *The Local Authority Freedom of Information and Protection of Privacy Regulations* (the Regulations) provide a local authority with the ability to recover costs associated with searching for and preparing responsive records. In past reports, my office has established that there are three kinds of fees a public body can include in a fee estimate:

1. Fees for searching for a responsive record;
2. Fees for preparing the record for disclosure; and
3. Fees for the reproduction of records.

[24] Search time consists of every half hour of manual search time required to locate and identify responsive records. For example:

- Staff time searching for records;
- Examining paper or electronic file indices, file plans or listings of records;
- Pulling paper files/records out of files; and
- Reading through files to determine if records are responsive.

[25] Preparation time includes time spent preparing the records for disclosure, including the anticipated time to sever exempted information from records. The test related to reasonable time spent severing is that it should take an experienced employee approximately two minutes per page to sever. Preparation time does not include:

- Deciding whether or not to claim an exemption;
- Identifying records that require severing;
- Identifying and preparing records requiring third-party notice;
- Packaging records for shipment;
- Transporting records to the mailroom or arranging for courier service;
- Time spent on a computer compiling and printing information;
- Assembling information and proofing data;
- Photocopying; and
- Preparing an index of records.

[26] The Regulations allow the U of R to charge \$15 per half hour for searching and preparing records for disclosure; the U of R should not charge for the first one hour of work. The Regulations allow a charge for photocopying of \$0.25 per page.

[27] The U of R provided the Applicant with the following fee estimate on June 4, 2018:

Type of Fee	Calculation of Fee	Total
Time to search/prepare	10 hours x \$15/half hour	\$300
Less first hour search/prepare	1 hour x \$15/half hour	(\$30)
Reproduction Costs		\$65.00
Total		\$335.00

[28] In its submission, the U of R stated that searching and severing required 9 hours and 43 minutes of time, rounded up to 10 hours. It based this time estimate on the following:

- 18 minutes to search the email accounts of six individuals;
- Reviewing approximately 500 pages at a rate of 12 pages per minute (approximately 45 minutes);
- 15 minutes of examining files, file plans or listings of records;
- 5 minutes for pulling paper files;
- Time for severing approximately 250 pages; and
- Photocopying 250 pages at \$0.25 per page.

[29] The U of R further stated that, based on the request, this would involve “more than 500 pages”. The U of R added it anticipated that “there would be duplication in the documents particularly where the email correspondence involved two or more custodians”, so selected 500 pages as a conservative estimate. Based on this, the U of R provided the Applicant with a written fee estimate of \$335.00. In its correspondence to the Applicant, the U of R

required a 50% deposit, or \$167.50, from the Applicant before it would begin processing the request. The Applicant paid the deposit on June 26, 2018.

[30] In the past, my office has stated that fee estimates should be based on the number of responsive pages. I will, therefore, base my calculations on the number of responsive pages identified by the U of R, which is 500 pages for searching and 250 pages for severing. I will also use the allowable charge of \$15 per hour (minus the first hour of time or \$30), plus the number of pages to search or sever as per my offices *Fee Estimate Quick Calculation Guide*, which provides:

- Searching – one minute to scan 12 pages (or 720 pages per hour); and
- Severing – two minutes per page to sever (or 30 pages per hour).

Search (500 pages)	$500/720 \times \$15 \text{ per half hour} = \20.84
Sever (250 pages)	$250/30 \times \$15 \text{ per half hour} = \250.00
Subtotal	\$270.84
Subtract first hour	(\$30)
Total search and sever	\$240.84
Add photocopying	$250 \text{ pages @ } \$0.25 \text{ per page} = \62.50
Total fee estimate	\$303.84

[31] I note that the U of R stated it “rounded up” its time in making its calculation, which accounts for some of the difference between the U of R’s calculated fee estimate total of \$335.00 and my calculated total of \$303.84, which is calculated based on a portion of time. Subsection 6(2) of the Regulations, however, states that a local authority can charge \$15 for each half hour or portion of a half hour. Based on this, I find the U of R’s fee estimate was reasonable.

4. Did the U of R properly apply subsection 17(1)(f) of LA FOIP?

[32] Subsection 17(1)(f) of LA FOIP provides:

17(1) Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(f) information, the disclosure of which could reasonably be expected to prejudice the economic interests of the local authority; or

[33] Subsection 17(1) of LA FOIP is a harms-based provision. It permits refusal of access in situations where release of a record could reasonably be expected to prejudice the economic interest of the local authority. When considering applying subsection 17(1)(f) of LA FOIP, my office suggests applying the following test: *Could disclosure reasonably be expected to prejudice the economic interests of the local authority?*

[34] In this case, “could reasonably be expected to” means there must be a reasonable expectation that release could prejudice the economic interests of the local authority. The Supreme Court of Canada set the standard for proof of harms-based provisions as follows:

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”...

[35] The local authority does not have to prove that harm is probable, but needs to show that there is a “reasonable expectation of harm” if any of the information were to be released. Local authorities should not assume that the harm is self-evident. While the expectation of harm need not be a certainty, evidence must:

- show how the disclosure of information would cause harm;
- indicate the extent of harm that would result; and
- provide facts to support the assertions made.

[36] In this context:

- *Prejudice* refers to detriment to economic interests; and
- *Economic interest* means the broad interests of the local authority in managing the production, distribution and consumption of goods and services. It also covers

financial matters such as the management of assets and liabilities by a local authority and the local authority's ability to project its own interests in financial transactions.

[37] The U of R applied subsection 17(1)(f) of LA FOIP to the following:

- Groupings 1A and 3A – donor information contained in a table;
- Grouping 22 – information in a PowerPoint presentation; and
- Groupings 23 to 26 – information in budget documents.

[38] I will separately analyze how the U of R applied subsection 17(1)(f) of LA FOIP to groupings 1A and 3A (donor information) and groupings 22 to 26.

Groupings 1A and 3A - Donor information

[39] With respect to donor information, the U of R stated that, “[t]he disclosure of information about third party donors/sponsors would impact the U of R’s ability to obtain future donations and sponsorships, thereby affecting the U of R’s economic interests”.

[40] To support its position, the U of R cited Order PO-2619 from the Ontario’s Information and Privacy Commissioner (Ontario IPC). The matter and Order pertain to subsection 18(1)(c) of *Ontario’s Freedom of Information and Protection of Privacy Act* (referred to as “FIPPA”) which I note is substantially similar to subsection 17(1)(f) of LA FOIP. In the Order, the Adjudicator stated some of the following:

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

I have carefully reviewed the representations and the contents of the record and I conclude that the University has provided me with the kind of detailed and convincing evidence required to make a finding that the information at issue is properly exempt under section 18(1)(c).

[41] In Ontario IPC Order PO-2619, I note that the Adjudicator further added that to meet the test of reasonableness, an institution must provide “detailed and convincing evidence to establish a reasonable expectation of harm” and that “speculation of possible harm is not sufficient”. The Adjudicator added that whether or not the harm exists is not “specifically based on previous findings with respect to similar information, but rests in large part on the quality of evidence by the party asserting the claim”. By way of evidence, the university subject to that report provided a “covenant that the University made with the donor in order to secure the donation”. According to *Black’s Law Dictionary* (11th Ed.), a covenant is a “formal agreement or promise, usu. in contract or deed, to do or not to do a particular act”. The covenant and other evidence provided to the Adjudicator in Ontario likely helped them come to the conclusion they did in Order PO-2619.

[42] With respect to the matter before me, the U of R has not provided my office with detailed evidence to support its argument that subsection 17(1)(f) of LA FOIP applies to this portion of the record. Such evidence could include, for example, copies of donor agreements or other documents that I can review in order to validate the U of R’s assertions. As I stated at paragraph [35] of this Report, evidence must include facts that are tangible or reviewable in order to support the assertions made; otherwise, the assertions are only speculative. Although what is stated in the affidavits provided by the U of R might possibly occur or may be based on one person’s knowledge, there lacks detailed or reviewable evidence. I, therefore, find that subsection 17(1)(f) of LA FOIP has not been properly applied to the documents in groupings 1A and 3A of the records. I recommend the release of the donor information as it appears in groupings 1A and 3A of the records.

Groupings 22 to 26

[43] With respect to identification of the information contained in groupings 22 to 26, the U of R stated, “[t]he University has also redacted information relative to the consideration of [XXXX]”. I note that the U of R has also applied subsection 18(1)(c)(ii) of LA FOIP to portions of the documents in groupings 22 to 25.

[44] To support its argument, the U of R would need to demonstrate the likelihood that releasing the information in this portion of the record could have the outcome anticipated. That is, there has to be a reasonable expectation that the outcome will occur. Again, as I stated at paragraph [35] of this Report, assertions should be supported by facts or reviewable evidence. Both Lisa Robertson and Glenys Sylvestre stated in their affidavits what harm *may* arise from release of this information, but did not provide supporting evidence in their arguments or demonstrate the extent of probable harm, which then leaves their assertions as speculative. Thus, I find that subsection 17(1)(f) of LA FOIP has not been properly applied to this information in the documents in groupings 22 to 26 of the record. I will, however, consider this information as it is contained in groupings 22 to 25 pursuant to subsection 18(1)(c)(ii) of LA FOIP in the next section.

5. Did the U of R properly apply subsection 18(1)(c)(ii) of LA FOIP?

[45] Subsection 18(1)(c)(ii) of LA FOIP provides:

18(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

- ...
(c) information, the disclosure of which could reasonably be expected to:
 - ...
(ii) prejudice the competitive position of; or
 - ...
a third party; or

[46] Subsection 18(1)(c) of LA FOIP is a mandatory, harms-based exemption that permits refusal in situations where disclosure of information could reasonably be expected to prejudice the competitive position of a third party. When applying this exemption, my office suggests the following two-part test:

1. What is the prejudice to a third party's competitive position that is being claimed?
2. Could release of the record reasonably be expected to result in the prejudice?

[47] The U of R applied subsection 18(1)(c)(ii) of LA FOIP to the information within groupings 22 to 25, to which I have already found that subsection 17(1)(f) of LA FOIP does not apply. I note that there was no third-party submission provided.

1. What is the prejudice to a third party's competitive position that is being claimed?

[48] Prejudice in this context refers to detriment to the competitive position of a third party.

[49] In its submission, the U of R provided some of the following arguments:

1. The disclosure of such information could reasonably be expected to prejudice and result in financial loss to the student athletes...
2. Among other matters, it could result in a decrease in financial and donor support...
3. A reduction in financial aid and donor support for [XXXX] would result in a reduction in the funding available to the individual athletes...

[50] The U of R added other arguments, but did not provide evidence to support how the release of information could prejudice the competitive position of a third party, which is what subsection 18(1)(c)(ii) of LA FOIP contemplates. The U of R, in its arguments, appears to have focused mainly on how the disclosure of information could affect its own competitive position, which subsection 18(1)(c)(ii) of LA FOIP does not contemplate. As the first part of the test has not been met, I find that subsection 18(1)(c)(ii) of LA FOIP has not been properly applied to the documents in groupings 22 to 25 of the records.

6. Did the U of R properly apply subsection 16(1)(e) of LA FOIP?

[51] Subsection 16(1)(e) of LA FOIP provides:

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

...

(e) information, including the proposed plans, policies or projects of the local authority, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

[52] Subsection 16(1)(e) of LA FOIP is a discretionary, class-based exemption that permits refusal of access in situations where release of a record could reasonably be expected to disclose information, including the proposed plans, policies or projects of a local authority, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision. Once a policy or budgetary decision has been taken and is being implemented, the information can no longer be withheld under this exemption. In considering subsection 16(1)(e) of LA FOIP, my office recommends the following test:

1. Is it information of a local authority?
2. Could disclosure reasonably be expected to result in disclosure of a pending policy or budgetary decision?

[53] The U of R applied subsection 16(1)(e) of LA FOIP to portions of documents in groupings 21 and 22, which are PowerPoint presentations, and to portions of a PowerPoint presentation in grouping 47, which also has an attached meeting agenda. According to the U of R, the redacted portions contain, “[i]nformation about proposed plans which would result in disclosure of pending policy or budgetary decisions...”

1. Is it information of a local authority?

[54] To be “information of a local authority”, *information* means facts or knowledge provided or learned as a result of research or study. The information may include the following that are proposed:

- Plan – which is a formulated, especially detailed method by which a thing is to be done, or an intention or decision about what one is going to do;
- Policy – which is a standard course of action that has been officially established by the local authority; or
- Project – which is an enterprise carefully planned to achieve a particular aim.

[55] Upon review of the presentations, I note that they contain information of the U of R’s athletics programs and Department of Kinesiology. The information appears to relate to

the department's budget planning, thus it is information of the U of R. The first part of the test has been met.

2. Could disclosure reasonably be expected to result in disclosure of a pending policy or budgetary decision?

[56] In its submission, the U of R stated that the redacted portions of the record relate to:

...proposed plans of the University to reinvest or reallocate the savings as a result of the elimination of certain sports teams... The University has not yet decided which plans will be implemented or how the savings will be reinvested. The decision will require the input of, consultation and cooperation with, and approval of numerous faculties and units of the University, which has not yet been completed.

[57] In its submission, the U of R stated it reviewed the applicability of a decision by Ontario's IPC (PO-2861) regarding subsection 18(1)(g) of Ontario's FIPPA. The U of R noted this provision is "analogous" to subsection 16(1)(e) of LA FOIP, and that it supports its position that the exemption, "permits an institution to withhold information about proposed plans the disclosure of which could reasonably be expect to result in premature disclosure of a pending decision or undue financial benefit or loss to a person." The U of R added that, "[t]he decisions to be made by the U of R, at some future date, as between these options, has the potential to impact any number of projects, faculties or units (and the personnel therein)."

[58] Upon review of Ontario's FIPPA, I note that its subsection 18(1)(g) lies within a section that speaks to the economic and other interests of Ontario. The "analogous" provision in LA FOIP is section 17, not section 16 as the U of R stated in its submission. I am not persuaded that the findings of Ontario's IPC in PO-2861, as they relate to that matter and section of FIPPA in Ontario, have any bearing on the matter before me.

[59] Based on the fact that the records (as noted in the PowerPoint presentations) contained a reference to a past budget year, my office can only assume that the records related to this particular matter were part of a past budget cycle; if this is not the case, the U of R has not provided evidence to support the contrary.

[60] In Review Report 086-2018, I reviewed an access request made to the Ministry of Health's (Health) EMS Working Group. Health applied subsection 17(1)(g) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to three pages, citing that they pertained to budget development and budgetary decisions. Subsection 17(1)(g) of FOIP is equivalent to subsection 16(1)(e) of LA FOIP, which is the exemption the U of R has claimed on this portion of the records, and which is the exemption I must analyze in this matter. In Review Report 086-2018, I found that decisions regarding the 2009-2010 budget, which was a past budget, had already been made, so the decisions were no longer *pending*. In this context, *pending* means awaiting a decision or settlement. I determined that the second part of the test had not been met and that subsection 17(1)(g) of FOIP did not apply.

[61] Subsection 16(1)(e) of LA FOIP prevents the *premature* disclosure of pending policy or budgetary decisions, and not disclosure from decisions that have already been made. Pursuant to subsection 16(1)(e) of LA FOIP, once a policy or budgetary decision has been taken and implemented, information can no longer be held under this exemption. Because a decision on a past budget appears to have been made by the U of R, decisions from that past budget cycle are no longer *pending*. If the U of R still considers some decisions to be *pending*, it has not provided my office with evidence, such as a current budget document, to support its position. As the second part of the test has not been met, I find that subsection 16(1)(e) of LA FOIP has not been properly applied to the documents in groupings 21, 22 and 47 of the records. I recommend the release of the information as it appears in groupings 21, 22 and 47 of the records.

7. Did the U of R properly apply subsections 23(1)(b), 23(1)(d) and 23(1)(j) of LA FOIP?

[62] Subsection 28(1) of LA FOIP is a mandatory provision that 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.

[63] For subsection 28(1) of LA FOIP to apply, I must first find that the information it is applied to constitutes third party personal information. To determine if information in a record is personal information, the local authority needs to confirm that the information qualifies as personal information pursuant to subsection 23(1) of LA FOIP. Part of this requires the local authority to assess: 1) if there is an identifiable individual; and 2) if the information is personal in nature.

[64] The U of R has applied subsections 23(1)(b), (d) and (j) of LA FOIP to identified data in various groupings of documents as indicated in its index of records. Based on how the submission is laid out, I will separately analyze each part of subsection 23(1) of LA FOIP as the U of R has applied them to the records.

Subsection 23(1)(d) of LA FOIP

[65] The U of R has applied subsection 23(1)(d) of LA FOIP to: 1) employee ID numbers contained in groupings 1A, 3A, 23 to 26, 30 to 39; and 2) to student ID numbers in groupings 39 and 42.

[66] Subsection 23(1)(d) of LA FOIP provides:

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:

...

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

[67] In Review Report 146-2017 at paragraph [34], my office identified that numbers such as student numbers assigned by a post-secondary institution would qualify as personal information pursuant to subsection 24(1)(d) of FOIP, which is equivalent to subsection 23(1)(d) of LA FOIP. In past reports, my office has also stated that employee numbers would qualify as personal information pursuant to subsection 23(1)(d) of LA FOIP. I find student and employee numbers qualify as personal information and that subsection 23(1)(d) of LA FOIP has been properly applied to student and employee numbers in groupings 1A, 3A, 23 to 26, 30 to 39 and 42 of the record. I recommend the U of R continue to withhold

information on student and employee ID numbers as it appears in groupings 1A, 3A, 23 to 26, 30 to 39 and 42 of the records pursuant to subsection 28(1) of LA FOIP.

Subsection 23(1)(b) of LA FOIP

[68] The U of R has applied subsection 23(1)(b) of LA FOIP to: 1) student grade point averages (GPA), student credit hours and notes about student activities to portions of documents in grouping 42 and 43; and 2) student ID numbers in grouping 45. As I found that the U of R can withhold student numbers as personal information pursuant to subsection 23(1)(d) of LA FOIP, I do not need to consider them pursuant to subsection 23(1)(b) of LA FOIP.

[69] As it was not apparent from the records, my office asked the U of R to clarify what it meant by “notes about student activities.” That is, it was not clear to my office whether or not these were actual written notes about students, for example, or if they referred to something else. In response, the U of R clarified it meant GPAs, number of credit hours taken, student ID numbers and amount of scholarship money received.

[70] Subsection 23(1)(b) of LA FOIP provides:

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:

...

(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;

[71] The U of R’s website describes a GPA as a calculation based on factors that include an individual’s credit hours and marks, and credit hours as a unit of measurement of instruction time that an individual would have received. Because these are part of a student’s education information, I find that they are personal information and that subsection 23(1)(b) of LA FOIP has been properly applied to student GPAs and credit hours in groupings 42 and 43 of the record. I recommend the U of R continue to withhold student GPAs and credit hours as it appears in these groupings of the records pursuant to subsection 28(1) of LA FOIP.

Subsection 23(1)(j) of LA FOIP

[72] The U of R has applied subsection 23(1)(j) of LA FOIP in the following manner, which I will review separately:

- Groupings 39, 41, 42, 43 and 45 - scholarship amounts received by students;
- Groupings 1A, 3A, 26 and 46 - fees paid by students; and
- Grouping 44 - third-party donor information.

[73] Subsection 23(1)(j) of LA FOIP provides:

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:

...

(j) information that described the individual’s finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness; or

Groupings 39, 41, 42, 43 and 45 - scholarship amounts received by students

[74] In its submission, the U of R provided the following arguments regarding scholarship amounts:

...scholarship funding can represent the entirety of a student’s income.

...students expressed concerns about information such as their grade point average, course hours and funding may be publically disclosed during meeting held in April of 2018.

...scholarship income received by one student for particular scholarship programs is correlated to the number of student credits the student is enrolled in at any given time. The disclosure of scholarship income received by the individual, when associated with the individual’s name, would permit the reader to determine the number of credit hours the student is enrolled in.

...the value of some scholarships is based on the student athletes maintaining a certain grade point average. As a result, disclosure of the scholarship funding would disclose this other personal information... about the student athletes that received the

scholarships, and those that did not. It would disclose which student athletes were academically strong, and which were not.

[75] Based on the aforementioned, the U of R applied subsection 23(1)(j) of LA FOIP to scholarship amounts or total each student received contained in groupings 39, 41, 42, 43 and 45. I note that it has released to the Applicant the names of the student, the student's faculty of enrollment and the name of the scholarship awarded to the student.

[76] As part of my analysis, I need to determine if scholarships are discretionary benefits paid by the U of R. In its submission, the U of R contended that, "[s]cholarships received by individual students are generally funded by third parties... Therefore, the scholarship amounts are not within the University's discretion do not constitute a discretionary benefit received by the student athlete from the University. As such, subsection 23(2)(e) does not apply" [sic].

[77] On its website, the U of R states that it manages and offers student awards, and that awards are funded through the, "University of Regina, the Government of Saskatchewan, or through private donations". Prospective students and students apply for awards through the U of R, which then bases its decisions on certain criteria set out in the relevant scholarship application (which can also be found online on the U of R website). Nothing on the U of R's website appears to indicate that third-party donors actually make decisions regarding who receives which award, or the amount of the actual award received, and the U of R has not provided this type of information in its submission. The U of R website does link to external awards for which students may apply, but the U of R makes it clear in its disclaimer that they are "non-University of Regina awards". I am satisfied, then, that the U of R is responsible for managing, based on factors individual to the students, who receives an award through the U of R and the amount of the award. In establishing this, I now turn my attention to whether or not scholarships are *discretionary benefits*.

[78] My office's Review Reports LA-2009-001 and 082-2017 described *discretionary* to mean that a "decision maker has a choice as to whether or how to exercise a power". As the U

of R appears to be responsible for determining which students receive a scholarship and the amount, it would appear it has the discretionary power to do so.

[79] In Review Reports LA-2009-001 and 082-2017, my office defines *benefit* as follows: “compensation or an indemnity paid in money, financial assistance or services.” In Review Report 173-2018, my office furthered this definition by concluding that *benefit* means something that “connotes some advantage or betterment”. The U of R website describes scholarships as something “to help you pay for school”. Based on this, a scholarship paid by the U of R would appear to be a financial benefit paid to the recipient to provide them with an advantage or betterment – to help pay for school.

[80] The U of R has the discretion to provide or not provide a scholarship when a student applies for one, and a scholarship is a financial benefit for a student’s betterment; therefore, I find that a scholarship is a *discretionary benefit*, and that the amount of a scholarship paid by the U of R as found in groupings 39, 41, 42, 43 and 45 of the record is not personal information pursuant to subsection 23(1)(j) of LA FOIP, but subject to release pursuant to subsection 23(2)(e) of LA FOIP, which provides:

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

...

(e) details of a discretionary benefit of a financial nature granted to an individual by a local authority;

[81] In Review Report LA-2009-001, the former Commissioner stated the *details* of a discretionary benefit “are not limited to the amount paid to the third party, but include the third party’s name, the reasons for providing the benefit and any consideration given to the public body in exchange for granting the benefit”. I, therefore, recommend the U of R release the amounts of the scholarships in groupings 39, 41, 42, 43 and 45 as they appear in the record.

[82] I wish to add that the U of R has not fully supported its representations, which I outlined at paragraph [75], with respect to the application of subsection 23(1)(j) of LA FOIP. From the U of R’s website, I note that the criteria for various scholarships differ based on

combinations of factors such as GPAs and/or credit hours. If a direct correlation between the scholarship amounts and scholarship criteria can be made, it is up to the U of R to draw these correlations on a case-by-case (or in the case, scholarship-by-scholarship) basis for the numerous scholarships listed in the record in order to demonstrate how or if the exemption applies in each case.

Groupings 1A, 3A, 26 and 46 - fees paid by students

[83] In its submission, the U of R stated it applied subsection 23(1)(j) of LA FOIP to individual fees paid by students in these groupings. The U of R stated that individual fundraising fees charged to players are “specific to the team”, and that “players from different teams can pay different fundraising fees”.

[84] Upon review of the pages in these groupings of the record, it does appear that disclosing the amount of the fees paid by the students would reveal the amount of a financial transaction of a personal nature. As such, I find that subsection 23(1)(j) of LA FOIP has been properly applied to the amount of fees paid by students in groupings 1A, 3A, 26 and 46 of the records. I recommend that the U of R continue to withhold fees paid by students as it appears in these groupings of the record pursuant to subsection 28(1) of LA FOIP.

Grouping 44 - third-party donor information

[85] In its submission, the U of R redacted the names of individual donors contained in this grouping but released the amounts of the donations and the donation dates. Upon review of this information, it does appear that disclosing the names of the donors along with the amounts they have donated would reveal a financial transaction. As such, I find that subsection 23(1)(j) of LA FOIP has been properly applied to the amounts paid by donors in grouping 44 of the record. I recommend the U of R continue to withhold third party donor information as it appears in this grouping of the record pursuant to subsection 28(1) of LA FOIP.

IV FINDINGS

- [86] I am not persuaded that the U of R has conducted an adequate search and located all records that may be responsive to the Applicant's request.
- [87] I find the U of R's fee estimate was reasonable.
- [88] I find that subsection 17(1)(f) of LA FOIP has not been properly applied to the documents in groupings 22 to 26 of the records, and that subsection 18(1)(c)(ii) of LA FOIP has not been properly applied to the documents in groupings 22 to 25 of the records.
- [89] I find that subsection 16(1)(e) of LA FOIP has not been properly applied to the documents in groupings 21, 22 and 47 of the records.
- [90] I find that subsection 23(1)(d) of LA FOIP has been properly applied to student and employee numbers in groupings 1A, 3A, 23 to 26, 30 to 39 and 42 of the record.
- [91] I find that subsection 23(1)(b) of LA FOIP has been properly applied to student GPAs and credit hours in groupings 42 and 43 of the record.
- [92] I find that a scholarship is a discretionary benefit, and that the amount of a scholarship in groupings 39, 41, 42, 43 and 45 of the record is not personal information pursuant to subsection 23(1)(j) of LA FOIP, but subject to release pursuant to subsection 23(2)(e) of LA FOIP.
- [93] I find that subsection 23(1)(j) of LA FOIP has been properly applied to the amount of fees paid by students in groupings 1A, 3A, 26 and 46 of the records.
- [94] I find that subsection 23(1)(j) of LA FOIP has been properly applied to the amounts paid by donors in grouping 44 of the record.

V RECOMMENDATIONS

- [95] I recommend a further search be conducted.
- [96] I recommend the release of the donor information as it appears in groupings 1A and 3A of the records.
- [97] I recommend release of the information as it appears in groupings 22 to 26 of the records.
- [98] I recommend the release of the information as it appears in groupings 21, 22 and 47 of the records.
- [99] I recommend the U of R continue to withhold information on student and employee ID numbers as it appears in groupings 1A, 3A, 23 to 26, 30 to 39 and 42 of the records pursuant to subsection 28(1) of LA FOIP.
- [100] I recommend the U of R release the amounts of the scholarships as they appear in groupings 39, 41, 42, 43 and 45 of the records.
- [101] I recommend that the U of R continue to withhold fees paid by students as it appears in groupings 1A, 3A, 26 and 46 of the record pursuant to subsection 28(1) of LA FOIP.
- [102] I recommend the U of R continue to withhold third-party donor information as it appears in grouping 44 of the record pursuant to subsection 28(1) of LA FOIP.

Dated at Regina, in the Province of Saskatchewan, this 1st day of April, 2020.

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