



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 395-2019, 396-2019

Saskatchewan Rivers Public School Division No. 119

May 25, 2021

Summary:

The Saskatchewan Rivers Public School Division No. 119 (School Division) received two access to information requests on October 23, 2019 from the same Applicant. The School Division partially denied access to the requested information pursuant to section 27 and subsections 13(1)(b), 15(1)(b)(ii), 16(1)(a), (b), (e), 17(1)(d), (e), (g), 18(1)(c), 21(a) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Upon notifying the third parties of this review, they advised the Commissioner they had no concern with the information being released, and therefore the School Division's reliance on subsection 18(1)(c) of LA FOIP was lifted. The Commissioner found subsection 28(1) of LA FOIP applies to the withheld information on pages 1.1, 1.3, 1.4 (severance #1), 1.6 (severance #1 and #2), 1.7 (severance #2), 1.8, 1.9, 1.10, 1.11, 1.13, 2.3 and 2.4 (severance #2 and #4). Further, the Commissioner found subsections 16(1)(a), (b) and (e) of LA FOIP do not apply to the information found under severance #1 on page 1.7. However, the Commissioner found subsection 16(1)(b) of LA FOIP does apply to severance #1 on page 1.14. The Commissioner found subsection 15(1)(b)(i) of LA FOIP applies to severances #1 and #3 on page 2.4 and subsection 21(a) of LA FOIP applies to severance #2 of page 1.4 and severance #3 on page 1.6. The Commissioner recommended the School Division release severance #1 on page 1.7, and continue to withhold severance #2 of page 1.7. Further, the Commissioner recommended the School Division continue to withhold the severed information found on pages 1.1, 1.3, 1.4, 1.6, 1.8, 1.9, 1.10, 1.11, 1.13, 1.14, 2.3 and 2.4. Finally, the Commissioner recommended that Board Members are provided School Division email addresses and that Board business is conducted on those email addresses and not on personal email addresses.

I BACKGROUND

[1] The Applicant submitted the following two access to information requests to the Saskatchewan Rivers Public School Division No. 119 (School Division) on October 23, 2019:

Request 1: Please provide any emails, memoranda, or other correspondence related to meetings with Premier Scott Moe. Please provide records created since April 1, 2019.

Request 2: Please provide all minutes, notes, and agendas from meetings between Saskatchewan Rivers Public School Division and Premier Scott Moe. Please provide records created between April 1, 2019 and August 30, 2019.

[2] By letter dated November 20, 2019, the School Division notified the Applicant that the response time was being extended an additional 30 days for Request 1. The School Division responded to Request 1 by letter dated December 13, 2019. In its response, the School Division advised the Applicant that some of the requested information was denied pursuant to section 27 and subsections 13(1)(b), 15(1)(b)(ii), 16(1)(a), (b), (e), 17(1)(d), (e), (g), 18(1)(c), 21(a) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[3] By letter dated November 20, 2019, the School Division notified the Applicant that the response time was being extended an additional 30 days for Request 2. The School Division responded to Request 2 by letter dated December 13, 2019. In its response, the School Division advised the Applicant that some of the requested information was denied pursuant to subsections 13(1)(b), 15(1)(b)(i), (b)(ii), 17(1)(d), (e), (g), 18(1)(c) and 28(1) of LA FOIP.

[4] By separate letters dated December 16, 2019, the Applicant requested a review of the School Division's use of the exemptions for Request 1 and 2. By emails of January 14, 2021, my office notified the Applicant and the School Division of our intention to undertake the reviews and invited both parties to make submissions.

[5] By email dated January 20, 2020, the School Division advised the Applicant and my office that it was dropping reliance of subsection 18(1)(c) of LA FOIP for Request 2. It further

advised the Applicant and my office that no additional records would be released as a result of the removal of its reliance on subsection 18(1)(c) of LA FOIP, as it was relying on other exemptions that it applied to the same information.

[6] The School Division identified two third parties for Request 1. My office notified each third party of this review on February 5, 2020 and invited each to make a submission in regards to subsection 18(1)(c) of LA FOIP which was claimed by the School Division.

[7] In their responses, each third party advised my office they had no concerns with the release of the information the school division identified as third party information. Therefore, the School Division lifted its reliance on subsection 18(1)(c) of LA FOIP for Request 1. However, the School Division advised my office and the Applicant that no additional records would be released as it was relying on other exemptions it applied to the same information.

II RECORDS AT ISSUE

[8] The portions of records at issue for Request 1 totals 12 pages and the portions of records at issue for Request 2 totals 2 pages. I will refer to the pages for Request 1 as 1.1, 1.3 – 1.11, 1.13 and 1.14 and the pages for request 2 as 2.3 and 2.4.

[9] There are 14 pages subject to this review where the School Division has partially withheld portions from the Applicant pursuant to section 27 and subsections 13(1)(b), 15(1)(b)(i), (b)(ii), 16(1)(a), (b), (e), 17(1)(d), (e), (g), 21(a) and 28(1) of LA FOIP.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[10] The School Division qualifies as a “local authority” pursuant to subsection 2(f)(viii) of LA FOIP. Therefore, I have jurisdiction to review this matter.

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

[11] The School Division has severed portions of information found in pages 1.1, 1.3, 1.6, 1.8, 1.9, 1.10, 1.11, 2.3 and 2.4 pursuant to section 27 and subsection 28(1) of LA FOIP.

[12] The School Division has not raised subsection 28(1) of LA FOIP for severance #1 on page 1.4, severance #2 on page 1.7, and severance #1 on page 1.13, however, it has raised other exemptions to withhold this information. It is mandatory that a local authority not disclose personal information pursuant to subsection 28(1) of LA FOIP unless a specific, prescribed circumstance exists. Therefore, upon reviewing these pages my office noted that this information may constitute personal information, I will consider if subsection 28(1) of LA FOIP applies to that information.

[13] Section 27 of LA FOIP provides:

27 No local authority shall **use** 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....

[Emphasis added]

[14] As outlined in my office’s dictionary (<https://oipc.sk.ca/resources/dictionary/>) “use” includes reference to or manipulation of personal information by the local authority that has possession or control of the information, but does not include disclosure to another person or local authority. When responding to an access to information request, a local authority is disclosing information, not using it. Further, it is not an exemption under which a local authority can rely on to withhold information from an applicant. Therefore, section 27 of LA FOIP is not applicable for the purposes of this review.

[15] 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.

[16] Subsection 23(1) of LA FOIP provides a list of types of information that may qualify as personal information, however, the list is not exhaustive. In order to qualify as personal information, the information must relate to an identifiable individual and the information must be personal in nature. Subsection 23(1) 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:

- (a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;
- (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;
- (c) information that relates to health care that has been received by the individual or to the health history of the individual;
- (d) any identifying number, symbol or other particular assigned to the individual;
- (e) the home or business address, home or business telephone number, fingerprints or blood type of the individual;
- (f) the personal opinions or views of the individual except where they are about another individual;
- (g) correspondence sent to a local authority by the individual that is implicitly or explicitly of a private or confidential nature, and replies to the correspondence that would reveal the content of the original correspondence, except where the correspondence contains the views or opinions of the individual with respect to another individual;
- (h) the views or opinions of another individual with respect to the individual;

(i) information that was obtained on a tax return or gathered for the purpose of collecting a tax;

(j) information that describes an individual's finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness; or

(k) the name of the individual where:

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

(ii) the disclosure of the name itself would reveal personal information about the individual.

[17] The information that has been withheld and marked severance #1 on pages 1.1, 1.3, 1.6, and part of severance #1 on page 1.8 is the personal email addresses and telephone numbers of the Board of Education [Board] members. I have commented on the use of personal email addresses in several past reports. In Review Report 184-2016 (Global Transportation Hub Authority (GTH)), I commented on this practice in paragraphs [16] to [19]:

[16] In its submission, GTH asserted that the email addresses were the personal email addresses of some GTH board members. Further, the board members were not employees of GTH but act in an advisory capacity for the benefit of GTH. In addition, GTH asserted that the board members do not have GTH email accounts and in many cases have used personal email accounts for their communications.

[17] Questions about security and records management arise if and when government-related activities are done using personal email accounts. It is clear from the record in this case that sensitive GTH information was sent to board members at their personal email addresses. I strongly encourage GTH to reconsider this practice. Using the Government of Saskatchewan email system that is supported by the Ministry of Central Services (Central Services) to do government-related activities is recommended. Central Services has the mandate, resources, and expertise to support and manage the Government of Saskatchewan email system, including ensuring the security of email accounts. The public can also be reassured that Central Services' practices are adequate through audits conducted by the Provincial Auditor.

[18] On the issue of whether the personal email addresses of the board members are personal information, in Review Report 157-2016, I found that the personal email addresses of the GTH board members qualified as personal information pursuant to subsections 24(1)(e) and (k) of FOIP. Subsections 24(1)(e) and (k) of FOIP provide as follows:

24(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:

...

(e) the home or business address, home or business telephone number or fingerprints of the individual;

...

(k) the name of the individual where: (i) it appears with other personal information that relates to the individual; or (ii) the disclosure of the name itself would reveal personal information about the individual.

[19] As the information constitutes personal information and there is no apparent consent from the board members to release it, I find that subsection 29(1) of FOIP was appropriately applied by GTH. I recommend GTH continue to withhold the personal email addresses of the board members. See Appendix A for details of where I have found subsection 29(1) of FOIP applies.

[18] As in the above case, going forward best practices would suggest that the School Division Board Members should be provided a School Division email address and Board business should be conducted through the School Division emails and not through personal email accounts. However, the personal email addresses and telephone numbers do qualify as personal information as it relates to an identifiable individual and the information being withheld is personal in nature.

[19] A portion of the information that has been withheld under severance #1 on 1.8 and 1.9 is information about an identifiable individual and is personal in nature. This information relates to the health of the recipient of the email and it is not related to the duties as a board member. This qualifies as personal information pursuant to subsection 23(1)(c) of LA FOIP, which 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:

...

(c) information that relates to health care that has been received by the individual or to the health history of the individual;

[20] Subsection 23(2) of LA FOIP outlines information that is not considered personal information under LA FOIP. Specifically, subsection 23(2)(a) provides:

23(2) “Personal information” does not include information that discloses:

(a) the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer or employee of a local authority;

[21] However, as noted above in subsection 23(1)(b) of LA FOIP, personal information does include, “...information that relates to the education or the criminal or employment history of the individual...”

[22] Severance #2 on pages 1.6 and 1.8 relates to employees with the School Division. However, that information does not relate to the employees’ work duties or other information outlined in subsection 23(2)(a) of LA FOIP. This information is about identifiable individuals and is personal in nature as it relates to the specific employees and the transfer of those employees to other schools within the School Division and potential grievances because of the transfers. Therefore, the School Division should continue to withhold this information.

[23] From a review of what has been severed for severance #1 on pages 1.10 and 1.11, board members are providing views and opinions about two other identifiable individuals. When reviewing the record, my office noted similar opinions being communicated under severance #1 on pages 1.4 and 1.13.

[24] Subsection 23(1)(h) 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:

...

(h) the views or opinions of another individual with respect to the individual;

[25] In these severances, the Board members were giving their personal views and opinions about an identifiable individual. Pursuant to subsection 23(1)(h) of LA FOIP, this qualifies as the personal information of the individual whom the Board members were speaking about. Therefore, subsection 28(1) of LA FOIP applies to the information that has been severed under severances #1 on pages 1.4, 1.10, 1.11 and 1.13.

[26] The School Division has withheld portions of information on page 2.3 (severance #1) and 2.4 (severances #2 and #4) as personal information. If released, severance #1 on page 2.3 would disclose information that is personal as the discussions are about teacher transfers and possible grievances that, if released, would be connected to the employees. Therefore, I recommend that the School Division should continue to withhold this information.

[27] From a review of the severance #2 on page 1.7 and the first portion of information withheld under severance #1 on page 1.4, the release of this information could also disclose information that is personal in nature as it relates to a specific transfer issue at a specific school that could be connected to the employees involved with the transfer. Therefore, the School Division should continue to withhold this information.

[28] I find subsection 28(1) of LA FOIP applies to the withheld information on pages 1.1, 1.3, 1.4 (severance #1), 1.6 (severance #1 and #2), 1.7 (severance #2), 1.8, 1.9, 1.10, 1.11, 1.13, 2.3 and 2.4 (severance #2 and #4).

3. Does subsection 16(1)(a), (b) and (e) of LA FOIP apply to the information that the School Division deemed not responsive?

[29] The School Division applied subsection 16(1)(a) of LA FOIP to severance #1 on page 1.7.

[30] Subsections 16(1)(a), (b) and (e) of LA FOIP are discretionary exemptions and provide:

16(1) Subject to subsection (2), 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;

...

(e) information, including the proposed plans, policies or projects of the local authority, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

[31] I will first consider subsection 16(1)(a) of LA FOIP. My office's *Guide to LA FOIP, Chapter 4: Exemptions to the Right of Access*, updated April 29, 2021 (Guide to LA FOIP) speaks to this provision starting at page 105. This provision permits refusal of access in situations where release of a record could reasonably be expected to disclose advice, proposals, recommendations, analyses or policy options developed by or for a local authority. The following two-part test can be applied:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for a local authority?

[32] In its submission, the School Division asserted that a portion of the records relates to communications between various parties. It did not outline if the communications qualified as advice, proposals, recommendations, analyses or policy options.

[33] A local authority must meet its burden of proof pursuant to subsection 51 of LA FOIP, which 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.

[34] My office's *Guide to LA FOIP, Chapter 2: Administration of LA FOIP*, updated August 7, 2020, speaks to the burden of proof requirements of a local authority starting at page 38. The burden is not on an applicant to establish that an exemption does not apply. When it

is said that a party has the “burden of proof”, what is meant is that one party has a duty in law first to bring forward evidence that a particular fact or situation exists, and then to persuade my office that the evidence meets the necessary standard of proof.

[35] The local authority has not met its burden of proof as it has provided my office with very limited arguments that are not persuasive.

[36] In addition, the School Division also argues that this information has been redacted as it is not relevant to the access to information request. That reasoning is not supportive of an exemption applying to the information. Where information is not responsive to an access to information request, I will recommend release of the not responsive information unless an exemption applies. The School Division has also raised subsections 16(1)(b) and (e) of LA FOIP to the information found in severance #1 on page 1.7.

[37] I find subsections 16(1)(a), (b) and (e) of LA FOIP do not apply to the information found under severance #1 on page 1.7. I recommend the School Division release the information found in severance #1 on page 1.7.

4. Does subsection 16(1)(b) of LA FOIP apply to the record?

[38] The School Division applied subsection 16(1)(b) of LA FOIP to severance #1 on page 1.14.

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

16(1) Subject to subsection (2), 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 a local authority.

[40] The Guide to LA FOIP speaks to this provision starting at page 112. It permits refusal of access in situations where release of a record could reasonably be expected to disclose consultation or deliberations involving officers or employees of a local authority.

[41] The provision is intended to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is to allow such persons to address an issue without fear of being wrong, looking bad, or appearing foolish if their frank deliberations were made public. For subsection 16(1)(b) of LA FOIP, the following two-part test can be applied:

1. Does the record contain consultations or deliberations?
2. Do the consultations or deliberations involve officers or employees of the local authority?

[42] I will now consider each part of the test.

1. Does the record contain consultations or deliberations?

[43] The Guide to LA FOIP starting at page 113 describes the requirements to meet this part of the test.

[44] **Consultation** means:

- the action of consulting or taking counsel together (deliberation, conference)
- a conference in which the parties consult and deliberate.

[45] A consultation can occur when the views of one or more officers or employees of the local authority are sought as to the appropriateness of a particular proposal or suggested action. It can include consultations about prospective future actions and outcomes in response to a developing situation. It can also include past courses of action. For example, where an employer is considering what to do with an employee in the future, what has been done in the past can be summarized and would qualify as part of the consultation or deliberation.

[46] *Deliberation* means:

- the action of deliberating (to deliberate: to weigh in mind; to consider carefully with a view to a decision to think over); careful consideration with a view to a decision;
- the consideration and discussions of the reasons for and against a measure by a number of councillors.

[47] In its submission, the School Division asserts that these deliberations are of officers of the Board of the School Division related to the substance of intergovernmental deliberations. From a review of the information, I agree that it would constitute post meeting deliberations including possible next steps. Therefore, the first part of the test has been met.

2. Do the consultations or deliberations involve officers or employees of the local authority?

[48] Page 114 of the Guide to LA FOIP states *involving* means including. Additionally, there is nothing in this exemption that limits the exemption to participation only of officers or employees of the local authority. Subsection 2(f)(viii) of LA FOIP provides the definition of “local authority” relevant to this review:

2 In this Act:

...
(f) **“local authority”** means:

...
(viii) any board of education or conseil scolaire within the meaning of *The Education Act*;

[49] Section 2 of *The Education Act, 1995* defines “board of education” as follows:

2 In this Act:

...
“board of education” means the board of education of a school division that is elected pursuant to *The Local Government Election Act, 2015*;

[50] The deliberation is between elected officials of the School Division's Board. Therefore, the second part of the test has been met.

[51] I find subsection 16(1)(b) of LA FOIP applies to severance #1 on page 1.14. I recommend the School Division continue to withhold the information that was severed on page 1.14.

5. Does subsection 15(1)(b)(i) of LA FOIP apply to the record?

[52] The School Division applied subsection 15(1)(b)(i) to severances #1 and #3 on page 2.4. Subsection 15(1)(b)(i) of LA FOIP provides:

15(1) A head may refuse to give access to a record that:

...

(b) discloses agendas or the substance of deliberations of meetings of a local authority if:

(i) an Act authorizes holding the meetings in the absence of the public;

[53] My office provided the School Division with a copy of the three part test in the January 14, 2020 notification email:

1. Has a meeting of council, board, commission or other body or a committee of one of them taken place?
2. Does a statute authorize the holding of the meeting in the absence of the public?
3. Would disclosure of the record reveal the agenda or substance of the deliberation of the meeting?

[54] I will now consider each part of the test.

- 1. Has a meeting of council, board, commission or other body or a committee of one of them taken place?*
- 2. Does a statute authorize the holding of the meeting in the absence of the public?*

[55] When considering these two parts of the test, the question to ask is whether the purpose of the meeting was to deal with specific subject matter described in the statute authorizing the holding of a closed meeting.

[56] As outlined in the School Division's submission, subsection 80(2) of *The Education Act, 1995* (Education Act) authorizes Board Trustee deliberations in "closed sessions." Subsection 80(2) of the Education Act provides:

80(2) Notwithstanding subsection (1) but subject to subsection (3), a board of education or conseil scolaire may determine, by resolution, that any matter should be dealt with in closed session and, on the making of that resolution, the board of education or the conseil scolaire may deal with that matter in closed session.

[57] From a review of the record, a meeting of the School Division's Board occurred Monday, September 9, 2019 and the record does show that a portion of the meeting was held in closed session. From a review of the Board meeting minutes from September 9, 2019, there was an approved motion to move into closed session, which is required by subsection 80(1) of the Education Act.

[58] Therefore, the first two parts of the test have been met. I will now consider the third part of the test.

3. Would disclosure of the record reveal the agenda or substance of the deliberation of the meeting?

[59] As noted earlier, a *deliberation* is a discussion or consideration of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

[60] *Substance* generally means more than just the subject or basis of the meeting. Rather, it is the essential or material part of the deliberations themselves. Records that would permit the drawing of accurate inferences with respect to the substance of the deliberations of the meeting could also qualify.

- [61] A local authority seeking to rely on this exemption must establish that the local authority's meeting in question was a properly constituted *in camera* meeting. Further, it must provide information concerning when the *in camera* meeting was held and details of the subject matter or substance of the deliberations of the meeting.
- [62] The content of *in camera* minutes (i.e. what matters were discussed), views council members expressed about those matters and how they voted, would generally be caught by the exemption.
- [63] The names of attendees, the dates and times of the meeting, the date the minutes were adopted and signed and who certified the minutes as correct would generally not reveal the substance of deliberations.
- [64] From a review of the record, if released it would release the agenda of what was discussed at the *in camera* portion of the meeting. Therefore, the third part of the test has been met.
- [65] I find subsection 15(1)(b)(i) of LA FOIP applies to severances #1 and #3 on page 2.4. As I have found subsection 28(1) of LA FOIP applies to severances #2 and #4 on this page, I recommend the School Division continue to withhold the severed information on page 2.4.

6. Does subsection 21(a) of LA FOIP apply to the record?

- [66] The School Division has applied subsection 21(a) of LA FOIP to severance #2 on page 1.4 and severance #3 on page 1.6, claiming solicitor-client privilege. I appreciate that the School Division provided my office with a copy of the record where they claimed solicitor-client privilege.
- [67] The exemption for solicitor-client privilege can be found under subsection 21(a) of LA FOIP, which provides:

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;

[68] The Guide to LA FOIP speaks to this provision starting at page 219. The purpose of solicitor-client privilege is to assure clients of confidentiality and enable them to speak honestly and candidly with their legal representatives. My office has established the following test for subsection 21(a) of LA FOIP:

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?

[69] I will now consider each part of the test.

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

[70] The Guide to LA FOIP starting on page 221, discusses this part of the test. In *Descôteaux et al. v. Mierzwinski*, [1982] 1 SCR 860, 1982 CanLII 22 (SCC), Justice Lamer outlined a very liberal approach to the scope of the privilege by extending it to include all communications made, “within the framework of the solicitor-client relationship.” The protection is very strong, as long as the person claiming the privilege is within the framework.

[71] A *communication* is the process of bringing an idea to another’s perception; the message or ideas so expressed or exchanged; the interchange of messages or ideas by speech, writing, gestures or conduct. Communication can be written or verbal.

[72] *Client* means a person who:

- Consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or

- Having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on their behalf.

[73] A client also includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work.

[74] However, some of the communications are not between a solicitor and client. If the communications are part of the continuum of legal advice they could still be captured by the provision. I previously commented how the continuum of legal advice would be captured under solicitor-client privilege in Review Report 004-2017, 153-2015 – Part II (University of Saskatchewan):

[18] As noted, the first test for subsection 21(a) of LA FOIP requires that a communication be between a solicitor and a client. However, past decisions of Commissioners from across the country have considered records in the “continuum” of giving legal advice.

[19] A resource from Alberta's Office of the Information and Privacy Commissioner (Alberta OIPC) entitled The Basics of Solicitor-client Privilege provides the following:

Documents that are not actually passed between the solicitor and client may be part of the continuum of legal advice, or reveal information subject to solicitor-client privilege.

More examples of records found to be part of the continuum of legal advice:

- a discussion between two public officials about how to frame the question that is to be asked of the lawyer (Order F2007-008 at para. 12)
- written communications between officials or employees of a public body, in which they quote or discuss the legal advice given by the public body's solicitor (Order 99-013 at paras. 62-63; Order 2001-025 at para. 67)
- communications discussing the application of legal advice given by a solicitor (Order 96-020 at para. 133)
- an employee's notes regarding a solicitor's legal advice, and comments on that advice (Order 99-027 at para. 95)
- notes “to file” in which legal advice is quoted or discussed (Order F2005-008 at para. 42)
- solicitors' briefing notes and working papers that are directly related to the seeking or giving of legal advice (96-017 at para. 30)

[75] From a review of the record, I can confirm that the communications that have been withheld under severance #2 on page 1.4 and severance #3 on page 1.6 are part of the continuum of legal advice for the solicitor-client privilege.

[76] I will now consider the second part of the test.

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

[77] The Guide to LA FOIP speaks to the second part of the test starting at page 224. The scope of solicitor-client privilege is broad. It applies to all communications made with a view of obtaining legal advice. If a communication falls somewhere within the continuum of that necessary exchange of information, the object of which is the giving or receiving of legal advice, it is protected by solicitor-client privilege.

[78] *Legal advice* means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. The second part of the test is satisfied where the person seeking advice has a reasonable concern that a particular decision or course of action may have legal implications, and turns to their legal advisor to determine what those legal implications might be.

[79] The privilege applies not only to the records that actually give the legal advice but also to those that seek it and that provide factual information relative to which the advice is sought. Background information can be included as part of the definition of legal advice because it forms part of the continuum of communication between a solicitor and his or her client. Statements of fact are not themselves privileged. It is the communication of those facts between a client and a lawyer that is privileged. The privilege applies to records that quote or discuss the legal advice.

[80] 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.

[81] From a review of the withheld information, I am satisfied that the communications qualify as the seeking or giving of legal advice as they appear to be part of the continuum of the legal advice.

[82] I will now consider the third part of the test for the withheld information.

3. *Did the parties intend for the communication to be treated confidentially?*

[83] The Guide to LA FOIP discusses the third part of the test starting on page 225. For the parties to intend that the communication be treated confidentially, there must be an expectation on the part of the local authority that the communication will be confidential. Conduct which is inconsistent with an expectation of confidentiality can constitute a waiver of privilege. Without confidentiality there can be no privilege and when confidentiality ends, so too should the privilege.

[84] From the School Division's submission, and other information that my office found in the record, the information found in severance #2 of page 1.4 and severance #3 on page 1.6 were intended to be kept confidential. Therefore, I am satisfied that the third part of the test has been met.

[85] I find subsection 21(a) of LA FOIP applies to severance #2 on page 1.4 and severance #3 on page 1.6. Therefore, I recommend the School Division continue to withhold severance #2 of page 1.4 and severance #3 on page 1.6.

IV FINDINGS

[86] I find subsection 28(1) of LA FOIP applies to the withheld information on pages 1.1, 1.3, 1.4 (severance #1), 1.6 (severance #1 and # 2), 1.7 (severance #2), 1.8, 1.9, 1.10, 1.11, 1.13, 2.3 and 2.4 (severance #2 and #4).

- [87] I find subsections 16(1)(a), (b) and (e) of LA FOIP do not apply to the information found under severance #1 on page 1.7.
- [88] I find subsection 16(1)(b) of LA FOIP applies to severance #1 on page 1.14.
- [89] I find subsection 15(1)(b)(i) of LA FOIP applies to severances #1 and #3 on page 2.4.
- [90] I find subsection 21(a) of LA FOIP applies to severance #2 on page 1.4 and severance #3 on page 1.6.

V RECOMMENDATIONS

- [91] I recommend the School Division release severance #1 on page 1.7, and continue to withhold severance #2 of page 1.7.
- [92] I recommend the School Division continue to withhold the severed information found on pages 1.1, 1.3, 1.4, 1.6, 1.8, 1.9, 1.10, 1.11, 1.13, 1.14, 2.3 and 2.4.
- [93] I recommend that Board Members are provided School Division email addresses and that Board business is conducted on those email addresses and not on personal email addresses.

Dated at Regina, in the Province of Saskatchewan, this 25th day of May, 2021.

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