



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 189-2019

Ministry of Central Services

August 19, 2020

Summary: The Ministry of Central Services identified records responsive to an access to information request and withheld portions pursuant to subsections 17(1)(a), (b), (c) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that none of the exemptions applied and recommended release of the record in its 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 has 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 former Deputy Minister and anyone at the Canadian National Institute for the Blind (CNIB) from April 1, 2014 to August 31, 2018.
- [3] The Ministry responded to the Applicant's request on April 23, 2019. It provided the Applicant with some responsive records. It also indicated that some of the information was

being withheld pursuant to subsections 17(1)(b)(i), 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.

II RECORDS AT ISSUE

[5] The Ministry withheld information from 13 of 19 pages of the record. The Ministry withheld the same cellular telephone number from eight pages of the record pursuant to subsection 29(1) of FOIP.

[6] The Ministry withheld information on four other pages of the record. It originally applied subsections 17(1)(b)(i) and 17(1)(c) of FOIP to these portions. After my office notified the Ministry of my intention to undertake a review, it notified the Applicant that it also applied subsection 17(1)(a) of FOIP to the record. The Applicant requested that my office also review this exemption.

[7] See Appendix A for more details of where the exemptions have been applied.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction in this matter?

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

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

[9] 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;

[10] The Ministry has applied subsection 17(1)(a) of FOIP to both the email and attachment in record 8 in their entirety.

[11] 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?

[12] In its submission, the Ministry indicated that the record qualifies as advice, proposals, recommendations and analyses. My office's *Guide to FOIP, Chapter 4* (updated February 4, 2020) (Guide to FOIP), at pages 120 to 121, define these terms as follows:

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 government institution 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; 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.

A proposal is something offered for consideration or acceptance.

Analyses (or analysis) is the detailed examination of the elements or structure of something; the process of separating something into its constituent elements.

- [13] The email in record 8 is an email from the Deputy Minister of the Ministry to CNIB. The text of the email contains one sentence that both comments on the status of the attachment and asks for feedback. This does not qualify as advice, recommendations, proposals or analyses. Further, the email header information and signature lines do not qualify as advice, recommendations, proposals or analyses either. The first test is not met. Subsection 17(1)(a) of FOIP does not apply to the email in record 8.
- [14] The Ministry described the two page attachment to record 8 as a draft proposal and analysis for the Tenancy Plan related to the CNIB and other development proposal to construct a building in Wascana Centre. The Ministry indicated that it did not know what the “genesis” of the attachment was, but that the document was drafted by the Ministry. It is also my understanding that approval of any proposal in this context would need come from the Ministry. In this case, the attachment was sent to CNIB to ask for feedback only. In Review Report 019-2019, 266-2019, I found that additional options qualified as a proposal because it was offered for consideration. In this case, the Ministry did not send the document in question to CNIB for ultimate “consideration or acceptance”, but only to generate feedback from a stakeholder. Therefore, I am not persuaded that the attachment qualifies as a proposal.

[15] The Ministry also indicated that the attachment qualifies as analysis. However, the attachment appears to be an outline of some sort. The document does not contain the detailed examination of the elements or structure of something, only a list of elements. The attachment does not qualify as analyses.

[16] The first part of the test is not met. I am not persuaded that subsection 17(1)(a) of FOIP applies to the record.

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

[17] 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;

...

[18] The Ministry has applied subsection 17(1)(b)(i) of FOIP to one paragraph in record 3.

[19] The following two-part test can be applied to determine if subsection 17(1)(b)(i) 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?

[20] Record 3 is an email from the CNIB to the Deputy Minister. 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.

[21] 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.

[22] Upon review of record 3, 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 3.

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

[23] 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;

[24] The Ministry has applied subsection 17(1)(c) of FOIP to one paragraph in record 3 and to record 8 in its entirety.

[25] 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.

[26] 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?

- [27] 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.
- [28] 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.
- [29] 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.

Record 3

- [30] Record 3 is an email from the CNIB to the Deputy Minister. 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. 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.
- [31] 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. In this case, the paragraph at issue is communication that occurred between the parties. I am not persuaded that the information is internal considerations requiring protection during negotiations pursuant to subsection 17(1)(c) of FOIP.

Record 8

- [32] The email in record 8 is one sentence that both comments on the status of the attachment and asks for feedback. This does not qualify as considerations or positions. Further, the email header information and signature lines do not qualify as considerations or positions

either. The first test is not met. Subsection 17(1)(c) of FOIP does not apply to the email in record 8.

[33] The Ministry also submitted that the attachment to record 8 qualifies as considerations regarding the development proposal to construct a building in Wascana Centre, but did not specify how it qualifies as considerations.

[34] As noted above, 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. In this case, the CNIB was a copy of the attachment. As the attachment was provided to 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.

[35] The Ministry also submitted that the Deputy Minister edited the attachment and offered opinions to the CNIB. The Ministry indicated that the opinions qualified as considerations. The Ministry did not identify where those opinions appear in the document, nor did it explain how the document qualifies as considerations. Again, these unidentified edits were shared with an external organization and, I am not persuaded that the information is internal considerations requiring protection during negotiations pursuant to subsection 17(1)(c) of FOIP. It is also unclear what negotiation is taking place because the Ministry wrote the document and has ultimate approval of its content.

[36] Subsection 17(1)(c) of FOIP does not apply to the attachment to record 8.

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

[37] The Ministry severed the same cellular telephone number from eight pages of the record, 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.

[38] 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.

[39] 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;

[40] Decisions issued by this office dealing with non-government employees, professionals and corporate officers, such as Review Report 277-2019, have treated the issue of personal information in much the same way as those dealing with government employees, which is that the cellular telephone number is included with other business card information is not personal information. In this case, the context of the emails pertains to a business transaction. It is clear that the cellular telephone number is being used for business purposes. As such, it does not qualify as personal information.

[41] Therefore, I find that the business cell phone numbers of the employee of the CNIB does not qualify as personal information pursuant to subsection 24(1) of FOIP. I find that subsection 29(1) of FOIP was not appropriately applied by the Ministry.

IV FINDING

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

V RECOMMENDATION

[43] I recommend that the Ministry release information as described in Appendix A.

Dated at Regina, in the Province of Saskatchewan, this 19th day of August, 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 2	29(1)	No	Release
Record 2	3 to 4	29(1)	No	Release
Record 3	5	17(1)(b)(i)	No	Release
		17(1)(c)	No	
Record 4	6 to 7	29(1)	No	Release
Record 4a (email)	8	29(1)	No	Release
Record 4a (attachment)	9	29(1)	No	Release
Record 5	10 to 11	29(1)	No	Release
Record 6 (email)	12	29(1)	No	Release
Record 6 (attachment)	13 to 14	Released in full		
Record 7	15 to 16	29(1)	No	Release
Record 8 (email)	17	17(1)(a)	No	Release
		17(1)(c)	No	
Record 8 (attachment)	18 to 19	17(1)(a)	No	Release
		17(1)(c)	No	