

## SASKATCHEWAN

### OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

#### REVIEW REPORT LA-2013-003

#### SASKATOON REGIONAL HEALTH AUTHORITY

**Summary:**

The Applicant submitted an access to information request to Saskatoon Regional Health Authority (SRHA). The request was for the submissions by members of the public presented to the Site Validation Panel. The Site Validation Panel was made up of members from various organizations, including SRHA, and from the public. It was set up to put forth a recommendation about the location of the Children's Hospital of Saskatchewan. SRHA withheld the majority of the information in the responsive records under sections 13(2), 16(1)(a), 16(1)(b), and 28(1) of *The Local Authority Freedom of Information Protection of Privacy Act* (LA FOIP). The Commissioner undertook a review on the request of the Applicant. He found that some of the records contained personal information as defined by section 23(1) of LA FOIP. Further, he found that some of the records contained personal health information as defined by section 2(m) of *The Health Information Protection Act*. He recommended that such records, once sufficiently de-identified, should be disclosed and not withheld under section 28(1) of LA FOIP. However, he found that other information was provided by those employed by SRHA in the course of their employment duties. He found that such information should be released and not withheld under sections 16(1)(a), 16(1)(b), and/or 28(1) of LA FOIP. Further, he found that section 13(2) of LA FOIP did not apply to a letter from the University of Saskatchewan to the Site Validation Panel. Finally, he found that SRHA did not exercise its discretion properly when applying sections 13(2), 16(1)(a) and 16(1)(b) of LA FOIP.

**Statutes Cited:**

*The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1, ss. 2(f)(xi), 2(f)(xiii), 3(1)(a), 3(1)(b), 8, 13(2), 16(1)(a), 16(1)(b), 23(1)(e), 23(1)(f), 23(1)(k), 23(2)(b), 28(1), 51;

*The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, ss. 24(1)(f), 29(1); *The Health Information Protection Act*, S.S. 1999, c. H-0.021, ss. 2(m), 2(t)(ii), 3(2)(a), 27(1), 38(2); Alberta's, *Freedom of Information Protection of Privacy Act*, RSA 2000, c.f-25, s. 24(1)(a).

**Authorities Cited:** Saskatchewan OIPC, Review Reports F-2004-003, F-2004-006, F-2006-001, H-2006-001, F-2006-002, F-2006-004, LA-2007-001, H-2008-001, F-2010-001, LA-2010-001, LA-2011-004; F-2012-001/LA-2012-001, LA 2013-001; Saskatchewan OIPC, Investigation Report H-2007-001; Ontario IPC, Order P-1412; Alberta IPC, Order F2004-026.

**Other Sources Cited:**

Saskatchewan OIPC *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review*; Government of Alberta, Service Alberta, *FOIP Guidelines and Practices (2009)*; OPC, *Legal information related to PIPEDA: Interpretation Bulletins: Personal Information*.

## I BACKGROUND

[1] On June 23, 2010, the Applicant submitted a request to the Saskatoon Regional Health Authority (SRHA) for the following:

The members of the public were invited to submit written comments to the Site Validation panel. I would like copies of those letters/emails realizing that the authors' names will be vetted/severed.

[2] After issuing a fee estimate and extending the timeline to respond to the request due to the need to conduct consultations, SRHA provided a section 7 response dated August 17, 2010 to the Applicant. SRHA withheld information under sections 13(2), 16(1)(a), 16(1)(b), and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).<sup>1</sup>

[3] My office received a request for review from the Applicant on September 7, 2010 asking for a review of SRHA's decision to withhold information under the above noted sections.

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

- [4] My office notified SRHA of the review and requested a submission and a copy of the record from SRHA on or about October 19, 2010.
- [5] My office received the submission and record from SRHA on September 9, 2011. Enclosed with the submission and record was a letter dated September 8, 2011 stating that SRHA “would not object to the [Office of the Saskatchewan Information and Privacy Commissioner] sharing our submission with the Applicant”.
- [6] Pursuant to my office’s procedure of exchanging submissions,<sup>2</sup> my office shared SRHA’s submission with the Applicant on or about December 29, 2011.
- [7] My office received a rebuttal from the Applicant on March 14, 2012.

## II RECORDS AT ISSUE

- [8] In total, there were 165 pages of responsive records. Most of the records are emails. The email header on many of the emails state the following:

From: (name of sender)  
Sent: (date of email)  
To: Corporate & Public Affairs SktnHR  
Subject: CHS Site Validation Feedback

- [9] The records were severed in full or in part.
- [10] One record, a one page letter with an enclosed six-page Consensus Statement, was sent through regular mail. It was a letter mailed to the Chairperson of the Site Validation Panel from a department within the University of Saskatchewan (the U of S). This record was withheld from disclosure under sections 13(2), 16(1)(a) and 28(1) of LA FOIP.

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<sup>2</sup>Office of the Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC), *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review*, p. 12, available at [www.oipc.sk.ca/Resources/Helpful%20Tips%20-%20Guidelines%20for%20Public%20Bodies%20+%20Trustees%20in%20Preparing%20for%20Review%20-%20September%202010.pdf](http://www.oipc.sk.ca/Resources/Helpful%20Tips%20-%20Guidelines%20for%20Public%20Bodies%20+%20Trustees%20in%20Preparing%20for%20Review%20-%20September%202010.pdf).

- [11] The remainder of records appear to have been submitted electronically.
- [12] It appears that the records could be categorized into two groups. The first group of records were submitted by private individuals. These records were severed by SRHA under sections 16(1)(a) and 28(1) of LA FOIP.
- [13] The second group of records were submitted by individuals who were employed by SRHA. These records were severed by SHRA under sections 16(1)(a), 16(1)(b) and 28(1) of LA FOIP.
- [14] There was a letter to the editor that was published in a newspaper that was included as a part of the responsive records. It was severed in its entirety by SRHA under sections 16(1)(a) and 28(1) of LA FOIP.
- [15] The records contain the views and opinions of the authors of the submissions on the issue of where the Children's Hospital of Saskatchewan should be located.

### **III ISSUES**

- 1. Did the Saskatoon Regional Health Authority properly apply section 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act*?**
- 2. Do the records contain any personal health information pursuant to section 2(m) of *The Health Information Protection Act*?**
- 3. Did the Saskatoon Regional Health Authority properly apply section 16(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act*?**
- 4. Did the Saskatoon Regional Health Authority properly apply section 16(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act*?**

5. **Did the Saskatoon Regional Health Authority properly apply section 13(2) of *The Local Authority Freedom of Information and Protection of Privacy Act*?**
6. **Did Saskatoon Regional Health Authority exercise its discretion properly?**
7. **Does *The Local Authority Freedom of Information and Protection of Privacy Act* apply to the letter to the editor that was published in a newspaper?**

#### IV DISCUSSION OF THE ISSUES

1. **Did the Saskatoon Regional Health Authority properly apply section 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act*?**

[16] SRHA is a local authority as defined by section 2(f)(xiii) of LA FOIP:<sup>3</sup>

2 In this Act:

...

(f) “local authority” means:

...

(xiii) a regional health authority or an affiliate, as defined in *The Regional Health Services Act*;<sup>4</sup>

[17] Section 28(1) of LA FOIP states:

**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.<sup>5</sup>

[18] In order for section 28(1) to apply, the information in the records must constitute personal information as defined by section 23(1) of LA FOIP. The applicable clauses of section 23(1) of LA FOIP are as follows:

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<sup>3</sup>I found Saskatoon Regional Health Authority (hereinafter SRHA) to be a local authority in my Review Report H-2008-001 at [16], available at [www.oipc.sk.ca/Reports/H-2008-001.pdf](http://www.oipc.sk.ca/Reports/H-2008-001.pdf).

<sup>4</sup>*Supra* note 1 at section 2(f)(xiii).

<sup>5</sup>*Ibid.* at section 28(1).

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:

...

(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;

...

(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.<sup>6</sup>

...

**a. Private Individuals’ e-mail addresses, and names appearing with other personal information**

[19] Some records contain the authors’ names along with other personal information such as their personal e-mail addresses, internet protocol (IP) addresses,<sup>7</sup> and information about his or her personal experiences. This type of information would be defined as “personal information” under sections 23(1)(e), 23(1)(f), and 23(1)(k) of LA FOIP.

**b. “Advice or recommendations” provided by private individuals**

[20] SRHA stated the following in its submission:

**LA FOIP, Sections 23(1), (2) and (3) define what is and is not considered personal information, Saskatoon Health Region had in its possession and under its control personal information of the individuals who submitted advice or recommendations to the Site Validation Panel. In addition, a number of the**

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<sup>6</sup>*Ibid.* at section 23(1).

<sup>7</sup>The Office of the Privacy Commissioner of Canada, *Legal information related to PIPEDA: Interpretation Bulletins: Personal Information*, states that “An Internet Protocol (IP) address can be considered personal information if it can be associated with an identifiable individual.”, available at [www.priv.gc.ca/leg\\_c/interpretations\\_02\\_e.asp](http://www.priv.gc.ca/leg_c/interpretations_02_e.asp).

**individuals who provided us with advice or recommendations** also provided us with either their own or a family member's personal health information. SHR stance is that there was an implied suggestion that the submissions would be kept confidential, with only the Site Validation Panel and those receiving the documents off the website actually seeing them.<sup>8</sup>

[emphasis added]

[21] It appears that SRHA describes the comments offered by these individuals to the Site Validation Panel as "advice or recommendations" and apparently considers such as personal information of those individuals because it applied both sections 16(1)(a) and 28(1) of LA FOIP to the same information in the records at issue. Does this "advice or recommendations" constitute personal information under LA FOIP?

[22] The Site Validation Panel solicited submissions from the public about the location of the Children's Hospital of Saskatchewan via their website.<sup>9</sup> SRHA indicated to my office that the following message was provided to private individuals prior to them providing their submissions to the Site Validation Panel:

The purpose of this website is to act as a mechanism for members of the public to become engaged in the site validation process. The website allows anyone to provide an **informed opinion**, in writing, on [sic] they think is most important in determining the site of the new hospital...<sup>10</sup>

[emphasis added]

[23] Once an individual submitted his/her comment, SRHA indicated to my office that another message was provided to the individual that read as follows:

Thank you very much for submitting your **thoughts and opinions** on what is important to you in validating the site of the new Children's Hospital of Saskatchewan (CHS) in Saskatoon.<sup>11</sup>

[emphasis added]

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<sup>8</sup>SRHA submission dated September 7, 2011 to SK OIPC.

<sup>9</sup>Children's Hospital of Saskatchewan (hereinafter CHS), Site Validation website, <http://chssitevalidation.wordpress.com/location-options-and-criteria/>.

<sup>10</sup>*Supra* note 8 at Appendix C.

<sup>11</sup>*Ibid.* at Appendix D.

[24] SRHA stated in its submission to my office that the responses are “advice or recommendations”. According to the messages above, the Site Validation Panel was soliciting the “thoughts and opinions” of individuals. Section 23(1)(f) of LA FOIP states that personal information includes:

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:

...

(f) the personal opinions or views of the individual except where they are about another individual;<sup>12</sup>

[25] Subsection 24(1)(f) of *The Freedom of Information and Protection of Privacy Act* (FOIP)<sup>13</sup> is worded the same as subsection 23(1)(f) of LA FOIP. It defines personal information as follows:

24(1) Subject to subsections (1.1) and (2), “**personal information**” means personal information about an identifiable individual that is recorded in any form, and includes:

...

(f) the personal opinions or views of the individual except where they are about another individual;<sup>14</sup>

[26] In my Review Report F-2006-004, I considered what constitutes an “opinion” is as follows:

[43] The Alberta Annotated FOIP Act, page 5-1-10, characterizes an “opinion” as follows:

**An “opinion” is a belief or assessment based on grounds short of proof; a view held as probable. An “opinion” is subjective in nature, and may or may not be based on fact.** An example of an “opinion” would be a belief that a person would be a suitable employee, whether or not the opinion is based on the person’s employment history (Order 97-020 [129]). Under section 1(n)(viii) anyone else’s opinions about an individual will be that individual’s personal information (Order 97-002 [41-45]). However, in order for information to be an

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<sup>12</sup>*Supra* note 1 at section 23(1)(f).

<sup>13</sup>*The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c F-22.01.

<sup>14</sup>*Ibid.* at section 24(1)(f).



opinion about an individual it must be connected with that individual (Order 98-001 [42]).

[44] The phrasing “views or opinions” appears in different parts of section 24 of the Act [24(1)(f), 24(1)(h) & 24(2)(c)]. Clauses 24(1)(f) “the personal opinions or views of the individual except where they are about another individual”, (h) “the views or opinions of another individual with respect to the individual” and 24(2)(c) “the personal opinions or views of an individual employed by a government institution given in the course of employment, other than personal opinions or views with respect to another individual” differ in meaning as follows:

a. Whether or not you work for a public body, if you have an opinion or view about another person, that view or opinion material is the personal information of the data subject, not the author; and

**b. If you are not an employee of a public body, your personal opinion or view (not involving another individual) is your own personal information. However, as per subsection 24(2)(c), if offered by a government employee in the course of employment, these will not be considered the employee’s personal information. This is due to the fact that the individual is only offering his/her opinion or view as part of his/her employment responsibilities, not in a personal capacity.**<sup>15</sup>

[emphasis added]

[27] In a similar case, in my Review Report F-2010-001,<sup>16</sup> I discussed where opinions submitted by private individuals to the public body as a part of a consultation process were appropriately withheld under section 29(1) of FOIP, LA FOIP’s section 28(1)’s equivalent, which reads:

**29(1)** No government institution 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 30.<sup>17</sup>

[28] The public body in my Review Report F-2010-001 severed the names, email addresses and contents of submissions from private individuals. I found that the public body correctly applied section 29(1) of FOIP in withholding the contact information of private

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<sup>15</sup>SK OIPC Review Report F-2006-004 at [43] to [44], available at [www.oipc.sk.ca/Reports/F-2006-004.pdf](http://www.oipc.sk.ca/Reports/F-2006-004.pdf).

<sup>16</sup>SK OIPC Review Report F-2010-001 at [115] to [128] available at [www.oipc.sk.ca/Reports/Report%20F-2010-001,%20March%209,%202010.pdf](http://www.oipc.sk.ca/Reports/Report%20F-2010-001,%20March%209,%202010.pdf).

<sup>17</sup>*Supra* note 13 at section 29(1).

individuals but it erred in withholding the content of their submissions. I stated in my Review Report F-2010-001 the following:

[128] ...The exception is in respect to submissions of private citizens to which Health has properly withheld email addresses and names of said. **Though the personal opinions of the authors, Health should nonetheless release the content of the emails as without names and email address, no individuals are identifiable.**<sup>18</sup>

[emphasis added]

[29] It appears that SRHA severed the responsive records similarly to the public body discussed in my Review Report F-2010-001. SRHA severed the names, email addresses, mailing addresses, and other contact information. It also, however, severed all of the opinions in each of the submissions received by the Site Validation Panel.

[30] After reviewing the contents of the submissions by private individuals, it appears that they do contain the personal views and opinions of each individual. However, similar to the situation described in my Review Report F-2010-001, once the name and contact information is severed from the record, the contents of the submission are sufficiently de-identified. Once information is sufficiently de-identified, it no longer is classified as personal information for purposes of LA FOIP.

[31] Section 8 of LA FOIP states 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.<sup>19</sup>

[32] Therefore, my office recommended in its letter to SRHA dated August 8, 2012 that the submissions authored and submitted by private individuals be severed as follows:

- 1) All identifiable information including the name and contact information, including IP addresses, should be severed.

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<sup>18</sup>*Supra* note 16 at [128].

<sup>19</sup>*Supra* note 1 at section 8.

- 2) If the individual may still be identified based on *some* of the information in the body of the submission, then identifiable information within the body of the submission should be severed.

...

[33] The remainder of information in the submissions should be disclosed.

[34] In a letter dated September 4, 2012, received by my office on September 7, 2012, SRHA stated it would not comply with our recommendation. It stated:

Thank you for your letter dated August 8, 2012, regarding the above file. As requested, SHR representatives including [name of President and Chief Executive Officer], President and Chief Executive Officer, have reviewed the analysis provided by the OPIC [sic] including findings and recommendations. SHR will not be complying with the recommendations included in the Note to File. It is SHR's position that individual responses were provided to SHR in confidence by the submitters and the feedback obtained during that process was incorporated into a document that was previously made public and remains accessible on SHR's Children's Hospital of Saskatchewan website <http://chssitevalidation.wordpress.com/>.

[35] In a point I will make again later on in this Review Report, the Site Validation Panel made 13 comments from submissions public on its website.<sup>20</sup> It appears that the 13 comments are de-identified comments. The disclosure of these de-identified comments is in the same spirit of my office's recommendation to disclose the de-identified portions of submissions from private individuals. It is difficult for me to understand SRHA's refusal to comply with my office's recommendation.

[36] I note that some of the submissions described above may contain personal health information. I will, however, consider that concern later in this Review Report.

**c. Views and opinions by employees provided from a professional capacity versus views and opinions provided from a personal capacity**

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<sup>20</sup>CHS Validation Site, *Validation Summary of Public Submissions - CHS Site Validation Panel (June 2, 2010)*, available at <http://chssitevalidation.files.wordpress.com/2010/02/summary-of-submissions1.pdf>.

[37] There is a distinction between views and opinions offered by employees provided in a professional capacity and views and opinions provided in a personal capacity. Such a distinction is captured in section 23(2)(b) of LA FOIP, which states as follows:

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

...

(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;<sup>21</sup>

...

[emphasis added]

[38] Section 23(2) of LA FOIP makes it clear that local authorities should treat information given in a professional capacity differently than information provided in a personal capacity. In my Review Report F-2006-004, I stated the following:

...

b. If you are not an employee of a public body, your personal opinion or view (not involving another individual) is your own personal information. However, as per subsection 24(2)(c), **if offered by a government employee in the course of employment, these will not be considered the employee’s personal information. This is due to the fact that the individual is only offering his/her opinion or view as part of his/her employment responsibilities, not in a personal capacity.**<sup>22</sup>

[emphasis added]

[39] Further, in my Review Report LA-2013-001, I stated that information provided by an employee that are observations of what occurred at a particular incident would not be considered to be personal information. However, if the information was about another individual, then that information would constitute as personal information.

[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

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<sup>21</sup>Supra note 1 at section 23(2)(b).

<sup>22</sup>Supra note 15 at [44].

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." The opinions of those employees of RQRHA recorded in the record and relating to the Applicant should be released to her.<sup>23</sup>

[40] Also, in my Review Report F-2010-001, I stated the following about whether or not information put forth by an employee in the course of employment is in fact personal information or not:

[125] The *Personal Information Protection and Electronic Documents Act* (PIPEDA) defines "personal information" as information about an identifiable individual, but *does not* include the name, title, or business address or telephone number of an employee of an organization. PIPEDA is an incomplete answer since it would have no application to most of the organizations that offered submissions.

[126] Further on this question, I found Ontario IPC Order PO-2420 of assistance in this regard:

**To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual** [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. However, 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].

[127] Also helpful on the question is another Ontario IPC Order MO-1550-F as follows:

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, **information associated with a person in his or her professional or official government capacity will not be considered to be "about" the individual within the meaning of the section 2(1) definition of "personal information"** (see, for example, Orders P-257, P-427, P-1412 and P-1621).

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<sup>23</sup>SK OIPC Review Report LA-2013-001 at [87], available at [www.oipc.sk.ca/What's%20New/Review%20Report%20LA-2013-001.pdf](http://www.oipc.sk.ca/What's%20New/Review%20Report%20LA-2013-001.pdf).

The Commissioner's orders dealing with non-government employees, professional or corporate officers treat the issue of "personal information" in much the same way as those dealing with government employees. The seminal order in this respect is Order 80. In that case, the Ministry of Health had invoked the personal privacy exemption to withhold the names of officers of the Council on Mind Abuse (COMA) appearing on correspondence with the Ministry concerning COMA funding procedures. Former Commissioner Sidney B. Linden rejected the institution's submission:

...In my view, the names of these officers should properly be categorized as "corporate information" rather than "personal information" under the circumstances.

In Reconsideration Order R-980015, Adjudicator Donald Hale reviewed the history of the Commissioner's approach to this issue and the rationale for taking such an approach. He also extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 on the approach which this office has taken to the definition of personal information. In applying the principles that he described in that order, Adjudicator Hale came to the following conclusions:

I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not about these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.

**In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. I find that the views which these individuals express take place in the context of their employment responsibilities and are not, accordingly, their personal opinions within the definition of personal information contained in section 2(1)(e) of the Act. Nor is the information "about" the individual, for the reasons described above. In my view, the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message.**

...

This distinction between personal and non-personal information has been extended to situations involving groupings of individuals that are less formal and structured than, for example, a corporation, partnership or government agency.<sup>24</sup>

[emphasis added]

- [41] The Ontario Office of the Information and Privacy Commissioner (IPC) has determined that information associated with a person in his or her professional capacity will not be considered to be “personal information”. In his Order P-1412, the Inquiry Officer from Ontario IPC stated the following:

**...information which identifies an individual in his or her employment, professional or official capacity, or provides a business address or telephone number, is usually not regarded as personal information. This also applies to opinions developed or expressed by an individual in his or her employment, professional or official capacity, and information about other normal activities undertaken in that context.** When not excluded from the Act under section 65(6), other employment-related information, whether of an evaluative nature, or in relation to other human resources matters, has generally been found to qualify as personal information.<sup>25</sup>

...

[emphasis added]

- [42] In his Order F2004-026, the former Alberta Information and Privacy Commissioner agrees with the Ontario IPC in that records created in a professional capacity are not personal. He stated the following:

[para 11] ...Information *about* a person’s “employment responsibilities” – a description of their position or duties – is different from information that records their performance of their responsibilities. The fact that a description of a person’s employment responsibilities is personal information does not conflict with the conclusion (found in the Ontario cases) that recorded information created by people “in their professional capacity or the execution of employment responsibilities” is not personal information about them. The Ontario cases also acknowledge that even information consisting of records of employment activities can, depending on its nature, have a personal aspect. **I agree with the Ontario cases referred to above**

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<sup>24</sup>Supra note 16 at [125] to [127].

<sup>25</sup>Office of the Ontario Information and Privacy Commissioner, Order P-1412 at p. 18, available at [www.ipc.on.ca/images/Findings/Attached\\_PDF/P-1412.pdf](http://www.ipc.on.ca/images/Findings/Attached_PDF/P-1412.pdf).

**insofar as they stand for the proposition that a record of what a public body employee has done in their professional or official capacities is not *personal* or *about the person***, unless that information is evaluative or is otherwise of a ‘human resources’ nature, or there is some other factor which gives it a personal dimension.<sup>26</sup>

...

[emphasis added]

[43] I accept the reasoning of the Ontario and Alberta IPCs on this point. Views and opinions provided by employees in a professional capacity cannot be considered personal information. Therefore, such information cannot be withheld from disclosure under section 28(1) of LA FOIP.

[44] After reviewing the records submitted by employees of SRHA, some of the submissions contain the employee’s views or opinions given apparently in the course of employment. Section 23(2)(b) of LA FOIP states as follows:

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

...

(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;<sup>27</sup>

[45] Examples of such records include the email on pages 29 to 31. It was written by an employee of SRHA. The contents of the letter describe the functions of the area he works in and the impacts the location of the Children’s Hospital of Saskatchewan will have upon the functions of his work area. Therefore, it appears that the employee is providing a view or opinion in his professional capacity. Another example is the email on pages 64 to 65. The submission describes the work area of the author, and the functions and resources of the work area. Such information is not about the individual, but about the employees’ work. The employee was apparently speaking in her professional capacity, and therefore, the opinions and views were given in the course of

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<sup>26</sup>Office of the Alberta Information and Privacy Commissioner, Order F2004-026 at [111], available at [www.oipc.ab.ca/downloads/documentloader.ashx?id=2109](http://www.oipc.ab.ca/downloads/documentloader.ashx?id=2109). The Ontario orders that the former Alberta Information and Privacy Commissioner is referring to are Orders P-1409 and Reconsideration Order R-98005, available at [www.ipc.on.ca/images/Findings/Attached\\_PDF/P-1409.pdf](http://www.ipc.on.ca/images/Findings/Attached_PDF/P-1409.pdf) and [www.ipc.on.ca/images/Findings/up-r\\_980015.pdf](http://www.ipc.on.ca/images/Findings/up-r_980015.pdf).

<sup>27</sup>*Supra* note 1 at section 23(2)(b).



their employment. Such information would not be subject to section 28(1) of LA FOIP. Later in this Review Report, I will discuss whether the opinions or views of the employees given in the course of their employment are caught by sections 16(1)(a) and/or 16(1)(b) of LA FOIP

- [46] Page 82 of the responsive records contains an email that was disclosed to the Applicant. It is dated April 30, 2010 and was sent from an employee of SRHA to “All SKTNHR Email Users”. The subject line is “We Want Your Input!”. The body of the email states the following:

**Children’s hospital of Saskatchewan site validation wants your input**

What do you think is important in selecting the site of the new Children’s Hospital of Saskatchewan?

Tell us what you think by submitting your opinion.

- [47] The above is an example of SRHA encouraging its employees to provide their views or opinions to the Site Validation Panel in regards to the location of the Children’s Hospital of Saskatchewan. However, based on the above email, it does not appear that employees were expected or required by their employer to provide their opinions. Rather, they were only encouraged to provide their opinions. In its submission to our office, SRHA states that:

Staff of the Saskatoon Health Region was also **encouraged** to use this process to consult or provide advice or make recommendations with the Panel regarding what was most important in determining the site of the new hospital...<sup>28</sup>

[emphasis added]

- [48] Therefore, providing an opinion was not a required part of the responsibilities or duties of the employees.
- [49] Nevertheless, it appears that the views and opinions expressed in some of the employee emails were not given in the course of the employment.

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<sup>28</sup>Supra note 8.

[50] An example is the email that appears on page 69 of the responsive record. The author identifies herself as a registered nurse of SRHA. In this situation, I considered the following factors to determine if this registered nurse expressed her views and opinions as a part of her employment duties:

1. The contents of the email deal with matters that are conceivably outside the duties of a registered nurse;
2. The submission was also sent from her personal e-mail address; and
3. The contents of the email appear not to represent the official views of her employer.

[51] Based on the above factors, it appears that the author did not send the submission to the Site Validation Panel in the course of her employment.

[52] Another example is the email that appears on page 96 of the responsive records. The author identifies himself as a registered nurse of SRHA. Similar to the situation described above, I considered the following factors:

1. The contents of the email deal with matters that are conceivably outside the duties of a registered nurse;
2. The submission contains his personal home address, telephone number, and email address at the bottom of the email; and
3. The contents of the email appear not to represent the official views of his employer.

[53] Based on the above factors, similar to the email found on page 69, it appears this email, on page 96, was not sent to the Site Validation Panel in the course of his employment.

[54] My office recommended in its letter dated August 8, 2012 that submissions written and submitted by those who are employed by SRHA be de-identified only if the personal view or opinion were not given in the course of the authors' employment, such as those emails on pages 69 and 96. Such personal views or opinions should be de-identified by removing the authors' names and any other identifiable information under section 28(1)

of LA FOIP. Once the submissions are de-identified sufficiently, the severed records should be disclosed.

[55] However, if the submissions were offered as part of an employment responsibility, then the submission should be released in full (unless another exemption applies), such as in the case of those on pages 29 to 31, and 64 to 65.

[56] Again, as stated earlier, SRHA responded in its September 4, 2012 letter to my office that it would not be complying with my office's recommendations.

**2. Do the records contain any personal health information pursuant to section 2(m) of *The Health Information Protection Act*?**

[57] In my Review Report H-2006-001, I stated there are three elements that must be present in order for *The Health Information Protection Act* (HIPA)<sup>29</sup> to apply:

[13] For *The Health Information Protection Act* to apply, three elements must be present: (1) there must be personal health information as defined in section 2(m); (2) the personal health information must be in either the custody or the control of an organization; and (3) that organization must be a "trustee" as defined in section 2(t).<sup>30</sup>

[58] To meet the first element, HIPA defines "personal health information" as follows:

**2** In this Act:

...

(m) "**personal health information**" means, with respect to an individual, whether living or deceased:

(i) information with respect to the physical or mental health of the individual;

(ii) information with respect to any health service provided to the individual;

(iii) information with respect to the donation by the individual of any body part or any bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual;

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<sup>29</sup>*The Health Information Protection Act*, S.S. 1999, c. H-0.021.

<sup>30</sup>SK OIPC Review Report H-2006-001 at [13], available at [www.oipc.sk.ca/Reports/H-2006-001.pdf](http://www.oipc.sk.ca/Reports/H-2006-001.pdf).

(iv) information that is collected:

(A) in the course of providing health services to the individual; or

(B) incidentally to the provision of health services to the individual; or

(v) registration information;<sup>31</sup>

[59] Some of the submissions provided to the Site Validation Panel contained details of individuals' experiences or their family members' experiences of receiving health care from hospitals in the health region. If individuals may be identified by such information, then such information may fit into the definition of "personal health information". It should be noted that once information is sufficiently de-identified, such as removing the name and e-mail addresses of individuals who provided submissions, then HIPA will not apply pursuant to section 3(2). Section 3(2)(a) of HIPA states as follows:

**3(2)** This Act does not apply to:

(a) statistical information or de-identified personal health information that cannot reasonably be expected, either by itself or when combined with other information available to the person who receives it, to enable the subject individuals to be identified;<sup>32</sup>

[60] For the second element, the Site Validation Panel was made up of individuals from the public, SRHA, the Ministry of Health, and the U of S.<sup>33</sup> Submissions that were sent to the Site Validation Panel has a "To" field that states that the submissions were sent to "Corporate & Public Affairs SktnHR". In other words, the submissions were sent to SRHA. So SRHA appears to have also had "custody"<sup>34</sup> of the personal health information contained in some of the submissions or was at least provided copies as a member of the committee.

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<sup>31</sup>*Supra* note 29 at section 2(m).

<sup>32</sup>*Ibid.* at section 3(2).

<sup>33</sup>CHS Site Validation Panel, list of members is available at <http://chssitevalidation.wordpress.com/expert-panel/>.

<sup>34</sup>In my Investigation Report H-2007-001 at [29], I stated that the custody is to be understood as "physical possession", available at [www.oipc.sk.ca/Reports/IR%20H-2007-001.pdf](http://www.oipc.sk.ca/Reports/IR%20H-2007-001.pdf); In my Review Report LA-2010-002 from [45] to [51], I explain that custody or possession requires a measure of control, available at [www.oipc.sk.ca/Reports/LA-2010-002.pdf](http://www.oipc.sk.ca/Reports/LA-2010-002.pdf).

[61] Finally, SRHA is a “trustee” as defined by section 2(t)(ii) of HIPA, which states:

**2** In this Act:

(t) “**trustee**” means any of the following that have custody or control of personal health information:

...

(ii) **a regional health authority** or a health care organization;<sup>35</sup>

[emphasis added]

[62] Also, I have previously stated that SRHA is a trustee.<sup>36</sup> All three elements are present, therefore HIPA applies.

[63] Section 27(1) of HIPA provides as follows:

**27(1)** A trustee shall not disclose personal health information in the custody or control of the trustee except with the consent of the subject individual or in accordance with this section, section 28 or section 29.<sup>37</sup>

[64] SRHA did not identify this section when it provided the Applicant with a section 7 response (section 36 response, HIPA’s equivalent to section 7 of LA FOIP). However, in its submission, it stated:

In the response documents to the applicant, SHR did not identify Section 27(1) of *The Health Information Protection Act* (HIPA) as a reason that the records were not disclosed. Upon review, this should have also been noted in our response. This however is a mandatory exemption and [sic] understand that it is the practice of the Saskatchewan Office of the Information and Privacy Commissioner (OIPC) to considers [sic] all mandatory exemptions in their review even if they are not noted in the response.<sup>38</sup>

[65] As mentioned earlier, personal health information appears in a few of the submissions. For example, the second paragraph of page 10 of the record contains information about

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<sup>35</sup>*Supra* note 29 at section 2(t)(ii).

<sup>36</sup>SK OIPC Review Report H-2006-001 at [16] and Review Report H-2008-001 at [16], available at [www.oipc.sk.ca/Reports/H-2006-001.pdf](http://www.oipc.sk.ca/Reports/H-2006-001.pdf) and [www.oipc.sk.ca/Reports/H-2008-001.pdf](http://www.oipc.sk.ca/Reports/H-2008-001.pdf), respectively.

<sup>37</sup>*Supra* note 29 at section 27(1).

<sup>38</sup>*Supra* note 8.

health services that the author's child received. Such information is "personal health information" as it is information about health services received by the writer's child. Without the information being sufficiently de-identified, such information would be exempted from release under section 27(1) of HIPA.

[66] However, if the information that appears on page 10 is sufficiently de-identified, then the remainder of the information may be released. For example, severing out the writer's name and address and the date/year the writer's child received health services would be sufficient to de-identify the information.

[67] SRHA severed all of the contents of the submissions the Site Validation Panel it received without attempting to remove the identifying information and disclosing the rest. Only the personal health information that cannot be sufficiently de-identified should be exempted from release under section 27(1) of HIPA, not the contents of the submissions in their entirety.

[68] Similar to section 8 of LA FOIP that was quoted earlier, HIPA contains section 38(2), which provides as follows:

**38(2)** Where a record contains information to which an applicant is refused access, the trustee shall grant access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.<sup>39</sup>

[69] Therefore, I recommended that SRHA give the Applicant access to as much of the record as can reasonably be severed by sufficiently de-identifying submissions that contain personal information and personal health information. The remainder of the submissions should be disclosed to the Applicant, unless it is found later in this analysis that another exemption applies.

[70] Again, as stated earlier, pursuant to its letter dated September 4, 2012, SRHA refused to comply with my office's recommendations.

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<sup>39</sup>*Supra* note 29 at section 38(2).

**3. Did the Saskatoon Health Region properly apply section 16(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act*?**

[71] The body of all the submissions, whether submitted by private individuals or those employed by SRHA, received by the Site Validation Panel were withheld from disclosure under section 16(1)(a) of LA FOIP.

[72] Section 16(1)(a) of LA FOIP 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:

(a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority;<sup>40</sup>

[73] In my Review Report LA-2010-001, I stated the following in regards to the purpose of section 16 of LA FOIP:

[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.

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<sup>40</sup>*Supra* note 1 at section 16(1)(a).

**[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.**<sup>41</sup>

[emphasis added]

[74] It is important to note from the above that, the purpose of section 16 of LA FOIP is to encourage frank discussions by protecting internal decision-making and policy-making processes. The Site Validation Panel consists of members external to that of SRHA, including the Ministry of Health and the U of S.

[75] I will first deal with the submissions provided by private individuals then proceed to deal with the submissions by those employed by SRHA.

**a. Submissions by private individuals**

[76] The message provided to individuals before they submitted their comments stated that the Site Validation Panel sought the informed opinion of private individuals.

[77] Section 24(1)(a) of Alberta's *Freedom of Information and Protection of Privacy Act* (Alberta's FOIP)<sup>42</sup> is very similar to that of section 16(1)(a) of LA FOIP. In my Review Report F-2010-001, I quote Order F2008-008 by Alberta's then-Commissioner:

[81] What is helpful is Alberta IPC Order F2008-008 that considers in depth the application of its similarly worded provision, 24(1) of its FOIP, 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,

...

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<sup>41</sup>SK OIPC Review Report LA-2010-001 at [21], available at [www.oipc.sk.ca/Reports/LA-2010-001%20\(2\).pdf](http://www.oipc.sk.ca/Reports/LA-2010-001%20(2).pdf).

<sup>42</sup>Alberta's *Freedom of Information and Protection of Privacy Act*, RSA 2000 c. F-25.



[para 34] **I first need to consider the extent to which a general stakeholder or member of the public can provide advice, etc. to a public body within the meaning of section 24(1)(a).** The Applicant submits that the information from a public opinion survey does not fall under the section, as a public body's solicitation of opinions from the public is not with the same intent or purpose as the solicitation of advice from a staff member, outside expert or consultant. The Applicant argues that these latter persons are asked for their opinion due to their knowledge, authority, position or expertise, and that an opinion from a member of the public does not require any of these qualities.

...

[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 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.**

[para 43] To put the point another way, the position of the party providing information under section 24(1)(a) – or the relationship between that party and the public body – **should be such that the public body has specifically sought or expected, or it is the responsibility of the informing party to provide, more than merely thoughts, views, comments or opinions on a topic. General stakeholders and members of the public responding to a survey or poll are not engaged by the public body in a sufficient advisory role. They have simply been asked to provide their own comments, and have developed nothing on behalf of the public body.**<sup>43</sup>

[emphasis added]

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<sup>43</sup>Supra note 16 at [81].

[78] The burden of proof rests on SRHA by reason of section 51 of LA FOIP that provides as follows:

**51** In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.<sup>44</sup>

[79] In order for SRHA to withhold information in submissions by private individuals under section 16(1)(a) of LA FOIP, it needs to meet the following two-part test:

1. that the private individuals were engaged in a sufficient advisory role to provide advice or recommendations by or for the local authority; and
2. what was provided constitutes advice or recommendations.<sup>45</sup>

[80] SRHA has not provided sufficient argument and/or evidence to demonstrate that any of the private individuals were engaged in a sufficient advisory role; nor do the submissions by private individuals appear to have been developed by or for SRHA by virtue of any “advisory position”. Private individuals were simply asked to provide their own comments. SRHA stated in its submission to my office:

...SHR believes that the submissions made **to the CHS Site Validation Panel** were recommendations or advice and, as such, used our discretionary power to choose to deny access to these records.<sup>46</sup>

[emphasis added]

[81] Since the submissions from private individuals were made to the Site Validation Panel<sup>47</sup> and not solely by or for SRHA, section 16(1)(a) of LA FOIP does not apply to any of the severed information.

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<sup>44</sup>*Supra* note 1 at section 51.

<sup>45</sup>SK OIPC Review Report LA-2007-001 at [47] and [91], available at [www.oipc.sk.ca/Reports/LA-2007-001.pdf](http://www.oipc.sk.ca/Reports/LA-2007-001.pdf); SK OIPC Review Report LA-2011-004 at [20] to [23], available at [www.oipc.sk.ca/Reports/LA-2011-004.pdf](http://www.oipc.sk.ca/Reports/LA-2011-004.pdf).

<sup>46</sup>*Supra* note 8.

<sup>47</sup>*Supra* note 33.

**b. Submissions by those employed by SRHA**

[82] In order for section 16(1)(a) of LA FOIP to apply, not only would SRHA have had to demonstrate that the submissions provided by its employees did not constitute personal information under LA FOIP, but it would have also have had to demonstrate any advice or recommendations were provided by or on behalf of the employer.<sup>48</sup>

[83] SRHA did not provide evidence to support that the submissions were “sought or expected, or that they were the responsibility” of the employees.<sup>49</sup>

[84] Further, SRHA had argued that the withheld information under section 16(1)(a) of LA FOIP was also personal information that should be withheld under section 28(1) of LA FOIP. If the information was indeed advice or recommendations provided by or for the local authority, then such information cannot also be personal information. Section 23(2) of LA FOIP provides as follows:

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

...

(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;<sup>50</sup>

[emphasis added]

[85] SRHA’s argument that the information is both advice or recommendations made by or for the local authority and personal information of the authors works against its claims.

[86] Finally, the submissions provided by employees went to the Site Validation Panel (a group made up of stakeholders)<sup>51</sup>, not solely to SRHA, the local authority.

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<sup>48</sup>SK OIPC Review Report LA-2011-004 at [27], available at [www.oipc.sk.ca/Reports/LA-2011-004.pdf](http://www.oipc.sk.ca/Reports/LA-2011-004.pdf).

<sup>49</sup>*Ibid.* at [27], [35], and [51].

<sup>50</sup>*Supra* note 1 at section 23(2)(b).

<sup>51</sup>*Supra* note 33.

[87] SRHA has not met its burden of proof in establishing that submissions submitted by employees were a part of the employees' official role and duties. Therefore, I find that section 16(1)(a) of LA FOIP does not apply.

**4. Did the Saskatoon Regional Health Authority properly apply section 16(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act*?**

[88] SRHA applied section 16(1)(b) of LA FOIP to records submitted by those employed by SRHA.

[89] After reviewing the contents of the records withheld by SRHA under section 16(1)(b), I find that the records could be categorized into two groups:

- Employees wrote and submitted emails possibly on behalf of, as part of his/her job or done in a professional capacity.
  - There is an email written by an employee of SRHA on pages 29 to 31 of the record. It discusses the functions of the area he works in, the history of the area he works in and the impacts the location of the Children's Hospital of Saskatchewan will have on the area he works in. The email contains a signature block that includes his name, professional designation and workplace contact information.
  - Similar to the email described above, another email submitted by an SRHA employee is found on pages 64 and 65. It describes the functions and resources of the area the author works in. This email also contains a signature that includes the author's name, job title and workplace contact information.
- There are emails sent in by employees of SRHA but the contents of the emails contain information provided in a personal capacity, not a professional capacity. Examples of such emails are on pages 69 and 96 (which were discussed earlier in this analysis):
  - The email on page 69 is an email from a SRHA registered nurse. She identifies herself as an employee of SRHA but the email was sent from a personal email account and the contents of the email deal with matters that are conceivably outside the duties of a registered nurse.
  - There is not enough information in the email on page 96 to determine whether the email was sent from an employee's work address or personal address. However, he provides his personal contact information, including a personal

email address and personal home address at the end of the email. He identifies himself as a registered nurse. However, the contents of the email are also, similar to the email on page 69, conceivably outside the duties of a registered nurse.

[90] In my Review Report LA-2007-001, I defined “consultations” and “deliberations” as follows:

[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.<sup>52</sup>

[91] In its submission to my office, SRHA stated:

The opinions of staff were sought by the Site Validation Panel, these opinions and thoughts were looked at and reviewed with the purpose of making a decision of what factors needed to be considered in determining the site location. The Site Validation Panel played a significant role in providing guidance as to where the Children’s Hospital would be located and we believe that all three criteria above were met with these submissions.<sup>53</sup>

[92] As mentioned earlier, a general email was sent to “ALL SKTNHR Email Users” on April 30, 2010, to encourage SRHA employees to provide their opinions to the Site Validation Panel on the location of the Children’s Hospital of Saskatchewan.

[93] The content of the email encourages all employees to provide an opinion. However, the email does not appear to be *imposing* an expectation or making it a responsibility of all SRHA employees to provide an opinion. If it were an expectation or a part of all

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<sup>52</sup>SK OIPC Review Report LA-2007-001 at [101] available at [www.oipc.sk.ca/Reports/LA-2007-001.pdf](http://www.oipc.sk.ca/Reports/LA-2007-001.pdf).

<sup>53</sup>*Supra* note 8.

employees' responsibilities to provide an opinion, then the Site Validation Panel would have received more than the ten or so emails it received from SRHA employees. It appears that SRHA, as an employer, did not require its employees to provide a submission. Submissions were apparently provided on a voluntary basis and was provided to this group, the Site Validation Panel, not directly and solely to the employer, SRHA.

[94] Since the first part of the three-part test is not met, then section 16(1)(b) of LA FOIP cannot be applied to withhold information in the emails.

**5. Did the Saskatoon Regional Health Authority properly apply section 13(2) of *The Local Authority Freedom of Information and Protection of Privacy Act*?**

[95] Section 13(2) of LA FOIP states as follows:

**13(2)** A head may refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from another local authority or a similar body in another province or territory of Canada.<sup>54</sup>

[96] Although the Applicant had stated in her access to information request that she was seeking submissions submitted to the Site Validation Panel from "members of the public", there was a letter signed by the head of a department at the U of S with an enclosed Consensus Statement signed by members of the same department. My office clarified through a telephone call with the Applicant on May 3, 2012 that she was interested in the record. She said that the U of S could have viewed itself as a member of the public during the stakeholder consultation process and not necessarily as a local authority. Therefore, she argued that section 13(2) of LA FOIP would not be applicable to the contents of the letter.

[97] The letter is one page in length. The enclosed Consensus Statement is six pages in length and bears the signatures of 13 doctors who I presume are employees at the U of S. The letterhead is that of the U of S.

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<sup>54</sup>*Supra* note 1 at section 13(2).

[98] Clearly, SRHA viewed the submission from the department at the U of S, found on page 15 to 21 of the responsive records, as if it were from a local authority since it withheld most of the information in this letter and Consensus Statement under section 13(2) of LA FOIP.

[99] Therefore, I have to consider the contents of the letter and Consensus Statement and determine if they were drafted in a personal capacity or in a professional capacity. If they were written and submitted in a personal capacity, then section 13(2) of LA FOIP would not be applicable. If they were prepared in a professional capacity, then they would be from a local authority and section 13(2) of LA FOIP may be applicable.

**a. Three-part test**

[100] Section 13(2) of FOIP is similar to section 13(2) of LA FOIP. My Review Report F-2012-001/LA-2012-001 contains the three-part test to determine if section 13(2) of FOIP applies to information in a record:

[15] The Ministry has applied section 13(2) of FOIP to the proposal portion of the record as it was obtained from RVFS. Section 13(2) of FOIP states:

(2) A head may refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from a local authority as defined in the regulations.

[16] In order for this exemption to apply, three criteria must be met:

1. Is RVFS a local authority as defined in the FOIP Regulations?
2. Was the record obtained from the local authority?
3. Was the record obtained “implicitly or explicitly in confidence” from a local authority?<sup>55</sup>

[101] An adapted version of the above three criteria to fit the situation of this review is as follows:

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<sup>55</sup>SK OIPC Review Report F-2012-001/LA-2012-001 at [15] to [16], available at [www.oipc.sk.ca/Reports/Report%20F-2012-001-LA-2012-001.pdf](http://www.oipc.sk.ca/Reports/Report%20F-2012-001-LA-2012-001.pdf).

- i. Is the U of S a local authority as defined in LA FOIP?
- ii. Was the record obtained from the local authority?
- iii. Was the record obtained “implicitly or explicitly in confidence” from a local authority?

[102] I will consider each of the three criteria in the following three subsections to determine if section 13(2) applies.

**i. Is the U of S a local authority as defined in LA FOIP?**

[103] Section 2(f)(xi) of LA FOIP reads as follows:

**2** In this Act:

...

(f) “**local authority**” means:

...

(xi) the University of Saskatchewan, including Saint Thomas More College;<sup>56</sup>

[104] However, even though the U of S is a local authority, if the employees of the U of S did not write the letter in the course of their employment, the letter would not be from a local authority but from private individuals.

[105] I have to determine if the letters were written by employees of the local authority in the course of their employment or offered in their capacity as private individuals on a balance of probabilities. If the letter contains information that is a result of the employees’ work, then section 13(2) of LA FOIP may apply. If it contains the personal views and opinions, instead then section 13(2) of LA FOIP certainly would not apply.

[106] Section 23(1)(f) of LA FOIP defines “personal information” as follows:

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<sup>56</sup>*Supra* note 1 at section 2(f)(xi).



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:

...

(f) the personal opinions or views of the individual except where they are about another individual;<sup>57</sup>

[107] However, as quoted earlier, section 23(2) of LA FOIP states what is not “personal information”.

[108] The Consensus Statement was signed by several individuals, all of which appear to be employees of a department at the U of S. The contents of the Consensus Statement describe the functions of the department from which the employees are based. The Consensus Statement discusses how the location of the Children’s Hospital of Saskatchewan will impact those functions.

[109] Based on the contents of the Consensus Statement, it appears that the information is not the personal opinion or view of any individuals. The contents of the Consensus Statement appear to be the collective opinion or view of a department at the U of S that was given in the course of employment by several employees. In other words, the employees who signed the Consensus Statement appear to be speaking on behalf of its department, not on the behalf of themselves personally.

[110] Therefore, this letter and the Consensus Statement do not contain personal information. However, section 13(2) of LA FOIP could still apply.

**ii. Was the information obtained from the local authority?**

[111] Next, I have to determine if the record was “obtained” from the local authority. In my Review Report F-2006-001, I defined the term “obtained” as follows:

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<sup>57</sup>*Ibid.* at section 23(1)(f).

[58] In Alberta IPC Order 2000-021, “obtain” is defined as follows:

“[para. 26.] The Concise Oxford Dictionary (9<sup>th</sup> Edition) defines “obtain” as “[to] acquire, secure; have granted to one.” Black’s Law Dictionary (6<sup>th</sup> Edition) defines “obtain” as: “[t]o get hold of by effort; to get possession of; to procure; to acquire, in any way.” Both definitions suggest that for the purposes of section 14(1)(b) a public body could “obtain” a record either intentionally or unintentionally. Further, the definitions suggest that a public body that obtains a record did not create it.”

[59] I adopt the same definition for purposes of section 13(2) of the Act. These records, although authored by the local authority, were subsequently acquired by CPS and are thus in the possession of CPS. Accordingly, I find these records were “obtained” from a local authority.<sup>58</sup>

[112] The letter and the Consensus Statement were authored by employees of a department at the U of S and subsequently acquired by SRHA. Therefore, the letter was obtained from a local authority.

**iii. Was the information obtained in confidence?**

[113] Finally, in my Review Report F-2006-002, I offered the following test to determine whether or not the information was obtained “in confidence explicitly”:

[56] The *Annotated Alberta Freedom of Information and Protection of Privacy Act* (Alberta’s Annotated FOIP Act) publication offers definitions of the above-noted terms as listed below:

Page 5-16-5, discusses “provided in confidence, implicitly or explicitly”.

In the past, factors that have been cited to support a finding that information has been supplied to a public body by a third party in confidence include:

- a. the existence of an express condition of confidentiality in an agreement between a public body and the third party (Orders 97-013 [23-27], 2001-008 [54], 2001-019 [15]);
- b. the fact that the public body requested the information be supplied in a sealed envelope (Order 97-013 [23-27]);

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<sup>58</sup>SK OIPC Review Report F-2006-001 at [58] to [59], available at [www.oipc.sk.ca/Reports/F-2006-001.pdf](http://www.oipc.sk.ca/Reports/F-2006-001.pdf).

c. the third party's evidence that it considered the information to have been supplied in confidence (Order 97-013 [23-27]);<sup>59</sup>

...

[114] To address the above three criteria:

1. There is no evidence of any agreement with an "express condition of confidentiality".
2. SRHA did not provide any evidence that it requested that the information be supplied in a sealed envelope.
3. SRHA has also not provided any evidence that the U of S considered that the information was obtained in confidence.

[115] It does not appear that the information was obtained explicitly in confidence. But, to go even further, in my Review Report F-2006-002, I offered the following test to define the meaning of "implicitly":

[57] Also, the same tool defines "implicitly" as meaning,

that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential. In such cases, all relevant facts and circumstances need to be examined to determine whether or not there is an understanding of confidentiality including whether the information was:

- a. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
- b. treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body;
- c. not otherwise disclosed or available from sources to which the public has access; or
- d. prepared for a purpose which would not entail disclosure.<sup>60</sup>

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<sup>59</sup>SK OIPC Review Report F-2006-002 at [56], available at [www.oipc.sk.ca/Reports/F-2006-002.pdf](http://www.oipc.sk.ca/Reports/F-2006-002.pdf).

<sup>60</sup>*Ibid.* at [57].

[116] First, there is no indication that the employees of the U of S communicated to the Site Validation Panel that the information was confidential and that it was to be kept confidential.

[117] Second, there is no indication that the information has been treated in a manner that indicates a concern for its protection from disclosure prior to being communicated to the Site Validation Panel.

[118] Third, the contents of the Consensus Statement describe the functions of the particular department at the U of S and how the location of the Children's Hospital of Saskatchewan would impact the functions. The functions of a department of a local authority (a public body) are public knowledge. No information has been provided to me to suggest that such information is to be kept implicitly in confidence.

[119] Fourth, a document entitled *Summary of Public Submissions – CHS Site Validation Panel (June 2, 2010)* contains 13 comments submitted to the Site Validation Panel. This document is publicly available through the Children's Hospital of Saskatchewan Site Validation website.<sup>61</sup> Since the Site Validation Panel made 13 comments available to the public, it cannot be argued that the Site Validation Panel accepted submissions on the basis that these submissions would be kept confidential.

[120] This disclosure of such comments illustrates the information could have been prepared for a purpose that entails disclosure.

[121] Based on the above, it appears that the information was not obtained in confidence implicitly.

[122] SRHA argued the following:

The invitation to submit responses and the letter thanking individuals for their submission would suggest that there is an implied level of confidentiality as there is a

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<sup>61</sup>*Supra* note 20.

suggestion that these would **only** be provided to the Children's Hospital Services site validation panel. At no time was there any suggestion that submissions would be available publicly for viewing.<sup>62</sup>

[emphasis added]

[123] However, as quoted earlier, the messages provided to individuals prior to them submitting their comments said as follows:

The purpose of this website is to act as a mechanism for members of the public to become engaged in the site validation process. The website allows anyone to provide an informed opinion, in writing, on [sic] they think is most important in determining the site of the new hospital. **Each submission will be evaluated individually and will not collectively be interpreted by the panel as a public opinion poll or plebiscite...**<sup>63</sup>

[emphasis added]

[124] The message provided to the individuals after they submitted their comments on the website said the following:

**Please be assured that your submission will be forwarded, in its entirety, to members of the CHS site validation panel for their consideration as they meet to validate the final location for the new hospital.** The panel will release its final site recommendation to the public in June.<sup>64</sup>

[emphasis added]

[125] Based on the two messages, the Site Validation Panel informed submitters that their submission will be read by the Site Validation Panel in its entirety. They do not indicate that the submissions would be read *only* by the Site Validation Panel.

[126] Further, since the Site Validation Panel made 13 comments public on its website, it can be concluded that the above two messages never implied that the submissions would only be provided to the Site Validation Panel. Also, given that members of the Site Validation

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<sup>62</sup>*Supra* note 8.

<sup>63</sup>*Ibid.* at Appendix C.

<sup>64</sup>*Ibid.* at Appendix D.

Panel included those from the public, it is difficult to interpret the two messages to state that the submissions would not be made public.

[127] Finally, the comments/submissions were received by the Site Validation Panel, not solely by SRHA.

[128] Therefore, since the burden of proof has not been met, I find that section 13(2) of LA FOIP does not apply to the letter and the Consensus Statement on pages 15 to 21.

## **6. Did Saskatoon Regional Health Authority exercise its discretion properly?**

[129] Sections 13(2), 16(1)(a) and 16(1)(b) of LA FOIP are discretionary exemptions. Even if I found the exemptions applied, the public body must demonstrate that it exercised its discretion properly. In my Review Report F-2004-006, I stated the following about discretionary exemptions:

[24] This is a discretionary exemption. Even if this section applies, the government institution may still decide to disclose the information. To exercise its discretion properly, the government institution must show that it considered the objects and purposes of the Act (one of which is to allow access to information) and did not exercise its discretion for an improper or irrelevant purpose. The objects and purposes of the Act were considered by this office in Report 2004-03, [5] to [11].

The burden of proof is on the Commission by reason of section 61 of the Act. Section 61 states:

In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.<sup>65</sup>

[130] The purpose of FOIP and LA FOIP is found in my Review Report F-2004-003, which stated as follows:

[10] Over the twenty two years since the *Access to Information Act* came into force, provincial and territorial governments have enacted their own access to information and protection of privacy legislation. Many of those more recent provincial

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<sup>65</sup>SK OIPC Report F-2004-006 at [24], available at [www.oipc.sk.ca/Reports/2004-006.pdf](http://www.oipc.sk.ca/Reports/2004-006.pdf).

instruments have included a more comprehensive purpose clause. Those purpose clauses tend to reflect and reinforce the approach taken by the federal Information Commissioner and numerous decisions of superior courts in Canada. A good example is section 2 of the British Columbia *Freedom of Information and Protection of Privacy Act*:

“2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

- (a) giving the public a right of access to records
- (b) giving individuals a right of access to, and a right to request corrections of, personal information about themselves
- (c) specifying limited exceptions to the rights of access
- (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
- (e) providing for an independent review of decisions made under this Act”

[11] I find that this neatly summarizes and clearly identifies the purpose of legislation such as the Saskatchewan Act. Our office will deal with the subject request for review and future requests for review by reference to those same five purposes.<sup>66</sup>

[131] As stated earlier, the purpose of section 16 is intended to foster candid and frank discussions so that the public body can achieve well-reasoned decisions. Section 24(1)(b) of Alberta’s FOIP is very similar to section 16(1)(b) of LA FOIP. Section 24(1)(b) of Alberta’s FOIP states 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

...

- (b) consultations or deliberations involving
  - (i) officers or employees of a public body,
  - (ii) a member of the Executive Council, or
  - (iii) the staff of a member of the Executive Council,<sup>67</sup>

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<sup>66</sup>SK OIPC Report F-2004-003 at [10] to [11], available at [www.oipc.sk.ca/Reports/2004-003.pdf](http://www.oipc.sk.ca/Reports/2004-003.pdf).

<sup>67</sup>*Supra* note 42 at section 24(1)(b).

[132] Alberta's *FOIP Guidelines and Practices* states the following as the purpose of section 24(1) of Alberta's FOIP as follows:

**Section 24(1)** is a discretionary exception that is intended to foster the candid exchange of views in the deliberative process involving senior officials and heads of public bodies, and their staff, as well as among officials themselves. This exception also protects the deliberative process involving senior officials of public bodies and the governing bodies of local public bodies.<sup>68</sup>

[133] Further, Alberta's *FOIP Guidelines and Practices* state:

The exercise of discretion is not a mere formality. The public body must be able to show that the records were reviewed, that all relevant factors were considered and, if the decision is to withhold the information, that there are sound reasons to support the decision.

In *IPC Order 2000-021*, the Commissioner stated that legislated discretion amounts to the power to make a decision that cannot be determined to be right or wrong in an objective sense. Discretion amounts to the power to choose a particular course of action for good reasons and in good faith, after the decision-maker has considered the relevant facts and circumstances; the applicable law, including the objects of the Act; and the proper application of the law to the relevant facts and circumstances.

...

Some factors that should be taken into account when exercising discretion include:

- the general purposes of the Act (i.e. public bodies should make information available to the public, and individuals should have access to personal information about themselves);
- the wording of the discretionary exception and the interests which the exception attempts to protect or balance;
- whether the applicant's request may be satisfied by severing the record and providing the applicant with as much information as is reasonably practicable;
- the historical practice of the public body with respect to the release of similar types of records;
- the nature of the record and the extent to which the record is significant or sensitive to the public body;

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<sup>68</sup>Government of Alberta, Service Alberta, *FOIP Guidelines and Practices* (2009) at p. 177, available at [www.servicealberta.ca/foip/documents/chapter4.pdf](http://www.servicealberta.ca/foip/documents/chapter4.pdf).



- whether the disclosure of the information will increase public confidence in the operation of the public body;
- the age of the record;
- whether there is a definite and compelling need to release the record; and
- whether Commissioner's Orders have ruled that similar types of records or information should or should not be disclosed.<sup>69</sup>

[134] In regards to the exercise of its discretion, SRHA has only offered the following:

Saskatoon Health Region chose to use our discretionary power to deny access to these records when the individual who is consulting, providing advice or recommendations to the Validation Site Panel [sic] was also identified as an employee of the Region.<sup>70</sup>

[135] Even if the discretionary exemptions apply, which I found they did not, SRHA has failed to establish it considered the objects and purposes of LA FOIP when exercising its discretion.

[136] My analysis above finds that none of these three sections apply as the burden of proof has not been met. Accordingly, I recommend that SRHA disclose the views and opinions of employees that were given in the course of their employment. In other words, no information would be severed from such submissions.

**7. Does *The Local Authority Freedom of Information and Protection of Privacy Act* apply to the letter to the editor that was published in a newspaper?**

[137] Page 103 of the responsive records contains a letter to the editor that was published in a newspaper. It is not apparent how or why this letter was included as a part of the responsive records.

[138] Nevertheless, SRHA withheld the letter from disclosure under sections 16(1)(a) and 28(1) of LA FOIP.

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<sup>69</sup>*Ibid.* at pp. 97 to 98.

<sup>70</sup>*Supra* note 8.

[139] Instead of considering whether these sections are applicable to the letter, I have to determine if LA FOIP applies to the letter.

[140] Section 3(1)(a) and 3(1)(b) of LA FOIP states as follows:

3(1) This Act does not apply to:

(a) published material or material that is available for purchase by the public;

(b) material that is a matter of public record; or<sup>71</sup>

...

[141] A copy of the letter can be found using an Internet search engine. Further, it appears the letter is available for purchase.<sup>72</sup> Therefore, I find that LA FOIP does not apply to the letter to the editor.

[142] In a letter dated August 8, 2012, my office recommended that SRHA advise the Applicant where she can obtain a copy of the letter or release as there is no reason to withhold the letter. However, as stated earlier, SRHA refused to comply with my office's recommendation, according to its letter dated September 4, 2012.

## V FINDINGS

[143] I find that the submissions from private individuals contain personal information that should be withheld under section 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act*. However, the balance of such submissions should be released.

[144] I find that some of the submissions contain personal health information that should be withheld under section 27(1) of *The Health Information Protection Act*. However, the balance of such submissions should be released.

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<sup>71</sup>*Supra* note 1 at sections 3(1)(a) and 3(1)(b).

<sup>72</sup>The letter appears to be for purchase at [www.fpinfomart.ca/](http://www.fpinfomart.ca/).

[145] I find that views and opinions of employees provided in the course of their employment cannot be withheld under sections 16(1)(a), 16(1)(b) or 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act*.

[146] I find that views and opinions of those employed by Saskatoon Regional Health Authority that were provided in a personal capacity may be withheld under section 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act*. However, I find that the submissions should be sufficiently de-identified and the remaining content be released.

[147] I find that section 13(2) of *The Local Authority Freedom of Information and Protection of Privacy Act* does not apply to the letter provided by the University of Saskatchewan to the Site Validation Panel.

[148] I find that Saskatoon Regional Health Authority did not exercise its discretion properly when applying sections 13(2), 16(1)(a) and 16(1)(b) to information in records.

[149] I find that *The Local Authority Freedom of Information Protection of Privacy Act* does not apply to the letter to the editor that was published in a newspaper.

## **VI RECOMMENDATIONS**

[150] I recommend that Saskatoon Regional Health Authority sufficiently de-identify submissions provided by private individuals to the Site Validation Panel and disclose the remainder of the submissions to the Applicant.

[151] I recommend that Saskatoon Regional Health Authority sufficiently de-identify submissions that contain personal health information and disclose the remainder of the submissions to the Applicant.

[152] I recommend that Saskatoon Regional Health Authority disclose to the Applicant the views and opinions of employees provided in the course of their employment.

[153] I recommend that Saskatoon Regional Health Authority sufficiently de-identify the views and opinions of employees provided from a personal capacity and disclose the remainder of the submissions to the Applicant.

[154] I recommend that Saskatoon Regional Health Authority advise the Applicant where she can obtain a copy of the letter to the editor (page 103 of the responsive records), or release the letter to the Applicant

Dated at Regina, in the Province of Saskatchewan, this 29th day of August, 2013.

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