



REVIEW REPORT 052-2017

Saskatchewan Power Corporation

February 8, 2018

Summary:

The Applicant requested copies of appraisal report(s) from SaskPower. SaskPower identified one responsive record and denied access to it in full pursuant to subsections 19(1)(b), 19(1)(c)(i) and 19(1)(c)(ii) of FOIP. Through the course of the review, the Commissioner also assessed if the report contained personal information of identifiable individuals pursuant to subsection 29(1) of FOIP. The Commissioner found that subsections 19(1)(b), 19(1)(c)(i) and 19(1)(c)(ii) do not apply to the appraisal report. The Commissioner found that subsection 29(1) of FOIP applies to the individual's names that are listed as the "Vendor" in index numbers 1, 6, 7, 10, 12, 13, and 14 and recommended that SaskPower continue to withhold those names. The Commissioner recommended the remainder of the appraisal report be released to the Applicant.

I BACKGROUND

[1] The Saskatchewan Power Corporation (SaskPower) received an access to information request on February 9, 2017 requesting access to the following:

Please provide the appraisal(s) related to SaskPower's purchase of land from the Global Transportation Hub. 2013 and 2014.

[2] SaskPower responded to the request on March 13, 2017, denying access to the record pursuant to subsections 19(1)(b), 19(1)(c)(i) and 19(1)(c)(ii) of FOIP.

- [3] My office received a request for review from the Applicant on March 16, 2017, and provided notice to the Applicant and SaskPower that same day of my office's intention to undertake the review. As section 19 of FOIP contains the third party exemptions, my office provided notice to the third party, an appraisal firm, on March 16, 2017.
- [4] My office received submissions from the third party and SaskPower.

II RECORD AT ISSUE

- [5] The record at issue is a 65-page document entitled *Report on Appraisal of Portion of Section 24-17-21 W2 Regina, Saskatchewan as at June 13, 2013* (appraisal) prepared by the third party for SaskPower. As part of its submission, the responsive record has been sequentially numbered pages 8 to 72 by SaskPower.
- [6] I would like to note that in *Review Report 072-2016 and 092-2016* I reviewed an appraisal much like the record responsive in this request and I found it not to be in the possession or control of the Global Transportation Hub Authority (GTH). However in that report, the GTH was not the body that commissioned the appraisal from that particular appraisal firm, therefore it became an issue of possession and control.
- [7] In this report, SaskPower has commissioned the appraisal from the third party and has determined it must deny access pursuant to section 19 under FOIP. As such, this review addresses the actual exemptions applied to the appraisal. Possession and control is not an issue in this review.

III DISCUSSION OF THE ISSUES

- [8] SaskPower is a "government institution" pursuant to subsection 2(1)(d)(ii) of FOIP.

1. Does Subsection 19(1)(b) of FOIP apply to this record?

[9] In its submission, SaskPower advised my office that it provided notice to the third party under section 34 of FOIP as the appraisal contained third party information. Subsection 34(1)(a) of FOIP provides:

34(1) Where a head intends to give access to a record that the head has reason to believe may contain:

(a) information described in subsection 19(1) that affects the interest of a third party;

...

and in the opinion of the head, the third party can reasonably be located, the head shall give written notice to the third party in accordance with subsection (2).

[10] On March 7, 2017, the third party responded to SaskPower providing arguments as to why subsections 19(1)(b), 19(1)(c)(i) and (ii) of FOIP apply to this record. Based upon these arguments, SaskPower denied access to the record in full pursuant to subsections 19(1)(b), 19(1)(c)(i) and (ii) of FOIP.

[11] In its submission, SaskPower advised my office that it has no objections to the release of the appraisal. As such, SaskPower has deferred to the third party to argue its position as to how this information qualifies under subsections 19(1)(b) and 19(1)(c)(i) and (ii) of FOIP. Therefore, I will consider if these exemptions apply based upon the third parties submission.

[12] 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;

[13] In order for 19(1)(b) of FOIP to be found to apply, all parts of the following three part test must be met:

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?
2. Was the information supplied by the third party to a public body?
3. Was the information supplied in confidence implicitly or explicitly?

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?

[14] In its submission, the third party asserts that the appraisal contains financial, commercial and technical information that was supplied implicitly and explicitly in confidence. I will first determine if the appraisal contains financial information.

[15] *Financial information* is information regarding monetary resources, such as financial capabilities, assets and liabilities, past or present. Common examples are financial forecasts, investment strategies, budgets, and profit and loss statements. The financial information must be specific to a particular party that must demonstrate a proprietary interest or right or use of the financial information. Review Report 306-2016 (Ministry of Highways and Infrastructure), further clarified the definition of financial information at paragraph [17]:

...financial information would typically describe a third party's financial resources or assets and liabilities.

[16] When addressing the issue of financial information, the third party has asserted in its submission that the appraisal lays out the methods and practices used by the third party to arrive at the value of the land. Methods and practices used by a third party does not qualify as financial information of the third party.

[17] Further, SaskPower was the public body that commissioned the appraisal from the third party as part of its due diligence through the purchase of land. Therefore, I would assume that the financial interest in the record would lie with SaskPower and not with the third

- party. However, as noted above SaskPower has no concerns with the release of the record and has not raised exemptions outside of the mandatory third party exemptions.
- [18] Based upon a review of the appraisal by this office, I was unable to identify any information that would qualify as financial information of the third party.
- [19] I will now determine if the appraisal contains commercial information.
- [20] *Commercial information* is information relating to the buying, selling or exchange of merchandise or services.
- [21] In its submission, the third party asserts that the appraisal contains information about the third party's business experiences in commercial appraisals, which in itself has a commercial value, along with their terms and conditions of service. The third party has not pointed to specific pieces of the appraisal to identify what constitutes commercial information and on the face of the appraisal I cannot identify commercial information. Further, I would note that the appraisal does not outline the experience of the appraiser or what SaskPower paid for the appraisal.
- [22] Therefore, I have not been provided sufficient evidence that the appraisal contains commercial information. I will now determine if the appraisal contains technical information.
- [23] *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.
- [24] In its submission, the third party asserts that the appraisal belongs to an organized field of knowledge with the use of specific methodology to arrive at its conclusions. Further it asserts that it employs certified appraisers such as the individual who conducted the appraisal in question. Finally, the third party advised that the report was prepared by an

expert, which compiles numerous sources of data relating to the land and applies them to determine land values.

[25] The third party's appraiser that conducted the appraisal holds an Accredited Appraiser Canadian Institute (AACI) designation with the Appraisal Institute of Canada (AIC). From the AIC website, the AACI designation is granted to individuals who have completed the AACI program of studies and fulfilled all the professional requirements of the AIC. AACI members are qualified to offer valuation and consulting services and expertise for all types of real property. Further, designated members must adhere to AIC's *Canadian Uniform Standards of Professional Appraisal Practice* (CUSPAP). CUSPAP 2018 includes the following standards:

1. Ethics Standard
2. Real Property Appraisal Standard
3. Review Standard
4. Consulting Standard
5. Reserve Fund Standard
6. Appraisal of Machinery and Equipment Standard
7. Mass Appraisal Standard

[26] Part 6 of CUPSAP 2018 addresses the Real Property Appraisal Standard Rules. The preamble to these rules state:

This Standard deals with the procedures for the development and communication of a formal opinion of value for real property [see 6.2] and incorporates the minimum content necessary to produce a credible report that will not be misleading.

[27] In essence, the CUSPAP provides standards that outline how professional appraisals are to be prepared and components that must be included. This is to ensure that valuations are prepared in a standardized way in fairness to interested parties.

[28] In addition, a review of the appraisal by my office has identified that much of the data used to produce this appraisal comes from publicly available sources including assessment and taxation information from the City of Regina, title searches from Saskatchewan's Land Registry maintained by the Information Services Corporation, excerpts from the City of Regina's Industrial Zoning Regulations and information from

annual reports of businesses in Regina. Further, an online search confirms that similar appraisals conducted by appraisal firms contain the exact type of data elements that are included in this appraisal and those appraisers appear to have released those in its entirety.

[29] While I do agree that one must meet rigorous education and other requirements to become an AIC designated appraiser, the methodologies are not unique to each appraiser or appraisal firm. In fact if that were the case, it would be difficult to rely on an appraisal as the methodologies from one appraiser to the next would not be consistent, resulting in highly varied land valuations and potentially a misleading appraisal report. This would be contradictory to the Real Property Appraisal Standard Rules.

[30] Although the term “copyright” is not contemplated under FOIP, the third party has put forward arguments of copyright and that the appraisal firm has copyright of the report. The third party asserts, “...that the intentional and/or forced release of the appraisal will infringe on [third party’s] copyright to the integrity of its work in accordance with the *Copyright Act*, RSC 1985 c.C-42....”

[31] Subsection 32.1(1)(a) of the *Copyright Act* provides:

32.1(1) It is not an infringement of copyright for any person

(a) to disclose, pursuant to the *Access to Information Act*, a record within the meaning of that Act, or to disclose, pursuant to a like Act of the legislature of a province, like material;

[32] In Saskatchewan, *FOIP* and *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) would both constitute, “...a like Act of the legislature of a province....” Whether or not the third party holds copyright of the appraisal is irrelevant because the release of it under FOIP is not an infringement of copyright.

[33] Therefore, I have not been provided with sufficient evidence to support that the appraisal contains technical information. The first part of the test for subsection 19(1)(b) of FOIP has not been met as I have not been provided enough evidence to support the assertion

that the appraisal contains financial, commercial or technical information of the third party.

[34] As the first part of the test has not been met, I find that subsection 19(1)(b) does not apply to the appraisal.

2. Does Subsection 19(1)(c)(i) or (ii) of FOIP apply to this record?

[35] Subsections 19(1)(c)(i) and (ii) of FOIP are mandatory exemptions and provide:

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 be reasonably expected to

(i) result in the financial loss or gain to;

(ii) prejudice the competitive position of;

...

a third party

[36] For either of these provisions to apply there must first be objective grounds for believing that disclosing the information could result in the harm alleged. The parties do not have to prove that a harm is probable, but need to show that there is a *reasonable expectation of harm* if any of the information were to be released.

[37] In British Columbia Order F16-45 (South Coast British Columbia Transportation Authority (TRANSLINK), Ms. Celia Francis, the Adjudicator, noted:

[43] The Supreme Court of Canada set out the standard of proof for harms-based provisions in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner)*:

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of

harm in order to reach that middle ground: Paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence 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] Moreover, in *British Columbia (Minister of Citizens’ Service) v. British Columbia (Information and Privacy Commissioner)*, Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm and that the burden rests with the public body to establish that the disclosure of the information in question could reasonably be expected to result in the identified harm.

[38] I adopt this same approach in establishing harm. To demonstrate the harm public bodies or in this case a third party, should not assume that the harm is self-evident. Particularity in describing the harm is needed to support the application of the provision.

[39] For subsection 19(1)(c)(i) of FOIP to be found to apply, there must be objective grounds for believing that disclosing the information could result in financial loss or gain to the third party. For subsection 19(1)(c)(ii) of FOIP to be found to apply, there must be objective grounds for believing that disclosing the information could prejudice the position of a third party.

[40] I will now assess if the third party has demonstrated the reasonable expectation of harm.

[41] In its submission, the third party asserts that subsections 19(1)(c)(i) and (ii) of FOIP are “intimately intertwined”.

[42] The third party asserts that the appraisal was done under specific assumptions and that it was not the only third party that conducted an appraisal on the land during the sale of land. The assumptions that the third party based its appraisal upon differed from the assumptions that the other appraisal firms based their appraisals on. Further, the land had a different value from time to time and without the knowledge of the timelines, effective dates of the various appraisals, and assumptions made, the conclusions that could be drawn could be erroneous.

[43] In order to understand what the required components of an appraisal are, my office reviewed section 6 of *CUSPAP 2018* which lists the Real Property Appraisal Standard Rules. The Preamble of these Rules at 6.1.1 provides:

This standard deals with the procedures for the development and communication of a formal opinion of value for real property [see 6.2] and incorporates the minimum content necessary to produce a credible report that will not be misleading [emphasis added].

[44] Section 6.2 lists the Rules:

6.2 Rules

In the report [see 7.1, 18.5] the Member must:

6.2.1	identify the client by name and intended user by name; [see 7.2, 18.6]
6.2.2	identify the intended use of the Member’s opinions and conclusions; [see 7.3]
6.2.3	identify the purpose of the assignment, including a relevant definition of value; [see 7.4, 18.8]
6.2.4	define the scope of the work necessary to complete the assignment; [see 7.5, 7.10.3, 7.27]
6.2.5	provide an analysis of reasonable exposure time linked to the market value opinion; [see 7.6, 18.13]
6.2.6	identify the effective date of the Member’s analyses, opinions and conclusions, and identify whether the opinion is current, retrospective, prospective, or an update; [see 7.7]
6.2.7	identify the date of the report; [see 7.8]
6.2.8	identify the interest appraised and the location, and describe the characteristics of the property; [see 7.9, 18.14, 18.21, 18.23]
6.2.9	identify all assumptions and limiting conditions (including extraordinary assumptions and extraordinary limiting conditions); [see 7.10, 18.24, 18.25, 18.26]
6.2.10	identify any hypothetical conditions; [see 7.11, 18.25]
6.2.11	identify and analyze land use control; [see 7.12, 18.27]
6.2.12	state the existing use and the use reflected in the appraisal; [see 7.13]
6.2.13	define, analyze and resolve the highest and best use; [see 2.26, 7.14, 18.23.1.ii, 18.28]
6.2.14	describe and analyze all data relevant to the assignment; [see 7.15, 18.23.1]
6.2.15	describe and apply the appraisal procedure relevant to the assignment and provide reasoning for the exclusion of any of the relevant valuation procedures; [see 7.16]

6.2.16	detail the reasoning supporting the analyses, opinions and conclusions of each valuation approach; [see 7.17]
6.2.17	analyze the effect on value, if any, of the terms and conditions of the lease(s) when developing an opinion of the value of a leased fee, leasehold estate; [see 7.17.1, 18.26.5]
6.2.18	analyze the effect on value of an assemblage; [see 7.19]
6.2.19	analyze the effect on value of anticipated public or private improvements; [see 7.20]
6.2.20	analyze the effect on value of any personal property; [see 2.45, 7.21]
6.2.21	analyze and comment on
	6.2.21.i. all Agreement for Sale, Option, or Listing of the property, subject to 7.22, and
	6.2.21.ii. all prior sales of the property, subject to 7.22. [see 18.31]
6.2.22	review and reconcile the data, analyses and conclusions of each valuation approach into a final estimate value; [see 7.23]
6.2.23	report the final value estimate; [see 2.59, 7.24]
6.2.24	Include a signed certification of value; [see 2.59, 7.25]
	Note: A Member who signs a certification of value accepts responsibility for the appraisal and the contents of the appraisal report. [see 7.1, 7.26, 18.32].

[45] In addition, through the course of this review, my office contacted the AIC. My office was advised that as the appraisal was conducted in 2013, CUSPAP 2012 standards would apply to the appraisal. The AIC further advised my office that the overall intent of the above standards from 2012 to 2018 remains intact, with minor changes. Therefore, I can conclude that the above standards are substantially similar to the standards from 2012.

[46] The third party asserts that given the specific nature of the assumptions contained in the appraisal requires a careful reading of the document, in its entirety, to determine how the values provided are arrived at. The third party has also raised the concern that the way the appraisal is portrayed in the public will cast doubt on the third party's abilities and confidence.

[47] The third party's assertions and the rules that they are governed by appear to be at odds. As outlined in the preamble the rules "...incorporates the minimum content necessary to produce a credible report that will not be misleading." Therefore, if the third party is following the requirements of the appraisal as outlined above in the rules, he or she will create a report that will not be misleading.

[48] The third party has also raised the argument that misapprehension of the content and conclusion of the Appraisal will be lost in reporting, such critical details not being important to a headline grabbing soundbite. My office cannot control what happens to information once it is released into the public realm. If the third party is faced with unfavourable media with the release of the appraisal, it could certainly take steps to publicly explain the contents of the appraisal and the specific assumptions that it used to come to the land valuation.

[49] The third party and the appraiser that prepared the appraisal is a designated member of the AIC and is a professional providing services to government that results in the potential spending of large amounts of taxpayers' dollars. As outlined above, section 6 of *CUSPAP 2018* is very prescriptive as to what needs to be included in order to not create a misleading appraisal.

[50] The *About Our Profession* portion of AIC's website includes the following information:

What Real Estate Appraisers Do

The real property market is a key building block of the Canadian economy and affect every segment of our society. Unbiased and dependable valuations are critical to the decision-making processes of individuals, businesses, and governments when conducting real property transactions. Appraisal Institute of Canada Designated Members are real estate appraisal professional who play a direct and vital role in the real estate sector. That role is to determine, report upon, and attest to the real value of property. Their valuation is the foundation upon which informed decisions about real estate are made...[emphasis added]

[51] As outlined above, one of the roles of appraisal professionals is to produce *unbiased and dependable* valuations. Based on this and what is outlined in *CUSPAP*, it is difficult for this office to accept an argument of harm when you are assessing that harm as it relates to something that is supposed to be unbiased and dependable.

[52] The third party has also made the argument surrounding the name of the third party and how it is connected with someone who was formerly part of the third party. I do not accept that argument, as privacy protection provisions are extended to individuals and not to a business or corporate name even if that name is connected to that of an individual.

- [53] The third party has not demonstrated to this office the reasonable expectation of harm. Therefore, I find that subsections 19(1)(c)(i) and (ii) of FOIP do not apply to the appraisal.
- [54] My advice to the third party, in this case, if it believes that it has issued a sound report that is not misleading, it should stop resisting its release. I encourage it to withdraw its objections to release the appraisal report.
- [55] I would like to generally comment on confidentiality language in contracts and reports as this issue has been raised by the third party. Public bodies would be well advised to warn third parties, prior to entering into a contract that their contracts or reports may be released under FOIP. Public bodies would be well advised to minimize the significance of confidentiality clauses in contracts and reports. The better course would be to have a clause in a contract that indicates that the contract and any reports or correspondence may be released in an access request. Dealing with this issue up front will prevent the third party from having the expectation that their work for government is confidential. I would encourage lawyers advising government and drafting contracts to minimize or eliminate confidentiality clauses.

3. Is there personal information in the appraisal?

- [56] There are protection of privacy requirements under FOIP that must be considered. 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.
- [57] In order for information to be found to be personal information, there must be an identifiable individual and the information must be personal in nature. Subsection 24(1) provides examples of types of information that is considered personal in nature. Subsection 24(1)(j) and (k) of FOIP provides:

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:

...

(j) information that describes an individual’s finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness.

(k) the name of the individual where:

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

(ii) the disclosure of the name itself would reveal personal information about the individual.

[58] When reviewing the appraisal my office noted that there were individual’s names connected with the sale prices of his or her land and in the appraisal report it could be considered personal information. This information can be found on pages 31 to 36 of the appraisal (as numbered by SaskPower) of those listed as the “Vendor” in Index number 1, 6, 7, 10, 12, 13 and 14.

[59] This information meets the two part test for personal information. First, it is about an identifiable individual as it lists the individuals by name. Secondly, the information is personal in nature as it lists the sale price of the land that each of the individual’s received. This type of personal information would be captured under subsections 24(1)(j) and 24(1)(k) of FOIP.

[60] Therefore, I find that subsection 29(1) of FOIP applies to the individuals’ names that are listed as the “Vendor” in Index numbers 1, 6, 7, 10, 12, 13 and 14.

[61] In response to the draft report, SaskPower informed my office that it intends to fully comply with the Recommendations.

IV FINDINGS

[62] I find that subsection 19(1)(b) of FOIP does not apply to the appraisal.

[63] I find that subsection 19(1)(c)(i) and (ii) of FOIP do not apply to the appraisal.

[64] I find that subsection 29(1) of FOIP applies to the individuals' names that are listed as the "Vendor" in Index numbers 1, 6, 7, 10, 12, 13 and 14.

V RECOMMENDATIONS

[65] I recommend that SaskPower continues to withhold the individual's names that are listed as the "Vendor" in Index numbers 1, 6, 7, 10, 12, 13 and 14.

[66] I recommend that SaskPower release the remainder of the appraisal report to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 8th day of February, 2018.

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