



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 019-2019, 266-2019

Provincial Archives of Saskatchewan

October 11, 2019

Summary: The Applicant made an access to information request to the Provincial Archives of Saskatchewan (Archives) for a report prepared for Archives by a third party. The Applicant requested a review of the portions of the record the Archives withheld pursuant to 13(1)(b) and 17(1)(a) of *The Freedom of Information and Protection of Privacy Act*. The Commissioner found that the exemptions applied to the record other than three paragraphs and recommended only this information be released.

I BACKGROUND

- [1] On December 12, 2018, the Provincial Archives of Saskatchewan (Archives) received an access to information request for “The 2013 KPMG study on the Provincial Archives of Saskatchewan prepared for the board of directors”.
- [2] The Archives determined that the responsive record is a report entitled “Office Feasibility Study for the Saskatchewan Archives Board’s Saskatoon Location”. It was prepared for the Archives by MNP LLP (MNP) and is dated July 5, 2013. This record references the name of Archives prior to their change of name in 2015.
- [3] On January 14, 2019, the Archives provided the Applicant with the 60 page report indicating that part of the responsive record was being withheld pursuant to subsections 13(1)(b), 17(1)(a) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [4] The Applicant requested a review by my office on January 15, 2019, for the parts of the records only where subsection 17(1)(a) of FOIP had been applied and did not request a review of the parts of the records where subsections 13(1)(b) and 29(1) of FOIP were applied.
- [5] On January 17, 2019, my office provided notification to the Archives and the Applicant of our intention to undertake the review.
- [6] My office received a copy of the record and a submission from the Archives on February 12, 2019.
- [7] On July 29, 2019, my office contacted the Applicant to confirm that they were requesting only the review of the parts of the record withheld pursuant to subsection 17(1)(a) of FOIP where those parts of the record were also withheld under subsection 13(1)(b) of FOIP. At this time, the Applicant advised that they also wished my office review the parts of the record which were withheld under subsection 13(1)(b). The Applicant did not request our review of the parts of the records withheld under subsection 29(1) of FOIP.
- [8] On August 7, 2019, my office provided notification to the Archives and the Applicant of our intention to undertake the additional review.
- [9] On September 4, 2019, my office received the second submission from the Archives for our review of the additional exemption.

II RECORDS AT ISSUE

- [10] The record at issue is a 60 page report entitled “Office Feasibility Study for the Saskatchewan Archives Board’s Saskatoon Location, prepared for the Saskatchewan Archives Board by MNP”.
- [11] The Archives applied subsection 17(1)(a) of FOIP to 43 pages of the 60 page record. On five of these pages, the Archives also applied subsection 13(1)(b) of FOIP.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[12] The Archives is a “government institution” pursuant to subsection 2(1)(d)(ii) of FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did the Archives properly apply subsection 17(1)(a) of FOIP?

[13] 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;

[14] The following two-part test can be applied for subsection 17(1)(a) of FOIP:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
 2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?
- 1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?*

[15] In its submission, the Archives asserted that the information qualified as advice, proposals, recommendations, analyses and policy options.

[16] Advice is guidance offered by one person to another. It can include 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 encompasses material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It can be an implied recommendation. The “pros and cons” of

various options also qualify as advice. It should not be given a restricted meaning. Rather, it should be interpreted to include an opinion that involves exercising judgement and skill in weighing the significance of fact. It includes expert opinion on matters of fact on which a public body must make a decision for future action.

[17] A recommendation is a specific piece of advice about what to do, especially when given officially; a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious. Recommendations relate to a suggested course of action more explicitly and pointedly than “advice”. It can include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised. It includes suggestions for a course of action as well as the rationale or substance for a suggested course of action. A recommendation, whether express or inferable, is still a recommendation.

[18] A proposal is something offered for consideration or acceptance.

[19] Analysis is a detailed examination of the elements or structure of something; the process of separating something into its constituent elements. To add to this further, 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.

[20] Records containing policy options can take many forms. They might include the full range of policy options for a given decision, comprising all conceivable alternatives, or may only list a subset of alternatives that in the public servant’s opinion are most worthy of consideration. They can also include the advantages and disadvantages of each option. The list can also be less fulsome and still constitute policy options. For example, a public servant may prepare a list of all alternatives and await further instructions from the decision maker for which options should be considered in depth. Or, if the advantages and disadvantages of the policy options are either perceived as being obvious or have already been canvassed orally or in a prior draft, the policy options might appear without any

additional explanation. As long as a list sets out alternative courses of action relating to a decision to be made, it will constitute policy options.

[21] The Archives submitted that:

The report prepared by MNP LLP for the Archives was prepared for the purpose of informing the internal evolution of the Archives' policy-making process. It was not the final word but was part of the process described in the paragraph above, which included "changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighting of the relative importance of the relevant factors" as the issue was studied. This weighting of the relative importance of the relevant factors needed for making decisions was occurring not only at the Archives Board but also at the level of the Minister Responsible who was reviewing the report at the same time as the Board of Directors. Subsection 17(1)(a) of FOIP protects this internal process from public scrutiny so "full and frank" advice can be provided and so the Archives' ability to formulate and justify its policies is not eroded.

[22] The Archives applied subsection 17(1)(a) of FOIP on pages 2 and 10 to the percentage of weighting for each of the criteria MNP used to evaluate the options. The Archives advised that these weightings were developed together by the Archives and MNP.

[23] The Archives indicated in *3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 FC 421, 2001 FCA 254 (CanLII) that records containing the percentage weightings ascribed by a working group to the various criteria for evaluating licence applications were exempt as "advice or recommendation".

[24] In the above case, Justice Evans determined that:

However, it is in my view untenable to characterize as essentially factual the documents emanating from members of the working group that deal with the percentage weightings. The reason for the group's informing the selection panel, and ultimately the Minister, of the bases of their evaluations was to suggest to the Minister the appropriate rankings of the applications, and not just to give an account of how they had gone about their work. The percentages represented the working group's view, approved by the Assistant Deputy Minister, of the relative importance of the various government objectives being pursued through the allocation of the licences.

[25] The percentage weightings were presented in the report as a recommended means of assessing the options for the Archives and not merely fact, therefore, they constitute advice.

- [26] On page 11, the Archives withheld three bullets which they advise identifies the alternative options which were identified by MNP and not identified in the RFP. The Archives states that these additional options are policy options and proposals. These alternative options are offered for consideration of the Archives. I find that this information constitutes policy options and proposals.
- [27] The Archives also applied subsection 17(1)(a) of FOIP to pages 3 – 5, 12, 15-16, 19, 21, and 22. These pages contain options along with the potential advantages and disadvantages of each of these options. Pages 3 – 5 is the executive summary of the other pages. Only the options which were not identified in the RFP have been withheld, whereas the advantages and disadvantages have been withheld for each of the options. I find that this information constitutes policy options.
- [28] The Archives applied subsection 17(1)(a) of FOIP to the key findings on pages 5, 6 and 32 – 34. Pages 5 and 6 contain the executive summary of the findings on pages 32 – 34. These findings were determined and presented as a result of the analysis of the various options. I find that this information constitutes advice.
- [29] The Archives applied subsection 17(1)(a) of FOIP to the information which is the advice of which option MNP suggests the Archives adopt and is presented on pages 6 and 35 by MNP. The first paragraph on page 35 is an introduction to the recommendation and states that the recommendation follows this paragraph. This paragraph is not part of the recommendation and should be released. I find that the remaining information containing the suggested course of action along with the rationale for this constitutes a recommendation.
- [30] Pages 12-13, 16, 19, 21 and 23 contain financial information for each of the options identified. Some of the factual information on these pages has been released. The information which has been withheld is the opinion of MNP to be considered by the Archives. The information withheld is information which is assumptions or estimates of MNP and in some cases, reveals the options identified. I find that this information constitutes advice.

- [31] The information withheld on pages 13, 16, 19-20, 21, and 23 contains the conclusions of the advantages and disadvantages of each of the options identified. I find that this information constitutes policy options.
- [32] The information contained on pages 13-15, 17-18, 20, 21-22, and 23-25 are the results of stakeholder interviews. The Archives states that some factual information on pages 12, 16 and 23 has been released and that the bullets which have been withheld constitute the opinion of MNP derived from analysis rather than fact and is option derived from analysis. The Archives advises that “MNP stated in the record that the input has been categorized based on a combination of the criteria and specific topics of interest relevant to these options”. I find that this information constitutes advice.
- [33] The information contained on pages 26-28 and 52 of the record is financial information and the Archives advises it contains analysis of the financial implications of each of the options identified. This analysis is based on various assumptions. I find that the information withheld on these pages consists of advice.
- [34] The information on pages 28-31 is charted information. The Archives indicated that these charts and the accompanied commentary are a way of examining the data in a way that allowed MNP to learn more about it, or to explain or interpret it. I find that these charts represent a detailed examination of the elements of the data to form the basis of the advice and recommendation and that this constitutes analysis.
- [35] Information obtained from other jurisdictions is contained on pages 36 – 43 with part being withheld under both subsections 17(1)(a) and 13(1)(b) of FOIP. Pages 36 – 39 is an overview of the information presented on the following pages and has, for the most part, been released. Some of the financial information is withheld on page 39. The Archives has indicated that this information is withheld as it is analysis which was obtained in confidence from another jurisdiction.
- [36] These pages contain a table, which separates into comparable components, the information gathered during the jurisdictional interviews, to inform the advice presented by MNP. I

find that the information withheld constitutes analysis and will assess whether it meets the second part of the test later in this Report.

[37] The Archives withheld most of the information on pages 40 – 43 as analysis, but did not provide their argument for doing so in their submission. These pages contain information which MNP obtained from other jurisdictions and is merely the written presentation of that information. There is no detailed examination or evaluation of this information. I find that Archives did not provide enough information to conclude that the information meets the first part of the test. This information was also withheld under 13(1)(b) of FOIP and I will assess this further in this Report.

[38] Pages 46-50 contain the interview guides which were used to gather the jurisdictional information. Two questions on page 47 have been withheld along with seven questions on page 49. The Archives advised that the first bullet on page 47 was withheld as it makes reference to an appendix of another document which involved internal analysis. The name of a document does not constitute analysis unless it somehow could be demonstrated that releasing the name could reveal it. I find that the first part of the test does not apply to this bullet and that it should be released.

[39] The question withheld on page 47 as well as the questions withheld on page 49 are questions that relate to an option identified by MNP during their analysis. These questions were developed based on the policy options identified by MNP for analysis purposes. I find that the information withheld on these pages is part of the analysis that could reveal these options and therefore meets the first part of the test.

[40] The majority of the information on pages 53 to 55 has been released. The Archives advised that the information that has been withheld under subsection 17(1)(a) of FOIP is information that identifies the options developed by MNP that were not in the RFP and is information that constitutes advice rather than fact. This material would reveal options and some assumptions of the analysis of those options. I find that this information constitutes advice.

[41] Schedules 3 and 4 have been withheld in full, other than the headings, under subsection 17(1)(a) of FOIP as analysis and advice. These two pages contain estimates costs and potential implications based on those estimates. I find that the information in these pages constitutes analysis and advice.

[42] I will now consider the second part of the test.

2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

[43] For information to be developed by or for a government institution, the person developing the information should be an official, officer or employee of the government institution, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the government institution.

[44] To put it another way, in order to be engaged in an advisory role, or have a sufficient connection to the government institution, the advice, proposals, recommendations, analyses and/or policy options should:

- i) be either sought, be expected, or be part of the responsibility of the person who prepared the record;
- 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.

[45] General feedback or input from stakeholders or members of the public would not normally qualify, as they are not sufficiently engaged in an advisory role. For example, general stakeholders and members of the public responding to a survey or poll would not qualify as they have simply been asked to provide their own comments, and have developed nothing on behalf of the government institution. However, where a government institution asks a specific stakeholder – who has a particular knowledge, expertise or interest in

relation to a topic – to provide advice, proposals, recommendations, analyses or policy options for it, it would be specifically engaging the stakeholder (even if not paid) in an advisory role and there would be a sufficient close connection to the government institution.

[46] The information from other governments on page 39 does not meet the second part of the test. The information was prepared by the other governments through the survey. In order for the information to be considered under this part of the test it must be prepared by someone engaged in an advisory role. The other governments were merely providing information and comments in response to the jurisdictional survey and were not in an advisory role. This information is also withheld under 13(1)(b) of FOIP and I will assess this further in this Report.

[47] In response to an RFP by the Archives, MNP was contracted to perform the feasibility study. The information in question is contained in the report which was prepared by MNP and provided for the purpose of taking an action. Therefore, the second part of the test has been met for the remaining withheld information.

[48] I find that subsection 17(1)(a) of FOIP does not apply to the introduction of a recommendation found on page 35 where it does not reveal the recommendation itself.

[49] I find that subsection 17(1)(a) of FOIP does not apply to the name of a document found on page 47.

[50] I find that subsection 17(1)(a) of FOIP does not apply to the information from other governments found on pages 39 - 43.

3. Did the Archives properly apply subsection 13(1)(b) of FOIP?

[51] Subsection 13(1)(b) of FOIP provides as follows:

13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:

...

(b) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;

[52] The Archives applied subsection 13(1)(b) of FOIP to pages 39 to 43 which contains information gathered from other jurisdictions.

[53] This is a mandatory class-based exemption. It permits refusal of access to information in a record where the information was obtained in confidence, implicitly or explicitly from another provincial or territorial government in Canada unless there is consent to release or the information was made public. It includes the province or territory's agencies, Crown corporations and other institutions.

[54] The following three -part test must be met in order for subsection 13(1)(b) of FOIP to apply:

1. Was the information obtained from the government of another province or territory of Canada?
2. Was the information obtained implicitly or explicitly in confidence?
3. Is there consent to disclose the information or has the information been made public?

1. Was the information obtained from the government of another province or territory of Canada?

[55] Each of the public bodies who were consulted for the jurisdictional research are governments of another province or territory of Canada, or its agencies, Crown corporations or other institutions, therefore, the first part of the test has been met.

[56] I will now consider the second and third part of the test.

2. Was the information obtained implicitly or explicitly in confidence?

3. Is there consent to disclose the information or has the information been made public?

[57] Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential.

[58] Factors to consider when determining whether information was obtained in confidence implicitly include (not exhaustive):

- What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the public body or the local authority?
- Was the information treated consistently in a manner that indicated a concern for its protection by the public body and the local authority from the point it was obtained until the present time?
- Is the information available from sources to which the public has access?
- Does the public body have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially?
- Was there a mutual understanding that the information would be held in confidence? Mutual understanding, in this context, means that the public body and the local authority both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.

[59] The above factors are not a test but rather guidance on factors to consider. Each case will require different supporting arguments. The bare assertion that the information was obtained implicitly in confidence would not be sufficient.

[60] In its submission, the Archives indicated that the information withheld on pages 39 – 43:

...was obtained in confidence for the purpose of the study and analysis. The confidentiality was implicit based on the type of information provided. The information was obtained through interviews conducted with representatives from the provincial archives in four provinces. This method of data collection was selected to obtain analysis of current archival facilities in other jurisdictions including some options and observations of the interviewed individuals. Further ARCHIVES has consistently treated this information as confidential. The report was prepared for the

Saskatchewan Archives Board and has been shared only with the Board, and with Government and University of Saskatchewan officials and Archives employees who had a need to know the information for the purpose of decision-making.

[61] The portion of financial information which was withheld on page 39 is current costs and revenue sources. The information was withheld for three of the four provinces interviewed. The Archives indicated that information which was withheld was an estimate and not actual.

[62] The information withheld on pages 40 – 43 contains information on plans regarding reorganization and facilities and the issues, perceptions and observations of the staff members providing it.

[63] Considering the type of information involved, that the public body has treated it consistently with confidence and the frankness of the comments provided by the other governments, it would be reasonable to have a mutual understanding by the parties that the information was obtained in confidence.

[64] Further, the Archives indicated that there was an expectation of confidentiality of the information and no consent for disclosure was provided by the other jurisdictions. I find that the second and thirds parts of the test have been met.

[65] Accordingly, I find that subsection 13(1)(b) of FOIP applies to the information withheld on pages 39 to 43.

IV FINDINGS

[66] I find that subsection 17(1)(a) of FOIP applies to the information withheld on pages 2-6, 10-35, 47, 49, 52-58.

[67] I find that subsection 17(1)(a) of FOIP does not apply to part of the information withheld on pages 35, 39-43 and 47.

[68] I find that subsection 13(1)(b) of FOIP applies to the information withheld on pages 39 to 43.

V RECOMMENDATIONS

[69] I recommend the Archives release the information identified on pages 35 and 47 to the Applicant.

[70] I recommend that the Archives continue to withhold the remaining information.

Dated at Regina, in the Province of Saskatchewan, this 11th day of October, 2019.

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