



## REVIEW REPORT 239-2016

### Kelsey Trail Regional Health Authority

January 3, 2017

#### Summary:

The Applicant requested all information pertaining to her return-to-work file and disability management from Kelsey Trail Regional Health Authority (Kelsey). Kelsey provided the Applicant access to some of the records but withheld portions of the records pursuant to subsections 16(1)(a), 16(1)(b), 21(a), 21(b), 21(c), 28(1), and 30(2) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Applicant appealed to the Office of the Information and Privacy Commissioner (IPC). The IPC recommended the release of some of the withheld portions of the records.

#### I BACKGROUND

[1] On July 18, 2016, Kelsey Trail Regional Health Authority (Kelsey) received the following access to information request:

- All information pertaining to my return to work file and disability management including written documentation, electronically stored information, and email correspondence (except those also sent to me). This should include information from all staff performing the role of Attendance and Disability Coordinator including [name], [name], [name], and [name].

This request includes, but is not exclusive of the following information:

- Communication and documentation pertaining to my medical leave
- Assessments used to establish my RTW plan
- Barriers considered to establish my RTW plan
- Correspondence, (including information provided to and received from), as well as discussions held with the vocational rehabilitation consultant, [name] from IRC/Bridges Health,
- Case notes and records
- Notes pertaining to meetings and discussions relating to my return to work.

- Correspondence with others involved including [name], other Pharmacy staff, HR staff, directors, other KTHR staff, and physicians including Dr. [name].
  - A Copy of all employee performance reviews completed during my employment (I believe there were 3).
  - All communication with HSAS (Health Science Association of Saskatchewan) involving me (related to overtime, medical leave, harassment complaint, return to work, grievances, etc.).
  - Correspondence from any staff member pertaining to concerns with my return to work, concerns with my performance, concerns with working with me, or relating to warnings or disciplinary action directed toward me. This should include information prior to my medical leave in December 2013.
- [2] In a letter dated July 29, 2016, Kelsey advised the Applicant that it would be extending the time period to respond to the access to information request pursuant to subsection 12(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).
- [3] In a letter dated August 24, 2016, Kelsey issued a fee estimate to the Applicant and requested that the Applicant pay a 50% deposit. On August 31, 2016, Kelsey received payment of the deposit.
- [4] In a letter dated September 9, 2016, Kelsey responded to the Applicant. Kelsey stated it was providing access to some of the records but withholding portions of the records pursuant to subsections 16(1)(a), 16(1)(b), 21(a), 21(b), 21(c), 28(1) and 30(2) of LA FOIP.
- [5] The Applicant was dissatisfied with this response. On September 30, 2016, she requested a review by my office.
- [6] On October 5, 2016, my office notified both Kelsey and the Applicant that it would be undertaking a review.

## II RECORDS AT ISSUE

[7] There are 704 pages of records at issue that relate to the Applicant's return-to-work and disability management. The records include emails and handwritten notes.

## III DISCUSSION OF THE ISSUES

[8] Kelsey is a "local authority" as defined by subsection 2(f)(xiii) of LA FOIP.

[9] Kelsey is a "trustee" as defined by subsection 2(t)(ii) of *The Health Information Protection Act* (HIPA).

### 1. Did Kelsey properly apply subsection 30(2) of LA FOIP?

[10] Kelsey applied subsection 30(2) of LA FOIP to portions of the records. Subsection 30(2) of LA FOIP provides:

30(2) A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by the local authority, where the information is provided explicitly or implicitly in confidence.

[11] In my office's resource *IPC Guide to Exemptions for FOIP and LA FOIP*, it provides that subsection 30(2) of LA FOIP is to address two competing interests: 1) the right of an individual to have access to his or her personal information and 2) the need to protect the flow of frank information to public bodies so that appropriate decisions can be made respecting the awarding of jobs, contracts and other benefits.

[12] In order for subsection 30(2) of LA FOIP to apply, the following three-part test must be met:

1. The information must be personal information that is evaluative or opinion material.

2. The personal information must be compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by the public body.
3. The personal information must have been provided explicitly or implicitly in confidence.

[13] Below is the analysis to determine if subsection 30(2) of LA FOIP applies to the records.

[14] First, I need to determine if the information at issue qualifies as personal information. The portions of the records that were redacted under subsection 30(2) of LA FOIP are information about the Applicant. The redacted portions include emails by Kelsey employees about the Applicant, return-to-work feedback forms filled out by Kelsey employees, and records about the Applicant's performance on her shifts in the Applicant's return-to-work program. I find that this type of information qualifies as personal information because it would be the opinions or views about the Applicant by others, or it is information about the employment history of the Applicant. Subsection 23(1)(b) and 23(1)(f) 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;

...

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

[15] Second, I need to determine if the information must be compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by the public body. In this case, it seems as though the information was compiled for the purpose of assessing the Applicant's performance in her return-to-work program. As such, this information was not compiled for employment or for the awarding of contracts or any benefit by Kelsey. Further, it would be an individual's physician, not the employer, who would determine if the individual is suitable for employment in a return-to-work scenario based on the

individual's personal health information. As such, I find that the second part of this test is not met.

[16] I find that subsection 30(2) of LA FOIP does not apply. However, based on a review of these records, I find that personal information belonging to individuals other than the Applicant may be in these records upon which Kelsey applied subsection 30(2) of LA FOIP. I will consider this matter in the next issue of this Review Report.

**2. Did Kelsey properly apply subsection 28(1) of LA FOIP?**

[17] Under subsection 30(1) of LA FOIP, individuals have a right to access their own personal information in the possession or control of a local authority subject to the exemptions in Part III of LA FOIP and subsections 30(2) and 30(3).

[18] Kelsey applied subsection 28(1) to withhold portions of the records. In order for subsection 28(1) of LA FOIP to apply, the information must 1) qualify as "personal information" as defined by subsection 23(1) of LA FOIP, and 2) the personal information must be about an individual other than the Applicant. Subsection 23(1) 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;

...

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

...

(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.

[19] If information within the records qualifies as personal information of an individual other than the Applicant, then a local authority must withhold such information under subsection 28(1) of LA FOIP.

[20] Kelsey withheld portions of the records pursuant to subsection 28(1) of LA FOIP. I must determine if these portions of the records qualify as personal information of individuals other than the Applicant. I also note at paragraph [16] I would determine if the information in the records that were withheld under subsection 30(2) of LA FOIP qualifies as personal information of individuals other than the Applicant.

[21] Based on a review of the records, I find that the information fits generally into the following three categories (A, B, C) that can be withheld under subsection 28(1) of LA FOIP:

- A. Information about another Kelsey employee who is going through the return-to-work process.
- B. Information about the Applicant's coworkers' personal concerns.
- C. Information about the Applicant's coworkers' observations in the workplace.

[22] For the first category of records, I find that such information qualifies as personal information of an individual other than the Applicant. Therefore, I find that Kelsey appropriately withheld this information under subsection 28(1) of LA FOIP.

[23] For the second category of records, I find that such information describes the Applicant's coworkers' personal concerns. An example of such information is found on pages 79 to 82. I find that such information is personal information of individuals other than the Applicant and should be withheld under subsection 28(1) of LA FOIP.

[24] For the third category of records, I find that such information is either personal information about the Applicant or is factual information that cannot be considered personal information. Examples of this type of information are on pages 232 and 253. I find that such information should not be withheld under subsection 28(1) of LA FOIP.

[25] Below is a listing of the pages in which I find that subsection 28(1) of LA FOIP applies and does not apply.

[26] Kelsey applied subsection 28(1) of LA FOIP to the following pages. Based on a review of these pages, though, I find that the information is information that is not personal in nature. Therefore, I find that subsection 28(1) of LA FOIP does not apply to pages 239, 232 to 234, 235, 238, 253, 259, 353, 354, 362, 402, 403, 455, 457, 458 comments about observations of the workplace or of the Applicant cannot be withheld under subsection 28(1) of LA FOIP on pages 479 to 482, and 575 to 577.

[27] Kelsey applied subsection 28(1) to the following pages. Based on a review of these pages, I find that information is information that is of a personal nature. Therefore, I find that subsection 28(1) of LA FOIP applies to pages: 1 to 4, 43, 79, 80, 81, 82, 89, 140 to 141, 152, 174 to 175, 192, 195, 199, 240, 358, 360, 474, and coworkers expressing their own feelings on page 479 to 482, 526, 527, 529, 530 to 531, 534, 539, 540, 541, 547 to 551, 554, 557, 559, 587, 596, 597, 624, and 680 to 681.

### **3. Did Kelsey properly apply subsection 16(1)(b) of LA FOIP?**

[28] Kelsey applied subsection 16(1)(b) of LA FOIP to portions of the records. 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;

[29] In order for subsection 16(1)(b) of LA FOIP to apply, the information must first qualify as a consultation or deliberation. A consultation occurs when the views of one or more officers or employees of the public body are sought as to the appropriateness of a particular proposal or suggested action. A deliberation is a discussion or consideration, by officers or employees of the local authority, of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

- [30] Second, the opinions solicited during a consultation or deliberation must:
1. be either sought, expected, or be part of the responsibility of the person who prepared the record; and
  2. be prepared for the purpose of doing something, such as taking an action, making a decision or a choice.
- [31] Kelsey applied subsection 16(1)(b) of LA FOIP to portions of emails, documents about the Applicant's return-to-work, and handwritten meeting notes.
- [32] Below is an analysis to determine if subsection 16(1)(b) of LA FOIP applies to the records.
- [33] Kelsey applied subsection 16(1)(b) of LA FOIP to the following pages. However, the redacted portions of these pages do not contain information that qualifies as a consultation or deliberation. In other words, my office was not able to identify any particular proposal or suggested action that was being discussed or considered in these pages. Therefore, I find that subsection 16(1)(b) of LA FOIP does not apply to: 152, 171, 172, 177, 195, 196, 198, 199, 200, 208, 211, bottom two paragraphs on page 213, 214, 238, 248, 260, 261, 300, 311, 334, 342, 354, 360, top half of page 366, 425, 456, 457, unnumbered page inserted between pages 462 and 463 (email dated March 3, 2016 (time stamped 11:55am), 478, 522, 523, 556, 557, 558, 578, e-mail body of email date January 4, 2016 on page 579, 580, 587, bottom half of 618, 630, 633, 696, and 698.
- [34] Kelsey also applied subsection 16(1)(b) of LA FOIP to the following pages. I find that subsection 16(1)(b) of LA FOIP applies to these pages as there was a particular proposal, suggested action, and/or decision being discussed and considered in these records. Further, it was a part of the responsibilities of the individuals who partook in the discussions. These pages are: 1, 2, 118, 140, 194, 216, 239, 240, 352, 363, bottom half of page 366, 368, 417, 418, 462, body of email dated December 31, 2015 (time stamped 1:45pm), 581, 582, 583, 584, 610, first paragraph of page 618, 627, 639, 690, 692, 701, and an unnumbered page – continuation of email at bottom of page 701.



**4. Did Kelsey properly apply subsection 16(1)(a) of LA FOIP?**

[35] Kelsey applied subsection 16(1)(a) of LA FOIP to portions of the records. 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;

[36] In order for subsection 16(1)(a) of LA FOIP to apply, the following three-part test must be met:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. The advice, recommendations, proposals, analyses and/or policy options must:
  - i) be either sought, expected, or be part of the responsibility of the person who prepared the record;
  - ii) be prepared for the purpose of doing something, for example, taking an action or making a decision; and
  - iii) involve or be intended for someone who can take or implement the action.
3. Was the advice, recommendations, analyses and/or policy options developed by or for the public body?

[37] Kelsey applied subsection 16(1)(a) of LA FOIP to the following pages. However, the redacted portions of these pages do not contain information that qualifies as advice, proposals, recommendations, analyses or policy options. Therefore, I find that subsection 16(1)(a) of LA FOIP does not apply to pages 463, 478, and 583.

[38] Kelsey applied subsection 16(1)(a) of LA FOIP to portions of pages 358 and 474. I find that subsection 16(1)(a) of LA FOIP applies to these portions as they contain recommendations made by Kelsey employees whose responsibilities included making such recommendations for the purpose of taking an action.

**5. Did Kelsey properly apply subsection 21(a) of LA FOIP?**

[39] Kelsey applied subsection 21(a) of LA FOIP to portions of the records. Subsection 21(a) of LA FOIP provides:

- 21 A head may refuse to give access to a record that:
- (a) contains information that is subject to solicitor-client privilege;

[40] In order for subsection 21(a) of LA FOIP to apply, a three-part test must be met:

- 1. the record must be a communication between solicitor and client,
- 2. the communication must entail the seeking or giving of legal advice or legal assistance, and
- 3. the communication must be intended to be confidential.

[41] Kelsey applied subsection 21(a) of LA FOIP to the following pages. However, the redacted portions did not contain the seeking or giving of legal advice or legal assistance. Therefore, I find that subsection 21(a) of LA FOIP does not apply to pages 529, 542, and 547.

[42] Kelsey applied subsection 21(a) of LA FOIP to pages 526, 539, 540, 579 to 581. I find that subsection 21(a) of LA FOIP applies to these portions of the record. Thus the three-part test is met.

**6. Did Kelsey properly apply subsection 21(b) of LA FOIP?**

[43] Kelsey applied subsection 21(b) of LA FOIP to portions of the records. 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;

[44] In order for subsection 21(b) of LA FOIP to apply, the following two-part test must be met:

- 1. Were the records “prepared by or for” an agent or legal counsel for a public body?

2. Were the records prepared in relation to a matter involving the provision of advice or other services by the agent or legal counsel?

[45] Kelsey applied subsection 21(b) of LA FOIP to pages 527, 528, 532 to 538, 543 to 546, and 552. I find that subsection 21(b) of LA FOIP applies to these pages since the records 1) were prepared by or for Kelsey's legal counsel, and 2) were prepared for the purpose of providing legal services by Kelsey's legal counsel. Specifically, Kelsey's legal counsel was negotiating a settlement agreement between Kelsey and the Applicant's union.

**7. Did Kelsey properly apply subsection 21(c) of LA FOIP?**

[46] Kelsey applied subsection 21(c) of LA FOIP to portions of the records. 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.

[47] In order for subsection 21(c) of LA FOIP to apply, the following two-part test must be met:

1. The record must be correspondence between the local authority's legal counsel and any other person.
2. The correspondence must be in relation to a matter involving the provision of advice or other services by legal counsel.

[48] Kelsey applied subsection 21(c) of LA FOIP to pages 547 to 549, and 555. I find that subsection 21(c) of LA FOIP applies to these pages since the records are 1) correspondence between Kelsey's legal counsel and the Applicant's union's legal counsel, and 2) the correspondence is in relation to negotiating a settlement agreement.

**8. Does HIPA apply to some of the records?**

[49] HIPA is engaged when three elements are present: 1) a trustee, 2) personal health information, and 3) the trustee has custody or control over the personal health information.

[50] First, as mentioned earlier, Kelsey is a “trustee” as defined by subsection 2(t)(ii) of HIPA.

[51] Second, “personal health information” is defined by subsection 2(m)(i) of HIPA, which provides:

2(m) “personal health information” means, with respect to an individual, whether living or deceased:

(i) information with respect to the physical or mental health of the individual;

[52] I note that subsection 23(1.1) of LA FOIP provides that “personal information” as defined by subsection 23(1) of LA FOIP does not include information that constitutes personal health information as defined in HIPA:

(1.1) On and after the coming into force of subsections 4(3) and (6) of *The Health Information Protection Act*, with respect to a local authority that is a trustee as defined in that Act, “personal information” does not include information that constitutes personal health information as defined in that Act.

[53] Therefore, any personal health information in the records would be subject to HIPA and not LA FOIP.

[54] Based on a review of the records, I find that personal health information is in some of the records. Since these records were generated by or received by Kelsey and they are a part of Kelsey’s record holdings, I find that Kelsey has custody and control of the personal health information.

[55] Since all three elements are present, I find that HIPA is engaged.

[56] I note that most of the personal health information in the records is of the Applicant’s. Such information cannot be withheld under an exemption of LA FOIP. Also, subsection

38(1) of HIPA provides circumstances in which a trustee may refuse an Applicant access to his or her personal health information. I find that none of the circumstances in subsection 38(1) of HIPA applies. Therefore, I recommend that Kelsey release the Applicant's personal health information found on pages 1, 200, 208, 311, 368, 463, 474, 478, 480, and 618.

[57] Personal health information of individuals other than the Applicant appeared on pages 196, 214, and 480. I recommend that Kelsey withhold the personal health information on these pages pursuant to subsection 27(1) of HIPA.

#### **IV FINDINGS**

[58] I find that subsection 30(2) of LA FOIP does not apply.

[59] I find that subsection 28(1) of LA FOIP does not apply to the pages listed in paragraph [26].

[60] I find that subsection 28(1) of LA FOIP applies to pages listed in paragraph [27].

[61] I find that subsection 16(1)(b) of LA FOIP does not apply to the pages listed in paragraph [33].

[62] I find that subsection 16(1)(b) of LA FOIP applies to the pages listed in paragraph [34].

[63] I find that subsection 16(1)(a) of LA FOIP does not apply to the pages listed in paragraph [37].

[64] I find that subsection 16(1)(b) of LA FOIP applies to the pages listed in paragraph [38].

[65] I find that subsection 21(a) of LA FOIP does not apply to the pages listed in paragraph [41].

[66] I find that subsection 21(a) of LA FOIP applies to the pages listed in paragraph [42].

[67] I find that subsection 21(b) of LA FOIP applies to the pages listed in paragraph [45].

[68] I find that subsection 21(c) of LA FOIP applies to the pages listed in paragraph [48].

[69] I find that subsection 27(1) of HIPA applies to the personal health information of individuals other than the Applicant which appear on the pages listed in paragraph [57].

## **V RECOMMENDATIONS**

[70] I recommend that Kelsey release the portions of the pages as described in paragraphs [26], [33], [37], [41], and [56].

Dated at Regina, in the Province of Saskatchewan, this 3rd day of January, 2017.

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