

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 050-2015

Ministry of Finance

Summary: The Ministry of Finance identified 16 records responsive to the Applicant's access request. It applied subsection 16(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to 12 of the responsive records. The Commissioner found that this exemption applied to 10 of the documents. The Ministry applied subsection 17(1)(a) of FOIP to 10 records. The Commissioner found recommended that the Ministry release three of the records to the Applicant.

I BACKGROUND

[1] On January 5, 2015, the Ministry of Finance received an access to information request for "All internal correspondence, analysis and/or briefing materials, prepared between January 1, 2012 and May 31, 2012, regarding the impact of eliminating the Film Employment Tax Credit". On March 5, 2015, the Ministry replied to the Applicant indicating that responsive records were being withheld pursuant to subsections 16(1)(a) and 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[2] The Applicant was dissatisfied with the Ministry's response and requested a review by my office on March 9, 2015. On March 16, 2015, my office provided notification to both the Applicant and the Ministry of our intention to undertake a review.

II RECORDS AT ISSUE

[3] The Ministry provided the following description of the record which contains 16 documents:

Page Number(s)	Item Description	Section
Record A Page 1-9	Draft of Cabinet Information Item “Film Industry Infrastructure – options to consider moving forward.”	16(1)(a)
Record B Page 10-14	Memorandum to Cabinet on the film industry	16(1)(a)
Record D Page 15-26 (Individual bullets on pages 16, 17 and 21)	“2012-13 Cabinet Finalization - Ministry of Tourism, Parks, Culture and Sport”	16(1)(a)
Record E Page 27-38 (Individual lines on pages 28, 29, 31, 36 and portions of pages 37 and 38)	“2012-13 Budget Briefing - Ministry of Tourism, Parks, Culture and Sport”	16(1)(a)
Record F Page 39	Email outlining options for dates for program changes to take effect	17(1)(a)
Record G Page 40-49	Memorandum to Cabinet on a film industry strategy (Earlier draft of record H)	16(1)(a)
Record H Page 50-60	Memorandum to Cabinet (Version of record G)	16(1)(a)
Record J Page 61-66	1. Email outlining policy options to implement Film Employment Tax Credit program changes 2. Q & A’s prepared for Minister of TPCS and Cabinet’s Budget Briefing Book	17(1)(a)
Record K Page 67-69	Email regarding the communication of the Film Employment Tax Credit in Budget documentation	17(1)(a)
Record L Page 70-74 (A portion of page 70 and one bullet on page 74)	Email with attached “2012-13 Potential Reduction List” draft	16(1)(a) 17(1)(a)
Record M Page 75-76 (One bullet on Page 76)	“2012-13 Potential Reduction List” Draft Version of record L	16(1)(a) 17(1)(a)
Record O Page 77-79 (One portion on page 79)	Email with attached “Budget Reduction Measures” note	16(1)(a) 17(1)(a)
Record P Page 80	“Budget Efficiencies and Fee Measures” briefing note for Cabinet	16(1)(a) 17(1)(a)

Page Number(s)	Item Description	Section
Record Q Page 81-87 (One portion on page 87)	Email with attached '2012-13 Budget Sensitivities' briefing note for Cabinet	16(1)(a) 17(1)(a)
Record R Page 88-93 (One portion on pages 92-93)	"Film Employment Tax Credit" briefing note for Cabinet	16(1)(a) 17(1)(a)
Record S Page 94-95 (One portion on page 95)	"2012-13 Budget Tax Measures" briefing note for Minister's Transition Binder	17(1)(a)

Note: Records C, I and N were duplicates of some of the above noted records and identified twice by the Ministry when it shared the record with my office.

III DISCUSSION OF THE ISSUES

1. Did the Ministry properly apply subsection 16(1)(a) of FOIP to the record?

[4] Subsection 16(1)(a) of FOIP states:

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

(a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;

[5] The Ministry has applied subsection 16(1)(a) of FOIP to 12 of the 16 records (A, B, D, E, G, H, L, M, O, P, Q and R).

[6] The Ministry's submission indicates that all of these documents provide advice, proposals, recommendations, analyses or policy options to Executive Council.

[7] My office has determined that documentation reflecting advice, proposals, recommendations, analyses or policy options developed from sources outside of the Executive Council for presentation to the Executive Council is intended to be covered by the provision.

[8] 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.

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.

- [9] Records O and P do not qualify for this exemption because the responsive portions do not constitute advice, recommendations, proposals, analyses or policy options.
- [10] The Ministry has indicated that record O contains analysis and that record P contains advice and analysis. The e-mail portion of record O is non-responsive to the request. The attachment is a list of budget reduction measures. Record P is similar. In order to qualify for this exemption, a record must recommend one or more courses of action and discuss the advantages and/or disadvantages of taking the action. These documents factually list the amount of savings due to the elimination of this tax credit. They appear to have been developed after budget decisions had been made. As such, it does not qualify as advice, recommendations proposals or policy options for the purposes of this exemption.
- [11] Subsection 16(1)(a) of FOIP do not apply to records O and P.
- [12] Upon review of records A, B, D, E, G, H, L, M, Q and R, I agree that they reflect advice, proposals, recommendations, analyses or policy options and would disclose a cabinet confidence. Also, I am satisfied that all of the records were developed for the Executive Council and/or Treasury Board, which is a committee of Executive Council. I find that subsection 16(1)(a) of FOIP applies to these records.

2. Did the Ministry properly apply subsection 17(1)(a) of FOIP to the withheld record in question?

[13] 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;

[14] The Ministry has applied this exemption to ten records (F, J, K, L, M, O, P, Q, R and S). However, records L, M, Q and R is captured by subsection 16(1)(a) of FOIP so there is no need to consider it here.

[15] 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?

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

[16] The same definitions for advice, proposals, recommendations, analyses and policy options provided for subsection 16(1)(a) of FOIP apply for this subsection as well.

[17] I have already considered whether records O and P constitute advice, proposals, recommendations, analyses or policy options in my analysis for subsection 16(1)(a) of

FOIP. I found they did not. Therefore, they do not qualify for subsection 17(1)(a) for the same reasons.

[18] The Ministry has described records F, J, K as e-mails. Record J contains an attachment.

[19] Record F contains policy options and sets out the advantages or disadvantages of particular courses of action. With respect to records J and K, the e-mails and the attachment contain advice. These records meet the first part of the test.

[20] The Ministry has identified record S as a briefing note to Cabinet. Its submission noted that it contains advice, analysis or policy options. Upon review, record S contains background information about the elimination of the tax credit. There is no suggested course of action. As such, it does not qualify as advice, policy options or analysis for the purpose of this exemption. It does not meet this part of the test.

[21] In summary, records F, J, K meet this first part of the test. Subsection 17(1)(a) of FOIP does not apply to the responsive portions of record S.

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

i) either sought, expected, or part of the responsibility of the person who prepared the record?

ii) prepared for the purpose of doing something, for example, taking an action or making a decision?

iii) intended for or involve someone who can take or implement the action?

[22] Upon review of records F, J and K, I am satisfied that all three of them meet this second test. The records were prepared by an individual who had responsibility for providing the information. They were all prepared for the purpose of taking an action or making a decision. Finally, they all involved someone who could take an action. Therefore, these records meet this part of the test.

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

[23] In all cases, the records were developed by or for a government institution or a member of the Executive Council. This part of the test is met.

[24] Subsection 17(1)(a) of FOIP applies to records F, J and K.

IV FINDINGS

[25] I find subsection 16(1)(a) of FOIP applies to records A, B, D, E, G, H, L, M, Q and R.

[26] I find subsection 17(1)(a) of FOIP applies to records F, J and K.

V RECOMMENDATIONS

[27] I recommend that the Ministry release the responsive portions of records O, P and S to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 11th day of June, 2015.

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