



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 123-2016 to 135-2016

Ministry of Highways and Infrastructure

January 17, 2017

Summary: The Applicant requested records from the Ministry of Highways and Infrastructure (Highways) related to a land transaction west of Regina. Highways provided the Applicant with its decision letter denying access to all of the records citing section 20 of *The Freedom of Information and Protection of Privacy Act* (FOIP). In addition, Highways advised the Applicant that it would continue the work on the requests after the Provincial Auditor's report was released. Upon review, the Commissioner found that the decision letter was unnecessary, inappropriate and unauthorized under FOIP. For these reasons, section 20 of FOIP was not upheld.

I BACKGROUND

[1] The Applicant submitted 14 access to information requests to the Ministry of Highways and Infrastructure (Highways) on March 8, 2016 for information related to the West Regina Bypass and a land transaction west of Regina. Upon receipt, Highways realized that there was a duplicate request therefore the total number of requests was 13. The 13 requests are outlined below:

Access to information request #1 (Review file 064-2016 & 123-2016)

Please provide all correspondence related to [Name] and comments he made in CBC stories about land transactions along the West Regina Bypass near the GTH from February 1, 2016 until March 5, 2016 – including any correspondence with [Name].

Access to information request #2 (Review file 065-2016 & 124-2016)

Please provide all internal and external correspondence related to [Name] and/or a CBC reporter and/or the CBC regarding stories about GTH land transactions along

the West Regina Bypass and/or [Minister] from February 3, 2016 until March 5, 2016.

Access to information request #3 (Review file 066-2016 & 125-2016)

Please provide all correspondence related to [Name] and comments he made in CBC stories about land transactions along the West Regina Bypass near the GTH from February 3, 2016 until March 5, 2016 – including any correspondence with [Name].

Access to information request #4 (Review file 067-2016 & 126-2016)

Please provide all correspondence, including attachments, between the Ministry and [Name], [Name] and/or their numbered company 101225232 Saskatchewan Ltd. from February 1, 2013 until June 30, 2014.

Access to information request #5 (Review file 068-2016 & 127-2016)

Please provide all internal and external correspondence related to [Name] and/or a CBC reporter and/or the CBC regarding stories about GTH land transactions along the West Regina Bypass and/or [Minister] from December 1, 2015 until February 3, 2016.

Access to information request #6 (Review file 069-2016 & 128-2016)

Please provide all internal correspondence/documentation related to the Ministry's potential interest or actual interest in purchasing Surface Parcel 165025414 (NW 20-17-20 W2 Ext 1) and/or Surface Parcel 166005862 (SW 20-17-20 W2 Ext 1) from 101225232 Saskatchewan Ltd. between February 1, 2013 until April 30, 2014.

Access to information request #7 (Review file 070-2016 & 129-2016)

Please provide all external correspondence/documentation related to the Ministry's potential interest or actual interest in purchasing Surface Parcel 165025414 (NW 20-17-20 W2 Ext 1) and/or Surface Parcel 166005862 (SW 20-17-20 W2 Ext 1) from 101225232 Saskatchewan Ltd. between February 1, 2013 until April 30, 2014.

Access to information request #8 (Review file 071-2016 & 130-2016)

Please provide all internal correspondence/documentation related to Surface Parcel 165025414 (NW 20-17-20 W2 Ext 1) and/or Surface Parcel 166005862 (SW 20-17-20 W2 Ext 1) from February 1, 2013 until April 30, 2014.

Access to information request #9 (Review file 072-2016 & 131-2016)

Please provide all external correspondence/documentation related to Surface Parcel 165025414 (NW 20-17-20 W2 Ext 1) and/or Surface Parcel 166005862 (SW 20-17-20 W2 Ext 1) from February 1, 2013 until April 30, 2014.

Access to information request #10 (Review file 073-2016 & 132-2016)

Please provide all records (emails, reports, briefing notes, etc.) related to a land sale agreement between the Global Transportation Hub and the Ministry of Highways – related to Surface Parcel 165025414 (NW 20-17-20 W2 Ext 1) and or Surface parcel 166005862 (SW 20-17-20 W2 Ext 1) signed in March 2014 – including but not limited to drafts, emails, briefing notes etc. from July 1, 2013 to June 30, 2014.

Access to information request #11 (Review file 074-2016 & 133-2016)

Please provide all correspondence with the Ministry of Economy and/or the Global Transportation Hub Authority related to Surface Parcel 165025414 (NW 20-17-20 W2 Ext 1) and/or Surface Parcel 166005862 (SW 20-17-20 W2 Ext 1) excluding any discussion of a land sale agreement between the entities involving this land from July 1, 2013 until June 30, 2014.

Access to information request #12 (Review file 075-2016 & 134-2016)

Please provide all records related to any and all appraisals of Surface Parcel 165025414 (NW 20-17-20 W2 Ext 1) and or Surface Parcel 166005862 (SW 20-17-20 W2 Ext 1) from January 1, 2013 until April 30, 2014.

Access to information request #13 (Review file 076-2016 & 135-2016)

Please provide all correspondence related to an appraisal of Surface Parcel 165025414 (NW 20-17-20 W2 Ext 1) and or Surface Parcel 166005862 (SW 20-17-20 W2 Ext 1) provided to the Global Transportation Hub and/or Ministry of Economy by [Name], [Name] and/or their numbered company 101225232 Saskatchewan Ltd. from March 1, 2013 until March 31, 2014.

- [2] By letter dated April 4, 2016, Highways provided the Applicant with a single estimate of costs in the amount of \$69,645.00. Issues related to the fee estimate are addressed in Review Report 064-2016 to 076-2016.
- [3] By letter dated May 20, 2016, Highways provided its response to the Applicant's requests indicating that "[y]our access request has been denied under s. 20" of *The Freedom of Information and Protection of Privacy Act* (FOIP). Further, that "[u]pon release of the Provincial Auditor's report, it is our intention to continue the necessary work in order to respond to your requests..."
- [4] On June 6, 2016, my office received a Request for Review from the Applicant, in which he disagreed with Highways interpretation of section 20 of FOIP and its decision to stop work on the Applicant's requests.
- [5] On June 15, 2016, my office provided notification to Highways and the Applicant of my office's intent to conduct 13 reviews. My office requested Highways provide an Index of Records, a copy of the records at issue and a submission in support of section 20 of FOIP. The Applicant was also invited to provide a submission for my office's consideration.

[6] On June 24, 2016, the Applicant provided a submission to my office. On August 16, 2016, Highways provided my office with its submission and a representative sample of records.

II RECORDS AT ISSUE

[7] No records are addressed in this Review Report. Any records responsive to the access requests are addressed in other Review Reports.

III DISCUSSION OF THE ISSUES

[8] Highways is a “government institution” as defined by subsection 2(1)(d)(i) of FOIP.

1. Did issuing the May 20th decision letter comply with FOIP?

[9] As noted above, in a letter dated April 4, 2016, Highways issued a fee estimate to the Applicant in the amount of \$69,645.00. In its fee estimate letter, Highways advised the Applicant of the following:

In order to proceed with your access request, our office will require a deposit of \$34,822.50, which is half the total amount required... We will continue to process your access request once this is received.

[10] Prior to the Applicant providing a deposit, Highways sent a decision letter to the Applicant dated May 20, 2016. The decision letter advised the Applicant that the access request was denied pursuant to section 20 of FOIP. Further, that it would continue processing the Applicant’s requests after the Provincial Auditor’s report was released. When asked by my office if it relied on the representative sample or the entire responsive record to determine the application of section 20 of FOIP, Highways advised that:

When the ministry/other agencies first received the 13 access requests in March, the option of applying s.20 was discussed and rejected. However, in May the Provincial Auditor wrote to the DM’s [Deputy Ministers] involved (including the DM to the Premier) and cautioned the government against releasing records during an audit; she

raised s.20 in her message. It was this message from the Auditor that prompted the application of s.20.

[11] Based on this response, it appears that Highways did not make its decision based on the content of the records but rather based on the Provincial Auditor. Highways took a blanket approach to its application of section 20 of FOIP. When we look at the sequence of events at the time, negotiations between the Applicant, Highways and my office regarding the fee estimate and narrowing the scope of the access requests were ongoing. These negotiations were going in a positive direction. It is not clear why Highways issued this decision letter prior to the negotiations concluding and the Applicant paying the deposit requested by Highways.

[12] When it comes to processing an access request, the statutory 30 day timeline for responding to an applicant can only be stopped in the event of a fee estimate pursuant to subsection 9(3) of FOIP. This provision provides as follows:

9(3) Where an estimate is provided pursuant to subsection (2), the time within which the head is required to give written notice to the applicant pursuant to subsection 7(2) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application.

[emphasis added]

[13] Subsection 9(4) of FOIP provides a discretionary authority for the head to require a deposit prior to commencing a search for records. Subsection 9(4) of FOIP provides:

9(4) Where an estimate is provided pursuant to subsection (2), the head may require the applicant to pay a deposit of an amount that does not exceed one-half of the estimated amount before a search is commenced for the records for which access is sought.

[emphasis added]

[14] Highways cannot stop a clock that is already stopped. Once an applicant pays a deposit, Highways must continue processing regardless of what exemptions it intends to apply. Rather than waiting for the Applicant to indicate he wished to proceed via a deposit being paid, Highways issued a decision letter. Further, it indicated that it would not proceed

with processing the requests. There was no authority under FOIP for Highways to have stopped processing the Applicant's 13 access requests based on section 20 of FOIP. Section 20 of FOIP is a discretionary exemption that should be applied like all others. All exemptions are to be determined in the first 30 days of processing the record (60 days if an additional 30 day extension is applied). In this case, Highways indicated that it applied section 20 and stopped processing even though it was in active negotiations.

[15] The May 20th decision letter disrupted negotiations and created confusion. It served no purpose. Therefore, I find that the May 20th decision letter was unnecessary, inappropriate and unauthorized under FOIP. As a result, the decision to apply section 20 of FOIP cannot be upheld. Going forward, Highways should consult FOI experts when access requests arrive that involve sensitive issues.

[16] On January 6, 2017, my office provided Highways with its preliminary findings and recommendations as outlined below. At the time of issuance of this Review Report, Highways had not provided my office with a response as to whether it would comply with the recommendations or not.

IV FINDINGS

[17] I find that the May 20th decision letter was unnecessary, inappropriate and unauthorized under FOIP.

[18] I find that the decision to apply section 20 of FOIP cannot be upheld.

V RECOMMENDATIONS

[19] I recommend that Highways review and improve its processes with regards to processing access requests in accordance with FOIP. Further, that Highways report back progress to my office within 60 days outlining:

- the review that was undertaken; and

- the improvements that will be implemented and when they will take effect.

Dated at Regina, in the Province of Saskatchewan, this 17th day of January, 2017.

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