

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 021-2015

Ministry of Central Services

Summary: The Applicant submitted an access to information request to the Ministry of Central Services (Central Services). Central Services 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, Central Services advised they were applying all of subsection 16(1) of FOIP to the responsive records. The Commissioner found that the records at issue were exempt from release pursuant to subsection 16(1)(a) of FOIP and recommended that Central Services continue to withhold the responsive records.

I BACKGROUND

- [1] On December 24, 2014, the Ministry of Central Services (Central Services) 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 21, 2015, Central Services 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 Central Services provide a copy of the record, Index of Records and submission in support of subsection 16(1)(a) of FOIP.

[5] In Central Services' submission to my office, they indicated that they were applying all of subsection 16(1) of FOIP to the 16 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 responsive record consists of 16 pages.

III DISCUSSION OF THE ISSUE

[7] Central Services 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] Central Services' 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 Central Services 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] FOIP does not provide a specific exemption for material that briefs a member of Executive Council in assuming responsibility for a Ministry. Equivalent pieces of

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 necessarily 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] While subsection 7(4) of Newfoundland and Labrador's *Access to Information and Protection of Privacy Act* limits access to records such as briefing books, there are opinions that certain portions of these records could be eligible for release.

[15] 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...

[16] 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.

[17] In my office's Review Report 086/2013, subsection 16(1) of FOIP was discussed as follows:

[11] Government Relations asserted that its position was that subsection 16(1) is a "blanket exemption" for all Cabinet documents and other confidences that, not only is before or proposed to be before Executive Council, but also has been considered by Executive Council. It stated that subsections 16(1)(a) to 16(1)(d) are examples of Cabinet confidences but is not an exhaustive list. Further, it asserted this was an interpretation that is consistent with the Supreme Court of Canada (SCC) decision *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23. In that decision, the SCC stated that public access to certain records may prevent full

and frank deliberation and discussions that are required for the proper functioning of Cabinet and therefore these records should be exempt. This SCC decision does not state that records containing matters already considered by Cabinet should be exempt.

...

[14] I find that the records at issue, agendas for Minister briefings, would qualify for exemption pursuant to subsection 16(1) of FOIP.

[18] Subsection 12(1) of Ontario's *Freedom of Information and Protection of Privacy Act* is similar to subsection 16(1) of Saskatchewan's FOIP and provides:

12. (1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

(a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

(d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and

(f) draft legislation or regulations.

[19] In Order PO-2677 from the Ontario Information and Privacy Commissioner's Office, it was found that:

Previous orders issued by the Commissioner's office have held that sections 12(1)(c) and (e) are intended to apply to records which either have been considered or are about to be considered by Executive Council or its committees in situations where final decisions respecting the subject of the deliberations have not yet been made or

implemented. The exemptions are not meant to apply to documents which have already been acted upon by these bodies (Orders 60, 73 and P-323).

...

In Order P-1182, former Assistant Commissioner Tom Mitchinson confirmed the approach taken by this office to the application of the exemption in [section 12(1)(e)], and stated:

In Order 131, former Commissioner Sidney B. Linden held that in order to qualify for exemption under this subsection, the record itself must have been prepared to brief a Minister in relation to matters that are either:

- (a) before or proposed to be brought before the Executive Council or its committees; or,
- (b) the subject of consultations among ministers relating to government decisions or the formulation of government policy.

In Orders 22 and 40, Commissioner Linden, in addressing the proper interpretation to be placed on the wording of section 12(1)(e), held that:

The use of the present tense in the subsection precludes its application to a record that has already been presented to and dealt with by the Executive Council or its committees.

In my view, the use of the word “are” in that portion of the section which discusses consultations among ministers also precludes the application of section 12(1)(e) to a record which has been, but is no longer, the subject of consultations among ministers. The former Assistant Commissioner then applied this approach to the records at issue in that appeal.

In Order P-1205, Former Assistant Commissioner Mitchinson again considered whether records, which in that appeal consisted of draft and final versions of an “Information Sheet” which accompanied draft regulations being considered by the Legislation Committee of Cabinet, were exempt under section 12(1)(e). The former Assistant Commissioner re-stated the requirements for this section as set out in Orders 22, 40 and 131, and found that the records did not qualify for exemption under section 12(1)(e), because “these records have either already been presented to and dealt with by Cabinet or are no longer the subject of ongoing consultations among Ministers.”

However, the Assistant Commissioner went on to determine that portions of the records qualified for exemption under the introductory wording of section 12(1), as their disclosure would reveal the contents of records which qualified for exemption under the introductory wording of that section. On that basis, he found that the records were properly exempt pursuant to the introductory wording of section 12(1) of the Act.

[20] 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?

[21] 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)

[22] 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 attaching these different types of documents in a binder does not automatically make all of the documents qualify for exemption.

[23] 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.

[24] The application of subsection 16(1) of FOIP will need to be considered for each of the documents contained in the briefing binder.

[25] The 16 pages that Central Services identified as being responsive to the Applicant's request are documents that identify issues and provide recommended responses and background information on the identified issues.

[26] Documentation reflecting advice, proposals, recommendations, analyses or policy options developed from outside of the Executive Council for presentation to Executive council is intended to be covered by subsection 16(1)(a) of FOIP.

[27] *Advice* includes the analysis of a situation or issue that may require action and presentation of options for future action.

[28] The record would qualify as advice pursuant to subsection 16(1)(a) of FOIP as the documents list issues faced by Central Services and identifies how to address the issues.

IV FINDING

[29] I find that subsection 16(1)(a) of FOIP applies to the responsive record.

V RECOMMENDATION

[30] I recommend that Central Services take no further action with regard to this record.

Dated at Regina, in the Province of Saskatchewan, this 20th day of May, 2015.

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