



REVIEW REPORT 273-2016

Saskatchewan Polytechnic

March 15, 2017

Summary:

The Applicant requested records related to his harassment complaint from Saskatchewan Polytechnic (SaskPolytech). SaskPolytech released certain records to the Applicant but withheld personal information pursuant to subsection 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). It also refused to confirm or deny that further records existed pursuant to subsection 7(4) of LA FOIP. Upon review, the Commissioner found that Saskpolytech did not appropriately apply subsection 7(4) of LA FOIP and recommended that if responsive records existed, they should be released to the Applicant. He also agreed with the decision to withhold any third party personal information.

I BACKGROUND

- [1] On August 22, 2016, Saskatchewan Polytechnic (SaskPolytech) received an access to information request from the Applicant for the complete file about his allegations of harassment made in 2014. The Applicant is an employee of SaskPolytech.
- [2] On October 14, 2016, SaskPolytech replied to the Applicant. It provided some responsive records to the Applicant, but refused to confirm or deny whether other records exist pursuant to subsection 7(4) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).
- [3] The Applicant was dissatisfied with SaskPolytech's response and, on November 17, 2016, requested a review by my office. On November 23, 2016, my office provided notification of our intention to undertake a review.

II RECORDS AT ISSUE

[4] SaskPolytech did provide the Applicant with 119 pages of records. It severed information from six of those pages pursuant to section 8 of LA FOIP. SaskPolytech indicated that the information severed qualifies as third party personal information and should be withheld pursuant to section 28(1) of LA FOIP.

[5] SaskPolytech has elected not to confirm or deny whether any additional records responsive to the Applicant's access to information requests exist pursuant to subsection 7(4) of LA FOIP.

III DISCUSSION OF THE ISSUES

[6] SaskPolytech qualifies as a local authority pursuant to subsection 2(f)(x) of LA FOIP.

1. Did SaskPolytech properly apply subsection 7(4) of LA FOIP to the records requested?

[7] Subsection 7(4) of LA FOIP provides:

7(4) Where an application is made with respect to a record that is exempt from access pursuant to this Act, the head may refuse to confirm or deny that the record exists or ever did exist.

[8] In order for subsection 7(4) of LA FOIP to be found to apply, there must be specific exemption(s) that could be relied upon to withhold the records if they existed. Given that subsection 7(4) of LA FOIP has been invoked, I will be careful and avoid confirming or denying the existence of any responsive records. Further, I will lay out the reasons for my findings in very general terms only.

[9] By invoking subsection 7(4) of LA FOIP, SaskPolytech is denying the Applicant the right to know whether a record exists. This subsection provides local authorities with a significant discretionary power that should be exercised only in rare cases. In my opinion,

this provision, and its identical provision in *The Freedom of Information and Protection of Privacy Act* (FOIP), are meant to protect highly sensitive records where confirming or denying the mere existence of a record would in itself impose significant risk. The types of risks could include risks to national security, an individual causing physical harm to others or risks to others or by revealing a law enforcement investigation is underway. Although there are exemptions to protect records that fall into these categories, this provision enables the local authority to address risks that could occur just by revealing a record exists. It is not meant to protect a local authority from a possible lawsuit, embarrassment or negative public scrutiny.

[10] SaskPolytech has indicated that if records existed, it would rely on subsections 16(1)(a), 16(1)(b), 18(1)(b) and 20 of LA FOIP. I will address each in turn.

Subsection 20 of LA FOIP

[11] Subsection 20 of LA FOIP states:

20 A head may refuse to give access to a record if the disclosure could threaten the safety or the physical or mental health of an individual.

[12] In order to determine whether a threat to the safety, physical or mental health of any person exists, the public body should apply the following test:

1. there must be a reasonable expectation of probable harm;
2. the harm must constitute damage or detriment and not mere inconvenience; and
3. must be a causal connection between disclosure and the anticipated harm.

[13] Generally, when a public body raises section 20 of LA FOIP, it must make an assessment of the risk and determine whether there are reasonable grounds for concluding there is a danger to the health or safety of any person. That assessment must be specific to the circumstances of the case under consideration. The inconvenience, upset or unpleasantness of dealing with difficult or unreasonable people is not sufficient to trigger

this section. The threshold cannot be achieved on the basis of unfounded, unsubstantiated allegations.

[14] The public body should be able to detail what the harm is and to whom the harm threatens if the information were released. For example, the mental or physical health of a person would be threatened if information were disclosed to an applicant that would cause severe stress such as suicidal ideation or that could result in verbal or physical harassment or stalking. Individual safety could be threatened if information were released that allowed someone who had threatened to kill or injure the individual to locate him or her. Examples of individuals whose safety might be threatened would include an individual fleeing from a violent spouse, a victim of harassment or a witness to harassment, or an employee who has been threatened.

[15] SaskPolytech has raised two possibilities in which the release of records, if they existed, might threaten the safety or physical or mental health of individuals. First, SaskPolytech submits the disclosure of possible records might threaten the mental health of the Applicant. Second, SaskPolytech has indicated that disclosure of the records could threaten the mental health of the Harassment Consultant and others within the SaskPolytech community who have been involved in dealing with other complaints.

[16] In support of both assertions, SaskPolytech described a pattern of behavior of the Applicant. The Applicant made a harassment complaint against his supervisor. The Harassment Consultant did an initial assessment of the complaint. She found that none of the claims made by the Applicant could be substantiated. For example, the Applicant's descriptions of events were not confirmed by witnesses and his understanding of certain situations were not shared by others. When the Harassment Consultant discussed her findings with the Applicant, he appeared to be overwhelmed and distraught that none of his assertions could be corroborated. She did not find his complaint to be a bona fide harassment complaint. Following the discussion, the Harassment Consultant and others at SaskPolytech that were involved with the complaint were unable to reach the Applicant for some time. SaskPolytech contacted a crises services team which checked on the Applicant and found him in good health.

- [17] SaskPolytech has indicated that since the Applicant learned about the Harassment Consultant findings, he has taken or has indicated he will take his complaints to other bodies, such as to the OH&S committee, and Labour Relations Board. When he does take his complaints farther, they are the same complaints but reframed. He has also made two complaints against the Harassment Consultant to the Saskatchewan College of Psychologists.
- [18] I will first assess SaskPolytech's assertion that the release of records, if they existed, would threaten the mental health of the Applicant. I recognize that SaskPoyltech and the Harassment Consultant are genuinely concerned about the Applicant's mental wellbeing. SaskPolytech's submission indicated that the Applicant has taken leave at various points in time. Also, the Applicant has expressed to SaskPoytech that he feels exhausted and the complaint took an emotional toll on him.
- [19] SaskPolytech has not explained what the effects of releasing responsive records, if they existed, would have on the Complainant's mental health. Further, I note that the Applicant has been told the results of the Harassment Consultant's initial assessment of the Complaint. If records do exist, I would assume that they would reflect those results. Therefore I do not see a causal connection between potential disclosure and anticipated harm. I am not persuaded that releasing responsive records, if they exist, to the Applicant would threaten the mental health of the Applicant.
- [20] Next, SaskPolytech has indicated that by continuing to pursue his complaints, the Applicant is demonstrating retaliatory behavior that might become harassing to the Harassment Consultant and others involved with his complaint. I note that the Applicant is pursuing his complaints through appropriate lawful channels available to him. The second part of the test for section 20 of LA FOIP requires that the harm constitute damage or detriment and not mere inconvenience. The channels used by the Applicant to pursue his complaint follow due process and I am not persuaded that they constitute damage or detriment. Further, the Applicant appears to be pursuing these complaints without receiving records that may or may not exist. Therefore, I am not persuaded that there is a causal connection between disclosure and the anticipated harm.

[21] I am not persuaded that section 20 of LA FOIP would apply to responsive records, if they exist.

Subsection 16(1)(a) of LA FOIP

[22] 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;

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

[23] The request made to SaskPolytech was for the complete file about his allegations of harassment made in 2014. While I am not confirming or denying the existence of any further responsive records, for the sake of this analysis, the types of records that would typically be found on such a file might include investigation notes, documents collected as evidence, reports of findings and communications between those involved.

[24] 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?

[25] SaskPolytech provided my office with its harassment policy. It describes the roles and responsibilities of various individuals with respect to harassment. In particular, it describes the role of the Harassment Consultant. Some of the relevant sections are as follows:

2.4.2 Specifically the responsibilities of the harassment consultant include:

a) Providing confidential advice and assistance respecting this policy and procedures to complainants, respondents, senior managers and supervisory personnel, employees, students, and other members of the Saskatchewan Polytechnic community

...

d) Providing initial screening of harassment complaints and utilizing informal resolution procedures where appropriate.

...

f) For bona fide harassment complaints, providing procedural assistance to complainants in the preparation of written complaints to the associate vice-president requesting the implementation of formal resolution procedures.

[26] While it is the role of the Harassment Consultant to provide advice regarding SaskPolytech's policy and procedure, this person also provides screening of harassment complaints. This is what occurred with the harassment complaint of the Applicant.

[27] My office has established that advice includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice has a broader meaning than recommendations. Recommendations relate to a suggested course of action as well as the rationale for a suggested course of action. Recommendations are generally more explicit and pointed than advice. Proposals, analyses and policy options are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

[28] When the Harassment Consultant conducts an "initial screening of harassment complaints", he or she must reach a conclusion and communicate that to management of

SaskPolytech. That conclusion would be a finding. The Harassment Consultant might also include advice or recommendations on how to proceed based on her conclusion.

[29] Additionally, it must be clear that any records containing the advice or recommendations meet the other parts of the test. More specifically, the record must have been prepared for the purpose of making a decision or taking an action. The record also must have been intended for someone who can take or implement the action.

[30] From all of the material presented to me by SaskPolytech, I am not persuaded that subsection 16(1)(a) of LA FOIP would apply to responsive records, if they exist.

Subsection 16(1)(b) of LA FOIP

[31] 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;

[32] 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.

[33] 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.

[34] In its submission, SaskPolytech suggested that, in general, the Harassment Consultant must be able to undertake “confidential consultations” with individuals involved in the harassment complaint in order to perform initial screening of harassment complaints under SaskPolytech’s harassment policy.

[35] The consultations in which SaskPolytech is describing appear to be fact finding interviews related to the harassment complaint. This is different than consultations contemplated by subsection 16(1)(b) of LA FOIP, as described above, where views are sought as to the appropriateness of a particular proposal or suggested action. As such, I am not persuaded that subsection 16(1)(b) of LA FOIP would apply to responsive records, if they exist.

Subsection 18(1)(b) of LA FOIP

[36] Subsection 18(1)(b) 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:

...

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to the local authority by a third party;

[37] The test that must be met is as follows:

1. Is the information financial, commercial, scientific, technical or labour relations information?
2. Was the information supplied by the third party to a public body?
3. Was the information supplied in confidence implicitly or explicitly?
4. Does the third party consent to release of the information?

[38] SaskPolytech indicated that the Applicant’s union was the Third Party in this instance. In support of this exemption, SaskPolytech indicated that information involved in the harassment complaint qualified as labour relations.

[39] Labour relations information is defined in my office's resource *IPC Guide to Exemptions*. Information regarding a harassment complaint of an employee would qualify as labour relations information. The purpose of this exemption is to protect labour relations information of a third party. Information with respect to the Complainant's allegations of harassment would be labour relations information specific to SaskPolytech, not the Third Party.

[40] With respect to the fourth part of the test, if the public body determines that the information qualifies for exemption under subsection 18(1)(b) of LA FOIP and it intends to withhold it, it should ask the third party if it consents to the release of the information pursuant to subsection 18(2) of LA FOIP. Consent should be in writing. On February 16, 2017, the Third Party indicated that it had no concerns with releasing any information involving its role in the Applicant's harassment complaint to the Applicant. It also indicated that it had communicated this to SaskPolytech in writing.

[41] I am not persuaded that subsection 18(1)(b) of LA FOIP would apply to responsive records, if they exist.

[42] As subsections 16(1)(a), (b), 18(1)(b) and section 20 of LA FOIP have been found not to apply, I find that there is no reasonable basis for SaskPolytech to invoke subsection 7(4) of LA FOIP in this circumstance.

2. Does subsection 28(1) of LA FOIP apply to the record?

[43] SaskPolytech applied subsection 28(1) of LA FOIP to portions of six pages of the record that was provided to the Applicant. The information that was severed was handwritten dates of employment. They appeared next to the names of individuals who held the position that was the subject of the record.

[44] 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.

[45] 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;

[46] SaskPolytech submitted that the dates of employment qualified as personal information pursuant to subsection 23(1)(b) of LA FOIP because it qualifies as employment history.

[47] My office defined employment history as the type of information normally found in a personnel file such as performance reviews, evaluations, disciplinary actions taken, reasons for leaving a job or leave transactions. It does not include work product.

[48] I agree that the dates of employment qualify as personal information of identifiable individuals other than the Applicant and that SaskPolytech should continue to withhold them from the Applicant pursuant to subsection 28(1) of LA FOIP.

IV FINDINGS

[49] I find that subsections 16(1)(a), (b), 18(1)(b) and section 20 of LA FOIP would not apply in these circumstances if the records exist.

[50] I find that there is no reasonable basis for SaskPolytech to invoke subsection 7(4) of LA FOIP.

[51] I find that the information severed from the records received by the Applicant qualifies as personal information pursuant to subsection 23(1)(b) of LA FOIP.

V RECOMMENDATIONS

[52] If records exist, I recommend that SaskPolytech release them to the Applicant.

[53] I recommend that SaskPolytech continue to withhold personal information other than that of the Applicant pursuant to subsection 28(1) of LA FOIP.

Dated at Regina, in the Province of Saskatchewan, this 15th day of March, 2017.

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