



REVIEW REPORT 170-2019

Horizon School Division No. 205

October 28, 2020

Summary: The Applicant requested a review of the decision of Horizon School Division No. 205 (HSD) to withhold documents pursuant to subsections 16(1)(a) and (b), 28(1) and section 21 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), as well as its search efforts. The Commissioner found that subsections 21(a) and 28(1) of LA FOIP applied to some of the withheld documents; that 21(a), (b), (c) 16(1)(a) and (b) of LA FOIP did not apply to some of the withheld documents; and that a reasonable search was conducted. The Commissioner recommended that HSD continue to withhold some of the documents and release the remainder of the documents.

I BACKGROUND

[1] On April 17, 2019, the Applicant made the following access to information request pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) to the Horizon School Division No. 205 (HSD) for the time period of September 2018 through April 17, 2019:

All correspondence, including paper documents, email documents, text messages, and any other form of communication, received by [Name] and any other Horizon School Division No. 205 staff members relating to allegations made by individuals stating that [Name] and/or [Name] ‘have been mounting what appears to be a ‘campaign’ against the Principal of Nokomis School’ and relating information to Horizon School Division that [Name] and/or [Name] ‘have made comments with respect to not stopping until you have forced the removal of the Principal from her position’.

[2] On May 17, 2019, the HSD responded to the Applicant indicating that it would provide access to three records that were responsive to the request. In addition, nine records had

been withheld in full pursuant to subsections 16(1)(a) and (b), 28(1) and section 21 of LA FOIP.

[3] On May 27, 2019, the Applicant requested that my office review HSD’s decision to deny access to some of the records, as well as its search efforts.

[4] On, June 12, 2019, my office notified both the Applicant and HSD that it would be undertaking a review of the exemptions applied and the search efforts conducted by the HSD.

II RECORDS AT ISSUE

[5] There were twelve responsive documents. HSB withheld in full documents 1 to 9 totalling 16 pages. It released documents 10 to 12 totalling eight pages. The following is a modified version of HSD’s Index of Records:

Document #	Record	Number of pages	Exemptions applied
1	Email	1	withheld - subsections 16(1)(a) and (b) of LA FOIP
2	Email	2	withheld - subsections 16(1)(a) and (b) and section 21 of LA FOIP
3	Email	2	withheld - subsections 16(1)(a) and (b) and section 21 of LA FOIP
4	Email	1	withheld - subsections 16(1)(a) and (b) and section 21 of LA FOIP
5	Email	3	withheld - subsections 16(1)(a) and (b) and section 21 of LA FOIP
6	Email	2	withheld - subsections 16(1)(a) and (b) and section 21 of LA FOIP
7	Diarized events of actions	2	withheld - subsection 28(1) of LA FOIP
8	Statement	2	withheld - subsection 28(1) of LA FOIP
9	Statement	1	withheld - subsection 28(1) of LA FOIP

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[6] The HSD is a “local authority” pursuant to subsection 2(f)(viii) of LA FOIP. Therefore, I have jurisdiction to conduct this review.

2. Does subsection 21(a) of LA FOIP apply to the records?

[7] HSD withheld documents 2 to 6 under subsection 21(a) of LA FOIP.

[8] Subsection 21(a) of LA FOIP provides:

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

(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

[9] My office has established the following three-part test for subsection 21(a) of LA FOIP:

- i. Is the record a communication between solicitor and client?
- ii. Does the communication entail the seeking or giving of legal advice?
- iii. Did the parties intend for the communication to be treated confidentially?

[10] I will now assess each part of the test.

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

[11] The HSD has provided my office with copies of the withheld records. I appreciate the HSD providing my office with the records.

[12] Upon review of the records, page 1 of document 2, the second email on page 1 of document 3 and the first email on page 1 of document 5, are emails between HSD staff and do not

involve legal counsel or legal advice; therefore, do not meet the first or second parts of the test. As all three parts of the test must be met, there is no need to consider these portions of the record further under subsection 21(a) of LA FOIP. However, I will consider these portions under the other exemptions applied by HSD.

[13] The remainder of documents 2, 3, 4, 5 and 6 are emails between the HSD and its legal counsel, therefore, these records meet the first part of the test.

ii. Does the communication entail the seeking or giving of legal advice?

[14] The scope of solicitor-client privilege is broad. It applies to all communications made with a view of obtaining legal advice. If a communication falls somewhere within the continuum of that necessary exchange of information, the object of which is the giving or receiving of legal advice, it is protected by solicitor-client privilege.

[15] *Legal advice* means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. Documents 2, 3, 4, 5 and 6 appear to involve the seeking or giving of legal advice and therefore, meet the second part of the test. I cannot elaborate further without revealing the details of that advice.

iii. Did the parties intend for the communication to be treated confidentially?

[16] Intended confidentiality, though necessary, is not sufficient to attach protection to communications between a lawyer and the local authority – legal advice must be involved. This distinction was emphasized by the Ontario Court of Appeal in *Straka v. Humber River Regional Hospital*, (2000), 193 DLR (4th) 680 at paragraph 698, where the Court states, “[it] has long been established that confidentiality alone, no matter how earnestly desired and clearly expressed, does not make a communication privileged from disclosure.”

[17] In its submission, the HSD indicated that:

Specifically, the email correspondence involves the communication between the client (the School Division) and its legal counsel, such communication is considered confidential (see disclaimer in email correspondence of legal counsel), and such emails contain the requesting and providing of legal advice

[18] Express statements of an intention of confidentiality on records may qualify. For example, email confidentiality clauses if they are specific to the communication (i.e. wording and content).

[19] In this case, the emails contain a confidentiality clause that specifically states the information “may contain” legally privileged. In addition, the content of the information is such that confidentiality would be implied between the parties. As such, I find that the third part of the test is met and subsection 21(a) of LA FOIP applies to the remainder of documents 2, 3, 4, 5 and 6. This is consistent with a similar finding in my Review Report 129-2015 at paragraph [18].

3. Did HSD properly apply subsection 21(b) of LA FOIP to the withheld records?

[20] Subsection 21(b) of LA FOIP provides:

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

...

(b) was prepared by or for legal counsel for the local authority in relation to a matter involving the provision of advice or other services by legal counsel

[21] My office has established the following two-part test for subsection 21(b) of LA FOIP:

- i. Were the records “prepared by or for” an agent or legal counsel for a local authority?
- ii. Were the records prepared in relation to a matter involving the provision of advice or other services by the agent or legal counsel?

[22] I will now assess each part of the test for page 1 of document 2, the second email on page 1 of document 3 and the first email on page 1 of document 5.

i. Were the records “prepared by or for” an agent or legal counsel for a local authority?

[23] The record must be “prepared”, as the term is understood, in relation to the advice or services or compiled or created for the purpose of providing the advice or services.

[24] Prepared means to be made ready for use or consideration.

[25] As noted earlier in this report, the information in these pages are emails between HSD staff. As such, the records were not “prepared by or for” legal counsel. I find that the first part of the test is not met.

[26] As both parts of the test must be met, there is no need to consider subsection 21(b) of LA FOIP further. I find that subsection 21(b) of LA FOIP does not apply to page 1 of document 2, the second email on page 1 of document 3 and the first email on page 1 of document 5.

4. Did HSD properly apply subsection 21(c) of LA FOIP to the withheld records?

[27] 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.

[28] Subsection 21(c) of LA FOIP is intended to allow parties to correspond freely in relation to matters about which they need to speak in order to allow the lawyer’s advice or services to be provided.

[29] The following two-part test can be applied:

- i. Is the record a correspondence between legal counsel for the local authority and any other person?

- ii. Does the correspondence relate to a matter that involves the provision of advice or other services by the legal counsel?

[30] I will now assess each part of the test for page 1 of document 2, the second email on page 1 of document 3 and the first email on page 1 of document 5.

- i. *Is the record a correspondence between legal counsel for the local authority and any other person?*

[31] *Correspondence* means letters sent or received. It is an interchange of written communication.

[32] A memorandum or note from one employee of a local authority to another summarizing a conversation between that employee and the local authority's lawyer may meet the criteria for this provision.

[33] The phrase "and any other person" is an intentional and inclusive phrase to capture just that – any other person. The local authority must make it sufficiently clear, as to what the nature of that other person's role in the correspondence was.

[34] Page 1 of document 2, the second email on page 1 of document 3 and the first email on page 1 of document 5, include correspondence between two staff members of the HSD and mentions reviewing a document and does not include any information from legal counsel. As such, page 1 of document 2, the second email on page 1 of document 3 and the first email on page 1 of document 5, do not meet the first part of the test. As the first part of the test is not met, I find that subsection 21(c) of LA FOIP does not apply.

5. Did HSD properly apply subsection 16(1)(a) of LA FOIP to the withheld records?

[35] HSD has withheld document 1, page 1 of document 2, the second email on page 1 of document 3, and the first email on page 1 of document 5 under subsection 16(1)(a) of LA FOIP. These pages constitute emails between HSD staff members.

[36] Subsection 16(1)(a) 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:

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

[37] Subsection 16(1)(a) of LA FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose advice, proposals, recommendations, analyses or policy options developed by or for a local authority.

[38] The following two-part test can be applied:

- i. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
- ii. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for a local authority?

[39] I will now assess each part of the test.

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

[40] Advice is guidance offered by one person to another. It can include 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. Advice encompasses material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It can be an implied recommendation. The “pros and cons” of various options also qualify as advice. It should not be given a restricted meaning. Rather, it should be interpreted to include an opinion that involves exercising judgement and skill in weighing the significance of fact. It includes expert opinion on matters of fact on which a local authority must make a decision for future action.

[41] Advice includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.

[42] Advice has a broader meaning than recommendations. The legislative intention was for advice to have a distinct meaning from recommendations. Otherwise, it would be redundant. While “recommendation” is an express suggestion, “advice” is simply an implied recommendation.

[43] The HSD advised in its submission that:

In this case, advice would include the correspondence... that relates to revisions to the draft letter, and the consultation involves discussions between Administration and the principal on the contents of the draft letter.

[44] The correspondence merely mentions that there is an attachment or requests the recipient to review the attachment and therefore, does not constitute advice. Accordingly, document 1, page 1 of document 2, the second email on page 1 of document 3 and the first email on page 1 of document 5, do not meet the first part of the test. As the first part of the test has not been met, I do not need to consider the second part.

[45] I find that subsection 16(1)(a) of LA FOIP does not apply to document 1, page 1 of document 2, the second email on page 1 of document 3, and the first email on page 1 of document 5.

6. Did HSD properly apply subsection 16(1)(b) of LA FOIP to the withheld records?

[46] Subsection 16(1)(b) 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:

...

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

[47] Subsection 16(1)(b) of LA FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose consultations or deliberations involving employees of a local authority.

[48] The provision is intended to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is to allow such persons to address an issue without fear of being wrong, looking bad, or appearing foolish if their frank deliberations were to be made public.

[49] The following two-part test can be applied:

- i. Does the record contain consultations or deliberations?
- ii. Do the consultations or deliberations involve employees of a local authority?

[50] I will now assess each part of the test.

i. Does the record contain consultations or deliberations?

[51] The HSD applied subsection 16(1)(b) of LA FOIP to document 1, page 1 of document 2, the second email on page 1 of document 3, and the first email on page 1 of document 5. In its submission, the HSD advised that:

Deliberations under Section 16(1)(b) is where views of employees may be sought to determine a future action of the local authority. In this case, advice would include ... the correspondence that relates to revisions to the draft letter, and the consultation involves discussions between Administration and the principal on the contents of the draft letter.

[52] *Consultation* means:

- the action of consulting or taking counsel together: deliberation, conference;
- a conference in which the parties consult and deliberate

[53] A consultation can occur when the views of one or more employees of a local authority are sought as to the appropriateness of a particular proposal or suggested action. It can include consultations about prospective future actions and outcomes in response to a developing situation. It can also include past courses of action. For example, where an employer is considering what to do with an employee in the future, what has been done in the past can be summarized and would qualify as part of the consultation or deliberation.

[54] *Deliberation* means:

- the action of deliberating (to deliberate: to weigh in mind; to consider carefully with a view to a decision; to think over); careful consideration with a view to a decision;
- the consideration and discussions of the reasons for and against a measure by a number of councillors.

[55] A deliberation can occur when there is a discussion or consideration of the reasons for or against an action. It can refer to discussions conducted with a view towards making a decision.

[56] The correspondence on page 1 of document 2, the second email on page 1 of document 3 and the first email on page 1 of document 5 is requesting that employees review an attached record and provide feedback. Document 1 is an email indicating a draft document is attached. There is nothing further in this email.

[57] Subsection 16(1)(b) of LA FOIP does not generally apply to records or parts of records that in themselves reveal only that:

- a consultation or deliberation took place at a particular time;
- particular persons were involved; or
- a particular topic was involved.

[58] If releasing information reveals the substance of the consultations or deliberations, the local authority can withhold this information. However, it should demonstrate for my office

how and why release of this type of information would reveal the substance of the consultations or deliberations.

[59] Upon review of the records, the emails only indicate that a consultation is taking place, the email headers indicate who was involved and the subject lines indicate the topics. However, the content of the emails do not reveal the substance of any consultations. This type of correspondence does not qualify as a consultation. As such, the first part of the test is not met. As both parts of the test must be met, there is no need to consider the second part. Therefore, I find that subsection 16(1)(b) of LA FOIP does not apply to document 1, page 1 of document 2, the second email on page 1 of document 3, and the first email on page 1 of document 5. There are no further exemptions to consider for document 1, page 1 of document 2, the second email on page 1 of document 3, and the first email on page 1 of document 5, so I recommend the HSD release these records.

7. Did HSD properly apply subsection 28(1) of LA FOIP to the withheld records?

[60] 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.

[61] Further, subsection 23(1) of LA FOIP defines what qualifies as personal information and 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:

(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;

(c) information that relates to health care that has been received by the individual or to the health history of the individual;

(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;

(f) the personal opinions or views of the individual except where they are about another 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;

(i) information that was obtained on a tax return or gathered for the purpose of collecting a tax;

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual; or

(ii) the disclosure of the name itself would reveal personal information about the individual

[62] In its submission, the HSD did not identify which subsection of 23(1) of LA FOIP applied to the records, but provided:

These records contain personal information (i.e. information that is about an identifiable individual) of the [Applicant] ([Name] and [Name]) and their son ([Name]), specific teachers at Nokomis School and other third parties (including the two individuals who wrote and provided the statements).

In our opinion it is too difficult to redact the personal information of the [Applicant and Applicant's family members] in order to disclose that personal information without disclosing the personal information of the other individuals referenced in the documents (in particular, the teacher being commented on and the witnesses who made the statements that were provided to the School Division). The Public School Division is aware of Section 8 of the LAFOIP Act and the obligation to give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access. In consideration of Section 8 and the School Division's obligation to protect personal information, the School Division takes the position that

redaction of the records is not reasonably possible without disclosing personal information that is to be refused access and as such, the whole records should be refused disclosure.

- [63] The HSD applied subsection 28(1) of LA FOIP to all of the information in documents 7, 8 and 9.
- [64] Documents 7, 8 and 9 appear to be witness statements. Early decisions by Information and Privacy Commissioners have held that information relating to an investigation into, or assessment of, the employment conduct of a public body employee is the employee's personal information (Review Report 010-2018 at [17]). The circumstances of this case appear to involve the employment conduct of an HSD employee.
- [65] Past reports of this office have found that general observations and descriptions of what occurs in the workplace is not considered personal information (Review Report 010-2018 at [19]). In addition, subsection 23(2)(b) of LA FOIP provides that personal information does not include, "the personal opinions or views of an individual employed by a local authority given in the course of employment, other than personal opinions or views with respect to another individual". However, only document 7 is a statement by an employee of the HSD. Documents 8 and 9 involve individuals who are not employees of the HSD.
- [66] In *Weidlich v. Saskatchewan Power Corporation (1998)*, [1998 CanLII 14047 \(SK QB\)](#), 164 Sask. R. 204, Mr. Justice Geatros of the Saskatchewan Court of Queen's Bench found that where facts and opinions are so intertwined in a document that they cannot be intelligently separated, the documents must be disclosed *in total* or not at all (see paragraph [15] of this decision and Review Report F-2004-004 at [11]). Although that finding was in the context of information other than personal information, I find that the same approach is appropriate here.
- [67] Much of the information in documents 7, 8 and 9 is the personal information of an HSD employee. Specifically, views and opinions about the employee and information that constitutes the employment history of the employee which constitutes the employee's personal information pursuant to subsections 23(1)(b) and (h) of LA FOIP. Although,

documents 7, 8 and 9 also contain some of the Applicant's personal information, I find that it is inextricably intertwined with the personal information of identifiable individuals other than the Applicant. As such, I recommend documents 7, 8 and 9 be withheld in full pursuant to subsection 28(1) of LA FOIP.

8. Did the HSD conduct an adequate search?

[68] The focus of a search review is whether or not the local authority conducted a reasonable search. A *reasonable search* is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the request.

[69] 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 local authority to prove with absolute certainty that records do not exist.

[70] When a local authority receives a notification letter from my office requesting details of its search efforts, the following can be included in the local authority's submission (non-exhaustive):

Outline the *search strategy* conducted:

- For personal information requests – explain how the individual is involved with the government institution (i.e. client, employee, former employee etc.) and why certain departments/divisions/branches were included in the search.
- 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 organization's record schedule and screen shots of the electronic directory (folders & subfolders).
- If the record has been destroyed, provide copies of record schedules and/or destruction certificates.
- Explain how you have considered records stored off-site.
- Explain how records that may be in the possession of a third party but in the local authority's control have been searched such as a contractor or information management service provider.
- Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Explain which folders within the records management system were searched and how these folders link back to the subject matter requested. For electronic folders – indicate what key terms were used to search if applicable.
- Indicate the calendar dates each employee searched.
- Indicate how long the search took for each employee.
- Indicate what the results were for each employee's search.
- Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided. For more on this, see the IPC resource, *Using Affidavits in a Review with the IPC* available on our website.

[71] The above list is meant to be a guide. Each case will require different search strategies and details depending on the records requested.

[72] In correspondence with my office on June 3, 2019, the Applicant indicated that they were anticipating a significant amount of information.

[73] In the HSD's submission, it indicated that its search took eight hours. Details of its search were as follows:

An electronic search was performed in the following areas:

- Division Email - Gmail - Organizational units including Nokomis Staff, and Horizon Administration:
 - Email messages are separated by folders with the associated account as either sending or receiving the message.
 - Contains emails where no attachments exist, which meet the criteria above.
 - In situations where emails were sent including attachments pertaining only to the requestor, these are included.
 - In the case of [Name], and [Name] an email was exchanged including counsellor notes which included multiple children. The associated attachment that meets the request was included in this request, but not the remainder of the attachments.
- Google Drive / Office 365 - Organizational units including Nokomis Staff, and Horizon Administration:
 - None of the files identified explicitly met the criteria of the request.
 - Most files that were excluded included bus rosters, track and field results, and class lists containing the name criteria.
 - Included files are limited to school work in general as the platform is generally only used for this purpose within schools.
- Nokomis File Server - Staff home directories and school data folder:
 - Some files were identified, but none matching the criteria put forth in the request.

Parameters were applied to the search in the form of various versions of first and/or last names and initials of the individuals.

Following the initial search of all records, the scope of the search was limited in accordance with the request as follows:

- Discipline
- Complaints
- Harassment
- Bullying

[74] Given the details provided in its submission, I find that HSD has demonstrated that its search for records was reasonable and adequate for purposes of LA FOIP.

IV FINDINGS

[75] I find that subsections 21(a), (b), (c) of LA FOIP do not apply to page 1 of document 2, the second email on page 1 of document 3, and the first email on page 1 of document 5.

[76] I find that subsection 21(a) of LA FOIP applies to the remainder of documents 2, 3, 4, 5, and 6.

[77] I find that subsections 16(1)(a) and (b) of LA FOIP do not apply to document 1, page 1 of document 2, the second email on page 1 of document 3, and the first email on page 1 of document 5.

[78] I find that subsection 28(1) of LA FOIP applies to documents 7, 8 and 9.

[79] I find that HSD has demonstrated that its search for records was reasonable and adequate for the purposes of LA FOIP.

V RECOMMENDATIONS

[80] I recommend that the HSD release document 1, page 1 of document 2, the second email on page 1 of document 3, and the first email on page 1 of document 5.

[81] I recommend that the HSD withhold the remainder of documents 2, 3, 5 and all of documents 4, 6, 7, 8 and 9.

Dated at Regina, in the Province of Saskatchewan, this 28th day of October, 2020.

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