

**SASKATCHEWAN  
INFORMATION AND PRIVACY COMMISSIONER**

**REVIEW REPORT 042-2015**

**Saskatchewan Liquor and Gaming Authority**

**Summary:** SLGA identified 25 records responsive to the Applicant's request – 23 Excel Workbooks and two other documents. The Commissioner found that 22 of the Excel Workbooks contained only raw numerical data would not qualify for exemption under subsections 17(1)(a), (b), (g), 18(1)(d) and (f) of *The Freedom of Information and Protection of Privacy Act* (FOIP). He recommended SLGA release most of these records, severing any personal information. He found that subsection 17(1)(a) applied to the remaining documents.

**I BACKGROUND**

[1] On January 9, 2015, Saskatchewan Liquor and Gaming Authority (SLGA) received a request that was transferred from the Ministry of Finance pursuant to section 11 of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant's request was for "Any analysis, briefing notes, publications or correspondence related to the impact provincial finances of changing the liquor retailing system conducted since January 1, 2012." SLGA responded to the Applicant on February 4, 2015 indicating that all responsive records would be withheld pursuant to subsections 17(1)(a) and (b) of FOIP.

[2] The Applicant was dissatisfied with the SLGA's response and requested a review by my office on February 24, 2015. On March 13, 2015, my office provided notification of our intention to undertake a review to both SLGA and the Applicant.

[3] After receiving a submission from SLGA, my office prepared a draft report and shared it with SLGA on April 24, 2015. SLGA indicated that it disagreed with the conclusions and recommendations of the draft report. My office met with officials from SLGA on May 8, 2015. SLGA provided a second submission on May 19, 2015. It applied additional exemptions: subsections 17(1)(g), 18(1)(d) and (f). Following that second submission, my office asked for further clarification regarding subsections 18(1)(d) and (f) of FOIP. SLGA provided a response.

## **II RECORDS AT ISSUE**

[4] The responsive record consists of 23 different Excel workbooks (Records 1-5 and 8-25). Some of the workbooks contain more than one spread sheet. There are also two documents that are appendices to the 2013-14 budget submission for SLGA (Record 6 and 7).

[5] SLGA originally applied subsections 17(1)(a) and 17(1)(b) of FOIP to the entire record. In its submission of May 19, 2015 it indicated further that subsections 17(1)(g), 18(1)(d) and (f) also applied to the record.

## **III DISCUSSION OF THE ISSUES**

[6] SLGA qualifies as a government institution pursuant to section 2(1)(d)(ii) of FOIP.

### **1. Did SLGA properly apply subsection 17(1)(a) to the record?**

[7] Subsection 17(1)(a) of FOIP states:

**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] My office has considered this exemption many times in the past. The exemption is meant to allow for candor during the policy-making process, rather than providing for the non-

disclosure of all forms of advice. The established test that my office uses to determine the applicability of this exemption is as follows:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. The advice, recommendations, proposals, analyses and/or policy options 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, for example, taking an action or making a decision; and
  - iii) involve or be intended for someone who can take or implement the action.
3. Was the advice, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

### **Excel Workbooks**

[9] I will begin with an analysis of the 23 Excel Workbooks.

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

[10] In the past, my office has defined the following terms:

***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. Advice has a broader meaning than recommendations.

***Recommendations*** relate to a suggested course of action as well as the rationale for a suggested course of action. Recommendations are generally more explicit and pointed than advice.

***Proposals, analyses and 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.

[11] In its submission, SLGA indicated that six of the Excel Workbooks were “prepared for analysis and policy options” (Records 1, 2, 4, 5, 8 and 9). It indicated that two of the Excel Workbooks are “analysis” (Records 13 and 23). Finally, it indicated that the

remainder of the Excel Workbooks “presents advice, analysis and policy options” (Records 3, 10-12, 14-22, 24 and 25).

[12] Most of the Excel Workbooks contain raw data with no textual analysis or an indication about a course of action. Without any sort of written context there is no way of knowing what advice is being given or what policy options have been proposed. Although SLGA may refer to this data as analysis, it is purely numerical data. It would not qualify as analysis in the context of this subsection because it does not set out advantages or disadvantages or reference any particular course of action.

[13] SLGA argues that these numbers were provided to the Minister in addition to the advice which should allow it to qualify. In its submission of May 19, 2015, it stated “That analysis was used to support the information in Appendix G and H in the budget submission. While some may be numbers, it is financial analysis that was used to formulate the advice.” I agree with SLGA’s description. However, subsection 17(1)(a) of FOIP is meant to protect the actual advice, not the information used to formulate the advice.

[14] Further, SLGA stated that:

In the alternative, if the records are provided, the reader can extrapolate the essential elements from the records and determine the range of potential actions yet to be determined by the Minister or members of Cabinet.

[15] Again, what is protected by this exemption is the advice surrounding the pros and cons of each course of action that is proposed to the decision maker. As noted by SLGA, potential actions have not yet been determined. As such, subsection 17(1)(a) cannot apply.

[16] However, there is one exception. Record #25 would qualify as analysis. The content in the column entitled “Description” contains text and clearly recommends certain courses of action. Combined with the numerical data, it does constitute advice. Therefore, record 25 does meet this part of the test.

[17] All Excel Workbooks, except for Record 25, do not meet this part of the test and subsection 17(1)(a) of FOIP does not apply.

**2. Was the analyses:**

***i) sought, expected, or be part of the responsibility of the person who prepared the record; and***

***ii) 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?***

[18] SLGA indicated that Record 25 was developed for the Treasury Board as part of its budget submission. The information that appears in record 25 also appears in Record 6 which is an attachment to its budget submission. Treasury Board must make budget decisions and Record 25 was prepared for making those decisions. Therefore, Record 25 meets this part of the test.

**3. Was the advice developed by or for a government institution or a member of the Executive Council?**

[19] The advice in Record 25 was developed by SLGA which is a government institution. As such, this part of the test is met. Subsection 17(1)(a) applies to Record 25.

**Appendices**

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

[20] SLGA has indicated in its submission that these Appendices (Records 6 and 7) contain analyses and policy options. Upon review, both Appendices contains a proposal with analyses and policy options. Therefore they meet this part of the test.

**2. Was the analyses and policy options:**

- i) sought, expected, or be part of the responsibility of the person who prepared the record; and*
- ii) 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?*

[21] As Records 6 and 7 were Appendices to SLGA's budget submissions, they would have been prepared for the purpose of making decisions. It was intended to assist Treasury Board to make those decisions. As such, it meets this part of the test.

**3. Was the analyses and policy options developed by or for a government institution or a member of the Executive Council?**

[22] The analyses and policy options were developed by SLGA which is a government institution. As such, this part of the test is met. Subsection 17(1)(a) applies to Records 6 and 7.

**2. Did SLGA properly apply subsection 17(1)(b) of FOIP to the record?**

[23] There is no need to consider whether subsection 17(1)(b) of FOIP, or other exemptions, apply to Records 6, 7 and 25 because these Records can be withheld under subsection 17(1)(a). However, I must consider the remaining Excel Workbooks.

[24] Subsection 17(1)(b) of FOIP states:

**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;

[25] In the past, my office has defined the following terms:

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.

A *deliberation* is a discussion or consideration, by the persons described in the section, of the reasons for and against an action.

[26] Again, the remaining Excel Workbooks contain raw numerical data. This would not qualify as consultations or deliberations. Therefore, subsection 17(1)(b) of FOIP does not apply to the remaining Excel Workbooks.

**3. Did SLGA properly apply subsection 17(1)(g) of FOIP to the record?**

[27] Subsection 17(1)(g) of FOIP states:

17(1) Subject to subsection (2), a head my refuse to give access to a record that could reasonably be expected to disclose:

...

(g) information, including the proposed plans, policies or projects of a government institution, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

[28] This provision allows public bodies to prevent premature disclosure of a policy or budgetary decision. The following two part test must be met for this exemption to apply:

1. Is it the information of a government institution?
2. Could disclosure reasonably be expected to result in disclosure of a pending policy or budgetary decision?

***1. Is the information of SLGA?***

[29] SLGA is responsible for the distribution, regulation, management and operation of liquor across the province. The Excel Workbooks at issue give detailed information about the distribution, regulation, management and operation of liquor. Therefore, this information is of SLGA.

***2. Could disclosure reasonably be expected to result in disclosure of a pending policy or budgetary decision?***

[30] In support of this exemption, SLGA wrote the following in its submission:

Government has publicly announced that it is currently reviewing the retail liquor system in Saskatchewan with a view to making an announcement in the fall respecting its proposed policy going forward. The contents of the excel worksheets

clearly indicate different factors SLGA is considering as part of that policy development. By releasing the records at this time, there is a potential that the disclosure of a pending policy decision could be reasonably expected to occur. At the very least, it would clearly indicate factors SLGA is considering respecting the potential closure of SLGA retail stores, outlet density factors, and costs to implement such changes. The release of this information would significantly hamper SLGA's efforts to develop the policy requested by Government.

[31] However, this passage indicates that SLGA has not yet finalized a particular policy. As noted in paragraph [14], SLGA indicates that it is considering a “range of potential actions”. Therefore, I am not persuaded that release of the information in question could reasonably be expected to result in disclosure of a pending policy. Therefore, this exemption does not apply to the remaining Excel Workbooks.

#### **4. Did SLGA properly apply subsection 18(1)(d) of FOIP to the record?**

[32] Subsection 18(1)(d) of FOIP states:

**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;

[33] The following criteria must be met by SLGA to demonstrate that this exemption applies:

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).

##### ***1. What are the contractual or other negotiations and the parties involved?***

[34] In its submission, SLGA stated: “Several of the worksheets analyse potential severance costs should SLGA close stores and have to enter into settlement negotiations with staff.”

[35] My office has stated in past reports that prospective or future negotiations could be included within this exemption, as long as they are foreseeable. Although decisions have not been made, it is foreseeable that some stores may be closed. In such an instance, severance negotiations would occur. As such, this part of the test is met.



***2. How would release of the record reasonably be expected to interfere with the contractual or other negotiation?***

[36] My office has said in the past that 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.

[37] SLGA’s submission did not specifically address the harms test, however, it stated: “Having estimated severance costs made public at this time would interfere with SLGA’s ability to negotiate with those individuals (and/or their agents for collective bargaining) who may be severed as a result of potential store closures in the future.”

[38] My office asked SLGA to specifically indicate which worksheets contain this “severance cost” information. It did not provide a response. Upon review of the record, I do not see any potential “severance costs”. Several of the worksheets present labour costs, salary and benefits as a percentage of sales, hourly and annual wages, years of service, operating expense savings and one time closing costs. However, from review there is no separate identification of severance costs.

[39] I find the circumstances do not meet this part of the test because the ‘estimated severance costs’ SLGA has described is not found in the record. Therefore, subsection 18(1)(d) of FOIP does not apply.

**5. Did SLGA properly apply subsection 18(1)(f) of FOIP to the record?**

[40] Subsection 18(1)(f) of FOIP states:

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

...

(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution;

[41] For the purposes of this exemption, economic interest refers to both the broad interests of a public body and for the government as a whole, in managing the production, distribution and consumption of goods and services.

[42] The phrase ‘could reasonably be expected to prejudice’, requires the harms test to be applied. The public body does not have to prove that the prejudice is probable, but needs to show that there is a “reasonable expectation of prejudice” if any of the information/records were to be released.

[43] The arguments must establish that the probability of harm is well beyond or considerably above a mere possibility of harm in order to reach the middle ground between that which is probably and that which is merely possible. This inquiry of course is contextual and what is needed to meet this standard will ultimately depend on the nature of the issue and inherent probabilities or improbabilities or the seriousness of the allegations or consequences.

[44] The harms test is as follows:

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

[45] After receiving SLGA’s initial submission for this exemption, my office asked that SLGA address the harms test. Its response did not specifically do so.

***1. Is there a clear cause and effect relationship between the disclosure and the harm which is alleged?***

[46] SLGA did not specifically state what harm would be foreseen. In its first submission, it stated that “this type of information is key to SLGA’s competitive position in the marketplace” and that it “could harm SLGA's economic interest as retail liquor sales move to a more competitive environment.” When my office asked for further explanation it stated that the information “will be key to SLGA’s ongoing ability to operate.”

[47] I am not convinced that there is a clear cause and effect relationship between the disclosure and SLGA’s “ability to operate”.

[48] SLGA’s submission stated:

Several of the records, such as document 16, contained detailed sales information by market segment per store. As Government moves into a more competitive retail market, particularly in Regina and Saskatoon where new private stores have or will be opening, this type of information is key to SLGA’s competitive position in the marketplace. Other documents, such as document 15, categorize SLGA's indirect retail expenses by customer type.

[49] When my office requested clarification SLGA stated:

...information such as detailed sales information by customer type and/or product category and detailed expense information by store will be key to SLGA’s ongoing ability to operate. Even in today’s environment, that is important information that goes to directly to business decisions, such as how much space is allocated to certain product types. I am not aware of any retail operator that makes this level of detailed expense and sales information by location public. Although SLGA is a Government Institution, it is also a retailer operating in an increasingly competitive market. SLGA would apply clause 18(1)(f) to all detailed sales and expense information contained in the records by store. As previously noted, some of the records contain summaries of total sales and total expense information by store; that information would be released.

[50] SLGA did not make the connection between the disclosure and the harm. It is unclear how disclosure of the information within the record could harm its economic interest. It is not for me to draw such conclusions when a government institution has not done so. As such it does not meet the first part of the harms test and subsection 18(1)(f) does not apply.

**6. Does the record contain personal information pursuant to section 24 of FOIP?**

[51] Records 23 and 24 contain columns with names, employee identification numbers, department identification numbers and birthdates of individuals. All of this data would qualify as personal information pursuant to section 24 of FOIP.

[52] Section 29(1) of FOIP states:

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.

[53] SLGA should sever this and any other personal information found in the record before providing a copy to the Applicant.

**IV FINDINGS**

[54] I find that subsection 17(1)(a) applies to Records 6, 7 and 25.

[55] I find that subsections 17(1)(a), (b), (g), 18(1)(d) and (f) do not apply to the rest of the record.

[56] I find that a portion of the record constitutes personal information.

**V RECOMMENDATIONS**

[57] I recommend SLGA release Records 1-5 and 8-24 to the Applicant once the personal information has been severed.

Dated at Regina, in the Province of Saskatchewan, this 27th day of May, 2015.

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