



REVIEW REPORT 061-2017

Ministry of the Economy

June 2, 2017

Summary:

The Applicant requested records from the Ministry of the Economy (Economy) related to a land transaction west of Regina. Economy withheld information in records indicating the information was “non-responsive” to the access request. Economy withheld other information citing subsections 17(1)(a), (b)(iii) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Upon review, the Commissioner found that Economy could not provide the Applicant with a copy of an appraisal that was addressed in Review Report 077-2016 and 092-2016 and recommended Economy destroy its copy. However, all references to the appraisal and a second appraisal in the records were responsive and should be released. In addition, the Commissioner found Economy did not have possession with a measure of control over the second appraisal and recommended that Economy destroy all copies. Further, the Commissioner found that subsections 17(1)(a) and (b)(iii) of FOIP did not apply and recommended the information be released. Finally, the Commissioner recommended that Economy revise its policy and procedures so that in its section 7 letters it indicates when records are being withheld as non-responsive or information is being severed as non-responsive and give reasons why.

I BACKGROUND

[1] On September 6, 2016, the Ministry of the Economy (Economy) received the following access to information request from the Applicant:

Please provide all of the emails on the attached document which are not highlighted in red.

- [2] Attached to the access request was a 12 page document created by the Ministry of Central Services and provided to Economy. It lists emails involving Economy. The list of emails was generated as part of the audit of the Global Transportation Hub land deal conducted by the Provincial Auditor. The list was previously provided to the Applicant in response to another access request. Five of the pages listed emails which the Applicant had requested access to.
- [3] By letter dated November 24, 2016, Economy provided its response to the Applicant indicating that access to the emails was partially granted. In addition, Economy advised that some of the information was being withheld pursuant to subsections 16(1), 19(1)(b), (c), 22(a), (b) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). On November 25, 2016, my office received a Request for Review from the Applicant in which he disagreed with Economy's application of the above provisions. This review is addressed in Review Report 277-2016.
- [4] Upon completion of that review, the Applicant indicated that he had also wanted my office to address the information in the record that Economy had deemed non-responsive to his access request.
- [5] I note that Economy did not indicate in its November 24, 2016 response to the Applicant that it was also withholding information as non-responsive to the access request. Applicants need to be informed of the reasons information has been withheld. I will be recommending that Economy revise its policy and procedures so that in its section 7 letters it indicates when records are being withheld as non-responsive or information is being severed as non-responsive and give reasons why. As a best practice, I believe that all public bodies should be doing this.
- [6] On March 30, 2017, my office notified Economy and the Applicant of my office's intent to undertake a review and invited all parties to provide submissions. On April 13, 2017, Economy provided my office with its submission. No submission was received from the Applicant.

II RECORDS AT ISSUE

[7] The record at issue consists of 21 pages. Economy severed information citing non-responsive on 19 of the 21 pages and subsections 17(1)(a) and (b)(iii) of FOIP on two pages. Some of the information is repeated across several pages.

III DISCUSSION OF THE ISSUES

[8] Economy is a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP.

1. Was there information in the records that was not responsive to the access request?

[9] When a public body receives an access to information request, it must determine what information is responsive to the access request.

[10] *Responsive* means relevant. The term describes anything that is reasonably related to the request. It follows that any information or records that do not reasonably relate to an Applicant’s request will be considered “not-responsive”. The Applicant’s access request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive.

[11] A public body can sever information as non-responsive only if the Applicant has requested specific information, such as his or her own personal information. The public body may treat portions of a record as non-responsive if they are clearly separate and distinct and not reasonably related to the access request.

[12] The purpose of FOIP is best served when a government institution adopts a liberal interpretation of a request. If a government institution has any doubts about its interpretation, it has a duty to assist the Applicant by clarifying or reformulating it.

[13] As noted earlier, the Applicant's request was for:

...all of the emails on the attached document which are not highlighted in red

[14] The access request is very broad and clearly requested all of the emails from a list. The Applicant did not limit the request in any way, for example, asking for only the emails containing a specific topic.

[15] I will now consider the 19 pages and what has been deemed "non-responsive" by Economy.

Pages 1, 11, 13, 43, 52, 53, 54, 55, 57, 59, 64, 141, 142, 145 and 147

[16] These pages constitute emails. Some of the emails have attachments. Economy severed the titles of an appraisal in the attachment lines of each email and withheld the attached appraisal in full. In addition, it severed references to the appraisal in the body of the emails.

[17] In its submission, Economy asserted that it did not have written authorization from the appraisal company to have a copy of the appraisal and therefore should not have had possession of it. Further, it asserted that in accordance with my recommendation in Review Report 077-2016 and 092-2016 Economy intends to destroy its copy following completion of a review with my office which engages the appraisal as a responsive record. That review had already started when the recommendation came forward.

[18] In Review Report 077-2016 and 092-2016, I addressed this same appraisal which was a "42-page document entitled *Report on Appraisal of NW 20-17-20 W2 Regina, Saskatchewan as at February 12, 2013*...prepared by one of the third parties, [the appraisal firm]..." The Review Report involved the Global Transportation Hub Authority (GTH). Following an analysis on possession and control, I found that GTH had inappropriate possession of the appraisal. During that review, I also learned that Economy had a copy of it. I recommended that all provincial government institutions

with a copy of the appraisal without written authorization destroy those copies or return them to the appraisal firm. This included the copy that Economy had. Therefore, in this case, Economy has clarified that it does not have written authorization to possess a copy and intends to destroy it. As such, it cannot provide a copy to the Applicant. I recommend that once the earlier review is completed, Economy proceed with destroying its copy.

[19] Economy indicated in its submission that it was advised by my office to apply non-responsive to this appraisal as it should not be at issue. This is correct, however, going forward, if any additional access requests are received that engage this specific appraisal, I recommend Economy indicate in its section 7 response to the Applicant that it does not have possession and/or control of the appraisal.

[20] Economy has also removed all references to this appraisal in the body of the emails, including its title in the attachment line. In its submission, Economy asserted that as it should not have had a copy, any reference to it must also be non-responsive as it would not have been able to comment on it if it had not had it.

[21] I disagree with Economy on this point. My recommendation in Review Report 077-2016 and 092-2016 was not intended to suggest that government institutions remove all references to the appraisal in its documents. You can refer to a document without having actual possession of it.

[22] Therefore, I find that all references to the appraisal in the emails, including its title, would be responsive. I recommend that Economy release this information on the pages noted above. Other information on some of these pages was also withheld as non-responsive. I will deal with that information below.

Pages 43, 59, 64, 141, 142, 145 and 147

[23] Economy withheld a second appraisal that was attached to the above noted pages indicating the second appraisal was non-responsive. In its submission, Economy asserted

that “written authorization” was required from the appraisal firm, and no written authorization has been located, therefore it should not have had possession of the second appraisal. Economy provided arguments in support of its position. I will address this issue later in this analysis.

[24] Economy has also removed all references to the second appraisal in the body of the emails, including its title in the attachment line. In its submission, Economy asserted that as it should not have had a copy, any reference to it must also be non-responsive as it would not have been able to comment on it if it had not had it.

[25] As I concluded above, you can refer to a record without having it in your possession. Therefore, I find that all references to the second appraisal in the emails, including its title, would be responsive. I recommend that Economy release this information.

2. Does Economy have possession or control of the second appraisal?

[26] Section 5 of FOIP states:

5 Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the **possession or under the control** of a government institution.

[emphasis added]

[27] Section 5 is clear that access can be granted provided the records are in the possession or under the control of the government institution. Possession and control are different things. It is conceivable that a public body might have possession but not control of a record or that it might have control but not possession.

[28] *Possession* is physical possession plus a measure of control over a record.

[29] *Control* connotes authority. A record is under the control of a public body when the public body has the authority to manage the record including restricting, regulating and administering its use, disclosure or disposition.

[30] In its submission, Economy asserted that based on the possession and control factors listed below that it should not have had possession of the appraisal as there is no indication that at any time, permission from Canadian Resource Valuation Group Inc. (CRVG) was ever sought or granted. Therefore, Economy submits it should destroy any copies that may exist.

[31] In this case, it is clear that Economy has physical possession of the second appraisal. However, it must also have a measure of control. To determine whether a public body has a measure of control over a record(s), the following two questions can be asked:

1. Do the contents of the document relate to a public body matter? and
2. Can the public body reasonably expect to obtain a copy of the document upon request?

[32] If both questions can be answered in the affirmative, the document is under the control of the public body (*Canada (Information Commissioner) v. Canada (Minister of Defence)*, (2011)). In answering these two questions, the following factors can be considered:

- 1. Was the appraisal created by a staff member, an officer, or a member of Economy in the course of his or her duties performed for Economy?***

[33] Economy submits that the appraisal report clearly states it was prepared by CRVG on the title page of the report and on page two. Further, it asserted that no employee of Economy was involved in the creation of the appraisal.

- 2. Was the appraisal created by an outside consultant for Economy?***

[34] Economy asserted that the title page, as well as the letter on page two, clearly state that the appraisal was prepared for Vertex. Further, it asserts that Economy is not mentioned within the appraisal report as an entity that the appraisal was meant to inform.

3. Does Economy possess the appraisal, either because it has been voluntarily provided by the creator or pursuant to a mandatory, statutory or employment requirement?

[35] Economy asserted that the appraisal was not voluntarily provided by CRVG. Economy also asserted that there was no mandatory, statutory or employment requirements to provide the appraisal to Economy.

4. Does an employee of Economy possess the appraisal for the purposes of his or her duties performed for Economy?

[36] Economy asserted that Economy did not have, then or now, a stake in the land purchases of GTH.

5. Is the appraisal specified in a contract as being under the control of Economy and there is no understanding or agreement that the appraisal is not to be disclosed?

[37] Economy asserted that there are no contracts with Economy that specify in any way that the appraisal should be under the control of Economy. The area responsible for privacy and access is also responsible for all contracts outside of the Labour Market Development Division. A thorough search of tracking documents as well as the electronic filing system was conducted by the Chief Privacy and Access Officer to determine if such a contract existed. No contract was located, and there is no indication on any tracking document that one exists or ever existed.

6. Does the content of the appraisal relate to Economy's mandate and core, central or basic functions?

[38] Economy asserted that none of the content of the appraisal relates to Economy's mandate and/or core, central or basic functions. Economy reproduced its mandate as follows:

The Ministry of the Economy advances economic growth to generate wealth and opportunity in Saskatchewan. The Ministry attracts investment and removes barriers to growth; regulates responsible resource development by facilitating resource exploration and development within an effective regulatory framework; and supports a robust labour market by developing, attracting and retaining a skilled labour force.

7. Does Economy have a right of possession of the appraisal?

[39] Economy submitted it does not have a right of possession and referred to excerpts from the appraisal.

[40] Upon review of the excerpts it is clear that consent from CRVG is needed.

8. Does Economy have the authority to regulate the appraisal's use and disposition?

[41] Economy asserted that no written authorization from CRVG has been located within Economy's records. The report was to be maintained in confidence between CRVG, Vertex and the GTH, and was to be disclosed only to the owner of the subject properties. Economy was not the owner of the subject properties and therefore should not have had possession of the appraisal. Given these facts, Economy submits it does not have the authority to use or disclose the appraisal.

9. Did Economy pay for the creation of the appraisal?

[42] Economy asserted that as it did not have a contract with CRVG to create the appraisal. Further, it asserted that payment of reports such as the appraisal can only be completed subject to contractual obligations in accordance with the Government of Saskatchewan's *Financial Administration Manual*. As such, Economy asserts it did not pay for the creation of the appraisal.

10. Has Economy relied on the appraisal to a substantial extent?

[43] Economy asserted that it was not the purchaser of the land in question, nor was it to be at any time. Therefore, it did not rely upon or use the appraisal in any way.

11. Is the appraisal closely integrated with other records held by Economy?

[44] Economy asserted that the only records in existence of this appraisal exist within the current Deputy Minister's email system. Further, that these records are not integrated within the

filing system of the Deputy Minister's Office, but are held separately within the folder structure of the Deputy Minister's email. It submits that no other Economy employee was involved in the sending or receiving of the appraisal.

12. *Is there a contract that permits Economy to inspect, review and/or possess copies of the appraisal (which the contractor produced, received or acquired)?*

[45] Economy asserted that a thorough search was conducted and no contract was located, and there is no indication on any tracking document that one exists or ever existed.

13. *What is Economy's customary practice in relation to possession or control of records of this nature in similar circumstances?*

[46] Economy asserted that it is not the mandate of Economy to have land appraisals conducted, as Economy does not own or purchase land of any kind. Therefore, there are no customary practices to rely upon. However, it asserted, as the emails containing the appraisal were sent to a limited number of employees at Economy, and were meant specifically as an attachment for a Cabinet Decision Item, it was handled in a confidential manner.

14. *What is the customary practice of other bodies in a similar trade, calling or profession in relation to possession or control of records of this nature in similar circumstances?*

[47] Economy referred to paragraphs [41], [42], [43] and [44] of my Review Report 077-2016 and 092-2016, which outlined the *Canadian Uniform Standards Professional Appraisal Practice* (CUSPAP) from the Appraisal Institute of Canada (AIC) which contained the customary practices of the appraisal professions in Canada. The practices support that in the appraisal industry, written authorization is required by the client and the member prior to appraisals being shared.

[48] Economy submitted that permission has not been sought from CRVG, nor has any communication occurred due to the fact that Economy has ascertained that it should not have had possession of the appraisal. It asserts that to seek permission at this late date

would undermine Economy's assertion that it should not have possession or control of the appraisal.

15. *Is Economy the owner of the appraisal?*

[49] Economy asserted that it would not be the owner of the appraisal as it was prepared for Vertex and the GTH.

[50] After considering the 15 factors and the submission from Economy, I find that Economy has physical possession of the second appraisal but no measure of control over it. As it should not have had physical possession of it, I recommend Economy destroy all copies.

3. Did Economy properly apply subsection 17(1)(a) of FOIP?

[51] Pages 219 and 222 are emails. The severed information is repeated on both pages. Economy initially severed the information as non-responsive. However, Economy later changed its position and applied subsections 17(1)(a) and (b)(iii) of FOIP to this information.

[52] Subsection 17(1)(a) of FOIP is a discretionary exemption and provides as follows:

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;

[53] This exemption is meant to allow for candor during the policy-making process, rather than providing for non-disclosure of all forms of advice. All three parts of the following test must be met in order for subsection 17(1)(a) of FOIP to be found to apply:

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 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 the public body?

[54] In its submission, Economy asserted that the information constituted analyses and policy options provided by a government institution to an employee of a member of Executive Council, who was the Chief of Staff for the Minister of the Economy at the time.

[55] *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.

[56] *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.

[57] *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.

[58] Therefore, advice is the course of action put forward, while analyses refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals, and policy options as to a course of action.

[59] From a review of the information on pages 219 and 222, it does not appear to fit any of the definitions noted above. It is not clear what the course of action is that is tied to these considerations. In its submission, Economy asserted that the information was prepared for the purpose of advising the Premier's Office of a pending issue with citizens of the

province and to allow for the preparation of a response to those concerns. However, that is not what is reflected in the emails. It appears to be a side-bar topic introduced by one individual in the email chain. Nobody responded to the side-bar topic. The emails were being exchanged for a completely different purpose and involved a different topic.

[60] Therefore, I find that the first part of the test has not been met. As all three parts must be met, there is no need to go further. As such, I find that Economy did not appropriately apply subsection 17(1)(a) of FOIP to the information on these pages.

4. Did Economy properly apply subsection 17(1)(b)(iii) of FOIP?

[61] Subsection 17(1)(b)(iii) 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:

...

(b) consultations or deliberations involving:

...

(iii) the staff of a member of the Executive Council;

[62] This provision is meant to permit public bodies to consider options and act without constant public scrutiny.

[63] 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.

[64] A *deliberation* is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

[65] In order to qualify, the opinions solicited during a “consultation” or “deliberation” 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, such as taking an action, making a decision or a choice.

[66] In its submission, Economy asserted that the information constituted a deliberation between a government institution and an employee of a member of Executive Council. Further, it asserted that the government employee was, and still is, expected to provide opinions to Executive Council. Finally, it added that the information was prepared for the purposes of advising the Premier's Office of a pending issue with citizens of the province and to allow for the preparation of a response to these concerns. I note that in Economy's Index of Records it indicates the information constitutes a consultation.

[67] Based on the definitions above, I do not find that the information on pages 219 and 222 qualify as a consultation or a deliberation. It is also not clear what decision needs to be made. It also doesn't appear to be a discussion but rather one individual inserting a side-bar topic. The emails were being exchanged for a completely different purpose and involved a different topic. Finally, the individuals involved appear to include the Deputy Minister of Economy, another Economy employee whose role is not clear and an employee with Executive Council whose role is also unclear.

[68] Therefore, I find that Economy did not appropriately apply subsection 17(1)(b)(iii) of FOIP to these pages. I recommend that Economy release these pages to the Applicant.

5. Did Economy properly apply subsection 29(1) of FOIP?

[69] Economy severed information on pages 127, 128, 129 and 130 and marked the information as non-responsive. It also applied subsection 29(1) of FOIP. The pages are an email chain and the information is repeated across the chain. The information severed appears to be opinions made about a sporting event.

[70] These pages were dealt with under subsection 29(1) of FOIP in Review Report 277-2016. I found that subsection 29(1) of FOIP applied to the severed information on these pages

and recommended that they continue to be withheld. I recommend that Economy continue to withhold the personal information on these pages.

IV FINDINGS

[71] I find that Economy cannot provide the Applicant with a copy of the appraisal that is addressed in Review Report 077-2016 and 092-2016.

[72] I find that all references to the appraisal, including its title, are responsive to the Applicant's access request.

[73] I find that references to the second appraisal, including its title, are responsive to the Applicant's access request.

[74] I find that Economy cannot provide the Applicant with a copy of the second appraisal as it does not have possession with a measure of control over it.

[75] I find that Economy did not appropriately apply subsections 17(1)(a) and (b)(iii) of FOIP to pages 219 and 222.

V RECOMMENDATIONS

[76] I recommend that Economy proceed with destroying a copy of the appraisal that is addressed in Review Report 077-2016 and 092-2016 once the earlier review is completed. Further, if this appraisal is responsive to any future access requests, Economy should indicate in its section 7 response to Applicants that it does not have possession and/or control of this appraisal.

[77] I recommend that Economy release the references to the appraisal addressed in Review Report 077-2016 and 092-2016, including its title on pages 1, 11, 13, 43, 52, 53, 54, 55, 57, 59, 64, 141, 142, 145 and 147.

- [78] I recommend that Economy release the references to the second appraisal, including its title on pages 43, 59, 64, 141, 142, 145 and 147.
- [79] I recommend that Economy proceed with destroying all copies of the second appraisal.
- [80] I recommend Economy release the information on pages 219 and 222.
- [81] I recommend that Economy continue to withhold the information deemed to be personal information on pages 127, 128, 129 and 130, consistent with Review Report 277-2016.
- [82] I recommend that Economy revise its policy and procedures so that in its section 7 letters it indicates when records are being withheld as non-responsive or information is being severed as non-responsive and give reasons why.

Dated at Regina, in the Province of Saskatchewan, this 2nd day of June, 2017.

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