Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 299-2019

Saskatoon Police Service

October 27, 2020

Summary: The Applicant submitted an access to information request to the Saskatoon Police Service (SPS). The SPS transferred a portion of the access request to the Saskatoon Board of Police Commissioners, but responded to the remainder of the access request. The SPS denied the Applicant access to records by citing subsection 21(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) as its reason. It also indicated to the Applicant that some of the records were non-responsive to the access request. The Commissioner found that subsection 21(a) of LA FOIP applied to some of the records but not all. The Commissioner also found that the records that the SPS deemed as non-responsive to the access request were actually responsive to the access request. The Commissioner recommended that the SPS release some of the records to the Applicant.

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 3, 2019, (SPS) received the following access to information request:

> 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].
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> 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 [names of five SPS members] versus the plaintiff, [name of the plaintiff].

[3] In a letter dated July 8, 2019, the SPS advised the Applicant that it would be transferring a portion of the access 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 SPS bolded and underlined the portion of the access request it was transferring to the Board, as shown 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 [names of five SPS members].
>
> [Emphasis in original]

[4] In a letter dated July 31, 2019, the SPS informed the Applicant that it was extending the 30 day time period in section 7 by an additional 30 days pursuant to subsection 12(1)(a)(ii) of LA FOIP.

[5] In a letter dated September 5, 2019, the SPS responded to the Applicant. It said that, for the portion that it did not transfer to the Board, it was withholding the records due to common interest privilege and public interest immunity pursuant to subsection 21(a) of LA FOIP. It said:

> In response to the remainder of your request, access to the records is denied pursuant to section 7(2)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* (the Act). The reason for refusal of these records is because release would disclose information that is subject to legal privilege, specifically common interest privilege and public interest immunity as per section 21 (a) of the Act, …

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

[7] On September 13, 2019, my office notified both the SPS and the Applicant that it was undertaking a review. The issues in the review were set out as SPS's application of subsection 21(a) of LA FOIP and records deemed as "non-responsive".

[8] In a letter dated November 8, 2019, the SPS advised the Applicant that it was no longer relying on public interest immunity as a legal privilege to withhold the information, but it was instead relying on litigation privilege and solicitor-client privilege. SPS also said some information was being withheld as the information was non-responsive to the access request. It said the following:

> This letter is to advise you that the SPS is no longer relying on public interest immunity as a legal privilege to withhold the information, but instead is relying on litigation privilege and solicitor-client privilege, and asserting that these privileges have not been waived given the common interest privilege that exists between the Scharfstein Gibbings, Walen, Fisher LLP. [sic] the SPS and the members.
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> Additionally, some information has been withheld as it was deemed to be outside the scope of your request, and therefore was withheld as being non-responsive.

II RECORDS AT ISSUE

[9] At issue are 47 records, totaling 124 pages. The records consist of emails and telephone notes of communications from Scharfstein Gibbings Walen Fisher LLP (the Firm) to the SPS.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[10] The SPS qualifies as a "local authority" as defined by subsection 2(f)(viii.1) of LA FOIP. As such, I have jurisdiction to conduct this review.

2. Did the SPS properly apply subsection 21(a) of LA FOIP?

[11] The SPS applied subsection 21(a) of LA FOIP to 47 records, totaling 124 pages, citing solicitor-client privilege and litigation privilege as the reasons for withholding these records. Subsection 21(a) of LA FOIP provides as follows:

> **21** A head may refuse to give access to a record that:
>
> (a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

[12] 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 by 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; or
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*).

[13] In this case, the SPS went with the third option. It provided my office with an affidavit signed by its Access and Privacy Officer on November 8, 2019. The affidavit includes a schedule that provides a description of the 47 records (totaling 124 pages). The majority of the records are emails from either a lawyer or a legal assistant at the Firm to a lawyer or legal assistant at the SPS. Other types of records are telephone notes of telephone conversations between a lawyer at the Firm and a lawyer or legal assistant at the SPS.

a. Solicitor-client privilege

[14] When determining if solicitor-client privilege applies to records, 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. Was the communication intended to be confidential?

[15] Below is an analysis of each part of the three-part test:

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

[16] At first glance of the affidavit of records and the attached schedule, the responsive records do not appear to be communications between the Firm and the SPS members. They appear to be communications between the Firm and SPS Legal Services Division. As such, I must consider the principle of agency raised by the SPS in its submission. In *Pioneer Grain Co. Ltd. V. Freeman*, 1997 CanLII 11272 (SK QB), the Saskatchewan Court of Queen's Bench described the principle of agency as follows:

> The principle of agency was stated by Culliton, C.J.S. in *Seven Oaks Manufacturing and Sales (1968) Ltd. v. Vaughan*, [1977] 4 W.W.R. 119, at p. 121 as follows:
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> > The law is that, where a person has, by words or conduct, held out to another person or enabled another person to hold himself out as having authority to act on his behalf, he is bound as regards third parties by the acts of such other person to the same extent as he would have been bound if such person had, in fact, had the authority which he was held out as having.

[17] Also, as raised by SPS in its submission, the dissenting in part opinion in *General Accident Assurance co. v. Chrusz* 1999 CanlII 7320 (ON CA), Justice Doherty indicated there are two established principles: 1) that not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by solicitor-client privilege, and 2) where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as those communications meet the criteria for the existence of the privilege. Justice Doherty provided examples to illustrate both principles. For the first principle, Justice Doherty cited *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675, 50 L.J. Ch. 793, 44 L.T. 632, 45 J.P. 728, 30 W.R. 235 (C.A.) (*Wheeler v. Le Marchant*) where a third party assisted the solicitor in formulating legal advice for a client. It was found that solicitor-client privilege did not protect the communications between the solicitor and the third party:

> *Wheeler v. Le Marchant*, supra, illustrates the first principle that communications to or by a third party are not protected by client-solicitor privilege merely because they assist the solicitor in formulating legal advice for a client. In that case, the client retained a solicitor for advice concerning a certain piece of property. The solicitor in turn retained a surveyor to give him information concerning that property. In subsequent litigation involving a claim for specific performance, the client contended that the information passed from the surveyor to the lawyer was protected by client- solicitor privilege. No litigation was contemplated at the time the surveyor provided the information to the solicitor. The client's claim succeeded initially, but on appeal it was unanimously held that the communications between the surveyor and the solicitor were not protected by client-solicitor privilege.

[18] As already quoted earlier in this Report, Justice Doherty provided an example from *Susan Hosiery Ltd. V. M.N.R.*, [1969] 2 Ex. C.R. 27 at p. 34, 69 D.T.C. 5278 (Susan Hosiery Ltd. v. M.N.R) to illustrate the second principle that shows when solicitor-client privilege extends to a third party. In *Susan Hosiery Ltd v. M.N.R*, the client instructed their financial advisors to speak with the solicitor. The financial advisors were intimately familiar with the client's business and were able to convey information about the business affairs to the solicitor. Justice Doherty provided that the financial advisors served as translators, "assembling the necessary information from the client and putting the client's affairs in terms which could be understood by the solicitor. In addition, they served as a conduit of advice from the lawyer to the client and as a conduit of instructions from the client to the lawyer."

[19] When I consider the examples provided by Justice Doherty, the relationship between the SPS members and the SPS Legal Services Division would resemble the example from *Susan Hosiery Ltd. v. M.N.R* more so than the example from *Wheeler v. Le Marchant*. In other words, the SPS Legal Services Division appears to be serving as a channel of communication between the SPS members and the Firm. Based on a review of the affidavit of records and the attached schedule, it is apparent that the SPS members have authorized the SPS Legal Services Division to act on their behalf in communications with their solicitor, the Firm. As such, in this case, I find that the records are communications between solicitor and client. Therefore, the first part of the test is met.

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

[20] Based on the descriptions of the emails in the affidavit of records and the attached schedule, I am satisfied that some of the records, including the records regarding the assembling of information or records, would entail the seeking or giving of legal advice. However, other records, including records about the scheduling of mediation, would not necessarily entail the seeking or giving of legal advice. Based on the description of the records, I find that the second part of the test is met for the following records: 2, 10, 13, 14, 15, 16, 17, 19, 20, 22, 23, 24, 25, 26, 28, 35, 37, 41, 42, 43, 44, and 46. For these records, I will determine if the third part of the test is met. For the remainder of the records not listed here, I will determine if litigation privilege applies to them later in this Report.

3. Was the communication intended to be confidential?

[21] Based on the affidavit of records, I am satisfied that the communications were intended to be confidential. As such, the third part of the test is met for the records listed at paragraph [20].

[22] I find that the SPS has made a *prima facie* case that solicitor-client privilege applies to the records listed at paragraph [20]. I recommend that the SPS continue to withhold these records pursuant to subsection 21(a) of LA FOIP.

b. Litigation Privilege

[23] 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?

[24] When the SPS responded to the Applicant's access request on September 5, 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.

[25] 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 at this time. SPS 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. I recommend that SPS release records 1, 3, 4, 5, 6, 7, 8, 9, 11, 12, 18, 21, 27, 29, 30, 31, 32, 33, 34, 36, 38, 39, 40, 45, and 47.

c. Common interest privilege

[26] In its submission, SPS offered arguments for how common interest exists between the SPS, the Firm, and the Board. I can accept that common interest privilege could potentially apply to records. However, based on a review of the affidavit and the attached schedule of records, I cannot determine upon which records the SPS is claiming common interest privilege. Without knowing which records the SPS is claiming common interest privilege, I find the SPS has not met the burden of proof pursuant to section 51 of LA FOIP in relation to its claim of common interest privilege.

3. Are there records that are non-responsive to the Applicant's access request?

[27] "Responsive" means relevant. The term describes anything that is reasonably related to the access request. It follows that any information or records that do not reasonably relate to an Applicant's access request would be considered non- responsive.

[28] In its submission, the SPS asserted that material containing correspondence from the SPS to the Firm or between SPS employees about the legal matters concerning the Applicant and SPS members is non-responsive to the access request. The reason it took this position is because of the wording of the second part of the Applicant's access request. The Applicant sought records "from" the Firm. The access request said:

> 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 [names of five SPS members] versus the plaintiff, [name of the plaintiff].

[29] To support its position, the SPS cited Order P-880 by the ON IPC and Order F2009-025 by the Alberta Information and Privacy Commissioner (AB IPC). In its submission, the SPS said:

> 7. In Order P-880, the Information and Privacy Commissioner of Ontario had the following to say about "responsiveness":
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> > In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.
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> 8. Further, in Order F2009-025, the Alberta Information and Privacy Commissioner provided that:
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> > The "non-responsiveness" of information in records is not an exception to the right of access created by section 6 of the FOIP Act. Rather, I understand the Commissioner to mean that there is no duty for a Public Body to grant access to information under section 6 if an applicant has not first made a request for access to that information. A Public Body is not required to provide a response in relation to all information in its custody or under its control to an Applicant; only information that reasonably relates to the access request. Essentially, a Public Body's duties to an applicant in relation to responding to an access request are not engaged until an applicant asks for the information.

[30] In previous review reports, my office has said that a local authority may treat portions of a record as not responsive if they are clearly separate and distinct and entirely unrelated to the access request. However, the local authority should sparingly claim portions of records as non-responsive and only when necessary. Also, in my blog "What About the Non-Responsive Record?" (available at www.oipc.sk.ca/category/blog), I said that an applicant can submit a subsequent access request for the portions of a record that have been redacted

as non-responsive. In that blog, I encouraged public bodies to release non-responsive portions of records (subject to exemptions).

[31] SPS determined that the following three categories of records were non-responsive to the Applicant's access request:

1) Communications and information shared from the SPS "to" the Firm;
2) Internal SPS emails; and
3) Notes prepared by SPS legal counsel.

[32] Based on the wording of the Applicant's access request, I can see that the Applicant sought only records "from" the Firm. However, I do not see that the "non-responsive" records as "clearly separate and distinct and entirely unrelated to the access request". As such, I find that the records the SPS deemed as non-responsive are actually responsive to the access request because they are so closely related to the access request. I recommend that the SPS release these records to the Applicant, subject to exemptions.

IV FINDINGS

[33] I find I have jurisdiction to conduct this review.

[34] I find that the SPS has made a *prima facie* case that solicitor client privilege applies to records 2, 10, 13, 14, 15, 16, 17, 19, 20, 22, 23, 24, 25, 26, 28, 35, 37, 41, 42, 43, 44, and 46.

[35] I find that litigation privilege no longer would apply to records or information that had been prepared for the dominant purpose of litigation.

[36] I find the SPS has not met the burden of proof pursuant to section 51 of LA FOIP in relation to its claim of common interest privilege.

[37] I find that the records the SPS deemed as non-responsive are responsive to the access request.

V RECOMMENDATIONS

[38] I recommend that SPS continue to withhold records 2, 10, 13, 14, 15, 16, 17, 19, 20, 22, 23, 24, 25, 26, 28, 35, 37, 41, 42, 43, 44, and 46 pursuant to subsection 21(a) of LA FOIP.

[39] I recommend that SPS release records 1, 3, 4, 5, 6, 7, 8, 9, 11, 12, 18, 21, 27, 29, 30, 31, 32, 33, 34, 36, 38, 39, 40, 45, and 47.

[40] I recommend that the SPS release the records it deemed "non-responsive" to the Applicant, subject to exemptions.

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

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