

**SASKATCHEWAN  
INFORMATION AND PRIVACY COMMISSIONER**

**REVIEW REPORT 007-2015**

**Ministry of Central Services**

**Summary:** In November 2014, the Ministry of Central Services received an access to information request. The Ministry denied access to portions of the responsive record pursuant to subsection 19(1)(b), 19(1)(c) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant requested the Commissioner review the Ministry's application of subsection 19(1)(b) and 19(1)(c) of FOIP to withhold portions of the record. The Commissioner found these exemptions did not apply and recommended the Ministry release these portions of the record.

**I BACKGROUND**

- [1] On November 4, 2014, the Ministry of Central Services received an access to information request from the Applicant requesting: "The Statement of Work attached to Information Technology Consulting Services Agreement ITO-12023."
- [2] The Ministry replied in a letter dated November 27, 2014 advising that the record contained Third Party information and pursuant to subsection 34 of *The Freedom of Information and Protection of Privacy Act* (FOIP) had sent notification of the request to the Third Party. The Ministry advised the Applicant that they would consider representations from the Third Party and respond by December 18, 2014.
- [3] On December 15, 2014, the Ministry replied to the Applicant which included the record responsive to the request. However, the letter indicated that portions of the record were severed pursuant to subsections 19(1)(b), (c)(i), (c)(ii), (c)(iii), and 29(1) of FOIP.

[4] The Applicant was dissatisfied with the Ministry's application of 19(1)(b), (c)(i), (c)(ii) and (c)(iii) of FOIP and made a request for review to my office. As section 29(1) of FOIP is not at issue, it will not be considered in this Review Report. On January 22, 2015, notification of my office's intention to undertake a review was provided to the Ministry, the Third Party and the Applicant.

## **II RECORD AT ISSUE**

[5] The record at issue is a six page Statement of Work between a Third Party and the Information Technology Office. The Third Party provided the Ministry with arguments that the estimated hours, hourly rate, estimated cost per consultant and total estimated cost be severed.

[6] The Ministry agreed to sever all but the total estimated cost from the Statement of Work. The Ministry applied subsection 19(1)(b), (c)(i), (c)(ii) and (c)(iii) of FOIP to the estimated hours, hourly rate and estimated cost per consultant.

## **III DISCUSSION OF THE ISSUES**

[7] The Ministry qualifies as a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP.

[8] The Third Party qualifies as a "third party" pursuant to subsection 2(1)(j) of FOIP.

### **1. Did the Ministry properly apply subsection 19(1)(b) of FOIP?**

[9] Subsection 19(1)(b) of FOIP is a mandatory exemption and provides:

**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;

[10] The three part test for subsection 19(1)(b) of FOIP is as follows:

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

[11] All three parts of this test must be satisfied in order for subsection 19(1)(b) of FOIP to apply to the severed portions of the record.

*i. Is the information financial, commercial, scientific, technical or labour relations information?*

[12] *Financial information* relates to money and its use or distribution and must contain or refer to specific data.

[13] *Commercial information* is information relating to the buying, selling or exchange of merchandise or services.

[14] I agree that the estimated hours, hourly rate and estimated cost per consultant severed from the record contain financial and commercial information.

*ii. Was the information supplied by the Third Party to a public body?*

[15] Information may qualify as “supplied” if it was directly supplied to a public body by a Third Party, or where disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a Third Party.

[16] The Ministry withheld the estimated hours, hourly rate and estimated cost per consultant from the Statement of Work. The Statement of Work is an attachment to an Agreement between the Information Technology Office and the Third Party.

[17] In the Ministry's submission to my office, they indicated that:

... the ministry carefully examined the "supplied" part of the test in light of the fact that contracts are typically the result of negotiations between the institution and the third party. In our view the very acceptance by the ministry of a term proposed by the third party is considered to be a negotiation. This means that any aspect of a contract that could be subject to change cannot meet the supplied test for subsection 19(1), because the mere acceptance of the term is part of the negotiation...

[18] It was also found in a past report issued by my office that contracts or agreements between a government institution and a Third Party generally would not qualify as having been supplied:

... an agreement where the public body contributed significantly to its terms would not qualify under this exemptions because it is the result of negotiation between the parties and was also largely based on the criteria set out by the public body in its request for proposals.

[19] Therefore, the test for "supplied" has not been satisfied for the estimated hours, hourly rate and estimated cost per consultant severed from this record.

[20] As all three parts of this test must be satisfied in order for subsection 19(1)(b) of FOIP to apply and part two has not been satisfied, this exemption has not been properly applied.

## **2. Did the Ministry properly apply subsection 19(1)(c) of FOIP?**

[21] Subsection 19(1)(c) is a mandatory exemption and 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;

[22] The Ministry and the Third Party provided arguments that the disclosure of the estimated hours, hourly rate and estimated cost per consultant would cause the Third Party to experience a “competitive disadvantage.”

[23] “Could” versus “could reasonably be expected to” have different requirements. The requirement for could is simply that the release of information could have the specified result. The threshold for a reasonable expectation is somewhat higher.

[24] A harms test is a set of criteria used to determine whether disclosure of records or information could reasonably be expected to cause harm to a particular interest. The harms test is as follows:

- i. There must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
- ii. The harm caused by the disclosure must be more than trivial or inconsequential; and
- iii. The likelihood of harm must be genuine and conceivable.

[25] For this provision, there must be objective grounds to establish that disclosing the information would result in a reasonable expectation of harm.

[26] Both the Ministry and the Third Party’s submissions indicate that releasing this information to the Applicant could result in a competitor having the ability to provide a lower rate for future contracts and harm the Third Party. However, neither party has provided me with any information to show that the release of this information is likely to result in a harm that is genuine and conceivable.

[27] Additionally, in a recent report issued by my office it was found that: "... the winning contractor would have access to the internal cost estimates in question as it is part of the current contract. In my opinion, keeping these figures from the public, including other future bidders, would jeopardize a competitive bidding processes."

[28] Therefore, as the harms test has not been met this exemption has not been properly applied.

[29] My office provided the Ministry with our Draft Review Report findings and recommendation to release the portions of the record withheld under subsection 19(1)(b) and (c) of FOIP. The Ministry responded that they intended to comply with the recommendation.

#### **IV FINDINGS**

[30] I find that subsection 19(1)(b) of FOIP does not apply to the record.

[31] I find that subsection 19(1)(c) of FOIP does not apply to the record.

#### **V RECOMMENDATION**

[32] I recommend that the Ministry release all portions of the record withheld under subsections 19(1)(b) and (c) of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 31<sup>st</sup> day of March, 2015.

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