



REVIEW REPORT 023-2017 & 078-2017

Saskatchewan Power Corporation

July 13, 2017

Summary: The Applicant requested records from the Saskatchewan Power Corporation (SaskPower). SaskPower withheld some information in records indicating the information was “non-responsive” to the access request. SaskPower also withheld other information citing subsection 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Upon review, the Commissioner found subsection 17(1)(a) of FOIP applied to the information requested by the Applicant. Further, that the remaining information in the record was non-responsive to the access request.

I BACKGROUND

[1] On December 28, 2016, Saskatchewan Power Corporation (SaskPower) received an access to information request from the Applicant for:

Access to Information Request SPC44/16G makes multiple references to 13 other options that were considered before SaskPower ultimately purchased land at the Global Transportation Hub. Please provide a list of the other sites and the project cost for each.

[2] By letter dated January 16, 2017, SaskPower provided its response to the Applicant indicating that access to responsive records was denied. In addition, SaskPower advised that the information was being withheld pursuant to subsection 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [3] On February 7, 2017, my office received a Request for Review from the Applicant, in which he disagreed with SaskPower's application of the above provision.
- [4] On February 7, 2017, my office notified SaskPower and the Applicant of my office's intent to conduct a review and invited all parties to provide submissions. My office also requested SaskPower provide my office with a copy of the record.
- [5] On March 2, 2017, my office received a copy of the record from SaskPower along with its submission. My office noted that the record provided to my office was entirely severed except for a small portion in which SaskPower applied subsection 17(1)(a) of FOIP. The remaining record was marked as non-responsive. My office also noted that SaskPower did not indicate in its January 16, 2017 response to the Applicant that it was also withholding information as non-responsive. On April 13, 2017, my office contacted the Applicant who indicated he did not know there was information withheld as non-responsive. The Applicant indicated he would like the issue of non-responsive also addressed in the review.
- [6] On April 19, 2017, my office opened a second review file (078-2017) and provided notification to SaskPower that my office would also be reviewing the application of non-responsive and requested that an unsevered version of the record be provided to my office along with SaskPower's submission in support of its application of non-responsive. On May 10, 2017, my office received these materials from SaskPower.

II RECORDS AT ISSUE

- [7] The record consists of two documents totalling 27 pages. Both documents are decision items. The first one is 10 pages. The second one is 17 pages. SaskPower applied subsection 17(1)(a) of FOIP to information that is repeated in both decision items which totals three pages. The remainder of both documents was severed as non-responsive.

III DISCUSSION OF THE ISSUES

[8] SaskPower is a “government institution” pursuant to subsection 2(1)(d)(ii) of FOIP.

1. Did SaskPower properly apply subsection 17(1)(a) of FOIP?

[9] Subsection 17(1)(a) of FOIP is a discretionary exemption and provides as follows:

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;

[10] This exemption is meant to allow for candor during the policy-making process, rather than providing for non-disclosure of all forms of advice or all records related to the advice. All three parts of the following test must be met in order for subsection 17(1)(a) of FOIP to be found to apply:

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] SaskPower applied subsection 17(1)(a) of FOIP to information on a chart on page 5 of the first decision item and the same chart repeated on pages 6 and 7 of the second decision item.

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?

[12] In its submission, SaskPower asserted that the list of sites and prices was advice, proposals, recommendations, analyses and/or policy options.

[13] *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.

[14] *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.

[15] *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.

[16] 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.

[17] In its submission, SaskPower asserted that the tables that present the list of options for the logistics warehouse complex is a financial, safety and regulatory analysis of the recommendations and the alternatives for the purchase of land for the development.

[18] In his submission, the Applicant asserted that a list of sites and prices, devoid of any analysis, advice or recommendation, clearly qualifies as a presentation of facts and therefore, the use of this exemption is inappropriate. Further, he argued that in Review Report 042-2015, I found that Excel Workbooks that contained only raw numerical data did not qualify as advice because there was no written context setting out the advantages or disadvantages or references to any particular course of action. Further, that I found in

that Review Report that the provision is meant to protect actual advice, not the information that is used to formulate the advice. Therefore, he asserted that a list of sites and costs may inform advice, but it is not itself advice – it is simply a presentation of facts.

[19] SaskPower asserted that the list of sites and prices represents the results of financial analysis, on the construction of the logistics warehouse at various potential locations, required to support a decision. Further, it asserted that it is an estimate of costs that are based on a series of high-level assumptions that are subject to change. By comparison, it is not a list of the asking price of alternative properties that could have been purchased, which would have been factual information.

[20] I am persuaded by SaskPower's arguments. Therefore, based on a review of the record and SaskPower's submission, I find that the list of sites and prices constitutes analyses. The first part of the test has been met.

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.***

[21] SaskPower asserted that the decision items, which contain the list of sites and prices, were sought, expected and part of the responsibility of the person who prepared the decision items. SaskPower explained that the decision items were prepared by the Acting Manager of Properties and Facilities Management and submitted by the Chief Commercial Officer. Further, it submitted that the decision items were prepared for the purpose of providing the members of the Audit and Finance Committee of the Board and the Board of Directors with advice, recommendation and analyses necessary for them to consider and approve the recommendation or consider one of the alternative options listed.

[22] Based on the face of the record and SaskPower's submission, it is clear the second part of the test is met.

3. Was the advice, recommendations, analyses and/or policy options developed by or for the public body?

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

[24] In its submission, SaskPower submitted that the decision items were developed by and for SaskPower.

[25] On the face of the record, it is clear that this is the case. The decision items indicated that they were presented to the SaskPower Audit and Finance Committee and the Board of Directors. The decision items have a signature line for the Chief Commercial Officer and indicate they were prepared by the Acting Manager, Properties and Facilities Manager. I am satisfied that the third part of the test has been met.

[26] In conclusion, as all parts of the test have been met, I find that subsection 17(1)(a) of FOIP was appropriately applied to the list of sites and prices.

2. Is the remainder of the information in the records responsive to the access request?

[27] When a public body receives an access to information request, it must determine what information is responsive to the access request.

[28] *Responsive* means relevant. The term describes anything that is reasonably related to the request. It follows that any information or records that do not reasonably relate to an Applicant's request will be considered "not-responsive". The Applicant's access request

itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive.

[29] A public body can sever information as non-responsive only if the Applicant has requested specific information, such as his or her own personal information. The public body may treat portions of a record as non-responsive if they are clearly separate and distinct and not reasonably related to the access request.

[30] The purpose of FOIP is best served when a government institution adopts a liberal interpretation of a request. If a government institution has any doubts about its interpretation, it has a duty to assist the Applicant by clarifying or reformulating it.

[31] As noted earlier, the Applicant's request was for:

Access to Information Request SPC44/16G makes multiple references to 13 other options that were considered before SaskPower ultimately purchased land at the Global Transportation Hub. Please provide a list of the other sites and the project cost for each.

[32] SaskPower submitted that the Applicant's request was very particular in the scope of the request to render the balance of the record non-responsive. Further, it submits that the responsive parts of the decision items are the tables that present the list of options for the logistics warehouse complex together with their costs. SaskPower argues that the Applicant requested a list of the 13 sites that were considered before purchasing the land at the Global Transportation Hub (GTH) and the projected cost of each, which is exactly what the tables in the decision item are.

[33] Upon review of the information in the decision items they do not appear to be responsive to the Applicant's request. The Applicant was specific in that he was seeking a list and project cost for the 13 other options that were considered by SaskPower. The chart lists the 13 other options and the cost. Therefore, I find that the information is non-responsive to the Applicant's access request.

[34] It is necessary to address a couple of the arguments raised in SaskPower's submission. It asserted that the Applicant does not have an unfettered right to a review by the Commissioner and the Commissioner must first be satisfied that there are reasonable grounds to review. SaskPower argued that there were not reasonable grounds to review whether the entirety of the decision items were responsive records to the specific access request and it was not necessary to use "non-responsive" in its section 7 response to the Applicant.

[35] An Applicant is entitled to records upon request. Section 5 of FOIP provides the right of access to records as follows:

5 Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to **records** that are in the possession or under the control of a government institution.

[emphasis added]

[36] Where access to a record is refused, the public body must set out the reason for the refusal and identify the specific provision of FOIP on which refusal is based (see subsection 7(2)(d) of FOIP). There is no explicit authority in FOIP to redact records as non-responsive. However, it has been the practice of this office thus far, to accept the application of non-responsive by public bodies. Despite this, there have been several cases where, upon review, my office has found that information taken out of a record as non-responsive was indeed responsive (e.g. Review Reports 016-2014, 110-2015, 112-2015 and 061-2017).

[37] The Newfoundland and Labrador Commissioner recently issued an update regarding the Newfoundland & Labrador OIPC's position on non-responsive redactions stating:

There is no explicit authority in *ATIPPA, 2015* to redact records as non-responsive. At one point a significant number of Canadian jurisdictions permitted redactions of non-responsive material. This is now the minority view. As an example, see the decision of Nova Scotia's Commissioner (2016 NSFOIPOP 10, <https://www.canlii.org/en/ns/nsfoipop/doc/2016/2016nsoipc10/2016nsoipc10.html>) rejecting non-responsive redactions entirely:

In my opinion, providing an applicant with a complete copy of a record subject only to limited and specific exemptions, even if this means providing what the public body views as “out of scope” or “not responsive” information is entirely consistent with the purposes of FOIPOP. Access to “all government information” is how FOIPOP achieves its purposes of facilitating informed public participation in policy formulation, ensuring fairness in government decision-making and permitting the airing and reconciliation of divergent views. In addition, such an approach gives meaning to the Court’s decision in O’Connor that FOIPOP is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada.

In contemplating whether my office needs to reevaluate its position, questionable, excessive and/or inappropriate employment of non-responsive redactions may necessitate that exercise.

[38] Currently, my office accepts the application of non-responsive to information in records. However, that practice may need to be reconsidered if its application by public bodies is counter to the purposes of the legislation.

[39] In conclusion, there are reasonable grounds to review this issue. According to the Applicant, SaskPower did not provide him with a copy of the record when it responded to his access request. In addition, SaskPower’s section 7 response to the Applicant did not indicate it was also withholding information as non-responsive. Such a practice is not transparent and undermines the purposes of FOIP. Further, it places the Applicant in an unfair position when it comes to requesting a review by my office. In the interest of fairness and transparency, best practice is to indicate when information in a record is being withheld as non-responsive and to give reasons why. This was recommended in my Review Report 061-2017. Finally, for the reasons above, I will review the application of non-responsive when requested to do so by Applicants.

[40] I recommend SaskPower amend its policy and procedures so that in its section 7 letters to Applicants it indicates when records are being withheld as non-responsive or information is being severed as non-responsive and give reasons why.

IV FINDINGS

[41] I find that subsection 17(1)(a) of FOIP was appropriately applied to the list of sites and prices.

[42] I find that the remainder of the information in the decision items is not responsive to the access request.

V RECOMMENDATIONS

[43] I recommend that SaskPower continue to withhold the two columns which list the sites and prices on page 5 of the first decision item and the same information repeated on pages 6 and 7 of the second decision item.

[44] I recommend that SaskPower revise its policy and procedures so that in its section 7 letters to Applicants it indicates when records are being withheld as non-responsive or information is being severed as non-responsive and give reasons why.

Dated at Regina, in the Province of Saskatchewan, this 13th day of July, 2017.

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