



REVIEW REPORT 185-2019

Ministry of Central Services

May 19, 2020

Summary:

The Ministry of Central Services (the Ministry) received an access to information request for all emails between the Deputy Minister of the Ministry and “any Brandt official”. The Ministry applied subsections 17(1)(a), (c), 19(1)(b) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to portions of the records responsive to the Applicant’s request. The Third Party also asserted that subsections 19(1)(a) and (c) of FOIP applied to portions of the record. The Commissioner found that none of the exemptions applied and recommended that the records be released to the Applicant in their entirety.

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 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 the Deputy Minister (the DM) of the Ministry and “any Brandt official”. The time period of his request was April 1, 2014 to August 22, 2018.

- [3] On April 24, 2019, the Ministry responded to the Applicant. It provided some records to the Applicant, but severed and withheld some information pursuant to subsections 17(1)(c) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [4] On May 28, 2019, the Applicant requested a review by my office. On June 19, 2019, my office notified both the Ministry and the Applicant of my intention to undertake a review.
- [5] On August 13, 2019, the Ministry notified the Applicant that it also applied subsections 17(1)(a) and 19(1)(b) of FOIP. On January 9, 2020, the Applicant confirmed that they wanted my office to review those exemptions as well. On January 17, 2020, my office notified the Third Party of our intention to undertake a review.

II RECORDS AT ISSUE

- [6] The record is 29 pages. It consists of the following:
- The first email is four pages. The Ministry has severed a cellular telephone number from two pages of the first email pursuant to subsection 29(1) of FOIP; and
 - The second email is one page in length and has an attachment which constitutes the remaining 24 pages in the record. The Ministry indicated in its section 7 response to the Applicant that it applied subsection 17(1)(c) of FOIP to these pages of the record. Later, it added subsections 19(1)(b) and 17(1)(a) of FOIP to these pages of the record.
- [7] When the Third Party made its submission to my office, it indicated that it believed that subsections 19(1)(a) and (c) of FOIP also apply to the second email and attachment in their entirety.
- [8] See Appendix A for details about the record and exemptions applied.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction to conduct this review?

[9] The Ministry qualifies as a government institution pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to conduct this review.

[10] Further, subsection 2(1)(j) of FOIP defines Third Party as follows:

2(1) In this Act:

...

(j) “**third party**” means a person, including an unincorporated entity, other than an applicant or a government institution.

[11] The Ministry has identified the Brandt Group of Companies (Brandt) as a Third Party pursuant to subsection 2(1)(j) of FOIP in relation to the records in question.

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

[12] Subsection 19(1)(a) of FOIP provide:

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

(a) trade secrets of a third party;

[13] The Third Party has indicated that it believes that this exemption applies to the last email and its attachment. The Third Party’s submission indicated that the attachment to the email contain drawings, plans and construction designs that constitute trade secrets. It submitted that the information is intellectual property and that disclosure of the information would prejudice its competitive position. The Ministry did not raise this exemption.

[14] In order to demonstrate that information qualifies for exemption under subsection 19(1)(a) of FOIP, the following test must be met: does the record contain trade secrets of a third party?

[15] My office's *Guide to FOIP, Chapter 4* (updated February 4, 2020), at page 198 defines a "trade secret" as information, including a plan or process, tool, mechanism or compound, which possesses each of the four following characteristics:

- i) the information must be secret in an absolute or relative sense (is known only by one or a relatively small number of people);
- ii) the possessor of the information must demonstrate he/she has acted with the intention to treat the information as secret;
- iii) the information must be capable of industrial or commercial application; and
- iv) the possessor must have an interest (e.g. an economic interest) worthy of legal protection. The information must meet all of the above criteria to be considered a trade secret.

[16] In its submission, the Third Party did not address how the information in the record in question meets these characteristics. It has not provided other details that have persuaded me that the information qualifies as a trade secret.

[17] Therefore, I find that subsection 19(1)(a) of FOIP does not apply to the record.

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

[18] 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;

[19] Both the Ministry and the Third Party have submitted that subsection 19(1)(b) of FOIP applies to the last email and attachment in their entirety.

[20] To determine if subsection 19(1)(b) of FOIP applies to a record, the following three-part test can be applied:

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

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?

[21] Both the Ministry and the Third Party have indicated that the information in question qualifies as commercial information.

[22] My office has defined “commercial information” as information relating to the buying, selling or exchange of merchandise or services. This can include third party associations, past history, references and insurance policies and pricing structures, market research, business plans, and customer records. Types of information included in the definition of commercial information can include:

- offers of products and services a third-party business proposes to supply or perform;
- a third-party business’ experiences in commercial activities where this information has commercial value;
- terms and conditions for providing services and products by a third party;
- lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises - such lists may take time and effort to compile, if not skill;
- methods a third-party business proposes to use to supply goods and services; and
- number of hours a third-party business proposes to take to complete contracted work or tasks.

- [23] The Ministry submitted that the drawings are a version of the Third Party's vision for the proposed property development project. These drawings were part of the methods and requirements that the Third Party must meet to complete the conditions and ultimately reach an agreement on an approved development proposal that would be compliant with development requirements. The Third Party did not explain why the information might qualify as commercial information.
- [24] Commercial information is fundamentally about the buying and selling of goods or services. In this case, the Ministry submitted that the Government's lease of land to the Canadian National Institute for the Blind (CNIB) is subject to federal Goods and Services Tax (GST) and qualifies as a commercial activity. It also submitted that the records were submitted by the CNIB to support the lease. However, the commercial activity identified by the Ministry does not involve Brandt, the Third Party identified by the Ministry as having an interest in the record. I am unaware of any buying or selling of goods or services that relates to the Third Party's interest in this record. Therefore, I do not find that the information in question qualifies as commercial information.
- [25] As subsection 19(1)(b) of FOIP is a mandatory exemption, I will consider if the information in question is technical information. My office has defined "technical information" as information relating to a particular subject, craft or technique. Examples are system design specifications and the plans for an engineering project. It is 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.
- [26] The email in question simply transmits the attachment to the Ministry. Therefore, the email does not qualify as technical information and subsection 19(1)(b) of FOIP does not apply to it.

[27] The attachment, however, contains building plans and drawings. From a review of the record, it is evident that the plans constitute information from the field of architecture and describe the construction of a building. Orders MO-1823 from the Information and Privacy Commissioner of Ontario (ON IPC) stated the following:

Records 7, 8, 12 and 40 consist of the building plans and shop drawings (which I will collectively refer to as the construction plans). I am satisfied that they contain information of a technical nature as they “involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing”, specifically, the plans for the construction of the hog barn.

[28] Building plans have also been found to be technical information in other ON IPC orders, including MO-3015 and MO-2735. I agree with this conclusion. Therefore, I find that the information in the attachment qualifies as technical information. The first part of the test is met for the attachment.

2. Was the information supplied by the third party to a government institution?

[29] Although the email to which the Ministry has applied 19(1)(b) of FOIP did not meet the first part of the test, it does show that the attachment was supplied directly by the Third Party to the Ministry.

[30] The attachment meets the second part of the test.

3. Was the information supplied in confidence implicitly or explicitly?

[31] Being supplied 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 government institution and the third party providing the information.

- [32] The Ministry indicated that the attachment was supplied implicitly in confidence. The Third Party did not specify if it was provided explicitly or implicitly in confidence.
- [33] Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential.
- [34] The expectation of confidentiality must be reasonable and must have an objective basis. Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated (*Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland, Gary Kachanoski*, (2014)).
- [35] Factors considered when determining whether a document was supplied in confidence implicitly include (not exhaustive):
- What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the third party or the government institution?
 - Was the information treated consistently in a manner that indicated a concern for its protection by the third party and the government institution from the point at which it was supplied until the present time?
 - Is the information available from sources to which the public has access?
 - Does the government institution have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially?
 - Was there a mutual understanding that the information would be held in confidence?
- [36] In its submission, the Third Party indicated that the records were sensitive and were provided to the Ministry with the intention that the record would remain confidential. It did not indicate if this was explicitly communicated or was provided with an implicit understanding that the record would be held in confidence. It did note that it was provided to the Ministry for the “strict purpose of dealings” between the Ministry and the Third

Party. The Third Party did not explain how this was communicated to the Ministry at the time the records were provided. The Third Party has not persuaded me that the records were supplied in confidence.

[37] The Ministry indicated that the record was supplied by the Third Party so that the Ministry could ensure proposed drawings met the requirements of the allowable development for Wascana Centre, which included ensuring compliance with the Wascana Centre Master Plan. The Ministry submitted that the record was draft in nature and was not made publicly available. I am not sure how these criteria demonstrate that it was implicitly communicated between the Ministry and the Third Party that the record was supplied in confidence. I am not persuaded. The third test is not met.

[38] I do not find that subsection 19(1)(b) of FOIP applies to the record.

4. Does subsection 19(1)(c)(i) of FOIP apply to the record?

[39] Subsection 19(1)(c)(i) of FOIP provides:

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

...

(c) information, the disclosure of which could reasonably be expected to:

(i) result in financial loss or gain to;

...

a third party;

[40] The Third Party indicated that it believes that subsection 19(1)(c)(i) of FOIP also applies to the attachment in question. The Ministry did not apply this exemption.

[41] To determine if subsection 19(1)(c)(i) of FOIP applies to the record, the following two-part test can be applied:

1. What is the financial loss or gain being claimed?

2. Could release of the record reasonably be expected to result in financial loss or gain to a third party?

[42] In its submission, the Third Party indicated that release of the records in question would result in financial loss because it might affect the third party's future business dealings with other third parties. Examples given are loss of future projects, changes in pricing from suppliers or other third parties, or the loss of good will. This is the loss being claimed by the Third Party. These losses listed by the Third Party are general in nature.

[43] In *Astrazeneca Canada Inc. v. Canada (Minister of Health)*, 2005 FC 189 (CanLII), the Federal Court stated that proof of harm for the equivalent provisions in the federal *Access to Information Act*, required reasonable speculation because "in many circumstances a party cannot rely on harm from past disclosures as evidence of reasonably expected harm because past disclosures of that type of evidence may never have occurred". Nonetheless, the Third Party seeking to exempt the information must put forward something more than internally held beliefs and fears. Forecasting evidence, expert evidence, and evidence of treatment of similar elements of proof or similar situations are frequently accepted as a logical basis for the expectation of harm.

[44] However, in its submission, the Third Party did not specifically provide an explanation about how the release of the records in question could result in the non-specific losses being claimed by the Third Party. I, therefore, am not persuaded that the release of the record reasonably be expected to result in financial loss to the Third Party.

[45] I find that subsection 19(1)(c)(i) of FOIP does not apply to the record.

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

[46] 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;

[47] The Ministry has applied subsection 17(1)(a) of FOIP to 25 pages of the record that is the email and attachment.

[48] Section 17 of FOIP is a discretionary class-based provision. It is intended to allow for candor during the decision-making process. The Supreme Court of Canada addressed the purpose of the equivalent provision in Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 13(1) in *John Doe v. Ontario (Finance)*, (2014) as follows:

[43] The purpose of this provision is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice... Failing to exempt such material risks having advice or recommendations that are less candid and complete, and the public service no longer being perceived as neutral...

[49] The British Columbia Court of Appeal similarly stated in *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, (2002), that the equivalent provision in British Columbia's *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, "recognizes that some degree of deliberative secrecy fosters the decision making process."

[50] However, protecting information is balanced against the need for effective public participation in a democracy. In *Canada Council of Christian Charities v. Canada (Minister of Finance)*, (1999), Justice Evans stated:

[32] On the other hand, of course, democratic principles require that the public, and this often means the representatives of sectional interests, are enabled to participate as widely as possible in influencing policy development. Without a degree of openness on the part of government about its thinking on public policy issues, and without access to relevant information in the possession of government, the effectiveness of public participation will inevitably be curbed.

[51] When determining the application of section 17 of FOIP, government institutions should keep the intention of the Legislature for provisions like section 17 in mind along with the purposes of FOIP.

[52] The following two part test can be used to determine if subsection 17(1)(a) of FOIP applies:

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?

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

[53] In its submission, the Ministry indicated that the information in question qualified as a proposal and recommendation.

[54] A proposal is something offered for consideration or acceptance.

[55] A recommendation is a specific piece of advice about what to do, especially when given officially; it is a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious. Recommendations relate to a suggested course of action more explicitly and pointedly than “advice”. It can include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised. It includes suggestions for a course of action as well as the rationale or substance for a suggested course of action. A recommendation, whether express or inferable, is still a recommendation.

[56] Upon review of the record, the one page email that transmits the attachment would not qualify as proposals or recommendations as it simply conveys the attachment.

[57] The remaining pages to which the Ministry has applied subsection 17(1)(a) of FOIP is drawings for a proposed building. The Ministry submitted that the drawings were part of

the methods and requirements that the Third Party must meet to complete the conditions and ultimately reach an agreement on an approved development proposal that would be compliant with Wascana Centre development requirements. In other words, the Ministry submitted that the proposal was provided to ensure that the proposed drawings met the requirements of the allowable development for Wascana Centre, which included ensuring compliance with the Wascana Centre Master Plan. Additionally, the front page of the document has a title “proposal”. I am satisfied that it qualifies as a proposal.

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?

[58] The phrase “developed by or for” means the advice, proposals, recommendations, analyses and/or policy options must have been created either: 1) within the government institution, or 2) outside the government institution but for the government institution. For information to be developed by or for a government institution, the person developing the information should be an official, officer or employee of the government institution, be contracted to perform services, be specifically engaged in an advisory role, or otherwise have a sufficient connection to the government institution.

[59] To put it another way, in order to be “developed by or for” the government institution, the advice, proposals, recommendations, analyses and/or policy options should:

- i) be either sought, be 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.

[60] General feedback or input from stakeholders or members of the public would not normally qualify, as they are not sufficiently engaged in an advisory role. For example, general stakeholders and members of the public responding to a survey or poll would not qualify as they have simply been asked to provide their own comments, and have developed

nothing on behalf of the government institution. However, where a government institution asks a specific stakeholder – who has a particular knowledge, expertise or interest in relation to a topic – to provide advice, proposals, recommendations, analyses or policy options for it, it would be specifically engaging the stakeholder (even if not paid) in an advisory role and there would be a sufficient close connection to the government institution.

[61] In this case, the Third Party provided the record to the Ministry to get approval for a project from which it will benefit. It does not have an advisory role in these circumstances. It would be a potential conflict of interest for the Ministry to claim that the Third Party was also participating in the Ministry's decision making process in an advisory role. As such, the second part of the test is not met.

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

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

[63] 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;

[64] This 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?

[65] Subsection 17(1)(c) of FOIP has been applied to one email and its attachment in their entirety.

[66] First, I must apply the first part of the test and 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 records qualifies as the Third Party's positions and plans.

[67] The *Guide to FOIP, Chapter 4* (updated February 4, 2020), at page 133 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.

[68] The email in question is simply a transmission email. It does not qualify as plans or positions. Therefore, the first part of the test has not been met and subsection 17(1)(c) of FOIP does not apply to it.

[69] As previously discussed the attachment is building plans or drawings for the proposed project. I agree that it meets the definition of a plan. However, the plan also must be developed for the purpose of contractual or other negotiations on behalf of the government institution.

[70] 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.

[71] “Developed” means to start to exist, experience or possess, while “for the purposes of” means intention or the immediate or initial purpose of something.

[72] In its submission, the Ministry indicated that the proposed drawings were “prepared for the purpose of either the [Third Party’s] development proposal and/or the [Canadian National Institute for the Blind] lease renewal/extension negotiations.”

[73] Subsection 17(1)(c) of FOIP requires that that the plans are developed for the purpose of contractual or other negotiations by or on behalf of the government institution. The *Guide to FOIP, Chapter 4* (updated February 4, 2020), at page 134 indicates that on behalf of means a person doing something “on behalf of” another, when he or she does the thing in the interest of, or as a representative of, the other person.

[74] In this case, the plans in question were provided to the Ministry by the Third Party it is negotiating with. The plans, in this case, were developed by the Third Party and given to the Ministry. Because they were not developed for the Ministry, the second part of the test is not met.

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

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

[76] 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.

[77] The Ministry has withheld the same cellular telephone number (cell phone number) of the former CEO of the Wascana Centre Authority twice 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.

[78] 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;

[79] 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. In Review Report 135-2019, where the same phone number was withheld, 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.

[80] In Review Report 277-2016, the Commissioner found that employer assigned cell phone numbers for government employees were 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.

[81] 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.

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

IV FINDING

[83] I find that subsections 17(1)(a), (c), 19(1)(a), (b), (c)(i) and 29(1) of FOIP do not apply to the record.

V RECOMMENDATION

[84] I recommend that the Ministry release the entire record to the Applicant as described in Appendix A.

Dated at Regina, in the Province of Saskatchewan, this 19th day of May, 2020.

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

APPENDIX A

PAGE OF THE RECORD	SECTION(S) APPLIED BY THE MINISTRY / CLAIMED BY THIRD PARTY	DOES IT APPLY?	RELEASE OR WITHHOLD
1	Released in full		
2	Released in full		
3	29(1) applied to a cellular telephone number	No	Release
4	29(1) applied to a cellular telephone number	No	Release
5	17(1)(a)	No	Release
	17(1)(c)	No	
	19(1)(a)	No	
	19(1)(b)	No	
	19(1)(c)(i)	No	
6 to 29	17(1)(a)	No	Release
	17(1)(c)	No	
	19(1)(a)	No	
	19(1)(b)	No	
	19(1)(c)(i)	No	