

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 016-2015

Ministry of Highways and Infrastructure

Summary:

The Applicant submitted an access to information request to the Ministry of Highways and Infrastructure (Highways) for a Transition Briefing Binder. Highways withheld the responsive records in their entirety, citing subsection 16(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant requested a review from the Information and Privacy Commissioner. In the course of the review, Highways advised they were applying all of subsection 16(1) of FOIP to the responsive records. The Commissioner found that some portions of the records at issue were exempt from release pursuant to subsection 16(1) of FOIP and some portions contained personal information pursuant to subsection 24(1) of FOIP and were exempt from release pursuant to subsection 29(1) of FOIP. The Commissioner also found there were portions of the record that were already publicly available or had been publicly revealed. The Commissioner recommended that Highways continue to withhold the portions of the record where 16(1) and 29(1) of FOIP applied and consider releasing those portions of the record where the information could be found publicly or did not qualify for exemption.

I BACKGROUND

[1] On December 24, 2014, the Ministry of Highways and Infrastructure (Highways) received an access to information request for the “Transition Briefing Binder provided to the new minister in June 2014.”

[2] In a letter dated January 16, 2015, Highways responded to the Applicant advising that access to the requested record was denied pursuant to subsection 16(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] My office received a letter from the Applicant dated January 30, 2015 requesting a review.

[4] In emails dated February 2, 2015, my office notified both parties of its intention to conduct a review. My office requested Highways provide a copy of the record, index of record and submission in support of subsection 16(1)(a) of FOIP.

[5] In Highways' submission to my office, they indicated that they were applying all of subsection 16(1) of FOIP to the 110 page responsive record. As such, I will consider the application of all of subsection 16(1) of FOIP to this record.

II RECORD AT ISSUE

[6] The record at issue is a transition briefing binder that was provided to the new minister in June 2014 that consists of 110 pages.

III DISCUSSION OF THE ISSUE

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

1. Does subsection 16(1) of FOIP apply to the record?

[8] Subsection 16(1) of FOIP provides as follows:

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

(a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;

(b) agendas or minutes of the Executive Council or any of its committees, or records that record deliberations or decisions of the Executive Council or any of its committees;

(c) records of consultations among members of the Executive Council on matters that relate to the making of government decisions or the formulation of government policy, or records that reflect those consultations;

(d) records that contain briefings to members of the Executive Council in relation to matters that:

(i) are before, or are proposed to be brought before, the Executive Council or any of its committees; or

(ii) are the subject of consultations described in clause (c).

[9] Highways' submission provides the following supporting their position that subsection 16(1) of FOIP applies to the requested record:

...16(1) is a class exemption and not a harm-based exemption. Accordingly, if the record fits within the description of the class of exemptions which the section delineates, it is subject to the exemption;

...The exemption applies to all records that would disclose a cabinet confidence.

...The exemption in section 16(1) is mandatory. If the record fits the class of exempt records, FOIP requires that it be withheld.

...

...The supreme court of Canada in a unanimous decision, has acknowledged that some information possessed by public institutions is entitled to protection in order to promote good governance...

...some government functions may be incompatible with disclosure of certain documents, citing the principle of Cabinet confidence...

...The principle of Cabinet confidence for internal government discussions offers another example. The historic function of a particular institution may assist in determining the bounds of institutional confidentiality... Certain types of documents may remain exempt from disclosure because disclosure would impact the proper functioning of affected institutions.

(Ontario (Public Safety and Security) v Criminal Lawyers' Association, 2010 SCC 23, [2010] 1 SCR 815 at paragraph 40.)

Transition briefing binders promote good governance. As previously indicated, they enable new Cabinet Ministers to readily familiarize themselves with their portfolios and understand key issues, policies or directions they must consider or defend.

...

The Ministry of Highways and Infrastructure submits that the transition briefing binder was not only a set of briefing notes but also a record that identifies the issues, policies and directions of priority for the new Minister.

[10] While 16(1)(d) of FOIP provides an exemption for “records that contain briefings to members of the Executive Council,” it does not provide a specific exemption for records that provide briefings when assuming responsibility for a Ministry. Legislation in some provinces provide language indicating that the right of access does not extend to these types of records.

[11] An example of this, is found in the Yukon’s *Access to Information and Protection of Privacy Act* which states:

5(4) The right of access to a record does not extend to a record created solely for the purpose of

(a) briefing a Minister in respect of assuming responsibilities under the Government Organisation Act for a department or corporation;

...

(5) Subsection 4 does not apply

(a) to a record described in paragraph 4(a), if five or more years have passed since the Minister was appointed as the Minister responsible for the department or corporation;

[12] As similar language is not included in Saskatchewan’s FOIP, my office has to make the assumption that the legislature did not intend to limit access to ministerial briefing binders under FOIP.

[13] The *Report of the 2014 Statutory Review Access to Information and Protection of Privacy Act Newfoundland and Labrador, Volume 1: Executive Summary* provided that:

The Supreme Court of Canada has clearly indicated the acceptability, in terms of good government, of the statutory protection that exists for policy advice. The only remaining matter for discussion is how those records are assembled. The minister responsible for the OPE and the deputy minister suggest briefing records can be separated easily from policy advice and recommendations.

...

The Committee recommends that

...

Public bodies change the manner in which briefing books are assembled, so that policy advice and Cabinet confidences are easily separable from factual information.

[14] Subsection 7(4) of Newfoundland and Labrador's *Access to Information and Protection of Privacy Act* limited the right of access to records that were created to brief a member of Executive Council when assuming responsibility for a Ministry.

[15] Newfoundland and Labrador's legislature has passed the *Access to Information and Protection of Privacy Act, 2015* which came into force June 1, 2015. Among the changes was repealing subsection 7(4) that limited the right of access to records such as briefing books, as recommended by the Committee in the Report discussed above.

[16] Access to these types of briefing records are also limited by subsection 6(4) of Alberta's *Freedom of Information and Protection of Privacy Act*. Alberta's *FOIP Guidelines and Practices* provides the following regarding briefing books:

Within the Government of Alberta, when a new Minister assumes responsibility for a ministry, the Department normally prepares a briefing book for the Minister. This briefing material is compiled to allow the Minister to quickly gain an overview of the ministry's functions that will allow him or her to assume leadership of the ministry, to report on the ministry in Cabinet, and to represent its interests. The briefing material will generally include some information that is publicly available, such as the ministry's business plan and annual report, as well as information created specifically for the new Minister, such as current assessments of operations and analysis of issues affecting the ministry...

[17] Nova Scotia's Freedom of Information and Protection of Privacy Review Officer's Review Report FI-07-14 provided the following comment regarding documents that are attached together:

The key to evaluating whether or not the cabinet confidentiality exemption has been properly applied to a particular document is to rely on the test of whether the disclosure would reveal the substance of deliberations of an Executive Council. Merely including or attaching a document, such as a department memorandum or a newspaper article to a Cabinet brief does not, however, necessarily convert that document to a properly excluded record under the exemption.

[18] In my office's Review Report 086/2013, "Government Relations asserted that its position was that subsection 16(1) is a 'blanket exemption' for all Cabinet documents and other confidences...". In that Report however, although my office recognized that the responsive records were agendas for Minister briefings and would qualify for exemption pursuant to subsection 16(1) of FOIP, I recommended it release the portions of the record that had already been publicly revealed.

[19] Section 16 of FOIP is a mandatory class-based exemption and subsections 16(1)(a) through (d) of FOIP is not an exhaustive list. Therefore, even where the subsections are found not to apply, the introductory wording of subsection 16(1) of FOIP must still be considered. In other words, is the information a confidence of Executive Council?

[20] Cabinet confidences can be generally defined as:

...in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public.

(Federal Access to Information and Privacy Legislation Annotated 2015 (Canada: Thomas Reuters Canada Limited, 2014) at p. 1-644.4)

[21] As discussed earlier in this Report, briefing binders consist of a number of different types of documents, some of which may have already been revealed through information that is publicly available and others that were prepared for the new Minister when assuming responsibility for the Ministry. Merely including these different types of documents in a binder does not automatically make all of the documents qualify for exemption.

[22] Section 8 of FOIP requires a page by page or line by line review as follows:

8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

- [23] The application of subsection 16(1) of FOIP needs to be considered for each of the pages contained in the briefing binder. Consideration also needs to be given as to whether or not the matters have already been publicly revealed.
- [24] Briefing binders contain a number of different types of documents, such as organizational charts, financial information, information on mandate and mission of the government institution, senior management profiles and documents containing information relating to the government institution, such as strategies and issues to address. Information found in these binders contain some information that was publicly available and information that was similar to information that had already been revealed publicly.
- [25] Based on a review of the information contained in the briefing binders, it appeared that portions of the record did qualify as information that reveal a cabinet confidence pursuant to subsection 16(1) of FOIP.
- [26] As well, although Highways did not apply subsection 29(1) of FOIP to withhold portions of the record, there was information that would qualify as personal information pursuant to subsection 24(1)(b) of FOIP and would qualify for exemption pursuant to subsection 29(1) of FOIP.
- [27] However, there were also portions of the record that contained information that did not qualify as a cabinet confidence, or were already publicly available or similar information that was already publicly revealed.
- [28] My office provided Highways with a Draft Review Report with the recommendation to release those portions of the record that did not qualify for exemption under 16(1) or 29(1) of FOIP or had already been revealed publicly.
- [29] Highways responded to my office's Draft Review Report advising that it agreed with some of the portions of the record we recommended it consider releasing and provided those portions of the record to the Applicant. Highways released portions of the record

related to the Ministry overview and information on the different divisions within Highways.

[30] There are other portions of the record that my office identified to Highways in our Draft Review Report that either did not appear to qualify for exemption under subsection 16(1) of FOIP or were already revealed publicly that it should consider releasing to the Applicant including the information identified on pages 1, 8, 11, 12, 13, 14, 15, 16, 29, 96, 98, 99, 100 and 101 of the record.

IV FINDINGS

[31] I find that portions of the record would qualify as a cabinet confidence pursuant to subsection 16(1) of FOIP.

[32] I find that portions of the record would qualify as personal information pursuant to subsection 24(1) of FOIP.

V RECOMMENDATIONS

[33] I recommend that Highways continue to withhold portions of the record that qualify for exemption under subsections 16(1) and 29(1) of FOIP.

[34] I recommend that Highways release portions of the record to the Applicant where subsections 16(1) or 29(1) of FOIP do not apply, or where similar information has already been revealed publicly, including the information identified on 1, 8, 11, 12, 13, 14, 15, 16, 29, 96, 98, 99, 100 and 101 of the record.

Dated at Regina, in the Province of Saskatchewan, this 26th day of June, 2015.

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