



REVIEW REPORT 028-2020

Saskatchewan Water Corporation

February 9, 2021

Summary:

Saskatchewan Water Corporation (SaskWater) received an access to information request regarding a certain parcel of land. SaskWater denied the Applicant access to portions pursuant to subsection 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP), and because portions were not responsive. The Commissioner found SaskWater properly applied subsection 19(1)(b) of FOIP to the records, and that portions of the records were not responsive to the access to information request. The Commissioner recommended SaskWater continue to withhold portions pursuant to subsection 19(1)(b) of FOIP, and release the not responsive portions of the records to the Applicant, subject to applicable exemptions from FOIP. The Commissioner also found SaskWater conducted a reasonable search for records and recommended it take no further action.

I BACKGROUND

[1] On January 7, 2020, Saskatchewan Water Corporation (SaskWater) received the following access to information request for the time period, “January 1, 2015 to January 7, 2020”:

RE: [address of land location]

1. All correspondence with [name of corporation] and/or [name of corporation] or any of its agents, including any tender offer submission, letter of intent, for the purchase or sale or rental/lease of [address of land location].
2. Copies of any & all applications for rezoning, plans and permits obtained & development permits submitted directly or by the owner of the property on behalf of Saskatchewan Water Corporation

3. Copy of any correspondence, letters, offers, leases with Saskatchewan Water and [address of land location]
4. Copies of all feasibility studies done on the property including all soil testing
5. Copy of awarded contract(s) for [address of land location]

[2] In correspondence dated January 27, 2020, SaskWater responded to the Applicant indicating it was denying access to portions of the records pursuant to subsection 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP), and because information in the record was not responsive to the access to information request. On January 31, 2020, the Applicant asked my office to review SaskWater's decision, as well as its search efforts.

[3] On February 12, 2020, my office sent notifications to the Applicant and SaskWater of my office's intent to undertake a review.

II RECORDS AT ISSUE

[4] At issue is a four-page letter dated February 28, 2018, sent to SaskWater by the Ministry of Central Services. SaskWater has denied access to portions of the letter pursuant to subsection 19(1)(b) of FOIP, and to other portions as not responsive to the access to information request. I note only pages 1, 2 and 3 have portions to which the Applicant has been denied access; page 4 of the letter has been released without redactions to the Applicant.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[5] Pursuant to subsection 2(1)(d)(ii) of FOIP and the Appendix at Part I of *The Freedom of Information and Protection of Privacy Regulations*, SaskWater is a "government institution". Therefore, I have jurisdiction to conduct this review.

2. Did SaskWater properly apply subsection 19(1)(b) of FOIP?

[6] Subsection 19(1)(b) of FOIP provides as follows:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;

[7] Subsection 19(1)(b) of FOIP is a mandatory, class-based exemption. It permits refusal of access in situations where a record contains financial, commercial, scientific, technical or labour relations information that was supplied in confidence to a government institution by a third party.

[8] The three-part test for subsection 19(1)(b) of FOIP, found in the *Guide to FOIP, Chapter 4* (February 4, 2020) (Guide to FOIP) at page 191 is as follows:

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?
2. Was the information supplied by the third party to a government institution?
3. Was the information supplied in confidence implicitly or explicitly?

[9] SaskWater applied subsection 19(1)(b) of FOIP to information at the bottom of page 3 of the record.

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?

[10] In support of its reliance on subsection 19(1)(b) of FOIP, SaskWater stated the following:

When one looks at the responsive record, even the redacted version sent to the applicant, it is obvious on its face that commercial information is being disclosed. Again, proponents were independent realty companies responding to an RFP. The responses indicate what property the proponent was putting forward for consideration, as well as details about base rent, gross rates, square footage and term. In our

assessment, this information fits comfortably with how the IPC Guide to FOIP defines commercial information; as “information relating to the buying, selling or exchange of merchandise or services”.

[11] *Commercial information* is information relating to the buying, selling or exchange of merchandise or services. This can include third party associations, past history, references and insurance policies and pricing structures, market research, business plans, and customer records. Types of information included in the definition of commercial information include:

- offers of products and services a third-party business proposes to supply or perform;
- a third-party business’ experiences in commercial activities where this information has commercial value;
- terms and conditions for providing services and products by a third party;
- lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises - such lists may take time and effort to compile, if not skill;
- methods a third-party business proposes to use to supply goods and services; and
- number of hours a third-party business proposes to take to complete contracted work or tasks (Guide to FOIP, Chapter 4, page 191).

[12] In Review Report 031-2015 concerning Saskatchewan Government Insurance (SGI), I stated the following at paragraph [23]:

I considered all of the submissions received. The Applicant argues that SGI should apply severing to the third party’s proposal packages. However, it is clear that the contents of the proposals as a whole were created by the third parties with the aim of winning contracts with SGI. Commercial information relates to a commercial enterprise, but it need not be proprietary in nature or have an independent market or monetary value. It is sufficient if the information is associated with the buying, selling or exchange of the entity’s goods or services. The information in the proposals relates to the buying or selling of goods and services. Therefore, I find that the entire proposal packages submitted by the third parties to SGI constitute third party commercial information. This approach is consistent with other jurisdictions (e.g. BC IPC Order F09-22, Ontario IPC Order MO-3179).

[13] Upon review of the portion of page 3 of the record where SaskWater applied subsection 19(1)(b) of FOIP, I am able to ascertain it contains information the third party provided for the purposes of winning something with SaskWater; in other words, it was part of their proposal. This is consistent with the example I have provided in the preceding paragraph regarding SGI. As such, I am satisfied that commercial information is involved, and that the first part of the test is met. I will now consider this information under the second part of the test.

2. Was the information supplied by the third party to a government institution?

[14] *Supplied* means provided or furnished (Guide to FOIP, Chapter 4, page 192).

[15] Information may qualify as “supplied” if it was directly supplied to a government institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.

[16] Upon review of the record, it is clear the information in question was supplied by the third party as part of its proposal to SaskWater. Therefore, the second part of the test is met and I will now consider the third part of the test.

3. Was the information supplied in confidence implicitly or explicitly?

[17] *In confidence* usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained in confidence means that the supplier of the information has stipulated how the information can be disseminated.

[18] In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the government institution and the third party providing the information.

[19] *Implicitly* means the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential.

[20] *Explicitly* means the request for confidentiality has been clearly expressed, distinctly stated or made definite. There may be documentary evidence that shows that the information was supplied on the understanding that it would be kept confidential.

[21] In terms of confidentiality, SaskWater stated as follows:

More generally, SaskWater has its own (extensive) procurement experience and is aware that government practice is to treat proponent information in confidence.

...

While SaskWater did not conduct this RFP and is not in possession of the material that was delivered to proponents, it has no reason to believe that Central Services would deviate from the general practice of this government. Even a rudimentary understanding of procurement practice must conclude that confidentiality of proponents' submissions is paramount to the principle of fairness, and its privation would erode both public confidence and participation...

...

SaskWater maintains that it is entirely reasonable to rely on the assumption that Central Services would follow procurement practice of this government and conclude that the information regarding particular proponents outlined in the Letter was *prima facie* provided in confidence. But further to this general and reasonable assumption, SaskWater contacted the legal counsel for the particular realty company tied to [address of land location] and confirmed that the information SaskWater ultimately redacted from its response to the applicant was mutually understood as confidential information.

[22] Upon review of the Government of Saskatchewan's resource, *Guide to Preparing a Request for Proposal* (July, 2020), I note several references to how third party proposal information is governed by FOIP and should be held by committees (those who evaluate the information) and others in strict confidence. The resource itself is linked from the Ministry of SaskBuilds and Procurement's website.

[23] SaskWater further attached to its submission, an email exchange dated January 23, 2020, between SaskWater and legal counsel for the third party. The email states as follows:

[E]ven though it's old, we'd want the rental rates redacted [description of rental rates] as those are sensitive commercial information we provided in confidence but otherwise we don't have any issue with this disclosure.

[24] Based on the aforementioned, I am satisfied that confidentiality of the terms of the proposal was mutually understood by all parties to have been provided explicitly in confidence. As the third part of the test is met, I find SaskWater properly applied subsection 19(1)(b) of FOIP to the information at the bottom of page 3 of the record; as such, I recommend it continue to withhold this information pursuant to subsection 19(1)(b) of FOIP.

3. Is there information that is not responsive to the Applicant's access to information request?

[25] When a government institution receives an access to information request, it must determine which information is responsive to the access to information request.

[26] *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" (Guide to FOIP, Chapter 3, page 11). A government institution can remove information as not responsive if they are clearly separate and distinct and entirely unrelated to the access request, but should take care to do so sparingly and only when necessary.

[27] The Applicant's access to information request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive. In this matter, the Applicant has only inquired about a specific address and representing corporation.

[28] The portions of the record, which SaskWater contends are not responsive to the Applicant's access to information request, are found at the bottom of page 1, on most of page 2, and for all of page 3 (except for the portion where it applied subsection 19(1)(b) of FOIP). I note SaskWater has released the header information from pages 1, 2 and 3 to the Applicant. Regarding these portions, SaskWater stated as follows:

SaskWater's response to the applicant provided the Letter with some redactions. The introductory paragraph was not redacted. What follows is a list of seven proponent responses providing the essential breakdown of the offer, all similar in nature to the

unredacted and responsive #6, the only one in the list that related to [address of land location that is subject of Applicant's access to information request]. By simple deduction the other six proposals were not responsive as the properties listed were for different addresses.

Both the 'Summary Results' paragraph and the 'Recommendation and Rationale' paragraph of the Letter had nothing to do with [address of land location that is subject of Applicant's access to information request].

[29] Upon review of the portions of pages 1, 2 and 3 of the record that SaskWater states are not responsive, I am able to discern that these portions contain information that does not relate to the Applicant's request for information regarding a particular address and representing corporation. That is, the Applicant asked for information regarding a particular address and representing corporation in their access to information request, and the information to which they have been denied access concerns other addresses and representing corporations. As such, I find the portions of the record at the bottom of page 1, for most of page 2, and all of page 3 (except for where SaskWater has applied subsection 19(1)(b) of FOIP) are not responsive. Although not responsive, I recommend SaskWater consider releasing these portions of the record to the Applicant, subject to any applicable exemptions that may apply to these portions of the records.

4. Did SaskWater conduct a reasonable search for records?

[30] Section 5 of FOIP provides 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.

[31] Section 5 of FOIP is clear that access to records must be granted if they are in the possession or under the control of the government institution subject to any exemptions that may apply pursuant to FOIP.

[32] Government institutions must grant access to records in their possession or control subject to any exemptions in Parts III and IV of FOIP. If a government institution indicates that records do not exist, an applicant may request my office conduct a review of the

government institution's search efforts. FOIP does not require a government institution to prove with absolute certainty that records do not exist, but it must demonstrate that it has conducted a reasonable search to locate the records.

[33] A reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records reasonably related to the access to information request. A reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances. Examples of information to support its search efforts that government institutions can provide to my office include the following:

- If personal information is involved, explain how the individual is involved with the government institution (e.g. current or former employee), and why certain branches or departments were searched;
- For general requests, tie the subject matter of the request to the department, branch, etc., involved. In other words, explain why certain areas were searched and not others;
- Identify the employees involved in the search and how they are experienced in the subject matter;
- Explain how the paper and/or records management systems are organized in the departments, branches, etc., involved in the search. Explain how records are classified, for example, if they are organized by alphabet, year, function or subject. Consider providing a copy of your organization's record schedule and/or destruction certificates. Consider how you have considered off-site records, records in possession of a third party but in the government institution's control, and mobile devices (e.g. laptops, smartphones and tablets);
- Explain the folders searched and how the folders link back to the subject matter requested; and
- Include on what dates employees searched and how long it took for each to search. Include the results of the search. Consider having employees provide affidavits to support a position that a record searched for does not exist, or to support the details provided.

[34] The preceding list is intended to be a guide. Each case will require different search strategies and details depending on the records requested.

[35] With respect to SaskWater's search efforts, the Applicant stated as follows:

I do not feel that SaskWater has provided me with all records and they are withholding information from me, perhaps at the request of the third party, or if whether they performed the property search procedures as in Attachment #3 the letter from Ministry of Central Services discusses seven proposals received of which [address of land location] was one of.

[A]s my ITEM #3 REQUEST refers to Proposals so they should have included the Proposal submitted by [name of corporation] which SaskWater has not yet provided to me either unredacted or redacted where is necessary. The proposal is referred to in the Letter from [name] Assistant Deputy Minister Ministry of Central Services to [name] VP Business Development & Corporate Services Saskwater dated February 28, 2018 attached to Attachment #3.

[36] SaskWater's response is as follows:

SaskWater responded to this request in a fashion typical to its general practice: SaskWater's computer network is managed by a third-party provider. SaskWater requested that a search of its email ('Outlook') and network be conducted on the following keywords: "[address of land location]". SaskWater also conducted a search of its hard copy records for responsive records. As a result of both searches, a single record was returned as responsive to the request. The responsive request was a letter sent by Central Services to our office on 28 February 2018 (the "Letter").

At the outset, SaskWater and Central Services executed a Memorandum of Understanding ('MOU') that included provision to treat all information confidentially. The parties to the MOU understood that Central Services would conduct a request for proposals ('RFP') on behalf of SaskWater to identify potential solution for consolidation of SaskWater office space. The proponents who responded were realty companies. Of the seven proposals received by Central Services, only one referenced [address of land location]. The Letter from Central Services outlined proponents who responded to the RFP and provided some key commercial details offered by each proponent.

[37] SaskWater provided my office with a copy of the Memorandum of Understanding (MOU), which I referenced in the quote in the preceding paragraph. The section titled, "RESPONSIBILITES OF THE PARTIES" on page 2 of the MOU reads as follows:

In support of the Purpose, SaskWater agrees to share relevant information on a confidential and proprietary basis where available, as may be required to inform the objectives and responsibilities of the Ministry in this matter. All costs related to

advertisements of Assets, legal fees (including but not restricted to final lease trust conditions, title searches or removal of encumbrances) that may be required to achieve the Purpose shall be invoiced to and paid by SaskWater.

The Ministry [Ministry of Central Services] agrees to cooperate in providing relevant information that will assist the parties in determining their timing, sale offers, cost and operational requirements for the disposition and leasing of appropriate properties. The Ministry further agrees to administer and open and fair, competitive request for proposal (RFP) and tendering processes, including preparing RFP and tendering documents, advertisements and other documentation required to solicit and receive proposals for the disposal and lease properties. The Ministry will evaluate all proposals and sale offers received following accepted 'best value' principles and criteria and will provide a recommendation to SaskWater regarding the facility disposition and lease.

Recommendations about accepting a sale offer and awarding a lease will be provided to SaskWater to be shared as information to the SaskWater Executive Management Committee prior to offers to sell and lease being finalized.

[38] In its submission, SaskWater further stated, “[i]n fact, SaskWater has no interest whatsoever in [address of land location]; it was merely one of several available options presented to SaskWater, who then decided on a different course of action”.

[39] Reasonableness is not a standard of perfection; rather, it is what a fair and rational person would expect to be done or consider appropriate in the circumstances. In these circumstances, the Applicant seeks a variety of records relating to a particular address and representing corporation. In response, SaskWater stated it performed a keyword search on its email system and network for the address and representing corporation in question, and came up with the record in question. This record was a letter sent by the Ministry of Central Services to SaskWater providing the details, as per its MOU with the Ministry of Central Services, of proposal options for SaskWater’s consideration. The MOU makes it apparent that SaskWater did not manage the RFP process, and SaskWater contends it did not pursue the address and representing corporation in question as an option. Based on all this, as well as on how it searched, it stands to reason that SaskWater would not have in its possession or control the types of documents the Applicant lists in their access to information request, such as purchase/lease agreements, rezoning plans and permits, etc. It does not appear SaskWater even got to the stage of the competition where it would have required such documentation. I am satisfied, therefore, that SaskWater’s explanations are

reasonable given the circumstances, and find it conducted a reasonable search for records. As such, I recommend it take no further action.

IV FINDINGS

[40] I find SaskWater properly applied subsection 19(1)(b) of FOIP to the information at the bottom of page 3 of the record.

[41] I find the portions of the record at the bottom of page 1, for most of page 2, and all of page 3 (except for the portion where SaskWater applied subsection 19(1)(b) of FOIP), are not responsive.

[42] I find SaskWater conducted a reasonable search for records.

V RECOMMENDATIONS

[43] I recommend SaskWater continue to withhold the information at the bottom of page 3 of the record pursuant to subsection 19(1)(b) of FOIP.

[44] I recommend SaskWater consider releasing to the Applicant the portions of the record that are not responsive at the bottom of page 1, most of page 2, and all of page 3 (except for the portion where it applied subsection 19(1)(b) of FOIP), subject to any applicable exemptions that may apply to these portions of the record.

Dated at Regina, in the Province of Saskatchewan, this 9th day of February, 2021.

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