



REVIEW REPORT 157-2016

Global Transportation Hub Authority

November 10, 2016

Summary:

The Global Transportation Hub Authority applied subsections 16(1)(a), (c), (d), 17(1)(a), (b), (f), 18(1)(d) and (f) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to portions of the responsive records. The Commissioner found that subsections 16(1)(a), 17(1)(a), 17(1)(b) and 18(1)(f) of FOIP applied to portions of the record and recommended release of the rest. He also found that some of the record qualified as personal information and recommended such be withheld pursuant to subsection 29(1) of FOIP.

I BACKGROUND

[1] On April 6, 2016, the Global Transportation Hub Authority (the GTH) received an access to information request for the following:

all correspondence between the GTH and any other ministry or arm of government (including but not limited to Executive Council and the Ministry of Economy) or any employee of government related to Brightenvision International Development Inc. from December 1, 2015 and April 5, 2016.

[2] On June 15, 2016, the GTH responded to the Applicant. It informed the Applicant that all responsive records were being withheld pursuant to subsections 17(1)(a), (b)(i), (ii), (iii), 18(1)(b), (d), (f), 19(1)(a), (b), (c)(i) and (c)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [3] The Applicant was dissatisfied with the GTH's response and, on June 20, 2016, requested a review by my office. On June 22, 2016, my office provided notification to the GTH and the Applicant of our intention to undertake a review. We also provided notification to Brightenvue which the GTH has identified as having third party interests with respect to the records under review.
- [4] The GTH identified 57 e-mails with 15 attachments as records responsive to the Applicant's request; a total of 72 documents. However, after this review commenced, the GTH released 33 of these documents to the Applicant. Only 39 remain at issue in this review.

II RECORDS AT ISSUE

[5] The record consists of 39 documents; 30 e-mails and nine attachments. The GTH has applied subsections 16(1)(a), (c), (d), 17(1)(a), (b), (f), 18(1)(d) and (f) of FOIP to certain portions as noted in this table:

Record #	16(1)(a)	16(1)(c)	16(1)(d)	17(1)(a)	17(1)(b)	17(1)(f)	18(1)(d)	18(1)(f)
1				X	X		X	X
2					X		X	X
5					X		X	X
6					X		X	X
6a							X	X
7a						X		X
9a			X					
12				X	X		X	X
13				X	X		X	X
16					X		X	X
17				X	X		X	X
18				X	X		X	X
19a	X		X					
20a	X		X					
20b	X		X					
20c	X		X					
20d	X		X					
21				X			X	X
22				X	X		X	X
25	Same as 23 which has been released							
28		X	X		X			
31				X	X			
33					X		X	X
34		X	X					
35		X	X					
37					X			
38		X	X		X			
39		X	X		X			
40					X		X	X
41		X	X		X			
42A							X	X
43					X			
48		X	X		X			
49		X	X		X			
50		X	X		X			
52		X	X		X			
53		X	X		X			
54		X	X		X			
57					X			

III DISCUSSION OF THE ISSUES

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

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

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

(a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;

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

[8] The GTH has applied this exemption to five attachments of two e-mails (19a, 20a, 20b, 20c and 20d). Two are briefing notes and three are question and answer documents. I note that the corresponding e-mails have been released to the Applicant.

[9] From e-mail 20, which was released to the Applicant, it is apparent that attachments 20a, 20b, 20c and 20d were prepared for Cabinet. I agree that subsection 16(1)(a) of FOIP applies to these four attachments.

[10] It is not apparent from the material that I have received that record 19a was prepared for Cabinet. It appears record 19a is a later version of record 20b, which was prepared for Cabinet; however, 19a is substantially different from 20b. Record 19, the e-mail which conveyed attachment 19a, is sent from one GTH employee to two other GTH employees, including the CEO. Record 19a was meant to prepare these employees for a public announcement. The e-mail was also sent to the Senior Communications Advisor of the Executive Council. It appears 19a was sent to the office of the Executive Council for public dissemination rather than discussion at a Cabinet meeting. I am not persuaded that subsection 16(1)(a) of FOIP applies to record 19a.

[11] I have also reviewed record 9a which appears to be a draft of a briefing note for an order-in-council decision. My office has determined that draft memorandum that was created for the purpose of presenting proposals and recommendations to Cabinet but that was never actually presented to Cabinet remains a confidence. Therefore, subsection 16(1)(a) of FOIP applies to record 9a.

2. Does subsection 16(1)(c) of FOIP apply to the balance of the record?

[12] Subsection 16(1)(c) of FOIP states:

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

...

(c) records of consultations among members of the Executive Council on matters that relate to the making of government decisions or the formulation of government policy, or records that reflect those consultations;

[13] This provision protects records used for, or records that reflect, consultations amongst members of the Executive Council on matters relating to the making of government decisions or the formulation of government policy.

[14] The GTH has applied this exemption to 12 of the remaining e-mail strings which it divided into two groups.

[15] The GTH's submission indicated that the first group of records (28, 34, 35, 38, 39 and 41) "contain Executive Council consultations involving [name], CEO of the GTH, [name], Deputy Minister to the Premier, and [name], Chief of Staff to the Premier." With respect to the second group of records (48, 49, 50, 52, 53 and 54), the GTH's submission identifies the CEO of the GTH and the Chief of Staff to the Ministry of the Economy as senders and recipients of the e-mails. Upon review of this submission and the record, I note that none of the e-mails included members of the Executive Council. Therefore subsection 16(1)(c) of FOIP does not apply to the record.

3. Does subsection 16(1)(d) of FOIP apply to the balance of the record?

[16] Subsection 16(1)(d) of FOIP states:

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

...

(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).

[17] In order for this provision to apply, the records must contain briefings and be intended for the Executive Council. In addition, subsections 16(1)(d)(i) or (ii) must apply. The purpose for which the record was prepared is key. It is important to note that the records must be for the purpose of briefing a minister in relation to matters before Cabinet or for use in a discussion with other ministers.

[18] The GTH applied subsection 16(1)(d) of FOIP to 12 of the remaining e-mails.

[19] One group of e-mails (28, 34, 35, 38, 39 and 41) deal with the timing of an announcement of a decision already approved by Cabinet. As noted above, none of the e-mails include a Member of the Executive Council. Subsection 16(1)(d) of FOIP does not apply.

[20] The second group of e-mails (48, 49, 50, 52, 53 and 54) deal with a news release regarding a decision approved by Cabinet. Again, no members of the Executive Council are included in the e-mails. Subsection 16(1)(d) of FOIP does not apply.

[21] The GTH also applied subsection 16(1)(d) of FOIP to one of the attachments, record 19a. This is a question and answer document that is a later version of record 20a which was prepared for Cabinet, however, it is substantially different from 20a. Further, it appears that this version of the record was used to prepare employees of the GTH for an announcement. The GTH has not demonstrated that this version of the document contained briefings for a member of the Executive Council.

4. Does subsection 17(1)(b) of FOIP apply to the balance of the record?

[22] Subsection 17(1)(b) of FOIP states:

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;

(ii) a member of the Executive Council; or

(iii) the staff of a member of the Executive Council;

[23] The GTH applied subsection 17(1)(b) of FOIP to 26 e-mails.

[24] This provision is meant to permit government institutions to consider options and act without constant public scrutiny.

[25] A consultation occurs when the views of one or more officers or employees of the public body are sought as to the appropriateness of a particular proposal or suggested action. A deliberation is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

[26] In order to qualify, the opinions solicited during a “consultation” must:

1. be either sought, expected, or be part of the responsibility of the person who prepared the record; and
2. be prepared for the purpose of doing something, such as taking an action, making a decision or a choice.

[27] I note that this provision is not meant to protect the bare recitation of facts, without anything further. Also, the exemption does not generally apply to records or parts of records that in themselves reveal only the following:

- that a consultation or deliberation took place at a particular time;
- that particular persons were involved; or
- that a particular topic was involved.

[28] Many of the e-mails identified by the GTH would not qualify as consultations or deliberations. A key component is that the consultation or deliberation must address a particular action or decision. In record 22, it is clear that a decision has been made and the e-mails contain follow up information or clarification. The information in record 57 can be described as questions that elicit opinions on the actions of the Applicant. No action by the GTH in response is discussed.

[29] The GTH's submission particularly addresses record 12. It is an e-mail from the President and CEO of the GTH to board members. It includes an itemized list of updates of certain issues faced by the GTH. One of the issues is the actions of the Applicant. The GTH stated that "The purpose of informing the Board of Directors of such matters is to enable it to govern and to provide management with directives to take action." No particular actions are discussed in this e-mail.

[30] In records 31, 48, 49, 50, 52, 53 and 54, the wishes of a third party are reported by a GTH employee. The employee's views are not voiced. Therefore it is factual information. Finally, the other e-mails can be described as factual information (28, 34, 35, 37, 38, 39, 41 and 47).

[31] I agree that this exemption applies to seven of these e-mails in their entirety and to portions of three other e-mails, as noted in Appendix A. These e-mails constitute consultations or deliberations and meet the test noted above.

5. Does subsection 17(1)(a) of FOIP apply to the balance of the record?

[32] Subsection 17(1)(a) of FOIP states:

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;

[33] The GTH has applied this exemption to five of the remaining records.

[34] My office has considered this exemption many times in the past. The exemption is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice. The established test that my office uses to determine the applicability of this exemption is as follows:

- a) Does the information qualify as advice, proposals, recommendations, analyses or policy options?
- b) The advice, recommendations, proposals, analyses and/or policy options must:
 - i. be either sought, expected, or be part of the responsibility of the person who prepared the record; and
 - ii. be prepared for the purpose of doing something, for example, taking an action or making a decision; and
 - iii. involve or be intended for someone who can take or implement the action.
- c) Was the advice, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

[35] Advice includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice has a broader meaning than recommendations. Recommendations relate to a suggested course of action as well as the rationale for a suggested course of action. Recommendations are generally more explicit and pointed than advice. Proposals, analyses and policy options

are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

[36] As described under my analysis of subsection 17(1)(b) of FOIP, records 12, 22 and 31 do not involve a decision that must be made or course of action that must be decided upon. As such, they do not qualify as advice, recommendations, proposals, analyses and/or policy options. Subsection 17(1)(a) of FOIP does not apply.

[37] Record 21 is an e-mail chain which invites a Member of Parliament to an announcement. The portions of the record to which the GTH has applied this exemption are factual information about the event and announcement. Also, the GTH attached suggested speaking notes. While the notes might qualify for this exemption, the information in the e-mail does not. Subsection 17(1)(a) of FOIP does not apply.

[38] Record 18 was also a responsive record in my Review Report 158-2016. I have already found that subsection 17(1)(a) applies to the record in that report.

6. Does subsection 17(1)(f) of FOIP apply to the balance of the record?

[39] Subsection 17(1)(f) of FOIP states:

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

...

(f) agendas or minutes of:

(i) a board, commission, Crown corporation or other body that is a government institution; or

(ii) a prescribed committee of a government institution mentioned in subclause (i);

[40] This exemption allows a government institution to withhold agendas and minutes of meetings because the meetings to which they relate provide the focus for decision-

making within these types of bodies. The exception can be applied only to the records of the governing body or a committee of the governing body of the public body.

[41] In order to qualify for this for this exemption a record must:

- a. be an agenda of a meeting or minutes of a meeting;
- b. the meeting must be of a:
 - i. governing body of a board, commission, Crown corporation or other body that is a government institution; or
 - ii. a prescribed committee of a board, commission, Crown corporation or other body that is a government institution.

[42] The GTH has applied subsection 17(1)(f) of FOIP to record 7a which are minutes of the GTH's Audit and Finance Committee. I agree that the record qualifies as minutes. I also agree that it is minutes of a committee meeting of the GTH, which qualifies as a government institution. However, subsection 17(1)(f)(ii) of FOIP requires that the committee be prescribed in the FOIP Regulations. They are not. Therefore, subsection 17(1)(f) of FOIP does not apply.

7. Does subsection 18(1)(f) of FOIP apply to the balance of the record?

[43] Subsection 18(1)(f) of FOIP states:

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;

[44] In order to qualify, the public body must show how the information is expected to prejudice economic interests. The public body does not have to prove that the prejudice is probable, but needs to show that there is a "reasonable expectation of prejudice" if any of the information/records were to be released.

[45] Prejudice in this context refers to detriment to economic interests. Economic interest refers to both the broad interests of a public body and for the government as a whole, in managing the production, distribution and consumption of goods and services. The term also covers financial matters such as the management of assets and liabilities by a public body and the public body's ability to protect its own or the government's interests in financial transactions.

[46] The GTH has applied this exemption to the nine remaining documents; six e-mails and three attachments. In its submission, the GTH has described two ways in which release of these records could prejudice the economic interest of itself or the Government of Saskatchewan.

[47] For this provision to apply there must be objective grounds for believing that disclosing the information would result in prejudice. The public body does not have to prove that prejudice is probable, but needs to show that there is a "reasonable expectation" of prejudice if any of the information were to be released. The following criteria are used:

1. There must be a clear cause and effect relationship between the disclosure and the prejudice which is alleged;
2. The prejudice caused by the disclosure must be more than trivial or inconsequential; and
3. The likelihood of prejudice must be genuine and conceivable.

[48] First, the GTH's submission stated:

There are conversations and correspondence specifically regarding Brightenvue, as well as other potential clients, all of which pertains to the GTH's economic interest - specifically the sale of land to Brightenvue and other potential clients, and also other services that are provided by the GTH. Prejudice arises as the release of this information would be detrimental to the GTH's economic interests. The GTH's broad economic interest is to sell land and manage the infrastructure within the GTH footprint and ultimately to contribute to the economy of Saskatchewan.

[49] The GTH's submission also noted that release of some records could prejudice the economic interests of Brightenvue, which would also affect the GTH's economic interests. I agree that certain information within records 5, 6a, 12, 21 and 42a contain

information about potential clients and the GTH's economic interests. For example, record 12 is an update from the GTH's President and CEO to board members. Some of the items discuss potential clients and their situations. I agree that release of some of these items would result in prejudice, but not the entire record. Other portions of these records are general items which would not prejudice any economic interests. Pursuant to section 8 of FOIP, the GTH should sever the information to which subsection 18(1)(f) of FOIP applies.

- [50] The GTH also stated that “the release of this information could increase potential clients’ knowledge of what the GTH has done for other potential clients. This could cause the GTH to lose bargaining power and enable the GTH's competitors to gain an advantage, by gaining knowledge of how the GTH negotiates and competes in the market place.” As such, I reviewed the record to see if it describes “what the GTH has done for” clients. Aside from details of purchase/lease agreements in other records, it appears that records 21, 22 and 40 demonstrate that GTH arranged a show of government support and a reception for a third party. As noted in Review Report 158-2016, I am not persuaded there is a clear cause and effect relationship between the release of records and the prejudice of economic interest in this case. Different businesses will have different needs. Further, I expect that the GTH will do whatever is necessary to pursue lucrative opportunities.
- [51] Record 7a is minutes of the GTH's Audit and Finance Committee. There is not enough detail within this record to persuade me that its release would cause the prejudice alleged by the GTH. Subsection 18(1)(f) of FOIP does not apply.
- [52] See Appendix A for a description of where subsection 18(1)(f) of FOIP applies. I also agree with severing the name of a potential client of Brightenview throughout all of the records.

8. Does subsection 18(1)(d) of FOIP apply to the balance of the record?

[53] 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;

[54] The GTH has applied subsection 18(1)(d) of FOIP to records 22 and 40 and portions of records 5, 12 and 21.

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

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 negotiations.

[56] In its submission, the GTH alluded to some negotiation with future clients, but did not provide any specific details. Upon review of these remaining records, I am not persuaded that the information within them would interfere with any negotiations. Subsection 18(1)(d) does not apply to these records.

9. Did the GTH properly apply subsection 29(1) of FOIP to the record?

[57] 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.

[58] In order for subsection 29(1) to apply, the information severed in the record must first be found to qualify as “personal information” pursuant to subsection 24(1) of FOIP. The relevant subsections state:

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:

(a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;

(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

...

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

...

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual; or

(ii) the disclosure of the name itself would reveal personal information about the individual.

[59] In its submission, the GTH explained that many members of the board use their personal e-mails to conduct their duties. They are not assigned GTH e-mail addresses. I agree that these qualify as personal information pursuant to subsections 24(1)(e) and (k) of FOIP.

[60] Further, record 12 describes the family status and employment history of two GTH employees. This qualifies as personal information pursuant to subsections 24(1)(a) and (b) of FOIP.

[61] I note that GTH Board Members are using personal e-mail addresses for correspondence with the GTH. I also note that personal information was disclosed to Board Members in such an e-mail. I am concerned about the safeguards in place. If the GTH has not already done so, I encourage the GTH to put policies in place regarding the Board Member’s use of personal e-mail to ensure compliance with the access and privacy

obligations imposed by FOIP. Further, the best practice would be for each Board Member to have a GTH e-mail account. My office will forward the GTH some resources for its consideration.

[62] The GTH should withhold personal information pursuant to subsection 29(1) of FOIP.

IV FINDINGS

[63] Subsections 16(1)(a), 17(1)(a), 17(1)(b), 18(1)(f) and 29(1) of FOIP apply to portions of the record.

[64] Subsection 16(1)(c), (d), 17(1)(f) and 18(1)(d) of FOIP do not apply to the record.

V RECOMMENDATIONS

[65] I recommend that the GTH release the records described in Appendix A.

[66] I recommend that the GTH develop policies regarding its Board Members' use of personal e-mail to ensure compliance with FOIP and if reasonably practicable set up GTH e-mail accounts for Board Members.

Dated at Regina, in the Province of Saskatchewan, this 10th day of November, 2016.

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

Appendix A

Record #	16(1)(a)	16(1)(c)	16(1)(d)	17(1)(a)	17(1)(b)	17(1)(f)	18(1)(d)	18(1)(f)	Release or Withhold
1				NNTR	Yes		NNTR	NNTR	Withhold
2					Yes		NNTR	NNTR	Withhold
5					Partially		No	Partially	Partial Release
	17(1)(b) and 18(1)(f) apply only to e-mail of January 22, 2016								
6					Yes		NNTR	NNTR	Withhold
6a								Yes	Withhold
7a						No		No	Release
9a	Yes		NNTR						Withhold
12				No	No		No	Partially	Partial Release
	18(1)(f) applies to e-mail of January 22, 2016 10:12 and items 1-6 and 8 of the e-mail dated January 22, 2016 7:12. 29(1) applies to e-mail addressed of board members and items 9 and 10.								
13				NNTR	Yes		NNTR	NNTR	Withhold
16					Yes		NNTR	NNTR	Withhold
17				NNTR	Yes		NNTR	NNTR	Withhold
18				Yes	NNTR		NNTR	NNTR	Withhold
19a	No		NNTR						Release
20a	Yes		NNTR						Withhold
20b	Yes		NNTR						Withhold
20c	Yes		NNTR						Withhold
20d	Yes		NNTR						Withhold
21				No			No	Partially	Partial Release
	18(1)(f) applies to the information under the headings "Opportunity Background" and "A bit more about..."								
22				No	No		No	No	Release
28		No	No		No				Release
31				No	No				Release
33					Yes		NNTR	NNTR	Withhold
34		No	No						Release
35		No	No						Release
37					No				Release
38		No	No		No				Release
39		No	No		No				Release
40					Partially		No	No	Release
	17(1)(b) applies only to the e-mail of February 2, 2016, 10:53:12								
41		No	No		No				Release
42A							NNTR	Yes	Withhold
43					No				Release
48		No	No		No				Release
49		No	No		No				Release
50		No	No		No				Release
52		No	No		Partial				Partial Release
	17(1)(b) applies only to last sentence of e-mail of February 29, 2016 11:17:14								
53		No	No		No				Release
54		No	No		No				Release
57					No				Release

NNTR = No need to Review