



## **REVIEW REPORT 174-2018**

### **Executive Council**

**June 14, 2019**

**Summary:** The Applicant submitted an access to information request to Executive Council. Executive Council provided its response to the Applicant indicating that access to the record was denied pursuant to subsections 17(1)(a) and (b) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant requested a review by the Commissioner. Upon review, the Commissioner found that Executive Council appropriately applied subsection 17(1)(a) of FOIP. The Commissioner recommended Executive Council continue to withhold the content of the email.

### **I BACKGROUND**

[1] On June 27, 2018, Executive Council received the following access to information request from the Applicant:

Please provide any correspondence to, from or including the email address [email address removed].

[2] By letter dated August 27, 2018, Executive Council provided its response to the Applicant indicating that access to the records was partially granted. In addition, it advised that some of the information was being withheld pursuant to subsections 17(1)(a) and (b) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On September 5, 2018, my office received a Request for Review from the Applicant.

[4] On September 13, 2018, my office notified Executive Council and the Applicant of my office's intent to undertake a review and invited all parties to provide submissions. My office received a copy of the record and a submission from Executive Council on October 4, 2018.

## **II RECORDS AT ISSUE**

[5] The record at issue is a one-page email. Executive Council released the email header and signature. It withheld the body of the email.

## **III DISCUSSION OF THE ISSUES**

### **1. Do I have jurisdiction?**

[6] Executive Council is a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to conduct this review.

### **2. Did Executive Council properly apply subsection 17(1)(a) of FOIP?**

[7] Subsection 17(1)(a) of FOIP is a discretionary exemption and provides as follows:

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;

[8] This exemption is meant to allow for candor during the policy-making process, rather than providing for non-disclosure of all forms of advice. My office has applied the following test for subsection 17(1)(a) of FOIP:

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 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 the government institution?

[9] In consideration of two recent court decisions, my office has modified its test to better reflect the language and considerations of subsection 17(1)(a) of FOIP:

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

(see *Britto v University of Saskatchewan*, 2018 SKQB 92 and *Hande v University of Saskatchewan*, QBG 1222 of 2018 May 21, 2019)

[10] Executive Council applied subsection 17(1)(a) of FOIP to all of the information in the body of the one-page email.

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

[11] In its submission, Executive Council asserted that the information qualified as advice, recommendations, analyses and policy options. It cited several court decisions and my office's *IPC Guide to Exemptions* for the definitions of these two terms.

[12] *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. Further, advice includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.

- [13] *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.
- [14] *Analysis* 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.
- [15] To add to this further, advice is the course of action put forward, while analyses refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals, and policy options as to a course of action.
- [16] Further, in *Britto v University of Saskatchewan*, 2018 SKQB 92, Justice Danyliuk broadened the definitions for “advice” and “recommendations” as follows:

22 The Court of Appeal also found that “[a]dvice may be construed more broadly than “recommendation” (para. 29). However, it distinguished these terms by finding that “recommendation” may be understood to “relate to a suggested course of action’ more explicitly and pointedly than “advice”, while “[a]dvice” ... encompass[es] material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation” (ibid.). In oral argument in this Court, the Information and Privacy Commissioner of British Columbia and the Canadian Civil Liberties Association made a similar distinction: that while “recommendation” is an express suggestion, “advice” is simply an implied recommendation (transcript, at pp. 52 and 57).

23 In this case, the IPC Adjudicator applied MOT. She found that to qualify as “advice” and “recommendations” under s. 13(1), “the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised” (p. 4). I accept that material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised falls into the category of “recommendations” in s. 13(1).

24 However, it appears to me that the approach taken in MOT and by the Adjudicator left no room for “advice” to have a distinct meaning from “recommendation”. A recommendation, whether express or inferable, is still a recommendation. “[A]dvice” must have a distinct meaning. I agree with Evans J.A. in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C. 421 (“Telezone”), that in exempting “advice or recommendations” from disclosure, the legislative intention must be that the term “advice” has a broader meaning than the term “recommendations” (para. 50 (emphasis deleted)). Otherwise, it would be redundant.

By leaving no room for “advice” to have a distinct meaning from “recommendation”, the Adjudicator’s decision was unreasonable.

[17] From a review of the information in the body of the email, there is information that clearly qualifies as advice and recommendations. There is an opinion and a suggested course of action. Therefore, I find that the first part of the test has been met.

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

[18] For information to be developed *by or for* a government institution, the person developing the information should be an official, officer or employee of a government institution, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the government institution.

[19] Executive Council includes the Premier and Ministers and is also referred to as Cabinet (*IPC Guide to Exemptions*, p. 21). In this case, the advice and recommendations were developed *by* the Premier at the time and were developed *for* a former Minister and others including staff of the Premier and other Ministers.

[20] Therefore, I find that the second part of the test has been met. As both parts of the test have been met, I find that Executive Council appropriately applied subsection 17(1)(a) of FOIP to the content of the email.

[21] Executive Council also applied subsection 17(1)(b) of FOIP to the same information. As I have found subsection 17(1)(a) of FOIP applies, there is no need to consider subsection 17(1)(b) of FOIP.

**IV FINDING**

[22] I find that subsection 17(1)(a) of FOIP was appropriately applied to the content of the email.

**V RECOMMENDATION**

[23] I recommend that Executive Council continue to withhold the content of the email.

Dated at Regina, in the Province of Saskatchewan, this 14<sup>th</sup> day of June 2019.

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