



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **REVIEW REPORT 047-2018**

### **Ministry of Environment**

**February 20, 2019**

**Summary:** The Commissioner reviewed the Ministry of the Environment's (the Ministry) application of subsections 17(1)(a), (c), 18(1)(b)(i) and 22(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP). He found that subsections 17(1)(c) and 18(1)(b)(i) of FOIP did not apply to the record. He also found that subsections 17(1)(a) and 22(a) of FOIP applied to portions of the record. The Commissioner recommended that portions of the record be released.

### **I BACKGROUND**

[1] On November 10, 2017, the Ministry of the Environment (the Ministry) received an access to information request for "Memos, emails and briefing notes related to the Clean Air Act and Regulations, Jan 1, 2014 to Dec. 31, 2015." The Applicant suggested the following key words: Clean Air Act, repeal, airshed associations, air quality, emissions, permits, provincial auditor. Jan 1, 2014 to Dec 31, 2015.

[2] On November 13, 2017, the Ministry clarified with the Applicant that there may not be specific keywords, but that the Applicant was seeking "internal discussion around the repealing of the Act and determining its replacement". The Applicant confirmed the understanding on November 17, 2017.

- [3] On November 30, 2017, the Ministry provided the Applicant with a fee estimate. The Applicant paid a deposit on December 7, 2017. On December 18, 2017, the Ministry extended the period to provide a response to the Applicant pursuant to subsection 12(1)(c) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [4] On January 15, 2018, the Ministry provided the Applicant with records, but indicated that portions of the record were being withheld pursuant to subsections 17(1)(a), (c), 18(1)(b)(i), 19(1)(b), 22(a) and (b) of FOIP. The Ministry refunded some of the fees paid to the Applicant because there were lower volumes of records than estimated.
- [5] On March 12, 2018, the Applicant requested a review by my office. On March 14, 2018, my office provided notification to both the Applicant and the Ministry of my intention to undertake a review.

## **II RECORDS AT ISSUE**

- [6] The Ministry identified 114 pages of responsive records. It has withheld information on 48 pages of the record pursuant to subsections 17(1)(a), (c), 18(1)(b)(i), 22(a) and (b) of FOIP. The Ministry has indicated it is no longer relying on subsection 19(1)(b) of FOIP to withhold information. It also indicated that it would be releasing page 35 of the record in its entirety at the end of this review.
- [7] See Appendix A for a more detailed description of the record.

## **III DISCUSSION OF THE ISSUES**

### **1. Does my office have jurisdiction in this matter?**

- [8] The Ministry qualifies as a government institution pursuant to subsection 2(d)(i) of FOIP. Therefore, my office has jurisdiction in this matter.

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

[9] 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;

[10] This exemption is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice or all records related to the advice. The object of the provision includes maintaining an effective and neutral public service capable of producing full, free and frank advice.

[11] In order for this exemption to be found to apply, all three parts of the following test must be met:

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, proposals, recommendations, analyses and/or policy options developed by or for the public body?

[12] I will use this test to evaluate the application of subsection 17(1)(a) of FOIP to various portions of the record.

[13] The Ministry has applied this exemption to 25 pages of the record.

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

[14] My office has established the following definitions:

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. Advice includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.

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.

[15] I agree that the information severed from pages 10 and 11 qualifies as analyses. I also agree that the information severed from pages 32, 33, 41, 42, 43, 46, 49, 50, 51, 99, 101 and 102 constitutes advice.

[16] Not all of the information withheld from pages 3-5 constitute advice, proposals, recommendations, analyses or policy options. It is a draft briefing note. My office has found in the past that draft advice, proposals, recommendations, analyses or policy options can qualify under this exemption. However, factual information in a draft document does not qualify. The issue, recommendation (which does not contain a recommendation), background and confidential/sensitive information sections of the briefing note do not qualify as advice, proposals, recommendations, analyses or policy options. The speaking points and analysis sections do though qualify as analyses or recommendations.

[17] The information severed from page 40 of the record (and copies on pages 48 and 98) is an email in a string where several Ministry employees weigh in on a matter. The entire email from where this information is severed would qualify as advice. However, the information severed is one sentence and appears to be an opinion, which would not normally qualify as

advice on its own. In this instance, it appears the Ministry has used its discretion to release most of the advice. The opinion, in this case, is still part of the advice.

[18] The information severed from page 39 (and copies on pages 47 and 97) is not advice in the context of this exemption. It is the last email in the email string where several Ministry employees weigh in on a matter. This particular passage communicates the decision and the direction. In other words, the decision has been made.

[19] Page 8 is an agenda for a briefing for a Minister. This document discloses topics and issues the Minister was briefed on and is intended to provide advice, analysis and make recommendations to the Minister and ministerial staff. While the document might disclose topics discussed with a Minister it does not reveal the actual advice, analysis or recommendation. As such, the information does not qualify under this exemption.

***2. Was the advice, recommendations, proposals, analyses and/or policy options:***

***i) either 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?***

[20] The briefing notes were created by senior officials for the Minister.

[21] The briefing note on page 3 to 5 indicates that it is for information only, there is no decision to be made. Therefore, it does not meet this part of the test because there is no action that needed to be taken or decision to be made. I also note that the record indicates that the information is not confidential. The second test has not been met.

[22] The briefing note on pages 10 and 11 relates to a decision about a ministerial order. The note was prepared to assist the Minister to make a decision. The second test is met for this briefing note.

[23] The email chain found on pages 32 and 33 includes an environmental specialist asking a question of an executive director. The environmental specialist provides advice as well.

The executive director replies with advice from other senior officials and makes suggestions back to the specialist. The Ministry advised my office that the advice was shared for the purpose of amending, permitting and regulation. The second part of the test is met.

[24] The document comprising pages 39 to 44 (and copies on pages 47-51 and 97-102) is an email string where a concern from an environmental specialist is elevated for comment to other officers in the Ministry. The purpose of the email string is to seek advice on legislative interpretation and structure. The second part of the test applies.

***3. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for the public body?***

[25] All of the records in question were internal to the Ministry. As such, I am satisfied that the records in question were developed by or for the Ministry. The third part of the test is met.

[26] Subsection 17(1)(a) of FOIP applies to a portion of the record as described in Appendix A. There is no need to consider subsection 17(1)(c) of FOIP.

**3. Does subsection 18(1)(b)(i) of FOIP apply to the record?**

[27] Subsection 18(1)(b)(i) of FOIP provides:

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

...

(b) financial, commercial, scientific, technical or other information:

(i) in which the Government of Saskatchewan or a government institution has a proprietary interest or a right of use;

[28] The Ministry has applied subsection 18(1)(b)(i) of FOIP to 19 pages of the record.

[29] In order to find that subsection 18(1)(b)(i) of FOIP applies to a record, all three parts of the following test must be met:

1. Does the information contain financial, commercial, scientific, technical or other information?
2. Does the public body have a proprietary interest or a right to use it?
3. Does the information have monetary value for the public body or is it likely to?

***1. Does the information contain financial, commercial, scientific, technical or other information?***

[30] There are three types of records to which the Ministry has applied subsection 18(1)(b)(i) of FOIP, as follows:

- Type 1 (Pages 14-26, 69-70) – a list of businesses with permits issued by the Ministry. The Ministry released the list of businesses and the activity or industry of each of the businesses. It severed other information factual or other information about each business.
- Type 2 (Pages 72-74) – Names of individuals who are contacts for certain businesses.
- Type 3 (Page 116) – a hyperlink to a document stored in the Ministry’s internal system.

[31] The Ministry indicated that the information in the first and second type of record qualifies as technical information. My office has defined technical information as 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.

[32] In the first type of record, the information severed relates to each businesses industries. The industries involved are in the oil and gas field. The information severed includes information about flares, oil and gas production rates and other emissions. I agree that this qualifies as technical information. The only exception is the land location and nearby

communities listed for the sites of each of the businesses. This would not qualify as technical information.

[33] The second type of information is names of individuals. This would not qualify as technical information.

[34] Finally, the Ministry did not indicate under what type of category the third type of information falls under. Again, government institutions should not assume that it is self-evident on the face of the record that a test is met.

***3. Does the information have monetary value for the public body or is it likely to?***

[35] Next, I will consider the third part of the test. The Ministry must demonstrate that the information has, or is likely to have, monetary value for the Ministry.

[36] Monetary value may be demonstrated by evidence of potential for financial return to the public body. An example of information that is reasonably likely to have monetary value might include a course developed by a teacher employed by a school board.

[37] With respect to both first and third type of records, the Ministry did not address how the information had monetary value for the Ministry.

[38] I am not persuaded that subsection 18(1)(b)(i) of FOIP applies to the record.

**4. Does subsection 22(a) of FOIP apply to the record?**

[39] Subsection 22(a) of FOIP provides:

22 A head may refuse to give access to a record that:

(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;



[40] My office has established the following test for subsection 22(a) of FOIP:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Was the communication intended to be confidential?

[41] The Ministry has applied subsection 22(a) of FOIP to four documents, totaling eight pages. However, I have found that subsection 17(1)(a) of FOIP applies to one of the records, so I will not consider if this exemption also applies to that record.

[42] The first document is a three-page email string between legal counsel from the Ministry of Justice and a Manager who works for the Ministry. This meets the first part of the test as it is a communication between a solicitor and a client. The Ministry has severed portions of the document. The Ministry's submission indicates that the severed portions entail discussions, advice and interpretations. Upon review of the record, I agree. The severed portions entail the seeking or giving of legal advice. The second part of the test has also been met. Finally, I am satisfied that the record was intended to be confidential and the third part of the test is met.

[43] The Ministry has applied subsection 22(a) of FOIP to another email from a Ministry employee to legal counsel to the Ministry. The first test is met. Upon review, the email entails the seeking of legal advice; therefore the second test is met. Also, I am satisfied that the record was intended to be confidential and the third part of the test is met.

[44] Finally, the last document to which subsection 22(a) has been applied is an e-mail to employees of the Ministry by an employee of the Ministry. This information is repeated on three pages of the record. Although it appears this is not a communication between a solicitor and a client, the Ministry indicated that it reflects a communication between the Ministry and its legal counsel.

[45] In Review Report 005-2017; 214-2015 – PART II, I discussed the continuum of legal advice. I noted that documents that are not actually a communication between a solicitor

and a client may be part of the continuum of legal advice, or reveal information subject to solicitor-client privilege. I listed the following examples that could qualify as part of the continuum:

- A discussion between two public officials about how to frame the question that is to be asked of the lawyer;
- Written communications between officials or employees of a public body, in which they quote or discuss the legal advice given by the public body's solicitor;
- Communications discussing the application of legal advice given by a solicitor;
- An employee's notes regarding a solicitor's legal advice, and comments on that advice;
- Notes "to file" in which legal advice is quoted or discussed; and
- Solicitors' briefing notes and working papers that are directly related to the seeking or giving of legal advice.

[46] The information severed from the last document is a communication discussing the application of legal advice given by a solicitor. As such, it qualifies as being part of the continuum of legal advice and the first part of the test is met.

[47] I am also satisfied that the information severed from the last document entails the giving of legal advice and was intended to be confidential. The second and third parts of the test have been met.

[48] I am satisfied that subsection 22(a) of FOIP applies to information severed on pages 29 to 31, 34, 39, 47 and 97 of the record.

[49] There is no need to consider subsection 22(b) of FOIP.

#### **IV FINDINGS**

[50] I find that subsection 18(1)(b)(i) of FOIP does not apply to the record.

[51] I find that subsections 17(1)(a) and 22(a) of FOIP apply to portions of the record as described in Appendix A.

**V RECOMMENDATION**

[52] I recommend that the Ministry release records as described in Appendix A and withhold the rest.

Dated at Regina, in the Province of Saskatchewan, this 20th day of February, 2019.

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

## APPENDIX A

| <b>PAGE OF THE RECORD</b> | <b>SECTION(S) APPLIED BY THE MINISTRY</b> | <b>DOES IT APPLY?</b> | <b>RELEASE OR WITHHOLD</b> |
|---------------------------|---|-----------------------|----------------------------|
| 3-5                       | 17(1)(a)                                  | No                    | Release                    |
| 8                         | 17(1)(a)                                  | No                    | Release                    |
| 10-11                     | 17(1)(a)                                  | Yes                   | Withhold                   |
| 14-26, 69-70              | 18(1)(b)(i)                               | No                    | Release                    |
| 29-31                     | 22(a)                                     | Yes                   | Withhold                   |
| 32                        | 17(1)(a)                                  | Yes                   | Withhold                   |
|                           | 22(a)                                     | No need to review     |                            |
| 33                        | 17(1)(a)                                  | Yes                   | Withhold                   |
| 34                        | 22(a)                                     | Yes                   | Withhold                   |
| 35                        | Ministry will release                     |                       |                            |
| 39, 47, 97                | 17(1)(a)                                  | No                    | Withhold                   |
|                           | 22(a)                                     | Yes                   |                            |
| 40, 48, 98                | 17(1)(a)                                  | Yes                   | Withhold                   |
| 41-42, 51, 101, 102       | 17(1)(a)                                  | Yes                   | Withhold                   |
| 72-74                     | 18(1)(b)(i)                               | No                    | Release                    |
| 116                       | 18(1)(b)(i)                               | No                    | Release                    |