



REVIEW REPORT 177-2016

Saskatchewan Power Corporation

November 15, 2016

Summary: The Applicant made an access to information request for e-mails between the President and CEO of Saskatchewan Power Corporation (SaskPower) and employees. SaskPower denied access to the records indicating that subsections 17(1)(a), (b)(i), (g), 19(1)(a), (b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP) applies. The Commissioner found that subsections 17(1)(b) and 19(1)(b) of FOIP applied to portions of the e-mail and recommended release of the rest.

I BACKGROUND

[1] On June 2, 2016, Saskatchewan Power Corporation (SaskPower) received a clarified access to information request as follows:

Please provide all emails and attachments sent or received by SaskPower's president and CEO related to the performance of the carbon capture system at Boundary Dam. Between April 1, 2016 and May 23, 2016.

[2] SaskPower replied to the Applicant on June 24, 2016. It granted the Applicant access to some of the responsive records. However, it denied access to portions of the responsive records pursuant to subsections 17(1)(a), (b)(i), (g), 19(1)(a), (b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On July 14, 2016, the Applicant requested a review by my office. On July 15, 2016, my office provided notification to SaskPower and the Applicant of our intention to conduct a

review. On August 8, 2016, we also notified Cansolv of the review as it has third party interests in the record.

II RECORDS AT ISSUE

[4] The record at issue in this review consists of three different e-mails and their attachments as follows:

Record	# of Pages	Exemptions Applied
Record A – E-mail string all dated April 11, 2016	2	17(1)(a), (b)(i)
Record B – E-mail string dated April 11, 2016 and May 24, 2016	3	17(1)(a), (b)(i), (g), 19(1)(a), (b), (c)
Record C – E-mail dated April 5, 2016 with attachments	3	17(1)(b)(i)

III DISCUSSION OF THE ISSUES

[5] SaskPower qualifies as a government institution pursuant to subsection 2(1)(d)(ii) of FOIP.

1. Are the records responsive to the Applicant’s access request?

[6] SaskPower had identified that there was information within Record B to which third party exemptions applied. My office notified the third party, Cansolv, and invited it to make representations with respect to the application of the third party exemptions.

[7] As part of Cansolv’s submission, it argued that Record B was not responsive to the Applicant’s request as it was written on May 24, 2016 and the Applicant asked for e-mails between April 1, 2016 and May 23, 2016.

[8] Currently, FOIP does not specifically state that there is a duty to assist applicants. My office however has taken the position that there is an implied duty on the part of government institutions to take reasonable steps to ensure that they respond to access requests openly, accurately and completely. The Legislative Assembly has given first reading to Bill 30, *An Act to amend The Freedom of Information and Protection of Privacy Act*, which provides for a duty to assist which would require government institutions to be open, accurate and complete in its dealings with an applicant.

[9] Applicants do have a responsibility to specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject matter to identify the record. However, many applicants do not have detailed knowledge about the types of records a public body maintains. In my view, this kind of implied duty to assist is essential to meet the purposes of FOIP.

[10] I am of the view that Record B constitutes the type of information that the Applicant was seeking. I applaud SaskPower for including it as a responsive record and responding to the access request openly and completely.

2. Does subsection 19(1)(b) of FOIP apply to the record?

[11] Subsection 19(1)(b) of FOIP provides:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;

[12] SaskPower has applied subsection 19(1)(b) of FOIP to the fourth paragraph in the e-mail dated May 24, 2016, 1:32PM in Record B.

[13] My office has established a three part test for subsection 19(1)(b) of FOIP as follows:

1. Is the information financial, commercial, scientific, technical or labour relations information?
2. Was the information supplied by the third party to a public body?
3. Was the information supplied in confidence implicitly or explicitly?

[14] Cansolv has indicated that the paragraph in question constitutes scientific or technical information. My office has defined technical information as information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. It will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information.

[15] The paragraph in question describes challenges and solutions about a part of the technology of SaskPower's carbon capture system at Boundary Dam. I agree that it qualifies as technical information.

[16] I now must consider whether the information in the paragraph in question was supplied by Cansolv to SaskPower. The Director of Carbon Capture Boundary Dam Station wrote the e-mail in question. In a sworn affidavit provided to my office, he stated that the information was supplied to him by Cansolv. In the affidavit, he identifies three specific documents supplied by Cansolv, two reports and an e-mail, from which he took information to write the paragraph in question. The affidavit also provides specific details about these documents.

[17] My office has said that information can still be "supplied" even when the record originates with the public body. In other words, if the records contain or repeat information extracted from documents supplied by the third party, this part of the test would be satisfied. Based on the affidavit, I am satisfied that the information in question was supplied by Cansolv.

[18] Finally, I must consider whether the information was supplied in confidence. In confidence usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained in confidence means that the supplier of the information has stipulated how the information can be disseminated. In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the public body and the third party providing the information.

[19] In the affidavit, the Director detailed a list of agreements that address projects related to the carbon capture operations between SaskPower and Cansolv. Cansolv has a specific role to play in these operations. The affidavit provided details about each agreement's strong confidentiality provisions. One of the agreements is a "Secrecy and Restricted Use Agreement" which restricts SaskPower from disclosing Cansolv information. The affidavit noted that "the 9th Amendment... designates nineteen SaskPower employees who may be recipients of this Cansolv information on a need to know basis and only as reasonable necessary, and it includes myself as a designated recipient."

[20] Further, the three documents supplied by Cansolv each have specific confidentiality statements. Both reports had the following statement on a footnote on each page:

The copyright of this document is vested with Cansolv Technologies Inc. All rights reserved. Neither the whole nor any part of this document or software may be reproduced, stored in any retrieval system or transmitted in any form or by any means (electronic, mechanical, reprographic, recording or otherwise) without the prior written consent of the copyright owner.

[21] The subject line of the e-mail supplied by Cansolv was ""HIGHLY CONFIDENTIAL:...for distribution only to those on the CANSOLV NDA". Also, the first line of the e-mail read: "THIS E-MAIL CONTAINS HIGHLY CONFIDENTIAL INFORMATION. PLEASE TREAT IT ACCORDINGLY". With this information, I am satisfied that subsection 19(1)(b) of FOIP applies to the paragraph in question.

[22] SaskPower has also applied subsections 19(1)(a), (c) and 17(1)(g) of FOIP to this paragraph. There is no need to review the application of these exemptions.

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

[23] Subsection 17(1)(b)(i) of FOIP 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:...

(b) consultations or deliberations involving:

(i) officers or employees of a government institution

[24] The provision is meant to permit public bodies 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 or deliberation 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, such as taking an action, making a decision or a choice.

[27] SaskPower has applied subsection 17(1)(b)(i) of FOIP to the entire record. In its submission, SaskPower points out that its President and Chief Executive Officer (CEO) “must be free to consult with employees on issues of concern to the corporation. He should be able to conduct those consultations by e-mail, without fear of public scrutiny of those records.”

[28] Record A begins in April 2016 with the President and CEO asking some of his directors a question. One of his Directors replies with an early opinion and asks for more time to do

analysis before he provides a conclusion. The e-mail chain concludes with agreement from the President for more analysis.

[29] Record B includes the e-mails from April 2016. There are an additional two e-mails from May of 2016. In the first, the Director provides some analysis and an opinion related to the President's original question. The second is simply an acknowledgment by the President receiving the information.

[30] The definitions of both consultation and deliberation require that views or discussions about the appropriateness of an action would qualify under this exemption. Only the e-mails of the Director in Records A and B would qualify as a consultation or deliberation. I am also satisfied that the other parts of the test for subsection 17(1)(b)(i) of FOIP are met with respect to the e-mails from the Director.

[31] My office has found that this 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.

[32] SaskPower's submission challenged this view. It stated:

With respect, there is nothing in the plain wording of the section to indicate that the exemption does not apply to records that reveal only that the advice was sought or given on a particular topic, that particular persons were involved at a particular time.

[33] My office's view has developed over time based on jurisprudence from similar legislation across the country. Examples of decisions from other jurisdictions that support this view include: Orders PO-2328 and PO-2087-I by the Ontario Information and Privacy Commissioner, Orders 01-25 and 193-1997 by the Office of the British Columbia Information and Privacy Commissioner and Order F2004-026 by the Office of the Alberta Information and Privacy Commissioner.

- [34] With this in mind, the e-mails of the President posing the question, making a decision that more analysis was needed and acknowledging receipt of information do not qualify as consultations or deliberations.
- [35] I find that subsection 17(1)(b)(i) only applies to the e-mails from the Director in Records A and B. Pursuant to section 8 of FOIP, SaskPower should sever these portions from Record A and B.
- [36] Record C is two e-mails from April 2016. The first is an e-mail to the President's Administrative Coordinator asking that the President provide feedback on two attachments. The second e-mail serves as a reminder to the President to review the attachments. The attachments are factual information.
- [37] No views or discussions of the appropriateness of an action are contained in Record C. As such, no information within the record qualifies as a consultation or deliberation. Subsection 17(1)(b)(i) of FOIP does not apply to Record C.

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

- [38] 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

- [39] SaskPower has applied subsection 17(1)(a) of FOIP to Records A and B. There is no need to consider the portions of these records that already qualify for exemption under subsections 19(1)(b) or 17(1)(b)(i) of FOIP.
- [40] 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:
 - a. be either sought, expected, or be part of the responsibility of the person who prepared the record; and
 - b. be prepared for the purpose of doing something, for example, taking an action or making a decision; and
 - c. 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?

[41] 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.

[42] As I have already noted, the remaining portions of Records A and B can be described as the President posing the question, making a decision that more analysis was needed and acknowledging receipt of information. Further, the information contained in Record C is a request for feedback, a reminder and factual information. This information does not qualify as advice, recommendations, analyses and/or policy options. The first test is not met.

[43] Subsection 17(1)(a) of FOIP does not apply to the record.

IV FINDINGS

[44] I find all the identified e-mails and attachments are responsive to the Applicant's request.

[45] I find that subsections 19(1)(b) and 17(1)(b) of FOIP apply to portions of the record.

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

V RECOMMENDATION

[47] I recommend that SaskPower release portions of the record to the Applicant as described in Appendix A.

Dated at Regina, in the Province of Saskatchewan, this 15th day of November, 2016.

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

Appendix A

Portion of the Record	Exemption that Applies	Withhold or Release
Record A		
E-mail – April 11, 2016 6:10	None	Release
E-mail – April 11, 2016 5:40	17(1)(b)	Withhold
E-mail – April 11, 2016 3:01	None	Release
Record B		
E-mail – May 24, 2016 1:35	None	Release
E-mail – May 24, 2016 1:32	17(1)(b), 19(1)(b)	Withhold
E-mail – April 11, 2016 6:10	None	Release
E-mail – April 11, 2016 5:40	17(1)(b)	Withhold
E-mail – April 11, 2016 3:01	None	Release
Record C		
E-mail – April 5, 2016 10:35	None	Release
E-mail – April 1, 2016 4:18	None	Release
Attachment 1	None	Release
Attachment 2	None	Release