SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REVIEW REPORT LA-2013-001

Regina Qu'Appelle Regional Health Authority

Summary: The Applicant, an employee of the Regina Qu'Appelle Regional Health Authority (RQRHA) made an access to information request to her employer for a number of records pertaining to two harassment investigations involving her. RQRHA denied access pursuant to sections 14(1)(d) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner found that section 14(1)(d) of LA FOIP only applied to a small portion of the record, and found that certain information contained in the withheld record constituted third party personal information. However, as bound by an earlier court decision, the Commissioner recommended release of all third party personal information to the Applicant. The Commissioner also recommended that the portions of the record that constituted the personal information of the Applicant and that which qualified as work product be released to her as well. Finally, the Commissioner recommended that RQRHA withhold the third party personal health information referenced in the record.

Statutes Cited: *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1, ss. 2(f), 8, 14(1)(d), 18, 22, 23(1), 23(1)(h), 23(2), 28(1), 28(2), 28(2)(n)(i), 30(1), 30(2), 30(3), and 51; *The Health Information Protection Act*, S.S. 1999, c. H-0.021 ss. 2(m) and 2(t); *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91 c. F-22.01, ss. 19, 29(2), 29(2)(o)(i); *The Trade Union Act*, R.S.S. 1978, c.T-17; *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1; *The Registered Nurses Act, 1988*, S.S. 1988-89, c. R-12.2; *The Interpretation Act, 1995*, S.S., 1995, c. I-11.2, s. 10

Authorities Cited: Saskatchewan OIPC Review Reports: LA-2007-001, LA-2009-002/H-2009-001, LA-2012-001, LA-2010-001, F-2004-003, F-2012-001/LA-2012-001; Saskatchewan OIPC Investigation Report: F-2009-001; Alberta IPC Order H2006-002, Alberta Adjudication Order #3 (Review Numbers 2170 and 2234); Ontario IPC Order PO-1879 and Reconsideration Orders MO-2026-R and R-980015; British Columbia IPC Order 01-19 British Columbia Ruling IPC File No. 15884; *Nautical Data International Inc. v. Canada (Minister of Fisheries and Oceans)*, [2005] FC 407; *Canada (Attorney General) v. Canada (Information Commissioner)*, [2004] FC 431; *Canada (Attorney General) v. Canada (Information Commissioner)*, [2002] FCT 128; *3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 FCA 421; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] SCC 53; *R. v. Dyment*, [1988] 2 SCR 417; *R. v. Mills*, [1999] 3 SCR 668; *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403; *R. v. Plant*, [1993] 3 SCR 281; *R. v. Duarte*, [1990] 1 SCR 30; *R. v. Edwards*, [1996] 1 SCR 128; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] SCC 8; *General Motors Acceptance Corporation of Canada Ltd. v. Saskatchewan Government Insurance*, [1993] SK CA 6655; *Liick v. Saskatchewan (Minister of Health)*, [1994] SKQB 4934; *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, [2001] FCT 231.

Other Sources Cited: Saskatchwean OIPC, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review*; Service Alberta, *FOIP Guidelines and Practices (2009)*, Appendix 1: Definitions; British Columbia's Ministry of Citizens' Services and Open Government, *FOIPP Act Policy and Procedures Manual*, *Policy Definitions*; Regina Qu'Appelle Health Region *2009-2010 Annual Report*; Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, *Access to Information and Protection of Privacy in Canadian Democracy*, May 5, 2009.

I BACKGROUND

[1] On or about June 27, 2008, the Applicant submitted an access to information request to her employer, the Regina Qu'Appelle Regional Health Authority (RQRHA).[1]

[1] *The Regional Health Services Act* establishes the Regina Qu'Appelle Regional Health Authority (RQRHA) as the governing body of the Regina Qu'Appelle Health Region (RQHR). Regina Qu'Appelle Health Region *2009-2010 Annual Report* at p. 9, available at www.health.gov.sk.ca/regina-quappelle-annual-report-2009-10.

[2] RQRHA provided an interim response to the Applicant on or about July 10, 2008.

[3] RQRHA provided further response to the Applicant by way of letter dated July 31, 2008. The exemptions applied to the withheld material at that time were sections 14(1)(c), 14(1)(d), 14(1)(f), 16(1)(a) 18(1)(b) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).[2]

[4] On August 26, 2008, my office received a request for review from the Applicant. Among other things, the Applicant raised concerns regarding the adequacy of RQRHA's search for responsive records.

[5] On or about October 3, 2008 my office provided notice to RQRHA that it was undertaking a review. In this letter, my office requested that RQRHA not only address the adequacy of its search for responsive records, but also provide a submission to justify the exemptions invoked. We also raised concern with RQRHA regarding the following statement noted in its July 31, 2008 letter to the Applicant: "**Access to these records would be granted** under *The Local Authority Freedom of Information and Protection of Privacy Act* **but they are already available to you**." [emphasis added]

[6] In its submission dated December 12, 2008, RQRHA reversed its above noted position as follows:

> The RQHR [Regina Qu'Appelle Health Region] did not intend by noting in our July 31, 2008, response to [the Applicant] that certain records were "already available to you" to withhold such records. Rather, the Region was merely noting that, as a practical matter, the applicant already had ready access to the records in question. Our approach in this regard may have been mistaken but it was not willful. **Nevertheless, RQHR acknowledges and agrees that, to the extent that our actions have been interpreted as denying access to the records in question, there is no statutory basis upon which to deny access to records**. These records are enclosed as Attachment A, and may be provided to [the Applicant].
>
> [emphasis added]

[2] *The Local Authority Freedom of Information and Protection of Privacy Act,* S.S. 1990-91, c. L-27.1 (hereinafter LA FOIP).

[7] My office sent another letter to RQRHA dated January 29, 2009 requesting a response to a number of issues including the Applicant's concern regarding an apparent alteration of documents.

[8] On April 9, 2009, my office received another submission from RQRHA. It advised us as follows:

> The RQHR **is no longer claiming** the exemptions 18(1)(b), 14(1)(c), (f) and 16(1)(a) of LAFOIPPA apply in this application. The RQHR continues to claim the 14(1)(d) and 28(1) exemptions. **All other referenced exemptions in the submission are abandoned**.
>
> [emphasis added]

[9] On April 9, 2009 and further on July 30, 2009, RQRHA provided my office with a reasonable explanation for the appearance of the document in question (original contained page break in mid sentence).

[10] On April 30, 2009, the Portfolio Officer assigned to the file attended a meeting with RQRHA officials to discuss our preliminary findings and then followed up with a letter the same date.

[11] On May 3, 2009, the Applicant provided our office with a list of what she alleged were missing documents. My office shared a copy of this list with RQRHA and asked it to comment.

[12] In response, RQRHA provided the following on May 21, 2009:

> I write in response to your letter dated May 3, 2009 advising that [the Applicant] wishes to request additional documentation from RQHR.
>
> The RQHR notes that [the Applicant]'s initial request was for the following:
>
> (1) Harassment Investigation Report Findings; Complainant [the Applicant] vs. Respondent [Co-worker] Prepared by: [Consultant/Private Investigator], Dated November 13, 2007

(2) Harassment Investigation Report Findings; Complainant [the Applicant] vs. Respondent [Manager] Prepared by: [Consultant/Private Investigator], Dated: October 26, 2007

- Recommendations in original form, from both Harassment Investigations Reports, as cited above

- Any & all records, recommendations, notes, documentation & information compiled, composed or recorded and in original form, from [Consultant/Private Investigator] to the RQHR regarding and pertaining to the 2 Harassment Investigations as cited above.

The terms of the original request were focused on the findings and recommendations of the two specified reports, along with all information *from* [Consultant/Private Investigator] *to the RQHR* and *pertaining to the 2 Harassment Investigations*. RQHR's initial search and subsequent responses have endeavored to respond to this request.

You have advised that [the Applicant] now seeks access to additional information including but not limited to information such as documents that [the Applicant] provided to senior level managers within RQHR, [the Applicant]'s letter to members of senior management team, letters [the Applicant] sent to the SK Human Rights Commission, the RQHR Harassment Orientation Package as well as other undated and unknown letters.

The RQHR's interpretation **is that the list provided is significantly more expansive than the request under review. Among other matters which plainly fall outside the scope of the initial request, the May 3 letter requests a broad range of information surrounding the [Manager] and [Co-worker] incidents with no limitation that the information have been "from [Consultant/Private Investigator] to the RQHR"** or related in any way to the investigations which were the subject of the initial request, as well as information alleged to arise out of investigations of incidents other than the two specifically identified in the initial request.

In order to ensure that all parties' rights under LAFOIP are protected, RQHR invites [the Applicant] to submit a new Access to Information application which formally requests this information. …

[emphasis added]

[13] Our office offered the following response dated May 25, 2009:

We understand that the RQHR will not entertain the notion of providing access to information to documents the Applicant has informally requested through discussion with the undersigned; such records would include documents initially provided by the Applicant to the RQHR. **We further understand that the RQHR is willing to**

> **provide access to this information should the Applicant submit a formal access to information request.**
>
> While we respect that the preference of the RQHR is to manage this matter in this fashion, we had hoped that access could have been afforded through more informal processes. **We shall relate to the Applicant that it is your desire to proceed in this fashion**.
>
> While it is clear from your response that the RQHR is satisfied that the records submitted to this office are all the responsive records in this matter, **we require further representations from RQHR regarding those records in the control of the RQHR which may be in the possession of [Consultant/Private Investigator].** We remind the RQHR that, although a contractor may have possession of a record, a local authority could have control over it if such control is stipulated in a contract or is granted to the local authority by a specific statutory right of access. In either case, the local authority is responsible for handling access requests, and the contractor is required to produce the record upon request.
>
> It is not clear from our meeting, and from the submissions of the RQHR before this office, that the RQHR has fully explored the notion that further responsive records may exist in the possession of [Consultant/Private Investigator] that are in the control of the RQHR. Please provide representations as to how the RQHR has determined that no further responsive records in [Consultant/Private Investigator]'s possession but in the control of the RQHR exist.
> …
>
> [emphasis added]

[14] RQRHA's noted position is that the missing records did not fall within the scope of the Applicant's original access to information request. However, its submission did not address the question of whether it had considered responsive records not within its possession but rather under its control. RQRHA addressed this particular issue as received by our office on August 26, 2009 dated June 2, 2009 (reprinted August 24, 2009) as follows:

> Thank you for your letter of May 25, 2009. In response to your request for further representation from RQHR regarding records which may be in the possession of [Consultant/Private Investigator], the Region previously stated in its detailed submission sent to your office on December 17, 2008 under Attachment B, Section 1:
>
> In determining whether documents fit this definition, RQHR undertook the following steps:
> …

> After receiving your May 25, 2009 letter I personally contacted [Consultant/Private Investigator]. **She confirms that she does not possess any records associated with her investigation of the harassment complaints which make up the subject matter of the Applicant's request. I also asked that our Labour Relations Consultant responsible for this investigation, [Name Removed], search his files for any records which may have been received from [Consultant/Private Investigator] that may be a responsive record. No responsive records were found within the file.**
>
> I trust this provides the representation requested and clarifies that the RQHR has fully explored the notion that further responsive records might exist in the possession of [Consultant/Private Investigator]. No such responsive records exist.
>
> [emphasis added]

[15] Accordingly, I am satisfied that the only records responsive to this request are as noted originally by RQRHA in its section 7 response as all others would be outside the scope of this request that crystallized on the day the application was made. If the Applicant seeks access to additional records, she can submit a new access to information request to RQRHA.

[16] Additional representation was provided by RQRHA after reviewing my office's preliminary analysis though it did not require any revision of our findings. As RQRHA did not agree to comply with our recommendations in full and the Applicant still seeks release, I proceeded to issue this public Report.

II RECORDS AT ISSUE

[17] The record consists of the following:

- 2.ii consists of 5 pages;
- 2.v consists of 12 pages;
- 2.vii consists of 1 page;
- 3.i consists of 2 pages;
- 3.iii consists of 17 pages; and
- 3.v consists of 3 pages. In total, 40 pages.

[18] I will now turn my attention to the exemptions claimed by RQRHA.

III ISSUES

1. Does section 14(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* apply to the withheld records in question?

2. Does section 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* apply to any of the withheld material in question?

IV DISCUSSION OF THE ISSUES

1. Does section 14(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* apply to the withheld records in question?

[19] RQRHA is a "local authority" as defined by LA FOIP as previously determined in my Review Report LA-2009-002/H-2009-001 as follows:

> [27] As a regional health authority (RHA), RQHR is defined as a local authority by virtue of section 2(f)(xiii) of LA FOIP[3]

[20] RQRHA relies upon section 14(1)(d) of LA FOIP as its authority to withhold all remaining records responsive to the access request. That provides as follows:

> 14(1) A head may refuse to give access to a record, the release of which could:
> …
>
> (d) be injurious to the local authority in the conduct of existing or anticipated legal proceedings;

[21] RQRHA asserts that the Applicant is involved in several different proceedings related to the records withheld under this review including:

[3]Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Review Report LA-2009-002/H-2009-001, available at www.oipc.sk.ca/reviews.htm and LA FOIP, section 2(f): "'local authority' means:… (xiii) a regional health authority…as defined in *The Regional Health Services Act*".

- a union grievance (in abeyance);
- a complaint before the Saskatchewan Human Rights Commission; and
- an allegation of professional misconduct against several staff members currently before the Saskatchewan Registered Nurses Association.

[22] In order to accept RQRHA's contention that the above exemption applies, I must be able to answer positively the following:

a) Do the above proceedings qualify as legal proceedings for the purposes of LA FOIP?

b) Could disclosure of withheld records be injurious to RQRHA in the conduct of existing or anticipated legal proceedings?

a) Do the above proceedings qualify as legal proceedings for the purposes of LA FOIP?

[23] In order to make that determination I must first define that term.

[24] RQRHA offered the following on what it contends constitutes "legal proceedings":

> Saskatchewan case law has not considered whether arbitration or administrative proceedings constitute "legal proceedings" for the purposes of LAFOIPPA. However, the question has been addressed in other jurisdictions. In *Newfoundland and Labrador (Public Service Secretariat) (Re),* Report A-2008-002 (NL I.P.C.) at para. 62, Commissioner Ring affirmed the application of the following test found in Manitoba's *Freedom of Information and Protection of Privacy Act Resource Manual* as cited with approval in *North Atlantic*:
>
> > I adopt the definition of "legal proceeding" set out in Manitoba's manual and find that for the purpose of section 22(1)(p) of the *ATIPPA* **a legal proceeding includes any civil or criminal proceeding or inquiry in which evidence is given or may be given and any proceeding or sanctioned by law and brought or instituted for the acquiring of a right or the enforcement of a remedy.** This definition would include, as indicated in Manitoba's manual, an arbitration hearing.
>
> [emphasis added]

[25] An Alberta publication offers the following definition of what constitutes "legal proceedings" as follows:

> Proceedings governed by rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgment of a court or a ruling by a tribunal. Legal proceedings include all proceedings authorized or sanctioned by law, and brought or instituted in a court or legal tribunal, for the acquiring of a right or the enforcement of a remedy.[4]

[26] British Columbia's *FOIPP [Freedom of Information and Protection of Privacy] Act Policy and Procedures Manual*[5] offers a similar definition of proceedings, stating that they "are activities governed by rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgment of a court or ruling of a judicial or quasi-judicial tribunal."[6]

[27] I accept and adopt the approach taken to "legal proceedings" by Alberta. Although consistent with the approach of other oversight bodies, it appears more comprehensive.

[28] I must next determine if the proceedings described in [21] qualify as a legal proceeding for purposes of subsection 14(1)(d).

[29] RQRHA asserts that the proceedings in question are established under the following legislation:

- the arbitration proceeding is governed by law under [*The*] *Trade Union Act,* R.S.S. 1978, c.T-17;
- the human rights hearings are administered under [*The*] *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1; and
- the allegation of professional misconduct is governed by [*The*] *Registered Nurses Act, 1988*, S.S. 1988-89, c. R-12.2.

[4]Service Alberta, *FOIP* [Alberta *Freedom of Information and Protection of Privacy Act*] *Guidelines and Practices (2009)*, Appendix 1: Definitions at p. 376, available at www.servicealberta.ca/foip/documents/appendix1.pdf.
[5]Ministry of Citizens' Services and Open Government, *FOIPP Act Policy and Procedures Manual* available at www.cio.gov.bc.ca/cio/priv_leg/manual/index.page.
[6]*Ibid*. at *Policy Definitions*, available at www.cio.gov.bc.ca/cio/priv_leg/manual/definitions/def.page?#I.

[30] In each case, there is a quasi-judicial tribunal. In this Report I am using the adjectives "quasi-judicial" and "administrative" interchangeably to describe the tribunals in each of the separate proceedings. Each proceeding will have the effect of determining the rights of the parties involved, and may result in remedies or sanctions against RQRHA or its employees.

[31] I accept RQRHA's contention that the above matters qualify as legal proceedings for the purposes of subsection 14(1)(d) of LA FOIP.

b) Could disclosure of withheld records be injurious to RQRHA in the conduct of existing or anticipated legal proceedings?

[32] Of the three different investigations, only the union grievance and the complaint to the Saskatchewan Human Rights Commission need be addressed since RQRHA acknowledges that the disciplinary process under *The Registered Nurses Act, 1988*[7] involves a number of individuals who are employees of RQRHA but RQRHA is not a party to that investigatory proceeding. In other words, in order for the release of a record to be injurious to RQRHA "in the conduct of existing or anticipated legal proceedings" RQRHA would need to be a party to such proceedings and it is not in this case.

[33] Having carefully considered the submissions from RQRHA, I have determined that the prejudice claimed by RQRHA appears to be that in their tactics when responding to the union grievance or the human rights matter, it would be deprived of the opportunity to withhold certain records from the opposite parties in those proceedings if RQRHA is required by LA FOIP to release the responsive record to the Applicant. In other words, RQRHA might lose some short term leverage.

[7] *The Registered Nurses Act, 1988,* S.S. 1988-89, c. R-12.2.

[34] This requires consideration of what was intended by the Legislative Assembly when it required that the release could be "...**injurious to the local authority** in the conduct of existing or anticipated legal proceedings;...".[8] [emphasis added]

[35] This phrase does not appear to have been judicially considered in this province nor has it been the subject of much discussion by my four predecessors in the first 20 years of *The Freedom of Information and Protection of Privacy Act* (FOIP)[9]. In my Review Report LA-2007-001, I had occasion to consider section 14(1)(d). At issue there was the claim by the University of Saskatchewan that it anticipated a civil action. That is not the case before me. I did however consider earlier Reports by my predecessors (Report 92/008, 2001/029, and Report 2003/034) in my Review Report LA-2007-001 and observed that to invoke section 14(1)(d) the threshold test is somewhat lower than a "reasonable expectation." I stated that: "Nonetheless, there would still have to be some kind of basis to found such an expectation. If it is fanciful or exceedingly remote, section 14(1)(d) could not be successfully invoked."[10]

[36] In considering the application of section 14(1)(d) to the current situation where the legal proceedings involve administrative tribunals rather than courts, it may be useful to consider first principles in determining what approach should be taken.

[37] Access to information statutes have been held by the Supreme Court to be a "quasi-constitutional" laws given the importance of access to information to a robust democracy.[11] This is reinforced by the paramountcy provision in section 22 of LA FOIP. That provides as follows:

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[8] *Supra* note 2 at section 14(1)(d).
[9] *The Freedom of Information and Protection of Privacy Act,* S.S. 1990-91, c. F-22.01 (hereinafter FOIP).
[10] SK OIPC Review Report LA-2007-001 at [117] available at www.oipc.sk.ca/reviews.htm.
[11] Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, *Access to Information and Protection of Privacy in Canadian Democracy*, May 5, 2009, available at www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm2009-05-05-eng.asp. *Nautical Data International Inc*. v. *Canada (Minister of Fisheries and Oceans)*, [2005] FC 407 at [8]; *Canada (Attorney General)* v. *Canada (Information Commissioner)*, [2004] FC 431; *Canada (Attorney General)* v. *Canada (Information Commissioner)*, [2002] FCT 128 at [20]; 3430901*Canada Inc*. v. *Canada (Minister of Industry)*, [2001] FCA 421 at [102]; *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, [2002] SCC 53 at [25]; *R*. v. *Dyment*, [1988] 2 SCR 417; *R*. v. *Mills*, [1999] 3 SCR 668; *Dagg* v. *Canada (Minister of Finance)*, [1997] 2 SCR 403; *R*. v. *Plant*, [1993] 3 SCR 281; *R*. v. *Duarte*, [1990] 1 SCR 30; *R*. v. *Edwards*, [1996] 1 SCR 128; *Canada (Information Commissioner)* v. *Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] SCC 8.

> **22**(1) Where a provision of:
>
> (a) any other Act;
>
> (b) a regulation made pursuant to any other Act; or
>
> (c) a resolution or bylaw;
>
> that restricts or prohibits access by any person to a record or information in the possession or under the control of a local authority conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant to it shall prevail.
>
> (2) Subject to subsection (3), subsection (1) applies notwithstanding any provision in the other Act, regulation, resolution or bylaw that states that the provision is to apply notwithstanding any other Act or law.
>
> (3) Subsection (1) does not apply to:
>
> (a) *The Health Information Protection Act*;
>
> (a.01) Part VIII of *The Vital Statistics Act, 2009*;
>
> (a.1) any prescribed Act or prescribed provisions of an Act; or
>
> (b) any prescribed regulation or prescribed provisions of a regulation;
>
> and the provisions mentioned in clauses (a), (a.01), (a.1) and (b) shall prevail.[12]

[38] In interpreting LA FOIP, I must apply section 10 of *The Interpretation Act, 1995*[13] that provides as follows:

> **10** Every enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects.[14]

[39] As noted in our *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* document, "[t]he OIPC, consistent with other privacy and access oversight agencies in Canada, follows the "modern principle" in interpreting FOIP, LA FOIP and

[12] *Supra* note 2.
[13] *The Interpretation Act, 1995*, S.S., 1995, c. I-11.2.
[14] *Ibid.*

HIPA[15] [*The Health Information Protection Act*]."[16] This has been described by the Alberta Information and Privacy Commissioner (IPC), when quoting the Supreme Court of Canada, as follows:

> The "modern principle" says I must read the words in enactment "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament[17]

[40] The Saskatchewan Court of Appeal has described the purpose of FOIP as follows:

> …The Act's basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.....The Act's broad provisions for disclosure, coupled with specific exemptions, prescribe the "balance" struck between an individual's right to privacy and the basic policy of opening agency records and action to public scrutiny…[18]

[41] I have ascribed the same purpose to LA FOIP.

[42] Since subsection 14(1)(d) is a discretionary exemption, my approach is not to substitute my discretion for that of the head of the local authority. My review must be limited to determining:

1) Does the exemption apply to the record in question?

2) Has RQRHA exercised its discretion? and,

3) If it exercised its discretion, has it done so for an improper purpose?

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[15] *The Health Information Protection Act*, S.S. 1999, c. H-0.021 (hereinafter HIPA).

[16] SK OIPC *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* at p. 9, available at www.oipc.sk.ca/resources.htm.

[17] SK OIPC Review Report F-2009-001 at [35], available at www.oipc.sk.ca/reviews.htm and Alberta Office of the Information and Privacy Commissioner (hereinafter AB IPC) Order H2006-002 at [para 28] available at www.oipc.ab.ca/downloads/documentloader.ashx?id=2244. See also Ontario Information and Privacy Commissioner (hereinafter ON IPC) Order PO-1879 at pp. 5 to 6 available at www.ipc.on.ca/images/Findings/Attached_PDF/PO-1879.pdf, British Columbia Office of the Information and Privacy Commissioner (hereinafter BC IPC) Ruling BC IPC File No. 15884 at pp. 8 to 9, available at www.oipc.bc.ca, Alberta Adjudication Order #3 (Review Numbers 2170 and 2234) available at www.oipc.ab.ca/Content_Files/Files/ExternalAdjudicationOrders/AdjudicationOrder_No3.pdf.

[18] *General Motors Acceptance Corporation of Canada Ltd. v. Saskatchewan Government Insurance*, [1993] SK CA 6655 at [III]; SK OIPC Reports 2004-003 at [8]; LA-2007-001 at [87] and Investigation Report F-2009-001 at [35] all available at www.oipc.sk.ca/reviews.htm.

[43] Although RQRHA has not provided much detail about either of the collateral proceedings it is concerned with, I assume that both involve the Applicant and RQRHA. Presumably, the union has carriage of the grievance under the collective agreement and does so on behalf of the aggrieved employee, who is the Applicant in the matter before me.

[44] I further assume that the factual context before the two tribunals will be very similar to the factual context in this review. I also further assume that procedural fairness will be an element of any legal proceedings before those administrative tribunals. I also assume that those other tribunals and counsel or representatives of the parties before them will be dealing with the evidence submitted by the parties and received by the tribunals. Presumably, if there are concerns or objections to the admissibility of any records, such concerns will be argued before those two tribunals and it is those tribunals, and not the parties that will have the last word on what documents are receivable. If RQRHA determines that some document or another is prejudicial to their position it will have the usual opportunity to make those submissions to those two tribunals, who will then make such determination as they determine appropriate. This is not a question of the Applicant being unaware that RQRHA has in its possession records that relate to its investigation since this very process and certainly the completion of my Report will mean that the Applicant will have information about such records, although not aware of the precise contents.

[45] Whether or not I recommend the release of all or part of the record before me does not in any way impact the decision by those tribunals as to what will be received, whether as evidence or as argument for purposes of those two collateral proceedings.

[46] Since the record in question is the record of RQRHA the only prejudice would be to the Applicant in those other proceedings who would not be aware of the contents of certain documents. RQRHA has acknowledged as much in its submission.

[47] So, the narrow question is whether the Legislative Assembly would have intended that, by including this exemption in LA FOIP, a local authority could deny a citizen access to records that would otherwise be available to that citizen under the provisions of LA FOIP

because that local authority might lose some tactical advantage in withholding records in the collateral legal proceeding until such time as it might be required by the tribunal to disclose them.

[48] I have in the past determined, consistent with other Canadian jurisdictions, that a parallel civil court action does not bar or preclude a formal review by this office under FOIP or LA FOIP.

[49] RQRHA did not initially provide particulars of the specific harm that could result to RQRHA if the record should be disclosed. When we requested particulars from RQRHA it suggested the following injury:

a) Certain notes may be inaccurate and could create confusion as between "the various parties, proceedings and investigations";

b) Certain witnesses may be disinclined to cooperate;

c) The Applicant may approach potential witnesses to discuss their views; and

d) Loss of opportunity to argue that the record in issue in this review ought not to be disclosed during the collateral legal proceedings.

[50] With respect to b) and c), both appear to assume that the identity of witnesses would not otherwise be known to the Applicant. The alleged harassment however occurred in the Applicant's workplace and involved her co-workers. The identity of witnesses or prospective witnesses would be no mystery to the Applicant.

[51] As for d), RQRHA appears to conflate what I might recommend be released to the Applicant with what evidence either tribunal in the collateral legal proceedings may permit. One really has nothing to do with the other. With respect to a), this stretches credulity and seems to assume that the parties and their counsel or representatives and the respective tribunals would be incapable of assessing and dealing with contradictions in evidence. If the record contains errors or omissions, RQRHA will be able to raise its objection to the record being received for the collateral legal proceedings. If the record in issue is received as evidence by one of the administrative tribunals, RQRHA is still free

to argue what weight should be given to such evidence. I have every confidence that competent counsel, representatives and specialized tribunals will have no difficulty whatsoever dealing with any alleged inaccuracies in the record. In any event, surely these would be all matters that could be argued or raised in the collateral legal proceedings whether or not the record is released to the Applicant under LA FOIP.

[52] These reasons proffered by RQRHA are extremely remote and with the exception of one portion of the record therefore cannot support the claim to an exemption under section 14(1)(d). Those reasons also offend the purpose of LA FOIP as earlier described by our Court of Appeal.

[53] The exception is the final paragraph on page 3 of document 3.v. This portion discusses the conduct of investigators and a third party. I agree that subsection 14(1)(d) would apply to this portion of the record.

[54] Finally, I find that RQRHA has not met the burden of proof in section 51 of LA FOIP to demonstrate that subsection 14(1)(d) applies to all other portions of the record.

2. Does section 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* apply to any of the withheld record?

[55] RQRHA has also relied on an alternate exemption, namely the mandatory exemption in section 28(1) for personal information of an individual(s) other than the Applicant. It asserts that personal information of individuals, other than the Applicant, including names and identifying information about witnesses and opinions about other parties must be severed.

[56] The record appears to contain "personal information" as defined by LA FOIP as follows:

> **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.

(1.1) On and after the coming into force of subsections 4(3) and (6) of *The Health Information Protection Act*, with respect to a local authority that is a trustee as defined in that Act, **"personal information"** does not include information that constitutes personal health information as defined in that Act.

(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;

(b) the personal opinions or views of an individual employed by a local authority given in the course of employment, other than personal opinions or views with respect to another individual;

(c) financial or other details of a contract for personal services;

(d) details of a licence, permit or other similar discretionary benefit granted to an individual by a local authority;

(e) details of a discretionary benefit of a financial nature granted to an individual by a local authority;

(f) expenses incurred by an individual travelling at the expense of a local authority;

(g) the academic ranks or departmental designations of members of the faculties of the University of Saskatchewan or the University of Regina; or

(h) the degrees, certificates or diplomas received by individuals from the Saskatchewan Institute of Applied Science and Technology, the University of Saskatchewan or the University of Regina.

(3) Notwithstanding clauses (2)(d) and (e), **"personal information"** includes information that:

(a) is supplied by an individual to support an application for a discretionary benefit; and

(b) is personal information within the meaning of subsection (1).[19]

[57] In Ontario IPC Reconsideration Order MO-2026-R the following is helpful:

The meaning of "about" the individual

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of **a personal nature about the individual** [Orders P-1409, R-980015, PO-2225].

[19] *Supra* note 2.

> **The meaning of "identifiable"**
>
> To qualify as personal information, **it must be reasonable to expect that an individual may be identified if the information is disclosed** [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].[20]
>
> [emphasis added]

[58] It appears that many of the individuals referenced in the record were employees of RQRHA. There are also a number of medical staff who presumably were contractors of RQRHA with privileges to practice medicine in the facilities of RQRHA. I considered the definition of "employee" in Review Report LA-2004-001 at [38] to [39] and found that it did not include a volunteer for a school division.[21] I have not previously considered whether "employee" of a regional health authority would include a physician with privileges to work in the facilities of that authority. Mindful of section 10 of *The Interpretation Act* and the *modern rule* of statutory interpretation discussed earlier in this Report, I find that a physician with privileges working in a facility of a regional health authority is captured by the term "employee" for purposes of LA FOIP.

[59] I must also consider section 23(2)(b) of LA FOIP. It would appear that some of the information in the record may also fit within this provision.

[60] Finally, I must also note that the record will contain significant portions of the Applicant's own personal information to which she is entitled under section 30(1) of LA FOIP:

> **30**(1) Subject to Part III and subsections (2) and (3), an individual whose personal information is contained in a record in the possession or under the control of a local authority has a right to, and:
>
> (a) on an application made in accordance with Part II; and
>
> (b) on giving sufficient proof of his or her identity;

[20]ON IPC Reconsideration Order MO-2026-R at p. 4, available at www.ipc.on.ca/images/Findings/up-mo_2026_r.pdf.
[21]For definitions of "employees", "officers" or "officials", see SK OIPC Review Report LA-2010-001 at [38] to [45] available at www.oipc.sk.ca/reviews.htm.

> shall be given access to the record.
>
> (2) A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by the local authority, where the information is provided explicitly or implicitly in confidence.
>
> (3) The head of the University of Saskatchewan or the University of Regina may refuse to disclose to an individual personal information that is evaluative or opinion material complied solely for the purpose of:
>
> (a) determining the individual's suitability for:
>
> (i) appointment, promotion or tenure as a member of the faculty of the University of Saskatchewan or the University of Regina;
>
> (ii) admission to an academic program; or
>
> (iii) receipt of an honour or award; or
>
> (b) evaluating the individual's research projects or materials for publication;
>
> where the information is provided explicitly or implicitly in confidence.[22]

[61] The reference in subsection 30(1) to Part III is a reference to the two mandatory exemptions and the seven discretionary exemptions to the right of access enumerated in that Part of LA FOIP. By virtue of my earlier analysis of the section 14(d) exemption claim of RQRHA, the sole Part III exemption raised by RQRHA is no longer in issue in this review.

[62] Subsection 30(2) does not apply since I am not dealing with information compiled solely for the purpose of determining suitability or eligibility for employment, and there is no awarding of contracts or benefits by the local authority. In any event, this has not been raised by RQRHA at any time in this protracted review.

[63] Subsection 30(3) does not apply since I am not dealing with the University of Saskatchewan or the University of Regina.

[22] *Supra* note 2.

[64] RQRHA quite properly acknowledged in the review process that "some portions of the Withheld Documents – particularly those not considered personal information as described at 3(a) above, those consisting of the Applicant's personal information, and those consisting of information provided by the Applicant – ought to be disclosed to the Applicant…".[23]

[65] I agree with RQRHA that those same materials should be disclosed to the Applicant. It is apparent from the record supplied to our office that RQRHA undertook a good deal of work, including a line by line review of the record and what severing it did was done sparingly in accordance with its understanding of what constituted the personal information of individuals other than the Applicant.

[66] So, if Part III of LA FOIP as well as subsections 30(2) and (3) do not apply, then the Applicant is entitled to access the record, unless parts of it do not qualify as the personal information of the Applicant within the meaning of section 23(1) of LA FOIP.

[67] RQRHA argued however that the "personal information of other parties - including names and **identifying information about witnesses**, and opinions about other parties … must be severed out to the extent possible."[24] [emphasis added]

[68] Section 8 of LA FOIP provides as follows:

> **8** Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.[25]

[69] I should note that there is no special category of personal information of or about "witnesses" in Part IV of LA FOIP in dealing with the collection, use or disclosure of personal information. LA FOIP does address the "identity of a confidential source" in the context of the section 14 exemption for law enforcement and investigations but that has not been raised by RQRHA for purposes of this review. In the result, witnesses to any

[23] RQRHA submission dated December 11, 2008.
[24] *Ibid.*
[25] *Supra* note 2.

investigation are, for purposes of sections 23, 28 and 30, not treated any differently than any other individual apart from an applicant.

[70] I must therefore determine the extent to which the record includes personal information of individuals other than the Applicant that should be appropriately withheld under section 28(1) of LA FOIP. Section 28 provides as follows:

> **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.
>
> (2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:
>
> (a) for the purpose for which the information was obtained or compiled by the local authority or for a use that is consistent with that purpose;
>
> (b) for the purpose of complying with:
>
> (i) a subpoena or warrant issued or order made by a court, person or body that has the authority to compel the production of information; or
>
> (ii) rules of court that relate to the production of information;
>
> (c) to the Attorney General for Saskatchewan or to his or her legal counsel for use in providing legal services to the Government of Saskatchewan or a government institution;
>
> (d) to legal counsel for a local authority for use in providing legal services to the local authority;
>
> (e) for the purpose of enforcing any legal right that the local authority has against any individual;
>
> (f) for the purpose of locating an individual in order to collect a debt owing to the local authority by that individual or make a payment owing to that individual by the local authority;
>
> (g) to a prescribed law enforcement agency or a prescribed investigative body:
>
> (i) on the request of the law enforcement agency or investigative body;
>
> (ii) for the purpose of enforcing a law of Canada or a province or territory or carrying out a lawful investigation; and

(iii) if any prescribed requirements are met;

(h) pursuant to an agreement or arrangement between the local authority and:

(i) the Government of Canada or its agencies, Crown corporations or other institutions;

(ii) the Government of Saskatchewan or a government institution;

(iii) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;

(iv) the government of a foreign jurisdiction or its institutions;

(v) an international organization of states or its institutions; or

(vi) another local authority;

for the purpose of administering or enforcing any law or carrying out a lawful investigation;

(h.1) for any purpose related to the detection, investigation or prevention of an act or omission that might constitute a terrorist activity as defined in the *Criminal Code*, to:

(i) a government institution;

(ii) the Government of Canada or its agencies, Crown corporations or other institutions;

(iii) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;

(iv) the government of a foreign jurisdiction or its institutions;

(v) an international organization of states or its institutions; or

(vi) another local authority;

(i) for the purpose of complying with:

(i) an Act or a regulation;

(ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada; or

(iii) a treaty, agreement or arrangement made pursuant to an Act or an Act of the Parliament of Canada;

(j) where disclosure is by a law enforcement agency:

(i) to a law enforcement agency in Canada; or

(ii) to a law enforcement agency in a foreign country;

pursuant to an arrangement, a written agreement or treaty or to legislative authority;

(k) to any person or body for research or statistical purposes if the head:

(i) is satisfied that the purpose for which the information is to be disclosed is not contrary to the public interest and cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates; and

(ii) obtains from the person or body a written agreement not to make a subsequent disclosure of the information in a form that could reasonably be expected to identify the individual to whom it relates;

(l) where necessary to protect the mental or physical health or safety of any individual;

(m) in compassionate circumstances, to facilitate contact with the next of kin or a friend of an individual who is injured, ill or deceased;

(n) for any purpose where, in the opinion of the head:

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or

(ii) disclosure would clearly benefit the individual to whom the information relates;

(o) to the Government of Canada or the Government of Saskatchewan to facilitate the auditing of shared cost programs;

(p) where the information is publicly available;

(q) to the commissioner;

(r) for any purpose in accordance with any Act or regulation that authorizes disclosure; or

(s) as prescribed in the regulations.[26]

[71] When we are considering the response of a local authority to an access request, section 28(1) is treated as a mandatory exemption that protects the personal information of individuals other than the individual applying for access. This becomes a mandatory exemption to the right of access although it is not included in Part III with the other mandatory and discretionary exemptions. What gives rise to some confusion is that other jurisdictions actually separate much more clearly in their access and privacy statutes the right of access to personal information and the exemption for third party personal information from the privacy part of their access and privacy laws. In Saskatchewan the same section that controls and limits disclosure without consent of the personal information of an individual also is the section that can be relied on by a local authority to deny access to an applicant.

[72] Section 28(2) addresses a number of situations where one's personal information may be disclosed without consent. This would normally be invoked by a local authority when there is no access request from the individual seeking his or her own personal information but rather when the local authority is contemplating disclosure without any reference to the individual at all.

[73] The reason why I make this distinction is that the right of an individual to access their own personal information is very different than the discretion that is conferred on a local authority to disclose personal information to third parties. In the exercise of the latter discretion, it is focused exclusively on third parties and not the data subject. The discretion to release that personal information will be subject to the data minimization and the need-to-know tests, both implicit in Part IV of LA FOIP.

[74] Data minimization requires that the local authority disclose to a third party the least amount of personal information necessary for the purpose. The need-to-know rule simply imposes the obligation on a local authority to disclose the least amount of personal information only to those persons who have a legitimate need-to-know. The need-to-

[26] *Supra* note 2.

know is defined in relation to the purpose for the disclosure. For the exercise of both data minimization and need-to-know, the purpose of the disclosure must be clear and defined.

[75] On the other hand, the right of access is not subject to the discretion of the local authority outside of the seven limited and clear exemptions (sections 14, 15, 16, 17, 19, 20 and 21 of LA FOIP) and is not subject to either the data minimization rule or to the need-to-know rule. Unlike the exercise of section 28(2) discretion, the motivation for the access request is irrelevant and not something that the public body can demand from the applicant and not something the public body is entitled to weigh to determine whether it is sufficient reason to provide access.

[76] The practical effect of the dual nature of section 28 is that when this is raised as an exemption in response to an access request it must be treated as a mandatory exemption.

[77] RQRHA has submitted a good deal of material with respect to the interpretation of "personal information" in the access and privacy legislation of other Canadian jurisdictions. I have not found that material helpful in my assessment of the exemption claim under section 28(1) in issue by reason of a substantial difference in the legislative provisions. Almost all provinces and territories have more modern privacy provisions than our 1992 FOIP Act and the 1993 LA FOIP Act. In those other jurisdictions there is a similarly broad definition of personal information, but also a kind of balancing test as to whether any given disclosure of personal information would constitute "an unreasonable invasion of privacy".[27]

[78] While there are many advantages to such a balancing test, the Saskatchewan Legislative Assembly has not seen fit to adopt such a test. I am therefore left to determine what is and is not personal information. If it is personal information, generally it requires protection regardless of whether its disclosure would constitute an unreasonable invasion of someone's privacy or not.

[27]Section 28(2)(n)(i) of LA FOIP states: "28(2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:… (n) for any purpose where in the opinion of the head: (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure…".

[79] RQRHA has acknowledged that the explicit balancing process in other provinces' access and privacy laws described above does not exist in LA FOIP. It has argued however that the boundaries of an "unreasonable invasion of privacy" may be instructive in defining which personal information ought to be classified generally as third party personal information subject to protection, and which ought to be released to the Applicant. I am not persuaded. The test found in these other provinces' laws requires a two part analysis i.e. (1) is information to be treated as "personal information" and if that test is answered in the affirmative; and (2) would the release of that personal information constitute an unreasonable invasion of privacy. The operation of that two part analysis engages a number of considerations that are not relevant to the Saskatchewan test (i.e. is the information caught by the broad definition in section 23 of LA FOIP?).

[80] In circumstances subject to LA FOIP, if the local authority wishes to consider disclosing a record of personal information to a third party, whether applicant under Part II of LA FOIP or a non-applicant, the only options would be to seek the prior express consent of the data subject, or perhaps consider its discretion to disclose without consent in the circumstances enumerated in section 28(2) of LA FOIP, or section 10 of its regulations.

[81] That portion of the record that has been withheld on account of personal information of third parties appears to fall into one of the following categories:

a) information of third parties (employees) including details of vacation periods and annual leaves;

b) information of third parties (employees) that provide some information about their position in RQRHA, length of service, current job title and sometimes past job titles within RQRHA;

c) Information about what witnesses observed about relevant facts such as the daily events and practices at the workplace and events surrounding the incidents that triggered the complaints of the Applicant and subsequent legal proceedings;

d) Information in the nature of opinions from employees of RQRHA with respect to the Applicant; and

e) Opinions gathered and recorded in the course of two investigations undertaken by RQRHA that relates to the circumstances of the complaints raised by the Applicant with her employer including those not attributed to a named individual.

a) Information of third parties including details of vacation periods and annual leaves

[82] I agree with RQRHA that this information about vacations, annual leaves and the reasons why an employee was away from work qualifies as the personal information of those employees and should not be released to the Applicant. In other words, I agree with the severing that was done by RQRHA for that purpose.

b) Information of third parties (employees) that provide some information about their position in RQRHA, length of service, current job title and sometimes past job titles within RQRHA

[83] I have reviewed all of the record and disagree that information about the employment position or job title whether current or past, the length of service with RQRHA insofar as it relates to employees or contractors of RQRHA should be protected as personal information. This is all material captured by section 23(2)(a) and therefore should be released to the Applicant.

c) Information about what third parties (employees) observed about relevant facts including daily events and practices at the workplace surrounding the incidents that triggered the complains and subsequent legal proceedings

[84] Even if employees are witnesses my view is that to the extent that their observations simply indicate relevant facts such as daily events and practices at the workplace, they are not exempt.

[85] In British Columbia IPC Order 01-19, I found the following helpful:

Witnesses' Factual Observations

[24] **I do not agree that witnesses' observations about relevant facts - namely daily events and practices at the worksite and events surrounding the fatal accident - must be withheld under s. 22(1) or (3). These observations form approximately half of the remaining interview notes (*i.e.*, one page). Such information does not qualify as the "personal views or opinions" of those making the statements. Nor are these factual statements otherwise personal information of the individuals making the statements.**

[25] **The notes also contain descriptions by the workers about their duties and their actions (and those of other workers) before, during and after the accident**, including the duties and actions of the applicant's husband. **I do not consider that an individual's recounting of his or her observations of an accident must be withheld under s. 22(1).** I made a similar finding at p. 31 of Order 00-42, [2000] B.C.I.P.C.D. No. 46:

> **There may be cases where a witness statement of this kind contains personal information of a witness, such that s. 22 considerations arise. But an individual's statements as to his or her perceptions of what happened in an accident (including who said what at the time, about fault or other accident-related matters) do not by any stretch qualify as personal information of that witness.**

[26] **In this case, the contents of the witness's statements of what happened, when it happened and how it happened are not the personal information of that individual.** The same applies to the information on the previous, similar, incident, as described in the other two pages of interview notes.[28]

[emphasis added]

[86] I agree with the approach taken by the British Columbia Commissioner. Therefore, any information in the record that constitutes observations, facts about events and actions taken or duties fulfilled related to the individuals in their professional capacities **does not** constitute personal information and should be released to the Applicant.

d) Information in the nature of opinions of employees of RQRHA with respect to the Applicant

[28]BC IPC Order 01-19 available at www.oipc.bc.ca/rulings/orders.aspx.

[87] The fact that someone was interviewed cannot constitute personal information of any person in the circumstances because that fact is not personal in nature. The reasons for interviewing could be many and most likely have to do with **observations** of what occurred on a certain date(s) and time(s) at a particular incident. If it becomes opinions about another, then that information constitutes the personal information of the other person. Such information would qualify as the personal information of the Applicant since it represents "...the views or opinions of another individual with respect to the individual" within the meaning of section 23(1)(h). The corollary is section 23(2)(b) that what is not considered the personal information of an employee is "the personal opinions or views of an individual employed by a local authority given in the course of employment, **other than personal opinions or views with respect to another individual**."[29] [emphasis added] The opinions of those employees of RQRHA recorded in the record and relating to the Applicant should be released to her.

e) Opinions gathered and recorded in the course of two investigations undertaken by RQRHA that relates to the circumstances of the complaints raised by the Applicant with her employer including those not attributed to a named individual

[88] I have considered the decision of Justice Hrabinsky in *Liick v. Saskatchewan (Minister of Health).*[30] The court was dealing with an appeal from the decision of the Ministry not to accept the recommendation from the former Saskatchewan Information and Privacy Commissioner, Derril McLeod Q.C. There are some similarities in that Justice Hrabinsky was dealing with the access request under FOIP from a worker at Saskatchewan Hospital for "[c]opies of all witness statements and other written material obtained in the cause of the internal investigations conducted by Saskatchewan Hospital, North Battleford into allegations of harassment in the work place...".[31] Commissioner McLeod had recommended release of this material to the applicant. The Ministry rejected the recommendation of the then Commissioner in part because "...the records requested

[29] *Supra* note 2.
[30] *Liick v. Saskatchewan (Minister of Health),* [1994] SKQB 4934.
[31] *Ibid.*

should not be released because they either contain personal information about an identifiable individual other than the Appellant (s. 29(1) of the Act)…".[32]

[89] Justice Hrabinsky, allowed the appeal and in his judgment concluded as follows:

> a. A decision by a head to withhold personal information of the appellant on the ground that it is also personal information of another individual is untenable in this instance. It is difficult to foresee a situation where there is personal information of an identifiable individual without there being personal information of another identifiable individual.
>
> b. I find that the public interest in disclosure clearly outweighs any invasion of privacy that could result in the disclosure. Further, the grievance would clearly benefit the appellant in his grievances against his employer.[33]

[90] I am mindful that, unlike the current review, in the 1994 Queen's Bench decision the applicant apparently was the individual alleged to have harassed another. In this review, the applicant is the person asserting she was the victim of the alleged harassment. I do not find that difference to be material since a harassment investigation is typically one which is largely shaped by the evidence of two individuals both of whom would have a huge stake in the outcome. That appears to me to be no different than the situation in the earlier court decision and I think I am bound to follow that direction from a superior court.

[91] Although with the greatest respect, I am not clear how the provision in section 29(2) for 'discretionary' disclosure can be rendered a 'mandatory' disclosure by judicial fiat, I am bound by the clear direction of this superior court on similar facts. The view of this office is that there is no general public interest override provision, although this is an important feature of similar legislation in other provinces. Indeed the only public interest tests in FOIP/LA FOIP are found in the limited circumstances of the exemption for the information of a third party in section 19 of FOIP/section 18 of LA FOIP and even there it is a discretionary matter, as it also is in section 29(2)(o)(i) of FOIP/section 28(2)(n)(i) of LA FOIP. I acknowledge that the Liick decision dealt with FOIP and not LA FOIP,

[32] *Ibid.*
[33] *Ibid.*

yet for all of the reasons described in my Review Report F-2012-001/LA-2012-001,[34] [47] to [50], I take the analysis from Liick to be fully applicable and binding in this matter under LA FOIP. In any event the text in section 28(2) of LA FOIP is very similar to section 29(2) of FOIP.

[92] RQRHA asserts that if employees are also witnesses in collateral legal proceedings that this in some fashion operates to justify a denial of access. Mindful that there is already a fulsome exemption for law enforcement and law investigations in section 14 of LA FOIP and RQRHA has not invoked that discretionary exemption, I find that the fact that an employee may also be a potential witness in a legal proceeding does not alter or affect the definition of personal information in section 23 of LA FOIP.

[93] Further, RQRHA has argued that much of the information in the record is information about witnesses, including their views, opinions and comments which should not be released to the Applicant. The short answer is that there is no special exemption of personal information for "witnesses". Certainly, if information fits within the definition of personal information in section 23(1) and is not excluded by section 23(2), then it must be withheld from the Applicant. In this case however, the witnesses in question all appear to be other employees of RQRHA and their statements relate to things they did or said in the course of their employment. The names of those employees should be disclosed. The name by itself is not personal information. It only becomes personal information when the name is used in conjunction with personal information of an individual. Opinions or views of an employee(s) of RQRHA given in the course of their employment to the extent that it relates to or is about the Applicant must be released.

[94] To follow the Liick decision reasoning, for the most part, resolves the issue of the personal information exemption claimed by RQRHA. In the event however that a superior court should disagree with my analysis and determine that I am not bound to follow the Liick decision, I will offer commentary on the different elements which are the subject of the personal information exemption claim of RQRHA apart from those dealt with above.

[34]SK OIPC Review Report F-2012-001/LA-2012-001, available at www.oipc.sk.ca/reviews.htm.

[95] What about the fact that certain employees of RQRHA were interviewed for purposes of the investigation undertaken into the harassment complaint and an associated complaint? Does this constitute "employment history" within the meaning of section 23(1)(b) and therefore is it personal information pursuant to LA FOIP? In Ontario IPC Reconsideration Order R-980015, the following quote speaks to this question:

> **Employment History**
>
> The affected person also argues that the information contained in the records constitute his/her employment history, thus invoking the application of the presumption in section 21(3)(d).
>
> **The Commissioner's orders have consistently found that discrete pieces of information which might reveal information about a particular episode in a person's employment do not constitute "employment history" for the purposes of sections 2(1)(b) and 21(3)(d) of the Act.** (Orders P-235, P-611 and P-1180). As explained by Inquiry Officer John McCamus in Order 170,
>
> > The Ministry seeks a severance of references in this document identifying Ministry employees who were interviewed by the Office of the Ombudsman with respect to a complaint made by the requester. The Ministry seeks a severance on the basis that information relates to "employment history" within the meaning of subsection 21(3)(d). In my view, this gives the notion of employment history too broad a reading. **The statutory notion of employment history appears to relate to what might be referred to as "personnel matters" and should not, in my view, be construed to include every action of an individual employee which might cumulatively be said to constitute that employee's "history".** ... The mere fact that a named public servant has performed or undertaken a specific particular task is not "employment history" in the requisite sense.
>
> The term "employment history" refers only to past employment and not to aspects of current employment such as an employee's current salary or job position (Orders 61 and P-399); it does not include information about an employee's expense claims (Order P-256); it does not include a person's name, without more (Order M-32); and **it does not generically refer to all employment-related incidents** (Orders P-360 and P-357).
>
> Based on these principles, a letter written by a corporate officer or government representative containing the official's name, title and the date of the correspondence, together with information about a corporate or official position or stance could not be considered to constitute the author's employment history, and does not, therefore, constitute the author's personal information.[35]

[35]ON IPC Reconsideration Order R-980015 at pp. 16 to 17, available at www.ipc.on.ca/images/Findings/up-r_980015.pdf.

[emphasis added]

[96] In *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration) (T.D.)*,[36] the following is of note:

> [40] I turn now to consider whether disclosure is required pursuant to paragraph 3(*j*) of the definition of "personal information" which, for ease of reference, states that personal information does not include:
>
> 3. …
>
> (j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,
>
> (i) the fact that the individual is or was an officer or employee of the government institution,
>
> (ii) the title, business address and telephone number of the individual,
>
> (iii) the classification, salary range and responsibilities of the position held by the individual,
>
> (iv) the name of the individual on a document prepared by the individual in the course of employment, and
>
> (v) the personal opinions or views of the individual given in the course of employment, . . .
>
> [41] At issue in the present case is whether the disputed information can be said to be personal opinions or views of an individual given in the course of employment, and whether the information falls within the opening words of paragraph 3(*j*).
>
> [42] In *Dagg* at paragraph 94, the majority of the Supreme Court of Canada considered the purpose of paragraph 3(*j*) and subparagraph 3(*j*)(iii) of the *Privacy Act*, concurring with the minority that the purpose is:
>
> . . . to exempt only information attaching to positions and not that which relates to specific individuals. **Information relating to the position is thus not "personal information", even though it may incidentally reveal something about named persons.** Conversely, information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is "personal information".

[36] *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, [2001] FCT 231.

> The majority then concluded that the sign-in logs provided information which would permit a general assessment of the amount of work required for a particular position or function so that it was information "that relates to" the position or function of the individual and hence such information fell within the opening words of paragraph 3(*j*).

[43] In considering the applicability of paragraph 3(*j*) to the present facts, I have concluded that a distinction must be drawn between those employees who were managers with certain responsibilities and functions, and those who were not.

[44] **With respect to managers, counsel for the Information Commissioner noted that the names of several interviewees were disclosed to Mr. Pirie, together with the notes taken at their interviews. This release was justified on the Minister's behalf because in all cases the names and notes released were in respect to "managers" with responsibility to prevent harassment in the workplace or to administer the harassment policy. The information was thus viewed to be opinions or views given in the course of employment. The correctness of that view was not challenged in this proceeding.**

[45] The Minister's representative acknowledged on cross-examination that seven senior managers at the CPC in Vegreville were interviewed during the administrative review, but that she did not know who they were, what their positions were, or what their role was. The Minister's representative did not know who acted in the place of Mr. Pirie in his absence. Rather "[w]here it was clear that it was the role of an individual, mostly at headquarters, to prevent harassment in the workplace, their identity has been revealed". The Minister's representative answered the question "[a]nd you're saying that you are not aware of the structure of management out there; who was part of management, who was not part of management during that period of time, and who of these persons have been interviewed?" in the negative.

[46] The burden of proving that a record does not fall within the exception set out in paragraph 3(*j*) of the *Privacy Act* is on the Minister (see *Dagg*, at paragraph 90).

[47] On the evidence recited above, I conclude that with respect to the names and opinions of individuals at the CPC in Vegreville with responsibility to prevent harassment in the workplace or to otherwise administer a harassment policy, the Minister has failed to meet the onus of proving that the information does not fall within paragraph 3(*j*) of the *Privacy Act*.

[48] **With respect to employees of the CPC in Vegreville without responsibility for preventing harassment, I conclude that their names are not information attaching to their position or function, but rather are information relating primarily to the individuals themselves**. It follows for this class of non-management employees that the requested information does not fall within paragraph 3(*j*) of the *Privacy Act.* I have reached this conclusion taking into account that:

> (i) a review of the TLS report shows that it also dealt with racism in the community of Vegreville (detailing, for example, racist conduct directed at the children of employees at school or on the school bus). This goes well beyond workplace issues;
> (ii) former employees were interviewed;
>
> (iii) participation in the administrative review was voluntary, notwithstanding that some employees were invited to participate; and
>
> (iv) the names of the persons interviewed were not provided to CIC until after Mr. Pirie's complaint. This shows, I believe, that the names were not required for any work-related purpose.[37]

[emphasis added]

[97] In keeping with the above, clearly what management does to investigate is not personal information of anyone. The above talks about employment responsibilities, not personal information of any identifiable individuals.

[98] Were it not for the Liick decision described earlier, I would have been inclined to address differently that part of the record that relates to the investigation into the harassment complaints being investigated by RQRHA. I am referring to opinions expressed by RQRHA employees that relate not to the Applicant but to other persons. I would have found that such opinions as recorded in the record would constitute the personal information of the individual to whom those opinions related. Such opinions I would have found to be captured by section 23(1)(h) "the views or opinions of another individual with respect to the individual".[38]

[99] Nonetheless, Justice Hrabinsky has clearly stated that "...the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure. Further, the disclosure would clearly benefit the appellant in his grievances against his employer."[39]

[37] *Ibid.*
[38] *Supra* note 2.
[39] *Supra* note 30.

[100] I therefore consider myself bound by that decision on similar facts and therefore find that the opinion evidence that is integral to the overall record of the investigation, even when expressing opinions about individuals other than the Applicant should be released to her.

[101] RQRHA is also a trustee for purposes of HIPA.[40] Though not identified by RQRHA, the record does contain at least two line items that constitute personal health information[41] of a third party. Even though I have found authority for the release of the personal information in question in the Liick decision, I have not similarly found authority for the release of the personal health information identified. Accordingly, I recommend its severance before the remainder of the record is released to the Applicant.

V FINDINGS

[102] I find that section 14(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* does not apply to the withheld records except for the earlier noted line items.

[103] I find that Regina Qu'Appelle Regional Health Authority cannot rely on section 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* to any portion of the withheld record.

[104] I find that the record contains two line items that constitutes the personal health information of a third party.

[40] *Supra* note 3 at [25].
[41] Section 2(m)(i) of HIPA states that "personal health information" includes "information with respect to physical or mental health…". LA FOIP does not apply to personal health information if the local authority is also a trustee as defined by 2(t) of HIPA. See section 23(1.1) of LA FOIP.

VI RECOMMENDATIONS

[105] I recommend release of the entire withheld record to the Applicant with the exception of third party personal health information and that information to which I found section 14(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* applies.

Dated at Regina, in the Province of Saskatchewan, this 9th day of January, 2013.

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