



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 028-2019

Saskatchewan Government Insurance

July 18, 2019

Summary:

Saskatchewan Government Insurance (SGI) received an access request related to driver training and accidents that have occurred at the intersection of Highway 35 and Highway 335. SGI applied subsections 16(1)(a), (c), (d)(ii), 17(1)(a), 17(1)(b), 17(1)(c) and 17(1)(d) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to various portions of the record. The Commissioner found that subsections 16(a) and 17(1)(b)(ii) applied to portions of the record and recommended release of the remainder of the record.

I BACKGROUND

- [1] The Applicant made an access to information request to the Ministry of Highways and Infrastructure. The request contained 17 items. Two of the items were transferred to Saskatchewan Government Insurance (SGI) on October 22, 2018, pursuant to section 11 of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [2] The two items in the Applicant's access to information request that were transferred to SGI were as follows:
1. Any and all reported accidents from the intersection of Highway 35 and Highway 335.
 2. Any communications between the Government of Saskatchewan and the Government of Alberta in respect of driver safety, driver qualifications, driver licensing and the April 6, 2018 accident at the intersection of highway 35/335.

[3] SGI responded to the Applicant on January 14, 2019. It provided some records to the Applicant. It also informed the Applicant that some information was being withheld pursuant to subsections 16(1)(a), (c), (d)(ii), 17(1)(a), 17(1)(b), 17(1)(c) and 17(1)(d) of FOIP.

[4] On January 22, 2019, the Applicant requested a review of the application of the exemptions by my office. On the same day, my office notified the Applicant and SGI of my intention to undertake a review.

II RECORDS AT ISSUE

[5] SGI withheld eight pages in their entirety and severed information from 19 pages. The information was withheld pursuant to subsections 16(1)(a), (c), (d)(ii), 17(1)(a), 17(1)(b), 17(1)(c) and 17(1)(d) of FOIP. See Appendix A for details.

[6] In its submission, SGI indicated that pages P002, P004, P005, P151, P168 (redaction #10A), P472 “may be released to the applicant”. They were not specifically addressed in SGI’s submission. I recommend that SGI release these documents to the Applicant and I will not review them further in my report

III DISCUSSION OF THE ISSUES

1. Does my office have jurisdiction in this matter?

[7] SGI qualifies as a government institution pursuant to subsection 2(1)(d)(ii) of FOIP. Therefore, I have jurisdiction to conduct this review

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

[8] 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;

[9] Subsection 16(1) is a mandatory class-based exemption. Subsection 16(1)(a) of FOIP specifically protects records that contain advice, proposals, recommendations, analyses or policy options developed from sources outside of the Executive Council for presentation to the Executive Council is intended to be covered by the provision.

[10] Executive Council consists of the Premier and Cabinet Ministers. Executive Council is also referred to as Cabinet. The *Federal Access to Information and Privacy Legislation Annotated 2015* (Canada: Thomas Reuters Canada Limited, 2014) generally defines cabinet confidences 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.

[11] 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.

- [12] 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.
- [13] Proposals and analyses or policy options are closely related to advice and recommendations and refer to the concise setting out of the advantages or disadvantages of particular courses of action.
- [14] SGI applied subsection 16(1)(a) of FOIP to pages P154 to P157 of the record in full. SGI submitted that it is a briefing note that was prepared for the Minister responsible for SGI. SGI indicated that the purpose of this briefing note was to update and prepare the Minister for Cabinet discussions on this issue held in November 2018. I am satisfied that subsection 16(1)(a) of FOIP applies to these records.
- [15] SGI indicated that pages P161 to P164 of the record was a draft copy of the briefing note found on pages P154 to P157 of the record. In Review Reports 023-2014, 056-2016 and 157-2016, my office found that a draft memorandum that was created for the purpose of presenting proposals and recommendations to Cabinet but that was never actually presented to Cabinet remains a confidence. I find that subsection 16(1)(a) of FOIP applies to P161 to P164 of the record.
- [16] SGI also applied subsection 16(1)(a) of FOIP to portions of pages P152 and P168. SGI did not address how subsection 16(1)(a) of FOIP applies to these pages in its submission. The redactions on these pages are excerpts from an email chain between a Vice President, an Executive Vice President and their staff. The redactions on this page contemplate that a Minister might receive questions in relation to an issue and that offers a view on a course of action that the Vice President thinks his staff should take. Nothing in this record reveals

specific advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees. Further, there is no evidence that these emails were presented to any members of the Executive Council. I find that subsection 16(1)(a) does not apply to these pages of the record. See Appendix A for more details.

3. Do subsections 16(1)(c) and (d)(ii) of FOIP apply to the record?

[17] Subsections 16(1)(c) and (d)(ii) of FOIP provide as follows:

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

...

(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:

...

(ii) are the subject of consultations described in clause (c).

[18] SGI has applied these exemptions to pages P152 and P168 as described above. It did not address these exemptions in its submission.

[19] My office's resource *IPC Guide to Exemptions* defined the term 'consultations' in relation to subsection 16(1)(c) of FOIP as follows: a consultation in this context occurs when one or more members of Executive Council discuss matters related to making government decisions or formulating government policy.

[20] Pages P152 and P168 do not involve any members of Executive Council. As such, it does not qualify as consultations among members of Executive Council. SGI submitted that the emails on the page include the Chief of Staff for a member of the Executive Council. I note that the Chief of Staff was not the author of the record and that the information in question does not reflect any of the consultations among members of the Executive

Council. Further, the records in question anticipates questions that may be asked to a Minister by the media and the need of staff to prepare the Minister. It also discusses how SGI and the Chief of Staff will communicate and the work performed by SGI employees. SGI has not demonstrated that this information discloses a confidence of the Executive Council. Subsection 16(1)(c) of FOIP does not apply to the record.

[21] In relation to subsection 16(1)(d) of FOIP, the *IPC Guide to Exemptions* indicates that the purpose for which the record was prepared is key. An important qualifier is that the records must be for the purpose of briefing a minister in relation to matters before Cabinet or for use in a discussion with other ministers.

[22] As these emails did not involve members of Executive Council, they were not prepared for the purpose of briefing a minister in relation to matters before Cabinet or for a use in a discussion with other ministers. Subsection 16(1)(d) of FOIP does not apply to the record.

4. Does subsection 17(1)(b)(i) of FOIP apply to the record?

[23] Subsection 17(1)(b)(i) 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;

...

[24] In the context of subsection 17(1)(b) of FOIP, a ‘consultation’ occurs when the views of one or more officers or employees of a public body are sought as to the appropriateness of a particular proposal or suggested action. A ‘deliberation’ is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

- [25] In order to qualify for subsection 17(1)(b)(i) of FOIP, the opinions solicited during a consultation or deliberation should:
- 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, such as taking an action, making a decision or a choice.
- [26] The provision is not meant to protect the bare recitation of facts, without anything further.
- [27] SGI applied subsection 17(1)(b) to all records, but specifically addressed the application of subsection 17(1)(b)(i) to pages P142, P144, P145, P147, P149, P152, P168, P173, P174, P469, P470, P474, P477 and P478.
- [28] In its submission, SGI indicated that the information severed from these pages involved SGI employees and other individuals from Manitoba Public Insurance, the Canadian Counsel of Motor Transport Administrator and other Alberta and Manitoba Government personnel around certain issues. SGI provided specifics about its employees' responsibilities in relation to these issues.
- [29] The information was severed from pages P142 and P145 (an email chain between SGI employees). The redactions constitute a question requesting a factual answer and an answer that provides an employee's guess of the facts. This does not constitute a consultation or deliberation as there are no views as to the appropriateness of a particular proposal or suggested action or the reasons for and against an action. Therefore, subsection 17(1)(b)(i) of FOIP does not apply.
- [30] Pages P144, P147 and P149 contain correspondence between individuals who do not work for SGI. The correspondence asked factual questions. Further, the information severed from pages P174, P477 (redaction 4D) and P478 are correspondence between two employees of the government of another province. As this information does not involve employees or officers of SGI, subsection 17(1)(b)(i) of FOIP does not apply.

- [31] The information severed from pages P173 and P477 (redaction 14C) of the record is an email from another provincial government. It asks questions of and input from SGI. The redaction on page P469 is factual information sent from an employee of another provincial government to SGI. The redaction on page P470 is an email to SGI containing factual information and a request for factual information from SGI. These redactions do not include SGI's views as to the appropriateness of a particular proposal or suggested action or the reasons for and against an action. As such, I cannot conclude that the records constitute deliberations and consultations that involve employees or officers of SGI. Subsection 17(1)(b)(i) of FOIP does not apply to these pages.
- [32] The information severed from page P474 of the record is an email from an SGI employee. It is unclear who the recipient of the email was. The email provides an explanation of the attached document. The explanation appears to be factual about the information included in the attachment but does not indicate why the information was included. The writer also indicates that further attachments will be sent. These redactions do not include SGI's views as to the appropriateness of a particular proposal or suggested action or the reasons for and against an action. Subsection 17(1)(b)(i) of FOIP does not apply.
- [33] Finally, the redactions on page P152 and P168 (redaction 10A) contains the view of a Vice President of SGI as to the appropriateness of a suggested action. The email is sent to other employees of SGI. This qualifies as a consultation for the purpose of taking an action. I am also satisfied that the action would be part of the responsibility of the Vice President. Subsection 17(1)(b)(i) applies to these redactions. See Appendix A for more information as to where subsection 17(1)(b)(i) of FOIP applies.

5. Does subsection 17(1)(a) of FOIP apply to the record?

[34] 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;

[35] Subsection 17(1)(a) of FOIP is an exemption that is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice. My office has recently adopted the following test for subsection 17(1)(a) of FOIP, in consideration of two recent court decisions (*Britto v University of Saskatchewan*, 2018 SKQB 92 and *Hande v University of Saskatchewan*, QBG 1222 of 2018 May 21, 2019). The test is as follows:

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

[36] SGI has applied subsection 17(1)(a) of FOIP to all of the redactions. The remaining redactions are on the following pages P142, P144, P145, P147, P149, P173, P174, P469, P470, P474, P477 and P478. These redactions have been described previously in this report. SGI's submission did not specifically address the application of subsection 17(1)(a) to these redactions.

[37] To meet the first part of the test, the information withheld must qualify as advice, proposals, recommendations, analyses or policy options. SGI has not indicated into what category it believes that the redactions fall. The *IPC Guide to Exemptions* defines advice, proposals, recommendations, analyses or policy options. However, these definitions do not include factual information. As noted above, the information severed from pages P142, P144, P145, P147, P149, P173, P469, P470, P474 and P477 qualifies as factual information or

questions requesting factual information. As such, they do not meet the first part of the test and subsection 17(1)(a) of FOIP does not apply.

[38] I will move on to pages P174 and P177. The second part of the test for subsection 17(1)(a) of FOIP requires that the advice, proposals, recommendations, analyses or policy options be developed by or for a government institution. Government institution is defined by subsection 2(1)(d) of FOIP as follows:

2(1) In this Act:

...

(d) “**government institution**” means, subject to subsection (2):

(i) the office of Executive Council or any department, secretariat or other similar agency of the executive government of Saskatchewan; or

(ii) any prescribed board, commission, Crown corporation or other body, or any prescribed portion of a board, commission, Crown corporation or other body, whose members or directors are appointed, in whole or in part:

(A) by the Lieutenant Governor in Council;

(B) by a member of the Executive Council; or

(C) in the case of:

(I) a board, commission or other body, by a Crown corporation; or

(II) a Crown corporation, by another Crown corporation;

[39] For information to be developed by or for a government institution, the person developing the information should be an official, officer or employee of a 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 a government institution.

[40] As noted earlier, the remaining redactions on P174, P477 (redaction 4D) and P478 were written by an employee of the government of another province to an employee of the same government. These organizations do not qualify as a government institution for the purposes of FOIP. As such, I am not persuaded that the information on these pages were

developed by or for SGI, or any government institution. Subsection 17(1)(a) of FOIP does not apply to these pages of the record.

6. Does subsection 17(1)(c) of FOIP apply to the record?

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

...

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution, or considerations that relate to those negotiations;

[42] The test used to determine if subsection 17(1)(c) of FOIP applies is as follows:

1. Does the record contain positions, plans, procedures, criteria, instructions or considerations that relate to the contractual or other negotiations?
2. Were they developed for the purpose of contractual or other negotiations?
3. Were the contractual or other negotiations being conducted by or on behalf of a public body?

[43] SGI applied this exemption to all of the information it withheld, but did not address its application in its submission. On the face of the record, I cannot determine if the information relates to contractual or other negotiations. In order to meet the test described above, SGI would be required to provide me with details of the contractual or other negotiations. It did not do so. As such, I am not persuaded that subsection 17(1)(c) of FOIP applies to this record.

7. Does subsection 17(1)(d) of FOIP apply to the record?

[44] Subsection 17(1)(d) 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:

...

(d) plans that relate to the management of personnel or the administration of a government institution and that have not yet been implemented;

[45] SGI applied this exemption to all of the information it withheld, but did not address its application in its submission. Upon review of the record, none of the information withheld relates to the management of personnel or administration of SGI because the records relate to certain accident, driver safety, driver qualifications and driver licensing. Subsection 17(1)(d) of FOIP does not apply to the record.

IV FINDINGS

[46] I find that subsections 16(1)(a) and 17(1)(b)(ii) apply to portions of the record as described in Appendix A.

[47] I find that subsections 16(1)(c), (d), 17(1)(a), (c) and (d) do not apply to the record.

V RECOMMENDATIONS

[48] I recommend that SGI release or withhold the records as described in Appendix A.

Dated at Regina, in the Province of Saskatchewan, this 18th day of July, 2019.

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

Appendix A

PAGE REVIEWED	SGI PAGE OF THE RECORD		SECTION(S) APPLIED BY SGI	DO THEY APPLY?	RELEASE OR WITHHOLD
	Page	Redaction			
1	P002	1	SGI indicated it may be released		Release
2	P004	2	SGI indicated it may be released		Release
3	P005	Same as P004	SGI indicated it may be released		Release
4-5	P142 & P144	4A & 4B	17(1)(a)	No	Release
			17(1)(b)	No	
			17(1)(c)	No	
			17(1)(d)	No	
6-7	P145 & P147	5A & 5B	17(1)(a)	No	Release
			17(1)(b)	No	
			17(1)(c)	No	
			17(1)(d)	No	
8	P149	6	17(1)(a)	No	Release
			17(1)(b)	No	
			17(1)(c)	No	
			17(1)(d)	No	
9	P151	7A 7B	SGI indicated it may be released		Release
10	P152	7C	17(1)(b)(i)	Yes	Withhold
11-14	P154- P157	8 (Entirety)	16(1)(a)	Yes	Withhold
15-18	P161- P164	9 (Entirety)	17(1)(a), (b), (c), (d)	16(1)(a) applies	Withhold
19	P168	10A	SGI indicated it may be released		Release
		10B	17(1)(b)(i)	Yes	Withhold
20-21	P173 & P174	11A & 11B	17(1)(a)	No	Release
			17(1)(b)	No	
			17(1)(c)	No	
			17(1)(d)	No	
22-23	P469 & P470	13A & 13B	17(1)(a)	No	Release
			17(1)(b)	No	
			17(1)(c)	No	
			17(1)(d)	No	
24	P472	14A	SGI indicated it may be released		Release
25-27	P474 & P477 & P478	14B 14C 14D	17(1)(a)	No	Release
			17(1)(b)	No	
			17(1)(c)	No	
			17(1)(d)	No	