



## **REVIEW REPORT 135-2019**

### **Ministry of Central Services**

**January 29, 2020**

**Summary:**

The Ministry of Central Services (the Ministry) applied subsections 17(1)(a), (b)(i), (c) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to portions of the responsive records. The Commissioner found that subsections 17(1)(b)(i) of FOIP applied to portions of the record, but encouraged the Ministry to ensure it has considered all factors related to the exercise of discretion before it decides to withhold the information. The Commissioner also found that subsections 17(1)(a), (c) and 29(1) of FOIP did not apply to the record. He recommended release of certain portions of the record.

### **I BACKGROUND**

[1] The Commissioner has identified a potential conflict with the subject material of the records in this review. The Commissioner has taken no part in this review and has delegated the Director of Compliance to make all decisions related to this review. The only thing that has occurred is that the final Report has been issued under the Commissioner's name after being reviewed and approved by the Director of Compliance.

[2] On February 22, 2019, the Ministry of Central Services (the Ministry) received an access to information request for “all emails between [a former Deputy Minister of the Ministry] and [a former Chief Executive Officer (CEO) of Wascana Centre Authority] – related to Brandt and/or [Canadian National Institute for the Blind (CNIB)] and/or Brandt's Wascana project”. The request was for records from April 1, 2014 to June 30, 2017.

- [3] The Ministry replied to the Applicant on April 18, 2019. It provided the Applicant with responsive records and indicated that some information was withheld pursuant to subsections 17(1)(b)(i), 17(1)(c) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [4] On May 2, 2019, the Applicant requested a review by my office. On May 10, 2019, my office notified both the Ministry and the Applicant of my intention to undertake a review.
- [5] On June 17, 2019, the Ministry notified the Applicant that it was also applying subsection 17(1)(a) of FOIP to portions of the record. On October 11, 2019, the scope of the review was expanded to also consider this exemption.

## **II RECORDS AT ISSUE**

- [6] The Ministry identified 22 pages of responsive records. It severed information from 16 of the pages pursuant to subsections 17(1)(a), (b)(i), (c) and 29(1) of FOIP. See Appendix A for details.

## **III DISCUSSION OF THE ISSUES**

### **1. Do I have jurisdiction in this matter?**

- [7] The Ministry qualifies as a government institution pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to review this matter.
- [8] I also note that there are responsive records related to the Provincial Capital Commission (PCC) which was known as the Wascana Centre Authority at the time the records were created. PCC qualifies as a government institution pursuant to subsection 2(d)(ii) of FOIP. I will refer to the Wascana Centre Authority as PCC in the remainder of this Report.

[9] The Ministry of Parks, Culture and Sport also qualifies as a government institution pursuant to subsection 2(1)(d)(i) of FOIP. The relationship of this Ministry to the responsive records will be discussed in this Report.

**2. Does subsection 17(1)(b)(i) of FOIP apply to the record?**

[10] Subsection 17(1)(b)(i) of FOIP provides:

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

...

(b) consultations or deliberations involving:

(i) officers or employees of a government institution;

[11] The Ministry has applied subsection 17(1)(b)(i) of FOIP to information on six pages of the record. See Appendix A for details.

[12] Subsection 17(1)(b) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose consultations or deliberations involving officers or employees of a government institution.

[13] The provision is intended to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is to allow such persons to address an issue without fear of being wrong, looking bad, or appearing foolish if their frank deliberations were to be made public. The provision is not meant to protect the bare recitation of facts, without anything further.

[14] The following two-part test can be applied:

1. Does the record contain consultations or deliberations?
2. Do the consultations or deliberations involve officers or employees of a government institution?

***1. Does the record contain consultations or deliberations?***

[15] My office's *Guide to FOIP – Chapter 4 Exemptions from the Right of Access* (the Guide to FOIP) (updated December 17, 2019) indicates that consultation means:

- the action of consulting or taking counsel together: deliberation, conference;
- a conference in which the parties consult and deliberate.

[16] A consultation can occur when the views of one or more officers or employees of a government institution are sought as to the appropriateness of a particular proposal or suggested action. It can include consultations about prospective future actions and outcomes in response to a developing situation. It can also include past courses of action. For example, where an employer is considering what to do with an employee in the future, what has been done in the past can be summarized and would qualify as part of the consultation or deliberation.

[17] The Guide to FOIP also indicates that a deliberation means:

- the action of deliberating (to deliberate: to weigh in mind; to consider carefully with a view to a decision; to think over); careful consideration with a view to a decision;
- the consideration and discussions of the reasons for and against a measure by a number of councillors.

[18] A deliberation can occur when there is a discussion or consideration of the reasons for or against an action. It can refer to discussions conducted with a view towards making a decision.

[19] The first email that starts on the second page and continues on to the third page was written by an employee of a company that the Ministry has identified as Brandt Developments Ltd. (Brandt) to PCC and transmits a letter through a link. This would not constitute consultations or deliberations because no views are expressed and there are no reasons for and against any measure. Therefore, the first part of the test is not met and subsection 17(1)(b)(i) of FOIP does not apply to this portion of the email.

[20] The second email which begins at the bottom of the first page and continues on to the second page also would not qualify as a consultation or a deliberation. In this email, the former CEO of PCC replies to Brandt. This information provides mainly factual information with respect to the process to come. Views of the former CEO of PCC are expressed in this email, but not specifically with respect to the appropriateness of a particular proposal or suggested action. The views are communicated more as instructions or informational items for Brandt. Therefore, the first part of the test is not met and subsection 17(1)(b)(i) of FOIP does not apply to this portion of the record.

[21] The Ministry's submission indicated that the information severed on pages 1 (first redacted email), 4, 18 and 19 in question is focused on considerations for finalizing the draft tenancy framework or reaching consensus on the acceptance for the project referred to in the access request. Upon review, I find that this information constitutes consultations because views are expressed as to the appropriateness of a particular proposal or suggested action related to issues pertaining to approving the project as described in the Ministry's email. This meets the definition of consultation as defined above and therefore, the first part of the test is met.

***2. Do the consultations or deliberations involve officers or employees of a government institution?***

[22] The consultations involve officers and employees of the Ministry, the Ministry of Parks Culture and Sport and PCC, which are all government institutions.

[23] In its submission, the Ministry indicated that it is the owner of the land in question within Wascana Centre. This land is leased to the CNIB and the subject of the Brandt proposal. PCC is responsible for the Wascana Centre Master Plan and was responsible to ensure any new developments adhered to the Master Plan. The Ministry also noted that the Ministry of Parks, Recreation and Sport acted as a liaison between PCC and the Government of Saskatchewan on a number of issues such as funding, legislation and reporting initiatives of the Government of Saskatchewan back to the Board of Directors of PCC. In particular, the Ministry added that the Deputy Minister of the Ministry of Parks, Culture and Sport

was designated as the government advisor to PCC Board of Directors and offered subject matter expertise on urban parks, legislation and government policies and procedures. The project in question was being considered by PCC's Board of Directors at the time that the records were created.

[24] I note that, in *Hande v University of Saskatchewan*, QBG 1222 of 2018, the Court of Queen's Bench considered the exemption in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) that is equivalent to 17(1)(b) of FOIP. The Court found that, "there is nothing in the exception which limits the exceptions to participation only" to individuals described in the exemption. This comment can also be applied to subsection 17(1)(b) of FOIP. As such, I am persuaded that the second part of the test is met because of the specific nature of the relationships in this case.

[25] I therefore find that subsection 17(1)(b)(i) of FOIP applies to the information severed on pages 1 (first redacted email), 4, 18 and 19 of the record. See Appendix A for details.

### ***Exercise of Discretion***

[26] Subsection 17(1)(b) of FOIP is a discretionary exemption which means a government institution can decide whether to withhold or release information to which the exemption applies. When applying any discretionary exemption, the government institution must first determine if the circumstances meet the test, as discussed above. The head then should exercise their discretion when deciding whether to withhold records pursuant to a discretionary exemption or to instead release them nonetheless.

[27] The Guide to FOIP summarizes some factors that should be taken into account when exercising discretion include:

- the general purposes of the Act (i.e. public bodies should make information available to the public, and individuals should have access to personal information about themselves);
- the wording of the discretionary exception and the interests which the exception attempts to protect or balance;
- whether the applicant's request may be satisfied by severing the record and providing the applicant with as much information as is reasonably practicable;
- the historical practice of the public body with respect to the release of similar types of records;
- the nature of the record and the extent to which the record is significant or sensitive to the public body;
- whether the disclosure of the information will increase public confidence in the operation of the public body;
- the age of the record;
- whether there is a definite and compelling need to release the record; and
- whether Commissioner's Orders have ruled that similar types of records or information should or should not be disclosed.

[28] The Supreme Court of Canada ruling in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exemption and to return the matter for reconsideration by the head of a public body

[29] The Supreme Court, in the same decision, also considered the following factors to be relevant to the review of discretion:

- the decision was made in bad faith;
- the decision was made for an improper purpose;

- the decision took into account irrelevant considerations; or
- the decision failed to take into account relevant considerations.

[30] During a review of a discretionary exemption, I may recommend that the head of the government institution reconsider its exercise of discretion if I feel that one of these factors played a part in the original decision to withhold information, or if not exercised at all. However, I will not substitute my discretion for that of the head.

[31] In this case, I do not have concerns with any of the four factors playing a role in the exercise of discretion exercised. Nonetheless, given the media attention in this project, I encourage the Ministry to ensure that it has considered all of these factors before it withholds information pursuant to subsection 17(1)(b) of FOIP.

### **3. Does subsection 17(1)(c) of FOIP apply to the record?**

[32] Subsection 17(1)(c) of FOIP provides:

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

...

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution, or considerations that relate to those negotiations;

[33] The provision covers positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the public body. It also covers considerations related to the negotiations. Examples of the type of information that could be covered by this exemption are the various positions developed by public body negotiators in relation to labour, financial and commercial contracts. The following two part test can be applied:

1. Does the record contain positions, plans, procedures, criteria, instructions or considerations that relate to the contractual or other negotiations?



2. Were the positions, plans, procedures, criteria, instructions or considerations developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution?
- [34] Subsection 17(1)(c) of FOIP has been applied to information on three remaining pages of the record. The information is the two severed emails that span from the bottom of the first page to the top of the third page as discussed previously in this Report.
- [35] First, I must consider if these portions of the record contain positions, plans, procedures, criteria, instructions or considerations that relate to the negotiations. In its submission, the Ministry indicated that the information in these emails qualifies as positions and plans.
- [36] The Guide to FOIP defined a plan as a formulated and especially detailed method by which a thing is to be done; a design or scheme. It is also a detailed proposal for doing or achieving something; an intention or decision about what one is going to do. A position is a point of view or attitude. It is an opinion; stand; a way of regarding situations or topics; an opinion that is held in opposition to another in an argument or dispute.
- [37] The first email that begins on the second page of the record is simply a transmission email as discussed previously. It does not qualify as plans or positions. Therefore, the first part of the test has not been met.
- [38] With respect to the second email that start at the bottom of the first page of the record and continues on to the second page, the email replies to Brandt and outlines some of the steps in an approval process of the project. This can be described as part of the plan of the approval process. However, the plan must be developed for the purpose of contractual or other negotiations.
- [39] A negotiation is a consensual bargaining process in which the parties attempt to reach an agreement on a disputed or potentially disputed matter. It can also be defined as dealings conducted between two or more parties for the purpose of reaching an understanding. It connotes a more robust relationship than “consultation”. It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion.

- [40] “Developed” means to start to exist, experience or possess, while “for the purposes of” means intention or the immediate or initial purpose of something.
- [41] In its submission, the Ministry indicated that the negotiations taking place were related to the final approval of the CNIB lease extension and/or renewal. It indicated that the contractual negotiations were a joint effort between the Ministry and PCC.
- [42] The steps that the Ministry, PCC and Brandt must take during the negotiation is a plan in the broadest sense. However, exemptions to the right of access are to be interpreted as limited and specific and are not intended to be interpreted so broadly. If it were interpreted this broadly, nothing would be accessible to the public. In Review Report 244-2018, my office considered subsection 18(1)(e) of FOIP, which is similar to subsection 17(1)(c) of FOIP. In relation to subsection 18(1)(e) of FOIP, it was determined that positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations are strategies and pre-determined courses of action that would be discussed internally in a public body, and not shared with third parties. In this case, PCC told Brandt what steps were necessary.
- [43] The plans expressed in this email do not disclose a government institution’s plans for its negotiations with Brandt on the project at issue, just common steps that must be taken. I am not persuaded that the information qualifies as plans or positions that relate to negotiations. Therefore, the first test is not met.
- [44] I find that subsection 17(1)(c) of FOIP does not apply to the record.

**4. Does subsection 17(1)(a) of FOIP apply to the record?**

[45] Subsection 17(1)(a) of FOIP provides:

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

(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;

[46] My office has adopted the following two-part test which can be applied for subsection 17(1)(a) of FOIP:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

[47] Subsection 17(1)(a) of FOIP has also been applied to the remaining two severed emails that span from the bottom of the first page to the top of the third page as discussed previously in this Report.

[48] In its submission, the Ministry indicated that the material in question qualifies as analyses. My office had defined analyses as a detailed examination of the elements or structure of something; the process of separating something into its constituent elements.

[49] The first email, which appears on the bottom of page 2 and the top of page 3 as described, is simply a transmittal email. It does not qualify as analyses. The first part of the test is, therefore, not met.

[50] Again, the remaining email on the first and second page of the record is PCC replying to Brandt. It provides informational and instructional information. This does not qualify as analyses and the first part of the test is not met.

[51] I find that subsection 17(1)(a) of FOIP does not apply to the record.

**5. Does subsection 29(1) of FOIP apply to the record?**

[52] Subsection 29(1) of FOIP provides:

**29(1)** No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[53] The Ministry has withheld the same cellular telephone number (cell phone number) of the former CEO of PCC 13 times in the record. In order for subsection 29(1) of FOIP to apply, the information in the record must first qualify as “personal information” as defined by subsection 24(1) of FOIP.

[54] Subsection 24(1)(e) of FOIP provides:

**24(1)** Subject to subsections (1.1) and (2), “**personal information**” means personal information about an identifiable individual that is recorded in any form, and includes:

...

(e) the home or business address, home or business telephone number or fingerprints of the individual;

[55] In its submission, the Ministry indicated that many former employees retain their business cell phone numbers for personal use after their employment has ended. As the cell phone number could potentially be for personal use, the Ministry denied access to this cell phone number pursuant to section 29(1) of FOIP. The Ministry indicated that it did not take steps to find out if the cell phone number has actually been retained by the former CEO.

[56] In Review Report 277-2016, the Commissioner found that employer assigned cell phone numbers for government employees was considered business card information. Business card information is the type of information found on a business card (name, job title, work address, work phone numbers and work email address). This type of information is

generally not personal in nature and therefore would not be considered personal information.

[57] The Ministry has not persuaded me that the cell phone number is still used by the former CEO. Further, an Internet search indicates that the same cell phone number was used by the former CEO in a public manner unrelated to the duties as CEO, while still CEO. The cell phone number in question was used by the former CEO in the records and therefore would qualify as business card information. I am not persuaded it qualifies as personal information.

[58] Subsection 29(1) of FOIP does not apply to the record.

#### **IV FINDINGS**

[59] I find that subsection 17(1)(b)(i) of FOIP applies to portions of the record as described in Appendix A.

[60] I find that subsections 17(1)(a), 17(1)(c) and 29(1) of FOIP do not apply to the record.

**V RECOMMENDATIONS**

[61] I recommend that the Ministry ensure that it has considered all factors related to the exercise of discretion before it decides to withhold information where I have found that subsection 17(1)(b) of FOIP applies, as described in Appendix A of this Report.

[62] I recommend that the Ministry release records as described in Appendix A of this Report.

Dated at Regina, in the Province of Saskatchewan, this 29th day of January, 2020.

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

## APPENDIX A

PAGE OF THE RECORD	SECTION(S) APPLIED BY THE MINISTRY	DOES IT APPLY?	RELEASE OR WITHHOLD
1	17(1)(a)	Does not apply to second redacted email	Release second redacted email on page  Where 17(1)(b)(i) applies - consider factors related to exercise of discretion
	17(1)(b)(i)	To first redacted email on page only Does not apply to second redacted email	
	17(1)(c)	Does not apply to second redacted email	
	29(1)	No	
2	17(1)(a)	No	Release
	17(1)(b)(i)	No	
	17(1)(c)	No	
	29(1)	No	
3	17(1)(a)	No	Release
	17(1)(b)(i)	No	
	17(1)(c)	No	
4	17(1)(a)	No need to review	17(1)(b)(i) applies - consider factors related to exercise of discretion
	17(1)(b)(i)	Yes	
	17(1)(c)	No need to review	
5	29(1)	No	Release
6	29(1)	No	Release
7	29(1)	No	Release
9	29(1)	No	Release
10	29(1)	No	Release
12	29(1)	No	Release
14	29(1)	No	Release
15	29(1)	No	Release
18	17(1)(a)	No need to review	17(1)(b)(i) applies - consider factors related to exercise of discretion
	17(1)(b)(i)	Yes	
	17(1)(c)	No need to review	
19	17(1)(a)	No need to review	17(1)(b)(i) applies - consider factors related to exercise of discretion
	17(1)(b)(i)	Yes	
	17(1)(c)	No need to review	
20	29(1)	No	Release
21	29(1)	No	Release