



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 188-2019

Ministry of Central Services

October 28, 2020

Summary:

The Ministry of Central Services (the Ministry) received an access to information request for emails relating to a project. The Ministry applied subsections 16(1)(a), (b), (d)(i), 17(1)(a), (b)(i), (b)(iii), (c), (f), 22(a), (b), (c) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to various portions of the record. The Commissioner found that the Ministry made a *prima facie* case that subsection 22(a) of FOIP applied to certain records. He also found that subsections 16(1)(a) and 17(1)(b) of FOIP applied to other portions of the record. The Commissioner recommended that those portions of the record be withheld, but other portions of the record be released to the Applicant.

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 has delegated the Executive Director of Compliance to make all decisions related to this review. The only thing that will occur is that the final Report will go out under the Commissioner's name after being reviewed and approved by the Executive Director of Compliance.

[2] On February 22, 2019, the Applicant made an access to information request to the Ministry of Central Services (the Ministry) for, "all emails between [the former Deputy Minister of the Ministry] and the minister or his officials related to Brandt and/or [Canadian Institute

for the Blind (CNIB)] and/or Brandt’s Wascana project and/or [owners of Brandt].” The timeframe that the Applicant requested was from April 1, 2014 to August 31, 2018.

[3] On April 24, 2019, the Ministry replied to the Applicant’s request. It provided some responsive records, but withheld portions pursuant to subsections 16(1)(a), (d)(i), 17(1)(a), (b)(i), (b)(iii), (c), (f), 22(a), (b), (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 of the exemptions applied. On June 19, 2019, my office notified both the Ministry and the Applicant of my intention to undertake a review.

II RECORDS AT ISSUE

[5] The Ministry has withheld information from 233 pages of responsive records. The Ministry has withheld this information pursuant to subsections 16(1)(a), (d)(i), 17(1)(a), (b)(i), (b)(iii), (c), (f), 22(a), (b), (c) and 29(1) of FOIP. In its submission, the Ministry also indicated that subsection 16(1)(b) of FOIP, a mandatory exemption, applies to portions of the records. See Appendix A for more details about where the exemptions have been applied.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

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

[7] I also note that the Ministry of Parks, Culture and Sport and Executive Council also qualify as government institutions pursuant to subsection 2(1)(d)(i) of FOIP.

[8] Finally, there are responsive records related to the Provincial Capital Commission (PCC) which was known as the Wascana Centre Authority at the time the records were created. PCC qualifies as a government institution pursuant to subsection 2(1)(d)(ii) of FOIP. I will refer to the Wascana Centre Authority as PCC in the remainder of this report.

2. Does subsection 22(a) of FOIP apply to the record?

[9] Subsection 22(a) of FOIP provides:

22 A head may refuse to give access to a record that:

(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

[10] The Ministry withheld three portions of one page of record 14 pursuant to subsection 22(a) of FOIP. Further, it withheld record 27 and record 28 in their entirety pursuant to subsection 22(a) of FOIP. The Ministry did not provide the portions of the record to which it has applied subsection 22(a) of FOIP to my office for review.

[11] On May 16, 2018, the Court of Appeal for Saskatchewan determined whether my office had authority to require local authorities to produce records that may be subject to solicitor-client privilege. *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 concluded that my office should follow the “absolutely necessary” principle. As a result, it suggested that my office follow a process to gather information about records and consider whether a *prima facie* case for solicitor-client privilege has been made before requiring a record.

[12] My office has established a process to consider a claim of solicitor-client privilege. When considering claiming solicitor-client privilege, public bodies have three options when preparing records for review with the Information and Privacy Commissioner (IPC):

1. Provide the documents to the IPC with a cover letter stating the public body is not waiving the privilege;

2. Provide the documents to the IPC with the portions severed where solicitor-client privilege is claimed; or
3. Provide the IPC with an affidavit with a schedule of records (see sample in the IPC's *Rules of Procedure*).

[13] The Ministry provided my office with an affidavit that was signed by the Deputy Minister on December 19, 2019.

[14] My office has established the following test for subsection 22(a) of FOIP:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Was the communication intended to be confidential?

Record 28

[15] The Ministry has described record 28 as an email string between a lawyer in the Ministry of Justice and the Deputy Minister of the Ministry. The Deputy Minister has also forwarded the email on to another employee in the Ministry.

[16] In its submission, the Ministry indicated that there is a solicitor-client relationship between the lawyer at the Ministry of Justice and the Ministry. My office's *Guide to FOIP, Chapter 4* (updated February 4, 2020) (Guide to FOIP) at page 249, indicates that the Ministry of Justice can act as legal advisors for all departments of government. The first part of the test is met.

[17] The affidavit of the Deputy Minister indicated that both the record and the attachment was communicated for the purpose of the seeking or obtaining of legal advice. The Ministry's submission also confirmed that these records contained legal advice. The affidavit indicated that record 28 was intended to be kept confidential and has been consistently treated as confidential. The second and third parts of the test are met.

[18] Although I have not reviewed record 28, I find the Ministry has made a *prima facie* case that subsection 22(a) of FOIP applies.

Record 27

[19] The Ministry has also described record 27 as an email string authored by a lawyer in the Ministry of Justice. The affidavit provided by the Ministry indicates that the email was first sent through the Ministry of Justice to employees of Executive Council and then finally to both the Ministry and the Ministry of Parks, Culture and Sport.

[20] The Ministry submitted that it is the owner of the land in question within Wascana Centre. This land is leased to the CNIB and the subject of the Brandt proposal. PCC is responsible for the Wascana Centre Master Plan and was responsible to ensure any new developments adhered to the Master Plan. The Ministry also noted that the Ministry of Parks, Recreation and Sport acted as a liaison between PCC and the Government of Saskatchewan on a number of issues such as funding, legislation and reporting initiatives of the Government of Saskatchewan. The Ministry also indicated the records related to a matter that would be placed before Cabinet.

[21] With respect to the first part of the test for subsection 22(a) of FOIP, the Ministry submitted that the record dealt with a matter that involved more than one government institution. It explained that the Ministry of Justice was providing legal advice to a client group that included the Ministry, the Ministry of Parks, Culture and Sport and Executive Council. The record also involved the office of the Minister of Justice since the Minister, as Attorney General, is responsible for providing legal advice to Cabinet. The Ministry indicated that there was a solicitor-client relationship between the lawyers in Justice who are involved in the email string and the client group that represented the Government of Saskatchewan.

[22] In the past, my office has not considered if a solicitor-client relationship could exist among a client group. Order P-1137 from the Information and Privacy Commissioner of Ontario (ON IPC) considered whether a client group that involved one of its ministries and counterparts in other provinces. It stated:

The relationship and interrelationship between counsel for all the provinces and territories and the Canadian Blood Agency are unique. All of these parties, including their counsel, were engaged in a common enterprise, the development and implementation of the MPTAP. In such situations, counsel must feel free to exchange legal opinions and advice without waiving solicitor client privilege. In effect, all the parties engaged in this enterprise may be considered to be the client group of all the counsel involved.

[23] As a result, the ON IPC found that solicitor-client privilege applied. I am satisfied that the Ministry, the Ministry of Parks, Culture and Sport and Executive Council have formed a similar client group for the purpose of the project that is the subject of these records. I am also satisfied that these government institutions had a solicitor-client relationship with the Ministry of Justice. As such, the records qualify as communications between a solicitor and client. The first part of the test is met.

[24] The affidavit of the current Deputy Minister indicated that both the record and the attachment was communicated for the purpose of the seeking or obtaining of legal advice. The Ministry's submission confirmed that this record entailed legal advice. The affidavit indicated this record was intended to be kept confidential and have been consistently treated as confidential. The second and third parts of the test are met.

[25] Although I have not reviewed record 27, I find the Ministry has made a *prima facie* case that subsection 22(a) of FOIP applies.

Record 14

[26] Record 14 is an email string. It was written by the Deputy Minister of the Ministry to the Deputy Minister of Executive Council. The Deputy Minister of the Ministry then forwarded the email to an employee of the Minister's office. The Ministry applied subsection 16(1)(a) of FOIP to the majority of the record. However, there are three portions where the Ministry applied subsection 22(a) of FOIP. The Ministry did not provide these three portions of the record to my office. The Ministry's submission indicated that these

portions of record 14 references discussions the Deputy Minister had with the Ministry's solicitor.

[27] As noted, the first part of the test requires that the record be a communication between solicitor and client. However, record 14 is an email primarily between the deputy ministers of two government institutions.

[28] In Review Report 005-2017; 214-2015 – PART II and Review Report 079-2018, I discussed the continuum of legal advice. I noted that documents that are not actually a communication between a solicitor and a client may be part of the continuum of legal advice, or reveal information subject to solicitor-client privilege. I listed the following examples that could qualify as part of the continuum:

- A discussion between two public officials about how to frame the question that is to be asked of the lawyer;
- Written communications between officials or employees of a public body, in which they quote or discuss the legal advice given by the public body's solicitor;
- Communications discussing the application of legal advice given by a solicitor;
- An employee's notes regarding a solicitor's legal advice, and comments on that advice;
- Notes "to file" in which legal advice is quoted or discussed; and
- Solicitors' briefing notes and working papers that are directly related to the seeking or giving of legal advice.

[29] The Ministry indicated that, as explained above, the Ministry and Executive Council were in the same client group. The solicitor for this group of clients was a lawyer at the Ministry of Justice. The Ministry noted that, rather than everyone involved communicating with the lawyer, the Deputy Minister of the Ministry communicated with the lawyer and then advised other senior public officials of the communication.

[30] I am satisfied the information severed from record 14 originated as a communication between a solicitor and a client and that it is part of the continuum of legal advice. The first part of the test is met.

[31] The affidavit of the current Deputy Minister indicated that both the information in question involves the purpose of the seeking or obtaining of legal advice. The Ministry later clarified that record 14 involved a legal opinion, which qualifies as legal advice. The affidavit also indicated that record 14 was intended to be kept confidential and have been consistently treated as confidential. The second and third parts of the test are met.

[32] Although I have not reviewed the three portions of record 14 in question, I find the Ministry has made a *prima facie* case that subsection 22(a) of FOIP applies.

[33] There is no need to consider whether subsections 16(1), 22(b) or (c) of FOIP apply to records 27 and 28. However, I will consider if subsection 16(1) of FOIP applies to the remaining portions of record 14.

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

[34] Subsection 16(1)(d)(i) of FOIP provides:

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

Records 9, 18 (email and attachment) and 19

[35] The Ministry applied subsection 16(1)(d)(i) of FOIP to records 9, 18 and 19 totaling nine pages. These nine pages were withheld in their entirety.

- [36] The following test can be applied when reviewing the application of subsection 16(1)(d)(i) of FOIP: Does the record contain briefings to members of Cabinet in relation to matters that are before, or are proposed to be brought before, Cabinet or any of its committees?
- [37] The Guide to FOIP, at page 111, defines “briefing” as a written summary of short duration; concise; using few words; a summary of facts or a meeting for giving information or instructions. An example would be a briefing note.
- [38] *Proposed* means something offered for consideration or acceptance, a suggestion.
- [39] Further, in Review Report 021-2015, I considered an Order PO-2677 from the ON IPC that noted the phrase, “are before, or are proposed to be brought before,” suggests present or future tense. This exemption does not apply to a record already presented to and dealt with by the Executive Council or its committees.
- [40] Record 9 is an email between the Deputy Minister of the Ministry and the Chief of Staff in the Minister’s office. The Ministry submitted that record 9 refers to a meeting with a Member of the Executive Council that was to occur on the same day and indicates what the Deputy Minister plans to propose at the meeting. While this email contains information that might be included in a briefing to Cabinet, the record itself does not constitute a briefing. In addition, the records were created over five years ago. I am not persuaded that the information is in relation to matters that are before, or are proposed to be brought before, Cabinet or any of its committees. The test is not met and subsection 16(1)(d)(i) of FOIP does not apply to record 9. I will, however, consider if portions of records 9 qualify for exemption under 16(1)(a) of FOIP later in this Report.
- [41] Record 18 is an email with an attachment. The email is blank and the header information does not qualify as a briefing. Subsection 16(1)(d)(i) of FOIP does not apply to the email. The attachment is speaking notes. In its submission, the Ministry indicated that the Deputy Minister sent briefing material to an employee of the Ministry. It indicated that the record contains a briefing to a member of the Executive Council in relation to a matter that was

before, or was proposed to be brought before, the Executive Council or any of its committees. However, the record indicates that the matter was previously discussed in Cabinet. The Ministry did not provide more specifics about who the notes were for and when they were used. I am not persuaded that it qualifies as a briefing to members of Cabinet. Further, I am not persuaded that the information relates to a matter that is before, or is proposed to be brought before, Cabinet or any of its committees because the Ministry has not drawn a link between the notes and any particular Cabinet or committee meeting. Further, the Ministry indicated that the document was for purely internal discussions, but did not indicate what internal meant. I find that the Ministry did not demonstrate that subsection 16(1)(d)(i) of FOIP applies to the record.

[42] Record 19 is an email from the Deputy Minister of the Ministry to the Deputy Minister of Executive Council. The email is then forwarded on to the Chief of Staff for the Minister. The original email depicts a conversation the Deputy Minister had with the CNIB. The purpose of the conversation summarized in the email appears to update the CNIB about the status of the project in question. In its submission, the Ministry indicated that record 19 contains a briefing to a member of the Executive Council in relation to a matter that was before, or was proposed to be brought before, the Executive Council or any of its committees. Again, the Ministry did not indicate for which member of the Executive Council the information was intended. Further, as the record is over five years old, I am not persuaded that the information relates to a matter that is before, or is proposed to be brought before, Cabinet or any of its committees. Finally, as the email depicts a conversation with an external organization, I am not persuaded the information qualifies as a cabinet confidence. I find that subsection 16(1)(d)(i) of FOIP does not apply to the record.

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

[43] Subsection 16(1)(b) of FOIP provides:

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

...

(b) agendas or minutes of the Executive Council or any of its committees, or records that record deliberations or decisions of the Executive Council or any of its committees;

Records 10, 11 and 16 (email portion only)

[44] The Ministry has applied subsection 16(1)(b) of FOIP to records 10, 11 and 16 in their entirety.

[45] Records 10 and 11 are emails between the Deputy Minister of the Ministry and either the Minister's Chief of Staff or another Ministry staff member. The Ministry submitted that they refer to when different topics would be discussed by Cabinet.

[46] Record 16 is a one page email. Upon review of record 16, the Deputy Minister of the Ministry appears to suggest two agenda items to an employee of Executive Council.

[47] To assess whether subsection 16(1)(b) of FOIP applies to the record, the two-part test noted below can be applied. However, only one of the questions needs to be answered in the affirmative for the exemption to apply. There may be circumstances where both questions apply and can be answered in the affirmative.

1. Does the record disclose agendas or minutes of Cabinet or any of its committees?
2. Is the record a record of deliberations or decisions of Cabinet or any of its committees?

1. Does the record disclose agendas or minutes of Cabinet or any of its committees?

[48] In its submission, the Ministry indicated that the record contains two items for a meeting of the Land Use Committee which, it submitted is a committee of Executive Council.

[49] As noted, in record 16, the Deputy Minister of the Ministry appears to suggest two agenda items to an employee of Executive Council with a copy to another employee of the

Ministry. Records 10 and 11 are emails between the Deputy Minister of the Ministry and either the Minister's Chief of Staff or another Ministry staff member.

[50] In Review Report 159-2016 and Review Report 186-2019, I considered subsection 17(1)(f) of FOIP which has similar wording as subsection 16(1)(b) of FOIP. Subsection 17(1)(f) of FOIP allows government institutions the discretion to withhold certain "agendas or minutes". In these reports, I concluded that an agenda item is not the same as an agenda.

[51] The Guide to FOIP, at page 95, defines "agenda" as a list of things to be done, as items to be considered at a meeting, usually arranged in order of consideration. This definition suggests that an agenda is a list of things to be considered.

[52] Further, ON IPC's Order PO-1725 made the following comment related to agendas of a Cabinet meeting:

I also want to comment on the important distinction between the term "agenda" as it appears in the exemption at section 12(1)(a) of the Act, and entries such as those appearing in the records at issue in these appeals. The word "agenda" in section 12(1)(a) refers to a specific record, created as an official document of Cabinet Office, which identifies the actual items to be considered at a particular meeting of Cabinet or one of its committees. In my view, an entry appearing in another record which describes the subject matter of an item considered or to be considered by Cabinet is not an "agenda" as this term is used at section 12(1)(a)...

[53] I apply the same reasoning here. The records do not qualify as agendas or minutes. The first part of the test is not met.

2. Is the record a record of deliberations or decisions of Cabinet or any of its committees?

[54] In its submission, the Ministry did not specifically assert that records 10, 11 and 16 qualified as a deliberation or decision of Cabinet.

[55] The Guide to FOIP at page 102 provides the following definitions:

Deliberation means the act of weighing and examining the reasons for and against a contemplated act or course of conduct. It also includes an examination of choices of direction or means to accomplish an objective.

A decision is a determination after consideration of the facts.

[56] The content of records 10, 11 and 16 contains two suggestions for topics of discussion, but not any substantive information. Therefore, the information does not qualify as deliberations or decisions. The second part of the test is not met.

[57] I find that subsection 16(1)(b) of FOIP does not apply to records 10, 11 or 16. However, I will consider whether subsection 16(1)(a) of FOIP applies to portions of record 11.

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

[58] Subsection 16(1)(a) of FOIP provides:

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;

[59] The following two-part test can be applied:

1. Does the record contain advice, proposals, recommendations, analyses or policy options?

Advice is guidance offered by one person to another. It can include 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 encompasses material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It can be an implied recommendation. The “pros and cons” of various options also qualify as advice. It should not be given a restricted meaning. Rather, it should be interpreted to include an opinion that involves exercising judgement and skill in weighing the significance of fact. It includes expert opinion on matters of fact on which a public body must make a decision for future action.

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.

Advice has a broader meaning than recommendations. The legislative intention was for advice to have a distinct meaning from recommendations. Otherwise, it would be redundant. While “recommendation” is an express suggestion, “advice” is simply an implied recommendation.

A recommendation is a specific piece of advice about what to do, especially when given officially; 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.

A proposal is something offered for consideration or acceptance.

Analyses is a detailed examination of the elements or structure of something; the process of separating something into its constituent elements. Policy options are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant’s identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.

Policy options are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant’s identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.

2. Was the record created to present to Cabinet or any of its committees?

[60] The Ministry applied subsection 16(1)(a) of FOIP to records 4, 5, 7, 8, 12, 13, 15, 17, 25 and 26 in their entirety. It also applied subsection 16(1)(a) of FOIP to the portions of record 14 that have not been withheld pursuant to subsection 22(a) of FOIP.

[61] Each of records 4, 5, 8, 13, 15, 17, 25 and 26 is a one page email with an attachment. The attachment for each one of these emails are different versions of a draft cabinet decision item (CDI). Record 7 is an email that is a continuation of an email string beginning with

the email from record 5. It has no attachment. Finally, record 12 is a one page email with another version of the draft CDI. It also has a second attachment which is a photograph with markings. The Ministry has applied subsection 16(1)(a) of FOIP to these records in their entirety.

Records 4, 5, 7, 8, 12, 13, 15, 17, 25 and 26 – attachment portions only
Portions of records 9 and 11

[62] First, I will consider if subsection 16(1)(a) of FOIP applies to the attachments to the emails in these records, the draft CDIs. In its submission, the Ministry indicated that the record was created to present advice, proposals, recommendations, analyses or policy options to the Executive Council, within the meaning of subsection 16(1)(a) of FOIP. Upon review of the CDI's, I agree that they contain recommendations, analyses and policy options. The Ministry submitted that the CDI was ultimately prepared for Cabinet. My office has indicated in Review Report 023-2014, Review Report 056-2017 and Review Report 028-2019 that a 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. In Review Report 277-2016, Review Report 051-2015 and Review Report 079-2013, my office found that particular CDIs qualified for exemption under subsection 16(1)(a) of FOIP. Upon review of the attachment, and consistent with the reports mentioned, I am persuaded that both parts of the test are met. I find that subsection 16(1)(a) of FOIP applies to all of the attachments that are draft CDIs in records 4, 7, 8, 12, 13, 15, 17, 25 and 26. See Appendix A for details.

[63] Record 12 has an additional attachment which is a photograph. A particular part of the photograph is highlighted. The part of the photograph that is highlighted is directly related to a policy option that is offered in certain versions of the draft CDIs. The Guide to FOIP, at page 97, indicates that advice, proposals, recommendations, analyses or policy options can be revealed in two ways: 1) the information itself consists of advice, proposals, recommendations, analyses or policy options; or 2) the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice, proposals, recommendations, analyses or policy options. In this case, one of the policy options in

some of the draft CDIs can be inferred from the photograph and the markings. Therefore, the photograph attached to the email in record 12 reveals a policy option created to present to Cabinet. I therefore find that subsection 16(1)(a) of FOIP applies to the photograph attachment in record 12.

- [64] In addition, the same policy options are found in the second sentence of the third paragraph of record 9 and the third and fourth sentences of the third paragraph in the first email of the chain of record 11. The Ministry applied subsections 16(1)(b) and (d)(i) of FOIP to these records, and I found those subsections did not apply. However, given subsection 16(1)(a) of FOIP is a mandatory exemption, I have considered whether this exemption also applies to these portions of the record. I find that subsection 16(1)(a) of FOIP also applies to the identified portions of records 9 and 11 for the same reasons noted in the paragraph above.

Records 4, 5, 7, 8, 12, 13, 15, 17, 25 and 26 – email portions only

- [65] Finally, I will consider if the emails in this set of records meet the test for subsection 16(1)(a) of FOIP. The emails in records 4, 8, 13, 15, 17, 25 and 26 are either blank, contain only a salutation or a comment about the status of the draft CDI attachment. The text of these emails do not qualify as advice, proposals, recommendations, analyses or policy options; neither do the header information and signature lines of the emails. Further, I am not persuaded that these emails were intended to be presented to Cabinet or any of its committees. Neither of the two parts of the test have been met. As such I find that subsection 16(1)(a) of FOIP does not apply to the email portions of these records. See Appendix A for details.

- [66] The emails in records 5, 7 and 12 have text with more substance. The text in the email of record 5 lists changes made to the draft CDI as well as information that will be added in the future. This list of items does not qualify as advice, proposals, recommendations, analyses or policy options. Further, the text of the email was not meant to be presented to Cabinet or one of its committees. However, I also must consider whether the text of this email “discloses a confidence of the Executive Council” as described in subsection 16(1) of FOIP. As described above, I have already found that the attachment portion of record

5, the CDI, qualifies for exemption pursuant to subsection 16(1)(a) of FOIP. The email portion of record 5 refers to changes made to the attachment portion of record 5. Therefore, the information in the text of the email of record 5 would “disclose a confidence of the Executive Council” and subsection 16(1) of FOIP would apply. This exemption does not apply to the header and signature information in the email in record 5.

[67] Record 7 is an email chain with no attachment. It contains the email from record 5. Subsection 16(1) of FOIP continues to apply to the text of the email found in record 5. The other two emails in the chain generally discuss a standard component of any CDI. This information does not qualify as or reveal advice, proposals, recommendations, analyses or policy options. Further, I am not persuaded that this information was intended to be provided to Cabinet because they constituted an exchange between two individuals who were not Cabinet members about a generally required component of a CDI. Subsection 16(1)(a) of FOIP does not apply to the remaining email portions in record 7, including email headers and signature lines.

[68] The Ministry has applied subsection 16(1)(a) of FOIP to the entire email in record 12. Consistent with what has been discussed above, subsection 16(1)(a) of FOIP does not apply to the header information and signature lines in this email, with one exception as discussed below. The text of the email in record 12 provides an acknowledgement (first paragraph) and instructions on how officials should proceed with preparations of the CDI (third paragraph). These portions of the email do not qualify as or reveal advice, proposals, recommendations, analyses or policy options and were not meant to be presented to Cabinet. Accordingly, I find that subsection 16(1)(a) of FOIP does not apply to the first and third paragraphs. The second paragraph, however reveals a policy option from the CDI that was intended for Cabinet. Further, the name of the second attachment in the header of the email could also reveal the policy option. Therefore, subsection 16(1)(a) of FOIP applies only to the second paragraph in the text of the email in record 12, as well as the name of the second attachment in the email header.

Record 14

[69] Finally, the Ministry has applied subsection 16(1)(a) of FOIP to portions of record 14. The record is an email string. It was written by the Deputy Minister of the Ministry to the Deputy Minister of Executive Council. The Deputy Minister of the Ministry then forwards the email to another employee of the Ministry. The text of the email contains policy options and analysis. The first part of the test is met for the text of the email. However, the headings and signature lines of the emails do not qualify as advice, proposals, recommendations, analyses or policy options. From a review of text of the email, it appears that the Deputy Minister of the Ministry was providing the information to the Deputy Minister of Executive Council who would share the information with the Treasury Board. The Guide to FOIP, at page 102-103, confirms that the Treasury Board is a committee of Executive Council. The second part of the test is met. Subsection 16(1)(a) of FOIP applies to the portions of record 14 in question.

[70] See Appendix A for more details about where subsection 16(1)(a) of FOIP applies to the record.

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

[71] 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;

[72] The Ministry has applied subsection 17(1)(a) of FOIP to the 17 remaining records.

[73] To assess if subsection 17(1)(a) of FOIP applies, the following two-part test can be applied:

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?*

[74] I have defined advice, proposals, recommendations, analyses or policy options in this report under subsection 16(1)(a) of FOIP.

Records 4, 5, 7, 8, 12, 13, 15, 17, 25, 26 – email portions only

[75] I have previously described emails 4, 8, 13, 15, 17, 25 and 26 in this Report as either blank or containing only a salutation or a comment about the status of the draft CDI attachment. This information does not qualify as advice, proposals, recommendations, analyses or policy options. The first part of the test is not met. Subsection 17(1)(a) of FOIP does not apply to these emails.

[76] Further, I have found that 16(1)(a) of FOIP applies to some of the text in the emails in records 5, 7 and 12. I have also already determined that the remainder of the text and email header and signature information does not qualify as advice, proposals, recommendations, analyses or policy options for the purposes of subsection 16(1)(a) of FOIP. Therefore, it does not qualify as advice, proposals, recommendations, analyses or policy options for the purposes of subsection 17(1)(a) of FOIP. The first part of the test is not met. This exemption does not apply to the remainder of these emails.

Record 1

[77] Record 1 is an email from the Deputy Minister to the Chief of Staff to the Minister. It contains informational bulleted points. In its submission, the Ministry identified three specific bulleted points that it believes qualifies as advice because it expresses the opinion of the Deputy Minister (bullets 8, 11, 12). As noted earlier in this Report, advice includes an opinion that involves exercising judgement and skill in weighing the significance of

fact. The first part of the test is met for bullets 8, 11 and 12, but not for the remainder of the document as it qualifies as factual information only.

Records 2 and 6

[78] Records 2 and 6 are emails. Both have similar attachments which can be described as drawings for a proposed building. The Ministry has applied subsection 17(1)(a) of FOIP to these documents in their entirety.

[79] The email in record 2 is from the Deputy Minister to the Chief of Staff for the Minister. The email in record 6 is from Brandt to the Deputy Minister. The Deputy Minister then forwards it on to the Minister and communications offices. These emails are transmittal emails and do not contain advice, proposals, recommendations, analyses or policy options. Subsection 17(1)(a) of FOIP does not apply to the emails.

[80] The Ministry submitted that the attachments are a proposal and recommendation submitted by Brandt for consideration of the Ministry. The attachments indicate they are proposals. Therefore, I am satisfied that the first part of the test is met.

Record 3

[81] Record 3 is an email chain with an attachment. The Ministry has withheld both in their entirety.

[82] The first email in the chain is written by the former CEO of the PCC to the CNIB, Brandt and board members. This email indicates that there is an attachment that reflects feedback from a past meeting. The first email also outlines deadlines for the recipients of the email. The first email is then sent from the Deputy Minister of the Ministry (who was not shown to be a recipient of the original email) to a staff member of the Minister's office with one sentence that indicates it is an update. In its submission, in relation to both the email chain and the attachment, the Ministry indicated that the Deputy Minister was providing to the Minister's Office with the preliminary opinions and advice of the Architectural Advisory

Committee (AAC), a committee of the former Wascana Centre Authority, regarding the CNIB/Brandt development proposal. I am not persuaded that either email in the chain constitutes opinions or advice, but rather conveys an attachment and confirms deadlines. The first part of the test is not met for the email chain in record 3. I find that subsection 17(1)(a) of FOIP does not apply.

- [83] The attachment for record 3 was written by the Chair of the AAC. The attachment details what was discussed between the AAC and the “proponent” of the project. This includes a list of information that the AAC requested and a list of deadlines. I am not persuaded that the attachment conveys advice, but factual information about what was discussed at a committee meeting with external organizations. The first part of the test is not met and subsection 17(1)(a) of FOIP does not apply to the attachment in record 3.

Record 18

- [84] As described above, record 18 is an email with an attachment. The Ministry applied subsection 17(1)(a) of FOIP to both documents in their entirety.

- [85] The email is blank and the header information does not qualify as advice, proposals, recommendations, analyses or policy options. The first test is not met.

- [86] The attachment is speaking notes. In its submission, the Ministry indicated the attachment included a policy option and a recommendation to the Minister with respect to renewal of the lease, and provided the analysis for that recommendation. The author also provided advice with the analysis. However, the Ministry has also described the document as a briefing which my office has defined as a written summary of short duration; concise; using few words; a summary of facts or a meeting for giving information or instructions. Therefore, I am not persuaded that these speaking notes were providing more than a summary of the facts or instructions. The first part of the test is not met.

- [87] I find that subsection 17(1)(a) of FOIP does not apply to the email or attachment in record 17.

Record 20 and 23

[88] Both record 20 and 23 are emails, each with an attachment. The Ministry applied subsection 17(1)(a) of FOIP to all of these documents in their entirety. I note that the email in record 20 is blank. The email in record 23 is factual information. Neither the text nor the header information in both emails qualifies as advice, proposals, recommendations, analyses or policy options. The first part of the test is not met.

[89] The attachments to both records 20 and 23 are draft letters to the CNIB or PCC. With respect to the attachment in record 23, the Ministry indicated that the Deputy Minister was providing a proposed draft to the Minister's office which recommends that the Government of Saskatchewan encourage the recipient to do something. Upon review of the attachment to record 20, the letter conveys instructions to the recipient. The Ministry also indicated that, with the attachment to record 23, the Deputy Minister was recommending the Minister's office convey a decision to another external organization. These draft letters do not contain suggested edits that might qualify as advice, proposals, recommendations, analyses or policy options, but instructions to the eventual intended recipient. As such, the first part of the test is not met. This is consistent with other findings involving draft letters such as my office's Review Report 017-2018, Review Report 077-2018 and 187-2019, where a draft letter did not qualify for these exemptions.

[90] I find that subsection 17(1)(a) of FOIP does not apply to the emails or attachments in records 20 and 23.

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?

[91] 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.

[92] 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;

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.

[93] 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.

Record 1

[94] I found earlier that bullets 8, 11 and 12 in the text of the email of record 1 qualify as advice. In its submission, the Ministry indicated that the Deputy Minister was providing an update to the Minister’s office regarding negotiations between the CNIB and the Ministry. I am satisfied that it would be part of the Deputy Minister’s role to provide this advice. However, it is unclear to me specifically what actions needed to be taken and whose responsibility it was to implement those actions. In its submission, the Ministry only

outlined the general structure of the government institutions involved in this project, not who had ultimate authority for each decision or action. The second part of the test is not met. Subsection 17(1)(a) of FOIP does not apply to record 1.

Records 2 and 6 – attachment portions only

[95] I have found that the attachments to records 2 and 6 qualify as a proposal. In this case, Brandt provided the record to the Ministry to get approval for a project from which it will benefit. Brandt does not have an advisory role in these circumstances. It would be a potential conflict of interest for the Ministry to claim that Brandt 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. Subsection 17(1)(a) of FOIP does not apply to the attachments in records 2 and 6.

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

[96] Subsection 17(1)(b) 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:

...

(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;

[97] The Ministry has applied subsection 17(1)(b) of FOIP to portions of 17 remaining records.

[98] The following two-part test can be applied to determine if subsection 17(1)(b) of FOIP applies to a record:

1. Does the record contain consultations or deliberations?

A consultation means:

- the action of consulting or taking counsel together: deliberation, conference;
- a conference in which the parties consult and deliberate.

A consultation can occur when the views of one or more officers or employees of a government institution are sought as to the appropriateness of a particular proposal or suggested action. It can include consultations about prospective future actions and outcomes in response to a developing situation. It can also include past courses of action. For example, where an employer is considering what to do with an employee in the future, what has been done in the past can be summarized and would qualify as part of the consultation or deliberation.

A deliberation means:

- the action of deliberating (to deliberate: to weigh in mind; to consider carefully with a view to a decision; to think over); careful consideration with a view to a decision;
- the consideration and discussions of the reasons for and against a measure by a number of councillors. A deliberation can occur when there is a discussion or consideration of the reasons for or against an action. It can refer to discussions conducted with a view towards making a decision.

2. Do the consultations or deliberations involve officers or employees of a government institution, a member of the Executive Council, or the staff of a member of the Executive Council?

1. *Does the record contain consultations or deliberations?*

Emails in Records 2, 4, 5, 7, 8, 12, 13, 15, 17, 18, 20, 23, 25, 26

[99] I have previously described emails 2, 4, 8, 13, 15, 17, 18, 20, 23, 25 and 26 in this Report as either blank or containing only a salutation or a comment about the status of the attachment or other factual or transmittal information. This information does not qualify as consultations or deliberations. Further, I have found that other exemptions apply to portions of records 5, 7 and 12. The email header and signature information and the remainder of the text which are simply remarks about formatting issues in or status of an

attachment do not qualify as consultations or deliberations. The first part of the test is not met. Subsection 17(1)(b) of FOIP does not apply to these emails.

Record 1

[100] Record 1 is an email from the Deputy Minister to the Chief of Staff to the Minister. It contains informational bulleted points. In its submission, the Ministry identified three specific bulleted points that it believes expresses the opinion of the Deputy Minister (bullets 8, 11, 12). I agree with this assessment. As such these portions of the record qualify as a consultation because they express the views of the Deputy Minister. Bullets 8, 11 and 12 meet the first part of the test. The remainder of the text of the email is factual information. The remainder of the text, the headings and signature lines do not qualify as consultations or deliberations. The first part of the test is not met for the remainder of Record 1.

Record 2 and 6 – attachment portions only

[101] The attachment to record 2 is drawings of a building proposed to be built by Brandt. The Ministry submitted that the Deputy Minister was sending the proposal to the Minister's office for consultation. However, the record itself does not reflect any of the consultations that occurred once it was shared with the Minister's office. The first test is not met. Subsection 17(1)(b) of FOIP does not apply.

Record 11

[102] Record 11 is an email chain between the Deputy Minister and an employee of the Minister's office. The Ministry has applied subsection 17(1)(b) of FOIP to the entire record. I have found that subsection 16(1)(a) of FOIP applies to the third and fourth sentences of the third paragraph in the first email of the chain.

[103] In its submission, the Ministry indicated that the record represented consultations. Upon review of the record, I agree that the entire text of the emails qualify as consultations

between the participants related to potential cabinet agenda items. The first part of the test is met for the text of the emails.

[104] The headers and signature lines of these emails do not qualify as consultations and deliberations. The first part of the test is not met for these and subsection 17(1)(b) of FOIP does not apply.

Record 18 – attachment portions only

[105] The attachment in record 18 is speaking notes. The Ministry has applied subsection 17(1)(b) of FOIP to the entire record. As previously discussed in this Report, the information in the attachment is factual information. Therefore, it does not qualify as a consultation or deliberation and the first part of the test is not met. Subsection 17(1)(b) of FOIP does not apply to the record.

Records 20 and 23 – attachment portions only

[106] The attachments to records 20 and 23 are draft letters to the CNIB and PCC. Both draft letters were sent from the Deputy Minister to the Minister's office for comment. For both letters, the Ministry submitted that they were sent to the Minister's office for the purpose of a consultation. The views as to the appropriateness of a particular proposal or suggested action of those involved are not contained in these attachments. I am not persuaded that the draft letters qualify as a consultation. The first part of the test is not met. Subsection 17(1)(b)(i) of FOIP does not apply to the attachments in records 20 and 23.

Record 21

[107] Record 21 is an email from the CNIB to the Deputy Minister. The Deputy Minister then forwards the email to the Ministry. The Ministry withheld only one paragraph of the email pursuant to subsection 17(1)(b)(i) of FOIP; the rest has been released to the Applicant.

[108] In its submission, the Ministry indicated that the CNIB and the Ministry were focused on reaching consensus on the acceptance of a development proposal. It noted that this candor was part of their deliberations and consultations to reach a “collective decision” regarding the development proposal including the appropriate process.

[109] Upon review of the record, it appears that the CNIB is noting challenges it was facing with a process set by the Ministry and poses questions about it. The Guide to FOIP, at page 129, indicates that, during a review, a government institution should identify the individuals involved in the consultations or deliberations, include the job title of each, list organization affiliation and clarification as to each individuals role in the decision making process. The Ministry has not provided details about how the CNIB has a role in the decision making about the government process in which the CNIB would then have to follow to gain approval from the Ministry. I am not persuaded that the paragraph in question qualifies as consultations and deliberations. Instead, it is feedback and questions from an external organization. The first part of the test is not met. Subsection 17(1)(b) of FOIP does not apply to record 21.

2. Do the consultations or deliberations involve officers or employees of a government institution, a member of the Executive Council, or the staff of a member of the Executive Council?

Record 1

[110] The three bullet points that met the first part of the test in record 1 were in an email between the Deputy Minister and the Chief of Staff to the Minister. The Guide to FOIP, at page 129, indicates that an employee of a government institution means an individual employed by a government institution pursuant to subsection 17(1)(b)(i) of FOIP. Further, subsection 2(1)(b.1) of FOIP provides the following definition:

2(1) In this Act:

...

(b.1) “**employee of a government institution**” means an individual employed by a government institution and includes an individual retained under a contract to perform services for the government institution;

[111] The Deputy Minister qualifies as an employee of the government institution as described in subsection 17(1)(b)(i) of FOIP. Further, the staff of a member of the Executive Council includes the staff in a Minister's office, such as Chief of Staff, pursuant to subsection 17(1)(b)(iii) of FOIP. The second part of the test is met. Subsection 17(1)(b) of FOIP applies to the 3 identified bullets in record 1.

Record 11

[112] Record 11 is an email chain between the Deputy Minister and the Chief of Staff in the Minister's office. The Deputy Minister qualifies as an employee of the Ministry pursuant to subsection 17(1)(b)(i) of FOIP and the employee of the Minister's office qualifies as staff of a member of the Executive Council pursuant to subsection 17(1)(b)(iii) of FOIP. The second part of the test is met. Subsection 17(1)(b) of FOIP applies to the text of the email chains in record 11.

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

[113] 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;

[114] The Ministry has applied subsection 17(1)(c) of FOIP to 17 remaining records.

[115] Subsection 17(1)(c) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of a government institution. 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 a government institution's negotiators in relation to labour, financial and commercial contracts.

[116] The following two-part test can be applied to determine if subsection 17(1)(c) of FOIP applies to a record:

1. Does the record contain positions, plans, procedures, criteria, instructions or considerations that relate to 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?

[117] In its submission, the Ministry has indicated that there are positions and considerations within the records where subsection 17(1)(c) of FOIP has been applied by the Ministry.

[118] A *position* is a point of view or attitude. It is an opinion, stand, a way of regarding situations or topics, or an opinion that is held in opposition to another in an argument or dispute.

[119] A *consideration* is a careful thought; a fact taken into account when making a decision. Thus, a record identifying the facts and circumstances connected to positions, plans, procedures, criteria or instructions could also fall within the scope of this provision.

Records 2, 4, 5, 6, 8, 12, 13, 15, 17, 20, 23, 25, 26 – email portions only

[120] I have previously described emails 2, 4, 6, 8, 13, 15, 17, 20, 23, 25 and 26 in this report as either blank or containing only a salutation or a comment about the status of the attachment or other factual or transmittal information. This information does not qualify as positions, plans, procedures, criteria, instructions or considerations that relate to negotiations. Further, I have found that other exemptions apply to portions of records 5 and 12. The email header and signature information do not qualify as positions, plans, procedures, criteria, instructions or considerations that relate to negotiations. The remainder of the text

in email 12 only comments on the status of the attachment and does not meet the first part of the test. Subsection 17(1)(c) of FOIP does not apply to these emails.

Record 1

[121] Record 1 is an email from the Deputy Minister to the Chief of Staff to the Minister. I have found that subsection 17(1)(b) of FOIP applied to bullets 8, 11 and 12 in this email. I found the other information was factual information.

[122] The Guide to FOIP, at page 134, indicates that a negotiation is a consensual bargaining process in which the parties attempt to reach 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.

[123] In its submission, the Ministry indicated that there were land lease and building development negotiations taking place between the CNIB and the Ministry and that record 1 contained positions and considerations related to those negotiations. However, in its submission, the Ministry also explained that Government of Saskatchewan is the owner of the land in question; and that the Ministry administers the land within Wascana Centre that pertains to the CNIB land lease. The Ministry also noted that the PCC was responsible for the Wascana Centre Master Plan and was responsible to ensure any new developments adhered to the Master Plan. Finally the submission also indicated the final building design approval required that the proposed building development met the obligations of the lease between the Ministry and the CNIB and the tenancy requirements of PCCs policies and bylaws.

[124] It is my understanding that the negotiations taking place occurred between CNIB and Brandt. It was the role of PCC and the Ministry to approve the project by ensuring that the project adhered to the Wascana Master Plan, the lease and various policies and bylaws.

[125] Therefore, the positions and consideration that the Ministry identified in the record is factual information about circumstances, requirements and obligations. It is the Ministry's role to ensure the requirements and obligations are met, not negotiate details where there is room for a process of back-and-forth and give-and-take discussion. Therefore, the first part of the test is not met. I find that subsection 17(1)(c) of FOIP does not apply to the remainder of record 1.

Records 2 and 6 – attachment portions only

[126] I have described the attachments to records 2 and 6 as drawings of a building proposed to be built by Brandt. The Ministry submitted that the preliminary, draft proposed drawings for the CNIB project are considerations directly related to the contractual negotiations. In my office's Review Report 135-2019 and Review Report 187-2019, I indicated that subsection 17(1)(c) of FOIP was meant to protect positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations and are strategies and pre-determined courses of action that would be discussed internally to a public body, and not shared with third parties. As these drawings were provided by an external organization, I am not persuaded that the information is internal considerations requiring protection during negotiations pursuant to subsection 17(1)(c) of FOIP; but rather, information communicated from an external organization. This information does not meet the first part of the test because this factual information does not qualify as considerations. I find that subsection 17(1)(c) of FOIP does not apply to the attachment portions of records 2 and 6.

Record 3

[127] Record 3 is an email chain with an attachment. In this Report, I previously described the first email in the chain as written by the former CEO of the PCC to Brandt, PCC and its board members. This email indicates that there is an attachment that reflects feedback from a past meeting. The first email also outlines deadlines for the recipients of the email. The attachment was written by the Chair of the AAC. The attachment details what was

discussed between the AAC and the “proponent” of the project. This includes a list of information that the AAC requested and a list of deadlines.

[128] The Ministry submitted that the record contained considerations and positions of the AAC regarding the development proposal.

[129] Again, I am not persuaded that the information is internal considerations requiring protection during negotiations pursuant to subsection 17(1)(c) of FOIP; but rather, constitutes information communicated to external organizations. This information does not meet the first part of the test because the factual information does not qualify as considerations or positions. I find that subsection 17(1)(c) of FOIP does not apply to the attachments in records 2 and 6.

Records 20 and 23 – attachment portions only

[130] Records 20 and 23 are draft letters to CNIB or PCC. Both draft letters were sent from the Deputy Minister to the Minister’s office for comment. In its submission, the Ministry identified a position of the government in the attachment to record 20. Another record in this review confirms that this position was made known to one of the parties with which it was negotiating. I am not persuaded that the information is internal considerations requiring protection during negotiations pursuant to subsection 17(1)(c) of FOIP; but rather, information previously communicated to an external organization. I find that the first test is not met and subsection 17(1)(c) of FOIP does not apply to the attachment to record 20.

[131] The Ministry submitted that the purpose of the letter was to communicate a decision to the PCC and that the letter was drafted for the purpose of negotiations. I am not persuaded that a decision that needed to be communicated to an external organization fits in to definition of positions, plans, procedures, criteria, instructions or considerations. The first part of the test is not met. Subsection 17(1)(c) of FOIP does not apply to record 23.

Record 21

[132] Record 21 is an email from the CNIB to the Deputy Minister. The Deputy Minister then forwarded the email to the Ministry. The Ministry withheld only one paragraph of the email pursuant to subsection 17(1)(c) of FOIP; the rest has been released to the Applicant. Upon review of the record, it appears that the CNIB is noting challenges it was facing with a process set by the Ministry and poses questions about it. This is communication that has occurred between the CNIB and the Ministry. This paragraph does not qualify as positions, plans, procedures, criteria, instructions or considerations that were developed by or on behalf of the Ministry, but communication that occurred between the parties. I am not satisfied that the first part of the test is met. Subsection 17(1)(c) of FOIP does not apply to record 21.

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

[133] Subsection 17(1)(f) 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:

...

(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);

[134] Subsection 17(1)(f) of FOIP permits refusal of access in situations where release of a record could reasonably be expected to disclose agendas or minutes of a board, commission, Crown corporation or other body that is a government institution or a prescribed committee of a government institution.

[135] The following two-part test can be applied:

1. Is the record an agenda of a meeting or minutes of a meeting?
2. Are the 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 board, commission, Crown corporation or other body that is a government institution?

[136] As described above, record 3 is an email chain and an attachment. The first email in the chain is written by the former CEO of the PCC to CNIB, Brandt and PCC board members. This email indicates that there is an attachment that reflects feedback from a past meeting. The first email also outlines deadlines for the recipients of the email. The attachment was written by the Chair of the AAC. The attachment details what was discussed between the AAC and the “proponent” of the project. This includes a list of information that the AAC requested and a list of deadlines.

[137] The Guide to FOIP, at page 143, defined agenda and minutes as follows:

Agendas are a list of things to be done, as items to be considered at a meeting, usually arranged in order of consideration.

Minutes are memoranda or notes of a transaction, proceeding or meeting; the formal record of a deliberative assembly’s meeting, approved by the assembly; the record of all official actions taken.

[138] Both the email and the attachment provide information about what was discussed at a meeting of the AAC. Although both the email and the attachment reflect what was discussed at a meeting, neither document qualifies as the official agenda or minutes. Neither the email nor the attachment qualify as an agenda because they discuss a meeting that had already occurred, not a list of what will occur at an upcoming meeting. Further, the title of the attachment suggests that the document was intended to provide information and instructions to a third party. Neither the email nor the attachment are the formal record of a meeting or official actions taken. Therefore, neither the email nor the attachment qualify as the minutes of a meeting.

[139] The first part of the test is not met. As the first part of the test is not met, there is no need to consider the second part. Subsection 17(1)(f) of FOIP does not apply to record 3.

10. Did the Ministry properly apply subsection 29(1) of FOIP to the record?

[140] 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.

[141] The Ministry severed the same cellular telephone number from records 22 and 24, applying subsection 29(1) of FOIP. The cellular telephone number belongs to an employee of the CNIB. The Ministry stated in its submission that the cellular telephone number was not publicly available.

[142] 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; however, it is not an exhaustive list.

[143] Some relevant portions of subsection 24(1) of FOIP are as follows:

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;

[144] Decisions issued by this office dealing with the business cellular telephone numbers of non-government employees, professionals and corporate officers, such Review Report 277-2019, have treated these numbers the same way as employer assigned cellular telephone numbers of government employees. The cellular telephone number is part of the business card information, the rest of which was released to the Applicant. The context of

the emails pertains to a business transaction. It is clear that the cellular telephone is being used for business purposes. As such, it is business card information and does not qualify as personal information.

[145] Therefore, I find that the business cellular telephone number of the employee of the CNIB does not qualify as personal information pursuant to subsection 24(1) of FOIP. As such, I find that subsection 29(1) of FOIP was not appropriately applied by the Ministry.

11. Is there information non-responsive to the Applicant's access to information request?

[146] When a government institution receives an access to information request, it must determine what information is responsive to the access to information request.

[147] Responsive means relevant. The term describes anything that is reasonably related to the request. It follows that any information or records that do not reasonably relate to an Applicant's request will be considered "non-responsive". An applicant's access to information request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive.

[148] A government institution can sever information as non-responsive only if an applicant has requested specific information, such as their own personal information. The government institution may treat portions of a record as non-responsive if they are clearly separate and distinct and not reasonably related to the access to information request.

[149] The Applicant requested all emails between the former Deputy Minister of the Ministry and the Minister or officials related to Brandt, CNIB, the Wascana project and/or the owners of Brandt.

[150] In its submission, the Ministry indicated that a portion of record 10 was not responsive to the Applicant's request. It also indicated that the attachments to record 16 were not responsive to the Applicant's request.

[151] Upon review of record 10, I agree that the first 3 paragraphs of the text of the email do not relate to the Applicant's request, but to unrelated matters that will be brought before Executive Council. The Ministry can continue to withhold these paragraphs.

[152] The Ministry has indicated that the two attachments to record 16 are not responsive to the Applicant's request. Upon review of the records, I agree that they relate solely to another matter that was before Cabinet. Although I have found the records to be non-responsive, best practice is to release to an applicant anyways, subject to applicable exemptions.

IV FINDINGS

[153] I find that I have jurisdiction to conduct this review.

[154] Although I have not reviewed these portions of the record, I find the Ministry has made a *prima facie* case that subsection 22(a) of FOIP applies to records 27, 28 and portions of record 14.

[155] I find that subsections 16(1)(a) and 17(1)(b) of FOIP apply to portions of the record.

[156] I find that subsections 16(1)(b), (d), 17(1)(a), (c), (f) and 29(1) of FOIP do not apply to the record and subsections 16(1)(a) and 17(1)(b) of FOIP do not apply to portions of the record.

[157] I find that portions of record 10 and the attachments to record 16 are not responsive to the Applicant's request.

V RECOMMENDATIONS

[158] I recommend that the Ministry withhold and release records as described in Appendix A.

[159] Although some information is non-responsive, I recommend that the Ministry release it, subject to applicable exemptions.

Dated at Regina, in the Province of Saskatchewan, this 28th day of October, 2020.

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

APPENDIX A

RECORD	PAGES OF THE RECORD	SUBSECTION(S) APPLIED BY THE MINISTRY	DOES IT APPLY?	RELEASE OR WITHHOLD
Record 1	1 to 3	17(1)(a)	No	Withhold bullets 8, 11 and 12 only, release remainder
		17(1)(b)	Yes – bullets 8, 11 and 12	
		17(1)(c)	No	
Record 2 (email)	4	17(1)(a)	No	Release
		17(1)(b)	No	
		17(1)(c)	No	
Record 2 (attachment)	5 to 25	17(1)(a)	No	Release
		17(1)(b)	No	
		17(1)(c)	No	
Record 3 (email)	26	17(1)(a)	No	Release
		17(1)(c)	No	
		17(1)(f)	No	
Record 3 (attachment)	27 to 28	17(1)(a)	No	Release
		17(1)(c)	No	
		17(1)(f)	No	
Record 4 (email)	29	16(1)(a)	No	Release
		17(1)(a)	No	
		17(1)(b)	No	
		17(1)(c)	No	
Record 4 (attachment)	30 to 39	16(1)(a)	Yes	Withhold
		17(1)(a)	No need to review	
		17(1)(b)	No need to review	
		17(1)(c)	No need to review	
Record 5 (email)	40	16(1)(a)	Yes, text of email only	Withhold text of email only, release remainder
		17(1)(a)	No	
		17(1)(b)	No	
		17(1)(c)	No	
Record 5 (attachment)	41 to 51	16(1)(a)	Yes	Withhold
		17(1)(a)	No need to review	
		17(1)(b)	No need to review	
		17(1)(c)	No need to review	
Record 6 (email)	52	17(1)(a)	No	Release
		17(1)(b)	No	
		17(1)(c)	No	
Record 6 (attachment)	53 to 76	17(1)(a)	No	Release
		17(1)(b)	No	
		17(1)(c)	No	

RECORD	PAGES OF THE RECORD	SUBSECTION(S) APPLIED BY THE MINISTRY	DOES IT APPLY?	RELEASE OR WITHHOLD
Record 7	77	16(1)(a)	Yes, text from email 5 only	Withhold text from email in record 5 only, release remainder
		17(1)(a)	No	
		17(1)(b)	No	
Record 8 (email)	78	16(1)(a)	No	Release
		17(1)(a)	No	
		17(1)(b)	No	
		17(1)(c)	No	
Record 8 (attachment)	79 to 89	16(1)(a)	Yes	Withhold
		17(1)(a)	No need to review	
		17(1)(b)	No need to review	
		17(1)(c)	No need to review	
Record 9	90	16(1)(d)(i)	No Subsection 16(1)(a) applies to second sentence of third paragraph	Withhold second sentence of third paragraph only
Record 10	91	16(1)(b)	No	Release
		Not responsive	First 3 paragraphs not responsive	
Record 11	92 to 93	16(1)(b)	No Subsection 16(1)(a) applies to the third and fourth sentences of the third paragraph in the first email of the chain	Withhold text of the email chains only – Release header and signature information
		17(1)(b)	Yes – to text of the emails in the chain only	
		Not responsive	No need to review	

RECORD	PAGES OF THE RECORD	SUBSECTION(S) APPLIED BY THE MINISTRY	DOES IT APPLY?	RELEASE OR WITHHOLD
Record 12 (email)	94	16(1)(a)	Yes, second paragraph and name of second attachment only	Withhold second paragraph and name of second attachment only, release remainder
		17(1)(a)	No	
		17(1)(b)	No	
		17(1)(c)	No	
Record 12 (attachment 1)	95 to 106	16(1)(a)	Yes	Withhold
		17(1)(a)	No need to review	
		17(1)(b)	No need to review	
		17(1)(c)	No need to review	
Record 12 (attachment 2)	107	16(1)(a)	Yes	Withhold
		17(1)(a)	No need to review	
		17(1)(b)	No need to review	
		17(1)(c)	No need to review	
Record 13 (email)	108	16(1)(a)	No	Release
		17(1)(a)	No	
		17(1)(b)	No	
		17(1)(c)	No	
Record 13 (attachment)	109 to 121	16(1)(a)	Yes	Withhold
		17(1)(a)	No need to review	
		17(1)(b)	No need to review	
		17(1)(c)	No need to review	
Record 14	122 to 123	16(1)(a)	Yes to text not covered by 22(a) only	Withhold text only – release email headers and signature
		22(a)	Yes – to the three identified portions only	
Record 15 (email)	124	16(1)(a)	No	Release
		17(1)(a)	No	
		17(1)(b)	No	
		17(1)(c)	No	
Record 15 (attachment)	125 to 138	16(1)(a)	Yes	Withhold
		17(1)(a)	No need to review	
		17(1)(b)	No need to review	
		17(1)(c)	No need to review	
Record 16	139 to 144	16(1)(b)	No	Release
Record 16 (attachment 1)	140 to 142	Not responsive	Yes	Release
Record 16 (attachment 2)	143 to 144	Not responsive	Yes	Release

RECORD	PAGES OF THE RECORD	SUBSECTION(S) APPLIED BY THE MINISTRY	DOES IT APPLY?	RELEASE OR WITHHOLD
Record 17 (email)	145	16(1)(a)	No	Release
		17(1)(a)	No	
		17(1)(b)	No	
		17(1)(c)	No	
Record 17 (attachment)	146 to 159	16(1)(a)	Yes	Withhold
		17(1)(a)	No need to review	
		17(1)(b)	No need to review	
		17(1)(c)	No need to review	
Record 18 (email)	160	16(1)(d)(i)	No	Release
		17(1)(a)	No	
		17(1)(b)	No	
Record 18 (attachment)	161 to 162	16(1)(d)(i)	No	Release
		17(1)(a)	No	
		17(1)(b)	No	
Record 19	163 to 164	16(1)(d)(i)	No	Release
Record 20 (email)	165	17(1)(a)	No	Release
		17(1)(b)	No	
		17(1)(c)	No	
Record 20 (attachment)	166	17(1)(a)	No	Release
		17(1)(b)	No	
		17(1)(c)	No	
Record 21	167	17(1)(b)	No	Release
		17(1)(c)	No	
Record 22	168 to 171	29(1)	No	Release
Record 23 (email)	172	17(1)(a)	No	Release
		17(1)(b)	No	
		17(1)(c)	No	
Record 23 (attachment)	173	17(1)(a)	No	Release
		17(1)(b)	No	
		17(1)(c)	No	
Record 24	174 to 177	29(1)	No	Release
Record 25 (email)	178	16(1)(a)	No	Release
		17(1)(a)	No	
		17(1)(b)	No	
		17(1)(c)	No	
Record 25 (attachment)	179 to 194	16(1)(a)	Yes	Withhold
		17(1)(a)	No need to review	
		17(1)(b)	No need to review	
		17(1)(c)	No need to review	

RECORD	PAGES OF THE RECORD	SUBSECTION(S) APPLIED BY THE MINISTRY	DOES IT APPLY?	RELEASE OR WITHHOLD
Record 26 (email)	195	16(1)(a)	No	Release
		17(1)(a)	No	
		17(1)(b)	No	
		17(1)(c)	No	
Record 26 (attachment)	196 to 208	16(1)(a)	Yes	Withhold
		17(1)(a)	No need to review	
		17(1)(b)	No need to review	
		17(1)(c)	No need to review	
Record 27	209 to 226	16(1)	No need to review	Withhold
		22(a)	Yes	
		22(b)	No need to review	
		22(c)	No need to review	
Record 28	227 to 242	16(1)	No need to review	Withhold
		22(a)	Yes	
		22(b)	No need to review	
		22(c)	No need to review	