Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 298-2019

Saskatoon Board of Police Commissioners

October 27, 2020

Summary: The Saskatoon Police Service (SPS) transferred a portion of an access to information request to the Saskatoon Board of Police Commissioners (the Board). The Board responded to the access request by neither confirming nor denying the existence of records pursuant to subsection 7(4) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Board indicated to the Applicant that it was relying on section 21 of LA FOIP to withhold other records from the Applicant. The Commissioner found that the Board cannot rely on subsection 7(4) of LA FOIP. The Commissioner found that subsection 21(a) of LA FOIP, on a *prima facie* case, would apply to certain records, if they exist, but not all of the records. The Commissioner found that the Board did not demonstrate pursuant to subsection 51 of LA FOIP that subsections 21(b) and 21(c) applies to certain records. The Commissioner recommended that the Board adopt a more realistic approach when engaged in a review with his office. Further, he recommended that the Board withhold documents 2, 4, 5, 6, and 7, but that the Board release documents 1 and 3.

I BACKGROUND

[1] On July 29, 2014, the Applicant filed a Statement of Claim against five Saskatoon Police Service (SPS) members. On April 29, 2019, a trial with a jury was held before the Honourable Mr. Justice R.S. Smith. On or about May 3, 2019, the Applicant's claim was dismissed with costs against the Applicant. On September 4, 2019, the Applicant filed a Notice of Appeal. On September 20, 2019, the Applicant served an application to extend the time to serve a notice of appeal. The Honourable Madam Justice Jackson dismissed the application in their reserved decision dated January 8, 2020.

[2] On July 9, 2019, SPS transferred a portion of an access to information request to the Saskatoon Board of Police Commissioners (the Board), pursuant to subsection 11(2)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The portion of the access request that was transferred is highlighted and bolded below:

> **The entire accounting report and receipts showing the money paid by the city of Saskatoon and the SPS to Scharfstein, Gibbings, Walen, Fisher, LLP., for the civil defense of 5 SPS members against [name of plaintiff]. Those members are- [sic] [names of five SPS members].**
>
> All the **accounting**, court notes, reports, **bills, receipts** or any messages directly, or indirectly, from the offices of Scharfstein, Gibbings, Walen, Fisher, LLP., related to the defense of [name of five SPS members] versus the plaintiff, [name of the plaintiff].
>
> [Emphasis in original]

[3] In a letter dated July 30, 2019, the Board advised the Applicant that it required additional time to process the access request given the large number of records to be searched and the consultations necessary. Therefore, pursuant to section 12 of LA FOIP, the Board said it would respond to the access request by August 30, 2019.

[4] In a letter to the Applicant dated August 27, 2019, the Board said the following:

> Notwithstanding that only a portion of the request was forwarded to Saskatoon Board of Police Commissioners, we will respond to the whole of the request. This will constitute written notice by Saskatoon Board of Police Commissioners, pursuant to section 7(2) of *The Local Authority Freedom of Information and Protection of Privacy Act*.
>
> Saskatoon Board of Police Commissioners is not, and was not, party to the civil action between you, [name of Applicant], and members [names of five SPS members] (the "Members") (the "Action"). However, Saskatoon Board of Police Commissioners shared and shares a common interest with the Members with respect to the Action. Pursuant to section 21 of *The Local Authority Freedom of Information and Protection of Privacy Act*, Saskatoon Board of Police Commissioners asserts common interest privilege over all records:
>
> 1. Which are records of the Members, or any of them, which may have been disclosed to Saskatoon Board of Police Commissioners which are or were related to the defence of the Members in the Action;

2. Are an accounting report or receipt showing money paid by the City of Saskatoon to Scharfstein Gibbings Walen Fisher LLP for the civil defence of the Members in the Action;
3. Are accounting, bills or receipts related to the defense of the Action;
4. Are Court notes related to the defence of the Members in the Action;
5. Are reports related to the defence of the Members in the Action; or
6. Are messages directly, or indirectly, from the offices of Scharfstein Gibbings Walen Fisher LLP related to the defence of the Members in the Action.

Pursuant to section 7(4) of *The Local Authority Freedom of Information and Protection of Privacy Act*, Saskatoon Board of Police Commissioners neither confirms nor denies the existence of any such records.

For clarity, Saskatoon Board of Police Commissioners asserts common interest privilege over any of its records pertaining to any and all of the request.

Further, and in addition, the law firm Scharfstein Gibbings Walen Fisher LLP is and was counsel for Saskatoon Board of Police Commissioners with respect to defence of the Members in the Action. Pursuant to section 21 of *The Local Authority Freedom of Information and Protection of Privacy Act*, Saskatoon Board of Police Commissioners asserts solicitor-client privilege over any records in its possession pertaining to:

1. Accounting reports and receipts showing money paid by the City of Saskatoon or the Saskatoon Police Service to Scharfstein Gibbings Walen Fisher LLP for the defence of the Members in the Action;
2. Accounting, bills or receipts related to the defense of the Members in the Action;
3. Court notes related to the defence of the Members in the Action;
4. Reports related to the defence of the Members in the Action; or
5. Messages directly, or indirectly, from the offices of Scharfstein Gibbings Walen Fisher LLP related to the defence of the Members in the Action.

[5] On September 6, 2019, the Applicant requested a review by my office.

[6] Since the Board did not specify which subsection of section 21 of LA FOIP it was relying on, my office sought clarification from the Board's counsel. On September 13, 2019, the Board's counsel clarified it was relying on subsections 21(a), (b), and (c) of LA FOIP.

[7] On September 13, 2019, my office notified both the Board and the Applicant it was undertaking a review.

Relationship between the Board and the City of Saskatoon

[8] In its submission, the Board indicated that any invoices, if they exist, rendered by the Scharfstein Gibbings Walen Fisher LLP (the Firm) are remitted to the Board, care of the City Clerk's Office at the City of Saskatoon (the City). Any payment would be made by the City directly to the Firm.

[9] Subsection 27(1) of *The Police Act, 1990* provides that a municipality shall establish, by bylaw, a board of police commissioners. The City has established *The Saskatoon Board of Police Commissioners Bylaw, 1996* (Bylaw No. 7531). Pursuant to section 2, the purpose of this bylaw is to establish a board of police commissioners for the City and provides for the appointment of its members as required by *The Police Act, 1990*.

[10] Pursuant to section 33 of *The Police Act, 1990*, the Board must adhere to a budget set by the City council. Otherwise, the Board operates independently from the City. However, it appears that the Board relies on the City for services, including making payments for the Board.

[11] On July 16, 2020, my office contacted the Board's lawyer to see if the Board could provide my office with any agreement the Board has in place with the City that outlines services the City provides on behalf of the Board. The Board indicated there was no formal agreement respecting the relationship between the Board and the City.

II RECORDS AT ISSUE

[12] Based on its letter dated August 27, 2019 to the Applicant, the Board is neither confirming nor denying the existence of the following records pursuant to subsection 7(4) of LA FOIP:

1. …records of the Members, or any of them, which may have been disclosed to Saskatoon Board of Police Commissioners which are or were related to the defence of the Members in the Action;
2. …an accounting report or receipt showing money paid by the City of Saskatoon to Scharfstein Gibbings Walen Fisher LLP for the civil defence of the Members in the Action;

3. … accounting, bills or receipts related to the defense of the Action;
4. … Court notes related to the defence of the Members in the Action;
5. … reports related to the defence of the Members in the Action; or
6. … messages directly, or indirectly, from the offices of Scharfstein Gibbings Walen Fisher LLP related to the defence of the Members in the Action.

[13] If any of the above records existed, the Board asserted that subsections 21(a), 21(b), and 21(c) of LA FOIP would apply.

[14] Further, based on its letter dated August 27, 2019 to the Applicant, the Board said it is refusing access to the following records pursuant to section 21 of LA FOIP:

1. Accounting reports and receipts showing money paid by the City of Saskatoon or the Saskatoon Police Service to Scharfstein Gibbings Walen Fisher LLP for the defence of the Members in the Action;
2. Accounting, bills or receipts related to the defense of the Members in the Action;
3. Court notes related to the defence of the Members in the Action;
4. Reports related to the defence of the Members in the Action; or
5. Messages directly, or indirectly, from the offices of Scharfstein Gibbings Walen Fisher LLP related to the defence of the Members in the Action.

[15] Part 9 of my office's *Rules of Procedure* sets out a procedure when the head of a local authority claims solicitor-client privilege or litigation privilege. When claiming subsection 21(a) of LA FOIP, local authorities have three options when preparing records for review with my office. The three options are:

i. Provide the records to my office with a cover letter stating the local authority is not waiving the privilege;
ii. Provide the records to my office with the portions severed where privilege is claimed;
iii. Provide my office with an affidavit with a schedule of records (see Part 9 and Form B of my office's *Rules of Procedure*).

[16] In this case, the Board went with the third option and provided my office with an affidavit and schedule of records. Since the Board is neither confirming nor denying the existence of some records but also confirming the existence of other types of records, I must be careful in describing the contents of the affidavit and schedule of records so as not to confirm nor deny the existence of certain records. I will indicate that there are seven

records listed in the schedule of records. Without providing a description of any of the records, I will provide my findings and recommendations in Parts IV and V of this Report.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[17] Subsection 2(f)(v) of LA FOIP defines "local authority":

> **2** In this Act:
> ...
> (f) **"local authority"** means:
> ...
> (v) any board, commission or other body that:
>
> (A) is appointed pursuant to *The Cities Act*, *The Municipalities Act* or *The Northern Municipalities Act, 2010*; and
>
> (B) is prescribed;

[18] Subsection 3(1) of *The Local Authority Freedom of Information and Protection of Privacy Regulations* (LA FOIP Regulations) provides as follows:

> **3**(1) For the purposes of subclause 2(f)(v) of the Act, the bodies set out in Part I of the Appendix are prescribed as local authorities.

[19] Part I of the Appendix of the LA FOIP Regulations provides as follows:

> 1. A board, commission or other body established pursuant to *The Cities Act*

[20] Subsection 8(1) of *The Cities Act* provides as follows:

> **8**(1) A city has a general power to pass any bylaws for city purposes that it considers expedient in relation to the following matters respecting the city:
>
> (a) the peace, order and good government of the city;
>
> (b) the safety, health and welfare of people and the protection of people and property;

[21] In the background section of this Report, I referenced *The Saskatoon Board of Police Commissioners Bylaw, 1996* (Bylaw No. 7531). Pursuant to section 2, the purpose of this bylaw is to establish a board of police commissioners for the City and the bylaw provides for the appointment of its members as required by *The Police Act, 1990*.

[22] As such, I find that the Board qualifies as a "local authority" pursuant to subsection 2(f)(v) of LA FOIP. Therefore, I have jurisdiction to conduct this review.

2. Can the Board rely on subsection 7(4) of LA FOIP?

[23] Subsection 7(2)(f) of LA FOIP provides:

> **7**(2) The head shall give written notice to the applicant within 30 days after the application is made:
>
> ...
>
> (f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4);

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

> **7**(4) If an application is made with respect to a record that is exempt from access pursuant to section 14, 20 or 21 or subsection 28(1), the head may refuse to confirm or deny that the record exists or ever did exist.

[25] By invoking subsection 7(4) of LA FOIP, the Board denied the Applicant the right to know whether a record (or records) exist. This subsection provides local authorities with a significant discretionary power that should be exercised in only rare cases. In my opinion, this provision is 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, or an individual causing risk or physical harm to others 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 (or records) exists. It is not meant to protect a local authority from a possible lawsuit, embarrassment or negative public scrutiny.

[26] 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.

[27] In order for a local authority to be able to show it properly refused to confirm or deny the existence of a record pursuant to subsection 7(4) of LA FOIP, the local authority must be able to:

1. Explain how disclosing the existence of records (if they existed) could reasonably compromise what it is protecting; and
2. Demonstrate that the records (if they existed) would qualify for exemption under the particular exemption it is citing.

[28] In its submission to my office, the Board asserted that solicitor-client privilege not only applied to the words communicated, but also to:

1. The fact of a communication;
2. The date of a communication;
3. The identify [sic] of the communicants;
4. The physical location of the communication, where applicable;
5. In the case of electronic mail, the "header", including but not limited to the time, date, sender, recipient, and subject line; and
6. The length of the communication.

[29] On September 2, 2020, my office contacted the Board to see if the Board would reconsider its reliance on subsection 7(4) of LA FOIP.

[30] In a letter dated September 3, 2020 to my office, the Board re-stated that it intended to rely on subsection 7(4) of LA FOIP.

[31] It is against common sense to neither confirm nor deny the existence of records when there has been court action, a jury trial, and an attempt at an appeal. When there has been a jury

trial and the Board is obligated to indemnify members pursuant to section 32 of *The Police Act, 1990*, common sense would dictate that records, such as invoices, would exist. It is bizarre for the Board to assert that it must neither confirm nor deny the existence of records in order to protect the privilege it is claiming.

[32] My office's request that the Board reconsider its reliance on subsection 7(4) of LA FOIP was based on common sense. I recommend that the Board adopt a more realistic approach when engaged in a review with my office.

[33] Based on the above, I find that the confirmation or denial of the existence of records would not reasonably compromise the privilege the Board is claiming. I find that the Board cannot rely on subsection 7(4) of LA FOIP. I recommend that the Board contact the Applicant and advise them if records exist or not. If records exist, then the Board should release the records to the Applicant. The Board should apply the limited and specific exemptions, based on my findings below, to the records (if they exist), pursuant to section 8 of LA FOIP.

3. Did the Board properly apply subsection 21(a) of LA FOIP?

[34] In its submission, the Board asserted that litigation privilege, solicitor-client privilege, and common interest privilege applied to records (if they existed).

a. Litigation privilege

[35] When determining if litigation privilege applies to records, my office has established the following two-part test:

1. Has the record or information been prepared for the dominant purpose of litigation?

2. Is the litigation ongoing or anticipated?

[36] When the Board responded to the Applicant's access request on August 27, 2019, litigation was ongoing or anticipated. As such, litigation privilege would have applied to records or information that had been prepared for the dominant purpose of litigation.

[37] However, the Applicant's appeal of the Honourable Mr. Justice R.S. Smith's order, issued on May 3, 2019, is not going forward. I am unaware of any litigation that is ongoing or anticipated. The Board has not informed me of any ongoing or anticipated litigation. Therefore, I find that litigation privilege no longer would apply to records or information that had been prepared for the dominant purpose of litigation (if they existed). This could include any records communicating matters related to the civil action or appeal sent by and received by the Board by others including the SPS, the members, and/or the Firm.

b. Solicitor-client privilege

[38] To determine if subsection 21(a) of LA FOIP applies, my office has established the following three-part test.

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Did the parties intend for the communication to be treated confidentially?

[39] My office's *Guide to FOIP, Chapter 4* (updated February 4, 2020) (Guide to FOIP) at page 247, noted that the scope of solicitor-client privilege is broad. The Guide to FOIP cited Justice Lamer in *Descôteaux et al. v. Mierzwinski*, [1982] 1 SCR 860, 1982 CanLII 22 (SCC) (*Descôteaux et al. v. Mierzwinski*) as taking a liberal approach to the scope of solicitor-client privilege. In *Descôteaux et al. v. Mierzwinski*, Justice Lamer provided that:

> [all] information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, to the lawyer as well as to his employees.

[40] However, at page 247, my office's Guide to FOIP cited *Solosky v. The Queen,* [1980] 1 SCR 821, 1979 CanLII9 (SCC) (*Solosky v The Queen*). Justice Dickson noted that

solicitor-client privilege can only be claimed document by document and that each document must meet the three-part test.

[41] Further, at pages 250, 251, and 253, the Guide to FOIP cited court decisions that provide that not all communications between solicitor and client are privileged. For example, in *R v. Campbell*, [1999] 1 SCR 565, it provided that government lawyers may provide policy advice that draws on departmental know-how instead of their legal training or expertise. As such, information would not be subject to solicitor-client privilege. Further, in *Canada (Information Commissioner) v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 877 (CanlII) at [17] provided that:

> [not] all communications between a lawyer and his or her client are privileged. For example, provision of purely business advice by in-house counsel or purely social interactions between counsel and their clients will not constitute privileged communications.

[42] Finally, in *Stevens v. Canada (Prime Minister)*, 1998 CanLII 9075 (FCA) (*Stevens v. Canada (Prime Minister)*), the Federal Court of Appeal provided two exceptions to solicitor-client privilege. The first exception is where the communications themselves are criminal or counsels a criminal act. The second exception is where information that is evidence of an act done by counsel or is a mere statement of fact:

> The history of solicitor-client privilege is one of a tension between the public interest in maintaining free communication between lawyers and clients and the public interest in the disclosure of relevant evidence before the court. The underlying justification in either case is the fair and proper administration of justice. This doctrine, which dates back to the 16th century, has evolved over the years. Nowadays any communication between a lawyer and a client in the course of obtaining, formulating or giving legal advice is privileged and may not be disclosed without the client's consent. Canadian law has sought to strike an appropriate balance between openness and secrecy by creating two exceptions to the privilege. The first exception is for communications which are themselves criminal or which counsel a criminal act. The second exception relates to information which is not a communication but is rather evidence of an act done by counsel or is a mere statement of fact.

[43] In its submission dated October 31, 2019, the Board explained that the members were represented by the Firm for the civil action and in relation to the Appeal. The Board

explained that it does not have and is not entitled to possession or control of any record of the members in relation to the members' representation by the Firm in the civil action.

[44] Earlier, I referenced the Board's obligation pursuant to section 32 of *The Police Act, 1990* to indemnify members. Section 32 of *The Police Act, 1990* provides:

> **32** Where a claim for damages is made, or a civil action is instituted against a member as the result of an act committed while acting in the scope of employment as a member, the employer of the member shall:
>
> (a) retain and pay for the services of a legal counsel to act on behalf of that member; and
>
> (b) pay any sum required in connection with a judgment or settlement of a claim for damages and costs awarded against the member.

[45] In its submission, the Board explained that if records existed, the Firm would have directed its invoices or statement of account for the members to the Board. It explained that the Board caused the statement of account of members to be paid by the City of Saskatoon. In Review Report 052-2013 and Review Report 280-2016 and 281-2016, I found that invoices issued by law firms to clients were subject to solicitor-client privilege. In those two reports, I cited *Maranda v. Richer*, [2003] 3 S.C.R 193, 2003 SCC67 where the Supreme Court of Canada (SCC) asserted there is a presumption of privilege for lawyers' bills of account as a whole in order to ensure that solicitor-client privilege is honoured. In *Maranda v. Richer*, the SCC indicated that issues relating to the calculation and payment of fees constitute an important element of the solicitor-client relationship for both parties. As such, solicitor-client privilege applies to communications related to the calculation and payment of fees. However, I note that this presumption of privilege can be rebutted if an applicant can provide persuasive argument that the disclosure of information (namely the fees detailed in the invoice) will not result in the applicant learning of information that is subject to solicitor-client privilege. I have not received arguments from the Applicant that persuades me that disclosure of information in invoices would not result in the applicant learning of information that is subject to solicitor-client privilege. As I have noted in my Review Report 003-2017, applicants are at a serious disadvantage when having to make arguments for why privilege does not apply to information they cannot see in their efforts to rebut the

presumption. The Applicant, in this case, is at a further disadvantage because the Board is neither confirming nor denying the existence of records pursuant to subsection 7(4) of LA FOIP.

[46] I find that the Board has made a *prima facie* case that solicitor-client privilege would apply to the invoices or statement of account by the Firm to the members (if they existed). To be clear, in this case the solicitor would be the Firm and the client would be the members. The Board is not privy to such a relationship. Therefore, I must determine if the solicitor-client privilege is waived if the invoices or statement of account is disclosed to the Board or if common interest privilege applies to the invoices or statement of account (if they existed).

c. Common interest privilege

[47] At page 246, the Guide to FOIP provided that "common interest privilege" is a privilege that exists when records are provided among parties where several parties have a common interest in anticipated litigation. In its Order 97-009, Alberta's Office of the Information and Privacy Commissioner (AB IPC) first determined that litigation privilege applied to certain records. Then, it determined common interest privilege between the parties that preserved the litigation privilege. AB IPC's Order 97-009 said:

> [126.] Furthermore, the third parties say there was a "common interest" privilege between them, such that in providing the documents to each other, the third parties did not waive privilege as against other parties or the world at large. This privilege is discussed by John Sopinka, Sidney N. Lederman and Alan W. Bryant in The Law of Evidence in Canada (Markham, Ontario: Butterworths Canada Ltd., 1992), at pp. 669-670. As to "common interest privilege", at pp. 483-484, the authors quote Lord Denning in *Buttes Gas and Oil Co. v. Hammar (No. 3)*, [1980] 3 All E.R. 475 (C.A.), varied on other grounds[1981] 3 All E. R. 616 (H.L.):
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> > That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the selfsame interest as he and who have consulted lawyers on the selfsame points as he but who have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsels' opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious

> anticipation because it affects each as much as it does the others....In all such cases I think the courts should, for the purposes of discovery, treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.
>
> [127.] Although I have already found that the third parties did not intend to waive litigation privilege, I also agree that there is a "common interest privilege" that applies to the third parties, such that the third parties did not waive the privilege as against other parties or the world at large. In this case, the third parties have a common interest in the contemplated litigation between the Public Body and the third parties, and in the actual litigation between the Applicant's clients and the third parties. While there is waiver as between the third parties, and as between the third parties and the Public Body, there is no waiver as between the third parties and other parties or the world at large.

[48] Therefore, based on Order 97-009, AB IPC's approach to determining if common interest privilege applies is: 1) establishing that privilege applies to records, and 2) determining if there is a common interest between parties such that the litigation privilege would not be waived when privileged documents are shared between the parties.

[49] Further, I look to Ontario for guidance in determining when common interest privilege applies. Section 19 of Ontario's *Freedom of Information and Protection of Privacy Act* (ON FOIP) provides as follows:

> **19** A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[50] In Order PO-3154, the Ontario Information and Privacy Commission (ON IPC) described how section 19 of ON FOIP contains two branches:

> [118] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.
> ...
> [124] Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

[51] Then, also in Order PO-3154 the ON IPC describes how loss of privilege can occur under each branch of section 19 of ON FOIP as follows:

> [129] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.
>
> [130] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege:
>
> - knows of the existence of the privilege, and
> - voluntarily evinces an intention to waive the privilege
>
> [131] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.
>
> [132] Waiver has been found to apply where, for example:
>
> - the record is disclosed to another outside party
> - the communication is made to an opposing party in litigation
> - the document records a communication made in open court

[52] However, if there is "a common interest" between the parties who share information, then the privilege is preserved (or not waived). In Order PO-3154, the ON IPC has set out a two-part test to determine if there is a common interest exception to resist waiver of privilege as follows:

> [179] Considering the above authorities in my opinion, the determination of the existence of a common interest to resist waiver of a solicitor-client privilege under Branch 1, including the sharing of a legal opinion, requires the following conditions:

> (a) the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under section 19 (a) of the Act, and
>
> (b) the parties who share that information must have a "common interest", but not necessarily identical interest.
>
> …
>
> [181] Parties may have a common interest even if they do not have identical interests. The possibility that parties might at some future point in time become adverse in interest is insufficient in denying a common interest at present.

[53] Based on the above Orders by both the AB IPC and ON IPC, I establish the following two-part test to determine the existence of a common interest to resist waiver of any privilege that is available at law under subsection 21(a) of LA FOIP:

1) The record contains information that is subject to any privilege that is available at law, and

2) The parties who share that information must have a "common interest", but not necessarily an identical interest, in the information.

[54] For the first part of the test, I already found that litigation privilege would not apply to records, if they existed. However, I found that solicitor-client privilege would apply to the Firms' account or accounts for members and communications related to the calculation and payment of fees, if they existed.

[55] For the second part of the test, if the records existed the Firm would direct the account or accounts to the Board. I must determine if a "common interest" exists between the members and the Board. If so, then common interest privilege applies to these records, if they existed.

[56] In its submission, the Board explained that section 32 of *The Police Act, 1990*, obligates the Board to retain and pay for the services of legal counsel to act on behalf of an SPS member, as well as pay any sum required in connection with a judgement or settlement of a claim for damages and costs awarded against the member. Considering the Board's responsibility pursuant to section 32 of *The Police Act, 1990*, I find that the Board and the

SPS members share a common interest in the Firms' account or accounts for the members and communications related to the calculation and payment of fees, if they existed. In other words, I find that common interest privilege applies to such records, if they existed. Also, I find that the sharing of these records does not waive the solicitor-client privilege that applies to these records, if they existed.

4. Does subsection 21(a) of LA FOIP apply to records between the Board and the Firm, where the Board is the client?

[57] As outlined in the background of this Report, the Board's letter to the Applicant dated August 27, 2019, it indicated that the Firm is and was counsel for the Board. Below, I will consider if litigation privilege, solicitor-client privilege or common-interest privilege would apply to records where the solicitor is the firm and the client is the Board.

a. Litigation privilege

[58] Earlier, I provided the two-part test my office uses to determine if litigation privilege applies. I am reproducing it here for ease of reference:

1. Has the record or information been prepared for the dominant purpose of litigation?

2. Is the litigation ongoing or anticipated?

[59] The Board has indicated that it is not a party to the civil action. As such, I find that records between the Firm and the Board, where the Board is the client, would not have been prepared for the dominant purpose of litigation. Therefore, I find that litigation privilege would not apply to these records.

b. Solicitor-client privilege

[60] Earlier, I outlined the three-part test that my office uses to determine if records are subject to solicitor-client privilege pursuant to subsection 21(a) of LA FOIP. For ease of reference, I am reproducing it here:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Did the parties intend for the communication to be treated confidentially?

[61] In its letter to the Applicant dated August 27, 2019, the Board stated that the Firm is and was the Board's counsel with respect to defense of the members in the action. In its submission, the Board asserted that solicitor-client privilege applies to all correspondence between the Firm and any commissioner, employee or agent of the Board where the correspondence is for the purpose of the Board obtaining legal services or advice from the Firm. Based on the test in the preceding paragraph, solicitor-client privilege would only apply to records between a solicitor and client that entails the seeking or giving of legal advice. As such, where there is no seeking or giving of legal advice, subsection 21(a) of LA FOIP would not apply. This would include giving summaries of what has occurred (such as the service of documents, the filing of defense, scheduling meetings, etc.). I find that subsection 21(a) of LA FOIP would not apply to such records.

[62] Based on analysis earlier in this Report, records related to the calculation and payment of fees, including invoices, statement of account, and payment records, would be subject to solicitor-client privilege. Therefore, records related to the calculation and payment of fees where the Firm is the solicitor and the Board is the client, is subject to solicitor-client privilege. I find that the Board has made a *prima facie* case that solicitor-client privilege would apply to such records.

[63] In its submission, the Board indicated that if invoices rendered by the Firm existed they would be remitted to the Board, care of the City Clerk's Office at the City of Saskatoon (the City). Payment for the accounts for the Board are made by the City directly to the Firm. As such, I need to determine if solicitor-client privilege would be waived if invoices

and payment records are sent to or from the City or if common interest privilege applies to such records.

c. Common interest privilege

[64] Without a formal agreement between the City and the Board, it is difficult for me to find there is a common interest between the two. However, in the background, I noted that the Board is established by the City pursuant to subsection 27(1) of *The Police Act, 1990*. Further, pursuant to section 33 of *The Police Act, 1990*, the Board must adhere to a budget set by City council. Therefore, it is reasonable that the City provides services such as paying invoices on behalf of the Board. As such, I find there is a common interest between the City and the Board with regards to records related to the calculation and payment of fees, such as invoices, statement of account, and payment records. In other words, I find that common interest privilege applies to these records.

5. Did the Board properly apply subsections 21(b) and 21(c) of LA FOIP?

[65] As noted in the background section, the Board's counsel informed my office on September 13, 2019, that it was relying on subsection 21(a), 21(b), and 21(c) of LA FOIP to withhold records, if they existed. I have already analyzed subsection 21(a) of LA FOIP above. Therefore, I will consider subsections 21(b) and 21(c) of LA FOIP.

[66] The Board's submission did not contain arguments as to how subsections 21(b) and 21(c) of LA FOIP applies to records, if they existed. Subsection 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.

[67] When my office does not receive arguments for an exemption that has been claimed by a local authority, it will review the records themselves to determine if it can be determined on the face of the records that the exemption applies. In this case, my office did not receive a copy of the records because the Board had only provided my office with an affidavit and

schedule of records. It should be noted that the procedure set out in Part 9 of my office's *Rules of Procedure* is only for records to which subsection 21(a) of LA FOIP is applied by a local authority.

[68] I find that the Board has not demonstrated that subsections 21(b) and 21(c) of LA FOIP applies to the records, if they existed.

IV FINDINGS

[69] I find that the Board qualifies as a "local authority" pursuant to subsection 2(f)(v) of LA FOIP. Therefore, I have jurisdiction to conduct this review.

[70] I find that the confirmation or denial of the existence of records would not reasonably compromise the privilege the Board is claiming.

[71] I find that the Board cannot rely on subsection 7(4) of LA FOIP.

[72] I find that litigation privilege no longer would apply to records or information that had been prepared for the dominant purpose of litigation, if they existed. This could include any records communicating matters related to the civil action or appeal sent by and received by the Board by others including the SPS, the members, and/or the Firm.

[73] I find that the Board has made a *prima facie* case that solicitor-client privilege would apply to the invoices or statement of account by the Firm to the members (if they existed).

[74] I find that the Board and the SPS members share a common interest in the Firms' account or accounts for the members and communications related to the calculation and payment of fees, if they existed. Also, I find that the sharing of such records does not waive the solicitor-client privilege that applies to these records, if they existed.

[75] I find that records between the Firm and the Board, where the Board is the client, would not have been prepared for the dominant purpose of litigation.

[76] I find that subsection 21(a) of LA FOIP would not apply to records where the communication between the Firm and the Board is about giving summaries of what has occurred (such as the service of documents, the filing of defence, scheduling meetings, etc.).

[77] I find that the Board has made a prima facie case that solicitor-client privilege applies to records related to the calculation and payment of fees where the Firm is the solicitor and the Board is the client. Therefore, I find that litigation privilege would not apply to these records.

[78] I find there is a common interest between the City and the Board with regards to records related to the calculation and payment of fees, such as invoices, statement of account, and payment records.

[79] I find that the Board has not demonstrated that subsections 21(b) and 21(c) of LA FOIP applies.

V RECOMMENDATIONS

[80] I recommend that the Board adopt a more realistic approach when engaged in a review with my office, especially as it relates to the reliance on subsection 7(4) of LA FOIP.

[81] I recommend that the Board contact the Applicant and advise them if records exist or not. If records exist, then the Board should release the records to the Applicant. The Board should apply the limited and specific exemptions, based on my findings above, to the records (if they exist), pursuant to section 8 of LA FOIP.

[82] I recommend that the Board withhold documents 2, 4, 5, 6, and 7.

[83] I recommend that the Board release to the Applicant documents 1 and 3.

Dated at Regina, in the Province of Saskatchewan, this 27th day of October, 2020.

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