



REVIEW REPORT 064-2020

Highway Traffic Board

December 8, 2020

Summary:

The Applicant submitted an access to information request to the Highway Traffic Board (HTB). The HTB provided the Applicant with access to some records but withheld others. The HTB claimed subsection 13(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP) as its reason for refusing access. The Applicant appealed to the Commissioner. The Commissioner found that the HTB did not demonstrate that subsection 13(1)(a) of FOIP applied to the records at issue. The Commissioner also found that the records at issue contained the personal information of third parties as defined by subsection 24(1) of FOIP. The Commissioner recommended the HTB sever the personal information of third parties pursuant to subsection 29(1) of FOIP and then release the remainder of the records to the Applicant.

I BACKGROUND

[1] On February 13, 2020, the Highway Traffic Board (HTB) received the following access to information request:

All information related & pertaining to [name of Applicant]'s review of an administrative drivers licence suspension.

[2] In an email to the Applicant dated February 21, 2020, the HTB provided the Applicant with access to some records. However, it withheld records that were provided to it by the Royal Canadian Mounted Police (RCMP). In its email to the Applicant, the HTB stated:

The Highway Traffic Board also had the information provided by the RCMP regarding the incident. Upon further discussion with Ministry of Justice and RCMP officials the Highway Traffic Board cannot release this information to you. To obtain a copy of this information you can make a request directly to the RCMP.

- [3] Also on February 21, 2020, the Applicant requested a review by my office of the HTB's decision to withhold the requested information.
- [4] After a review of HTB's email dated February 21, 2020, to the Applicant, an Early Resolution Officer at my office determined that the HTB's email did not meet the requirements of section 7 of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [5] On February 27, 2020, the HTB issued a new response to the Applicant that met the requirements of section 7 of FOIP. It cited section 13 of FOIP as its reason for withholding records from the Applicant. The HTB clarified with my office that it was relying on subsection 13(1)(a) of FOIP.
- [6] On March 18, 2020, my office sent emails to both the Applicant and to the HTB that it would be undertaking a review of the HTB's decision to deny access to part of the record pursuant to subsection 13(1)(a) of FOIP.

II RECORDS AT ISSUE

- [7] At issue are 16 pages of records. These 16 pages originated from the RCMP "F" Division.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

- [8] Section 14 of *The Traffic Safety Act* provides as follows:

14(1) The Highway Traffic Board continued pursuant to *The Highway Traffic Act* is continued.

(2) The board consists of at least five persons appointed by the Lieutenant Governor in Council.

[9] Therefore, pursuant to subsections 2(1)(d)(ii)(A) of FOIP and section 3 and Part I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations*, the HTB qualifies as a “government institution”. I find that I have jurisdiction to conduct this review.

2. Did the HTB properly apply subsection 13(1)(a) of FOIP?

[10] The HTB indicated that subsection 13(1)(a) of FOIP was its reason for withholding all 16 pages of the records at issue. Subsection 13(1)(a) of FOIP provides as follows:

13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:

(a) the Government of Canada or its agencies, Crown corporations or other institutions;

...

unless the government or institution from which the information was obtained consents to the disclosure or makes the information public.

[11] My office uses the following three-part test when determining if subsection 13(1)(a) of FOIP applies:

1. Was the information obtained from the Government of Canada or its agencies, Crown corporations or other institutions?
2. Was the information obtained implicitly or explicitly in confidence?
3. Is there consent to disclose the information or has the information been made public?

[12] I will analyze each part of the test below.

1. Was the information obtained from the Government of Canada or its agencies, Crown corporations or other institutions?

[13] The 16 pages are from the RCMP “F” Division. HTB’s position was that the RCMP is a “federal government crown”. It asserted that since the records at issue were from the

RCMP, then the RCMP should be redacting the document and not the HTB. Its submission provided the following arguments:

1. The information in question was originally created and supplied (to SGI) by the RCMP. It is my understanding that the RCMP, as a federal government crown, is not subject to FOIP.
2. The document created by the RCMP contains third party personal information. Any redaction of the document should be done by the initial creator and not the HTB.
3. The document was provided to the HTB (through SGI) by another government institution and done so on the basis that the document will remain confidential. The RCMP, the creator of the document, have not provided consent to the HTB for the release of this document.
4. The HTB is not aware of the status of any criminal proceedings that may be ongoing relating to the document in question. The RCMP is in a better position to make decisions relating to this document.

[14] First, subsection 5 of FOIP provides every person a right to access to records in the possession or under the control of a government institution. While the RCMP may have created the records, the HTB are in possession of the records. As such, the HTB must consider these records as part of its response to the Applicant's access request under FOIP.

[15] In *Evenson v. Saskatchewan (Ministry of Justice)*, 2013 SKQB 296 (CanLII) (*Evenson v. Saskatchewan*), Justice Gabrielson found that subsection 13(1)(a) of FOIP would apply to documents obtained by the RCMP when delivered to a government institution in confidence. Justice Gabrielson said:

There is nothing in s. 13(1)(a) of the Act which suggests that the exemption found there is lost if the federal agency is acting under a contract with a provincial government. In my opinion, therefore, the exemption found in s. 13(1)(a) would apply in respect to documents obtained by the RCMP and delivered to the Crown Prosecutors' Office in confidence.

[16] As such, I must consider if the RCMP qualifies as "Government of Canada or its agencies, Crown corporations or other institutions". Page 18 of Chapter 4 of my office's *IPC Guide to FOIP* (Guide to FOIP) provides:

For this exemption to apply, the agencies in question must qualify as either “Government of Canada or its agencies, Crown corporations or other institutions”. Because of the possessive pronoun in this clause, “agencies” and “other institutions” should be understood as federal agencies and federal institutions. For “other institutions”, it should be either federal government institutions as defined by the federal *Access to Information Act* or institutions controlled by the federal government.

For some assistance, Schedule 1 (Section 3) of the federal *Access to Information Act* provides a list of federal government institutions.

[17] Schedule 1 of the federal *Access to Information Act* provides that the RCMP is a federal government institution. As such, I find that the RCMP is a federal government institution for the purposes of subsection 13(1)(a) of FOIP.

[18] Based on a review, the records at issue were created and sent by the RCMP to the HTB. I find that the first part of the test is met.

[19] I must keep in mind that Justice Gabrielson indicated that subsection 13(1)(a) of FOIP would apply to documents obtained by the RCMP and delivered to the government *in confidence*. Therefore, I will proceed to the second part of the three-part test to determine if the HTB has demonstrated that the information was obtained in confidence.

2. Was the information obtained implicitly or explicitly in confidence?

[20] To meet the second part of the test, the government institution must be able to demonstrate that the information was obtained implicitly or explicitly in confidence.

[21] Page 19 of Chapter 4 of my office’s Guide to FOIP describes “in confidence” as a situation of mutual trust in which private matters are relayed or reported. Information obtained in confidence means that the provider of the information has stipulated how the information can be disseminated. In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the government institution and the party that provided the information.

[22] Page 19 of Chapter 4 of my office’s Guide to FOIP provides that “implicitly” means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding. When determining if information is confidential, the Federal Court of Canada indicated that it is not enough for a party to assert that it is confidential without further evidence in *Jacques Whitford Environment Ltd. v. Canada (Minister of National Defence)*, 2001 FCT 556 at [40]:

[40] The parties agreed at the hearing that the requested documents met criteria 1, 3 and 4 as outlined in paragraph 38. I agree. This Court must now decide whether the document is confidential information. For ease of reference, I will repeat the remarks of MacKay J. in *Air Atonabee, supra* at pages 208 and 210, which read as follows:

The second requirement under subsection 20(1)(b), that the information be confidential, has been dealt with in a number of decisions. These establish that the information must be confidential in its nature by some objective standard which takes account of the content of information, its purposes and the conditions under which it was prepared and communicated (per Jerome A.C.J., in *Montana, supra*, at page 25). **It is not sufficient that the third party state, without further evidence, that it is confidential** (see, e.g., *Merck Frosst Canada Inc., supra*; *Re Noel and Great Lakes Pilotage Authority Ltd. et al.* (1987), 1987 CanLII 5385 (FC), 45 D.L.R. (4th) 127 (F.C.T.D.)).

[Emphasis added]

[23] Furthermore, page 20 of Chapter 4 of my office’s Guide to FOIP provides that the government institution and the party that provided the information must have had a mutual understanding regarding the confidentiality of the information *at the time it was provided*. The Office of the Information and Privacy Commissioner of Ontario took the same position in its Order MO-1896 where it said:

To satisfy the “in confidence” component of the section, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided.

[24] Finally, page 20 of Chapter 4 of my office’s Guide to FOIP provides that “explicitly” means that the request for confidentiality has been clearly expressed, distinctly stated or made definite. There may be documentary evidence that shows that the information was obtained with the understanding that it would be confidential.

[25] As quoted earlier, the HTB asserted that the RCMP provided the documents to the HTB “on the basis that the document will remain confidential”. On November 5, 2020, my office sought further information from the HTB to support this assertion. My office asked:

Would you be able to elaborate further on the bolded and underlined portion of the quote above? For example, was there an explicit agreement between SGI/HTB and the RCMP that outlines a mutual understanding that the information would be kept confidential at the time the information was obtained by SGI/HTB? If so, would you be able to provide a copy of the agreement? Or, was there an implicit understanding that the information would be kept confidential? If so, would you be able to describe the implicit understanding of confidentiality?

[26] On November 25, 2020, the HTB indicated to my office the following:

After receiving this request from [the Applicant] I followed up with our lawyer and representatives from the Ministry of Justice.

Following their suggestion in February 2020 I contacted an RCMP representative in the access to information and privacy office. The RCMP confirmed that [the Applicant] would have to make a request through their office for this document and that the Highway Traffic Board should not release it.

[27] Based on the response provided to my office by the HTB, I am unable to conclude that there was a mutual understanding that the RCMP was providing the information, implicitly or explicitly, in confidence at the time that the HTB obtained the information. Even though the RCMP may have expressed its preference that the HTB withhold the record and the Applicant submit an access to information request to the RCMP for the information, the RCMP’s preference does not mean that there was a mutual understanding that the information was obtained in confidence at the time the RCMP provided the information. Further, the HTB can only withhold information if an exemption under FOIP applies, which the HTB has the burden of proof in demonstrating pursuant to section 61 of FOIP. I find that that the HTB has not demonstrated that subsection 13(1)(a) of FOIP applies to the records.

[28] Since I find that the HTB has not met the second part of the test for subsection 13(1)(a) of FOIP, there is no need for me to consider the third part.

3. Does subsection 29(1) of FOIP apply to the records at issue?

[29] If information in records qualifies as “personal information” of an individual other than the Applicant as defined by subsection 24(1) of FOIP, then the HTB should be applying subsection 29(1) of FOIP to withhold the personal information. Subsection 24(1) of FOIP defines “personal information” as follows:

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:

(a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;

(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

...

(d) any identifying number, symbol or other particular assigned to the individual, other than the individual’s health services number as defined in The Health Information Protection Act;

(e) the home or business address, home or business telephone number or fingerprints of the individual;

(f) the personal opinions or views of the individual except where they are about another individual;

...

(h) the views or opinions of another individual with respect to the individual;

...

(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.

[30] The HTB has not applied subsection 29(1) of FOIP to the records at issue. However, in its submission, the HTB indicated that the records at issue contained the personal information

of third parties. Based on a review of the records, I agree with the HTB. I find that the records at issue contain the personal information of third parties as defined by subsection 24(1) of FOIP.

[31] Section 8 of FOIP requires that government institutions sever only the portions of the records to which the applicant is refused access and then providing the remainder of the record. Section 8 of FOIP provides:

8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

[32] Therefore, I recommend that the HTB sever the personal information of third parties pursuant to subsection 29(1) of FOIP and then release the remainder of the records (including the Applicant's own personal information) to the Applicant.

IV FINDINGS

[33] I find that I have jurisdiction to conduct this review.

[34] I find that that the HTB has not demonstrated that subsection 13(1)(a) of FOIP applies to the records at issue.

[35] I find that the records at issue contain the personal information of third parties as defined by subsection 24(1) of FOIP.

V RECOMMENDATION

[36] I recommend that the HTB sever the personal information of third parties pursuant to subsection 29(1) of FOIP and then release the remainder of the records (including the Applicant's own personal information) to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 8th day of December, 2020.

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