



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 077-2016 and 092-2016

Global Transportation Hub Authority

September 30, 2016

Summary:

The Global Transportation Hub Authority (GTH) responded to two access to information requests denying access to a land appraisal report pursuant to subsections 18(1)(d), 18(1)(h), 19(1)(b), 19(1)(c)(i) and 19(1)(c)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Through the course of the review my office identified a preliminary issue of whether the GTH actually has possession and control of the Appraisal. The Commissioner found the GTH was inappropriately provided a copy of the Appraisal. The Commissioner recommended the GTH destroy all copies of the Appraisal or return them to [the appraisal firm]. Further, the Commissioner recommended that provincial government institutions with a copy of the Appraisal without the written authorization also destroy those copies or return them to [the appraisal firm].

I BACKGROUND

- [1] The Global Transportation Hub Authority (GTH) received two access to information requests from separate applicants on February 18, 2016 and March 9, 2016, requesting access to the following:

Access to information request #1 (Review file 077-2016)

Please provide a copy of the property assessment provided by Anthony Marquart's company valuing the land involved in Order in Council 44/2014. For clarity this is the assessment that Minister Boyd stated in his interview with [the CBC] shows a valuation of the land at approximately \$125,000 an acre.

Access to information request #2 (Review file 092-2016)

Please provide a copy of the \$125,000 an acre appraisal Minister Bill Boyd referred to in the attached CBC news article entitled “Businessmen made millions on Regina land that wound up in taxpayer’s hands.”

- [2] A summary of Order in Council 44/2014, found online at the Government of Saskatchewan’s Publications Centre, states:

Title: The Global Transportation Hub Authority – Purchase of Land from 100225232 Saskatchewan Ltd. for \$21,038,780.00 (204 acres)

Minister: Minister Responsible for The Global Transportation Hub Authority

Summary: Orders that The Global Transportation Hub Authority is approved to purchase the following lands from 100225232 Saskatchewan Ltd. for a total price not to exceed \$21,038,780.00 consisting of about 204 acres (82.69 hectares):

Surface Parcel #165025414

Reference Land Description: NW Sec 20 Twp 17 Rge 20 W2 Extension 1 (116.86 acres or 47.31 hectares); and

Surface Parcel #166005862

Reference Land Description: SW Sec 20 Twp 17 Rge 20 W2 Extension 1 (87.40 acres or 35.38 hectares).

See: The Global Transportation Hub Authority Act, section 6

- [3] My office conducted a Corporate Registry search of 100225232 Saskatchewan Ltd. (the numbered company) with the Information Services Corporation. A search of the company resulted that it was not in existence. We ordered a copy of the original Order in Council 44/2014 from Executive Council which had the numbered company listed also as 100225232 Saskatchewan Ltd. My staff contacted the GTH regarding the non-existent numbered company and was informed by a GTH official that there was, in fact, an error in Order in Council 44/2014. The actual numbered company the GTH purchased the land from was 101225232 Saskatchewan Ltd.

- [4] My office then conducted a Corporate Registry search of 101225232 Saskatchewan Ltd. The listed officers/directors are Anthony Marquart and Harold Rotstein and the

shareholders are Harnei Management Ltd. and Royalty Developments Ltd. The date of incorporation for the numbered company was February 6, 2013.

- [5] The GTH responded to request #1 on March 14, 2016, denying access to the record pursuant to subsection 18(d) [sic] of FOIP. By letter dated April 1, 2016, the GTH sent a letter of correction to the Applicant citing the reason for denial as subsection 18(1)(d) of FOIP. By letter dated May 3, 2016, the GTH sent another response letter to the applicant citing additional exemptions. Therefore, the GTH denied access to request #1 in full pursuant to subsections 18(1)(d), 18(1)(h), 19(1)(b), 19(1)(c)(i) and 19(1)(c)(ii) of FOIP.
- [6] The GTH responded to request #2 on May 2, 2016, denying access to the record pursuant to subsections 18(1)(d), 18(1)(h), 19(1)(b), 19(1)(c)(i) and 19(1)(c)(ii) of FOIP. These were the same exemptions cited in response to request #1.
- [7] My office received a request for review for request #1 on April 26, 2016 and for request #2 on May 12, 2016. I will note that my office has also opened a file on an estimate of cost issue for request #2, however that is being reviewed under a separate file.
- [8] We notified the applicants for request #1 and #2 and the GTH of our intention to review on May 19, 2016. As the GTH cited third party exemptions under section 19 of FOIP, my office also provided notice of this review to the two third parties identified by the GTH. The GTH confirmed with my office that the responsive record for request #1 and #2 is the same.
- [9] My office received submissions from each of the third parties and the GTH. Upon beginning our analysis of this review, I identified a preliminary issue of whether the GTH has possession and control of the record. My office invited the third parties and the GTH to provide a supplemental submission on the issue of possession and control of the Appraisal on August 16, 2016.

[10] I received supplemental submissions on behalf of the third parties and the GTH.

II RECORDS AT ISSUE

[11] The record at issue is a 42-page document entitled *Report on Appraisal of NW 20-17-20 W2 Regina, Saskatchewan as at February 12, 2013* (Appraisal) prepared by one of the third parties, [the appraisal firm], for Royalty Developments Limited.

[12] As the responsive record is the same in each request, I will be reviewing both of the access to information requests under one report.

III DISCUSSION OF THE ISSUES

[13] The GTH is a “government institution” pursuant to subsection 2(1)(d)(ii) of FOIP.

1. Does the GTH have possession and/or control of the Appraisal?

[14] When IPC staff received the record and submission from the GTH, they noted there was documentation that brought into question whether the GTH has possession and control of the Appraisal. This included a letter dated April 15, 2016 on behalf of [the appraisal firm] to the GTH. This letter read, in part:

At pages 1 and 3 of the appraisal it clearly states that “It is not reasonable for any person other than the client, the lender of the client’s choice, and [the appraisal firm] to rely upon this appraisal without first obtaining written authorization from all parties.” No authorization, written or otherwise, has been given by [the appraisal firm] to enable any party to provide this appraisal to GTH, let alone for it to be released under a FOIP application. At this time, the simple fact that GTH is in possession of the appraisal is a clear violation of our corporate client’s contractual rights.

[15] I reviewed the Appraisal to see if there were confidentiality clauses to support the April 15, 2016 letter. At page one of the Appraisal, under the heading *Intended Use of the Report*, it states:

The intended use of the appraisal is for internal uses of the client and to assist with financing arrangements relating to the subject property. It is not reasonable for any person other than the client, the lender of the client's choice, and [the appraisal firm] to rely upon this appraisal without first obtaining written authorization from all parties. This report has been prepared on the assumption that no other person will rely on it for any other purpose and all liability to all such persons is denied.

[16] Similar language was found in two other areas of the Appraisal. At page 3 and 4 of the Appraisal under the heading *Assumptions and Limiting Conditions* it states:

Except as it may be necessary to expedite the function of this appraisal as identified herein, it is not reasonable for any person other than the client, the lender of the client's choice, and [the appraisal firm] to rely upon this appraisal without first obtaining written authorization from all parties.

...

Neither possession of this report nor a copy of it carries with it the right of publication. All copyright is reserved to the author and is considered confidential by the author. It shall not be disclosed, quoted from or referred to, it whole or in part, or published in any manner without the expressed written consent of the client and [the appraisal firm].

[17] As this language was repeated several times throughout the Appraisal by [the appraisal firm], I determined we must first look at the preliminary issue of possession and control before considering exemptions applied by the GTH.

[18] 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].

[19] *Possession* is physical possession plus a measure of control of the record. *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.

[20] To determine whether a public body has a measure of control over a record(s), the following two part test can be applied:

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?

[21] If these questions can both be answered in the affirmative, the document is under the control of the public body. In order to answer these two questions, the following 15 factors can be considered.

1. Was the Appraisal created by a staff member, an officer, or a member of the GTH in the course of his or her duties performed for the GTH?

[22] It is clearly outlined in the Appraisal that it was prepared for Royalty Developments Ltd. by [the appraisal firm]. The GTH did not play a role in commissioning or creating the Appraisal.

2. Was the Appraisal created by an outside consultant for the GTH?

[23] In submissions made to my office on behalf of [the appraisal firm], they have advised, “[the appraisal firm] did not create the Appraisal for the GTH in any capacity.” This is fully supported by language in the Appraisal that it was created for Royalty Developments Ltd.

[24] The GTH confirmed with my office that the Appraisal was not created for them by an outside consultant. As outlined above in question #1, the Appraisal was prepared by [the appraisal firm] for Royalty Developments Ltd.

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

[25] The GTH has confirmed with my office that the Appraisal was not voluntarily provided by the creator. Further, they have confirmed there was not a mandatory, statutory or employment requirement for the GTH to possess a copy of the Appraisal.

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

[26] The GTH has advised my office that the Appraisal was not required for them to fulfill their mandate, and therefore no employee would have required a copy of the Appraisal to perform his or her duties. The GTH has recognized that a copy of the Appraisal was useful to them, however it was not necessary.

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

[27] [The appraisal firm] advised my office, "...there is no contract or agreement regarding the Appraisal to which GTH is a party."

[28] The GTH has confirmed with my office there is no contract in place. In its supplemental submission, the GTH stated, "No such thing is specified in a contract. There was an understanding at least on the part of the author that it would NOT be disclosed without the author's authorization."

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

[29] GTH officials advised my office that its mandate does include completing land transactions. However, they also advised that this Appraisal only relates to one transaction. Therefore, in their opinion it would not engage this factor.

[30] In my opinion, although this is an Appraisal of a parcel of land that the GTH ultimately purchased, the GTH would not have been required to receive this from the seller in order to finalize acquisition of this land.

[31] [The appraisal firm] has advised my office they assume a copy of the Appraisal was provided to the GTH by Royalty Developments Ltd. to support the asking price for this land.

[32] I conclude this particular Appraisal would not have been necessary in order to complete the land transaction as the GTH would have the ability to commission an appraisal if necessary.

7. Does the GTH have a right of possession of the Appraisal? and;

8. Does the GTH have the authority to regulate the Appraisal's use and disposition?

[33] [The appraisal firm] has demonstrated to my office through the language of the Appraisal itself, and submissions made to my office that the explicitly required written authorization was not given to Royalty Developments Ltd. to share the Appraisal. They assert that the GTH does not have a right to possess the Appraisal and therefore, would have no authority to regulate its use or disposition.

[34] In response to these questions the GTH appears to have concluded that they may not have the right to possess the record, nor the authority to regulate its use and disposition.

9. Did the GTH pay for the creation of the Appraisal?

[35] The GTH advised my office they did not pay for this appraisal. [The appraisal firm] advised my office that Royalty Developments Ltd. paid [the appraisal firm] to conduct the Appraisal for Royalty Developments Ltd.

10. Has the GTH relied on the Appraisal to a substantial extent?

[36] The GTH informed my office that this Appraisal only formed part of the information considered for one land transaction. The GTH advised they did not rely on this appraisal to a substantial extent.

11. Is the Appraisal closely integrated with other records held by the GTH?

[37] The GTH advised my office that it is not. The GTH views the Appraisal as a, "...self-contained, independent record."

12. Is there a contract that permits the GTH to inspect, review and/or possess copies of the Appraisal the contractor produced, received or required?

[38] [The appraisal firm] and the GTH have each advised my office that there was not a contract in place for the GTH to inspect, review and/or possess copies of the Appraisal. This is supported through [the appraisal firm]'s assertion that the required authorization was not given in order for the GTH to possess a copy of the Appraisal.

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

[39] The GTH informed my office that appraisal reports are often shared with parties who did not commission the report. However, I am not sure if authority exists from authors of appraisals for the GTH to have copies as they relate to other land transactions.

[40] The GTH also advised, "...it is not a necessary pre-requisite" to share appraisal reports in order to complete land transactions.

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?

[41] From its website, the Appraisal Institute of Canada (AIC) is, "...a self-regulating organization that is guided by a Code of Conduct and Canadian Uniform Standards Professional Appraisal Practice (CUSPAP...." [The appraisal firm] is a member of the AIC.

[42] The *Canadian Uniform Standards Professional Appraisal Practice* (CUSPAP), found on the Appraisal Institute of Canada's website, contains the customary practices of the appraisal professions in Canada. I found the following helpful in determining how others in the professional appraisal industry approach the sharing of appraisals. Article 7.2 of CUSPAP states:

7.2 Client and Intended User [see 6.2.1, 16.12]

7.2.1 The client is the individual or organizations for whom the member renders professional services. The client is typically the intended user of the assignment. It does not matter who pays for the work.

7.2.2 The client/member relationship lasts at least until the completion of the intended use of the original appraisal, or release from the client.

7.2.1.i. A party receiving a copy of an appraisal report does not become an intended user unless **authorized, and clearly identified by name and in writing, by the Member and the client** [emphasis added].

[43] Article 2 of CUPSAP outlines the definitions, and specifically intended use and intended user are defined in articles 2.37 and 2.38 of CUPSAP:

2.37 INTENDED USE:

The use of a Member's professional services, as identified by the Member based on communication with the client.

2.38 INTENDED USER:

The client and any other party, as identified by name, as a user of the professional services of the Member, based on communication between the Member and the client.

[44] These articles support [the appraisal firm]'s assertions that in the appraisal industry written authorization is required by the client and the member prior to appraisals being shared.

[45] The GTH has advised my office that appraisals are often shared prior to concluding land transactions. I am not able to comment as I am not sure if proper authorization is sought or if the type of intended users identified in appraisals can vary.

15. Is the GTH the owner of the Appraisal?

[46] The GTH would not be the owner of the Appraisal as it was prepared for Royalty Developments Ltd. by [the appraisal firm].

[47] [The appraisal firm] has assumed that the Appraisal was provided to the GTH by Royalty Developments Ltd. However, our office was advised by the GTH that the Appraisal was provided to them from an official with the Ministry of Economy by email on December 20, 2013. The GTH provided a copy of this email to my office which confirmed the date they received the Appraisal. This email does not address or identify how the Appraisal first came into the possession of the Ministry of Economy or if it was provided to the Ministry from another government institution.

[48] Now that I have reviewed the above 15 factors to determine if the GTH has a measure of control over the Appraisal, I have determined that the two questions posed in paragraph [20] do not need to be specifically answered. The circumstances surrounding this case are unique. I agree that the Appraisal relates to a departmental matter as it was an appraisal for land the GTH ultimately purchased. However, the GTH could not have reasonably expected to obtain a copy of the Appraisal given the circumstances of how the GTH came into possession of the Appraisal in the first place. [The appraisal firm] did not provide the required, written authorization for the GTH to possess a copy of the Appraisal. Therefore, the GTH should not have possession and does not have control of the Appraisal.

[49] This particular land transaction has garnered much media and political attention. I would like to reiterate that my role does not include commenting on whether the purchase price of land is appropriate or if proper procedures were followed through this particular land acquisition - this is the role others. My findings are based solely on FOIP.

[50] In conclusion, I have determined that based on the above, the GTH inappropriately has “possession” of the Appraisal.

[51] On September 21, 2016, my office shared the above analysis with the GTH. The GTH advised my office on September 22, 2016 that it would comply with the first recommendation and destroy all copies of the Appraisal or return the copies to [the appraisal firm].

IV FINDINGS

[52] I find that the GTH was inappropriately provided with a copy of the Appraisal.

[53] I find that I cannot continue with these reviews as FOIP does not apply to this record.

V RECOMMENDATIONS

[54] I recommend that the GTH destroy all copies of the Appraisal or return them to [the appraisal firm].

[55] I recommend provincial government institutions with a copy of the Appraisal without the written authorization destroys those copies or return them to [the appraisal firm].

Dated at Regina, in the Province of Saskatchewan, this 30th day of September, 2016.

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