

SASKATCHEWAN
OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER

REPORT LA-2010-001

City of Saskatoon

Summary:

The Applicant made two applications to the City of Saskatoon (the City) for records involving certain of its development projects. The City withheld the responsive material citing sections 16(1)(a), 16(1)(b), 16(1)(c), 16(1)(e), 21(a), 21(b) and 21(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner found that the City did not meet the burden of proof with respect to the application of sections 16(1)(c) or 16(1)(e) of LA FOIP to any record or portion therein. The Commissioner found that section 21 applied to the records in respect to which the City claimed solicitor-client privilege (four pages). The City applied sections 16(1)(a) and/or 16(1)(b) of LA FOIP to the remaining portion of the record (143 pages). The Commissioner agreed that these sections applied to much of the responsive record (content) but did not apply to email header information that did not reveal the substance of deliberations. He found that the exemptions did not apply to correspondence involving, or records containing, comments of third parties. During the review, the Commissioner's office recommended release of this particular material. The City complied by releasing some records in full as well as email header information after severance of other content. The City advised the Commissioner of its disagreement with the recommendations pertaining to nine pages of the original 148, three of which contained personal data elements not previously identified. As the Commissioner agreed that the information in question was third party personal information, he upheld the City's decision to withhold. He found however that sections 16(1)(a) and 16(1)(b) of LA FOIP did not apply to the remaining six pages or portions identified so recommended the City release.

Statutes Cited: *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1, ss. 16(1)(a), 16(1)(b), 16(1)(c), 16(1)(e), 21(a), 21(b), 21(c), 23(1), 23(2), 28(1) and 51; *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, ss. 17(1)(b) and 22; *The Freedom of Information and Protection of Privacy Regulations*, c. F-22.01 Reg. 1, Appendix, PART I, Boards, Commissions, Crown Corporations and Other Bodies Prescribed as Government Institutions; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(e), 24(1)(a) and (b); *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, s. 13(1) and Schedule 1; *Access to Information and Protection of Privacy Act*, S.N.W.T. (Nu.) 1994, c. 20, s. 2; *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c.20, s. 2; *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, F-15.01, s. 1(c); *Access to Information and Protection of Privacy Act*, RSY 2002, c.1, s. 3; *The Freedom of Information and Protection of Privacy Act*, C.C.S.M. c. F175, s. 1; *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, s. 3(b); *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, s. 2(e).

Authorities Cited: Saskatchewan Office of the Information and Privacy Commissioner Investigation Reports LA-2005-003 and LA-2010-001, Reports LA-2007-001, LA-2009-002/H-2009-001, F-2006-004, LA-2004-001, F-2005-002, and F-2010-001; Office of the Information and Privacy Commissioner for British Columbia Order F07-17; Office of the Information and Privacy Commissioner of Alberta Orders F2004-026 and F2008-008; Information and Privacy Commissioner/Ontario Order M-755.

Other Sources Cited: Access and Privacy Branch, Service Alberta, *FOIP Guidelines and Practices* (2009); *Black's Law Dictionary*, 6th Ed., USA: Thomson West, 2004.

I. BACKGROUND

[1] The Applicant submitted three different access to information requests to the City of Saskatoon (the City) on February 9, 2004, February 11, 2004 and August 3, 2004 respectively. Although subsequent correspondence made some reference to the first, it is not at issue.

[2] The second access to information request submitted to the City is dated February 11, 2004. The request reads as follows:

I would like to obtain a copy of the contract, and the terms of reference, and any correspondence between the City of Saskatoon and Stantec Architecture Ltd. pertaining to Stantec's current work involving the Gathercole Building and Site.

I would like to obtain a copy of the contract, and the terms of reference, and any correspondence between the City of Saskatoon and Saunders Evans Architects Inc. pertaining to Saunders Evans work involving the DCD1 Guidelines review.

[3] The City responded to both requests by way of letter dated March 8, 2004 as follows:

This is in response to your requests for access to information, filed in this office on February 9 and February 11, for information relating to the Gathercole site development.

...

There are **two other documents on our file relating to correspondence between the Saunders Evans Architects and the City. These are not being released, in accordance with section 16(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act***, since they are consultations involving officers or employees of the City.

[emphasis added]

[4] The only material withheld by the City with respect to the first two applications that the Applicant was interested in are the two documents described above as "relating to correspondence between the Saunders Evans Architects and the City." Those records pertain to the second access to information request, not the first.

- [5] The Applicant made a third access to information request to the City on or about August 3, 2004 for the following:

I would like copies of all correspondence, to and from (including e-mails), pertaining to the south downtown between the City of Saskatoon and [the Consultant...]; and also between the City of Saskatoon and Persephone Theatre from March 1, 2004 to August 3, 2004, inclusive.

- [6] On or about August 25, 2004, the City responded to the Applicant denying access and advised him as follows:

The only correspondence on file is between individual members of the civic Administration and [the Consultant]. I am refusing to release this information pursuant to Section 16 of *The Local Authority Freedom of Information and Protection of Privacy Act...*

- [7] The City then cited the specific portions of section 16 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) it applied to the withheld material: (a), (b), (c) and (e).¹

- [8] In this same letter, the City advised the Applicant as follows:

There is also a memorandum on file that I am refusing to release in accordance with Section 21, entitled "Solicitor-Client Privilege, ...(a)...(b)...(c)..."

- [9] On August 29, 2004, the Applicant requested a review involving two of his above noted requests. Specifically, he requested the following:

Please find attached copies of two letters I received from the City of Saskatoon where refusals have happened.

The most recent case is outlined in the **August 25, 2004** correspondence from the City Clerks Office where my request for **copies of all letters (including emails) between the City and the CitySpaces Consultant ... pertaining to the South Downtown redevelopment project were refused completely.**

What concerns me is that in February 2004 when I submitted a similar request for information between the City and the same consultant I was granted copies of letters

¹ *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1.

and an email. My most recent request was simply a continuation of the previous one. A good deal of time had passed and I wanted to update the request to include the time period between March and August 2004. It is difficult to understand that this type of information was generally available earlier this year but now it is not....

The other refusal for information is described in the **March 8, 2004** letter from the City Clerks Office **where two documents on file between Saunders Evans Architects and the City will not be released.**”

[emphasis added]

- [10] The Applicant’s request for review did not involve records pertaining to his first access to information application, only the second and third.
- [11] On or about September 8, 2004, our office acknowledged receipt of the Applicant’s request for review and advised that we were consolidating both requests into one review.
- [12] We provided notice to the City also on September 8, 2004 that we would be undertaking a review.

II. RECORDS AT ISSUE

- [13] On September 17, 2004, the City provided our office with the record pertaining to one of the Applicant’s above noted requests. The City lists its file numbers as follows: File No. 416-4/04 (February 2004 request) and 416-9/04 (August 2004 request). The two withheld documents [1st, four pages; 2nd, one page] were included. However, the City indicated that the second of the two was “released in error” so would no longer be at issue [email dated February 19, 2004]. The City indicated that it was withholding these records “in accordance with Section 16(1)(b) of the Act. As you can see, the documents clearly relate to subsections (a), (b) and (c) of this section, entitled “Advice from Officials”.”
- [14] The City originally only provided our office with samples of the responsive documents withheld with respect to the August 2004 application. Along with the samples, the City provided its reasons for withholding records responsive to both requests as follows:

416-4/04

Enclosed, for your information only, are copies of the two documents that were not released, in accordance with Section 16(1)(b) of the *Act*. As you can see, the documents clearly relate to subsections (a), (b) and (c) of this section, entitled "Advice from Officials."

...

416-9/04

The only correspondence on file relating to this request are working documents between the City's Administration and [the Consultant], who is the consultant hired by the City to assist in developing the South Downtown. All of the correspondence is in the form of e-mails, and they all fall under subsections (a)(b) and (c) of section 16.

[15] After our Portfolio Officer met with City officials, on or about September 30, 2004, the City provided us with the remaining responsive record which consisted of:

- Two memos from the City Solicitor, both dated July 22, 2004, not released in accordance with Section 21, Solicitor/Client Privilege (two documents, totaling four pages); and
- A package of documents not released in accordance with Section 16(1), subsections (a), (b), (c) and (e) of LA FOIP (consisting of 139 pages).

[16] The City withheld all 139 pages citing all of the above clauses [(a), (b), (c) and (e)] of section 16(1) of LA FOIP. After considering our preliminary analysis with respect to the exemptions invoked, on January 21, 2010, the City advised us as follows:

I have carefully reviewed your letter, together with the index of records containing the OIPC recommendation. I agree with substantially all of your recommendations; however there are several documents that I do not agree should be disclosed.

[17] The City then identified which pages or portions that it did not agree should be released. The nine pages at issue are as follows: C1 – Email (page 1), C3 – Email (page 3), C12 – Email (page 16), C40 – Email (page 46), C77 – Email (page 96), C78 – Email (Page 97), C79 – Email (Page 98) and C81 – Email (Pages 101-102). The City indicated it was relying on sections 16(1)(a), 16(1)(b) and 28(1) of LA FOIP to withhold.

III. ISSUES

1. **Did the City properly apply section 16(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?**
2. **Did the City properly apply section 16(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?**
3. **Did the City properly apply section 16(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?**
4. **Did the City properly apply section 16(1)(e) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?**
5. **Did the City properly apply section 21 of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld document in question?**
6. **Does the record contain anyone's personal information as defined by section 23(1) of *The Local Authority Freedom of Information and Protection of Privacy Act*?**

IV. DISCUSSION OF THE ISSUES

1. **Did the City properly apply section 16(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?**

[18] In previous Reports I have found that the City is a local authority for purposes of LA FOIP.² I note that the City raised only discretionary exemptions in its response to the Applicant, the first of which is section 16(1)(a) of LA FOIP.

² See SK OIPC Investigation Report LA-2005-003 at [11] and SK OIPC Investigation Report LA-2010-001 at [11], available at: www.oipc.sk.ca/reviews.htm.

[19] The applicable provision of LA FOIP is as follows:

16(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority;

[20] The City bears the burden of proof pursuant to section 51 of LA FOIP.³

[21] For a general synopsis of the purpose of a similar provision to our section 16(1) of LA FOIP, I took the following commentary from Adjudicator's Order F07-17 with British Columbia's Information and Privacy Commissioner's (IPC) Office:

[16] **3.3 Advice or Recommendations**—Section 13 of FIPPA provides, in part, as follows:

Policy advice or recommendations

13(1) **The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body** or a minister.

...

[18] In making a determination regarding s. 13, a public body must first determine whether the material fits within the scope s. 13(1). If it does, the public body must then go on to determine whether the material falls within any of the categories set out in s. 13(2). If the records at issue are caught by one of the categories under s. 13(2), the public body must not refuse disclosure under s. 13(1). If the public body determines that the material falls within s. 13(1) and is not caught by any of the s. 13(2) categories, the public body must then decide whether to exercise its discretion to refuse disclosure.

[19] **The purpose of s. 13 has been identified in previous orders as being to protect a public body's internal decision making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.**⁴

[emphasis added]

³ See SK OIPC Investigation Report LA-2010-001 at [25], available at: www.oipc.sk.ca/reviews.htm.

⁴ Office of the Information and Privacy Commissioner for British Columbia Order F07-17, available at: www.oipcbc.org/orders.

[22] This sentiment is reiterated in the Alberta Government's *Freedom of Information and Protection of Privacy Guidelines and Practices* (FOIP Guidelines) as follows:

Advice, proposals, recommendations, analyses or policy options

Section 24(1)(a)

This exception is intended to allow for candour during the policy-making process, rather than providing for the non-disclosure of all forms of advice (see *IPC Order 99-001*) **or all records related to the advice** (*IPC Order 99-040*).

This exception [equivalent to exemption in SK legislation] **applies to these advisory functions at all levels in a public body. It also applies to advice and recommendations obtained from outside the public body, including advice and recommendations received under a contractual or other advisory arrangement** (see *IPC Order F2005-012*). However, it does not apply to unsolicited documents sent to a public body by special interest groups for lobbying purposes (see *IPC Order 2001-002*) or **to records created by a third party participating in a general stakeholder consultation** (see *IPC Orders F2004-021* and *F2008-008*).

...

Section 24(1)(a) would not apply where the disclosure of information would not reasonably be expected to reveal advice or recommendations. For example, the disclosure of documents discussed at a meeting of a Cabinet Policy Committee that is open to the public would not *reveal* advice (see *IPC Order 2001-002*). **The exception also would not apply to the names of correspondents, dates, subject lines that do not reveal advice, or information that reveals that a person participated in a discussion about a particular subject matter but does not indicate anything substantive about their involvement** (*IPC Order F2004-026*).

...

Section 24(1)(b) covers consultations or deliberations at all levels in a public body and also those involving a minister or his or her staff.

...

The exception also will not apply to the names of correspondents, dates, subject lines that do not reveal advice, or information that reveals that a person participated in a discussion about a particular subject matter but does not indicate anything substantive about his or her involvement (*IPC Order F2004-026*).⁵

[emphasis added]

⁵ Access and Privacy Branch, Service Alberta, *FOIP Guidelines and Practices* (2009), p. 178-181, available at: <http://foip.alberta.ca/resources/guidelinespractices>.

[23] The above is helpful as the wording of Alberta's 24(1)(a) and (b) of its freedom of information legislation is very similar to our 16(1)(a) and (b) of LA FOIP.⁶

[24] I have previously considered the 'advice from officials' exemption in my Report LA-2007-001. Of relevance in terms of its general application is the following:

[91] In this Report I have not addressed in any significant way the words "...proposals, recommendations, analyses or policy options" in section 16(1)(a) of the Act. I take the view that each of these words also require more than mere information. **To qualify for purposes of section 16(1)(a), the information in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Furthermore, information that would permit the drawing of accurate inferences as to the nature of the actual proposals, recommendations, analyses or policy options would also qualify for the exemption in section 16(1)(a) of the Act.**⁷

[emphasis added]

[25] The record consists of a variety of different kinds of documents including email discussion threads composed of text and header information (i.e. date, to, from, subject, etc).

[26] The following excerpts from Alberta's IPC Order F-2004-026 provide clarification on the application of this type of provision to information specifically contained in headings or headers:

[para 82] A **decision of the Ontario Office of the Information and Privacy Commissioner** (PO-2328) **supports the idea that headings** (in that case of agendas) that, in the words of the Ministry "*would reveal that advice and recommendations were being formulated or given*" in respect of a matter, **cannot be excepted from disclosure**. The Assistant Commissioner said that "Clearly this is not sufficient to establish the requirements of section 13(1) [the section in the Ontario legislation dealing with advice and recommendations]". **I agree that the mere statement of a topic about which advice or a recommendation is given or a discussion is being held does not in itself necessarily advise or recommend. Neither does it reveal the substance of a consultation or deliberation.**

⁶ *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25.

⁷ SK OIPC Report LA-2007-001; this particular finding is also contained in my more recent Report LA-2009-002/H-2009-001 at [146], both available at: www.oipc.sk.ca/reviews.htm.

[para 83] As well, I note Ontario Order PO-2087-I. This case involved an extensive review and analysis of records relative to the section (section 13(1)) discussed in the preceding paragraph. After reviewing which parts of records could be withheld on the basis that they revealed advice and recommendations, the Adjudicator stated:

Other information on these memoranda, such as the "to" and "from" lines, date and so on can be severed from the "content" of each record and to do so provides the appellant with information about the process without revealing exempt information. In my view, although the amount of information is small, it cannot be characterized as "worthless" or "meaningless" or "disconnected snippets" (as discussed above), and should therefore be disclosed to the appellant. (emphasis added)

[para 84] In an order of the British Columbia Privacy Commissioner, B.C. Order 01-25, the B.C. legislation under consideration permitted public bodies to withhold information that would reveal advice or recommendations developed by or for a public body or Minister. The Public Body argued that this section applies to the identity of an employee who wrote a memorandum on the basis that "the document inherently recommends that one option available to the Board is that the author or the author's office take certain actions with respect to the Appeal Division matter." The Commissioner wrote:

Even if the record did contain advice or recommendations, which it does not, I fail to see how the identity of the employee who wrote the memorandum "inherently" reveals advice or recommendations.

In the same case, the B.C. Commissioner also cited an earlier decision of his own office. In British Columbia Order No. 193-1997, the former Commissioner wrote with respect to the same legislation:

The applicant submits that this section cannot be used to protect the names of public servants who may have participated in a meeting, or their names generally, from government records.

The Ministry replies that disclosing the names and positions may reveal "a recommendation that a matter be dealt with at a particular level." ... The Ministry has not provided any evidence as to how the disclosure would reveal recommendations in this case. I note that names of public servants were disclosed to the applicant. **The fact that a particular person provided advice or recommendations does not, in this case, in and of itself reveal the advice or recommendations. There may be sensitive issues where the very fact that a particular person has given advice on a particular date reveals the advice or recommendations. I am unable to conclude that in this case the names and positions withheld would reveal advice or recommendations.**

...

[para 88] Finally, I reject any suggestion by the Public Body that I ought to defer to the Head of the Public Body to decide whether an inference as to the substance of advice or discussions can be drawn from other factors, as he is in the best position to do this. **If the Public Body wishes to rely on section 24(1)(a) or (b) on this basis, it must satisfy me that this condition is met for every document for which the condition is claimed.**

Conclusions under section 24

[para 89] I find, therefore, that the Public Body is entitled to withhold under sections 24(1)(a) and 24(1)(b) only the records or parts of them that reveal substantive information about the matter or matters on which advice was being sought or given (Bill 27), or about which the consultations or deliberations were being held. **The remainder of the information cannot be withheld under section 24(1)(a) or (b). The latter includes the names of correspondents, dates and, in many cases, subject lines, as well as documents or parts of documents that express the fact that advice is being sought or given or that information is being conveyed, without revealing any substantive content.** A great many of the documents include such information.⁸

[emphasis added]

[27] I adopted the above noted approach in Report F-2006-004.⁹ To the extent that email headers (i.e. correspondents, dates, subject lines, etc), or similar information contained on fax cover sheets or other transmittal documents, do not appear to indicate anything substantive about those named individuals' involvement or the particular advice given, I recommended release of said information. After sharing this as a preliminary finding, on January 21, 2010 the City advised us that it would release header information to the Applicant. This is therefore no longer an issue with respect to this review.

[28] I found definitions for the terms "advice, proposals, recommendations, analyses or policy options" also in the above noted Alberta resource, FOIP Guidelines, as follows:

Advice includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts.

⁸ Office of the Information and Privacy Commissioner of Alberta (Alberta OIPC) Order F2004-026, available at: <http://www.oipc.ab.ca/pages/OIP/Orders.aspx>.

⁹ SK OIPC Report F-2006-004 at [34]: "Even as I have not yet determined which of the 71 pages are releasable, I find that **heading information such as subject lines and "to" and "from" lines of internal email communications of Commission employees or similar details contained on fax cover sheets are releasable**". [emphasis added] That quote, which is cited at [33] reads: "[para 81] I am also strengthened in my view that the names of authors or correspondents, dates, and subject lines are not excepted from disclosure under section 24 of the Act by a number of court decisions and decisions of Offices of the Information and Privacy Commissioners in other jurisdictions."

Recommendations includes suggestions for a course of action as well as the rationale for a suggested course of action.

Proposals and *analyses or policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

The Information and Privacy Commissioner has defined all these terms as types of advice. The Commissioner's criteria for advice are that it should be:

- sought or expected, or be part of the responsibility of a person by virtue of that person's position;
- directed towards taking an action, including making a decision; and
- made to someone who can take or implement the action.¹⁰

[29] When considering whether or not section 16(1)(a) of LA FOIP applies, it must first be demonstrated that whatever advice is offered is developed "by or for the local authority."

[30] I have not previously offered a clear interpretation of "by or for". The Alberta IPC did however in its Order F2008-008. The relevant portions are reproduced as follows:

[para 14] The provisions of section 24 of the Act that are relevant to this inquiry are as follows:

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

*(a) **advice, proposals, recommendations, analyses or policy options developed by or for a public body** or a member of the Executive Council,*

(b) consultations or deliberations involving

(i) officers or employees of a public body,

...

[para 41] Under other sections of the Act, it has been concluded that, for a record to be created "by or for" a person, the record must be created "by or on behalf" of that person [Order 97-007 at para. 15, discussing what is now section 4(1)(q); Order 2000-003 at para. 66, discussing what is now section 4(1)(j)]. I adopt the same conclusion in respect of section 24(1)(a). I further note that section 24(1)(c) refers to information developed "by or on behalf" of a public body. While I acknowledge that different wording is used in subsections 24(1)(a) and (c), I believe that the intent behind both subsections is to allow a public body to withhold information developed by or on behalf of it. **In other words, I equate "by or for" in subsection 24(1)(a) with "by**

¹⁰ Supra note 5 at p. 179.

or on behalf” in subsection 24(1)(c). As a result, it is not sufficient under section 24(1)(a) for an organization or individual to simply have provided information to a public body.

[para 42] **In my view, for information to be developed by or on behalf of a public body under section 24(1)(a) of the Act, the person developing the information should be an official, officer or employee of the public body, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the public body. I do not believe that general feedback or input from stakeholders or members of the public normally meets the first requirement of the test under section 24(1)(a), as the stakeholders or members of the public do not provide the information by virtue of any advisory “position”. This is even if the public body has sought or expected the information from them.**¹¹

[emphasis added]

[31] For purposes of this analysis, I adopt the above noted definitions of “by or for”. In this regard, I need to examine the role of each individual involved in the discussions/correspondence comprising the record (i.e. emails, attachments, etc) before being able to make a determination with respect to whether or not the exemption may apply.

[32] The City provided some basic information as to its affiliation with most of the individuals named in the record as follows:

- Consultant hired by City, CitySpaces, Victoria BC
- Civic Employees:
 - City Manager
 - City Solicitor
 - Special Projects Manager
 - Manager, City Planning Branch
 - Senior Planner, City Planning Branch
 - Urban Design Coordinator, City of Saskatoon
- Chief Executive Officer (CEO) of Meewasin Valley Authority (MVA)

¹¹ Alberta OIPC Order F2008-008, available at: <http://www.oipc.ab.ca/pages/OIP/Orders.aspx>.

- Member of MVA
- Two Architects hired by the City

[33] Not all of the above individuals appear to qualify as employees or officials of the local authority (i.e. the Member of or CEO of MVA¹²), nor is the relationship with the City clear as the City did not provide any representation respecting same. I also note that the record contains commentary unattributed to any particular person(s) [comments from unidentifiable individuals attending a community meeting (i.e. pages 72-74)]. In those cases, I am unable to conclude that any advice, in its various forms, was offered “by or for the local authority”.

[34] The City however has provided the following with respect to the Consultant’s role: “The only correspondence on file relating to this request are working documents between the City’s Administration and [the Consultant], who is the consultant hired by the City to assist in developing the South Downtown.” The City also indicated that it hired two Architects. Work done by the Consultant and the Architects may be viewed as “by or for the local authority” in the case at hand as would be done ‘for’ or ‘on behalf’ of the local authority.

[35] Many of the records reviewed contain advice in its various forms and have been developed by its employees, the Consultant or the Architects. Even though the content at times seems rather innocuous, the information contained within nonetheless may either reasonably be expected to disclose or permit the drawing of accurate inferences as to the nature of the actual proposals, recommendations, analyses or policy options so would also appear to qualify for the exemption in section 16(1)(a) of LA FOIP; therefore, those portions I agree may be withheld.¹³ In that regard, section 16(1)(a) of LA FOIP appears to apply to a number of records or portions thereof. That is not the case though in terms

¹² Meewasin Valley Authority is a government institution as per *The Freedom of Information and Protection of Privacy Regulations*, c. F-22.01 Reg. 1, Appendix, PART I, Boards, Commissions, Crown Corporations and Other Bodies Prescribed as Government Institutions.

¹³ See SK OIPC Report LA-2007-001 at [91]: “Furthermore, information that would permit the drawing of accurate inferences as to the nature of the actual proposals, recommendations, analyses or policy options would also qualify for the exemption in section 16(1)(a) of the Act.”, available at: www.oipc.sk.ca/reviews.htm.

of those documents or line items that: (a) constitute background information; (b) deal with issues such as scheduling, etc; or (c) consist of correspondence (to or from) or contains comments of employees or officials of MVA or of the general public. As this exemption does not exempt all the material withheld by the City, I must now consider whether another provision permits withholding the remainder of the material in question.

2. Did the City properly apply section 16(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?

[36] I note that the City applied both sections 16(1)(a) and 16(1)(b) of LA FOIP to every page of the record except for those few to which it instead applied section 21 of LA FOIP. Since I have determined that section 16(1)(a) of LA FOIP only exempts certain material, I must next consider whether section 16(1)(b) has any application to the withheld records to which the City has applied the exemption. Most of the record at issue in this section is comprised of records containing comments to, from and/or views of City employees, the Consultant, the Architects, the government institution, the Member and others (general public).

[37] From my Report LA-2007-001, referenced earlier, I detailed what is required for section 16(1)(b) of LA FOIP to apply:

[100] The relevant provision in the Act is as follows:

16(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

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

[101] In Report F-2004-001, **I defined “consultation” as when the views of one or more officers or employees of a government institution are sought as to the appropriateness of a particular proposal or suggested action. A “deliberation” is a discussion of the reasons for and against an action by the persons described in the section.** I further held that in order to justify withholding a record on the basis of section 17(1)(b)(i), which is the counterpart in FOIP to section 16(1)(b) in the Act, **consultations and deliberations must:**

- a) either be sought or expected, or be part of the responsibility of the person from whom they are sought;**
- b) be sought for the purpose of doing something, such as taking an action or making a decision; and**
- c) involve someone who can take or implement the action.**¹⁴

[emphasis added]

[38] As with 16(1)(a), the application of 16(1)(b) of LA FOIP is determined by the nature of the roles played by the individuals involved. As stated above, for a consultation to take place, “officers or employees of a government institution,” or in this case a local authority, must be involved in the decision making process. The City has not claimed that the Consultant or the Architects qualify as “employees or officials” of the local authority; however, may they be considered such?

[39] “Employee” is defined in *Black’s Law Dictionary* as:

A person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed...One who works for an employer; a person working for salary or wages. Generally when a person for whom the services are performed has right to control and direct the individual who performs the services not only as to result to be accomplished by work but also as to details and means by which result is accomplished, individual subject to direction is an “employee”.¹⁵

[40] FOIP Guidelines defines “employee” as follows:

Includes, in relation to a public body, a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body.¹⁶

[41] I canvassed other Canadian jurisdictions to see if a definition for employee, officer or official is offered in other freedom of information statutes. Those definitions are as follows:

¹⁴ Supra note 7.

¹⁵ *Black’s Law Dictionary*, 6th Ed., USA: Thomson West, 2004.

¹⁶ Supra note 5 at p. 372.

British Columbia

Freedom of Information and Protection of Privacy Act

Schedule 1

“employee”, in relation to a public body, includes

- (a) a volunteer, and
- (b) a service provider;¹⁷

Alberta

Freedom of Information and Protection of Privacy Act

1(e) “employee”, in relation to a public body, includes a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body;¹⁸

Manitoba

The Freedom of Information and Protection of Privacy Act

1... “employee”, in relation to a public body, includes a person retained under a contract to perform services for the public body;¹⁹

Nova Scotia

Freedom of Information and Protection of Privacy Act

3(b) “employee”, in relation to a public body, includes a person retained under an employment contract to perform services for the public body;²⁰

PEI

Freedom of Information and Protection of Privacy Act

1(c) “employee”, in relation to a public body, includes a person who performs a service for the public body as an appointee, volunteer or student or under a contract with the public body;²¹

Newfoundland

Access to Information and Protection of Privacy Act

2(e) “employee”, in relation to a public body, includes a person retained under a contract to perform services for the public body;²²

Yukon

Access to Information and Protection of Privacy Act

¹⁷ *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165.

¹⁸ *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25.

¹⁹ *The Freedom of Information and Protection of Privacy Act*, C.C.S.M. c. F175.

²⁰ *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5.

²¹ *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, F-15.01.

²² *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1.

3 “employee”, in relation to a public body, includes a person retained under a contract to perform services for the public body;²³

North West Territories

Access to Information and Protection of Privacy Act

2 “employee”, in relation to a public body, includes a person who performs a service for the public body

- (a) as an appointee,
- (b) as a volunteer,
- (c) as a student,
- (d) under a contract, or
- (e) under an agency relationship;²⁴

Nunavut

Access to Information and Protection of Privacy Act

2 “employee”, in relation to a public body, includes a person retained under contract to perform services for the public body;²⁵

[42] The following excerpt, taken from Alberta IPC Order F2004-026, I find helpful as it is on point:

[para 76] I acknowledge there may be circumstances where a public servant’s participation in certain kinds of discussions may give rise to criticism. Despite this, I do not accept that the words of section 24(1) are intended to shield from exposure the very fact that consultations or deliberations between particular officers or employees took place, or took place about a particular topic, on the basis that this may dissuade public servants from participating in discussions of particular subjects. Where a person consults or is consulted on a given subject as a function of their office, and the application of section 24 is claimed on the basis that they are officers or employees of a public body, the very fact they participated in the consultation cannot, in my view, be withheld under section 24 unless this fact also reveals the substance of the consultation.^{FN 23}

[FN 23: **This point applies to both public body officials, and people who are consulted and provide advice on a ‘fee for service’ basis.**]²⁶

[emphasis added]

²³ *Access to Information and Protection of Privacy Act*, RSY 2002, c.1.

²⁴ *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c.20.

²⁵ *Access to Information and Protection of Privacy Act*, S.N.W.T. (Nu.) 1994, c. 20.

²⁶ *Supra* note 8.

[43] In my Report LA-2004-001, I stated the following with respect to employees:

[38] “Employee” is not defined in the LA FOIP Act. This question does not appear to have been addressed by this office in the past. We note that in the Alberta *Freedom of Information and Protection of Privacy Act*, employee was defined prior to 1999 as “...a person retained under a contract to perform services for the public body;”. [s. 1(1)(e)] This was considered by the Alberta Information and Privacy Commissioner’s office in Investigation Report 98-IR-015. That case involved a parent who worked as a volunteer fund raiser at the high school her children attended. The Portfolio Officer considered that subsequent to the date of the complaint the Alberta Legislative Assembly redefined employee to include “a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body [s. 1(1)(e)].” In the particular circumstances of that case, the Portfolio Officer concluded that the parent was an employee of the school division. We note that the volunteer role of the individual in the Alberta case appears to have been more formal and more defined than was the case for this Applicant.

[39] In the case of the Saskatchewan provision, our view is that it should be for the Saskatchewan Legislative Assembly to amend the Act if it determines that the word “employee” should be given an expanded scope to capture volunteers.²⁷

[44] As such, the Consultant and the Architects should also qualify in the circumstances as they are not volunteers but are paid by the City for services rendered.

[45] To the extent that the Consultant and the Architects were involved in the consultative/deliberation process and worked alongside City employees and officials at the time the record was created, it appears that section 16(1)(b) of LA FOIP may apply in those circumstances. Conversely, this would not be the case where employees or officials of the government institution or others parties (e.g. general public) offered commentary or were apparently ‘kept in the loop’. Accordingly, as the City has only fulfilled the criteria for the application of section 16(1)(b) of LA FOIP in certain cases, I do not agree that the exemption applies to all the records to which the City has invoked it.

[46] Even though it appears that section 16(1)(b) of LA FOIP would apply to most content, I do not agree that it would apply to email header information consistent with the approach I took with section 16(1)(a).

²⁷ SK OIPC Report LA-2004-001, available at: www.oipc.sk.ca/reviews.htm.

[47] As previously indicated, the City advised that it was releasing additional information to the Applicant based on our recommendations. However, the City did not agree to release all of the information that my office recommended to be released on the basis of our consideration of sections 16(1)(a) and/or 16(1)(b) of LA FOIP. Though the City released the header information as recommended, the City did not comply with our recommendation in full and withheld the substantive parts of the following records: pages 1, 16, 46, 101-102. The City did release page 3 but severed two words. The reason provided is as follows: “Release but sever the words ... from the first sentence. It was only [the Consultant’s] speculation that the document was ... and the [government institution], which is an independent body, may take offence to that characterization.” I recommend release of the withheld words as LA FOIP does not authorize public bodies to withhold statements to prevent embarrassment.

3. Did the City properly apply section 16(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?

[48] The next applicable subsection to consider is as follows:

16(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(c) **positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the local authority, or considerations that relate to those negotiations;**

[emphasis added]

[49] The terms under consideration with respect to the application of 16(1)(c) of LA FOIP are defined as follows in Ontario IPC Order M-755:

Previous orders of the Commissioner’s office have defined “**plan**” as “**... a formulated and especially detailed method by which a thing is to be done; a design or scheme**” (Order P-229). **In my opinion, the other terms in section 11(e),**

that is, “positions”, “procedures”, “criteria” and “instructions”, are similarly referable to pre-determined courses of action or ways of proceeding.²⁸

[emphasis added]

[50] I note that, in its representations, the City has not identified those portions of the record which it considers to be positions, plans, procedures, criteria and/or instructions, nor has it provided evidence that the “record was developed for the purpose of contractual or other negotiations.”

[51] The City has not provided details of any negotiations that it is engaged in or will be engaged in at some future point. Accordingly, there is no proper basis for information to be withheld on account of section 16(1)(c).

4. Did the City properly apply section 16(1)(e) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?

[52] The final clause of 16(1) of LA FOIP invoked by the City to consider is 16(1)(e) which reads as follows:

16(1) Subject to subsection (2), a head may refuse to give access to a record that **could reasonably be expected** to disclose:

...

(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**.

[emphasis added]

[53] In terms of the application of section 16(1)(e) of LA FOIP, the City has not provided any representation as to how release of the information could reasonably be expected to result in disclosure of a pending policy or budgetary decision. Accordingly, the City has not met the burden of proof of establishing that exemption applies to any part of the record.

²⁸ Information and Privacy Commissioner/Ontario Order M-755, available at: http://www.ipc.on.ca/images/Findings/Attached_PDF/M-755.pdf.

[54] Now that I have determined that no part of section 16(1) of LA FOIP applies to certain records or line items, I recommend release of the following to the Applicant: pages 1, 16, 46, 102 and another copy of page 3 without any severance applied. I also recommend release of the bottom portion of the email discussion thread on page 101, but not the top.

5. Did the City properly apply section 21 of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld document in question?

[55] The City withheld two other documents citing the following discretionary exemption of LA FOIP:

21 A head may refuse to give access to a record that:

(a) contains information that is subject to solicitor-client privilege;

(b) was prepared by or for legal counsel for the local authority in relation to a matter involving the provision of advice or other services by legal counsel; or

(c) contains correspondence between legal counsel for the local authority and any other person in relation to a matter involving the provision of advice or other services by legal counsel.

[56] In my Report F-2005-002, I offered analysis with respect to the ‘solicitor-client privilege’ provision as follows:

Report 2003/004

[28] This section was addressed by former Commissioner Richard Rendek in Report No. 2003/004. ... Former Commissioner Rendek found that the exemption for solicitor-client privilege in section 22 had been properly invoked. Mr. Rendek relied on the Federal Court of Appeal decision in *Stevens v. Canada*, [1998] 4 F.C. 89. The Court of Appeal was then considering section 23 of the federal *Access to Information Act* that provides as follows:

The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

[29] Mr. Rendek ‘s discussion of section 22 in that Report is as follows:

The Federal Court of Appeal followed *Canadian Jewish Congress v. Canada*, [1996] 1 F.C. 268 (T.D.), in finding that since there was no definition of “solicitor-client privilege” in the Act, the common law definition should be followed. The Court adopted the definition of solicitor-client privilege formulated

by the Exchequer Court in *Consultant Hosiery Ltd. v. Minister of National Revenue* [1969] 2 Ex. C.R. 27, as follows:

(a) all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers, directly related thereto) are privileged; and

(b) all papers and materials created or obtained specifically for the lawyer's "brief" for litigation, whether existing or contemplated are privileged.²⁹

[emphasis added]

[57] In addition to the above, I note that through a review of decisions from Commissioners in other jurisdictions, the basic criteria offered incorporates these principles: it must be direct communication of a confidential nature between a solicitor and a client, made for the purpose of obtaining or giving professional legal advice; there must be a continuum of communication; and communication that solely conveys factual information will not be privileged because the communication does not entail the seeking or giving of legal advice.

[58] Further though, the City raised sections 21(b) and 21(c) of LA FOIP, not just 21(a). In the recently issued Report F-2010-001, I noted the following with respect to the application of the other parts of the Saskatchewan solicitor-client exemption, albeit in consideration of section 22 of *The Freedom of Information and Protection of Privacy Act*:³⁰

[110] In my Report F-2005-002, the application of solicitor client privilege is considered at [26] to [37], but I have not reproduced as it is not on point. What is relevant though is that the solicitor-client privilege exemption incorporates the common law doctrine of solicitor-client privilege as noted by Health. However, our section has broader application due to the language contained in clauses 22(b) and (c) of FOIP. In that regard, I found the following excerpt taken from *Government Information: Access and Privacy* by Woodbury and McNairn (McNairn) helpful:

The expanded exemption in the Saskatchewan Act covers information prepared by or for an agent of the Attorney General or legal counsel for an institution in

²⁹ SK OIPC Report F-2005-002, available at: www.oipc.sk.ca/reviews.htm.

³⁰ *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01.

relation to any matter involving the provision of advice or services – not necessarily of a legal nature – by the agent or counsel. This information includes correspondence between any such agent or counsel and a third party.³¹

[59] I relied on the above excerpt from McNairn also in Report LA-2009-002/H-2009-001 at [160] and stated the following at [161]: “While McNairn clearly contemplates *The Freedom of Information and Protection of Privacy Act*, the analysis is entirely applicable to section 21 of LA FOIP.”³²

[60] In studying the withheld pages, two memos (four pages in total) prepared by the City Solicitor, I find section 21 of LA FOIP applies as the Solicitor is offering advice to the Mayor and Councillors. Accordingly, I am not recommending release of those documents to the Applicant.

6. Does the record contain anyone’s personal information as defined by section 23(1) of *The Local Authority Freedom of Information and Protection of Privacy Act*?

[61] In a preliminary review of the responsive record, a few details or line items appeared to perhaps qualify as the personal information of a number of different identifiable individuals. As this would be a mandatory exemption, I considered the application of the following sections of LA FOIP, though not raised by the City:

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;

...

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

...

³¹ SK OIPC Report F-2010-001, available at: www.oipc.sk.ca/reviews.htm.

³² SK OIPC Report LA-2009-002/H-2009-001, available at: www.oipc.sk.ca/reviews.htm.

(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;

...

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.

[62] Certain emails (pages 26 and 47) contain the Consultant’s home phone number. Pursuant to section 23(1)(e) of LA FOIP, this constitutes her personal information and must be withheld pursuant to section 28(1) of LA FOIP as the Consultant is a third party. Other records contain other third party personal information (i.e. pages 57, 66, 78 and 95). For instance, one record contains information about an individual’s illness, which constitutes the data subject’s personal information pursuant to section 23(1)(c) of LA FOIP. I therefore recommend the City continue to withhold these line items per section 28(1) of LA FOIP.

[63] I am not recommending that the City withhold the names or business contact information (i.e. business card information) for its officers or employees, its consultants or others (i.e. government employees) as this does not constitute personal information by reason of section 23(2).³³

[64] On or about January 21, 2010, the City released most of the information that my office recommended release of including the previously withheld business card type information described above. At that time, the City identified a few additional data elements on pages 96-98 relating to employee vacations that we had not previously identified. As I agree that those constitute third party personal information, I uphold the City’s decision to withhold from the Applicant.

³³ See SK OIPC Report F-2006-004 at [45], available at: www.oipc.sk.ca/reviews.htm.

V. ACKNOWLEDGEMENT

[65] I wish to acknowledge and thank both the Applicant and the City for their cooperation and patience throughout this process.

VI. RECOMMENDATIONS

[66] I recommend the City release all the withheld information on pages 1, 3, 16, 46, and 102 to the Applicant forthwith. The City should also release to the Applicant the bottom portion of the email discussion thread on page 101 which is correspondence with a government institution, but continue to withhold the rest [top portion of the page (content of email only)].

[67] I recommend that the City continue to withhold the remaining exempt records and portions therein for the reasons previously noted.

Dated at Regina, in the Province of Saskatchewan, this 22nd day of September 2010.

R. GARY DICKSON, Q.C.
Saskatchewan Information and Privacy Commissioner