



## **REVIEW REPORT 031-2015**

### **Saskatchewan Government Insurance**

**September 1, 2015**

**Summary:** The Applicant requested records from Saskatchewan Government Insurance (SGI) related to an RFP process. SGI provided partial access to records but withheld portions pursuant to subsections 15(1)(d), 17(1)(b)(i), 18(1)(d), (e), (f), 19(1)(a), (b), (c), 22(a) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Upon review, the Commissioner found that SGI appropriately applied subsections 19(1)(b), 19(1)(c)(i), (c)(ii), 17(1)(b)(i), 29(1) and 18(1)(d) of FOIP to the withheld records. The Commissioner recommended that SGI continue to withhold the records.

### **I BACKGROUND**

[1] On December 4, 2014, Saskatchewan Government Insurance (SGI) received an access to information request from the Applicant for:

With respect to the foregoing events, and without limitation, [REDACTED] requests all records and information relating to or arising from the conduct of the RFP, including the evaluation of all proposals and the debrief session, including without limitation the following:

1. All proposals submitted in response to the RFP...with all supporting materials attached...
2. Further to the above, all price and/or cost proposals submitted by each proponent in response to the RFP...
3. All records that were created and considered during the evaluation of each proposal, including, without limitation, instructions to members of the RFP evaluation team, all policies and directives related to the evaluation and/or scoring

of each proposal, scoring templates, minutes and/or recordings of evaluation team meetings or any meeting at which evaluation of proposals submitted in response to the RFP was discussed;

4. All records created by members of the RFP team;
  5. All records of questions and answers arising from or related to the RFP;
  6. All records, including, without limitation, letter correspondence, emails, memoranda and notes within SGI and among SGI and others arising from or related to the RFP;
  7. All records arising from or related to the determination of whether each and every proponent's proposal was responsive to the RFP or not, and whether disqualification should or should not occur;
  8. All records, including, without limitation, letter correspondence, emails, memoranda and notes, exchanged between SGI and each proponent...in relation to the RFP;
  9. All records in the possession, or under the control, of SGI, whether prepared by SGI or a third party, which provided information relevant to, or that may assist, SGI in verifying each proponents' ability to deliver the services set out in the proponents' respective proposals and/or in determining each proponent's ability to satisfy the requirements of the RFP; and
  10. Any and all records arising from or related to the RFP not covered in the requests herein.
- [2] SGI responded to the request by a letter dated March 17, 2015 indicating that access was partially granted. SGI advised the Applicant that portions of the record were being withheld pursuant to subsections 15(1)(d), 17(1)(b)(i), 18(1)(d), (e), (f), 19(1)(a), (b), (c), 22(a) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [3] On February 13, 2015, my office received a Request for Review from the Applicant.
- [4] My office notified SGI, the Applicant and two third parties of our intention to undertake a review on April 7, 2015. On April 27, 2015, SGI provided my office with a copy of the withheld record and its submission. The record totaled 1276 pages. A submission was also received from the Applicant and both third parties.

[5] Given the volume of records, my office contacted the Applicant's legal counsel. The Applicant is a company that was unsuccessful in the bidding process. My office attempted to reduce the volume of records by having the Applicant review the index of records provided by SGI and determine if there were any records the Applicant was not interested in. However, the Applicant indicated that it was interested in all of the records.

## **II RECORDS AT ISSUE**

[6] The record at issue in this review totals 1276 pages. However, 134 pages were duplicates.

## **III DISCUSSION OF THE ISSUES**

[7] SGI is a "government institution" pursuant to subsection 2(1)(d)(ii) of FOIP.

[8] Drager Safety Canada Ltd. (DSCL) is a "third party" pursuant to subsection 2(1)(j) of FOIP.

[9] Smart Start Inc. (Smart Start) is a "third party" pursuant to subsection 2(1)(j) of FOIP.

### **1. Did SGI properly apply subsection 19(1)(b) of FOIP to the withheld record in question?**

[10] Subsection 19(1)(b) of FOIP is a mandatory exemption and provides:

**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;

[11] Subsection 19(1)(b) of FOIP is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.

Although one of the central purposes of the Act is to shed light on the operations of government, subsection 19(1)(b) of FOIP serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.

[12] All three parts of the following test must be met in order for subsection 19(1)(b) of FOIP to apply:

- i. The information in question must qualify as financial, commercial, scientific, technical or labour relations information;
- ii. The information must have been supplied by the third party; and
- iii. The information must have been supplied in confidence either implicitly or explicitly

[13] SGI applied subsection 19(1)(b) of FOIP to 1062 pages of the record.

*i. Is the information in question financial, commercial, scientific, technical or labour relations information?*

[14] From a review of the record, pages P1-P387 constitutes the actual proposal submitted by DSCL to SGI. In its submission, DSCL asserted that the records contain its financial, commercial and technical information.

[15] Pages P388 to P975 constitutes the actual proposal submitted by Smart Start to SGI. In its submission, Smart Start asserted that the records contain its financial, commercial, scientific/technical, or labour relations information.

[16] In addition, there are 87 pages that are separate from the proposal packages which SGI has severed portions of information pursuant to subsection 19(1)(b) of FOIP. These pages are largely made up of emails.

[17] *Financial information* relates to money and its use or distribution and must contain or refer to specific data. Examples of “financial” information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.

[18] *Commercial information* is information relating to the buying, selling or exchange of merchandise or services. In British Columbia IPC Order F05-09, a number of types of information which its jurisdiction considered to be included in the definition of commercial information are as follows:

- Offers of products and services a third-party business proposes to supply or perform;
- A third-party business's 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.

[19] *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information.

[20] *Technical information* is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics...it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information.

[21] *Labour relations information* is information that relates to the management of personnel by a person or organization, whether or not the personnel are organized into bargaining

units. It includes relationships within and between workers, working groups and their organizations as well as managers, employers and their organizations. Labour relations information also includes collective relations between a public body and its employees. Common examples of labour relations information are hourly wage rates, personnel contracts and information on negotiations regarding collective agreements.

[22] I reviewed the records and find that they contain financial, commercial, scientific, technical and labour relations information. For example, page P206 of the record contains technical information about DSCL's product. An example of labour relations information could be found on page P390 as it contains information related to staffing requirements and resumes of personnel.

[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).

**ii. *Was the information supplied by the third party to the government institution?***

[24] Information may qualify as "supplied" if it was directly supplied to a government institution by a third party.

[25] Pages P1-P975 were clearly supplied by the two third parties in this case as the records represent their proposal packages which were submitted to SGI. With regards to the remaining 87 pages partially withheld under this subsection, the information severed also

qualifies as having been supplied by the third parties to SGI. For example, a number of the pages are emails sent from the third parties to SGI.

*iii. Was the information supplied in confidence implicitly or explicitly?*

[26] Based on the submissions received, it appears the parties agree that the information was supplied explicitly in confidence to SGI. The RFP included a confidentiality clause.

[27] I have reviewed the confidentiality clause in SGI's RFP and it is clear that both SGI and any third party providing information would be under the mutual understanding that the information was being provided explicitly in confidence.

[28] In conclusion, I find that subsection 19(1)(b) of FOIP was appropriately applied by SGI to the records in question.

**2. Did SGI properly apply subsection 19(1)(c) of FOIP to the withheld record in question?**

[29] Subsection 19(1)(c) of FOIP is a mandatory exemption and provides:

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

...

(c) information, the disclosure of which could reasonably be expected to:

- (i) result in financial loss or gain to;
- (ii) prejudice the competitive position of; or
- (iii) interfere with the contractual or other negotiations of;

a third party;

[30] The parties do not have to prove that a harm is probable, but needs to show that there is a "reasonable expectation of harm" if any of the information were to be released.

[31] SGI applied subsection 19(1)(c) of FOIP to 42 pages of the record. From a review of the records they appear to be largely comparison spreadsheets drafted by SGI which

compares information provided by the third parties. The information appears to have been drawn directly from the proposals provided by the third parties to SGI.

[32] In its submission, Smart Start asserted that if one proponent in an RFP process had access to another's proposal or its sensitive third party information, it could use it to its advantage in its own proposal(s), which is likely to alter the outcome of a subsequent RFP process. Release of detailed RFP proposals would permit a competitor to improve upon its own proposals, to develop proposals it might not otherwise develop, and ultimately to improve its business prospects without expenditure of time, expense, or risk. DSCL provided similar arguments.

[33] It is reasonable that release of the information drawn directly from the third parties proposals could result in financial loss for the third parties and gain for competitors. As a result, I find that SGI appropriately applied subsection 19(1)(c)(i) and (ii) of FOIP to the records in question. There is no need to consider subsection 19(1)(c)(iii) of FOIP.

**3. Did SGI properly apply subsection 17(1)(b)(i) of FOIP to the withheld record in question?**

[34] Subsection 17(1)(b)(i) of FOIP is a discretionary exemption and 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;

...

[35] This provision is meant to permit government institutions to consider options and act without constant public scrutiny.

[36] A *consultation* occurs when the views of one or more officers or employees of the public body are sought as to the appropriateness of a particular proposal or suggested action.



[37] 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.

[38] In order to qualify, the opinions solicited during a “consultation” or “deliberation” 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, such as taking an action, making a decision or a choice.

[39] SGI applied subsection 17(1)(b)(i) of FOIP to portions of 33 pages of the record. From a review of the records they constitute internal emails between different SGI employees. In its submission, SGI explained the nature of emails and the consultations and deliberations occurring in them. In addition, it clarified the roles of the employees involved.

[40] From a review of the emails, it is clear that there are discussions going back and forth between SGI employees involved in the RFP process including those responsible for making decisions regarding the proposals received.

[41] I find that the information severed in the emails constitutes consultations and deliberations. Further, I find that the purpose for the consultations and deliberations was to make decisions related to the RFP process. It was also part of the responsibilities of the employees involved. Therefore, I find that SGI appropriately applied subsection 17(1)(b)(i) of FOIP to the records in question.

**4. Did SGI properly apply subsection 29(1) of FOIP to the withheld record in question?**

[42] SGI applied subsection 29(1) of FOIP to two pages of the record; pages P1552 and P1553. SGI severed what it determined was personal information and released the remainder of the pages.

[43] When dealing with information in a record that appears to be personal information, the first step is to confirm the information indeed qualifies as personal information pursuant to section 24 of FOIP. Once identified as personal information, a decision needs to be made as to whether to release it or not pursuant to section 29 of FOIP.

[44] In its submission, SGI indicated that the severed information on the pages was an SGI customer's name, driver's license number and address. These data elements constitute personal information pursuant to subsections 24(1)(d), (e) and k(i) of FOIP.

24(1) Subject to subsections (1.1) and (2), "**personal information**" means personal information about an identifiable individual that is recorded in any form, and includes:

...

(d) any identifying number, symbol or other particular assigned to the individual, other than the individual's health services number as defined in *The Health Information Protection Act*;

(e) the home or business address, home or business telephone number or fingerprints of the individual;

...

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual;

...

[45] Subsection 29(1) of FOIP provides:

29(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[46] As the information constitutes personal information, I find that SGI appropriately applied subsection 29(1) of FOIP to the records in question.

**5. Did SGI properly apply subsection 18(1)(d) of FOIP to the withheld record in question?**

[47] Subsection 18(1)(d) of FOIP is a discretionary exemption and 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;

[48] In order to qualify, the following criteria must be met:

1. Identify and provide details about the contractual or other negotiations and the parties involved; and
2. Detail how release of the record could reasonably be expected to interfere with the contractual or other negotiation(s).

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

[50] The public body does not have to prove that interference is probable, but needs to show that there is a “reasonable expectation of interference” if any of the information or records were to be released.

[51] SGI severed information on three pages under subsection 18(1)(d) of FOIP and released the remainder. In its submission, SGI advised that pages P981 and P982 were portions of a risk summary specific to SGI. Further, the information severed from page P1189 is information which sets out potential economic consequences to SGI. SGI indicated that the contractual negotiations are still ongoing.

[52] It is clear that if the information severed were released it would interfere with SGI's ability to conclude its negotiations with the selected vendors. Therefore, I find that SGI appropriately applied subsection 18(1)(d) of FOIP to the records in question.

#### **IV FINDINGS**

[53] I find that subsections 19(1)(b), 19(1)(c)(i), (c)(ii), 17(1)(b)(i), 29(1) and 18(1)(d) of FOIP were appropriately applied to the record in question.

#### **V RECOMMENDATIONS**

[54] I recommend that SGI continue to withhold the record.

Dated at Regina, in the Province of Saskatchewan, this 1<sup>st</sup> day of September, 2015.

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