



REVIEW REPORT 009-2016

SaskBuilds

August 10, 2016

Summary:

In December 2015, the Applicant submitted a request to SaskBuilds for information relating to the Regina Bypass Project. SaskBuilds provided the Applicant with responsive records, severing portions of the record pursuant to subsections 17(1)(a), (b), (c), (g), 18(1)(b), (e) and 24(1)(k) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The IPC found that subsection 18(1)(d) of FOIP applied to some of the withheld portions. The IPC recommended SaskBuilds release portions of the record where exemptions were not found to apply. SaskBuilds agreed to comply with this recommendation.

I BACKGROUND

- [1] On December 7, 2015, SaskBuilds received an access to information request from the Applicant requesting access to the business case document submitted to PPP Canada regarding a funding application for the Regina Bypass Project or the VFM analysis for the project circa 2012 or 2013.
- [2] On January 6, 2016, SaskBuilds provided the Applicant with some responsive records and withheld others in part citing subsections 17(1)(a), (b), (c), (g), 18(1)(b), (e) and 24(1)(k) of *The Freedom of Information and Protection of Privacy Act* (FOIP) as authority to withhold.

[3] On January 21, 2016, my office received a Request for Review from the Applicant. Through the early resolution process, the Early Resolution Officer was able to have the Applicant specify which portions of the responsive record the Applicant was interested in obtaining. This removed section 24(1)(k) from the review. SaskBuilds released additional portions of the information but continued to withhold other portions the Applicant was seeking access to, as such the Applicant wished for the review to proceed.

[4] On February 11, 2016, my office provided notification to SaskBuilds and the Applicant of the review. My office requested SaskBuilds provide a submission in support of the exemptions raised, a copy of the records and an index of records. The Applicant was also invited to provide a submission for my office’s consideration in this review.

II RECORDS AT ISSUE

[5] The record consists of 27 partially severed pages of funding information regarding the Regina Bypass Project. The severed portions of the pages and the exemptions applied by SaskBuilds are as follows:

Page #	Title/Description	Exemptions Applied (FOIP)
1	Table 1.3 Source of Funds <ul style="list-style-type: none"> • PPP Canada - Substantial Completion Payment • PPP Canada – Milestone Payment 	17(1)(a), 17(1)(c), 18(1)(b), 18(1)(d), 18(1)(f)
2	Table 4.1 Project Cost Assumptions	17(1)(a), 17(1)(c), 18(1)(b), 18(1)(d), 18(1)(f)
3	Table 4.7: Base Case VFM Results	17(1)(a), 17(1)(c), 18(1)(b), 18(1)(d), 18(1)(f)
3	Figure 4.5 DBFOM Net Present Cost	17(1)(a), 17(1)(c), 18(1)(b), 18(1)(d), 18(1)(f)
4	Section 8.1.3 Utilities	17(1)(a), 17(1)(c), 18(1)(d)
5-27	Appendix F: Breakdown of Construction Costs	17(1)(a), 17(1)(c), 18(1)(b), 18(1)(d), 18(1)(f) of

III DISCUSSION OF THE ISSUES

[6] SaskBuilds is a government institution pursuant to subsection 2(1)(d)(ii) of FOIP.

1. Does subsection 18(1)(d) of FOIP apply?

[7] Subsection 18(1)(d) of FOIP is a discretionary exemption and provides:

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

...

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution;

[8] SaskBuilds applied subsection 18(1)(d) of FOIP to all of the severed portions of the record.

[9] The following test must be met in order for subsection 18(1)(d) of FOIP to be found to apply:

- i. Identify and provide details about the contractual or other negotiations and the parties involved; and
- ii. Detail how release of the record could reasonably be expected to interfere with the contractual or other negotiations.

i. Identify and provide details about the contractual or other negotiations and the parties involved

[10] In its submission, SaskBuilds asserted that there would be future negotiations with contractors on P3 projects involving overpass projects that were in the Request for Proposal stage at the time the review commenced. SaskBuilds submitted that “although the contract for which was the focus of the records at issue in this case has been executed, the record, if disclosed, will have a direct impact on the negotiations of future contracts

for highway construction projects.” SaskBuilds explained in its submission that the release of this information would not only interfere with “SaskBuilds’ negotiation position on current and future projects as potential bidders would be able to interfere with SaskBuilds’s costs and funding strategies in regards to projects” but that it would also interfere with the Ministry of Highways and Infrastructure’s negotiations. SaskBuilds stated that “several ongoing and future highway construction project negotiations would be substantially impacted, as potential bidding parties would be aware of this technical and costing information, placing the Ministry at a significant disadvantage in the negotiation phase of those projects.”

- [11] Prospective negotiations can be included within subsection 18(1)(d) of FOIP, as long as they are foreseeable. SaskBuilds has provided sufficient information in its submission to show that the future negotiations are foreseeable. Therefore, I find that the first part of the test has been met for all severed portions except the redacted portions found on page 4 of the record.
- [12] SaskBuilds redacted a portion of a sentence on page 4 of the record. SaskBuilds provided in its submission that it “submits that this portion of the record clearly describes a negotiating strategy that, if disclosed would impact future and ongoing negotiations between the Ministry of Highways and Infrastructure and utility providers that own pipelines or other infrastructure that conflict with proposed construction on this Project. Negotiations are continuing on certain aspects of the Project and it is not expected to be completed until 2019.”
- [13] However, based on the information severed it is not clear how this would reveal the strategy the Ministry would use in its negotiations. As such, I do not find the portion of the severed information on page 4 of the record to meet the first part of the test.

ii. Detail how release of the record could reasonably be expected to interfere with the contractual or other negotiations

[14] *To interfere with contractual or other negotiations* means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement involving the public body.

[15] Further, *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 test for a *reasonable expectation* is somewhat higher.

[16] The public body does not have to prove that interference is probable, but needs to show that there is a “reasonable expectation” of interference if any of the information or records were to be released. The following criteria are used:

1. There must be a clear cause and effect relationship between the disclosure and the interference which is alleged;
2. The interference caused by the disclosure must be more than trivial or inconsequential; and
3. The likelihood of the interference must be genuine and conceivable.

[17] In its submission, SaskBuilds outlined how release of the information would interfere with its future negotiations, including interference with ongoing and future highways construction projects and the associated costs paid by the province for the projects. SaskBuilds tied the specific information on the pages to the interference it proposes.

[18] From a review of the severed portions of the record, the severed information, if disclosed, could disadvantage SaskBuilds and the Government of Saskatchewan in its future negotiations for highway construction projects in the ways asserted by SaskBuilds in its submission. Therefore, I find that SaskBuilds appropriately applied subsection 18(1)(d) of FOIP to the information of the withheld portions of pages 1, 2, 3 and 5-27 of the record.

2. Does subsection 17(1)(a) of FOIP apply?

[19] Subsection 17(1)(a) of FOIP is a discretionary exemption and provides:

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;

[20] As I have found subsection 18(1)(d) of FOIP to apply to all pages except page 4 of the record, I will only consider the application of subsection 17(1)(a) of FOIP to page 4 of this record.

[21] The first part of this test to determine if the exemption applies is to determine if the severed information would qualify as advice, proposals, recommendations, analyses or policy options.

[22] *Advice* includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice has a broader meaning than recommendations.

[23] *Recommendations* relate to a suggested course of action as well as the rationale for a suggested course of action. Recommendations are generally more explicit and pointed than advice.

[24] *Proposals, analyses and policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

[25] Based on my review of the information severed it is not clear how the information would qualify as any of the definitions provided above. Therefore, I do not find subsection 17(1)(a) of FOIP to apply to the severed portions of page 4 of the record.

3. Does subsection 17(1)(c) of FOIP apply?

[26] Subsection 17(1)(c) of FOIP is a discretionary exemption and provides:

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution, or considerations that relate to those negotiations;

[27] As I have found subsection 18(1)(d) of FOIP to apply to all pages except page 4 of the record, I will only consider the application of subsection 17(1)(c) of FOIP to page 4 of this record.

[28] The first part of this test is to determine if the records contain positions, plans, procedures, criteria, instructions or considerations that relate to the contractual or other negotiations.

[29] A *plan* is a formulated and especially detailed method by which a thing is to be done; a design or scheme.

[30] *Positions and plans* refer to information that may be used in the course of negotiations.

[31] *Procedures, criteria, instructions and considerations* are much broader in scope, covering information relating to the factors involved in developing a particular negotiating position or plan.

[32] Based on my review of the information severed it is not clear how the information would meet any of the definitions provided above. Therefore, I do not find subsection 17(1)(c) of FOIP to apply to the severed portions of page 4 of the record.

[33] On July 27, 2016, my office shared the above analysis with SaskBuilds. My office recommended that SaskBuilds release the portions of page 4 where subsection 17(1)(a) and (c) did not apply. On August 5, 2016 SaskBuilds responded to my office indicating that it would comply with the recommendation and release the previously severed portion of the record.

IV FINDINGS

[34] I find that SaskBuilds appropriately applied subsection 18(1)(d) of FOIP to all withheld portions of the record with the exception of page 4 of the record.

[35] I find that SaskBuilds did not appropriately apply subsections 17(1)(a) and (c) to page 4 of the record.

V RECOMMENDATION

[36] I recommend that SaskBuilds continue to withhold the severed information, with the exception of the severed portion on page 4 of the record that SaskBuilds agreed to release.

Dated at Regina, in the Province of Saskatchewan, this 10th day of August, 2016.

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