



REVIEW REPORT 298-2017

University of Saskatchewan

June 5, 2018

Summary:

The Applicant requested an audio recording from the University of Saskatchewan (U of S) related to a symposium titled, *Research Management and the Right to Know* held at the U of S on December 2, 2015. The U of S responded providing partial access to records. The U of S withheld information citing subsections 16(1)(a), (b) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Upon review, the Commissioner found that subsections 16(1)(a) and (b) were not appropriately applied by the U of S. Further, the Commissioner found that the U of S did not appropriately apply subsection 28(1) of LA FOIP to some portions of the records but appropriately applied it to others. The Commissioner recommended some information continue to be withheld while the remaining be released.

I BACKGROUND

[1] On August 23, 2017, the University of Saskatchewan (U of S) received the following access to information request from the Applicant:

Audio recording of proceeding, “Symposium: Research Management and the Right to Know,” 2 Dec 2015.

[2] The U of S issued a fee estimate to the Applicant by way of letter dated September 1, 2017. The Applicant paid the required 50% deposit to proceed with the request on September 22, 2017. Following this, the U of S sent a letter to the Applicant dated October 16, 2017, extending the time for a response an additional 30 days. In a letter dated November 14, 2017, the U of S responded to the Applicant indicating that access to the records was

partially granted. In addition, it advised that some of the information was being withheld pursuant to section 16 and subsection 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[3] On November 22, 2017, my office received a Request for Review from the Applicant in which he disagreed with the U of S' application of the above provisions.

[4] On November 22, 2017, my office notified the U of S and the Applicant of my office's intent to undertake a review and invited all parties to provide submissions.

[5] On January 5, 2018, the U of S provided my office with its submission and a copy of the records at issue.

II RECORDS AT ISSUE

[6] The responsive record is a transcript totalling 42 pages. The U of S severed information on 40 pages citing subsections 16(1)(a), (b) and 28(1) of LA FOIP.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[7] The U of S is a "local authority" pursuant to subsection 2(f)(xi) of LA FOIP. Thus, I have jurisdiction to conduct this review.

2. Did the U of S properly apply subsection 28(1) of LA FOIP?

[8] When dealing with information in a record that appears to be personal information, the first step is to confirm that 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 the following two elements:

1. An identifiable individual; and
2. Information that is personal in nature.

[9] 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.

[10] In its submission, the U of S explained that on December 2, 2015, a professor with the Johnson-Shoyama Graduate School of Public Policy at the U of S hosted an event. The event was a symposium titled, *Research Management and the Right to Know*. The event was not open to the public and attendees were by invitation only. Invited were leaders, researchers, research and communications professionals from the U of S and the public and private sector. The U of S provided my office with a list of the 19 participants at the event which included the professor. The event was recorded for the professor's use and a transcript of the recording was made in order to respond to the access request. It is the transcript that forms the responsive record in this review. The U of S also advised that the meeting was recorded and premised on the Chatham House Rule.

[11] The U of S withheld information on 33 pages of the 42-page transcript citing subsection 28(1) of LA FOIP. The U of S severed the names, positions and affiliations of non-university employees. In its submission, the U of S asserted that redacting positions and affiliations was necessary in order to prevent identification of the individuals. The U of S further asserted that the information qualified as employment history and the personal opinions or views of the individuals. However, the U of S advised, the names and positions of the university employees in attendance had been disclosed.

[12] Subsections 23(1)(b), (f) 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;

...

(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;

[13] From a review of the pages, it appears the U of S has severed the names of non-university employees who participated in the event along with the names of the companies they represented. Based on the transcript, the individuals introduced themselves by name and indicated their positions and the companies they worked for. Based on the list of the 19 participants provided by the U of S, all of the individuals are connected to a professional association or private business. In other words, it appears they were acting in their professional capacity at this event.

[14] *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 could only qualify if the information revealed something personal about the individual for example, information that fits the definition of employment history.

[15] *Employment history* is 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.

[16] *Work product* is information generated by or otherwise associated with an individual in the normal course of performing his or her professional or employment responsibilities, whether in a public or private setting. This is not considered personal information.

[17] In Review Report LA-2012-002, the former Commissioner found that an individual's position, function or responsibilities pertained more to a job description of an individual than personal information.

- [18] Further, *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.
- [19] Therefore, the names, positions and affiliations of the individuals do not qualify as personal information as the individuals were functioning in their professional capacities. Such information is considered business card information. In addition, any opinions given by the individuals in the course of their work do not constitute personal information as they are not personal in nature but rather constitute work product.
- [20] I find the U of S did not appropriately apply subsection 28(1) of LA FOIP to the information on pages 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 25, 28, 31, 32, 33, 34, 37 and portions of pages 7 and 8. There are no further exemptions to consider on pages 2 and 3 of the transcript; therefore, I recommend the U of S release this information. For the other pages, the U of S also applied subsections 16(1)(a) and (b) to the information so I will consider those exemptions.
- [21] However, some of the information in the transcript would constitute personal information. For example, participant P19 speaks about the impact something has had on him personally on pages 7 and 8 of the transcript. Some of this information also constitutes employment history as defined by subsection 23(1)(b) of LA FOIP. Therefore, I find that the U of S appropriately applied subsection 28(1) of LA FOIP to pages 9, 26, 27, 29, 36 and portions of pages 7 and 8.
- [22] As the information on these pages constitutes personal information and there is no apparent consent from the individuals to release it, I find that subsection 28(1) of LA FOIP was appropriately applied by the U of S. I recommend the U of S continue to withhold the personal information on pages 9, 26, 27, 29 and 36. In addition, I recommend it withhold the portions of pages 7 and 8 as noted above.

3. Did the U of S properly apply subsection 16(1)(a) of LA FOIP?

[23] Subsection 16(1)(a) of LA FOIP is a discretionary exemption and provides as follows:

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;

[24] This exemption is meant to allow for candor during the policy-making process, rather than providing for non-disclosure of all forms of advice. All three parts of the following test must be met in order for subsection 16(1)(a) of LA FOIP to be found to apply:

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 part of the responsibility of the person who prepared the record; and
 - 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] The U of S applied subsection 16(1)(a) of LA FOIP to 38 pages. In its submission, the U of S asserted that the event was held to discuss an important issue facing the U of S, its researchers, the public sector and industry partners. Further, it was intended to elicit strategies for the university and others with respect to designing more effective contracts and partnerships, managing information flow and dealing with controversy.

[26] The Applicant asserted that it was hard to rationalize how the U of S could claim that it had no official involvement in organizing the symposium, yet it claims that the information withheld is advice, proposals, recommendations, analyses or policy options developed by

or for the U of S. In support of this argument, the Applicant provided a copy of a letter the U of S sent the Applicant dated August 14, 2017. In that letter, the U of S stated in part that:

...

- There was no application or approval for the event; it was an investigator-led initiative. As such there are no records.

- There was no approved budget and no such record.

...

[27] The information withheld must qualify as advice, proposals, recommendations, analyses or policy options developed by or for the local authority. The U of S did not explain how the information qualified as one of these or how the information qualified as having been developed by the U of S or for the U of S. The information in the transcript appears to be speaking in terms of strategies for the broader scientific, corporate and scholarly communities.

[28] Local authorities should not assume that it is self-evident on the face of the record that a test is met. Section 51 of LA FOIP provides:

51 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[29] Therefore, I am not persuaded that subsection 16(1)(a) of LA FOIP has been appropriately applied to the 38 pages. This includes pages 4 to 41.

[30] This finding was provided to the U of S in my office's preliminary analysis. The U of S responded by referring to a recent decision by the Court of Queen's Bench of Saskatchewan. The U of S referred to *Britto v. University of Saskatchewan, 2018*. The U of S asserted that in that decision, Danyiuk, J. suggested subsection 16(1)(a) of LA FOIP was broader than my office's three-part test allowed for. Further, that Danyiuk, J. stated that although my office's definition of "advice" included the analysis of a situation or issue that may require action and the presentation of options for future action, this may sometimes be the case and sometimes may not.

[31] My office respects the decision of Danyliuk, J. and will consider its impacts on the approach taken by my office. However, it is not clear how the U of S has tied that decision to the circumstances in this case. The U of S has suggested the information constitutes strategies. The strategies appear to be for the broader scientific, corporate and scholarly communities. As stated in the initial submission from the U of S, it was "...to gather professionals and academics in research, communications and the biotech industry to discuss how to better manage their relationships and communicate research with the public."

[32] The phrase "by or for the local authority" found in subsection 16(1)(a) requires that the information be developed by an official, officer or employee of the local authority, be contracted to perform services, be specifically engaged in an advisory role or otherwise have a sufficient connection to the local authority.

[33] The U of S did not meet the burden of proof in demonstrating that the information qualifies as advice, proposals, recommendations, analyses or policy options developed by or for the U of S. Further, this case involves quite a different set of circumstances than the one before Danyliuk J. Therefore, I remain unconvinced that subsection 16(1)(a) of LA FOIP applies.

[34] The U of S also applied subsection 16(1)(b) of LA FOIP to the same information on these pages. Therefore, I will also consider that provision.

4. Did the U of S properly apply subsection 16(1)(b) of LA FOIP?

[35] 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;

- [36] This provision is meant to permit public bodies to consider options and act without constant public scrutiny.
- [37] 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.
- [38] 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.
- [39] 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.
- [40] The U of S applied subsection 16(1)(b) of LA FOIP to 38 pages. In its submission, the U of S asserted that the meeting involved a number of officers and employees of the U of S. The meeting was intended to solicit opinions and views from all participants with respect to relationships and communications strategies, and debate the merits thereof with a view to action. The U of S asserted that the meeting was a consultation and deliberation.
- [41] Based on the U of S submission and on the content of the transcript, I am not convinced that there is a consultation or deliberation going on as these terms have been defined. It is not clear what the particular proposal or suggested action is. I do not see reasons for or against a particular action and it is not clear what decision needs to be made.
- [42] Local authorities should not assume that it is self-evident on the face of the record that a test is met. Section 51 of LA FOIP requires the local authority to demonstrate that an exemption applies. This includes explaining how each part of the section or subsection applies.

[43] Therefore, I am not persuaded that subsection 16(1)(b) of LA FOIP has been appropriately applied to the 38 pages. This includes pages 4 to 41.

[44] Again, this finding was provided to the U of S in my office's preliminary analysis. The U of S responded by referring to *Britto v. University of Saskatchewan, 2018*. The U of S asserted that in that decision, Danyliuk, J. suggested my office's interpretation of subsection 16(1)(b) of LA FOIP was unduly restrictive. The U of S did not explain further how that decision applies to the circumstances of this case. Upon review of that decision, Danyliuk J. makes the determination that my office's interpretation is unduly restrictive based on the definitions suggesting that actions and outcomes can only be prospective ones – not past actions or outcomes. The reason for my finding in this case was not based on there being past actions or outcomes but rather what appears to be a lack of actual consultation and deliberation occurring on the face of the record. The U of S did not meet the burden of proof in demonstrating that the exemption applied as required by section 51 of LA FOIP. Therefore, I remain unconvinced that subsection 16(1)(b) of LA FOIP applies.

[45] As subsections 28(1), 16(1)(a) or (b) of LA FOIP have been found not to apply, I recommend the U of S release the information on pages 4 to 41. This does not include the information that has been found to constitute personal information as noted above.

IV FINDINGS

[46] I find that subsection 28(1) of LA FOIP was not appropriately applied to the information on pages 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 25, 28, 31, 32, 33, 34, 37 and portions of pages 7 and 8.

[47] I find that subsection 28(1) of LA FOIP was appropriately applied to the information on pages 9, 26, 27, 29, 36 and portions of pages 7 and 8.

[48] I find that subsection 16(1)(a) of LA FOIP was not appropriately applied to the information on pages 4 to 41.

[49] I find that subsection 16(1)(b) of LA FOIP was not appropriately applied to the information on pages 4 to 41.

V RECOMMENDATIONS

[50] I recommend that the U of S continue to withhold the personal information on pages 9, 26, 27, 29 and 36. In addition, it should withhold the portions of pages 7 and 8 as noted in this report.

[51] I recommend that the U of S release the remaining information on pages 4 to 41.

Dated at Regina, in the Province of Saskatchewan, this 5th day of June, 2018.

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