

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 040/2014

SaskBuilds

Summary: In March 2014, an Applicant submitted an access to information request to SaskBuilds. SaskBuilds advised the Applicant that it was withholding portions of the record pursuant to subsections 17(1)(a), (b), (c), 18(1)(d) and (g) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant proceeded to request a review by the Office of the Information and Privacy Commissioner (OIPC). Upon review, the Commissioner found that SaskBuilds appropriately applied subsections 17(1)(a) and 18(1)(d) of FOIP to the record. The Commissioner recommended SaskBuilds continue to withhold the record.

I BACKGROUND

[1] On March 6, 2014, SaskBuilds received an access to information request from the Applicant for the following information:

Copy of all briefing notes prepared by or for SaskBuilds and/or Minister of Highways and Infrastructure on P3 schools from October 2012 to present.

[2] SaskBuilds responded to the Applicant by a letter dated April 4, 2014. SaskBuilds provided some records in full to the Applicant and withheld others in part citing subsections 17(1)(a)(b)(c) and 18(1)(d)(g) of *The Freedom of Information and Protection of Privacy Act* (FOIP) as authority to withhold.

[3] On April 17, 2014, my office received a Request for Review from the Applicant.

[4] My office notified SaskBuilds and the Applicant of its intention to undertake a review via letter dated April 25, 2014. A copy of the record and an Index of Records was received from SaskBuilds on May 23, 2014. A submission was received on August 8, 2014.

II RECORDS AT ISSUE

[5] The record consists of 12 severed pages of various briefing notes.

III DISCUSSION OF THE ISSUES

[6] SaskBuilds is a government institution pursuant to subsection 2(1)(d)(ii) of FOIP.

1. Does subsection 17(1)(a) of FOIP apply?

[7] Subsection 17(1)(a) 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:

(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;

[8] SaskBuilds applied subsection 17(1)(a) of FOIP to portions of pages 8, 11, 12, 17, 18 and 19.

[9] The following two criterion must be met in order for subsection 17(1)(a) of FOIP to be found to apply:

- i. The information in the record must constitute “advice”, “proposals” “recommendations”, “analyses” and/or “policy options”; and
- ii. It is offered or developed “by or for” a government institution or a member of the Executive Council.

i. Does the information in the record constitute “advice”, “proposals” “recommendations”, “analyses” and/or “policy options”?

[10] SaskBuilds asserted in its submission that the information in the severed pages constituted “advice”, “recommendations” and “analyses”.

[11] *Advice* includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts.

[12] *Recommendations* include suggestions for a course of action as well as the rationale for a suggested course of action.

[13] *Proposals, analyses or policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

[14] Further, proposals, recommendations, analyses and/or policy options must be:

- sought or expected, or be part of the responsibility of a person by virtue of that person’s position;
- directed towards taking an action, including making a decision; and
- made to someone who can take or implement the action.

[15] From a review of the pages, the information severed appears to qualify as advice, recommendations and analyses. For example, page 12 of the briefing note contains recommendations and an analysis section. This information is meant to assist SaskBuilds in decision-making. Therefore, I find that the information severed by SaskBuilds on pages 8, 11, 12, 17, 18 and 19 qualifies for the first part of the test.

ii. Was it offered or developed “by or for” a government institution or a member of the Executive Council?

[16] For information to be developed by or on behalf of a public body, the person developing the information should be an official, officer or employee of the public body, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the public body.

[17] In its submission, SaskBuilds asserted that the briefing notes were developed by senior civil servants for the Minister to assist him in decision-making. Upon review of the pages, the names of the civil servants responsible for drafting the briefing notes appear at the bottom of some of the pages. In addition, the date, contact information and name of the government institution also appears. Therefore, I find that pages 8, 11, 12, 17, 18 and 19 qualify for the second part of the test.

[18] In conclusion, I find that SaskBuilds has demonstrated that subsection 17(1)(a) of FOIP applies to the information severed on pages 8, 11, 12, 17, 18 and 19 and the information should continue to be withheld.

2. Does subsection 18(1)(d) of FOIP apply?

[19] 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;

[20] SaskBuilds applied subsection 18(1)(d) of FOIP to portions of pages 13, 14, 15, 16, 20 and 21.

[21] The following test must be met in order for subsection 18(1)(d) of FOIP to be found to apply:

- i. Identify and provide details about the contractual or other negotiations and the parties involved; and
- ii. Detail how release of the record could reasonably be expected to interfere with the contractual or other negotiations.

i. Identify and provide details about the contractual or other negotiations and the parties involved

[22] In its submission, SaskBuilds asserted that there would be future negotiations with contractors on the P3 projects. SaskBuilds acknowledged that the exact parties are not known at this time but indicated that there would be parties to future contracts as new school construction is a certainty. SaskBuilds asserted that the Government of Saskatchewan and SaskBuilds would be involved in those future negotiations.

[23] Prospective negotiations could be included within subsection 18(1)(d) of FOIP, as long as they are foreseeable. SaskBuilds explained in its submission how the future negotiations were relatively certain. Therefore, I find that the first part of the test has been met.

ii. Detail how release of the record could reasonably be expected to interfere with the contractual or other negotiations

[24] *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.

[25] Further, *could* versus *could reasonably be expected to* have different requirements. The requirement for *could* is simply that the release of information *could* have the specified result (i.e. section 15). The threshold test for a *reasonable expectation* is somewhat higher. The public body does 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 disclosed.

[26] The phrase, *could reasonably be expected to interfere with*, requires the harms test to be applied. The harms test is a set of criteria used to determine whether disclosure of records or information could reasonably be expected to cause harm to a particular interest. The test is as follows:

- there must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
- the harm caused by the disclosure must be more than trivial or inconsequential; and
- the likelihood of harm must be genuine and conceivable.

[27] In its submission, SaskBuilds outlined how release of the information would interfere with its future negotiations, including interference with the bidding process and the associated costs paid by the province for the projects. SaskBuilds tied the specific information on the pages to the interference it proposes.

[28] From a review of pages 13, 14, 15, 16, 20 and 21, the information in the documents, if disclosed, could disadvantage SaskBuilds and the Government of Saskatchewan in its future negotiations for the P3 projects in the ways asserted by SaskBuilds in its submission. Therefore, I find that SaskBuilds appropriately applied subsection 18(1)(d) of FOIP to the information on pages 13, 14, 15, 16, 20 and 21.

IV FINDINGS

[29] I find that SaskBuilds appropriately applied subsection 17(1)(a) of FOIP to pages 8, 11, 12, 17, 18 and 19.

[30] I find that SaskBuilds appropriately applied subsection 18(1)(d) of FOIP to pages 13, 14, 15, 16, 20 and 21.

V RECOMMENDATIONS

[31] I recommend that SaskBuilds continue to withhold the severed information in 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21.

Dated at Regina, in the Province of Saskatchewan, this 10th day of October, 2014.

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