

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 125/2014

Ministry of Highways and Infrastructure

Summary: The Ministry of Highways and Infrastructure applied subsection 18(1)(d) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to certain parts of the record. The Commissioner found the exemption did not apply and recommended release of all portions of the record withheld under this exemption.

I BACKGROUND

- [1] On July 25, 2014, the Applicant made a request to the Ministry of Highways and Infrastructure for certain records. The Ministry replied in a letter dated August 18, 2014 which included the records responsive to the request. However, the letter indicated that portions of the record were severed pursuant to subsections 18(1)(d), 24(1)(e) and (k) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [2] The Applicant was dissatisfied with the Ministry's application of subsection 18(1)(d) of FOIP and made a request for review to my office on November 18, 2014. On November 20, 2014, notification of my office's intention to undertake a review was provided to both the Applicant and the Ministry.
- [3] My office received a copy of the record and the index of records from the Ministry on December 3, 2014. However, despite several reminders from my office, the Ministry did not provide a submission. On February 11, 2015, my office provided a draft report to the Ministry. My office received the Ministry's submission on February 13, 2015. An amended copy of the draft report was provided to the Ministry on February 18, 2015. My

office asked that a response be provided by February 24, 2015. No response was received.

II RECORDS AT ISSUE

[4] The record includes two contracts for the application of rubber asphalt crack sealant. It is 17 pages long and the Ministry has applied subsection 18(1)(d) of FOIP to certain numerical figures on half of the pages. The Applicant is interested in two “Ministry Estimate” and two “Total Cost Estimate” figures that have been severed.

[5] The Ministry also severed two winning bid figures which the Applicant indicated were available online. My office checked and the winning bid figures are available at www.highways.gov.sk.ca/updated-tender/. I find that this is an inappropriate practice and somewhat contradictory to sever something that is already public. I would encourage all Ministries not to engage in such a practice.

[6] The nature of the other figures severed from the contract varies.

III DISCUSSION OF THE ISSUES

[7] The Ministry qualifies as a government institution pursuant to subsection 2(1)(d)(i) of FOIP.

1. Did the Ministry properly apply subsection 18(1)(d) of FOIP?

[8] Subsection 18(1)(d) of FOIP states:

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;

[9] In past Reports, my office has established the following two part test for this exemption:

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

[10] The Ministry's submission only addresses "internal estimate costs". It is unclear if this refers to both the "Ministry Estimate" and "Total Cost Estimate" figures. It did not mention the other figures severed from the contract, therefore the other figures severed under section 18(1)(d) of FOIP should be released to the Applicant.

[11] The above noted test was communicated to the Ministry in the notification letter of November 20, 2014. However, the Ministry has not specifically addressed this test in its submission. The Ministry has provided no details of what contractual or other negotiations could be affected by release of the responsive material in question. Further, the record is contracts that have already been executed. My office has said in past Reports that, generally, negotiations that have concluded would not be captured by this exemption. Nonetheless, I can only make decisions on the material presented to me. The Ministry has not met the first part of the test.

[12] The Ministry's submission did focus on the expected interference resulting from release of the record. It stated: "By disclosing internal estimates, the ministry would in fact be leading and influencing contractor bidding by setting a benchmark. This violates the fair and competitive bidding practices used virtually everywhere in the industrialized world." However, as stated above, the Ministry has not provided details of exactly what contractual or other negotiations would be affected by release of these figures. Therefore, neither of the parts of the test have been met.

[13] I note that the Applicant has provided our office with a submission which contains examples of decisions from Saskatchewan and British Columbia where, in his opinion, this exemption did not apply in similar circumstances. In it, he referenced Order F14-37

from the Office of the Information and Privacy Commissioner for British Columbia. The adjudicator in that Order found that the City of Vancouver could not apply a similar exemption to cost estimates. The order stated:

...the City says that releasing the reports reveals cost estimates and recommendations for future work, which would provide potential bidders with pricing estimates and preclude unbiased and fair bids in any RFP, ultimately harming the City. I do not accept this argument. First, any RFP process is inherently a competitive process, so cost estimate information does not preclude bidders from submitting a bid that gives them the best chance of being the successful proponent. As noted above, many factors influence proponents' bids and the overall competitiveness of an RFP process. Arguably, the release of the reports will assist in obtaining fair bids, because having multiple informed bidders is the best way to assure the competitiveness of the RFP bid process. The competitiveness of the bid process for the City will certainly not be assisted by having one or more bidders who have greater knowledge than all other bidders.

[14] I agree with this Adjudicator. Although the Ministry has not provided sufficient detail, it is my understanding that the winning contractor would have access to the internal cost estimates in question, as it is part of the current contract. In my opinion, keeping these figures from the public, including other future bidders, would jeopardize a competitive bidding process.

[15] Therefore, this exemption has not been properly applied.

IV FINDINGS

[16] I find the Ministry did not properly apply subsection 18(1)(d) of FOIP to the record.

V RECOMMENDATIONS

[17] I recommend the Ministry release all portions of the record withheld under section 18(1)(d) of FOIP.

[18] I recommend the Ministry change its practice of severing information that it has already made public.

Dated at Regina, in the Province of Saskatchewan, this 27th day of February, 2015.

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