



## **REVIEW REPORT 116-2016**

### **Ministry of Environment**

**August 29, 2016**

**Summary:** The Ministry applied subsection 16(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to records responsive to the Applicant's request. The Commissioner found that the exemption did not apply because the records did not qualify as advice, proposals, recommendations, analyses or policy options. He also found that the entire record was responsive to the Applicant's request and that the record did not qualify as personal information.

### **I BACKGROUND**

[1] On February 26, 2016, the Ministry of Environment (Ministry) received an access to information request from the Applicant for:

Any documents pertaining to the WHPA, the Wildlife Habitat Protection Act designation of NE 21-53-24W2 and NW 22-53-24W2.

[2] On March 28, 2016, the Ministry replied to the Applicant on March 28, 2016 and released certain responsive records to the Applicant. It also indicated that some pages were withheld pursuant to subsection 16(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On May 26, 2016, my office received a request for review from the Applicant. My office provided notification to the Ministry and the Applicant of our intention to undertake a review.

## II RECORDS AT ISSUE

- [4] The Ministry applied subsection 16(1)(a) of FOIP to five pages of records and severed one portion of a sixth page. The records can be characterized as follows:
- Three pages of e-mails between the Ministry of Environment and the Ministry of Agriculture; and
  - Three pages of spreadsheets attached to the e-mails.

## III DISCUSSION OF THE ISSUES

### 1. Does subsection 16(1)(a) of FOIP apply to the record?

- [5] Subsection 16(1)(a) of FOIP states:

**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;

- [6] My office has determined that documentation reflecting advice, proposals, recommendations, analyses or policy options developed from sources outside of the Executive Council for presentation to the Executive Council is intended to be covered by the provision.

- [7] The records all relate to an amendment to *The Wildlife Habitat and Ecological Lands Designation Regulations* (the Regulations). The Ministry indicated the amendment was considered by the Legislation and Regulation Review Committee (LRRC). This committee was established by Order-in-Council 656/2009 pursuant to section 6 of *The Executive Government Administration Act*. As such, it qualifies as a committee of Executive Council for the purposes of subsection 16(1)(a) of FOIP.

**A. E-mails**

[8] With respect to the e-mails between the Ministries of Agriculture and Environment, the Ministry stated in its submission that they “were created as part of the drafting and consultation process” of a regulation to be considered by the LRRC. Both convey the spreadsheets discussed below. In the second e-mail, only the name of the attached spreadsheet was severed. However, the submission also stated that these e-mails were not presented to the committee.

[9] As these e-mails were not presented to the LRRC, subsection 16(1)(a) of FOIP does not apply to the e-mails. Following the draft report, the Ministry agreed to release the e-mails.

**B. Spreadsheets**

[10] The record contains two spreadsheets. The first is a draft of the second spreadsheet. The spreadsheets list the parcels of land that were considered by the LRRC to be removed as wildlife habitat or ecological lands. Information about each parcel of land on the spreadsheet includes the location, number of acres, names of individuals that had been leasing the land, rural municipality, constituency and a CLEAT score.

[11] The Ministry of Agriculture sent the first draft spreadsheet by e-mail to the Ministry of Environment on September 16, 2015. The Ministry of Environment indicated that this version of the spreadsheet did not go to the LRRC. As such, it does not qualify for exemption.

[12] The LRRC met on October 27, 2015 to discuss this matter. Order-in-Council 540/2015 was issued on November 3, 2015 which reflects the LRRC’s decision about which lands were removed from the Regulations. On November 5, 2015, the Ministry of Environment sent a copy of the Order-in-Council as well as the second spreadsheet to the Ministry of Agriculture. The e-mail states that the “amendment removed the following lands” and refers to the list in the spreadsheet.

[13] The Ministry indicates that the second spreadsheet was presented to the LRRC in a binder. Its submission states that “CLEAT refers to the Crown Land Ecological Assessment Tool, which is used to determine the ecological value of a parcel of land, in conjunction with physical surveillance by ministry experts.” The Ministry indicated that the CLEAT score is “the primary determination of rationale by the ministry when selecting lands to be removed from (or added to) WHPA designation.” For this reason, the Ministry asserts that they qualify as advice, proposals, recommendations, analyses or policy options. I note that different parcels of land on the spreadsheets have different CLEAT ratings. Some are rated “moderate” and others are rated “lower”. I understand that recommendations emanated from these scores. However, these recommendations cannot be deciphered from the list of land and CLEAT scores.

[14] The removal of all of the land listed in the second spreadsheet is publicly known through the Order-in-Council and changes to the Regulations.

[15] Subsection 16(2)(b) of FOIP states:

16(2) Subject to section 30, a head shall not refuse to give access pursuant to subsection (1) to a record where:

...

(b) consent to access is given by:

- (i) the President of the Executive Council for which, or with respect to which, the record has been prepared; or
- (ii) in the absence or inability to act of the President, by the next senior member of the Executive Council who is present and able to act.

[16] Because the land has been removed from the Regulations and the CLEAT scores do not reveal the basis of the recommendation to the LRRC, I recommend that the Ministry seek consent from the President of the Executive Council to provide the Applicant with access to the second spreadsheet pursuant to subsection 16(2)(b) of FOIP.

[17] From time to time, my office encounters situations where information is public but the government institution claims a particular exemption. Technically the exemption applies but it seems contradictory to then say we cannot release it because of a specific exemption. This is particularly true, when it is a government institution that has deliberately published the information. I would encourage government institutions, where

information is already public in one form or another, to release the requested information or seek authorization to release that information even though an exemption would apply.

**2. Should the Ministry sever information from the record before releasing it to the Applicant?**

[18] The Ministry's submission stated the following:

Please note that the original access to information request concerned only land parcels owned by the applicant. In the event the withheld records were disclosed, the land parcels that are not owned by the applicant would be removed from the spreadsheets, as they are not responsive to the request.

[19] In order to determine if a record, or portion thereof, is responsive, I must closely examine the access request. The request itself defines the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. However, I must note that the purpose of FOIP is best served when there is a broad and liberal interpretation of the request.

[20] In this spirit, it is my opinion that the entire record is responsive to the Applicant's request. Further, if the Applicant is interested in this information, it saves the Applicant and the Ministry the work associated with a new request through the FOIP process.

[21] I have also considered whether the names of the individuals who have been leasing the protected lands would qualify as personal information pursuant to section 24 of FOIP. However, subsection 24(2)(e) of FOIP states:

24(2) **"Personal information"** does not include information that discloses:

...

(e) details of a licence, permit or other similar discretionary benefit granted to an individual by a government institution;

[22] My office has previously indicated that discretionary means that a decision-maker has a choice as to whether, or how, to exercise a power. The leasing of protected land would

qualify as a discretionary benefit. Therefore, since the names of those leasing the land are not personal information, no severing is required.

#### **IV FINDINGS**

[23] I find that subsection 16(1)(a) of FOIP does not apply to the e-mails or the draft spreadsheet.

[24] I find the entire record is responsive to the Applicant's request.

[25] I find that the record does not qualify as personal information.

#### **V RECOMMENDATIONS**

[26] I recommend the Ministry release the e-mails and the draft spreadsheet to the Applicant.

[27] I recommend that the Ministry seek consent from the President of the Executive Council to provide the Applicant with access to the second spreadsheet pursuant to subsection 16(2)(b) of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 29th day of August, 2016.

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