



REVIEW REPORT 165-2016

Ministry of Finance

August 17, 2016

Summary: The Ministry of Finance (the Ministry) applied subsections 13(1)(a) and 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to records responsive to the Applicant's request. The Commissioner found that subsection 17(1)(a) applied to a portion of the record, but encouraged the Ministry, if the Minister had made a public statement, to exercise its discretion to release it. The Commissioner found that subsection 13(1)(a) of FOIP applied to another portion of the record.

I BACKGROUND

[1] On May 20, 2016, the Ministry of Finance (the Ministry) received an access to information request for the following:

Please provide all briefing notes related to the Canada Revenue Agencies allegations that [a third party] has failed to pay the taxes it owes in Canada, and/or the resulting actions the [Canada Revenue Agency (CRA)] is taking to redress the situation and/or the consequences for Saskatchewan from January 1, 2014 until May 15, 2016.

[2] On June 17, 2016, the Ministry replied to the Applicant and released a two page document to the Applicant. It indicated that portions were severed pursuant to subsection 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On June 21, 2016, the Applicant requested a review by my office. On June 28, 2016, my office provided notification to the Applicant and the Ministry of my intention to undertake a review.

II RECORDS AT ISSUE

- [4] The record is a two page briefing note prepared for the Minister of Finance. The Ministry has severed a portion on the first page pursuant to subsection 17(1)(a) of FOIP. It severed a portion on the second page pursuant to subsection 17(1)(a) of FOIP. As a result of this review, the Ministry also indicated that it was relying on subsection 13(1)(a) of FOIP and provisions in the *Income Tax Act* (Canada) and *The Income Tax Act* (Saskatchewan) to withhold the portion on the second page.

III DISCUSSION OF THE ISSUES

- [5] The Ministry of Finance is a government institution pursuant to subsection 2(1)(d)(i) of FOIP.

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

- [6] 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;

- [7] This exemption is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice. In order to qualify for this exemption, the record must meet the following three part test:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?

2. 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.

3. Was the advice, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

[8] 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.

Portion on First Page

[9] The parts of the record released to the Applicant discuss media reports that a third party is disputing tax liabilities with the CRA. The portion severed on the first page appears to be talking points for the Minister of Finance on this issue. The Ministry's submission maintains that this qualifies as advice because the Ministry is advising the Minister on how to discuss this topic. I agree that this would qualify as advice. I also agree that the other parts of the test have been met and subsection 17(1)(a) of FOIP applies.

[10] However, the Ministry indicated "With respect to your first question about key messages in briefing notes produced at the Ministry of Finance, key messages propose advice to the Minister to be used for many audiences including, but not limited to the public." If the Minister has used these talking points to speak publically about this topic, I question why the Ministry would want to withhold it from the Applicant. I encourage the Ministry to check with the Minister if he has used these messages to speak publically about this issue. If he has, the Ministry should reconsider the use of this exemption and use its discretion to release this portion of the record to the Applicant.

Portion on Second Page

[11] The portion that has been severed on the second page of the record describes the involvement of the Ministry in the issue at hand. The Ministry contends that it qualifies as advice. As noted above, advice includes analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Upon review of the portion severed on the second page, it is not apparent to me that an action is required. This does not meet the first part of the test and subsection 17(1)(a) of FOIP does not apply.

2. Does subsection 13(1)(a) of FOIP apply to the record?

[12] Subsection 13(1)(a) of FOIP states:

13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:

(a) the Government of Canada or its agencies, Crown corporations or other institutions;

...

unless the government or institution from which the information was obtained consents to the disclosure or makes the information public.

[13] The test for subsection 13(1)(a) of FOIP provides as follows:

1. Was the information obtained from the Government of Canada or its agencies, Crown corporations or other institution?
2. Was the information obtained implicitly or explicitly in confidence?

[14] Upon review of the second severed portion, most of it appears to be information about legislation and the involvement of the Ministry in this issue. The only exception is the first bulleted item. On the face of the record, it is apparent that the information was provided by the CRA. The CRA qualifies as an agency of the Government of Canada pursuant to the *Canada Revenue Agency Act*.

[15] I must also determine if it was obtained implicitly or explicitly in confidence. The Ministry did not address this part of the test in its submission. However, it did indicate that it was relying on confidentiality sections in both the *Income Tax Act* (Canada) and *The Income Tax Act* (Saskatchewan).

[16] Section 241 of the Canadian *Income Tax Act* states:

241(1) Except as authorized by this section, no official or other representative of a government entity shall

(a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;

(b) knowingly allow any person to have access to any taxpayer information; or

(c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act* or for the purpose for which it was provided under this section.

...

(10) In this section

...

official means any person who is employed in the service of, who occupies a position of responsibility in the service of, or who is engaged by or on behalf of,

(a) Her Majesty in right of Canada or a province, or

(b) an authority engaged in administering a law of a province similar to the *Pension Benefits Standards Act, 1985* or the *Pooled Registered Pension Plans Act*,

or any person who was formerly so employed, who formerly occupied such a position or who was formerly so engaged and, for the purposes of subsection 239(2.21), subsections 241(1) and 241(2), the portion of subsection 241(4) before paragraph (a), and subsections 241(5) and 241(6), includes a designated person;

[17] Upon review of the rest of section 241, there is nothing that contemplates the disclosure of this information to the Applicant in these circumstances. I accept this provision as evidence that the information was obtained implicitly in confidence.

[18] A draft of this report was provided to the Ministry. It indicated that it would comply with the recommendation with respect to the portion severed on the second page. However, the Ministry raised concerns with my recommendation regarding the key messages and advised that “to the best of [its] knowledge, the Minister has not spoken publically on this issue”. I recommend that the Ministry ask the Minister whether he had done so. If so, I recommend the Ministry use its discretion and release this portion of the record to the Applicant.

IV FINDINGS

[19] I find that subsection 17(1)(a) of FOIP only applies to the portion of the record on the first page of the record.

[20] I find that subsection 13(1)(a) of FOIP only applies to the first bulleted item in the severed portion on the second page of the record.

V RECOMMENDATIONS

[21] I recommend that the Ministry ask the Minister whether he used the key messages in the record to speak publically about the issue. If so, I recommend the Ministry use its discretion and release this portion of the record to the Applicant.

[22] I recommend that the Ministry release the portion that was severed from the second page to the Applicant with the exception of first bulleted item.

Dated at Regina, in the Province of Saskatchewan, this 17th day of August, 2016.

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