



REVIEW REPORT 119-2018

Saskatchewan Telecommunications

August 6, 2019

Summary: The Applicant submitted an access to information request to Saskatchewan Telecommunications (SaskTel). SaskTel responded by releasing two partially redacted records but withholding 12 records in their entirety. SaskTel cited subsections 19(1)(b), 19(1)(c)(iii), 18(1)(d), 18(1)(e), 18(1)(f), 16(1)(a), 16(1)(d), 17(1)(a), and 17(1)(c) of FOIP as its reasons for withholding records (or portions of records). Further, SaskTel took the position some of the records were non-responsive to the access request. While the Information and Privacy Commissioner (IPC) found that SaskTel appropriately applied exemptions to many of the records, he recommended that SaskTel release portions of certain records.

I BACKGROUND

[1] On August 23, 2017, Saskatchewan Telecommunications (SaskTel) received the following access to information request under *The Freedom of Information and Protection of Privacy Act* (FOIP):

Please provide any documents, including correspondence, referencing any offers or purchases of equity stakes in SaskTel from May 01, 2017 to August 18, 2018.

[2] In a letter dated January 16, 2018, SaskTel responded to the Applicant. SaskTel withheld 12 records in their entirety and released two partially redacted records. SaskTel cited subsections 19(1)(b), 19(1)(c)(iii), 18(1)(d), 18(1)(e), 18(1)(f), 16(1)(a), 16(1)(d), 17(1)(a), and 17(1)(c) of FOIP as its reasons for withholding records (or portions of records). Further, it argued that three of these records are “not within the scope of the request” or non-responsive to the access request.

- [3] In a letter dated June 22, 2018, the Applicant requested a review by my office. The Applicant requested that my office determine whether SaskTel appropriately applied exemptions to the records.
- [4] On July 6, 2018, pursuant to section 51 of FOIP, my office sent a notification to SaskTel that it would be undertaking a review. It also sent notifications to the Applicant and the two third parties that it would be undertaking a review.
- [5] On July 9, 2018, pursuant to section 52 of FOIP, SaskTel notified the two third parties that my office would be undertaking a review.

II RECORDS AT ISSUE

Record	Description	SaskTel Exemptions/non-responsive	Third Party A	Third Party B
1	Mutual Non-Disclosure Agreement between SaskTel and a third party. Dated May 2, 2017.	Non-responsive, 19(1)(b), 19(1)(c)	“NDA” Non-responsive, 19(1)(b), 19(1)(c)(ii), 19(1)(c)(iii)	
2	Joint Defence Privileged Agreement between SaskTel and a third party. Dated May 2, 2017.	Non-responsive, 19(1)(b), 19(1)(c)	“JDA” Non-responsive, 19(1)(b), 19(1)(c)(ii), 19(1)(c)(iii)	
3	Slide deck by Third Party A. Dated May 2, 2017.	Non-responsive, 19(1)(b), 18(1)(d), 18(1)(f)	“[Third Party A] Deck 1” Non-responsive, 19(1)(b), 19(1)(c)(ii), 19(1)(c)(iii)	
4	Slide deck by Third Party A with handwritten notes by a SaskTel employee. Dated May 2017.	19(1)(b), 18(1)(d), 18(1)(f)	“[Third Party A] Deck 3” Non-responsive, 19(1)(b), 19(1)(c)(ii), 19(1)(c)(iii)	
5	Slide deck by Third Party A with handwritten notes	19(1)(b), 18(1)(d), 18(1)(f)	“[Third Party A] Deck 2” 19(1)(b),	

	by a SaskTel employee. Dated May 2017.		19(1)(c)(ii), 19(1)(c)(iii)	
6	Slide deck by Third Party B with handwritten notes by a SaskTel employee. Dated May 4, 2017. Business card of an employee of Third Party B.	19(1)(b), 18(1)(d)		“Document B” or “the [Third Party B] decks” 19(1)(b)
7	Slide deck by Third Party B with notes by SaskTel employees. Dated May 4, 2017	19(1)(b), 18(1)(d)		“Document C” or “the [Third Party B] decks” 19(1)(b)
8	Slide deck by Third Party A. Dated May 2017.	19(1)(b), 18(1)(d), 18(1)(f)	“[Third Party A] Deck 3” Non-responsive, 19(1)(b), 19(1)(c)(ii), 19(1)(c)(iii)	
9	Slide deck by Third Party A. Dated May 2017	19(1)(b), 18(1)(d), 18(1)(f)	“[Third Party A] Deck 2” 19(1)(b), 19(1)(c)(ii), 19(1)(c)(iii)	
10	Draft slide deck by SaskTel President & CEO for a meeting with the Minister. Dated June 1, 2017.	16(1)(a), 16(1)(d), 19(1)(b), 18(1)(d), 18(1)(e), 18(1)(f)	“SaskTel Deck Excerpt” Release on a redacted basis 19(1)(b), 19(1)(c)(ii), 19(1)(c)(iii)	“Document A” Consents to the release of slides 18 to 20 as long as all references to Third Party B and the substantive terms of Third Party B’s slide deck.
11	Slide deck by SaskTel President & CEO for a meeting with the Minister. Dated June 1, 2017.	16(1)(a), 16(1)(d), 19(1)(b), 18(1)(d), 18(1)(e), 18(1)(f)	“SaskTel Deck Excerpt” Release on a redacted basis	“Document A” Consents to the release of slides 18 to 20

			19(1)(b), 19(1)(c)(ii), 19(1)(c)(iii)	as long as all references to Third Party B and the substantive terms of Third Party B's slide deck.
12	Slide deck by SaskTel President & CEO for SaskTel board meeting. Dated June 14, 2017.	17(1)(a), 17(1)(c), 18(1)(d), 18(1)(e)		
13	Email to SaskTel employee from a third party. Dated May 15, 2017.	18(1)(d), 19(1)(b), 19(1)(c)	“E-mail 1” Release on a redacted basis only 19(1)(b), 19(1)(c)(ii), 19(1)(c)(iii)	
14	Email from SaskTel employee to a third party. Dated May 18, 2017.	18(1)(d), 19(1)(b), 19(1)(c).	“E-mail 2” Release on a redacted basis only 19(1)(b), 19(1)(c)(ii), 19(1)(c)(iii)	

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction to review this matter?

[6] SaskTel qualifies as a “government institution” pursuant to subsection 2(1)(d)(ii) of FOIP, and section 3 and Part I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Therefore, I have jurisdiction to review this matter.

2. Are records 1, 2, 3, and 4 non-responsive to the access request?

[7] When a government institution receives an access to information request, it must determine what information is responsive to the access request. “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 the Applicant’s request will be considered non-responsive.

[8] The purpose of FOIP is best served when a government institution adopts a liberal interpretation of a request. In my blog entitled [What About the Non-Responsive Record?](#), I indicated that if a government institution has made the decision that a record is non-responsive, the government institution should provide the record anyway (subject to exemptions). The blog provides as follows:

There will be times where a record is in the area where a decision has to be made as to whether it is responsive or non-responsive. If the decision is that it is non-responsive, the public body should provide it anyway (subject to exemptions). If the public body would see the non-responsive record as being exempt from disclosure, then of course, the record should not be provided but the applicant should be advised in the response that there are records that are non-responsive but also exempt under a particular section of the legislation. How else will the applicant or my office know that a record was treated as non-responsive?

[9] If a government institution has any doubts about the interpretation to be given to a request, the government institution has a duty to assist the applicant in reformulating the request pursuant to subsection 5.1(1) of FOIP.

[10] In this case, SaskTel and one of the third parties (“Third Party A) asserts that records 1, 2, and 3 are non-responsive. In addition, Third Party A asserts record 4 is also non-responsive.

[11] In its submission, SaskTel offers the following arguments as to why records 1, 2, and 3 are non-responsive to the access request.

Record 1

[12] SaskTel argues that record 1, a mutual non-disclosure agreement, does not make any reference to “any offers or purchases of equity stakes in SaskTel”. It provides that the non-

disclosure agreement covers the exchange of information between it and Third Party A in connection with the purpose of the non-disclosure agreement. The purpose of the non-disclosure agreement is quite broad and the offer to purchase an equity stake is one of many possible outcomes of the exchange of information.

- [13] If an equity stake is one of many possible outcomes that could be covered by the non-disclosure agreement, then I find that this non-disclosure agreement (record 1) is responsive to the access request.

Record 2

- [14] SaskTel argues that record 2, a joint defense privileged agreement, does not make any reference to “any offers or purchases of equity stakes in SaskTel”. It provides that record 2 is intended to allow it and Third Party A to exchange information as privileged information in anticipation of a review by the Competition Bureau and potentially the Competition Tribunal, the Courts and Innovation Science and Economic Development. SaskTel asserts that the purchase of an equity stake in SaskTel is only one of many possible outcomes that the joint defense privileged agreement is designed to cover.

- [15] If an equity stake is one of many possible outcomes that could be covered by the joint defense privileged agreement, then I find that record 2 is responsive to the access request.

Record 3

- [16] SaskTel argues that record 3 does not make any reference to “any offers or purchases of equity stakes in SaskTel”. It provides that the access request is very specific to an equity stake. Therefore, SaskTel argues that record 3 is not within the scope of the access request. However, I note that record 5 is an updated version of record 3. Record 5 references an equity stake. Therefore, based on context, I find that record 3 is responsive to the access request.

[17] SaskTel took a narrow, not a broad, interpretation of the access request. Instead, SaskTel should be adopting a liberal and broad interpretation of the access request. If SaskTel had any doubts on how to interpret the access request, then SaskTel should have clarified the access request with the Applicant pursuant to subsection 5.1 of FOIP. However, SaskTel provided no evidence that it clarified the access request with the Applicant.

[18] Finally, I note that Third Party A provided arguments that records 1, 2, 3, 4 and 8 are not responsive to the access request. It is not the role of a third party to interpret an access request and determine whether records are responsive or not. Section 19 of FOIP is intended to protect the business interests of third parties and to ensure that government institutions are able to maintain confidentiality necessary to effectively carry on business with the private sector. If a third party wishes to argue against the disclosure of records, then it must argue for the application of section 19 of FOIP. Therefore, I will not consider Third Party A's arguments as to why records 1, 2, 3, 4, and 8 are non-responsive to the access request.

3. Does subsection 19(1)(b) of FOIP apply to records 1 and 2?

[19] Subsection 19(1)(b) of FOIP provides as follows:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;

[20] In order for subsection 19(1)(b) of FOIP to apply, the following test must be met:

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?
2. Was the information supplied by the third party to a public body?
3. Was the information supplied in confidence implicitly or explicitly?

[21] Below I will determine if the above three-part test is met for each record:

Record 1 – Non-Disclosure Agreement between SaskTel and Third Party A

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?

[22] According to its submission, SaskTel is asserting that the non-disclosure agreement between it and Third Party A qualifies as “commercial information”. In the past, my office has defined “commercial information” as information relating to the buying, selling or exchange of merchandise or services. My office’s *IPC Guide to Exemptions* provides the following examples of commercial information:

- offers of products and services a third-party business proposes to supply or perform;
- a third-party business’ experiences in commercial activities where this information has commercial value;
- terms and conditions for providing services and products by a third party;
- lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises-such lists may take time and effort to compile, if not skill;
- methods a third-party business proposes to use to supply goods and services; and
- number of hours a third-party business proposes to take to complete contracted work or tasks.

[23] I note that at paragraph 36 of *Canadian Bank Note Limited v. Saskatchewan Government Insurance (2016)*, Zarzeczny J. agreed with my office’s conclusion that the information in question in my office’s Review Report 229-2015 qualified as commercial information. In my office’s Review Report 229-2015, my office had defined commercial information the same as it is defined above.

[24] In its submission, SaskTel asserts that “commercial information” is a very broad term and includes a legal agreement under which information shall be mutually shared between parties as part of exploring a commercial transaction. It argues that “an exchange of information on certain terms and conditions is similar to an exchange of merchandise or services.”

[25] In its submission, Third Party A asserts that the non-disclosure agreement constitutes commercial information but does not explain how.

[26] Based on a review of the non-disclosure agreement, I find that it does not contain commercial information. The non-disclosure agreement is for the purpose of protecting the confidentiality of certain information that will be exchanged between the parties. However, the non-disclosure agreement itself does not qualify as commercial information. It sets out the terms and conditions of the exchange of information, but it does not contain information about the buying, selling or exchange of merchandise or services.

[27] I find that subsection 19(1)(b) of FOIP does not apply to record 1.

Record 2 – Joint Defense Privileged Agreement

[28] According to its submission, SaskTel asserts that the Joint Defense Privileged Agreement qualifies as “commercial information”. It asserts that the term is broad enough to include an agreement designed to govern the exchange of commercial information between two commercial entities.

[29] In its submission, Third Party A asserts that the non-disclosure agreement constitutes commercial information but does not explain how.

[30] Based on a review of the Joint Defense Privileged Agreement, I find that it does not contain commercial information. While this agreement governs the exchange of information that may be commercial in nature, the agreement itself does not contain commercial information.

[31] Since the first part of the test is not met, there is no need to consider the two other parts of the test. I find that subsection 19(1)(b) of FOIP does not apply to record 2.

4. Does subsection 19(1)(c)(ii) of FOIP apply to records 1 and 2?

[32] Both SaskTel and Third Party A asserted that subsection 19(1)(c)(ii) of FOIP applies to records 1 and 2, the non-disclosure agreement and the Joint Defense Privileged Agreement. Before proceeding with the analysis, I note that in Review Reports 052-2017 and 311-2017, 312-2017, 313-2017, 316-2017, 340-2017, 341-2017, 342-2017, I considered the application of subsection 19(1)(c) of FOIP. In both Reports, I noted that government institutions would be well advised to warn third parties, prior to entering into a contract, that records may be released under FOIP. Dealing with this issue up front will prevent third parties from having the expectation that records such as agreements/contracts, reports, or correspondence with the government institution, might be releasable under FOIP.

[33] Subsection 19(1)(c)(ii) of FOIP provides as follows:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(c) information, the disclosure of which could reasonably be expected to:

...

(ii) prejudice the competitive position of; or

...

a third party;

[34] In order for subsection 19(1)(c)(ii) of FOIP to apply, there must be objective grounds for believing the disclosure of the information would result in an undue loss or gain measured in monetary or monetary-equivalent terms (e.g. loss of revenue, loss of corporate reputation or loss of good will) or would prejudice or cause detriment to the competitive position of a third party.

[35] The Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner)*, (2014) sets out the standard of proof for harms-based provisions as follows:

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence

“well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”...

[36] The government institution does not have to prove that a harm is probable but needs to show that there is a “reasonable expectation of harm” if any of the information were to be released. In *British Columbia (Minister of Citizens’ Service) v. British Columbia (Information and Privacy Commissioner)*, (2012), Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

[37] SaskTel argued that subsection 19(1)(c)(ii) of FOIP applies to records 1 and 2 by indicating that the disclosure of records 1 and 2 would reveal the identity of Third Party A. As such, Third Party A’s interest in an equity stake of SaskTel would be revealed. SaskTel points out the public nature of the “sometimes divisive debate” around this topic could result in lost telecom sales for Third Party A. Further, SaskTel argues that public knowledge of Third Party A’s failure to consummate a deal with SaskTel could impact Third Party A’s other negotiations with other parties. However, SaskTel points out that it has a wide range of dealing with Third Party A and “it is hard to imagine that [the] public release of [Third Party A’s] interest in SaskTel would harm Third Party A’s negotiations with SaskTel”.

[38] Third Party A offered arguments for why subsection 19(1)(c)(ii) of FOIP applies to records 1, 2, 3, 4, 5, 8, and 9. Below, I will consider these arguments for records 1 and 2:

- The non-disclosure agreement and the Joint Defense Privileged Agreement (and Third Party A’s slide decks) are all on the Third Party A’s standard forms. Competitors and other parties that deal with Third Party A can easily attribute these standard forms to Third Party A.
- Being associated with any offers or purchases of equity stakes in SaskTel would reasonably be expected to prejudice Third Party A’s competitive position by informing competitors and other parties about Third Party A’s competitively sensitive strategic and operational intentions. Currently, Third Party A’s interest in SaskTel is not publicly known. If it became known, then Third Party A’s competitors could use Third Party A’s interest to tailor its own expansion plans and operations to its advantage, thereby negatively impacting Third Party A’s

competitive position. For example, competitors could tailor their contractual negotiations with SaskTel or Third Party A to address this scenario in advance.

[39] I am only dealing with record 1 (non-disclosure agreement) and record 2 (the Joint Defense Privileged Agreement) at this point in the analysis. Discussion of slide decks by the third parties will be discussed later in this Report.

[40] After reviewing records 1 and 2 and the harms alleged, I find there is no clear cause and effect relationship between the disclosure of the records and the harms alleged. Disclosing records 1 and 2 would not reveal the substance of the discussions between SaskTel and Third Party A. As noted earlier, SaskTel asserted that an equity stake is merely one of the many possible outcomes that the non-disclosure agreement (record 1) and the Joint Defense Privileged Agreement (record 2) is designed to cover. Since disclosing records 1 and 2 would not reveal the substance of the discussions between SaskTel and Third Party A, then it is difficult to conceive how the harms alleged would be genuine and conceivable. For example, it is difficult to conceive how competitors would tailor its own expansion plans and operations to their advantage based solely on the information in records 1 and 2. The disclosure of records 1 and 2 would reveal that Third Party A had discussions with SaskTel, but they would reveal none of the substance of Third Party A's record nor the discussions between SaskTel and Third Party A.

[41] I find that subsection 19(1)(c)(ii) of FOIP does not apply to records 1 and 2.

5. Does subsection 19(1)(c)(iii) of FOIP apply to records 1 and 2?

[42] Third Party A asserted that subsection 19(1)(c)(iii) of FOIP applies to records 1 and 2. Subsection 19(1)(c)(iii) of FOIP provides as follows:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(c) information, the disclosure of which could reasonably be expected to:

...

(iii) interfere with the contractual or other negotiations of;

a third party;

[43] To interfere with contractual or other negotiations means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement involving a third party.

[44] Third Party A provided arguments for how subsection 19(1)(c)(iii) of FOIP applies to records 1, 2, 3, 4, 5, 8, and 9. I will consider the following arguments for records 1 and 2.

[45] Third Party A indicates that being associated with “any offers or purchases of equity stakes in SaskTel” would reasonably be expected to interfere with its ongoing and future contractual or other negotiations with SaskTel and other parties by informing competitors about its strategic and operational intentions. Third Party A indicates that releasing records 1 and 2 would negatively impact it by:

- making competitors aware of Third Party A’s interest in a potential transaction with SaskTel could result in competing proposals or approaches to SaskTel;
- making civil society groups aware of Third Party A’s interest in a potential transaction with SaskTel would allow such groups to attempt to negatively influence stakeholders regarding the potential transaction or Third Party A’s brand, more generally;
- making governments and regulatory bodies aware of Third Party A’s interest in a potential transaction with SaskTel could negatively influence their review of submissions made regarding other Third Party A transactions and strategic initiatives in Canada; and
- making the media aware of Third Party A’s interest in a potential transaction with SaskTel would invite unnecessary attention to the industry and potentially harm Third Party A’s brand, in particular, in Saskatchewan.

[46] For the first harm alleged, another third party (Third Party B) presented a proposal to SaskTel without the disclosure of records 1 and 2. Therefore, I find there is no cause and effect relationship between the disclosure of the records and the harm alleged.

[47] The remaining three harms alleged by Third Party A are not sufficiently detailed nor convincing and are speculative. First, SaskTel indicated to my office that there was a failure to consummate a deal with Third Party A. In other words, the “potential

transaction” no longer has potential. Second, it is entirely speculative as to how civil society groups, governments and regulatory bodies, and the media would respond to the disclosure of records 1 and 2.

[48] I find that subsection 19(1)(c)(iii) of FOIP does not apply to records 1 and 2.

6. Does subsection 19(1)(b) of FOIP apply to records 3, 4, 5, 6, 7, 8, and 9?

[49] SaskTel and Third Party A argues that subsection 19(1)(b) of FOIP applies to records 3, 4, 5, 8, and 9. SaskTel and Third Party B argues that subsection 19(1)(b) of FOIP applies to records 6 and 7.

[50] Below is my analysis to determine if the three-part test for subsection 19(1)(b) of FOIP applies to each record. Instead of reproducing the three-part test for each record, below is the three-part test:

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?
2. Was the information supplied by the third party to a public body?
3. Was the information supplied in confidence implicitly or explicitly?

Record 3 – Slide deck by Third Party A. Dated May 2, 2017

[51] Both SaskTel and Third Party A asserts that record 3 contains information that qualifies as commercial information. I have already provided a definition of commercial information at paragraph [22].

[52] Based on a review, I find that record 3 in its entirety qualifies as commercial information as the information is about Third Party A’s buying, selling or exchanging of goods and services.

[53] Next, I find that record 3 was supplied by Third Party A to SaskTel.

[54] Finally, I find that record 3 was supplied in confidence explicitly. The non-disclosure agreement (record 1) is evidence that Third Party A supplied this record in confidence to SaskTel. Based on a review, the non-disclosure agreement (record 1) covers information exchanged between SaskTel and Third Party A for a purpose defined in the non-disclosure agreement, which includes information in record 3.

[55] I find that subsection 19(1)(b) of FOIP applies to record 3 in its entirety.

Record 4 – Slide deck by Third Party A with handwritten notes by SaskTel employee. Dated May 2017.

[56] Record 4 is a slide deck by Third Party A that is different from the slide deck presented in record 3. It also contains the handwritten notes of a SaskTel employee on pages 3, 4, and 5. SaskTel categorized these handwritten notes into three buckets. Bucket 1 is handwritten notes that are based solely on oral comments provided by the third party to the author of the handwritten notes (i.e. the SaskTel employee). It argues that bucket 1 handwritten notes qualifies as commercial information provided orally by the third party. Bucket 2 is handwritten notes that are a restatement of the contents of the slide. As such, it argues that the bucket 2 handwritten notes qualifies as commercial information. Bucket 3 is handwritten notes that represent SaskTel's thoughts. As such, it suggests that the bucket 3 handwritten notes are not third party commercial information.

[57] Specific to record 4, SaskTel said that the handwritten notes on page 3 fits into bucket 3, and that the handwritten notes on page 4 fits into bucket 2. Finally, SaskTel said that some of the handwritten notes on page 5 fits into bucket 1 and the remainder fits into bucket 3.

[58] Third Party A asserts that the information in record 4 qualifies as commercial information.

[59] I find that the contents of the slide deck itself qualifies as commercial information as the information relates to the buying, selling or exchange of goods and services. Further, I find that the bucket 2 handwritten notes on page 4 and the bucket 1 handwritten notes on page 5 qualifies as commercial information. However, I find that the bucket 3 handwritten notes on pages 3 and 5 do not qualify as commercial information.

- [60] Next, I find that the contents of the slide deck itself was supplied by Third Party A to SaskTel. Further, I find that the bucket 2 handwritten notes on page 4 and the bucket 1 handwritten notes on page 5 were supplied by Third Party A to SaskTel.
- [61] Finally, I find that contents of the slide deck, the bucket 2 handwritten notes on page 4, and the bucket 1 handwritten notes on page 5 is information supplied in confidence explicitly. The non-disclosure agreement (record 1) is evidence that Third Party A supplied the information in confidence to SaskTel. Based on a review, the non-disclosure agreement (record 1) covers information exchanged between SaskTel and Third Party A for a purpose that is defined in the non-disclosure agreement, which includes information in record 4.
- [62] I find that subsection 19(1)(b) of FOIP applies to the contents of the slide deck in record 4, the bucket 2 handwritten notes on page 4, and the bucket 1 handwritten notes on page 5. SaskTel asserted that subsections 18(1)(d) and 18(1)(f) of FOIP applies to record 4. Later in this report, I will need to determine if either subsection applies to the bucket 3 handwritten notes on pages 3 and 5 of record 4.

Record 5 – Slide deck by Third Party A with handwritten notes by SaskTel employee. Dated May 2017.

- [63] Record 5 is an updated version of record 3, which is a slide deck too. It also contains handwritten notes of a SaskTel employee. Pages 1 and 3 contains bucket 3 handwritten notes and page 4 contains bucket 1 handwritten notes.
- [64] I find that the contents of the slide deck and the bucket 1 handwritten notes on page 4 qualifies as commercial information as the information relates to the buying, selling or exchange of goods and services.
- [65] Next, I find that the contents of the slide deck and the bucket 1 handwritten notes on page 4 was supplied by Third Party A to SaskTel.

- [66] Finally, I find that contents of the slide deck and the bucket 1 handwritten notes on page 4 was information supplied in confidence explicitly. The non-disclosure agreement (record 1) is evidence that Third Party A supplied this slide deck in confidence to SaskTel. Based on a review, the non-disclosure agreement (record 1) covers information exchanged between SaskTel and Third Party A for a purpose that is defined in the non-disclosure agreement which includes information in record 5.
- [67] I find that subsection 19(1)(b) of FOIP applies to the contents of the slide deck in record 5 and the bucket 1 handwritten notes on page 4. SaskTel asserted that subsections 18(1)(d) and 18(1)(f) of FOIP applies to record 5. Later in this Report, I will need to determine if either subsection applies to the bucket 3 handwritten notes on pages 1 and 3 of record 5.

Record 6 – Slide deck by Third Party B with handwritten notes by a SaskTel employee. Dated May 4, 2017.

- [68] Record 6 is 22 pages in total. The first 21 pages are a slide deck by Third Party B that contains handwritten notes by a SaskTel employee. The 22nd page is a business card.
- [69] The handwritten notes in record 6 are as follows: page 5 contains handwritten notes that fits into buckets 1, 2, or 3. Page 6 contains bucket 1 handwritten notes. Page 8 contains bucket 2 handwritten notes. Page 10 contains handwritten notes that fits into buckets 2 or 3.
- [70] Third Party B asserts that the information in record 6 qualifies as financial and commercial information while SaskTel asserts that the information qualifies as commercial information.
- [71] I have already provided a definition of commercial information earlier in this Report. In terms of “financial information”, my office has defined this term as information regarding the monetary resources, such as financial capabilities, assets and liabilities, past or present. Common examples are financial forecasts, investment strategies, budgets, and profit and loss statements. The financial information must be specific to a third party that must demonstrate a proprietary interest or right of use of the financial information.

[72] Based on a review of record 6, I find that the information contained with the slide deck itself qualifies as commercial information as it relates to the buying, selling, or exchange of goods and services. Further, I find that the bucket 1 and 2 handwritten notes that are on pages 5, 6, 8 and 10 qualifies as commercial information. However, I find that the business card found on page 22 of record 6 does not qualify as financial information or commercial information.

[73] Next, I find that the contents of the slide deck and the bucket 1 and bucket 2 handwritten notes on pages 5, 6, 8 and 10 is information that was supplied by Third Party B to SaskTel.

[74] Finally, I find that contents of the slide deck and the bucket 1 and bucket 2 handwritten notes on pages 5, 6, 8, and 10 is information that was supplied in confidence. Third Party B asserts that the footer of the slide deck that says “[Third Party B] Proprietary” is evidence of an intention not to disclose this slide deck past SaskTel. Further, SaskTel asserts that the nature of the meeting suggests that the information will be exchanged on a confidential basis. It was SaskTel’s understanding that the information provided by Third Party B at the meeting was confidential. Based on the above, I am satisfied that the slide deck was submitted by Third Party B to SaskTel in confidence.

[75] I find that subsection 19(1)(b) of FOIP applies to the contents of the slide deck and the bucket 1 and bucket 2 handwritten notes on pages 5, 6, 8, and 10 in record 6. However, it does not apply to the business card found on page 22 of record 6. SaskTel asserted that subsection 18(1)(d) of FOIP applies to record 6. Later in this Report, I will need to determine if subsection 18(1)(d) of FOIP applies to the bucket 3 handwritten notes on pages 5 and 10 and the business card.

Record 7 – Slide deck by Third Party B with notes by SaskTel employees. Dated May 4, 2017.

[76] Record 7 is 21 pages long and contains the same slide deck by Third Party B that appears on the first 21 pages of record 6. Record 7 has the handwritten notes by a SaskTel employee

that appear in record 6 but also additional handwritten notes by another SaskTel employee. Page 5 contains bucket 3 handwritten notes and page 6 contains bucket 1 handwritten notes.

[77] Similar to the analysis for record 6, I find that subsection 19(1)(b) of FOIP applies to the contents of the slide deck and the bucket 1 handwritten notes on page 6 in record 7. SaskTel asserted that subsection 18(1)(d) of FOIP applies to record 7. Later in this Report, I will need to determine if subsection 18(1)(d) of FOIP applies to the bucket 3 handwritten notes on page 5 in record 7.

Record 8 – Slide deck by Third Party A Dated May 2017.

[78] Record 8 contains the same slide deck as the one that appears in record 4. The only difference is that the slide deck in record 8 does not contain the handwritten notes by the SaskTel employee in the slide deck that appears in record 4.

[79] Similar to the analysis for record 4, I find that subsection 19(1)(b) of FOIP applies to the slide deck in record 8. In other words, I find that subsection 19(1)(b) of FOIP applies to record 8 in its entirety.

Record 9 – Slide deck by Third Party A Dated May 2017.

[80] Record 9 contains the same slide deck as the one that appears in record 5. The only difference is that slide deck in record 9 does not contain the handwritten notes by the SaskTel employee in the slide deck that appears in record 5.

[81] Similar to the analysis for record 5, I find that subsection 19(1)(b) of FOIP applies to the contents of the slide deck in record 9. In other words, I find that subsection 19(1)(b) of FOIP applies to record 9 in its entirety.

7. Does subsection 18(1)(d) of FOIP apply to the handwritten notes in records 4, 5, 6, and 7, as well as the business card in record 6?

[82] SaskTel asserted that subsection 18(1)(d) of FOIP applies to records 4, 5, 6, and 7. Since I have already found that subsection 19(1)(b) of FOIP applies to the contents of the slide decks and to buckets 1 and 2 handwritten notes, I will only consider whether subsection 18(1)(d) of FOIP applies to the bucket 3 handwritten notes in each of these records, as well as the business card in record 6.

[83] Subsection 18(1)(d) of FOIP provides as follows:

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

...

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution;

[84] The following test must be met in order for subsection 18(1)(d) of FOIP to apply:

1. Identify and provide details about the contractual or other negotiations and the parties involved; and
2. Detail how the release of the record could reasonably be expected to interfere with the contractual or other negotiations.

[85] To interfere with contractual or other negotiations means to obstruct or make much more difficult the negotiations of a contract or other sort of agreement involving the public body.

[86] As mentioned earlier, the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner)*, (2014), sets out that a government institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm. The government institution does not have to provide that a harm is probable but needs to show that there is a “reasonable expectation of harm” if any of the information were to be released. In *British Columbia (Minister of Citizens’*

Service) v. *British Columbia (Information and Privacy Commissioner)*, (2012), Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

[87] SaskTel offered the following arguments for the application of subsection 18(1)(d) of FOIP to records 4, 5, 6, and 7:

1. Identify and provide details about the contractual or other negotiations and the parties involved;

[88] In its submission, SaskTel indicates that when it received the access request (August 23, 2017), there were active negotiations going on with Third Party A and Third Party B. There was considerable discussion about possible partnerships being entered into. I find that the first part of the test is met.

2. Detail how the release of the record could reasonably be expected to interfere with the contractual or other negotiations.

[89] SaskTel's submission does not indicate how the release of the records (and specifically about the bucket 3 handwritten notes and the business card) could reasonably be expected to interfere with the negotiations that were going on with Third Party A and Third Party B at the time it received the access request. The negotiations are no longer active. According to a [news release](#) dated November 21, 2017, the Government of Saskatchewan indicated that it was introducing legislation to repeal the provisions implemented by Bill 40 that allow for the sale of a partial equity position of a Crown corporation. In its submission, SaskTel indicates that the sale of SaskTel has been a topic for several decades and it is possible it could be considered again in the future. It argues that the disclosure of the records could easily impact future negotiations.

[90] Prospective negotiations could be included within subsection 18(1)(d) of FOIP as long as they are foreseeable. While it remains a possibility that a Crown corporation like SaskTel could be considered for sale again, the possibility of a sale is not enough to suggest that negotiations of SaskTel is foreseeable. I find that the second part of the test is not met. Therefore, I do not have to consider the second part of the test. I find that subsection

18(1)(d) of FOIP does not apply to the bucket 3 handwritten notes that appears in records 4, 5, 6, and 7, nor does it apply to the business card that appears in record 6.

8. Does subsection 18(1)(f) of FOIP apply to the handwritten notes in records 4 and 5?

[91] SaskTel asserted that subsection 18(1)(f) of FOIP applies to records 4 and 5. Since I have already found that subsection 19(1)(b) of FOIP applies to the original contents in records 4 and 5 and to the buckets 1 and 2 handwritten notes, I will only consider whether subsection 18(1)(f) of FOIP applies to the bucket 3 handwritten notes.

[92] Subsection 18(1)(f) of FOIP provides as follows:

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

...

(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution;

[93] In order for subsection 18(1)(f) of FOIP to apply, there must be objective grounds to believe that disclosing the information could result in prejudice.

[94] In its submission, SaskTel offers arguments for how subsection 18(1)(f) of FOIP applies to the contents of the slide decks but not the bucket 3 handwritten notes by SaskTel employees that appears in records 4 and 5. However, SaskTel does not offer arguments for how subsection 18(1)(f) of FOIP applies to the bucket 3 handwritten notes by SaskTel employees found in records 4 and 5. I find that SaskTel has not demonstrated that subsection 18(1)(f) of FOIP applies to the bucket 3 handwritten notes in records 4 and 5.

9. Does subsection 16(1) of FOIP apply to records 10 and 11?

[95] Record 10 is a draft slide deck by the SaskTel President & CEO for a meeting with the Ministry. Record 11 is the final version of the slide deck. They are both dated June 1,

2017. SaskTel asserted that subsections 16(1)(a) and 16(1)(d) of FOIP applies to the record in its entirety.

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;

...

(d) records that contain briefings to members of the Executive Council in relation to matters that:

(i) are before, or are proposed to be brought before, the Executive Council or any of its committees; or

(ii) are the subject of consultations described in clause (c).

[96] Subsection 16(1) of FOIP is a mandatory class-based exemption. Subsections 16(1)(a) through (d) are not an exhaustive list. Therefore, even if none of the subsections are found to apply, the introductory wording of subsection 16(1) must still be considered. At page 285 of volume 2 of the report entitled *Public government for privacy people: the report of the Commission on Freedom of Information and Individual Privacy* (1980) by the Ontario Commission on Freedom of Information and Individual Privacy defined cabinet documents as follows:

...it is useful to assume, for definitional purposes, that Cabinet documents consist only of those documents that have been either generated by or received by Cabinet members and officials in the course of their participation in the decision-making processes. Thus, described, Cabinet documents would include agendas, informal or formal minutes of the meetings of Cabinet committees or full Cabinet, records of decision, draft legislation, Cabinet submissions and supporting material, memoranda to and from ministers relating to matters before Cabinet, memoranda prepared by Cabinet officials for the purpose of providing advice to Cabinet, and briefing materials prepared for ministers to enable them to participate effectively in Cabinet discussions.

[97] In its submission, SaskTel indicated the following:

- the Cabinet Committee on Crown Structure had been set up to oversee the potential sale of up to 50% of crown corporations. It was created by the Premier at the March 1, 2017 Cabinet meeting.

- the Vice-Chairperson of the Cabinet Committee on Crown Structure (Vice-Chairperson), who was also the Minister Responsible for SaskTel and SaskTel Holding Corporation (SaskTel Minister), verbally asked SaskTel's President and CEO to prepare the slide decks (records 10 and 11).
- SaskTel's President and Chief Executive Officer (CEO) prepared the slide deck to allow the Vice-Chairperson/SaskTel Minister to review the progress that had been made and to ultimately make decisions and determine next steps, if any, to achieve a partial sale of SaskTel.
- SaskTel's President and CEO was advised that the slide deck would be shared with the Cabinet Committee on Crown Structure where further decisions would be made.
- The content of records 10 and 11 would clearly be so important that Cabinet and its committees would had to have been involved in a decision.

[98] SaskTel provided my office with a sworn affidavit by SaskTel's former President and CEO affirming points made above. Based on a review of records 10 and 11, I find that SaskTel appropriately applied subsection 16(1) of FOIP to both records in their entirety.

10. Does subsection 16(1) of FOIP apply to record 12?

[99] Record 12 is a slide deck prepared by SaskTel's President and CEO for a presentation to the SaskTel Board of Directors. The slide deck is dated June 14, 2017. The contents of this slide deck is substantially similar to the contents of records 10 and 11. SaskTel asserts that it should be withheld in its entirety under section 17 of FOIP, and that the record would be subject to heavy redaction pursuant to subsections 18(1)(d), 18(1)(e), 18(1)(f), and 19(1)(b) of FOIP.

[100] SaskTel did not offer arguments for subsection 16(1) of FOIP. However, since subsection 16(1) of FOIP is a mandatory exemption and because this slide deck contains substantially similar contents as records 10 and 11, I must consider subsection 16(1) of FOIP.

[101] In Order PO-3401 by the Ontario Office of the Information and Privacy Commissioner (Ontario OIPC), the Assistant Commissioner found that section 12 of Ontario's *Freedom of Information and Protection of Privacy Act* (Ontario FOIP) applied to a record that was not submitted to a Cabinet committee but contained information that was substantially

similar to information in a record that was submitted to a Cabinet committee. Section 12 of Ontario FOIP is the mandatory exemption for Cabinet documents. Paragraph 43 of Order PO-3401 provides:

On my review of record 5, I note that the information contained within the slide deck in this record is substantially similar to information contained within the slide deck in record 8, which, I find below, was submitted to a committee of Cabinet. Although not submitted to Cabinet, record 5 therefore contains information substantially similar to that set out in a document that was submitted to Cabinet. Its disclosure would permit the drawing of accurate inferences with respect to Cabinet deliberations and is therefore exempt under the introductory wording of section 12(1).

[102] Similar to Order PO-3401 by Ontario OIPC, I find that the disclosure of record 12 in this case would reveal the confidence of Cabinet committee. This is because I found that subsection 16(1) of FOIP applies to records 10 and 11 in their entirety and because the contents of record 12 is substantially similar to the contents of records 10 and 11. As a result, the disclosure of record 12 would permit the drawing of accurate inferences of Cabinet confidences. Therefore, I find that subsection 16(1) of FOIP applies to record 12 in its entirety.

11. Does subsections 18(1)(d), 19(1)(b), 19(1)(c)(ii), and 19(1)(c)(iii) of FOIP apply to record 13?

[103] Record 13 is an email from Third Party A to SaskTel. SaskTel redacted portions of this record pursuant to subsections 18(1)(d), 19(1)(b), 19(1)(c)(ii), and 19(1)(c)(iii) of FOIP. Specifically, it redacted the portions of the record that would reveal the identity of Third Party A and the identity of the person who sent the email. This includes the following:

- The contents in the “From” field, including the first and last name of the sender and the sender’s email address,
- A portion of the “Subject” field,
- The name of the sender at the end of the email, and
- The sender’s email signature that includes the sender’s first and last name, Third Party A’s name, the sender’s position, and the sender’s office and cell phone number.

[104] Furthermore, Third Party A asserted that subsections 19(1)(b), 19(1)(c)(ii), and 19(1)(c)(iii) of FOIP applies to the redacted portions of the record.

[105] Below is an analysis to determine if any of these exemptions apply to record 13.

a. Subsection 18(1)(d) of FOIP

[106] Below, I have re-produced the two-part test that must be met in order for subsection 18(1)(d) of FOIP to apply:

1. Identify and provide details about the contractual or other negotiations and the parties involved; and
2. Detail how the release of the record could reasonably be expected to interfere with the contractual or other negotiations.

[107] Below is an analysis to determine if the two-part test is met.

1. Identify and provide details about the contractual or other negotiations and the parties involved;

[108] In its submission, SaskTel indicated that the negotiations involved one of the third parties and a proposed purchase. I find that the first part of this test is met.

2. Detail how the release of the record could reasonably be expected to interfere with the contractual or other negotiations.

[109] In its submission, SaskTel indicated that negotiations were going on between it and Third Party A at the time it received the access request. SaskTel asserted that the release of the record would interfere with the negotiations but did not explain how. SaskTel has the obligation to demonstrate to my office that a particular exemption applies pursuant to section 61 of FOIP, which provides:

61 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[110] Therefore, I find that SaskTel has not demonstrated how subsection 18(1)(d) of FOIP applies to record 13.

b. Subsection 19(1)(b) of FOIP

[111] Below, I have re-produced the three-part test:

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?
2. Was the information supplied by the third party to a public body?
3. Was the information supplied in confidence implicitly or explicitly?

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?

[112] SaskTel asserts that Third Party A's name is an important element of the commercial information that has been provided to SaskTel explicitly in confidence. It says that it believes it is not appropriate to disclose bits and pieces of its dealings with Third Party A, including Third Party A's name, on the basis that a name is not commercial information in some contexts. Its view is that the entire transaction needs to be considered and that a broad interpretation of commercial information is appropriate in these circumstances to include Third Party A's name as part of the overall commercial information that has been shared with SaskTel and vice-versa.

[113] Third Party A provided the same arguments for why subsection 19(1)(b) of FOIP applies to some of the information found in records 10, 11, 13, and 14. I will consider Third Party A's arguments for subsection 19(1)(b) as it relates to redacted information in record 13. Third Party A asserted that the redacted information constitutes commercial information that was extracted from documents directly supplied by Third Party A to SaskTel pursuant to an express condition of confidentiality by way of the non-disclosure agreement. It appears that Third Party A's arguments apply to the information in records 10 and 11. It is difficult to see how its arguments apply to the information in record 13.

- [114] Earlier in this Report, at paragraph 22, I indicated that my office has defined “commercial information” as information relating to the buying, selling or exchange of merchandise or services.
- [115] In my office’s Review Report 336-2017, I found that the names of the third party vendors who had submitted a bid in response to the Invitation to Tender, did not qualify as commercial information. In my office’s Review Report 236-2017, I found that third party’s names listed in a table qualified as commercial information, because the names were associated with the quotes provided by each of the third parties in response to a Request for Quotation (RFQ). Based on all considerations, in this case, the third party’s name itself does not qualify as commercial information.
- [116] In this case, when I review record 13 (which is an email), the redacted information is not associated with commercial information. The body of the email, which was released to the Applicant, indicates that a proposal was being sent to SaskTel. It does not contain the contents of the proposal itself. Indicating a proposal is being sent is not information that qualifies as commercial information. Therefore, I do not find that the redacted information qualifies as commercial information. Since the first part of the test has not been met, then I find that subsection 19(1)(b) of FOIP does not apply to the redacted information.

c. Subsection 19(1)(c)(ii) of FOIP

- [117] In order for subsection 19(1)(c)(ii) of FOIP to apply, there must be objective grounds for believing the disclosure of the information would result in an undue loss or gain measured in monetary or monetary-equivalent terms (e.g. loss of revenue, loss of corporate reputation or loss of good will), or would prejudice or cause detriment to the competitive position of a third party.
- [118] Earlier in this Report, I summarized the arguments presented by SaskTel and Third Party A for the application of subsection 19(1)(c)(ii) of FOIP to records 1 and 2. SaskTel and Third Party A offered the same arguments for the application of subsection 19(1)(c)(ii) of FOIP to record 13.

[119] I find that subsection 19(1)(c)(ii) of FOIP does not apply to record 13 for the same reasons that I find that subsection 19(1)(c)(ii) of FOIP does not apply to records 1 and 2. Third Party A argued that if it became known that it has an interest in a potential transaction with SaskTel, then its competitors could use Third Party A's interest to tailor its own expansion plans and operations to its advantage, thereby negatively impacting Third Party A's competitive position. However, I found earlier that it is difficult to conceive how competitors would tailor their own expansion plans and operations to their advantage based solely on the information in records 1 and 2. Similarly, it is difficult to conceive how competitors would tailor their own expansion plans and operations to their advantage based on the information in record 13. Disclosing the redacted portions of record 13 would reveal the identity of Third Party A and that it submitted an "equity alternative proposal" (which is in the body of the email that was disclosed to the Applicant). However, the substance of the "equity alternative proposal" is not disclosed in this email. Therefore, it is difficult to conceive how competitors would tailor their own expansion plans and operations based on record 13.

a. Subsection 19(1)(c)(iii) of FOIP

[120] In order to interfere with contractual or other negotiations means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement involving a third party.

[121] SaskTel indicates that public knowledge of Third Party A's failure to consummate a deal could impact other negotiations that Third Party A may be having with other parties given that a big part of Third Party A's operating strategy involves mergers and acquisitions. However, as noted earlier, SaskTel indicates that it does a wide range of dealings with Third Party A each year and it is hard to imagine that the public release of Third Party A's interest in SaskTel would harm the negotiations between both parties. This suggests that the harm is not genuine and conceivable.

[122] Third Party A offered the same arguments for why subsection 19(1)(c)(iii) of FOIP applies to record 13 as it did for why subsection 19(1)(c)(iii) of FOIP applies to records 1 and 2. For the same reasons in paragraphs [46] and [47] on why subsection 19(1)(c)(iii) of FOIP does not apply to records 1 and 2, I find that subsection 19(1)(c)(iii) of FOIP does not apply to record 13.

12. Does subsections 18(1)(d), 19(1)(b), 19(1)(c)(ii), and 19(1)(c)(iii) of FOIP apply to record 14?

[123] Record 14 is an email exchange between SaskTel and Third Party A. The email exchange is two emails. The first email is from SaskTel to Third Party A. The following portions of the first email were redacted:

- the contents of the “To” field,
- the contents of the “Subject” field,
- a portion of the body of the email.

[124] The second email is from Third Party A to SaskTel. The following portions of the second email were redacted:

- the contents of the “From” field,
- the majority of the contents of the “Subject” field,
- the first name of the sender at the end of the email.

[125] Essentially, two types of information are redacted from record 14 – information that would identify Third Party A and information in the body of the second email. SaskTel has cited subsections 18(1)(d), 19(1)(b), 19(1)(c)(ii), and 19(1)(c)(iii) of FOIP as its reasons for withholding portions of record 14. Third Party A has cited subsections 19(1)(b), 19(1)(c)(ii), and 19(1)(c)(iii) of FOIP.

[126] For the information that would identify Third Party A in record 14, SaskTel offered the same arguments as it did for withholding the information that would identify Third Party A in record 13. Third Party A also provided the same arguments as it did for record 13. Since I already found that that none of those exemptions apply to the redacted information in record 13, then I also find none of those exemptions apply to the information that

identifies Third Party A in record 14. Specifically, I find that subsections 18(1)(d), 19(1)(b), 19(1)(c)(ii), and 19(1)(c)(iii) of FOIP do not apply to the following in record 14:

- the contents of the "To" and "Subject" fields in the first email,
- the contents of the "From" and "Subject" fields and the first name of the sender in the second email.

[127] The remainder of this analysis will focus on the body of the email in record 14 that was withheld pursuant to subsections 18(1)(d), 19(1)(b), 19(1)(c)(ii) and 19(1)(c)(iii) of FOIP. The body of the email in record 14 consists of three questions posed by SaskTel to Third Party A.

a. Subsection 18(1)(d) of FOIP

[128] Below, I have reproduced the two-part test that must be met in order for subsection 18(1)(d) of FOIP to apply:

1. Identify and provide details about the contractual or other negotiations and the parties involved; and
2. Detail how the release of the record could reasonably be expected to interfere with the contractual or other negotiations.

[129] To interfere with contractual or other negotiations means to obstruct or make much more difficult the negotiations of a contract or other sort of agreement involving the public body. Below is an analysis to determine if the two-part test is met.

1. Identify and provide details about the contractual or other negotiations and the parties involved;

[130] In its submission, SaskTel identifies that the negotiations were in regards to the then-current prospect of completing a sale and a prospect of any future sale. The parties involved are Third Party A and SaskTel. I find that the first part of the test is met.

2. Detail how the release of the record could reasonably be expected to interfere with the contractual or other negotiations.

[131] In its submission, SaskTel indicated that the release of the first question “could impact future negotiations” because the topic of question 1 “would always be a point of negotiation and discussion”. In terms of question 2, SaskTel asserted that the release of the information could lead to challenges given that “most parties” would misunderstand some of the information. The release of question 2 would “require an unnecessary explanation and uncertainty in any negotiations for a sale of all or a portion of SaskTel or its assets”. In terms of question 3, SaskTel asserts that the release of the information would have the potential to interfere with future negotiations of SaskTel.

[132] Based on the above, SaskTel is asserting there is a mere possibility of harm. Asserting there is a mere possibility of a harm is not enough to show there is a reasonable expectation of harm. As mentioned earlier, the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner)*, (2014), sets out that a government institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm. The government institution does not have to provide that a harm is probable but needs to show that there is a “reasonable expectation of harm” if any of the information were to be released.

[133] I find that SaskTel has not demonstrated how the release of the information would have obstructed or make much more difficult the negotiations between it and Third Party A. I find that SaskTel has not demonstrated that subsection 18(1)(d) of FOIP applies to record 14.

b. Subsection 19(1)(b) of FOIP

[134] In its submission, SaskTel argued that the contents of the email are “part and parcel of the commercial information that was supplied to SaskTel explicitly in confidence by Third Party A (records #4 and #8) insofar as they disclose in effect what was contained in those documents.” It is SaskTel’s view that if records 4 and 8 are exempt from disclosure pursuant to subsection 19(1)(b) of FOIP, then the questions that disclose content and issues with respect to that commercial information should also be exempt from disclosure. Earlier, I had found that subsection 19(1)(b) of FOIP applies to records 4 and 8 in their entirety.

[135] Based on a review of the three questions posed by SaskTel to Third Party A in record 14, I observe the following:

- The content of question 1 does not reveal the information that was supplied by Third Party A in records 4 and 8. In fact, SaskTel says in its submission that the proposal was not clear on the topic so it sought clarification.
- The content of question 2 references information supplied by Third Party A in records 4 and 8. Specifically the third word in question 3 references information supplied by Third Party A.
- The content of question 3 references and quotes information supplied by Third Party A in records 4 and 8. Specifically, the first sentence in question 3 references and quotes information supplied by Third Party A. The remainder of question 3 is not information supplied by Third Party A.

[136] Based on the above observations, I find that subsection 19(1)(b) of FOIP applies only to the third word in question 2 and the first sentence in question 3. Subsection 19(1)(b) of FOIP does not apply to the rest of the content in questions 1, 2, and 3 because such information was not “supplied” by the third party to SaskTel, which is one of the requirements that must be met in order for subsection 19(1)(b) of FOIP to apply.

c. Subsection 19(1)(c)(ii) of FOIP

[137] In order for subsection 19(1)(c)(ii) of FOIP to apply, there must be objective grounds for believing the disclosure of the information would result in an undue loss or gain measured in monetary or monetary-equivalent terms (e.g. loss of revenue, loss of corporate reputation or loss of good will) or would prejudice or cause detriment to the competitive position of a third party.

[138] SaskTel did not offer arguments as to why subsection 19(1)(c)(ii) of FOIP would apply to the information in record 14.

[139] Third Party A indicated the following in its submission to my office:

The information redacted from the Redacted Documents would reasonably be expected to prejudice [Third Party A's] competitive position and interfere with the contractual or other negotiations of [Third Party A] and other parties for the same reasons set out under Section (1)(b)(ii) [sic] above.

[140] Based on the above, neither SaskTel nor Third Party A have demonstrated to my office that there are objective grounds for believing the disclosure of the information would result in an undue loss or gain measured in monetary or monetary-equivalent terms. Merely reciting words from the exemption is not enough to demonstrate to my office there is a reasonable expectation of harm that would come from the disclosure of the information. Therefore, I find that subsection 19(1)(c)(ii) of FOIP does not apply to record 14.

d. Subsection 19(1)(c)(iii) of FOIP

[141] In order to interfere with contractual or other negotiations means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement involving a third party.

[142] In its submission, SaskTel indicated that the slide deck by Third Party A to SaskTel was very SaskTel specific, such that the knowledge of the content of same could easily impact any other mergers or acquisitions that Third Party A might undertake in the future. SaskTel asserts that other negotiations of Third Party A could be impacted by the release of record 14 because it shows the willingness of Third Party A to consider alternative models in its negotiations with SaskTel.

[143] In arguing subsection 19(1)(c)(iii) of FOIP, Third Party A offered the same arguments as it did for subsection 19(1)(c)(ii) of FOIP:

The information redacted from the Redacted Documents would reasonably be expected to prejudice [Third Party A's] competitive position and interfere with the contractual or other negotiations of [Third Party A] and other parties for the same reasons set out under Section (1)(b)(ii) [sic] above.

[144] SaskTel's arguments are far too abstract to demonstrate a reasonable expectation of harm that would befall Third Party A. For example, SaskTel did not identify which negotiations

would be affected by the disclosure and how the disclosure would object or make much more difficult the negotiations. Further, Third Party A merely recited words from the exemption, which is not enough to demonstrate a reasonable expectation of harm. Based on the above, I find that neither SaskTel nor Third Party A have demonstrated that subsection 19(1)(c)(iii) of FOIP applies to record 14.

IV FINDINGS

[145] I have jurisdiction to review this matter.

[146] I find that records 1, 2, 3, and 4 are responsive to the access request.

[147] I find that subsection 19(1)(b) of FOIP does not apply to records 1, 2, and 13.

[148] I find that subsection 19(1)(c)(ii) of FOIP does not apply to records 1, 2, 13, and 14.

[149] I find that subsection 19(1)(c)(iii) of FOIP does not apply to records 1, 2, and 13.

[150] I find that subsection 19(1)(b) of FOIP applies to record 3 in its entirety.

[151] I find that subsection 19(1)(b) of FOIP applies to the contents of the slide decks and bucket 1 and bucket 2 handwritten notes in records 4 and 5.

[152] I find that subsection 19(1)(b) of FOIP applies to the contents of the slide deck and the bucket 1 and bucket 2 handwritten notes in record 6 but it does not apply to the business card found on page 22 of record 6.

[153] I find that subsection 19(1)(b) of FOIP applies to the contents of the slide deck and the bucket 1 handwritten notes in record 7.

[154] I find that subsection 19(1)(b) of FOIP applies to records 8 and 9 in their entirety.

[155] I find that subsection 18(1)(d) of FOIP does not apply to the bucket 3 handwritten notes that appears in records 4, 5, 6, and 7, nor does it apply to the business card that appears in record 6.

[156] I find that SaskTel has not demonstrated that subsection 18(1)(f) of FOIP applies to the bucket 3 handwritten notes in records 4 and 5.

[157] I find that SaskTel appropriately applied subsection 16(1) of FOIP to records 10 and 11 in their entirety.

[158] I find that subsection 16(1) of FOIP applies to record 12 in its entirety.

[159] I find that SaskTel has not demonstrated how subsection 18(1)(d) of FOIP applies to record 13.

[160] I find that subsections 18(1)(d), 19(1)(b), 19(1)(c)(ii), and 19(1)(c)(iii) of FOIP does not apply to the following in record 14:

- the contents of the "To" and "Subject" fields in the first email,
- the contents of the "From" and "Subject" fields and the first name of the sender in the second email.

[161] I find that SaskTel has not demonstrated that subsection 18(1)(d) of FOIP applies to record 14.

[162] I find that subsection 19(1)(b) of FOIP applies only to the third word in question 2 and the first sentence in question 3.

[163] I find that neither SaskTel nor Third Party A have demonstrated that subsection 19(1)(c)(iii) of FOIP applies to record 14.

V RECOMMENDATIONS

[164] I recommend that SaskTel release records 1 and 2 to the Applicant.

[165] I recommend that SaskTel continue to withhold record 3 in its entirety.

[166] I recommend that SaskTel release the bucket 3 handwritten notes in record 4, but continue to withhold the contents of the slide deck, the bucket 1 handwritten notes, and the bucket 2 handwritten notes.

[167] I recommend that SaskTel release the bucket 3 handwritten notes in record 5, but continue to withhold the contents of the slide deck, the bucket 1 handwritten notes, and the bucket 2 handwritten notes.

[168] I recommend that SaskTel release the bucket 3 handwritten notes and the business card in record 6 but continue to withhold the contents of the slide deck, the bucket 1 handwritten notes, and the bucket 2 handwritten notes.

[169] I recommend that SaskTel release the bucket 3 handwritten notes in record 7, but continue to withhold the contents of the slide deck and the bucket 1 handwritten notes.

[170] I recommend that SaskTel continue to withhold record 8 in its entirety.

[171] I recommend that SaskTel continue to withhold record 9 in its entirety.

[172] I recommend that SaskTel continue to withhold records 10 and 11 and their entirety.

[173] I recommend that SaskTel continue to withhold record 12 in its entirety.

[174] I recommend that SaskTel release record 13 to the Applicant.

[175] I recommend that SaskTel release record 14 to the Applicant except for the third word that appears in question 2 and the first sentence in question 3.

Dated at Regina, in the Province of Saskatchewan, this 6th day of August, 2019.

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