



REVIEW REPORT 258-2016

Kelsey Trail Regional Health Authority

March 30, 2017

Summary:

The Applicant requested all information pertaining to concerns about her return-to-work and all correspondence where she was mentioned from Kelsey Trail Regional Health Authority (Kelsey). Kelsey provided the Applicant with some records but withheld information citing subsections 16(1)(b), (c), 21(a), (c), 28(1) and 30(2) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Upon review, the Commissioner found that subsections 28(1) and 16(1)(c) of LA FOIP did not apply to some of the information in the record and recommended it be released. In addition, the Commissioner found that subsections 28(1), 30(2), 16(1)(b) and 21(a) of LA FOIP applied to some information and recommended that it continue to be withheld.

I BACKGROUND

[1] On June 22, 2016, Kelsey Trail Regional Health Authority (Kelsey) received an access to information request from the Applicant for:

1. Allegations by KTHR employees regarding their “concerns” about my return to work. Allegations sent to [Name] and/or [Name]...
2. I would also like copies of all other correspondence between KTHR Pharmacy Director, Pharmacy staff, HR staff, HSAS [Name], Labour Relations staff [Name], Primary Healthcare Director, Mental Health Director, Nursing staff, Nursing Supervisors, Facility Administrator where I am mentioned.

[2] Kelsey responded to the Applicant by a letter dated September 1, 2016, indicating that access to the records was partially granted. In addition, Kelsey advised that some of the information was being withheld pursuant to subsections 16(1)(b), (c), 21(a), (c), 28(1)

and 30(2) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[3] On November 8, 2016, my office received a request from the Applicant to review the exemptions applied by Kelsey.

[4] On November 15, 2016, my office notified both Kelsey and the Applicant of my office's intent to undertake a review.

II RECORDS AT ISSUE

[5] The record at issue is 55 pages consisting of emails and handwritten notes.

III DISCUSSION OF THE ISSUES

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

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

[7] When dealing with information in a record that appears to be personal information, the first step is to confirm the information indeed qualifies as personal information pursuant to subsection 23(1) of LA FOIP. Part of that consideration involves assessing if the information has both of the following:

1. Is there an identifiable individual?
2. Is the information personal in nature?

[8] Once identified as personal information, the public body needs to consider subsection 28(1) of LA FOIP which 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.

[9] Kelsey withheld information on 11 pages citing subsection 28(1) of LA FOIP. The pages are all email chains. From a review of the 11 pages, the information appears to be information about another Kelsey employee (not the Applicant). This information appears to qualify as personal information pursuant to subsections 23(1)(b) and (k)(i) of LA FOIP. Subsections 23(1)(b) and (k)(i) of LA FOIP provide:

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;

...

(k) the name of the individual where:

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

[10] As the information constitutes personal information and there is no apparent consent from the employee to release it, I find that subsection 28(1) of LA FOIP was appropriately applied by Kelsey. I recommend Kelsey continue to withhold the personal information of other individuals on pages 25, 30, 241, 256, 257, 258, 259, 267, 268 and 269.

[11] On page 260, Kelsey severed the phone number and cell phone number of a Director with the Saskatchewan College of Pharmacy Professionals. In order to qualify as personal information the information must be personal in nature. *Personal in nature* means that the information reveals something personal about the individual. Information that relates to an individual in a professional, official or business capacity does not generally qualify unless it revealed something personal about the individual for example, information that fits the definition of employment history.

[12] *Business card information* is the type of information found on a business card (name, job title, work address, work phone numbers and work email address). This type of information is generally not personal in nature and therefore would not be considered personal information.

[13] The phone numbers severed by Kelsey appear to be business card information rather than personal information. Further, the cell phone number is listed on the Saskatchewan College of Pharmacy Professionals website for this individual. Therefore, I find that the business phone numbers severed on page 260 do not qualify as personal information pursuant to subsection 23(1) of LA FOIP. As such, I find that subsection 28(1) of LA FOIP was not appropriately applied by Kelsey. I recommend that Kelsey release this information.

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

[14] Subsection 30(2) of LA FOIP is a discretionary exemption and 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.

[15] This provision attempts to address two competing interests: the right of an individual to have access to his or her personal information and 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. All three parts of the following test must be met in order for this exemption to be found to apply:

1. Is the information personal information that is evaluative or opinion material?
2. Was the personal information compiled solely for one of the following purposes:
 - for determining the individual's suitability, eligibility or qualifications for employment? or
 - for awarding of a contract with the public body? or
 - for awarding other benefits?
3. Was the personal information provided explicitly or implicitly in confidence?

[16] Kelsey applied subsection 30(2) to information on 14 pages. This includes the following pages: 35, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 234, 235 and 271.

1. Is the information personal information that is evaluative or opinion material?

[17] In order to be found to be *personal information*, the information must qualify pursuant to subsection 23(1) of LA FOIP. The information must be about an identifiable individual and must be personal in nature.

[18] Subsection 30(2) of LA FOIP also requires that the personal information be evaluative or opinion material. *Evaluative* means to have assessed, appraised, to have found or to have stated the number of. An *opinion* is a belief or assessment based on grounds short of proof; a view held as probable for example, a belief that a person would be a suitable employee, based on that person's employment history. An opinion is subjective in nature, and may or may not be based on facts.

[19] In its submission, Kelsey asserted that all of the information that has been withheld is information about the Applicant and her suitability for return-to-work. Further, Kelsey asserted that Human Resources asked employees to submit their opinions regarding the employee's return-to-work as it was well known that there were issues in the work environment.

[20] The purpose and intent of subsection 30(2) of LA FOIP is to allow individuals to provide frank feedback where there is an evaluation process occurring. From a review of similar provisions in other jurisdictions and the approach taken by our counterparts in those jurisdictions, I found that the name of the individual giving the opinion is also captured by the relevant provisions (Alberta IPC Orders F2002-008, F2002-027 and Newfoundland & Labrador IPC Report A-2014-014).

[21] From a review of the severed information on the 14 pages, I find that they contain personal information about the Applicant. Specifically, the pages contain opinions about the Applicant which are evaluative or opinion material based on the above definitions.

The opinions discuss the Applicant's character and personality as well as working relationships with the Applicant. The opinions provided are also evaluative since the individuals are commenting on the Applicant's skills and suitability for the position. Therefore, the first part of the test is met for these pages.

[22] In addition, some of the pages include personal information of the individuals who supplied the feedback. The personal information of the individuals who supplied feedback can include, but is not limited to, personal feelings and concerns the individuals have that are not about the Applicant. This information would qualify as personal information pursuant to subsection 23(1)(f) and (k)(i) of LA FOIP which provides that:

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:

...

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

...

(k) the name of the individual where:

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

[23] As this information qualifies as the personal information of the individuals who supplied the feedback, Kelsey requires the consent of each of the individuals in order to release it pursuant to subsection 28(1) of LA FOIP. No consent is apparent, therefore, I recommend Kelsey continue to withhold the personal information of these individuals on pages 35, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 234, 235 and 271.

2. Was the personal information compiled solely for one of the following purposes:

- **for determining the individual's suitability, eligibility or qualifications for employment? or**
- **for awarding of a contract with the public body? or**
- **for awarding other benefits?**

- [24] The Applicant asserted in her submission that she was placed on a medical leave due to the way she was being treated in the workplace. Upon being cleared by her physician to return to work, Kelsey would not allow her to return to her full-time permanent position stating that there were concerns. With regards to subsection 30(2) of LA FOIP, the Applicant asserted that she was simply returning to her full-time permanent position that she had held for three years. There had never been any concerns reported to her while she was still in the workplace, and these only surfaced once she was medically cleared to return to work. Further, Kelsey has since posted her position and given it to another person.
- [25] In its submission, Kelsey asserted that Human Resources requested the evaluations and opinions from the Applicant's co-workers in order to determine the Applicant's suitability for return-to-work.
- [26] Page 144 of the record indicates that the situation was a labor relations issue and not a medical accommodation. Further, page 118 of the record indicates that the Applicant's manager had "concerns brought to [his] attention regarding the reintroduction of this employee to the work force." The manager told the Applicant's co-workers to "write them down and to send them into the HR department." This suggests the feedback or opinions were not solicited by Human Resources. Further, the sole purpose of compiling the opinions appears to be to assess the Applicant's suitability for employment but not as part of the return-to-work process.
- [27] In *Fogal v. Regina School Division No. 4* (2002), a teacher was placed on an extensive performance evaluation process as a result of parental concerns brought forward to a school division. The teacher later requested access under LA FOIP to the views or opinions made about her. The school division withheld the information pursuant to subsection 30(2) of LA FOIP. Justice Hrabinsky determined that the provision was appropriately applied and that evaluating suitability for employment can take place not only during the hiring process but also during an employee's tenure. Further, the provision can include unsolicited records such as letters of concern or complaint from parents.

[28] I find the circumstances here are similar. Therefore, I find that the second part of the test is met.

3. Was the personal information provided explicitly or implicitly in confidence?

[29] In its submission, Kelsey asserted that the majority of the employees who submitted their opinions to the manager, senior leadership and Human Resources used words such as “I am concerned”, “I am uncomfortable”, “I will be scrutinized and criticized”, etc. However, Kelsey did not clarify whether the information was provided explicitly or implicitly in confidence.

[30] From a review of the pages, it appears the opinions were provided both explicitly and implicitly in confidence. *Explicitly* means that the request for confidentiality has been clearly expressed, distinctly stated or made definite. *Implicitly* means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential.

[31] From a review of the records, it appears in some instances, employees specifically asked that their opinions not be shared. For example, page 39 has such a statement included. Such statements qualify as an expressed condition of confidentiality.

[32] Page 271 suggests that all of the employees requested confidentiality from management prior to providing opinions. This suggests that the employees were providing the opinions with some expectation of confidentiality. This would qualify the opinions as having been provided implicitly in confidence.

[33] Therefore, I find that the third part of the test has been met. As all parts of the test have been met, I find that Kelsey appropriately applied subsection 30(2) of LA FOIP to the information. I recommend Kelsey continue to withhold the Applicant’s personal information on pages 35, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 234, 235 and 271.

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

[34] Subsection 16(1)(b) of LA FOIP is a discretionary exemption and 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;

[35] This provision is meant to permit local authorities to consider options without public scrutiny.

[36] 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.

[37] A *deliberation* is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

[38] In order to qualify, the opinions solicited during a “consultation” or “deliberation” must:

- i. be either sought, expected, or be part of the responsibility of the person who prepared the record; and
- ii. be prepared for the purpose of doing something, such as taking an action, making a decision or a choice.

[39] Kelsey applied subsection 16(1)(b) of LA FOIP to information on 22 pages of the record. The pages constitute email chains. In its submission, Kelsey explained the nature of the information on the pages, the names of the employees involved and their job titles.

[40] From a review of the pages, the information appears to be both consultations and deliberations as defined above. For example, page 32 is an email chain involving senior officials at Kelsey. They appear to be deliberating on whether to take a particular action or not. In my view, this fits within the definition of a deliberation. Further, it involves

individuals whose responsibility it would be to participate in the deliberation based on their identified roles. Finally, there was a decision to be made. As such, subsection 16(1)(b) of LA FOIP was appropriately applied to the information on page 32.

[41] Similar types of consultations and deliberations occur on the remaining pages. Therefore, I find that Kelsey appropriately applied subsection 16(1)(b) of LA FOIP to the information on the following pages: 31, 33, 36, 114, 118, 119, 143, 173, 174, 229, 230, 232, 248, 249, 250, 251, 256, 260, 267, 268 and 271.

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

[42] Subsection 16(1)(c) of LA FOIP is a discretionary exemption and provides:

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

...

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the local authority, or considerations that relate to those negotiations.

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

1. Does the record contain positions, plans, procedures, criteria, instructions or considerations that relate to the contractual or other negotiations?
2. Were they developed for the purpose of contractual or other negotiations?
3. Were the contractual or other negotiations being conducted by or on behalf of a public body?

[44] Kelsey applied subsection 16(1)(c) of LA FOIP to page 141. The page constitutes an email. In its submission, Kelsey asserted that the information severed constituted plans and instructions developed for the purpose of negotiations regarding the Applicant's return-to-work.

- [45] A *plan* is a formulated and especially detailed method by which a thing is to be done; a design or scheme.
- [46] *Procedures, criteria, instructions* and *considerations* are much broader in scope, covering information relating to the factors involved in developing a particular negotiating position or plan.
- [47] Upon review of page 141, the information clearly lays out a plan and includes instructions to those included in the email. In addition, the information appears to be in preparation for a meeting with the Applicant where negotiations were planned.
- [48] The federal *Access to Information Act* (ATIA) has a similar provision. In the Office of the Information Commissioner of Canada's resource titled, *Investigators Guide to Interpreting the ATIA*, subsection 21(1)(c) of ATIA states that in order to qualify for this provision the negotiations must involve the government and an outside party. This requirement is also noted in the federal Treasury Board Secretariat's resource titled, *Access to Information Manual*. This resource states that subsection 21(1)(c) of ATIA only covers negotiations with parties outside the federal government and does not apply to such activities when carried on among government institutions.
- [49] My office adopts the same approach. Subsection 16(1)(c) of LA FOIP is intended to capture negotiations involving a local authority and an outside party. In this case, the negotiation is with an employee. Therefore, I find that Kelsey did not appropriately apply subsection 16(1)(c) of LA FOIP to page 141. I recommend Kelsey release the information.

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

- [50] Subsection 21(a) of LA FOIP is a discretionary exemption and provides:

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

- (a) contains information that is subject to solicitor-client privilege;

[51] Subsection 21(a) of LA FOIP is meant to protect information that is subject to solicitor-client privilege. In *Solosky v. Canada* (1980), Justice Dickson regarded the rule of solicitor-client privilege as a “fundamental civil and legal right” that guaranteed clients a right to privacy in their communications with their lawyers. In *Descoteaux et al. v. Mierzwinski*, (1982), Justice Lamer outlined a very liberal approach to the scope of the privilege by extending it to include all communications made “within the framework of the solicitor-client relationship.” The protection is very strong, as long as the person claiming the privilege is within the framework. Subsection 21(a) of LA FOIP ensures that the local authority, as the client, has the same protection for its legal documents as persons in the private sector.

[52] In order to qualify for this exemption, the withheld information must meet all three parts of the following test established in *Solosky v. Canada*, (1980):

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Was the communication intended to be confidential?

[53] Economy applied subsection 21(a) of LA FOIP to information on 15 pages of the record. The pages are email chains.

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

[54] In its submission, Kelsey identified its legal counsel for each of the pages. Upon review of each of the pages, some of the emails are between Kelsey and its legal counsel. These pages include 136, 144, 145, 146, 147, 148, 149, 240, 241, 242, 246, 247, 248 and 251.

[55] For page 135, the email does not involve legal counsel. However, written communications between officials or employees of a public body, in which they quote or discuss the legal advice given by the public body’s solicitor, could be captured by the privilege as it is part of the continuum of legal advice. Such is the case for this

communication. The Kelsey senior officials are discussing the legal advice they received.

[56] Therefore, I find that all of the pages meet the first part of the test.

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

[57] *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.

[58] Based on the definition and from reviewing the severed information on the pages, I find that the information withheld constitutes both the seeking and giving of legal advice. Therefore, the second part of the test is met.

3. Was the communication intended to be confidential?

[59] In *Descoteaux et al. v. Mierzwinski*, (1982), Justice Lamer set out a substantive rule of confidentiality:

1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

[60] Further, the nature of the records themselves can imply confidentiality. Based on a review of the correspondence, it would appear to have been intended to be confidential

based on its content. The parties involved are talking frankly about options. Therefore, I find that the third part of the test has been met.

[61] As all parts of the test have been met, I find that Kelsey appropriately applied subsection 21(a) of LA FOIP to the information on pages 135, 136, 144, 145, 146, 147, 148, 149, 240, 241, 242, 246, 247, 248 and 251.

[62] On March 24, 2017, my office shared its preliminary findings and recommendations with Kelsey. On March 30, 2017, it responded indicating that it agreed with the findings and will comply with the recommendations.

IV FINDINGS

[63] I find that subsection 28(1) of LA FOIP was appropriately applied to some of the information and inappropriately applied to other information.

[64] I find that subsection 30(2) of LA FOIP was appropriately applied by Kelsey.

[65] I find that subsection 16(1)(b) of LA FOIP was appropriately applied by Kelsey.

[66] I find that subsection 16(1)(c) of LA FOIP was not appropriately applied by Kelsey.

[67] I find that subsection 21(a) of LA FOIP was appropriately applied by Kelsey.

V RECOMMENDATIONS

[68] I recommend that Kelsey release the information on pages 260 and 141.

[69] I recommend Kelsey continue to withhold the information on pages 25, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 114, 118, 119, 135, 136, 143, 144, 145, 146, 147, 148, 149, 173, 174, 229, 230, 232, 234, 235, 240, 241, 242, 242, 246, 247, 248, 249, 250, 251, 256, 257, 258, 259, 260, 267, 268, 269 and 271.

Dated at Regina, in the Province of Saskatchewan, this 30th day of March, 2017.

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