



REVIEW REPORT 025-2017

Saskatchewan Power Corporation

July 13, 2017

Summary: The Applicant requested records from the Saskatchewan Power Corporation (SaskPower). SaskPower withheld the records in full citing subsections 17(1)(a) and (f) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Upon review, the Commissioner found that subsection 17(1)(f) of FOIP was appropriately applied. Further, he found that subsection 17(1)(a) of FOIP was appropriately applied to some of the information but not all. He recommended some information be released to the Applicant.

I BACKGROUND

[1] On May 25, 2016, Saskatchewan Power Corporation (SaskPower) received an access to information request from the Applicant for:

Please provide all reports or other documentation analyzing and/or evaluating the possibility of purchasing land in the Global Transportation Hub from January 1, 2012 until December 30, 2013.

[2] By letter dated February 3, 2017, SaskPower provided its response to the Applicant indicating that access to some responsive records was granted. In addition, SaskPower advised that some records were being withheld in full pursuant to subsection 17(1)(a) and (f) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On February 8, 2017, my office received a Request for Review from the Applicant, in which he disagreed with SaskPower's application of the above provision.

[4] Also on February 8, 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 1, 2017, my office received a copy of the record from SaskPower along with its submission.

II RECORDS AT ISSUE

[6] The record consists of three documents totalling 31 pages. The first document is the Board of Directors Minutes totalling two pages. The remaining two documents are decision items. The first one is 12 pages. The second one is 17 pages. All 31 pages have been withheld in full.

III DISCUSSION OF THE ISSUES

[7] 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?

[8] 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;

[9] This exemption is meant to allow for candor during the policy-making process, rather than providing for non-disclosure of all forms of 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 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?

[10] SaskPower applied subsection 17(1)(a) of FOIP to all of the information in two decision items.

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

[11] In its submission, SaskPower asserted that the information withheld was advice, proposals, recommendations, analyses and/or policy options. Further, it asserted that the decision items provide a recommendation together with advice and analyses of the recommendation and the alternatives presented.

[12] *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.

[13] *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.

[14] *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.

[15] 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.

[16] I note that no severing was applied to the decision items as required by section 8 of FOIP. The ‘advice from officials’ provision has been the most frequently used discretionary exemption by Saskatchewan public bodies since at least 2002 (Review Report LA-2007-001 at para. [48]). In several Review Reports, my office has quoted from *Public Government for Private People: The Report of the Ontario Royal Commission on Freedom of Information and Individual Privacy/1980* (e.g. Review Reports LA-2007-001, LA-2011-001 & F-2014-001). This is a particularly persuasive document since almost all provincial and territorial access to information laws, including FOIP in Saskatchewan have been constructed from its foundation. The following emphasizes the importance of factual material and information underlying decisions taken by government being made accessible to the public:

The need for confidentiality pertaining to various aspects of decision-making processes is not restricted to decisions at the Cabinet level. An absolute rule permitting public access to all documents relating to policy formulation and decision-making processes in the various ministries and other institutions of the government would impair the ability of public institutions to discharge their responsibilities in a manner consistent with the public interest. On the other hand, were a freedom of information law to exempt from public access all such materials, it is obvious that the basic objectives of the freedom of information scheme would remain largely unaccomplished. There are very few records maintained by a governmental institution that cannot be said to pertain in some way to a policy formulation or decision-making process.

Although the precise formula for achieving a desirable level of access for deliberative materials has been a contentious issue in many jurisdictions in which freedom of information laws have been adopted or proposed, there is broad general agreement on two points. First, it is accepted that some exemption must be made for documents or portions of documents containing advice or recommendations prepared for the purpose of participation in decision-making processes. Second, there is a general agreement that documents or parts of documents containing essentially factual material should be made available to the public. If a freedom of information law is to have the effect of increasing the accountability of public institutions to the electorate, it is essential that the information underlying decisions taken as well as the information about the operation of government programs must be accessible to the public. We are in general agreement with both of these propositions.

[17] Subsection 17(1)(a) of FOIP would not apply where disclosure of the information would not reasonably be expected to reveal advice, recommendations, proposals, analyses or policy options. In addition, it would not apply to the names, dates and subject lines that do not reveal advice or substantive information.

[18] It is apparent on the face of the record that there are portions of the decisions items that are factual information. The following pieces of information do not contain advice, recommendations, proposals, analyses or policy options and should be released:

Record #2: Decision Item:

- Headers (includes title, presented to, subject, meeting date);
- Footers;
- All headings throughout the document;
- *Approvals Required* section (page 1);
- Portion of the background section (page 3) – the first paragraph and bulleted list;
- *Advance Consultation* section (page 12);
- *Submitted by* section (page 15); and
- Pages 16 & 17.

Record #3: Decision Item:

- Headers (includes title, presented to, subject, meeting date);
- Footers;
- All headings throughout document;
- *Approvals Required* section (page 1);
- Portion of the background section (pages 2 & 3) – the first paragraph and bulleted list;
- *Advance Consultation* section (page 5);
- *Submitted by* section (page 8); and
- Order in Council.

[19] Subsection 17(1)(a) of FOIP does not apply to this information and it should be released to the Applicant.

[20] The remainder of the information in the two decision items contains advice, recommendations and analyses. Options are presented and analyses follow. There are

also recommendations made about the best option. The first part of the test is met for this remaining information.

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] In its submission, SaskPower submitted that the decision items were sought, expected and part of the responsibility of the person who prepared them. They were prepared by the Acting Manager of Properties and Facilities Management and submitted by the Chief Commercial Officer. SaskPower asserted that these are the individuals at SaskPower who have the knowledge necessary to provide this type of advice, recommendation and analyses and it was part of the responsibilities to do so. 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 decision items meet the second part of the test.

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] As all three parts of the test have been met for some of the information in the decision items, I find that subsection 17(1)(a) of FOIP was appropriately applied by SaskPower.

[27] I also find that subsection 17(1)(a) of FOIP was not appropriately applied to other information and recommend that information be released.

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

[28] Subsection 17(1)(f) 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:

...

(f) agendas or minutes of:

(i) a board, commission, Crown corporation or other body that is a government institution; or

(ii) a prescribed committee of a government institution mentioned in subclause (i);

[29] This provision is intended to protect agendas and/or meeting minutes as they relate to decision-making within the bodies listed in the provision. The government institution must demonstrate that the agenda or minutes are those of one of the bodies noted in the provision and it can only be applied to the records of that body. Both parts of the following test must be met:

1. Is the record an agenda of a meeting or minutes of a meeting?
2. Was it a meeting of:
 - i. a board, commission, Crown corporation or other body that is a government institution? or
 - ii. a committee of a board, commission, Crown corporation or other body that is a government institution as prescribed in the *FOIP Regulations*?

[30] SaskPower applied this exemption to all of the information in a two page document titled, *Minutes – Thursday, May 23, 2013*. In its submission, SaskPower asserted that the document constituted minutes of a meeting. Further, that it is a Crown corporation and a government institution, as it is listed in the Appendix at Part 1 of *The Freedom of Information and Protection of Privacy Regulations (FOIP Regulations)*. Accordingly, it asserted, the Minutes were properly classified as minutes of a meeting of a Crown corporation that is a government institution under section 17(1)(f) of FOIP.

[31] Based on a review of the document and on SaskPower's submission, it is clear the document contains minutes from a SaskPower Board of Directors meeting. Further, I agree that SaskPower is a Crown corporation that is a government institution under FOIP. Therefore, both parts of the test are met. I find that subsection 17(1)(f)(i) of FOIP applies to the meeting minutes.

IV FINDINGS

[32] I find that subsection 17(1)(a) of FOIP was appropriately applied to some information but not to other information.

[33] I find that subsection 17(1)(f) of FOIP was appropriately applied to the meeting minutes.

V RECOMMENDATIONS

[34] I recommend that SaskPower release the information found not to qualify for exemption under subsection 17(1)(a) of FOIP.

[35] I recommend that SaskPower continue to withhold the information found to qualify for exemption under subsection 17(1)(a) of FOIP.

[36] I recommend that SaskPower continue to withhold the meeting minutes found to qualify for exemption under subsection 17(1)(f)(i) of FOIP.

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

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