



REVIEW REPORT 013-2018

Ministry of Education

February 20, 2019

Summary:

The Applicant submitted an access to information request to the Ministry of Education. The Ministry denied access to portions of the record pursuant to subsections 17(1)(a), 17(1)(b)(i), 17(1)(b)(ii), 17(1)(c), 18(1)(b)(i), 18(1)(d), 18(1)(e), 18(1)(f), 19(1)(b), 19(1)(c)(i), 19(1)(c)(ii), 19(1)(c)(iii), and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant requested my office conduct a review of the exemptions applied to the responsive portions of the record. The Commissioner found that some of the exemptions were appropriately applied to portions of the record, where others were not. The Commissioner recommended Education release some of the withheld portions of the record and continue to withhold the portions of the record where exemptions were properly applied.

I BACKGROUND

- [1] On October 25, 2017, the Ministry of Education (Education) received an access to information request for “...all emails to the deputy minister received from or sent to [a specified @saskparty.com email address] – or referencing [the specified @saskparty.com email address] from January 1, 2014 to present.”
- [2] On November 24, 2017, Education indicates it advised the Applicant by letter that it was extending the 30 days response time by 30 days.
- [3] On December 27, 2017, Education provided its section 7 response to the Applicant refusing portions of the responsive records pursuant to sections 15, 17, 18, 19 and 29 of *The*

Freedom of Information and Protection of Privacy Act (FOIP). Additionally, in the copy of the partially severed records released to the Applicant, Education identified portions that were non-responsive to the Applicant’s request.

[4] On January 17, 2018, my office received a request for review from the Applicant to review Education’s decision to deny access to portions of the records as per the exemptions outlined in Education’s section 7 response. Education notified my office that section 15 of FOIP was mistakenly referenced in the section 7 response to the Applicant and clarified that it was not being relied on to withhold any portion of the responsive records.

[5] On February 13, 2018, my office notified Education, the Applicant and the third parties of my office’s intention to undertake a review of Education’s decision to deny access to portions of the records pursuant to subsections 17(1)(a), 17(1)(b)(i), 17(1)(b)(ii), 17(1)(c), 18(1)(b)(i), 18(1)(d), 18(1)(e), 18(1)(f), 19(1)(b), 19(1)(c)(i), 19(1)(c)(ii), 19(1)(c)(iii), and 29(1) of FOIP.

II RECORDS AT ISSUE

[6] Education forwarded my office 14 pages of records, however it also identified portions of the emails that it deemed to be non-responsive to the Applicant’s request. The portions of the record identified as non-responsive were email communications that did not include the specified @saskparty.com email address. Below is a table showing which pages Education has identified as responsive or non-responsive and the exemptions relied on to withhold responsive portions of the record:

Page Number(s)	Title / Description	Section(s)	Withheld in full or part?
1	Email correspondence dated April 28, 2014. Portions withheld.	17(1)(a)(b)(i)(ii) and 29(1)	Part
2	Email correspondence dated April 13, 2014. Portions withheld.	17(1)(a)(b)(i)(ii)(c), 18(1)(b)(i)(d)(e)(f) and 19 (1)(b)(c)(iii)	Part
3	Email correspondence dated March 14, 2014.	Disclosed to applicant.	N/A

4 - 5	E-mail correspondence dated March 9, 2014. Portions withheld.	Non-responsive* and 17(1)(b)(i)(ii)	Part
6	Email dated March 9, 2014. Portions withheld.	Non-responsive* and 17(1)(b)(i)(ii)	Part
7	Email correspondence dated March 9, 2014. Portions withheld.	Non-responsive* and 17(1)(b)(i)(ii)	Part
8 - 9	Email correspondence dated January 6, 2014. Portions withheld.	Non-responsive* and 17(1)(b)(i)(ii)	Part
10	Withheld.	Non-responsive*	Full
11	Email correspondence dated September 30 and October 1, 2013. Portions withheld.	Non-responsive* and 29(1)	Part
12	Email correspondence dated September 30, 2013. Portions withheld.	Non-responsive*	Part
13 - 14	Email correspondence dated September 25, 2013. Portions withheld.	19(1)(b)(c)(i)(ii) and Non-responsive*.	Part

*Portions of email correspondence were withheld and marked as non-responsive when “[the specified @saskparty.com email address]” was not included.

[7] This review only considers the portions of the record that Education identified as responsive to the request and severed portions pursuant to one of the exemptions identified in the above table.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction to review this matter?

[8] Education is a government institution as defined by subsection 2(1)(d)(i) of FOIP. Thus, I have jurisdiction to conduct this review.

2. Did Education properly apply subsection 29(1) of FOIP to the withheld portions of the record?

[9] Education applied subsection 29(1) of FOIP to the redacted portion of page 1, the second redaction on page 11 and the first redaction on page 13.

[10] Subsection 29(1) of FOIP provides:

29(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[11] When dealing with information in a record that appears to be personal information, the first step is to confirm the information indeed qualifies as personal information pursuant to section 24 of FOIP.

[12] Subsection 24(1) of FOIP provides a list of examples of what would qualify as personal information, however the list is not exhaustive. There are other types of information that could qualify as personal information that are not listed. Part of that consideration involves assessing if the information has both of the following:

1. Is there an identifiable individual?

Identifiable individual means that it must be reasonable to expect that an individual may be identified if the information were disclosed. The information must reasonably be capable of identifying particular individuals because it either directly identifies a person or enables an accurate inference to be made as to their identity when combined with other available sources of information (data linking) or due to the context of the information in the record.

2. Is the information personal in nature?

Personal in nature means that the information reveals something personal about the individual. Information that relates to an individual in a professional, official or business capacity could only qualify if the information revealed something personal about the individual for example, information that fits the definition of employment history.

Page 1

[13] The redaction on page 1 of the record contains two short paragraphs describing an individual that was applying for a position with the Ministry. The first paragraph contains the name of an individual and the remaining contents of the two paragraphs contains information about the individual that would qualify as being personal in nature.

[14] As the information in this redaction contains an identifiable individual and information that reveals something personal about the individual, I find that subsection 29(1) of FOIP was appropriately applied to the redacted portion of page 1 of the record.

[15] Education had also applied subsections 17(1)(a), 17(1)(b)(i) and 17(1)(b)(ii) of FOIP to this portion of the record. However, as I have already found that subsection 29(1) of FOIP applies, there is no need to consider the application of any other exemptions to this portion of the record.

Page 11

[16] Education also applied subsection 29(1) of FOIP to the second redaction on page 11 of the record. In this portion of the record, the member of Executive Council was requesting follow up on a comment made on Twitter. Education released the comment that was made on twitter, the username of the individual and the screen name of the individual that made the comment on twitter, as well as the fact that it was forwarded on for follow up. However, Education withheld the response indicating what action was taken to follow up with the user.

[17] Education identified the Twitter user as a third party individual on this file. Our office notified the individual of the review and asked if they objected to the release of the records. In a response provided to our office, the individual stated that based on a telephone conversation with Education, it did not appear they had anything to object to.

[18] As the individual did not have any objections to the release of the second redaction on page 11, Education should consider releasing this portion of the record, provided it has received consent from the individual.

Page 13

[19] In this portion of the record, Education released the email header to the Applicant, so the Applicant is aware of the identity of the email sender, therefore there is an identifiable

individual. Without revealing the nature of the information redacted in this portion of the record, based on a review of this portion of the record the information would reveal something personal about the individual.

[20] Therefore, I find that subsection 29(1) of FOIP applies to the first redaction on page 13 of the responsive records.

[21] Education had also applied subsections 19(1)(b), 19(1)(c)(i) and 19(1)(c)(ii) of FOIP to this portion of the record. However, as I have already found subsection 29(1) of FOIP to apply to this portion of the record, there is no need to consider the application of any other exemptions.

[22] I find that Education has appropriately applied subsection 29(1) of FOIP to pages 1 and 13 of the record.

3. Did Education properly apply section 17(1)(b) of FOIP to the withheld portions of the record?

[23] Education applied different subsections of section 17 to different portions of the record:

- subsections 17(1)(a), 17(1)(b)(i) and 17(1)(b)(ii) of FOIP to the redaction on page 1 – however, as I have already found subsection 29(1) of FOIP to apply to this portion of the record, there is no need for me to consider any further exemptions;
- subsections 17(1)(a), 17(1)(b)(i), 17(1)(b)(ii) and 17(1)(c) of FOIP to both redactions on page 2; and
- subsections 17(1)(b)(i) and 17(1)(b)(ii) of FOIP to the second redaction on page 5, the second and third redaction on page 6, the second redaction on page 7, the second and third redaction on page 8 and the redacted portion on page 9.

[24] Subsections 17(1)(b)(i) and 17(1)(b)(ii) of FOIP provide:

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

...

(b) consultations or deliberations involving:

(i) officers or employees of a government institution;

(ii) a member of the Executive Council;

...

[25] This provision is meant to permit public bodies to consider options and act without constant public scrutiny. 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. A *deliberation* is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

[26] For this exemption to apply, the consultations or deliberations must involve officers or employees of a government institution. In addition, the following two part test must be met:

1. The opinions solicited during a consultation or deliberation must be either sought, expected, or be part of the responsibility of the person who prepared the record; and
2. The opinions solicited during a consultation or deliberation must be prepared for the purpose of doing something, such as taking an action, making a decision or a choice.

[27] The provision is not meant to protect the bare recitation of facts, without anything further. Further, the exemption does not generally apply to records or parts of records that in themselves only reveal that a consultation or deliberation took place at a particular place or time; that particular persons were involved; or that a particular topic was involved.

[28] Education's submission replicates the test found in the *IPC Guide to Exemptions*. It also provides the definitions of consultation and deliberation, as defined in *Black's Law Dictionary* and quotes the definitions found in the *IPC Guide to Exemptions*. It also refers to a 1994 Saskatchewan Court of Queen's Bench decision that considered the application of subsection 17(1)(b) of FOIP. While Education states that the Court found that the exemption applied to portions of the records at issue, Education then goes on to state that the decision did not contain much analysis regarding this decision.

[29] Education's submission also provided a general statement for the application of subsections 17(1)(b)(i) and 17(1)(b)(ii) of FOIP for the redactions on pages 1, 2, 5, 6, 7, 8 and 9 which stated:

The Ministry submits that the records where clauses 17(1)(b)(i) and (ii) are relied on involve the employees of a government institution or a member of Executive Council discussing a particular suggested recommendation, proposal or course of action. In some portions of the record, it is with respect to considering an individual for a particular position. In another, the employees and member of Executive Council are discussing a particular approach to negotiations. On other records, a portion of the record is redacted because a member of Executive Council is considering a specific issue and seeking an update on that particular issue from an employee of a government institution or is advising that that member will make inquires.

Page 2

[30] Education applied subsections 17(1)(b) and 17(1)(c) of FOIP to the redaction on page 2 of the record, along with a number of other exemptions. Education's submission provided that parts of the record it withheld pursuant to subsection 17(1)(b) of FOIP were a discussion of a particular approach to negotiations.

[31] Based on a review of this portion of the record, the member of Executive Council put forth a suggested approach to negotiations that they intended to take and sought the opinions of the employee of the government institution regarding this approach.

[32] As the communication is seeking the appropriateness of the proposed course of action, it would qualify as a consultation. As well, the opinions solicited from this consultation were sought by the member of Executive Council for the purpose of taking an action in relation to the negotiations.

[33] As such, I find that Education has appropriately applied subsection 17(1)(b) of FOIP to page 2 of the record.

[34] Education had also applied subsections 17(1)(a), 17(1)(c), 18(1)(b)(i), 18(1)(d), 18(1)(e), 18(1)(f), 19(1)(b) and 19(1)(c)(iii) of FOIP to this portion of the record. However, as I

have found subsection 17(1)(b) of FOIP to apply to this portion of the record, there is no need to consider the application of any other exemptions of this portion of the record.

Pages 5, 6 and 7

[35] The second redaction on page 5, the third redaction on page 6 and the second redaction on page 7 are all the same redacted portions of the originating email. The second redaction on page 6 is a response to the originating email.

[36] Based on a review of the record, this portion of the responsive record would appear to be the part that Education has described as a consideration of a specific issue or seeking of an update on that particular issue.

[37] Based on a review of the record, it appears there was a request for employees of a government institution to provide factual information in relation to a news article. It does not appear that the member of Executive Council was seeking any opinions about the appropriateness of a proposed action or reasons for or against an action. Nor does Education indicate whether or not the information was being sought for the purpose of taking any type of action.

[38] As the information at issue does not appear to qualify as a consultation or deliberation, I find that subsection 17(1)(b) of FOIP does not apply to the redactions on pages 5, 6 and 7 of the record.

Pages 8 and 9

[39] The third redaction on page 8 and the redacted portion on page 9 is the originating email communication. The second redaction on page 8 is a response to the originating email.

[40] Based on a review of the record, this portion of the responsive record would appear to be the part that Education has described as a consideration of a specific issue or seeking of an update on that particular issue.

[41] Based on a review of the record, it appears this portion of the record is a request for information regarding any concerns that may have been brought to their attention in relation to a change in practice. It does not appear that the member of Executive Council is seeking any opinions regarding the appropriateness of the change of practice or the reasons for or against any action. Further, it does not appear the communication was prepared for the purpose of taking any actions as the change in practice was already in place.

[42] As the information at issue does not appear to qualify as a consultation or deliberation, I find that subsection 17(1)(b) of FOIP does not apply to the redactions on pages 8 and 9 of the record.

IV FINDINGS

[43] I find that Education has appropriately applied subsection 29(1) of FOIP to pages 1 and 13 of the record.

[44] I find that Education has appropriately applied subsection 17(1)(b) of FOIP to page 2 of the record.

[45] I find that subsection 17(1)(b) of FOIP does not apply to the redacted portions on pages 5 through 9 of the record.

V RECOMMENDATIONS

[46] I recommend Education continue to withhold the redacted portions of pages 1, 2 and 13 of the record.

[47] I recommend Education release the redacted portion of page 11 of the record, provided Education has received consent from the individual.

[48] I recommend Education release the redacted portions of pages 5 through 9 of the record.

Dated at Regina, in the Province of Saskatchewan, this 20th day of February, 2019.

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