



## **REVIEW REPORT 311-2017, 312-2017, 313-2017, 316-2017, 340-2017, 341-2017, 342-2017**

### **Global Transportation Hub Authority**

**April 24, 2018**

**Summary:**

The Applicant submitted four access to information requests to the Global Transportation Hub Authority (GTH). The Applicant requested reviews by the Information and Privacy Commissioner (IPC) when the GTH did not respond to the requests. In the meantime, GTH had consulted with the third party on the requests. GTH informed the third party it intended to provide the Applicant access to some of the records. The third party objected to the release of all the records to three of the four requests and appealed GTH's decision to the IPC. The IPC found that GTH did not demonstrate that subsection 19(1)(b) of FOIP applied. Further, he found that neither GTH nor the third party demonstrated that subsection 19(1)(c) of FOIP applied to the records. The IPC recommended that GTH review and prepare the records, applying exemptions the head considers appropriate (including subsection 29(1) of FOIP and subsection 27(1) of HIPA), and then release the records to the Applicant.

## **I BACKGROUND**

### **The access requests**

[1] On May 26, 2017, the Global Transportation Hub Authority (GTH) received the following four access to information requests:

All records which mention [name of individual] and/or [name of individual] and/or [name of individual] and/or [name of individual] from January 1, 2013 to present (**access request #1**)

All emails between Rhonda Ekstrom and/or Bryan Richards and [name of Brightenvue employee] and/or [name of Brightenvue employee] from January 1, 2016 to present (**access request #2**)

All correspondence to or from Rhonda Ekstrom and/or Bryan Richards related to Yingke Global Holding Group from April 1, 2016 to present (**access request #3**)

All correspondence between Rhonda Ekstrom and/or Bryan Richards and Laurie Pushor and/or Alastair MacFadden from April 2016 to present (**access request #4**)

### **The fee estimates**

[2] On June 20, 2017, GTH issued a fee estimate to the Applicant for each of the four access requests. It required the Applicant to pay a deposit for each of the fee estimates. Alongside the fee estimates, the GTH indicated to the Applicant that it would be extending the 30 days response period by an additional 30 days pursuant to subsections 12(1)(a)(i) and (ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP). It also indicated that it may be relying on subsection 12(1)(c) of FOIP to extend the response period but it is not entirely certain yet until it reviews the records and determines if third party notice is required.

[3] At this point, the GTH suspended its processing of the four access requests.

[4] On October 3, 2017, GTH received payment from the Applicant that covered the deposits for each of the fee estimates.

### **Third party notices**

[5] After receiving payment from the Applicant, GTH continued processing the four access requests.

[6] For access request #1, GTH sent a letter dated October 25, 2017 to notify Brightenview, the third party, of the access request and sent another letter with the same date to the Applicant to advise that it is conducting third party consultations.

- [7] For access request #2, GTH sent a letter dated November 3, 2017 to notify Brightenview of the access request and sent another letter with the same date to the Applicant to advise that it is conducting third party consultations.
- [8] For access request #3, GTH sent a letter dated October 25, 2017 to notify Brightenview of the access request and sent another letter with the same date to the Applicant to advise that it is conducting third party consultations.
- [9] For access request #4, GTH sent a letter dated October 19, 2017 to notify Brightenview of the access request. Then, it sent a letter dated October 20, 2017 to the Applicant to advise that it is conducting third party consultations.

#### **Requests for review by the Applicant**

- [10] On November 24, 2017, the Applicant requested reviews by my office into the four access requests since the Applicant had not received responses or records.
- [11] On December 6, 2017, my office notified the Applicant and GTH that it would be undertaking four reviews on December 6, 2017.

#### **Decisions by the GTH**

- [12] For access requests #1, #2, and #3, GTH sent letters dated December 14, 2017 to the Applicant and letters dated December 15, 2017 to Brightenview indicating it has taken Brightenview's representations into consideration and had revised the records to be released. It said that the Applicant will be given access to the records unless the Applicant or Brightenview requests a review by my office within 20 days.
- [13] For access request #4, GTH sent a letter dated December 5, 2017 to Brightenview and a letter dated December 14, 2017 to the Applicant indicating it has taken Brightenview's representations into consideration and had again revised the records to be released. It said that the Applicant will be given access to the records unless the Applicant or Brightenview requests a review by my office within 20 days.

### **Release of records by GTH to the Applicant for access request #4**

[14] For access request #4, GTH advised the Applicant on January 2, 2018 that the records were ready for pick-up. On that same day, the Applicant paid the remaining fees for access request #4 and picked up the records. Therefore, the records at issue in this report will be about the records related to access requests #1, #2, and #3 only.

[15] Both GTH and Brightenvue have a right to make representations to the Commissioner pursuant to subsections 53(2)(b) and (c) of FOIP in the reviews requested by the Applicant. I will consider their submissions on the reviews requested by the Applicant.

## **II RECORDS AT ISSUE**

### **Access request #1**

[16] At issue is 60 records. GTH describes them as 49 primary records and 11 attachments totalling 173 pages. Based on a review of the records, the types of records include the following:

- cooperation agreements,
- briefing notes,
- meeting agendas,
- internal GTH email exchanges (email exchanges between GTH employees or between GTH employees and GTH Board members),
- email exchanges between GTH, Ministry of the Economy, and/or Executive Council,
- email exchanges between GTH and Brightenvue,
- email exchanges between GTH and its lawyers,
- transcript of CBC Morning Edition (dated May 24, 2017).

[17] GTH has applied subsection 19(1)(b) to a portion of record #27. It also applied subsection 19(1)(c) of FOIP to all or a portion of the following 12 additional records:

- record #6 – briefing note,
- record #11a – draft of decision item (attachment to an email),
- record #12 – email exchange,
- record #12a – draft of a letter,

- record #12b – draft of a letter,
- record #13 – email exchange,
- record #17 – email exchange,
- record #27 - email exchange,
- record #30 – email exchange,
- record #31 – email exchange,
- record #35 – email exchange,
- record #39 – briefing note.

[18] According to its submission, Brightenview is objecting to the release of all of the records (i.e., all 173 pages of records) pursuant to subsection 19(1)(c) of FOIP.

### **Access request #2**

[19] At issue are 107 pages of records. GTH describes them as 59 records comprised of 47 primary records and 12 attachments totaling 107 pages. Most of the records are either internal GTH email exchanges, or email exchanges between GTH and Brightenview. Based on a review of the records, other records include:

- drafts of news release documents,
- a image taken from Google Maps,
- a copy of a magazine article, and
- an event agenda.

[20] GTH applied subsection 19(1)(c) of FOIP to all or a portion of the following records:

- record #1 – email exchange,
- record #5 – email exchange,
- record #6 – email exchange,
- record #7 – email,
- record #9 – email exchange,
- record #10a – letter,
- record #11 – email,
- record #13 – email,
- record #15a – news release document,
- record #16 – email,
- record #17 – email,
- record #18 – email,
- record #19 – email,
- record #21- email,
- record #22 – email exchange,

- record #23 – email exchange,
- record #24 – email exchange,
- record #26 – email exchange,
- record #28 – email exchange,
- record #29 – email exchange,
- record #30 – email exchange,
- record #31 – email exchange,
- record #32 – email exchange,
- record #34 – email,
- record #36 – email,
- record #38 – email exchange,
- record #39 – email exchange,
- record #40 – email,
- record #43 – email exchange,
- record #45 – email,
- record #47 – email exchange.

[21] According to its submission, Brightenview is objecting to the release of all of the records (i.e., all 107 pages of records) pursuant to subsection 19(1)(c) of FOIP.

### **Access request #3**

[22] At issue are 51 pages. There are 27 records comprised of 24 primary records and 3 attachments. The records include:

- internal GTH email exchanges (including emails between GTH employees, and between GTH employees and its board members),
- email exchanges between GTH and Ministry of the Economy and/or Executive Council,
- email exchanges between GTH and Brightenview,
- email exchanges between GTH and the Government of Canada,
- a briefing note, and
- documents about events.

[23] GTH applied subsection 19(1)(c) of FOIP to all or a portion of the following 16 records:

- record #5 – briefing note,
- record #6 – email,
- record #7a – briefing note (duplicate of record #5),
- record #8 – email exchanges,
- record #10 – email,

- record #11 – email,
- record #12 – email,
- record #14 – email containing instant messages,
- record #15 – email,
- record #16 – email exchange,
- record #17 – email,
- record #18 – email exchange,
- record #19 – email exchange,
- record #20 – email exchange,
- record #21 – email exchange,
- record #22 – email exchange.

[24] According to its submission, Brightenview is objecting to the release of all of the records (i.e., all 51 pages of records) pursuant to subsection 19(1)(c) of FOIP.

### **III DISCUSSION OF THE ISSUES**

[25] The GTH is a “government institution” as defined by subsection 2(1)(d)(ii) of FOIP.

#### **1. Did GTH meet legislated timelines?**

[26] Before I conduct an analysis as to whether or not GTH met legislated timelines processing these access to information requests, I will outline the legislated timelines relevant here.

##### **a. Legislated timelines in FOIP**

[27] Subsection 7(2) of FOIP requires government institutions to respond to access to information requests within 30 days after the request is made. Subsection 7(2) of FOIP provides:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

...

[28] I note that subsection 9(3) of FOIP provides that the time within which a government institution is to respond to an Applicant’s request pursuant to subsection 7(2) of FOIP is suspended when a government institution issues a fee estimate pursuant to subsection 9(2)

of FOIP. The time is suspended until the applicant notifies the government institution that he or she wishes to proceed with the request. Subsections 9(2) and 9(3) of FOIP provide:

9(2) Where the amount of fees to be paid by an applicant for access to records is greater than a prescribed amount, the head shall give the applicant a reasonable estimate of the amount, and the applicant shall not be required to pay an amount greater than the estimated amount.

9(3) Where an estimate is provided pursuant to subsection (2), the time within which the head is required to give written notice to the applicant pursuant to subsection 7(2) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application

[29] Further, section 12 of FOIP enables government institutions to extend the 30 days prescribed in subsection 7(2) for a reasonable period not exceeding 30 days in some circumstances. If one of those circumstances exist, subsection 12(3) of FOIP requires that the government institution must provide a response pursuant to section 7 to the Applicant within the period of extension. In other words, the government institution has a **maximum** of 60 days to provide a response pursuant to section 7 to the Applicant. Section 12 of FOIP provides:

12(1) The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period **not exceeding 30 days**:

(a) where:

- (i) the application is for access to a large number of records or necessitates a search through a large number of records; or
- (ii) there is a large number of requests;

and completing the work within the original period would unreasonably interfere with the operations of the government institution;

(b) where consultations that are necessary to comply with the application cannot reasonably be completed within the original period; or

(c) where a third party notice is required to be given pursuant to subsection 34(1).

(2) A head who extends a period pursuant to subsection (1) shall give notice of the extension to the applicant within 30 days after the application is made.



(3) Within the period of extension, the head shall give written notice to the applicant in accordance with section 7.

**b. Was GTH's responses to the Applicant adequate in terms of what is required by subsection 12(3) of FOIP and subsection 7(2) of FOIP?**

[30] GTH received the Applicant's access requests on May 26, 2017. Twenty-five days elapsed and then it issued fee estimate letters dated June 20, 2017 to the Applicant. That means that once the Applicant paid deposits for each of the fee estimates, GTH would have had only five more days to provide a response pursuant to section 7 of FOIP.

[31] However, alongside the fee estimates, GTH said it would be relying on subsections 12(1)(a)(i) and (ii) of FOIP to extend the time period to respond to the access requests. That period is not to exceed 30 days. In other words, once it received payment of the deposit, the GTH would have had only 35 days (or until November 7, 2017) to provide a response to the Applicant. That is because subsection 12(3) of FOIP requires the GTH to provide a response required by subsection 7(2) of FOIP within the period of extension. Subsection 12(3) of FOIP provides:

12(3) Within the period of extension, the head shall give written notice to the applicant in accordance with section 7.

[32] GTH had until November 7, 2017 to provide its written response to the Applicant. It failed to do so. Therefore, after November 7, 2017 it was deemed to have given notice of a decision to refuse to give access to the record pursuant to subsection 7(5) of FOIP:

7(5) A head who fails to give notice pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record.

[33] I find that GTH's responses, or lack of responses, to the Applicant is inadequate in terms of what is required by subsections 12(3) or 7(2) of FOIP for all four access requests.

[34] In its submissions to my office, GTH recognized that it failed to meet the legislated timelines. GTH explained that the primary reason for the delay was the "significant

objection” by the third party to the release of information. GTH indicated it would revise its process as follows to ensure that, if an objection of this nature is received:

1. Revise redactions if deemed necessary;
2. Discuss with the third party its rights to request a review by my office;
3. Send its decision letter promptly which will allow the third party to request a review by my office if necessary.

[35] In addition to the above steps, I recommend that the GTH amend its procedures so that even if it is extending the time period set out in subsection 7(2) of FOIP, pursuant to section 12 of FOIP, that it takes steps to ensure it is providing notices to third parties pursuant to Part V of FOIP, no later than the 30<sup>th</sup> day from which it received the access request. This will minimize the likelihood of GTH putting itself at risk of being in a “deemed refusal” situation in the future.

[36] As noted in the background, the Applicant requested reviews into the four access requests on November 24, 2017. My office sent notice to GTH that it was undertaking reviews on December 6, 2017 pursuant to section 51 of FOIP.

[37] When a government institution receives a notice from my office that it is undertaking a review, the government institution is to notify the third party (or third parties) of the review. This is because third parties are entitled to make representations to my office in the course of a review. Subsections 52(1) and 53(2) of FOIP provides:

52(1) A head who has refused an application for access to a record or part of a record shall, immediately on receipt of a notice of review pursuant to section 49, give written notice of the review to any third party that the head:

- (a) has notified pursuant to subsection 34(1); or
- (b) would have notified pursuant to subsection 34(1) if the head had intended to give access to the record or part of the record.

...

53(2) The:

- (a) person who applies for a review;
- (b) third party or applicant who is entitled to notice pursuant to section 52; and
- (c) head whose decision is the subject of a review;

are entitled to make representations to the commissioner in the course of the review.

[38] In the reviews requested by the Applicant, GTH did not send notice to Brightenviv pursuant to subsection 52(1) of FOIP. However, Brightenviv did become aware of the Applicants access requests because GTH sent late third party notices to Brightenviv. GTH indicated to Brightenviv that it intended to provide the Applicant access to some of the records. Brightenviv objected to GTH's intentions by requesting reviews by my office.

[39] On January 5, 2018, my office sent to Brightenviv an email requesting a submission on why the records should not be disclosed. On January 14, 2018, Brightenviv provided my office with a submission. On March 1, 2018, my office sent an email to Brightenviv requesting more information. On March 29, 2018, Brightenviv provided additional information to my office. Through a telephone discussion between my office and Brightenviv, Brightenviv indicated it had additional information to provide to my office. My office requested that it do so by April 6, 2018. Brightenviv did not. On April 19, 2018, my office sent an email to Brightenviv requesting that if there was any more information it would like to provide to my office, that it do so by April 23, 2018.

[40] Below, I will consider GTH's representation on the application of subsections 19(1)(b) and 19(1)(c) of FOIP and Brightenvivs' representation on the application of subsection 19(1)(c) of FOIP. No other exemptions were considered in this review.

**2. Does subsection 19(1)(b) of FOIP apply to record #27 of access request #1?**

[41] For access request #1, GTH applied subsection 19(1)(b) to the body of an email that appears in record #27 (page 85). The email is date stamped January 25, 2016.

[42] Subsection 19(1)(b) of FOIP provides as follows:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(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;

[43] In order for subsection 19(1)(b) of FOIP to apply, the following test must be met:

- i. Is the information financial, commercial, scientific, technical or labour relations information of a third party?
- ii. Was the information supplied by the third party to a government institution?
- iii. Was the information supplied in confidence implicitly or explicitly?

[44] I will consider the three parts of the test below.

**i. Is the information financial, commercial, scientific, technical or labour relations information of a third party?**

[45] In its submission, GTH asserts that the information in the body of the email contains commercial information. The body of the email provides the name of a Brightenview client organization, a representative of the client organization, and a description of the assets of the representative. It also includes a description of the intention of the client organization in the last three sentences of the email.

[46] My office has defined “commercial information” as information relating to the buying, selling or exchange of merchandise or services.

[47] I find that the information in the email qualifies as commercial information because it reveals something about Brightenview’s selling or exchange of services. This is consistent with Order F2014-044 by the Alberta Office of the Information and Privacy Commissioner where it found that client names of a third party, and the business contact information of representatives of the clients, qualified as commercial information. It said:

[para 35] As discussed above, the Public Body has withheld information referring to the names of some clients of Aon and the business contact information of representatives of the clients. The information consisting of the names of some of Aon’s clients and general descriptions of the services Aon was retained to provide them, may be considered commercial information of a third party, as it reveals something about Aon’s selling or exchange of services.

[48] I will continue to consider whether the second part of the test is met.

**ii. Was the information supplied by the third party to a government institution?**

[49] Information may qualify as “supplied” if it was directly supplied to a government institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.

[50] As described earlier, the name of the Brightenvue client organization, the name of the representative, and a description of the representative’s assets meets the second part of the test, was supplied by Brightenvue to GTH in an email. I find that the second part of the three-part test is met.

**iii. Was the information supplied in confidence implicitly or explicitly?**

[51] In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the government institution and the third party supplying the information.

[52] In its submission, GTH asserts that it can be seen by the email chain that the information was provided by the third party in confidence to the GTH. Based on a review of the email chain, my office cannot determine that the information was supplied in confidence by the third party.

[53] Brightenvue, in its submission, asserts that it has a confidentiality agreement in place. It asserts that under that agreement, it expects that business related communications and information that are supplied in confidence to the GTH will remain confidential. The GTH is a government institution, which is engaged in commercial business dealings with third party businesses, and as a result of these dealings it obtains confidential commercial information and communication related to business development interest.

[54] Both the GTH and Brightenvue provided my office with a copy of the confidentiality agreement. It was signed in July 2013. This is the same confidentiality agreement discussed in my report 158-2016. The confidentiality agreement stated that “This Agreement shall automatically expire when the parties enter into a form agreement in relation to the Lands.”

In that report, I found that this confidentiality agreement expired in February 2016 because an agreement in relation to the Lands (purchase agreement) was signed in February 2016. Within this purchase agreement, clause 13.11 provided:

In addition, without limitation, GTHA or the Purchase may disclose:

- a) any Confidential Information to the Saskatchewan Provincial Auditor for the purposes of complying with *The Provincial Auditor Act* (Saskatchewan), or to such party's internal or external auditors for the purpose of obtaining proper and complete audits of such party's business and accounting practices;
- b) any Confidential Information as directed by any committee or advisory body of the Saskatchewan Legislature or Cabinet, including the Saskatchewan Rate Review Panel;
- c) any Confidential Information as may be required pursuant to *The Freedom of Information and Protection of Privacy Act* (Saskatchewan); and
- d) any confidential information as necessary with all relevant provincial bodies authorities and ministries, agencies, boards, commissions and as applicable, Crown Investments Corporation.

[55] This clause in the purchase agreement contemplates exceptions to the confidentiality statement and one of those exceptions was if the information was required to be released pursuant to FOIP. I believe this was a positive exception and should be included in other third party contracts.

[56] Brightenview sent the email on January 25, 2016. Therefore, at the time the information was supplied by Brightenview to GTH, the confidentiality agreement was in effect. However, Brightenview and GTH agreed that the confidentiality agreement would expire once the purchase agreement was signed. Therefore, the purchase agreement amended the understanding of the confidentiality agreement. I find that subsection 19(1)(b) of FOIP does **not** apply to the email that appears on a portion of record #27 for access request #1.

**3. Does subsection 19(1)(c) of FOIP apply to the record?**

[57] GTH's position is that subsection 19(1)(c) of FOIP applies to some of the records while Brightenview's position is that subsection 19(1)(c) of FOIP applies to all the records. Subsection 19(1)(c) of FOIP provides:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(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;

[58] In order for subsection 19(1)(c) of FOIP to apply, there must first be *objective grounds* for believing that the disclosure of information within the records could reasonably expect to result in the harm alleged. GTH and Brightenview do not have to prove that harm is probable but they need to show there is a reasonable expectation of harm if any of the information was disclosed.

[59] To demonstrate harm, the government institution or third party should not assume that the harm is self-evident. Particularity in describing the harm is needed to support the application of the provision.

[60] Both GTH and Brightenview provided my office with arguments as to why they believe subsection 19(1)(c) of FOIP applies. I will consider these arguments below. I have organized the analysis based on the harms alleged.

**Harm alleged – breach of a confidentiality agreement between the GTH and Brightenview, and breaching confidentiality agreements between Brightenview and its clients.**

[61] In its submission, Brightenview indicated one of the harms was that if GTH disclosed the records, then GTH would be breaching the confidentiality agreement it had entered into with Brightenview. Another harm it identified is that it has confidentiality agreements with

its investors and business partners. It alleged that GTH's disclosure of the records would damage Brightenview and its investors and related institution entities. It alleges that GTH would be financially responsible for those damages. It said the following:

The Crown corporation aspect of the GTH does not excuse it from honoring the confidentiality of information exchanged in the course of business.

[62] First, the confidentiality agreement that was signed in July 2013 between GTH and Brightenview had expired, as discussed earlier in this report.

[63] Second, records in the possession or control of the GTH is governed by FOIP. If a confidentiality agreement is not consistent with FOIP, then FOIP prevails. In Review Report 052-2017, I commented that government institutions would be well advised to warn third parties, prior to entering into a contract that contracts, reports, or any other record is subject to FOIP. Government institutions would be well advised to minimize the significance of confidentiality clauses in contracts. The better course would be to have a clause in a contract that indicates that the contract and any reports or correspondence may be released in an access request. Dealing with this issue up front will prevent third parties from having the expectation that contracts, reports, and/or correspondence with the government institution is confidential.

[64] In its submission, GTH characterized access requests related to Brightenview as "constant intrusive action" that has begun to fracture its relationship with Brightenview. It asserts that Brightenview is now questioning whether information it once considered "private and confidential" will now be released for public consumption. This suggests that Brightenview was not well-informed by GTH about FOIP and that it had an expectation that all information and records it has exchanged with GTH is to be kept secret. This is an expectation that cannot be met due to GTH's responsibilities under FOIP.

[65] Unmet expectations does not mean that Brightenview has demonstrated that there is a reasonable expectation of the three types of harms contemplated by subsection 19(1)(c) of FOIP that would come to it if the records are disclosed. As noted earlier, Brightenview is objecting to the release of all the records responsive to the Applicant's access requests. One of the records that is responsive to access request #1 that Brightenview is objecting to



the release of is the transcript of CBC Morning Edition dated May 24, 2017. Another record that is responsive to access request #2 is an image taken from Google Maps. These two records are to the public. It is unclear how withholding the transcript from the Applicant now can prevent harm.

[66] Also, Brightenview is objecting to the release of email exchanges that the Applicant may already have. Brightenview has not demonstrated to my office how GTH withholding these email exchanges would prevent harm.

[67] Finally, Brightenview indicates it has confidentiality agreements with its own clients, which could be breached if GTH disclosed information about Brightenview's clients. GTH made a similar assertion – that if Brightenview's client information is released to the Applicant, then this release would call into question Brightenview's ability to maintain the confidentiality of all of its clients' information. If this is the case, then Brightenview should have considered FOIP, a law that GTH is subject to, prior to releasing its client information to the GTH. GTH's responsibilities under FOIP remains the same in spite of Brightenview's confidentiality agreements with its own clients. The harm identified by both GTH and Brightenview is a result of Brightenview disclosing client information to the GTH in the first place. The harm would not be a result of GTH disclosing information to the Applicant.

[68] I find that Brightenview has not demonstrated to my office a reasonable expectation of harm resulting from the disclosure of information to the Applicant.

**Harm alleged – the Applicant is likely to publish information released to him by the GTH and this type of activity hurts the financial investments of Brightenview**

[69] In its submission, the GTH identified records to which it claims that subsection 19(1)(c) of FOIP applies to portions. For each of the records, it argued that it has released information similar to the information to the Applicant, which resulted in the information being used as follows:

“...negatively used...in published...articles. These articles written by the applicant, partially fuelled by information obtained through access requests, have directly hurt

Brightenview's business. They have damaged their reputation with clients, negatively impacted the public's perception and hurt relationships with partners and investors."

"...used by the applicant to directly influence a negative perception of [name of individual] in the media."

"...used by the Applicant in a defamatory manner through negative media coverage related to the third party on nearly a dozen occasions. In certain cases [name of individual] has been specifically targeted."

[70] GTH asserts that the negative media attention has impacted Brightenview's relationships with clients, partners and investors. Further, GTH asserted the Applicant has taken information released to him and used it to support claims that are untrue. For example, GTH asserted that the Applicant repeatedly insinuates that GTH has a "special partnership" with Brightenview, which GTH asserts is "categorically untrue and inappropriate" and that it does not give preferential treatment to the third party but works with all clients based on their needs to ensure they are successful. It asserts that claims made by the Applicant are taken out of context or misconstrued to the reader.

[71] Brightenview, in its submission, makes a similar argument as GTH but it asserts that subsection 19(1)(c) of FOIP applies to all the responsive records. Brightenview asserts that the Applicant's publications in the past "hurts the financial investment of Brightenview at the GTH and impacts the reputation of its associated investors and parties".

[72] Section 5 of FOIP provides every person with the right to access records in the possession or under the control of government institutions. It provides:

5 Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the possession or under the control of a government institution.

[73] This right is subject to limited and specific exemptions. Subsection 19(1)(c) of FOIP is one of those exemptions. However, as I said earlier, in order for subsection 19(1)(c) of FOIP to apply, there must be *objective grounds* for believing that the disclosure of information within the records could reasonably be expected to result in the harm alleged. Black's Law Dictionary (Tenth Edition) defines the term "objective" as "without bias or prejudice; disinterested".

[74] The Applicant's right pursuant to section 5 of FOIP is no different from any other person who requests access to records. However, GTH and Brightenvue (who asserts the Applicant has identified himself in his publications) is factoring in the identity the Applicant and his past actions in their decision to claim that subsection 19(1)(c) of FOIP applies to responsive records. GTH and Brightenvue are attempting to rely on subsection 19(1)(c) of FOIP to withhold responsive records because the Applicant has published information he has received under FOIP in the past and that he may publish the information he may receive under FOIP in the future. This suggests that GTH and Brightenvue would **not** be relying on subsection 19(1)(c) of FOIP if a person, other than the Applicant, made the same requests. In other words, there is no objective grounds for GTH and Brightenvue's application of subsection 19(1)(c) of FOIP. Exemptions under FOIP cannot be discriminately applied based on the identity of the Applicant. The legislation and my office does not differentiate between different types of applicants. All applicants have a right to records unless exemptions apply.

[75] One of the purposes of FOIP is to ensure government institutions are transparent and accountable to the public. While third parties are not subject to FOIP, a risk to third parties for entering into agreements with government is that information exchanged may be released under FOIP. This risk may be perceived as a harm by third parties. Third parties, including Brightenvue, should not have an expectation that it can conduct business with government institutions in a vacuum without public scrutiny that is facilitated by FOIP. The purpose of FOIP would be defeated if information could be legitimately withheld simply because an applicant may publish information the applicant has received under FOIP. Individuals' rights under FOIP cannot be taken away based on what the individual may or may not do with the information.

[76] While Brightenvue's relationships with clients, partners, and investors may have been impacted, I must repeat that government institutions would be well advised to be up front regarding of their obligations under FOIP. Brightenvue cannot have expectations of absolute confidentiality when dealing with government institutions.

[77] I find that neither GTH nor Brightenview has demonstrated to my office that there are objective grounds for believing there is a reasonable expectation of harm if the information was disclosed.

**Harm alleged – disclosure of records would reveal Brightenview’s strategic plans and undermine the competitive nature of the market**

[78] In its submission, Brightenview asserted that the disclosure of the records would reveal “strategic plans that are foundational to the long term investments and business of [third] parties. Imprudent public release of this information would allow competitors to be aware of these strategic plans and undermine the competitive nature of the market”.

[79] Brightenview applied subsection 19(1)(c) of FOIP to all the responsive records. It did not identify specific portions of the responsive records as detailing “strategic plans”. As mentioned earlier, third parties should not assume the harm is self-evident. Particularity in describing the harm is needed to support the application of subsection 19(1)(c) of FOIP.

[80] On the face of the records, I cannot determine which of the information Brightenview considers as “strategic plans that are foundational to the long term investments”. However, I repeat what I said earlier - a risk to third parties for entering into agreements with government institutions is that information exchanged may be released under FOIP. It cannot expect absolute confidentiality when interacting with the GTH.

[81] I find that Brightenview has not demonstrated to my office that there is a reasonable expectation of the alleged harm.

**Harm alleged – revealing Brightenview’s internal corporate affairs would undermine the competitive nature of the market. Also, the imprudent release of information pertaining to business and business development communications could result in losses to its investment at the GTH.**

[82] In its submission, Brightenview asserted that the disclosure of the records would reveal its internal corporate affairs and that would undermine the competitive nature of the market. It stated that the imprudent public release of information pertaining to its business and its

business development communications with the GTH could result in losses to its investment at the GTH.

[83] Brightenview did not specify which pages contains information about its internal corporate affairs. Brightenview cannot assume that harm is self-evident. On the face of the records, I cannot determine which of the information Brightenview defines as “internal corporate affairs” or what it regards as business and business development communications with the GTH. Again, a cost to third parties for entering into agreements with government institutions is that information exchanged may be released under FOIP. It cannot expect absolute confidentiality when interacting with the GTH.

[84] In the future, Brightenview or any third party does itself a disservice by objecting to the release of all records. It would be better advised to select the records that it truly thinks would cause harm.

[85] I find that Brightenview has not demonstrated to my office that there is a reasonable expectation of the alleged harm.

#### **4. Does subsection 29(1) of FOIP apply to the records at issue?**

[86] If information qualifies as personal information as defined by subsection 24(1) of FOIP, then GTH should be applying subsection 29(1) of FOIP to those records. In these reviews, GTH has not identified information that qualifies as personal information. However, if my office can determine that information qualifies as personal information on the face of the records, then I recommend that such information be exempted from disclosure pursuant to subsection 29(1) of FOIP.

[87] I find that personal information as defined by subsection 24(1) of FOIP, appears in the records. For example, for access request #1, record #12 (page 63), record #14 (page 52), record #16 (page 62), record #20 (page 67), record #30 (pages 96 and 97), record #31 (page 100) contains personal email addresses of a GTH employee and of GTH board members. For access request #3, record #3 (page 6) and record #4 (pages 9 and 10) contains personal email addresses of GTH board members. In Review Report 184-2016, I found that personal

email addresses qualified as personal information. Therefore, I recommend these personal email addresses in the records listed above be removed pursuant to subsection 29(1) of FOIP.

[88] Also in Review Report 184-2016, I recommended that GTH reconsider the practice of its board members using personal email addresses for government-related activities. In Investigation Report 101-2017, GTH indicated to my office that it was working on sourcing and implementing a secure package for all board communications including the transmission of documents. I repeat that same recommendation here – I recommend that GTH continue to work towards having both its employees and its board members use the GTH email system for government-related activities.

[89] Other personal information I found appears at record #3 (page 8) and record #4 (page 10) for the records at issue for access request #3, which includes information about leaves taken by employees. I recommend that this information be removed pursuant to subsection 29(1) of FOIP. Also, some of the information on these two pages, as well as information about a personal appointment of an individual that appears on record #21 (page 38) qualifies as “personal health information” as defined by subsection 2(m) of *The Health Information Protection Act* (HIPA). I recommend that such information be redacted pursuant to subsection 27(1) of HIPA.

#### **IV FINDINGS**

[90] I find that GTH’s responses, or lack of responses, to the Applicant is inadequate in terms of what is required by subsections 12(3) and 7(2) of FOIP for all four access requests.

[91] I find that subsection 19(1)(b) of FOIP does not apply to the email on record #27 for access request #1.

[92] I find that neither GTH nor Brightenview has demonstrated that subsection 19(1)(c) of FOIP applies to the records.

[93] I find that personal information as defined by subsection 24(1) of FOIP appears in the records.

[94] I find that personal health information as defined by subsection 2(m) of HIPA appears in the records.

## **V RECOMMENDATIONS**

[95] I recommend that the GTH amend its procedures so that even if it is extending the time period set out in subsection 7(2) of FOIP pursuant to section 12 of FOIP, that it takes steps to ensure it is providing notices to third parties pursuant to Part V of FOIP no later than the 30th day from which it received the access request. This will minimize the likelihood of GTH putting itself at risk of being in a “deemed refusal” situation in the future.

[96] I recommend that GTH review and prepare the records, applying exemptions the head considers appropriate (including subsection 29(1) of FOIP and subsection 27(1) of HIPA), and then release the records to the Applicant.

[97] I recommend that GTH continue to work towards having both its employees and its board members use the GTH email system for government-related activities.

Dated at Regina, in the Province of Saskatchewan, this 24th day of April, 2018.

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