

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 079/2013

Executive Council

Summary:

The Applicant submitted an access to information request to Executive Council for records related to the sale of all or part of the Information Services Corporation. Executive Council responded by stating that no records exist. The Applicant appealed to the Information and Privacy Commissioner (IPC). In the course of the review, Executive Council continued to argue that no records exist but provided the IPC with two non-responsive records and cited subsection 16(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP) as a reason to withhold one of the records and subsection 17(1)(f)(i) of FOIP as a reason to withhold the other record. The IPC found that Executive Council demonstrated it completed a reasonable and adequate search for records. He also found that while subsection 16(1)(a) of FOIP applies to the one record, he found that subsection 17(1)(f)(i) of FOIP did not apply to the other. In the course of the review, Executive Council agreed to release this record to the Applicant.

I BACKGROUND

- [1] On July 17, 2014, Executive Council received an access to information request for the following:

Any analysis and review of the sale of all or part of the Information Services Corporation prepared for or by the corporation in 2011, 2012 and 2013. Please provide any correspondence related to the review(s) between Executive Council officials and officials of the former crown corporation.

- [2] In a letter dated August 16, 2013, Executive Council refused the Applicant access to the records because the records do not exist, pursuant to subsection 7(2)(e) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] The Applicant requested a review by my office in a letter dated August 15, 2013.

II RECORDS AT ISSUE

[4] The records sought by the Applicant are described in the background section. In addition to stating that records do not exist in its letter dated August 16, 2013 to the Applicant, Executive Council advised the Applicant that FOIP “does not apply to the Legislative Assembly Service or offices of members of the Assembly or members of the Executive Council as per Section [sic] 2(2)(b) of the Act.”

[5] However, Executive Council did locate two records. The first record is a Decision Item document that was addressed to the chair of the Legislation and Regulation Review Committee (LRRC). The second record is a document entitled *Presidents Report to the Board*. It is on Crown Investment Corporation (CIC) letterhead and is dated May 23, 2013. Executive Council claimed that these records are non-responsive to the Applicant’s request. However, it also asserted that if my office determined that these records were responsive, then subsection 16(1)(a) would be applicable to the first record and subsection 17(1)(f)(i) would be applicable to the second record.

III DISCUSSION OF THE ISSUES

[6] Executive Council is a “government institution” as defined in subsection 2(1)(d)(i) of FOIP.

1. Did Executive Council conduct an adequate search?

[7] FOIP does not require a government institution to prove with absolute certainty that records do not exist. However, it must demonstrate that it has made a reasonable effort to identify and locate responsive records.

[8] In the past, my office has stated that government institutions should utilize and document a search strategy. The strategy should consider the following:

- Were records in any form or format considered (i.e. electronic, paper, and other)?
- Is the original access request broad and does it include information developed over a wide open time period? If so, determine how you will define the search?
- How do you intend to conduct the search for records in the public body's possession?
 - Do you search yourself?
 - Do you delegate others to do the search? If so, how can you be sure that the search was comprehensive?
 - Do you send out an email to other units, etc.?
- Could records also exist that are responsive but are not in your possession, but in your control?
- Did agents, consultants or other contracted services have any role in the project?

[9] Further, when in a review with my office regarding a search for records, the details that should be provided to our office is as follows:

- Who conducted the search?
- On what dates did each employee search?
- What was the search strategy?
 - for paper files; and
 - for electronic files (i.e. what key terms were used to search?)
- Which files or departments were searched and why?
- How long did the search take for each employee?
- What were the results of each employees search?
- Are there any additional program areas that should be searched in order to ensure that every reasonable effort was made?
- Have staff searched files held apart from the main department files (such as those held by individual employees), or records stored off-site?

[10] In its letter dated December 5, 2014 to my office, Executive Council explained that it understood the Applicant's request to be very specific:

The original request was not broad, but was quite specific in relation to documents prepared by or for ISC regarding any analysis or review of the sale of all or part of ISC.

[11] Based on the above understanding of the Applicant's request, Executive Council conducted its search for records. It provided details of its search strategy and the search itself in letters dated December 3, 2013 and December 5, 2014. In order to identify the branches that may have responsive records, freedom of information requests are mentioned at weekly senior management meetings. I find that this is an efficient and comprehensive method of identifying the areas within a government institution that should be searched for responsive records.

[12] A searched was conducted in the Premier's office, Cabinet Planning, the Deputy Minister's office, Intergovernmental Affairs, and Cabinet Secretariat. From that search, two records were provided to the Access Coordinator. These two records will be discussed later in this Review Report.

[13] My office has considered the details of Executive Council's search and I find that Executive Council has made a reasonable effort to search for responsive records.

[14] However, I acknowledge that the Applicant was dissatisfied because he was expecting there to be a lot of responsive records. In his request for review dated August 15, 2013 to my office, he asserted that his request was broad and it would even capture email records. He said:

I thought my request to be straight forward and broad enough to encompass discussions via email or otherwise on the topic,...

[15] The Applicant's opinion that the request was broad contrasts with Executive Council's understanding of the request to be very specific.

[16] To avoid misunderstandings, I encourage staff of Executive Council, or any government institution, to contact the Applicant and attempt to clarify the scope of a request. Any such narrowing or broadening of scope should be documented by email or letter.

2. Does subsection 16(1)(a) of FOIP apply?

[17] Executive Council asserted in its submissions dated December 3, 2013 and March 19, 2014 that the LRRC document located by the Cabinet Secretary and Clerk of the Executive Council is non-responsive to the request. It argued, though, that if my office found it to be responsive, that the record would be exempt pursuant to subsection 16(1)(a) of FOIP.

[18] On the issue of whether the LRRC document is responsive or not, Executive Council did not provide arguments as to why it is non-responsive. On the face of the record, I find that the record is responsive as it is relevant to the Applicant's request.

[19] Next, I need to determine if subsection 16(1)(a) of FOIP applies. Subsection 16(1)(a) of FOIP provides:

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

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

[20] In order for subsection 16(1)(a) of FOIP to apply, the information in the record must first qualify as advice, recommendations, proposals, analyses or policy options, which has been defined in Review Report LA-2010-001 at [28]. Then, the information must be presented to Executive Council or any of its committees.

[21] On the face of the record, the record contains proposals, recommendations and analyses. The record also is addressed to the chair of the Legislation and Regulation Review Committee. This committee is a committee of the Executive Council. Therefore, I find that subsection 16(1)(a) applies.

3. Does subsection 17(1)(f)(i) of FOIP apply?

[22] Executive Council applied subsection 17(1)(f)(i) of FOIP to the Report by the President of the Crown Investments Corporation. Subsection 17(1)(f)(i) of FOIP provides:

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(f) agendas or minutes of:

(i) a board, commission, Crown corporation or other body that is a government institution;

[23] My office has not considered subsection 17(1)(f)(i) of FOIP in a review report. Prior to amendments in 1999 to the *Alberta Freedom of Information and Protection of Privacy Act* (Alberta FOIP), subsection 23(1)(f) of Alberta FOIP was very similar to subsection 17(1)(f)(i) of FOIP. Subsection 23(1)(f) of Alberta FOIP provided as follows:

23(1)(f) the contents of agendas or minutes of meetings of an agency, board, commission, corporation, office or other body that is a public body.

[24] The Alberta Office of the Information and Privacy Commissioner (Alberta IPC), stated that the intent behind subsection 23(1) was to protect the decision-making process. It also explained that it had to give the words of subsection 23(1)(f) their ordinary meaning since those words – referring to the words “agenda” and “minutes” – don’t bear any other interpretation.

[25] I adopt the same approach to interpret subsection 17(1)(f)(i) of FOIP. In order for subsection 17(1)(f)(i) of FOIP to apply, the record being withheld must first be an agenda or meeting minutes of a board, commission, Crown corporation or other body that is a government institution.

[26] In its submission dated March 19, 2014, Executive Council argued that the president’s report would have formed a part of the minutes of the Crown Investment Corporation Board meeting. It argued the report would have been attached to the meeting minutes.

[27] At issue is the president's report itself. The report is not an agenda or meeting minutes. As such, my office found that subsection 17(1)(f)(i) of FOIP does not qualify and recommended that Executive Council release the report to the Applicant.

[28] In a letter dated December 5, 2014, Executive Council agreed that it would release the Report to the Applicant.

IV FINDINGS

[29] I find that Executive Council has demonstrated it completed a reasonable and adequate search for records.

[30] I find that subsection 16(1)(a) of FOIP applies to the Cabinet Decision Item that is addressed to the Chair of the LRRC.

[31] I find that subsection 17(1)(f)(i) of FOIP does not apply to the CIC President's Report to the Board.

V RECOMMENDATIONS

[32] I recommend that Executive Council, in appropriate circumstances, clarify access to information requests with the Applicant prior to conducting a search for records.

[33] I recommend that Executive Council advise my office when it releases the CIC President's Report to the Board to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 12th day of December, 2014.

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