QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2019 SKQB 150**

Date: **2019 06 13**
Docket: QBG 2367 of 2018
Judicial Centre: Regina

BETWEEN:

GEOFF LEO

APPLICANT

- and -

GLOBAL TRANSPORTATION HUB AUTHORITY

RESPONDENT

- and –

BRIGHTENVIEW DEVELOPMENTS INTERNATIONAL LTD.

THIRD PARTY

Counsel:

Sean M. Sinclair	for the applicant
David J. Bishop and Graham E. Quick	for the respondent
E.F. Anthony Merchant, Q.C. and Barton P.J. Soroka	for Brightenview

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JUDGMENT
JUNE 13, 2019

KALMAKOFF J.A.
ex officio

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[1] This decision relates to an appeal by Geoff Leo from a decision of the head of the Global Transportation Hub Authority [GTH], relating to disclosure and non-disclosure of documents pursuant to the provisions of *The Freedom of Information and Protection of Privacy Act,* SS 1990-91, c F-22.01 [*FOIP*].

[2] For reasons which follow, I have determined that Mr. Leo's appeal must be dismissed.

BACKGROUND

[3] Mr. Leo, a journalist employed by the Canadian Broadcasting Corporation, requested access to certain records held by GTH, pursuant to the provisions of *FOIP*. GTH's response to those requests led to a review of the matter by the Information and Privacy Commissioner [IPC]. The IPC made recommendations to GTH. After that, GTH disclosed some records to Mr. Leo, but refused to disclose others. Some records were disclosed in redacted form, with GTH claiming various exemptions set out in *FOIP*. Mr. Leo takes the position that GTH has improperly disregarded the IPC's recommendations, and applied exemptions which it was not legally entitled to apply.

[4] GTH argues that the exemptions it has applied are all proper, permitted by *FOIP*, and not inconsistent with the IPC's recommendations. GTH takes the position that I ought to dismiss the appeal.

[5] Brightenview Developments International Ltd. [Brightenview] takes part in the appeal as a third party, under s. 57(4) of *FOIP*. It argues that the appeal should be dismissed, and that GTH should be permitted to continue to apply the exemptions because of the damage that would be done to Brightenview's interests as a third party by disclosure of that information. In fact, argues Brightenview, GTH has already permitted Mr. Leo too much access. Brightenview says that all the records Mr. Leo seeks are properly exempt from release, not only on the basis of the exemptions claimed by GTH,

but also on the basis of exemptions applicable to information that affects the interests of third parties, under s. 19 of *FOIP*.

[6] The relevant statutory framework, and the factual background which underlies the application are fully laid out in my earlier decision, *Leo v Global Transportation Hub Authority,* 2018 SKQB 323 [*Step One Decision*]. I will not repeat the facts, but I rely on that factual underpinning, and the legislative framework detailed in the *Step One Decision* for the purpose of this decision.

[7] As I said in the *Step One Decision,* an appeal under s. 58 of *FOIP* is not an appeal from the recommendations of the IPC; it is an appeal from a decision of the head of a government institution, regarding the implementation of those recommendations.

[8] Section 58 clearly states that an appeal such as this is a hearing *de novo,* during which the court may examine any record *in camera* in order to determine, on the merits, whether the information in the record may be properly withheld by the government institution. This means I am not bound by the recommendations made by the IPC. Nor are those recommendations – or the decision of the head of the government institution – owed any particular deference: *Consumers' Co-operative Refineries Limited v Regina (City),* 2016 SKQB 335, 6 CELR (4th) 70 [*CCRL*]; *Evenson v Saskatchewan (Ministry of Justice),* 2013 SKQB 296, 428 Sask R 37; *Evenson v Kelsey Trail Regional Health Authority*, 2012 SKQB 382. In an appeal of this nature, I am to consider the matter afresh, based on the evidence provided by the parties on appeal: *CCRL* at para 13; *Britto v University of Saskatchewan*, 2017 SKQB

259 at para 19, 13 CPC (8th) 187; *Britto v University of Saskatchewan,* 2018 SKQB 92 [*Britto #2*].

[9] In the *Step One Decision*, I determined that it was necessary for me to review the records in question *in camera* before proceeding further. Following that review, I concluded that it was appropriate to receive further evidence and representations *in camera* from GTH relating to its reasons for redacting the records in question. I also permitted Brightenview to participate in the *in camera* portion of the hearing, given the extent to which its interests are implicated by the information contained in the records Mr. Leo seeks.

[10] This decision relates to "Step Two" of the appeal. Step Two requires that I determine, in light of the evidence presented on the appeal, whether or not the exemptions applied by GTH were proper. In that regard, I must be guided by the provisions of s. 58 of *FOIP,* which read, in part, as follows:

> **58**(1) On an appeal, the court:
>
> (a) shall determine the matter de novo; and
>
> (b) may examine any record in camera in order to determine on the merits whether the information in the record may be withheld pursuant to this Act.
>
> ...
>
> (5) Where a head has refused to give access to a record or part of it, the court, if it determines that the head is not authorized to refuse to give access to the record or part of it, shall:
>
> (a) order the head to give the applicant access to the record or part of it, subject to any conditions that the court considers appropriate; or

> (b) make any other order that the court considers appropriate.
>
> (6) Where the court finds that a record falls within an exemption, the court shall not order the head to give the applicant access to the record, regardless of whether the exemption requires or merely authorizes the head to refuse to give access to the record.
>
> (7) If, with respect to an appeal of a decision of the head regarding the matters mentioned in clauses 49(1)(a.1) to (a.4), the court determines that the decision of the head was not authorized pursuant to this Act, the court may:
>
> (a) order the head to reconsider the decision and proceed in accordance with this Act, subject to any conditions that the court considers appropriate; or
>
> (b) make any other order that the court considers appropriate.
>
> (8) If, with respect to an appeal mentioned in subsection (7), the court finds that the head had authority pursuant to this Act to make the decision that is the subject of the appeal, the court shall not order the head to reconsider the decision.

[11] Subsection 6 is particularly important. While the jurisprudence says that I am not bound by the decision of the head of the government institution, s. 58(6) makes clear that if I determine that a record which the head has refused to disclose falls within the exemption claimed, I cannot order the head to disclose that record, regardless of whether the head's authority to refuse disclosure is discretionary or mandatory in nature.

[12] In this case, GTH applied exemptions contained in ss. 15, 17, 18, 22, 24 and 29 of *FOIP*, as well as s. 27 of *The Health Information Protection Act,* SS 1999, c H-0.021 [*HIPA*] when it either redacted or refused to disclose documents to Mr. Leo. Brightenview also argues that exemptions set out in s. 19 of *FOIP* apply. I will refer to each category of exemption in general terms, as follows:

(a) Section 15: The investigative/law enforcement exemption;

(b) Section 17: The government advice or consultation exemption;

(c) Section 18: The economic interest exemption;

(d) Section 22: The legal advice/privilege exemption;

(e) Sections 24 and 29 *FOIP*, and s. 27 *HIPA*: The protected personal information exemption.

(f) Section 19: The third party interest exemption.

[13] As I explained to counsel during submissions, my reasons in this decision will of necessity be somewhat circumspect in terms of reviewing the evidence which underlies my conclusions about the propriety of GTH's application of these exemptions, especially where I conclude that an exemption was properly applied. In that regard, s. 58(3) of *FOIP* reads, in part, as follows:

> **58** (3) The court shall take every reasonable precaution...to avoid disclosure by the court or any person of:
>
> (a) any information or other material if the nature of the information or material could justify a refusal by a head to give access to a record or part of a record;

[14] This provision applies, in my view, not only to the procedural aspects of the hearing, but to the reasons given for a decision as well. If I determine that an exemption was properly applied, and that non-disclosure of a record was justified, it would defeat the purpose of *FOIP* if I were to

describe the evidence supporting that conclusion in such a way as to effectively disclose the information that the record contains.

ANALYSIS

The Legal Framework

[15] At its heart, *FOIP* presumes that the public should have access to records held by government institutions. The intention is to ensure that such institutions are transparent and accountable to persons affected by their operation. This is accomplished, in part, by insuring that public access to records is inhibited only to the extent deemed appropriate by the legislature: see s. 5 of *FOIP;* see also *Britto #2,* at para 25.

[16] The onus of proving that access to the records sought should not be granted, in this case, is on GTH: *FOIP*, s 61.

[17] Applying the exemptions set out in *FOIP* involves, in large part, an exercise in statutory interpretation. The modern principle of statutory interpretation is that the words of an Act are to be read 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 the legislative body: *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at para 23 [2017] 2 SCR 289; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27.

[18] In *John Doe v Ontario (Finance),* 2014 SCC 36 at para 23, [2014] 2 SCR 3 [*John Doe*], the Supreme Court of Canada concisely summarized the legislative purpose of access to information statutes such as *FOIP.* In the opening paragraphs, Justice Rothstein wrote:

> [1] Access to information legislation serves an important public interest: accountability of government to the citizenry. An open and democratic society requires public access to government information to enable public debate on the conduct of government institutions.
>
> [2] However, as with all rights recognized in law, the right of access to information is not unbounded. All Canadian access to information statutes balance access to government information with the protection of other interests that would be adversely affected by otherwise unbridled disclosure of such information.

[19] Justice Rothstein went on to say, at para. 41, that statutes like *FOIP* establish a presumption in favour of granting access to information, because access to information in the hands of a public institution can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. This requires that the citizenry be granted access to government records when it is necessary to meaningful public debate on the conduct of government institutions. However, he cautioned that the presumption in favour of granting access must be rebuttable in those limited and specific circumstances where the legislation permits an exemption to the government institution.

Section 15: ***The investigative/law enforcement exemption***

[20] In this case, GTH has applied the exemption in s. 15(1)(c) and (k) to certain documents. These subsections permit refusal of access in situations where the release of a record could interfere with or disclose information relating to a lawful investigation or law enforcement matters in general. The relevant portions of s. 15(1) read as follows:

> **15**(1) A head may refuse to give access to a record, the release of which could:
>
> ...

> (c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;
>
> ...
>
> (k) interfere with a law enforcement matter or disclose information respecting a law enforcement matter;

[21] The use of the word "may" in s. 15(1) means that the head's decision in this respect is discretionary. But, as I said earlier, if I determine that a record to which GTH has applied the investigative/law enforcement exemption falls within the scope of s. 15(1)(c) or (k), s. 58(6) does not permit me to review GTH's exercise of its discretion.

[22] Section 15 of *FOIP* recognizes that there is a strong public interest in protecting documents related to law enforcement: see *Ontario (Public Safety and Security) v Criminal Lawyers' Association,* 2010 SCC 23 at para 44, [2010] 1 SCR 815.

[23] The terms "lawful investigation" and "law enforcement matter" are not defined in *FOIP*, but courts interpreting similar provisions in other jurisdictions have determined that the meaning of the word "matter" in this context is very broad. The plain wording of the section also makes it clear that "investigation" and "law enforcement matter" are not synonymous terms. If they were, there would be no need to create a distinct exemption for each.

[24] The jurisprudence also suggests that the exemptions in s. 15(1) apply to more than just specific ongoing investigations or proceedings: *Ontario (Ministry of Community Safety & Correctional Services) v Ontario (Information and Privacy Commissioner)* (2007), 231 OAC 230 (Ont Sup Ct). In *Evenson v Saskatchewan (Ministry of Justice),* 2013 SKQB 296, 428 Sask R

37, Justice Gabrielson also noted that there is no requirement in s. 15(1)(k) that the law enforcement matter in question be ongoing before the exemption is deemed to apply. This, in my view, would apply to s. 15(1)(c) as well. In short, the exemptions in s. 15(1) apply to both active and closed matters.

[25] Furthermore, in my view, the reach of s. 15(1) is not limited to investigations conducted by, or law enforcement matters involving only the GTH. Nothing in the wording of the section suggests such a limit.

[26] Of course, application of any of the exemptions set out in s. 15(1) is not justified by a bare assertion. As I stated earlier, s. 61 of *FOIP* places the onus on GTH to demonstrate that access to records should not be granted. In the context of s. 15(1), this requires GTH to provide an evidentiary record to support the conclusion that there is a risk that disclosure of a record could interfere with, or disclose information respecting, an investigation or other law enforcement matter, whether active or closed.

[27] I am satisfied, based on the evidence before me, that where GTH has applied the "investigative/law enforcement exemption", it was justified in doing so. Exemptions under ss. 15(1)(c) and (k) were applied to portions of three documents (which each contain the same part of an email chain) related to an investigation being conducted by the R.C.M.P. Disclosure of that information would clearly disclose information that relates to both an investigation and a law enforcement matter. GTH was authorized by *FOIP* to apply this exemption because the portion of the record redacted falls within the scope of s. 15(1). As such, I find no basis to intervene.

Section 17: ***The government advice or consultation exemption***

[28] GTH has also applied exemptions under s. 17(1)(a) and (b) of *FOIP* to certain records. The relevant portions of those provisions read as follows:

> **17**(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 a government institution or a member of the Executive Council;
>
> (b) consultations or deliberations involving:
>
> (i) officers or employees of a government institution;
>
> (ii) a member of the Executive Council; or
>
> (iii) the staff of a member of the Executive Council;

[29] The plain meaning of the word "advice" refers to guidance or recommendations offered with regard to future action. In the context of s. 17 of *FOIP*, "advice" refers to opinions or analysis related to a situation which may require action. "Recommendations" include suggestions as to a course of action, and the rationale for such suggestions. "Proposals", "analyses" and "policy options" refer to the concise setting out of the advantages and disadvantages of particular courses of action: *Saskatoon (City), Re,* 2011 CarswellSask 949 (WL) (Sask IPC). See also *John Doe*.

[30] In *John Doe,* the Supreme Court noted that the definition of "policy options" is necessarily broad. At paras. 26-27, Justice Rothstein wrote:

> [26] Policy options are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant's identification and

> consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.
>
> [27] Records containing policy options can take many forms. They might include the full range of policy options for a given decision, comprising all conceivable alternatives, or may only list a subset of alternatives that in the public servant's opinion are most worthy of consideration. They can also include the advantages and disadvantages of each option, as do the Records here. But the list can also be less fulsome and still constitute policy options. For example, a public servant may prepare a list of all alternatives and await further instructions from the decision maker for which options should be considered in depth. Or, if the advantages and disadvantages of the policy options are either perceived as being obvious or have already been canvassed orally or in a prior draft, the policy options might appear without any additional explanation. As long as a list sets out alternative courses of action relating to a decision to be made, it will constitute policy options

[31] In *John Doe,* Justice Rothstein went on to make further comment on the rationale underlying such an exemption in access to information legislation. At paras. 44-46, he wrote:

> [44] In my opinion, Evans J. (as he then was) in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245, persuasively explained the rationale for the exemption for advice given by public servants. Although written about the equivalent federal exemption, the purpose and function of the federal and Ontario advice and recommendations exemptions are the same. I cannot improve upon the language of Evans J. and his explanation and I adopt them as my own:
>
> > To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies.
> >
> > It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns,

> changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness. [paras. 30-31]

> [45] Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada (*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 86; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at pp. 44-45). The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.

[32] In its "Guide to Exemptions" [Guide], the office of the IPC says that the exemption in s. 17(1)(a) is:

> ...meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice or all records related to advice. The object of the provision includes maintaining an effective and neutral public service capable of providing full, free and frank advice.

[33] The Guide suggests the application of a three-part test for determining whether an exemption is applicable under s. 17(1)(a):

> 1. The information must qualify as advice, proposals, recommendations, analyses or policy options;
>
> 2. The proposals, recommendations, analyses or policy options must:
>
> a. Be either sought, expected, or be part of the responsibility of the person who prepared the record; and

> b. Be prepared for the purpose of doing something, for example, taking an action or making a decision; and
>
> c. Involve or be intended for someone who can take or implement the action;
>
> 3. The advice, recommendations, analyses or policy options must be developed by or for a government institution or member of Executive Council

[34] Mr. Leo argues that I ought to follow, to the letter, the three-part test set out in the Guide as it relates to the interpretation of s. 17(1)(a). GTH, on the other hand, argues that there is nothing in the wording of s. 17(1)(a) which requires that the advice, recommendations, proposals, analyses or policy options be communicated to anyone, or that the application of the exemption be limited to situations where the advice, recommendations, proposals, etc., are explicitly requested by the prescribed category of persons. GTH says that the exemption applies as long as the record in question contains advice, proposals, recommendations, analyses or policy options.

[35] The Guide, of course, is not binding on the court. It assists, but does not govern, my interpretation of the exemption provisions in *FOIP*.

[36] Having reviewed the governing jurisprudence, I am of the view that the test set out in the Guide is generally consistent with the leading authorities. In *John Doe,* the court concluded, in applying a provision similar to s. 17(1)(a), that the protection from disclosure should apply even if such advice, recommendations, policy options or proposals were not (i) communicated to the ultimate intended recipient (or decision-maker) or (ii) acted upon. At paras. 50-51, Justice Rothstein wrote:

> [50] No words in s. 13(1) express a requirement that the advice or recommendations be communicated in order to qualify for exemption from disclosure. A public servant may engage in writing any number of drafts before communicating part or all of their content to another person. The nature of the deliberative process is to draft and redraft advice or recommendations until the writer is sufficiently satisfied that he is prepared to communicate the results to someone else. All the information in those earlier drafts informs the end result even if the content of any one draft is not included in the final version.
>
> [51] Protection from disclosure would indeed be illusory if only a communicated document was protected and not prior drafts. It would also be illusory if drafts were only protected where there is evidence that they led to a final, communicated version. In order to achieve the purpose of the exemption, to provide for the full, free and frank participation of public servants or consultants in the deliberative process, the applicability of s. 13(1) must be ascertainable as of the time the public servant or consultant prepares the advice or recommendations. At that point, there will not have been communication. Accordingly, evidence of actual communication cannot be a requirement for the invocation of s. 13(1). Further, it is implicit in the job of policy development, whether by a public servant or any other person employed in the service of an institution or a consultant retained by the institution, that there is an intention to communicate any resulting advice or recommendations that may be produced. Accordingly, evidence of an intention to communicate is not required for s. 13(1) to apply as that intention is inherent to the job or retainer.

[37] Nothing in the test set out in the Guide appears to require that the information actually be communicated, but only that it be prepared by someone as part of their employment responsibilities, and with a prescribed purpose in mind. This, as *John Doe* makes clear, casts a net that is fairly wide in the protection of preparatory and draft work.

[38] With respect to the exemption in s. 17(1)(b), the Guide says it is intended "...[t]o permit public bodies to consider options and act without constant public scrutiny".

[39] The Guide says that a "consultation" occurs when the views of one or more officers or employees of a public body are sought as to the appropriateness of a particular proposal or suggested action. It describes a "deliberation" as a discussion or consideration by the persons described in s. 17(1)(b) of the reasons for and against an action. It refers to discussions conducted with a view toward making a decision. In my view, this means "consultations or deliberations" would encompass the communications between the persons listed in s. 17(1)(b) which take place during, and for the purpose of development of "advice, proposals, recommendations, analyses or policy options".

[40] Consultations may include background materials that inform the advisors about matters relative to which advice is being sought, and deliberations include discussions by the officers or employees of a government institution of the reasons for or against an action.

[41] The exemption in s. 17(1)(b) is not meant to protect a bare recitation of facts, and does not generally apply to records which reveal only that a consultation or deliberation took place, when it took place, who was present, or that a particular topic was involved. It is the substance of the consultation or deliberation that matters for the purpose of determining whether the exemption applies to it.

[42] Having thoroughly reviewed the original records *in camera,* and having compared them to the redacted versions to which Mr. Leo was given access, I am satisfied that, in each instance where GTH applied the "government advice or consultation", it was authorized to do so. I will explain why I reach that conclusion.

[43] GTH submits that the records to which the exemption in s. 17(1)(a) was applied generally fall into three broad categories:

(a) Briefings, agendas, and decision items prepared for the Board of GTH by Bryan Richards;

(b) Briefings prepared by Rhonda Ekstrom, the former Vice President of Business Development for GTH; and

(c) Email communications involving members of the GTH executive, the GTH Board, the Minister, and third parties working in conjunction with GTH, relating to contractual agreements, marketing endeavours and business relationships.

[44] I agree that this is an accurate characterization of the categories of records to which s. 17(1)(a) has been applied in this case. As set out in the November 5, 2018 affidavit of Matthew Schroeder, at paras. 34, 65 and 79, these records contain, among other things:

(a) key messages from Briefing Notes prepared by employees of the GTH for the Minister, which also include analyses, action items, and descriptions of potential opportunities for the GTH;

(b) meeting agendas, information and decision items prepared for the Board detailing the status of current and future projects and providing updates on business development for review, decision, and response by the Board;

(c) email correspondence between GTH employees regarding proposed responses to current and potential clients and media inquiries;

(d) email correspondence between GTH employees and potential clients related to structure and status of action items related to land sales and associated agreement;

(e) a draft letter from a potential client regarding a proposed agreement and potential projects at the GTH;

(f) email correspondence between GTH employees and the Board regarding proposed actions that may be taken to move a project forward or complete agreements with current and potential clients;

(g) email correspondence between GTH employees regarding information required to evaluate whether and how to move a potential project or agreement forward;

(h) email correspondence between the GTH and the Ministry regarding marketing and promotion of the GTH to potential clients;

(i) email correspondence between GTH employees regarding terms and conditions to be included in agreement with potential clients; and

(j) periodic updates prepared by the GTH for the Board of Directors regarding the status of current and potential projects at the GTH.

[Para. 34]

a) email correspondence between GTH employees and representatives of Brightenview regarding proposed opportunities for business development at the GTH including correspondence from potential clients;

b) email correspondence between GTH employees and representatives of Brightenview regarding marketing opportunities, promotions, and events to attract business opportunities to the GTH;

c) email correspondence between GTH employees regarding proposals and recommendations received from representatives of Brightenview;

d) email correspondence between GTH employees and representatives of Brightenview regarding expectations for proposed projects;

e) email correspondence between the GTH and representatives of Brightenview about the terms and content of their agreements and projects; ...

[Para. 65]

a) email correspondence between GTH employees regarding proposed responses to current and potential clients;

b) email correspondence between GTH employees and the Board regarding proposed actions that may be taken to move a project forward or complete agreements with current and potential clients;

c) email correspondence between the GTH and Chief of Staff to the Minister Responsible for the GTH regarding marketing and promotion of the GTH to potential clients;

d) email correspondence between GTII employees and other government officials regarding potential clients, client development opportunities, and strategies to attract business development opportunities to the GTH;

e) email correspondence between the GTH and the Government of Canada regarding marketing and promotion of the GTH to potential clients;

f) periodic updates prepared by the GTH for the Board of Directors regarding the status of current and potential projects at the GTH; and

g) email correspondence between the GTH and other local organizations regarding marketing and promotion of the GTH.

[Para 79]

[45] In that affidavit, Mr. Schroeder also explained the rationale behind why GTH applied the exemptions in s. 17(1)(a) and (b) to the documents in question. At para. 36, he deposed as follows:

> 36. It is difficult to provide specific information for each instance where these subsections have been applied to portions of the responsive records without revealing the information withheld itself; however, I can make the following statements regarding the GTH and how it operates as a government institution to further explain why the specific portions of the responsive records in question were redacted on the basis of subsections 17(1)(a) and 17(1)(b):
>
> a) the GTH and its employees have a responsibility to provide updates to the Board, Minister and fellow GTH employees on potential and current clients; for example, as all land sales require Board approval, when potential clients are close to signing a land purchase agreement, the GTH will prepare a summary of the potential project and related information necessary for the Board to understand progress and to make a decision. Regular updates are provided by the CEO to the Board related to various organizational matters, including business development activities, to seek Board input with the goal of furthering organizational objectives;
>
> b) the GTH is also required to provide proposals and recommendations to the Board with respect to what is needed for a project to move forward or for an agreement to be signed;
>
> c) GTH employees provide advice to other GTH employees and the Board by identifying an issue with a potential or current client. Sometime this advice also includes a consideration of the issue and an evaluative analysis, including what the client's perspective is in terms of what is required to move a project forward or for the client to sign an agreement;

d) when GTH employees and the Board consider the information they have received from one another, it often results in a dialogue between the GTH employees and/or the Board regarding the advice, proposal, or recommendation. It is the responsibility of GTH employees to engage in this dialogue such that the GTH has considered all of its options with respect to a specific proposal or recommendation;

e) the GTH also receives recommendations, proposals and analyses from clients regarding potential or current projects related to what needs to be done for a project or agreement to move forward. While the analysis or recommendation is for the GTH's consideration, it is valuable for the GTH to understand how the client or potential client views the project or agreement. Importantly, these recommendations and analyses from the client's perspective requires trust and confidentiality to a certain extent; and

f) the analysis, advice, and recommendations related to current and potential clients are necessary for the GTH to develop plans for rail, highways, competitive real estate, and to provide superior services to its clients. It is necessary for this advice, analysis and recommendations to remain confidential in order for the GTH to operate effectively and to compete in a commercial environment against other inland ports such as CentrePort in Winnipeg, Manitoba and CN Logistics Park in Calgary, Alberta, while also maintaining the trust of its current and potential clients.

[46] Having reviewed all of these records, and having considered them in light of the affidavit evidence and the evidence presented in the *in camera* hearing, I am satisfied that in each instance where GTH applied exemptions under s. 17(1)(a) or (b), it was authorized to do so. The records in question all, in some fashion, involve or relate to advice, recommendations, proposals, or

analysis or development of policy options related to the business activities of GTH. The records in question include strategic discussions about soliciting clients and investment, developing business relationships, and pursuing sales and marketing opportunities.

[47] In my view, the records implicated by these exemptions were all (i) prepared as part of the employment duties of those who prepared them; (ii) prepared for the purpose of taking action or making a decision; (iii) intended for someone who could take or implement action; and (iv) developed by or for GTH. Or, alternatively, they involved consultations or deliberations regarding development of various business opportunities for GTH, and were generated as part of the process of making decisions about what course of action should be taken.

[48] The nature of the records to which the s. 17(1) exemptions were applied is such that there is not just a mere possibility that providing access to the redacted portions would disclose the types of information listed in s. 17(1)(a) and (b). In my view, based on the evidence, it is a certainty that providing access to the redacted portions of the records would disclose that type of information.

[49] Accordingly, I conclude that GTH was authorized to apply the exemptions under s. 17(1)(a) and (b) in the instances where those exemptions were applied. In that regard, there is no basis for me to intervene.

Section 18: ***The economic interest exemption***

[50] GTH has also applied the exemption set out in s. 18(1)(f) of *FOIP* to various records. That portion of *FOIP* reads:

> **18**(1) A head may refuse to give access to a record that could reasonably be expected to disclose:
>
> ...
>
> (f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution;

[51] In this case, in order for information to fall within the scope of s. 18(1)(f), GTH must establish that disclosure of that information could be reasonably expected to prejudice the economic interests of the Government of Saskatchewan or a government institution, such as the GTH itself.

[52] A "reasonable expectation" of prejudice to economic interests is more than a mere possibility. However, demonstrating a "reasonable expectation" does not require the party asserting the exemption to show that prejudice is probable. "Reasonable expectation" falls somewhere between "merely possible" and "probable": *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23 [*Merck Frosst*]; *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para 54, [2014] 1 SCR 674 [*OCSCS*].

[53] A reasonable expectation of prejudice to economic interests is not established by simply asserting that disclosure of records would result in financial loss or that it would interfere in future business dealings. Nor is it established by the mere prospect of heightened competition flowing from disclosure: *Canadian Broadcasting Corp. v Canada (National Capital Commission)*, 147 FTR 264 (Fed Ct). The use of the word "reasonably" in s. 18(1)(f) adds an objective and qualitative element to the analysis required:

Kattenburg v Manitoba (Industry, Trade and Tourism) (1999), 143 Man R (2d) 42 (Man QB).

[54] While direct evidence of specific future harm is not required, there must be an explanation based on the evidence to establish that the harm feared is more than speculative or "merely possible". The evidence must be more than conjecture: *Canada (Information Commissioner) v Toronto Port Authority,* 2016 FC 683.

[55] Once again, having thoroughly reviewed the original records *in camera,* and having compared them to the redacted versions to which Mr. Leo was given access, I am satisfied that, in each instance where GTH applied the "economic interest" exemption, the record in question fell within the scope of s. 18(1)(f), and thus GTH was authorized to apply that exemption. Once again, I will explain why the evidence leads me to that conclusion.

[56] In his November 5, 2018 affidavit, Mr. Schroeder describes the documents to which s. 18(1)(f) was applied as follows, at paras. 39, 69 and 82:

> a) Co-operation Agreement between the GTH and Brightenview;
>
> b) Briefing Notes prepared by employees of the GTH for the Minister that make reference to current and potential projects at the GTH, potential clients of the GTH, and efforts to attract business to the GTH;
>
> c) agendas for events put on by the GTH for the purposes of attracting business opportunities to the GTH for potential clients not yet disclosed to the public;
>
> d) decision items prepared by GTH employees for the Board that make reference to current and potential clients of the GTH, contractual and other negotiations between the GTH

and current and potential clients, and options to generate business for the GTH;

e) email correspondence between GTH employees regarding potential clients, client development opportunities, and strategies to attract business opportunities to the GTH;

f) a draft letter from a potential client regarding a proposed agreement and potential projects at the GTH;

g) email correspondence between GTH employees regarding information required to evaluate whether and how to move a potential project or agreement forward;

h) email correspondence between GTH employees and the Board regarding proposed actions that may be taken to move a project forward or complete agreements with current and potential clients;

i) email correspondence between the GTH and the Chief of Staff to the Minister Responsible for the GTH regarding marketing and promotion of the GTH to potential clients;

j) email correspondence between the GTH and current or potential clients about the terms and content of a proposed agreement or project;

k) email correspondence between GTH employees regarding existing and outstanding information about potential clients;

l) descriptions and names of potential and unannounced projects at the GTH, some of which appear in the subject lines of email correspondence;

m) periodic updates prepared by the GTH for the Board of Directors regarding the status of current and potential projects at the GTH; ...

[Para. 39]

a) email correspondence between GTH employees regarding potential clients, client development opportunities, and strategies to attract business opportunities to the GTH;

b) a letter from Brightenview to the GTH that identifies a potential project for the GTH;

c) email correspondence between GTH employees and representatives of Brightenview regarding potential clients of the GTH;

d) email correspondence between the GTH and Brightenview about the terms and content of a proposed agreement or project;

e) descriptions and names of potential and unannounced projects at the GTH, some of which appear in the subject lines of email correspondence; and

f) an agenda for an event put on by the GTH for the purposes of marketing the GTH to a potential client;

g) email correspondence disclosing the conference call login information for the GTH's conference call system; ...

[Para 69]

a) a Business Development Dashboard prepared by GTH employees for the Board regarding current and potential clients and projects and business development opportunities;

b) Briefing Notes prepared by employees of the GTH for the Minister that make reference to current and potential projects at the GTH, potential clients of the GTH, and efforts to attract business to the GTH;

c) email correspondence between GTH employees regarding potential clients, client development opportunities, and strategies to attract business opportunities to the GTH;

d) email correspondence between GTH employees and other government officials regarding potential clients, client development opportunities, and strategies to attract business development opportunities to the GTH;

e) email correspondence between GTH employees regarding information required to evaluate whether and how to move a potential project or agreement forward;

f) email correspondence between the GTH and the Chief of Staff to the Minister Responsible for the GTH regarding marketing and promotion of the GTH to potential clients;

> g) descriptions and names of potential clients of the GTH, some of which appear in the subject lines of email correspondence;
>
> h) periodic updates prepared by the GTH for the Board of Directors regarding the status of current and potential projects at the GTH; and
>
> i) email correspondence between the GTH and other local organizations regarding marketing and promotion of the. [Sic]
>
> [Para. 82]

[57] Mr. Schroeder also deposed that the withheld portions of these records include information about, among other things, value-added services offered by GTH and specific information about current and potential clients. He said, and I accept, that the ability to compete in the market against similar major business parks in Western Canada is integral to GTH's success. In order to compete effectively, it is important that the value-added services GTH offers to prospective clients must remain confidential and closely held. As Mr. Schroeder deposed, at paras. 46 – 49 of his November 5, 2018 affidavit:

> 46. In many instances these records make reference to the names of potential clients of the GTH who have not located any of their operations in North America to date. If the portions of the records withheld are released, the GTH's competitors would be able to access the records and use this information to their competitive advantage and divert business opportunities from the GTH. This would undermine the GTH's ability to compete not just in Western Canada but also around the world.
>
> 47. A number of the entities whom the GTH directly competes with are private entities who are not compelled to release similar information as the GTH must release.
>
> 48. The release of the withheld information in these records would also provide future clients with prior knowledge of not only the services the GTH may offer to

> entice clients, which are not currently publicly known, but also knowledge of how the GTH negotiates its agreements with clients or, in the case of the Co-operation Agreement, the exact terms and conditions on which the GTH may enter into such an agreement.
>
> 49. Further, negotiations with any potential clients of the GTH will be negatively impacted if these potential clients know that certain information provided by them to the GTH could be released to the public. This will remove the open dialogue and collaboration the GTH currently experiences with its clients. Once current and potential clients know that the GTH has released this information about other clients, they are unlikely to share the same information with us and we will be unable to engage in the business dialogue or complete the due diligence necessary to create future business relationships. I am also advised by Mr. Richards and believe it to be true that the GTH has already lost potential clients and business opportunities due to fears of these clients about the release of their information and public scrutiny. The information I have received from Mr. Richards in this respect is further set out in the Affidavit of Bryan Richards sworn November 5, 2018, and filed in response to this application.

[58] GTH also has a significant interest in maintaining its ongoing business relationship with Brightenview. Mr. Schroeder deposed, and I accept, that release of the withheld information could reasonably be expected to jeopardize this relationship. At para. 51 of his November 5, 2018 affidavit, he said:

> 51. As discussed, the GTH has an ongoing business relationship with Brightenview, as it does with all of its clients for the purposes of assisting in the success of their business; however, to release of the withheld information in the records can reasonably be expected to jeopardize the GTH's relationship with Brightenview and also affect Brightenview's ability to generate business opportunities at the GTH. Specifically, the following are negative impacts the GTH could experience if its relationship with Brightenview is eroded by the release of the withheld information in the records:

(a) lost property taxation revenue from the purchase of the remaining 20 acres of land;

(b) lost lease payments from Brightenview, which currently amount to approximately $330,000 per year;

(c) lost revenue on potential future land sales to Brightenview, which are expected to total $5.1 million; and

(d) loss of construction of the remainder of the GTEC facility originally planned at $45 million which would generate additional permanent employment, construction jobs, ongoing property taxes and investment at the GTH.

[59] The information in the records to which s. 18(1)(f) has been applied relates in many instances to negotiations between GTH and Brightenview, and a significant amount of information regarding other potential clients of GTH or potential projects at the GTH.

[60] During the *in camera* hearing, I heard evidence from Bryan Richards and Mr. Schroeder. They testified about specific instances where potential GTH clients either backed out of deals, or expressed concerns about entering into arrangements with GTH because of the impact it would have on them if GTH were required to disclose sensitive business information. For these potential clients, there would not be a similar risk of such a disclosure requirement if they were dealing with a private entity.

[61] Mr. Richards provided evidence that such concerns on the part of various prospective clients led to the loss of deals which would have generated tens of millions of dollars in land sales for GTH, as well as the loss of ancillary benefits to the province of Saskatchewan, in the form of employment, taxes, and the attraction of other investments.

[62] Based on the testimony provided during the *in camera* hearing, and the evidence in Mr. Schroeder's affidavit, I am satisfied that there is more than a mere possibility that release of the information which has been withheld on the basis of s. 18(1)(f) would prejudice the economic interests of the Government of Saskatchewan or of GTH. There is evidence of concrete examples where the mere prospect of the release of such information caused clients to take their business elsewhere. The actual release of this information could hardly do otherwise.

[63] Furthermore, there is no question, in my view, that release of the intricate details of the Co-operation Agreement between GTH and Brightenview would be detrimental to GTH's economic interests. It would damage GTH's relationship with Brightenview, and jeopardize the long-term ability of GTH to attract investment and clients. It would also place GTH at a significant disadvantage when negotiating terms with future clients, if those clients knew all the details of GTH's arrangement with Brightenview.

[64] In short, I am satisfied that in each instance where GTH has applied the "economic interest" exemption to information, that information properly falls within the scope of s. 18(1)(f) of *FOIP*. Accordingly, GTH was authorized to apply the exemption, and I have no basis to intervene.

Section 22: ***The legal advice/privilege exemption***

[65] GTH claims exemption over certain records on the basis that they are either subject to solicitor-client privilege, or fall within the scope of communications for the purpose of providing or receiving legal advice. In that vein, s. 22 of *FOIP* reads:

> **22** A head may refuse to give access to a record that:
>
> (a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;
>
> (b) was prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel for a government institution in relation to a matter involving the provision of advice or other services by the agent or legal counsel; or
>
> (c) contains correspondence between an agent of the Attorney General for Saskatchewan or legal counsel for a government institution and any other person in relation to a matter involving the provision of advice or other services by the agent or legal counsel.

[66] Solicitor-client privilege applies to all confidential communications between client and solicitor. It arises any time a client seeks legal advice from the solicitor, whether or not litigation is involved: *Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319. Solicitor-client privilege is fundamental to the proper functioning of our legal system, and a cornerstone of access to justice. It is to be jealously guarded, and should only be set aside in the most unusual circumstances. It must remain as close to absolute as possible, and should not be interfered with unless absolutely necessary. It is a privilege that only yields in limited and clearly defined circumstances: *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at paras 34-43, [2016] 2 SCR 555.

[67] The scope of solicitor-client privilege is broad. It applies to all communications made with a view to obtaining legal advice: *Maranda v Richer*, 2003 SCC 67, [2003] 3 SCR 193. If a communication falls somewhere within the continuum of that necessary exchange of information, the object of which is the giving or receiving of legal advice, it is protected by solicitor-client privilege: *Canada (Public Safety and Emergency Preparedness) v*

Canada (Information Commissioner), 2013 FCA 104, 360 DLR (4th) 176; *Redhead Equipment v Canada (Attorney General),* 2016 SKCA 115, 402 DLR (4th) 649.

[68] Based on the evidence before me, I am satisfied that in each instance where GTH has applied the legal advice/privilege exemption, it has done so properly. The records to which GTH has applied the s. 22 exemptions are all emails and attachments containing correspondence between GTH and its solicitors, related to seeking or providing legal advice. Accordingly, GTH was authorized by *FOIP* to apply this exemption, and there is no basis upon which I can properly intervene.

Sections 24 and 29 *FOIP*, and s. 27 *HIPA*: *The protected personal information exemption*

[69] GTH has refused disclosure of certain portions of the records on the basis of ss. 24 and 29 of *FOIP* and s. 27 of *HIPA*. These provisions of *FOIP* prohibit the disclosure of personal information (as that term is defined in *FOIP*) except in certain limited circumstances, while s. 27 of *HIPA* does the same with respect to certain health information.

[70] Having reviewed the original records in this case, I am satisfied that in each instance where GTH refused to release information on the basis of the "personal protected information exemption", the information to which the refusal related fell within the purview of the section under which the exemption was claimed. In short, all redactions made by GTH under these sections were proper, and I see no basis to intervene.

Section 19: ***The third party interest exemption***

[71] Brightenview submits that even if the information which GTH refused to release does not fall within the exemptions GTH claims, it is properly exempt from disclosure under s. 19(1) of *FOIP*. In particular, Brightenview relies on subparagraphs (a), (b) and (c), which read as follows:

> **19**(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:
>
> (a) trade secrets of a third party;
>
> (b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;
>
> (c) information, the disclosure of which could reasonably be expected to:
>
> (i) result in financial loss or gain to;
>
> (ii) prejudice the competitive position of; or
>
> (iii) interfere with the contractual or other negotiations of;
>
> a third party;

[72] The trade secrets exemption in s. 19(1)(a) is meant to provide protection to third party organizations that do business with government or government institutions. In *Merck Frosst,* the Supreme Court of Canada adopted a definition of "trade secrets" comprised of four components (at para. 109):

> - the information must be secret in an absolute or relative sense (i.e. known only by one or a relatively small number of persons);

- the possessor of the information must demonstrate that he has acted with the intention to treat the information as secret;
- the information must be capable of industrial or commercial application;
- the possessor must have an interest (e.g. an economic interest) worthy of legal protection.

[73] Subparagraph 19(1)(b) refers to certain types of information supplied in confidence by a third party to a government institution. In order to qualify for this exemption, (i) the information must be financial, commercial, scientific or technical in nature, or pertain to labour relations; (ii) it must be confidential and consistently treated as such by the third party; and (iii) it must be supplied to the government institution by the third party on a confidential basis: *Merck Frosst* at para 133.

[74] The exemption contained in s. 19(1)(c) is a form of "safety net" for third party information that does not fall into the categories defined by s. 19(1)(a) and (b). Where information is not trade secrets, or confidential information of the sort described in subparagraph (b), s. 19(1)(c) exempts information from disclosure where the disclosure could reasonably be expected to harm the business interests of the third party in the ways described.

[75] The use of the term "could reasonably be expected" in s. 19(1)(c) should, in my view, be interpreted in the fashion described in *Merck Frosst* and *OCSCS*. That is, the harm to the business interests of the third party that would result from disclosure of the information must be demonstrated to be more than a mere possibility. While it is not necessary to demonstrate that such harm is probable in order to establish a reasonable expectation, the

concern must be real and substantial. As Justice Zarzeczny noted in *Canadian Bank Note Limited v Saskatchewan Government Insurance,* 2016 SKQB 362:

> [49] At para 204 of *Merck* [2012 SCC 3, [2012] 1 SCR 23], the Supreme Court, when considering the *AIA* [*Access to Information Act*, RSC 1985, c A-1] provision similar to ss. 19(1)(c) observed as follows:
>
> > ...Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason...The words "could reasonably be expected" "refer to an expectation for which real and substantial grounds exist when looked at objectively"...
>
> [50] I note firstly that there is a close interrelationship between the notion of "prejudice" to the competitive position of a third party, the criteria set out in ss. 19(1)(c)(ii), and resultant financial loss or gain set out in ss. 19(1)(c)(i). If an opponent to disclosure establishes prejudice to its competitive position, it is likely or at least it "could reasonably be expected to result in financial loss" to it.

[76] In this case, since GTH is not claiming such exemptions, it would fall to Brightenview to establish that the information to which it suggests this exemption should apply falls within the scope of s. 19(1).

[77] All of that said, I need not determine whether any of the records in question would properly fall within the scope of s. 19(1), as claimed by Brightenview, because I have determined that all the records withheld by GTH were properly withheld on the basis of the exemptions it claimed.

CONCLUSION

[78] Mr. Leo's appeal is dismissed.

[79] I direct the Local Registrar to re-seal the records submitted under seal by GTH for my *in camera* review, as well as the briefs submitted by GTH

and Brightenview during the *in camera* hearing. If no appeal is taken from this decision, the sealed records and briefs may be returned to the GTH and Brightenview, as appropriate, at the expiration of the appeal period.

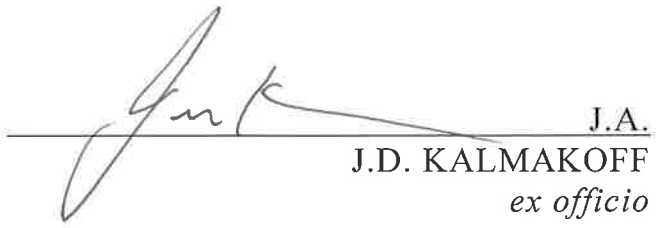
COSTS

[80] GTH was successful in defending the appeal. This would suggest that it ought to be entitled to costs as against Mr. Leo.

[81] Mr. Leo argued that, in the event I dismissed the appeal, I ought to consider success to have been mixed, and thus make no order as to costs. He takes the position that he was partially successful because his appeal from the decision of the IPC led to GTH conducting a further review of the records, and releasing some of the information it had previously withheld.

[82] With respect, I cannot accede to this argument. GTH was wholly successful on the contested portion of the appeal, which was the only matter before me. Accordingly, I do not consider success to have been mixed.

[83] GTH is entitled to the costs of this appeal as against Mr. Leo, calculated on Column 1 of the Tariff. I make no other order as to costs.



J.A.
J.D. KALMAKOFF
ex officio