



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **REVIEW REPORT 026-2019**

### **Ministry of Social Services**

**December 11, 2019**

**Summary:** The Applicant requested a review of the Ministry of Social Services' (the Ministry) response to an access to information request for records related to social impact bonds. The Commissioner reviewed whether subsections 13(1)(a), 16(1)(a), 17(1)(a), 17(1)(b) and 18(1)(d) of *The Freedom of Information and Protection of Privacy Act* applied to portions of the record. The Commissioner recommended that the Ministry continue to withhold some portions of the record and release other portions of the record. The Commissioner also recommended that the Ministry release headings and footers and any already publicly available information.

### **I BACKGROUND**

[1] On November 7, 2018, the Applicant submitted an application to the Ministry of Social Services (the Ministry) for access to the following records, which the Ministry received on November 14, 2018:

Copies of any briefing notes or reports, with attachments, regarding plans to use social impact bonds in Saskatchewan, and any evaluations of existing social impact bonds in the province. I am asking for records from January 1, 2016 to present.

[2] On December 18, 2018, the Ministry wrote to the Applicant to indicate that the Ministry required an additional thirty days to process the request, pursuant to subsections 12(1)(a)(ii) and 12(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Ministry indicated that the additional time required was necessary because of the large

number of records involved that would unreasonably interfere with operations, and because necessary consultations could not be completed within the original thirty day legislative timeline.

- [3] On January 14, 2019, the Ministry provided the Applicant with their section 7 response and provided a copy of the responsive records. The Ministry indicated in its letter to the Applicant that some of the information was denied pursuant to subsections 13(1)(a), 16(1)(a), 17(1)(a), 17(1)(b) and 18(1)(d) of FOIP.
- [4] On January 18, 2019, the Applicant wrote to my office to request a review of the exemptions applied by the Ministry. In their letter, the Applicant noted that over 90% of the information provided to them by the Ministry had been redacted, including dates and subject lines of documents, which the Applicant noted prevented them from assessing the timeframe of the records. The Applicant indicated that they felt the exemptions applied by the Ministry were excessive.
- [5] On January 22, 2019, my office provided notifications to the Applicant and the Ministry of its intention to undertake a review pursuant to Part VII of FOIP.

## **II RECORDS AT ISSUE**

- [6] The Ministry identified 74 pages of records as responsive to the Applicant's request. The Ministry withheld information either in part, or entirely, on all 74 pages. The Ministry stated that information has been withheld in accordance with subsections 13(1)(a), 16(1)(a), 17(1)(a), 17(1)(b) and 18(1)(d) of FOIP.
- [7] The Ministry noted in its submission that after reviewing with the business unit the portion of page 61 that was exempted in accordance with subsection 13(1)(a) of FOIP, the Ministry determined that the redactions on page 61 should not have included subsection 13(1)(a) of FOIP. However, the Ministry noted that the remaining exemptions applied pursuant to

subsections 17(1)(a), 17(1)(b) and 18(1)(d) of FOIP. Because of this clarification provided by the Ministry, I do not need to consider the application of subsection 13(1)(a) of FOIP.

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

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

[8] The Ministry qualifies as a government institution pursuant to subsection 2(d)(i) of FOIP; therefore, my office has jurisdiction in this matter.

#### **2. Does subsection 16(1)(a) of FOIP apply to the record?**

[9] Subsection 16(1)(a) of FOIP provides:

**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;

[10] Subsection 16(1)(a) is a mandatory class-based exemption. It permits refusal of access in situations where release of a record could disclose a confidence of the Executive Council including records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees.

[11] Cabinet confidences are 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.

[12] Including means that the list of information that follows (advice, recommendations, policy considerations or draft legislation or regulations) is incomplete. These are examples of types of information that would be presumed to disclose a confidence of the Executive Council (Cabinet).

[13] I will assess the following two-part test:

1. *Does the record contain advice, proposals, or recommendations?*
2. *Was the record created to present to Executive Council or any of its committees?*

[14] 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.

[15] 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.

[16] Advice has a broader meaning than recommendations. The legislative intention was for advice to have a distinct meaning from recommendations. Otherwise, it would be redundant. While “recommendation” is an express suggestion, “advice” is simply an implied recommendation.

[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] The Ministry applied subsection 16(1)(a) of FOIP to pages 45 – 52, 53 – 57, and 64 – 68. As the Ministry indicated in its submission, these records were created with the purpose of presenting to Cabinet recommendations, a proposal and advice all related to the subject of social impact bonds. Pages 53 – 57 and 64 – 68 are briefing notes and pages 45 – 52 is a proposal. These pages were developed by the Strategic Management Branch of the Ministry. These pages do qualify as advice, proposals and recommendations for the Minister. I am satisfied that these pages were also developed from sources outside of Cabinet for presentation to Cabinet. Consequently, as indicated in Appendix A, I find that subsection 16(1)(a) of FOIP applies in full to pages 45 – 52, 53 – 57, and 64 – 68.

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

[20] 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;

[21] The Ministry applied subsection 17(1)(a) of FOIP to the responsive records as follows:

- pages 1 – 41, which were entirely withheld;
- pages 42 – 44, which were released in part;
- pages 58 – 60, also released in part;
- pages 61 – 63, also released in part; and
- pages 69 – 74, which were entirely withheld.

[22] The following two part test can be applied:

1. Does the information qualify as advice, 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?

[23] I will now assess the first part of the test.

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

[24] In regards to pages 1 – 41, this document is a draft evaluation report related to a social impact bond project. It is dated December 2016. The Ministry has indicated in its submission:

The draft evaluation by the Ministry was prepared for the purpose of informing the internal evolution of the Ministry’s 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-weighing of the relative importance of the relevant factors” as the issue was studied.

[25] In its submission, the Ministry indicated that the draft evaluation report contains advice, policy options, and analysis that at the time was formulated to inform Ministry officials regarding recommendation of the future development of the project. In this regard, the Ministry indicated that the draft evaluation report also contains information that would qualify as recommendations.

[26] Analyses is a detailed examination of the elements or structure of something; and the process of separating something into its constituent elements.

[27] Policy options are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant’s identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.

- [28] 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 record sets out alternative courses of action relating to a decision to be made, it will constitute policy options.
- [29] The Ministry has confirmed that the draft evaluation report was never finalized or approved. I note that the Ministry has not addressed the fact that the draft report was created in December 2016, over two years ago. There are sections of the draft evaluation report which is completely empty of any content and describes what project is and describes the purpose of the evaluation report. Portions of these sections do not contain advice, policy options, and analysis. The information is more factual in nature.
- [30] Given the passage of time since the Ministry's evaluation report was drafted, more information on the topic of social impact bonds has also been published. For instance, the Organisation for Economic Co-operation and Development (OECD) has published online a working paper entitled "Understanding Social Impact Bonds", and the Canadian Centre for Policy Alternatives Manitoba has also published online a research paper entitled "Social Impact Bonds and the Financing of Child Welfare". Both of these reports contain some of the same factual information found in the Ministry's draft evaluation report about social impact bonds generally, and the project. As such, I find that not all the information in the draft evaluation report qualifies for exemption pursuant to subsection 17(1)(a) of FOIP.
- [31] In regards to pages 42 – 44, 58 - 60 and pages 61 – 63, these pages have been released in part. Pages 42 – 44 is a briefing note related to the social impact bonds and dated

April 9, 2018, and pages 58 – 60 represent the updated version of the briefing note at pages 42 – 44. As noted by the Ministry in its submission, this briefing note contains recommended options for action along with analysis of the options. The Ministry also noted that information that was already publicly available was released. I am satisfied that pages 42 – 44 and 58 - 60 contain information that would qualify for exemption pursuant to subsection 17(1)(a) of FOIP.

[32] Pages 61 – 63 are also a briefing note related to developing a Social Finance Strategy for Canada. The Ministry has noted that the document contains analysis of potential outcomes based on the direction the federal strategy could take and that information that was already publicly available was released to the Applicant.

[33] I am convinced that the information exempted by the Ministry on pages 42 – 44, 58 – 60, and 61 – 63 meets the first part of the test.

[34] In regards to pages 69 – 74, which were entirely withheld, are briefing notes that as the Ministry noted in its submission, contain recommendations and analysis related to funding of potential projects via social impact bonds. I am convinced that these pages, 69 – 74, meet the first part of the test.

[35] I will now assess 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?***

[36] 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.



[37] 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.

[38] The advice, recommendations, analyses and policy options contained in the records discussed above, pages 1 – 44, 58 – 60, pages 61 – 63 and 69 – 74, were prepared for the purpose of Ministry officials taking some action or making decisions in regards to social impact bonds, whether related to funding or the project.

[39] All the records discussed above were developed by and for the Ministry. As such, I am satisfied that all the records meet the second part of the test.

[40] Since all parts of the test are met, I find that subsection 17(1)(a) of FOIP applies to pages 1 – 44, 58 – 60, 61 – 63 and 69 – 74. The only information I would note would not qualify for exemption pursuant to subsection 17(1)(a) of FOIP would be the portions of pages 1 – 41, which are factual in nature. These are identified in Appendix A.

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

[41] Subsection 17(1)(b) 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:

...

(b) consultations or deliberations involving:

- (i) officers or employees of a government institution;

(ii) a member of the Executive Council; or

(iii) the staff of a member of the Executive Council;

[42] Subsection 17(1)(b) of FOIP is a discretionary exemption that permits refusal of access in situations where release of a record could reasonably be expected to disclose consultations or deliberations involving officers or employees of a government institution, a member of Executive Council or the staff of a member of the Executive Council. The provision is intended to allow persons having the responsibility to make decisions freely to discuss the issues before them in order to arrive at well-reasoned decisions; to allow such persons to address issues without fear of being wrong, looking bad, or appearing foolish if their frank deliberations were made to be public.

[43] In order for subsection 17(1)(b) to be found to apply, the following two-part test must be met:

1. Does the record contain consultations or deliberations?
2. Do the consultations or deliberations involve officers or employees of a government institution, a member of the Executive Council, or the staff of a member of the Executive Council?

[44] I will now assess the first part of the test.

***1. Does the record contain consultations or deliberations?***

[45] A consultation is the action of consulting or taking counsel together, or a conference in which the parties consult and deliberate. A consultation can occur when the views of one or more officers or employees of a government institution are sought as to the appropriateness of a particular proposal or suggested action. It can include consultations about prospective future actions and outcomes in response to a developing situation. It can also include past courses of action.

[46] A deliberation is the action of deliberating, or to weigh in mind, consider carefully with a view to a decision or to think over. It is also the consideration and discussions of the reasons for and against a measure. A deliberation can occur when there is a discussion or consideration of the reasons for or against an action, and it can refer to discussions conducted with a view towards making a decision.

[47] I find that the portions of pages 1 – 41 are, as previously noted, factual information and therefore, do not meet the first part of the test. As such, I will not assess the second part of the test. As identified in Appendix A, I find that subsection 17(1)(b) of FOIP does not apply to the portions of pages 1 – 41.

**4. Does subsection 18(1)(d) of FOIP apply to the record?**

[48] Subsection 18(1)(d) of FOIP provides:

**18(1)** A head may refuse to give access to a record that could reasonably be expected to disclose:

...

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution;

[49] In order for subsection 18(1)(d) of FOIP to apply, both parts of the following test must be met:

1. Are there contractual or other negotiations occurring?
2. Could release of the record reasonably be expected to interfere with the contractual or other negotiation(s)?

[50] To interfere with contractual or other negotiations means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement involving the public body.

[51] Public bodies should not assume that the interference is self-evident. Particularity in describing the interference is needed to support the application of the provision.

Prospective or future negotiations could be included within this exemption, as long as they are foreseeable. Once a contract is executed and negotiation is concluded, the exemption would generally not apply.

[52] I will now assess the first part of the test.

*1. Are there contractual or other negotiations occurring?*

[53] In its submission, the Ministry has stated that the use of social impact bonds is still being developed by the Government of Saskatchewan. The Ministry has indicated in regards to pages 1 – 41, the draft evaluation report, that there are still ongoing negotiations involving the project but did not provide any evidence to substantiate this. As I noted earlier in this Report, the draft evaluation report was never finalized nor approved and the Ministry further noted in their submission that the document does not necessarily reflect the direction the Government of Saskatchewan may choose to take. Further, as I previously noted, the draft evaluation report only considered the project from 2014 to 2016. As this information is quite dated, it would prevent anyone from knowing the direction the Government of Saskatchewan may take. As such, I am not persuaded by the Ministry's arguments that information if released in the draft evaluation report could actually affect ongoing negotiations related to the project.

[54] I find the information on these pages does not meet the first part of the test and therefore, I will not assess the second part.

[55] As identified in Appendix A, I find that pages 1 – 41 do not qualify for exemption pursuant to subsection 18(1)(d) of FOIP.

**5. Did the Ministry comply with section 8 of FOIP?**

[56] In my notification to the Ministry, I requested that the Ministry address in its submission how the Ministry met its obligations under section 8 of FOIP, which provides:

**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.

[57] Throughout its submission, the Ministry noted that information that was already publicly available in regards to pages 42 – 44 and 58 – 67 was released to the Applicant. Pages 45 – 52, 53 – 57 and 68 were all withheld in full as their entire contents qualify for exemption under subsection 16(1)(a) of FOIP, cabinet documents. Some headings, such as “Issue”, “Key Messages” and “Background”, and footers in the briefing notes at pages 42 – 44 and 53 -74, should have been released to the Applicant.

[58] Based on the explanations provided in the submission, and my review of the records at issue, I am persuaded that the Ministry has reviewed each page, line-by-line, and released as much of the records, other than the headings noted above, as could reasonably be released without disclosing the information to which the Applicant should be refused access.

[59] The only other exception to this is the decision of the Ministry to withhold, in full, pages 1 – 41. These pages represent the draft evaluation report drafted by staff within the Ministry. I find that the Ministry could have released already publicly available information. In this regard, to fully comply with section 8 of FOIP, I recommend that the Ministry re-review pages 1 – 41 in its entirety and determine what information on those pages is also already publicly available and release this information to the Applicant.

#### **IV FINDINGS**

[60] I find that subsection 16(1)(a) of FOIP applies to pages 45 – 52, 53 – 57, and 64 – 68 in full.

[61] I find that subsection 17(1)(a) of FOIP applies to pages 1 – 44, 58 – 60, 61 – 63 and 69 – 74 as severed by the Ministry and does not apply to portions of pages 1 – 41.

[62] I find that subsection 17(1)(b) of FOIP does not apply to the portions of pages 1 – 41.

[63] I find that subsection 18(1)(d) of FOIP does not apply to portions of pages 1 – 41.

[64] I find that the Ministry should have released already publicly available information on pages 1 – 41 to the Applicant.

[65] I find that the Ministry should have released some headings and footers in the briefing notes at pages 42 – 44 and 53 -74, to the Applicant.

## **V RECOMMENDATIONS**

[66] I recommend that the Ministry continue to withhold information pursuant to subsections 16(1)(a) and 17(1)(a) of FOIP as noted in Appendix A.

[67] I recommend that the Ministry release portions of pages 1 – 41 to the Applicant to which I found no exemptions apply as noted in Appendix A.

[68] I recommend that the Ministry review the headings and footers in the briefing notes at pages 42 – 44 and 53 -74, as noted in Appendix A, and determine which can be released and release them to the Applicant.

[69] I recommend that the Ministry review pages 1 – 41 in their entirety and determine what information on those pages is already publicly available, and release this additional information to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 11<sup>th</sup> day of December, 2019.

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

**APPENDIX A**

Page #	Description	Release or Withhold
1 - 41	Draft Report	Withhold in part 17(1)(a) Release publically available information
42 - 44	Briefing Note	Withhold 17(1)(a) Review headers and footers for potential release
45 - 52	Proposal	Withhold 16(1)(a)
53 - 57	Briefing Note	Withhold 16(1)(a) Review headers and footers for potential release
58 - 60	Briefing Note	Withhold 17(1)(a) Review headers and footers for potential release
61 - 63	Briefing Note	Withhold 17(1)(a) Review headers and footers for potential release
64 - 67	Briefing Note	Withhold 16(1)(a) Review headers and footers for potential release
68	Briefing Note	Withhold 16(1)(a) Review headers and footers for potential release
69 - 70	Briefing Note	Withhold 17(1)(a) Review headers and footers for potential release
71 - 72	Briefing Note	Withhold 17(1)(a) Review headers and footers for potential release
72 - 74	Analysis	Withhold 17(1)(a)