



## **REVIEW REPORT 017-2018**

### **Ministry of Environment**

**June 12, 2018**

**Summary:** The Ministry of Environment withheld records responsive to the Applicant's request pursuant to subsections 17(1)(a) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that these subsections applied to only certain portions of the record and recommended release of the remainder.

#### **I BACKGROUND**

- [1] On November 1, 2017, the Ministry of the Environment (the Ministry) received an access request for specific records related to Quill Lakes Watershed Association – Common Drainage Division Project.
- [2] On November 20, 2017, the Ministry advised the Applicant that it extended the 30 day response time pursuant to subsection 12(1)(c) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [3] On January 8, 2018, the Ministry provided the Applicant with a response. The Ministry provided responsive records. It advised the Applicant, that pursuant to section 8 of FOIP, some of the records had been severed. The redacted portions had been withheld pursuant to subsections 17(1)(a) and 29(1) of FOIP. Further, the Ministry noted that subsection 17(1)(a) of FOIP had been applied to some records in full.

- [4] On January 19, 2018, the Applicant requested a review by my office. On February 12, 2018, my office provided notification to both the Ministry and the Applicant of my intention to review the exemptions applied to the remaining records.

## II RECORDS AT ISSUE

- [5] The following is a list of the responsive records at issue in this review.

| Page                           | Type of Record  | Description of withheld information                            | Exemption |
|--------------------------------|---|--|-----------|
| <b><i>Part 1 of Record</i></b> |   |  |           |
| 1                              | E-mail  | Cellular telephone number                                      | 29(1)     |
| 2                              | E-mail  | Cellular telephone number                                      | 29(1)     |
| 13                             | Slide deck  | Contents of slide entitled “Results”                           | 17(1)(a)  |
| 15                             | Slide deck  | Contents of slide entitled “Closure of Illegal Drainage Works” | 17(1)(a)  |
| 16                             | Slide deck  | Contents of slide entitled “Summary”                           | 17(1)(a)  |
| <b><i>Part 2 of Record</i></b> |   |  |           |
| 11                             | Appendix to Application                                 | 3 instances – names of land owners                             | 29(1)     |
| 12                             | Appendix to Application                                 | 6 instances – names of land owners                             | 29(1)     |
| 20                             | E-mail  | Statement in e-mail  | 17(1)(a)  |
| 22-25                          | E-mail attachment (Draft decision)                      | Entire document  | 17(1)(a)  |
| 34                             | E-mail  | Statement in e-mail  | 17(1)(a)  |
| 35-37                          | E-mail attachment (Draft Briefing Note)                 | Entire document  | 17(1)(a)  |
| 38                             | E-mail  | Two separate statements in e-mail                              | 17(1)(a)  |
| 40                             | E-mail attachment (Draft letter page 1 of 2)            | Entire document  | 17(1)(a)  |
| <b><i>Part 3 of Record</i></b> |   |  |           |
| 1                              | E-mail attachment (Draft letter page 2 of 2)            | Entire document  | 17(1)(a)  |
| 10                             | Page 10 represents 3 e-mail attachments (10A, 10B, 10C) |  |           |
| 10A                            | 9 page assessment                                       | Entire document  | 17(1)(a)  |
| 10B                            | 14 page assessment                                      | Entire document  | 17(1)(a)  |
| 10C                            | 14 page assessment (identical to 10B)                   | Entire document  | 17(1)(a)  |
| 11                             | E-mail  | Statement in e-mail  | 17(1)(a)  |
| 17                             | E-mail  | Two consecutive paragraphs of e-mail                           | 17(1)(a)  |

| <b>Page</b> | <b>Type of Record</b> | <b>Description of withheld information</b> | <b>Exemption</b> |
|-------------|-----------------------|--|------------------|
| 18          | E-mail                | Three consecutive paragraphs of e-mail     | 17(1)(a)         |
| 32          | E-mail                | E-mail Address                             | 29(1)            |
| 35          | E-mail                | E-mail Address                             | 29(1)            |

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

#### **1. Does my office have jurisdiction in this matter?**

[6] The Ministry qualifies as a government institution pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to proceed in this matter.

[7] Further, the records in question contains information of the Water Security Agency (WSA) which is also a government institution pursuant to subsection 2(1)(d)(ii) of FOIP. It provides that the definition of a government institution includes a body that is prescribed in *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). WSA is prescribed in Part I of the Appendix of the FOIP Regulations.

#### **2. Does subsection 17(1)(a) of FOIP apply to the record?**

[8] Subsection 17(1)(a) of FOIP 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;

[9] This exemption is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice or all records related to the advice. The object of the provision includes maintaining an effective and neutral public service capable of producing full, free and frank advice.

[10] In order for this exemption to be found to apply, all three parts of the following test must be met:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. The advice, recommendations, proposals, analyses and/or policy options must:
  - i) be either sought, expected, or be part of the responsibility of the person who prepared the record; and
  - ii) be prepared for the purpose of doing something, for example, taking an action or making a decision; and
  - iii) involve or be intended for someone who can take or implement the action.
3. Was the advice, recommendations, analyses and/or policy options developed by or for the public body?

[11] I will use this test to evaluate the application of subsection 17(1)(a) of FOIP to various portions of the record.

**Slide Deck (Part 1 - Pages 13, 15, 16)**

[12] In its submission, the Ministry indicated it believed that the information in this portion of the record qualifies as advice, proposals, recommendations and analyses. The *IPC Guide to Exemptions* defines these terms as follows:

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. Advice includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.

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.

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. Therefore, advice is the course of action put forward, while analyses refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals, and policy options as to a course of action.

- [13] With respect to the first part of the test, not all of the information on these three pages would qualify as advice, proposals, recommendations and analyses. The first bullet on page 13 is a fact. The rest would qualify as advice and analyses. The first two bullets on page 15 are factual. The rest appears to be an outline of a plan that has been decided. The first, fourth and fifth bullets on page 16 are factual. The rest qualifies as analyses. Only certain portions meet the first part of the test.
- [14] The Ministry's submission indicated that the slide deck was prepared by WSA for a project committee mandated with educating and assisting stakeholders and providing recommendations to senior government officials who will make decisions and implement action on the project. The committee is made up of officials from the ministries of Environment, Agriculture, Highways and Infrastructure and Government Relations.
- [15] The second test for subsection 17(1)(a) of FOIP requires that the advice recommendation, proposals and analyses must be either sought, expected, or be part of the responsibility of the person who prepared the record. It must also be prepared for the purpose of doing something, for example, taking an action or making a decision. Finally, it must involve or be intended for someone who can take or implement the action.
- [16] The record was prepared for the committee. However, based on the committee description provided by the Ministry, it was not the committee's mandate to make decisions or take action related to the analyses in the record. The committee's purpose is to relay information to decision makers and stakeholders. As such, the second part of the test is not met.
- [17] Subsection 17(1)(a) of FOIP does not apply to this portion of the record.

**Statements (Part 2 - pages 20, 38; Part 3 - page 11)**

- [18] In its submission, the Ministry indicated that the redactions on the next three pages qualify as advice.

[19] The Ministry indicated that the redacted statement on page 20 in Part 2 of the record contains advice that discloses that an action by the ministry is underway and it also requests that the recipient treat the information as confidential. Upon review, this is a statement of fact and a request. The first part of the test is not met.

[20] The next redactions can be described as predictions by the author. This includes the two redactions on page 38 of Part 2 of the record which predicts what might be discussed at a meeting. The redaction on page 11 of Part 3 of the record is an understanding of the author about future events in another ministry. The first part of the test is not met.

[21] Subsection 17(1)(a) of FOIP does not apply to these redactions.

**Statement (Part 3 - page 17)**

[22] The Ministry submitted that the next statement qualifies as advice. The statement on page 17 is two paragraphs and I agree that they qualify as advice. They discuss edits to two documents. It gives an analysis of two parts of these documents and suggests options. The first part of the test is met.

[23] The redaction appears in an e-mail chain. The advice was written by an employee of the WSA. The advice was sought by the Ministry. The WSA prepared the advice so that the Ministry could complete a letter. The advice was developed for the Ministry. The second and third parts of the test have been met.

**Draft Decision (Part 2 – pages 22 to 25)**

[24] Pages 22 to 25 of Part 2 of the record is what the Ministry described as a draft document which provides a decision on a project. The Ministry indicated that a revised decision was approved by the Minister and made public. The Ministry submitted that the decision qualifies as advice, proposals, recommendations and analyses. The Ministry also provided me with the final decision which is publically available.

[25] Upon review of both the record and the final decision, the two documents are very different in structure. The Ministry indicated that “The content in this draft document evolved during the life of the project and information-gathering process.” There was a three month period between the creation of the draft decision and the release of the final decision. The draft decision clearly diverges in some areas from the final version. As such it is clear that the draft decision analysis was of a situation that required action. It is more than merely an early draft of the final product. The first part of the test is met.

[26] The Ministry’s submission indicated that the draft decision was created by a Ministry official as part of their role in the environmental assessment program. It was prepared for senior decision makers for the purpose of making a decision. I am satisfied that the second and third parts of the test are met. Subsection 17(1)(a) of FOIP applies to this record.

**Draft Briefing Note (Part 2 – pages 35 to 37)**

[27] Pages 35 to 37 of Part 2 of the record is a draft briefing note. It is being withheld in its entirety. The Ministry submits that the entire document constitutes advice and analyses.

[28] The briefing note consists of five parts: header information, issue, key facts, recommendations and background. Upon review, only the information in the “recommendation” portion qualifies as recommendations in the context of subsection 17(1)(a) of FOIP. In a recent Court of Queen’s Bench decision issued on March 22, 2018, Justice Danyiuk acknowledged that subsection 16(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) (the equivalent to subsection 17(1)(a) of FOIP) cannot apply to purely factual information. The rest of the information is factual. The first part of the test is met only for the recommendations portion of the document.

[29] The Ministry also indicated that the briefing note was created by a Ministry official for the Deputy Minister. The record indicates that it is for the purpose of taking action. The record was created by and for the Ministry. The Ministry also indicated that the briefing note was never completed or received by the intended recipient. I have found in the past that drafts

and redrafts of advice, recommendations, proposals, analyses and/or policy options may be protected by the exemption. The second and third parts of the test are met.

[30] I find subsection 17(1)(a) applies to the recommendation portion of the briefing note only.

[31] Further, page 34 in Part 2 of the record is an e-mail that transmits the draft briefing note. The redaction on this page reveals what is presented in the recommendation portion of the briefing note. As such, it qualifies as advice and meets the other tests for subsection 17(1)(a) of FOIP.

**Draft Letter (Part 2 – page 40; Part 3 – Page 1)**

[32] The Ministry communicated that this draft letter was created by a WSA official intended to be sent to the project proponent. This draft document was never approved, issued or communicated to the proponent or the public. The Ministry was consulted in the wording of the letter. An e-mail sending the letter to the Ministry has been released to the Applicant in full and indicates that the Ministry and WSA would be discussing its content.

[33] The Ministry submitted that the document contains “draft messaging” discussed between government officials. Upon review of the letter, I do not agree that the content of the letter qualifies as advice. It provides instructions to the project proponent as to how to proceed with a project. The draft messaging does not explain why or why not the letter should be reworded or sent. As such, it does not meet the first part of the test.

**Excerpt from letter (Part 3 - page 18)**

[34] The redaction on page 18 of Part 3 of the record is an excerpt from the draft letter above. The excerpt provides instruction to the proponent of the project. The excerpt itself does not contain analyses in the context of subsection 17(1)(a) of FOIP. I acknowledge that the Ministry and the WSA may have consulted each other regarding the wording of the letter. However, any advice or recommendations that may have been shared about the changes to the letter are not revealed in the redacted information. As such, the first part of the test is not met and subsection 17(1)(a) of FOIP does not apply.



**Draft Assessments (Part 3 – page 10A (9 page document) Part 3 – page 10B and 10C (identical 14 page documents)**

[35] The next three records are drafts of an assessment. Upon review, the two 14 page documents are identical. The nine page document is an earlier version and contains editorial comments.

[36] In its submission, the Ministry indicated that it believes the draft assessments contain advice, proposals, recommendations and analyses. Upon review of the document, the majority is scientific observations and assessments about the subject material.

[37] I note subsection 17(2)(c) of FOIP which provides:

17(2) This section does not apply to a record that:

...

(c) is the result of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

(i) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or

(ii) as preliminary or experimental tests for the purpose of:

(A) developing methods of testing; or

(B) testing products for possible purchase;

[38] This provision limits the scope of subsection 17(1) by excluding the results of product or environmental testing carried out by or for a public body. The Ministry noted in its submission that the draft documents were created by a WSA official and contains WSA's analysis to assess the possible effects of the proposed project. A large portion of the document can be classified as results of scientific testing carried out by or for a government institution. Therefore, subsection 17(2)(c) of FOIP applies, not subsection 17(1)(a) to the testing results.

[39] The documents also contain assessment of the results of the scientific testing combining information found in the proposal and other sources. Orders from both the Information and Privacy Commissioners of Alberta and Ontario have found that this type of assessment would not qualify as advice, proposals, recommendations, policy options or analyses in the context of similar provisions in those jurisdictions. Order F-2012-06 from Alberta states:

However, in my view, the scientific analysis or evaluation of physical data by the application of professional knowledge reaches what are in essence conclusions about physical facts, which in my view are not advice within the terms of [sections of Alberta's FOIP similar to section 17(1)(a)]. Even if the conclusions might vary based on the knowledge of the analyst, they are still conclusions about physical facts. In my view, the "analysis" contemplated by section 24(1)(a) refers to the analysis of options or potential courses of action or decisions that have a subjective or opinion element, not to the application of scientific principles to physical data.

[40] This is also supported by Ontario Order PO-1993 that made a distinction between professional or technical opinions and the advice of a public servant making recommendations to the government with respect to a proposed policy initiative. This Order from the Information and Privacy Commissioner of Ontario was upheld by the Ontario Divisional Court.

[41] As such, I find that the body of these documents do not qualify as advice, proposals, recommendations and analyses for the purpose of subsection 17(1)(a) of FOIP. The first part of the test is not met and the exemption does not apply.

[42] However, the nine page version of the draft assessment also contains editorial comments using a 'track changes' feature. Upon review most of the comments would qualify as advice or recommendations. The exception is the comment on page 5 which appears to be an observation not tied to any recommended course of action. With respect to the comments, the first part of the test is met, with the exception of the comment on page 5. The first part of the test is met.

[43] The Ministry indicated that the document was written by a WSA official and the editorial comments were written by a superior at the WSA. The advice and recommendations was expected to be part of the responsibility of the person who prepared the advice, it was

prepared for the purpose of taking action and intended for someone who can implement the action. This advice was both prepared by and for the WSA which, as noted, is a government institution. The second and third parts of the test are met. Subsection 17(1)(a) of FOIP applies to the comments as described above.

[44] Appendix A of this report summarizes where I have found subsection 17(1)(a) of FOIP applies to the record.

### **3. Did the Ministry appropriately apply subsection 29(1) of FOIP?**

[45] 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.

[46] In order to apply subsection 29(1) of FOIP, the information in question must qualify as personal information. Personal information is defined by subsection 24(1) of FOIP. The relevant portions provide:

24(1) Subject to subsections (1.1) and (2), “personal information” means personal information about an identifiable individual that is recorded in any form, and includes:

...

(e) the home or business address, home or business telephone number or fingerprints of the individual;

...

(j) information that describes an individual’s finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness; or

#### **Cellular Telephone Numbers**

[47] On page 1 of Part 1 of the record, the Ministry has redacted the cellular telephone number of a WSA official.

[48] Business card information is the type of information found on a business card (name, job title, work address, work phone numbers and work email address). This type of information

is generally not personal in nature and therefore would not be considered personal information.

[49] In the past I have found that, with regards to the government employee's cellular telephone number, it is commonplace for employers to issue employees cellular telephones for business purposes. In such circumstances, the cellular telephone number is considered business card information. Even where an employee chooses to use that cellular telephone for personal use, it was still assigned for business purposes. Report A-2018-012 by the Office of the Information and Privacy Commissioner of Newfoundland and Labrador also supports the conclusion that business cellular telephone numbers do not qualify as personal information.

[50] The Ministry has indicated the cellular telephone number is a business cellular telephone number of a WSA official. I recommend that the Ministry release the WSA official's cellular telephone number.

[51] The Ministry has also redacted the cellular telephone number of a third party business person on page 2 of Part 2 of the record. Decisions issued by this office dealing with non-government employees, professionals and corporate officers, have treated the issue of personal information in much the same way as those dealing with government employees. The Ministry has attempted to contact the business person to determine if it is a business telephone number or a personal one, but have not been able to reach the individual. I recommend the Ministry withhold this cellular telephone number until it can determine whether it qualifies as personal information or business card information.

### **Names of Land Owners**

[52] The Ministry has withheld the names of landowners that appear on pages 11 and 12 of Part 2 of the record. The names appear with corresponding land locations. The Ministry submits that the release of the information would disclose information about the assets of an individual. It submits, the names would qualify as personal information pursuant to subsection 24(1)(j) of FOIP.

[53] As the information is publically available from Information Services Corporation, I recommend that the Ministry release it to the Applicant.

**E-mail Addresses**

[54] On pages 32 and 35 of Part 3 of the record, the Ministry has redacted two different e-mail addresses of two different reeves of rural municipalities. The reeves had both written to the Ministry. The Ministry has indicated one of the e-mail addresses is the personal e-mail address of the reeve and the other one is the business e-mail address of a reeve. I take the same approach with e-mail addresses as I do with cellular telephone numbers. A business e-mail address would qualify as business card information and not personal information. I recommend that the Ministry release the business card information and withhold the personal information.

**IV FINDINGS**

[55] I find that subsection 17(1)(a) of FOIP applies to portions of the record.

[56] I find the Ministry correctly applied subsection 29(1) of FOIP to portions of the record.

**V RECOMMENDATION**

[57] I recommend that the Ministry release records in accordance with the table found in Appendix A of this report.

Dated at Regina, in the Province of Saskatchewan, this 12th day of June, 2018.

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

**Appendix A**

| <b>Page</b>                    | <b>Type of Record</b>                                   | <b>Description of withheld information</b>                     | <b>Exemption</b> | <b>Release or Withhold</b>                                    |
|--------------------------------|---|--|------------------|---|
| <b><i>Part 1 of Record</i></b> |   |  |                  |   |
| 1                              | E-mail  | Cellular telephone number                                      | 29(1)            | Release   |
| 2                              | E-mail  | Cellular telephone number                                      | 29(1)            | Withhold  |
| 13                             | Slide deck  | Contents of slide entitled "Results"                           | 17(1)(a)         | Release   |
| 15                             | Slide deck  | Contents of slide entitled "Closure of Illegal Drainage Works" | 17(1)(a)         | Release   |
| 16                             | Slide deck  | Contents of slide entitled "Summary"                           | 17(1)(a)         | Release   |
| <b><i>Part 2 of Record</i></b> |   |  |                  |   |
| 11                             | Appendix to Application                                 | 3 instances – names of land owners                             | 29(1)            | Release   |
| 12                             | Appendix to Application                                 | 6 instances – names of land owners                             | 29(1)            | Release   |
| 20                             | E-mail  | Statement in e-mail  | 17(1)(a)         | Release   |
| 22-25                          | E-mail attachment (Draft decision)                      | Entire document  | 17(1)(a)         | Withhold  |
| 34                             | E-mail  | Statement in e-mail  | 17(1)(a)         | Withhold  |
| 35-37                          | E-mail attachment (Draft Briefing Note)                 | Entire document  | 17(1)(a)         | Withhold only "Recommendations" section and release remainder |
| 38                             | E-mail  | Two separate statements in e-mail                              | 17(1)(a)         | Release   |
| 40                             | E-mail attachment (Draft letter page 1 of 2)            | Entire document  | 17(1)(a)         | Release   |
| <b><i>Part 3 of Record</i></b> |   |  |                  |   |
| 1                              | E-mail attachment (Draft letter page 2 of 2)            | Entire document  | 17(1)(a)         | Release   |
| 10                             | Page 10 represents 3 e-mail attachments (10A, 10B, 10C) |  |                  |   |
| 10A                            | 9 page assessment                                       | Entire document  | 17(1)(a)         | Release   |
| 10B                            | 14 page assessment                                      | Entire document  | 17(1)(a)         | Release   |
| 10C                            | 14 page assessment (identical to 10B)                   | Entire document  | 17(1)(a)         | Release   |
| 11                             | E-mail  | Statement in e-mail  | 17(1)(a)         | Release   |
| 17                             | E-mail  | Two consecutive paragraphs of e-mail                           | 17(1)(a)         | Withhold  |
| 18                             | E-mail  | Three consecutive paragraphs of e-mail                         | 17(1)(a)         | Release   |
| 32                             | E-mail  | E-mail Address   | 29(1)            | Release   |
| 35                             | E-mail  | E-mail Address   | 29(1)            | Withhold  |