



REVIEW REPORT 202-2016

Ministry of the Economy

October 14, 2016

Summary: The Applicant requested a review of the Ministry of the Economy's application of subsections 17(1)(a), (b) and 18(1)(d) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to three portions of a briefing note. The Commissioner found that subsection 17(1)(a) of FOIP applied to the first and third redactions. He found that no exemption applied to the second redaction and recommended its release.

I BACKGROUND

[1] On May 19, 2016, the Ministry of the Economy (the Ministry) received the following access to information request:

Please provide all briefing notes related to Yancoal Canada from January 1, 2015 until May 15, 2016.

[2] On August 17, 2016, the Ministry provided the Applicant with 27 pages of responsive records. However, it indicated that portions had been severed pursuant to subsections 17(1)(a), (b), 19(1)(b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On August 19, 2016, the Applicant requested a review by my office as he was not satisfied with the Ministry's application of the exemptions on the last three pages of the record. On August 22, 2016, my office provided notification to both the Ministry and the Applicant of our intention to undertake a review.

II RECORDS AT ISSUE

[4] At the beginning of this review, there were three pages of records with redactions under review. The Ministry then released one of the pages in full and one of the redactions on one of the remaining pages.

[5] This report will deal with three redactions made to the remaining two pages of the record. The Ministry has applied subsections 17(1)(a), (b)(i), (ii) and 18(1)(d) of FOIP to these portions of the record.

III DISCUSSION OF THE ISSUES

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

[6] Subsection 17(1)(a) of FOIP states:

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;

[7] My office has considered this exemption many times in the past. The exemption is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice. The established test that my office uses to determine the applicability of this exemption is as follows:

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

b. The advice, recommendations, proposals, analyses and/or policy options must:

i) be either sought, expected, or be part of the responsibility of the person who prepared the record; and

ii) be prepared for the purpose of doing something, for example, taking an action or making a decision; and

iii) involve or be intended for someone who can take or implement the action.

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

[8] Advice includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice has a broader meaning than recommendations. Recommendations relate to a suggested course of action as well as the rationale for a suggested course of action. Recommendations are generally more explicit and pointed than advice. Proposals, analyses and policy options are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

[9] Upon review of the record, the first and third redaction would qualify as advice or analysis. The third redaction sets out an analysis of a situation and a suggested course of action. The first redaction is analysis related to the course of action in the third redaction.

[10] I am satisfied that the last two parts of the test also applies to these two redactions. Subsection 17(1)(a) of FOIP applies to the first and third redaction. There is no need to consider whether any other exemptions apply to these redactions.

[11] The second redaction would not qualify as advice, proposals, recommendations, analyses or policy options. It is a factual statement. Therefore, subsection 17(1)(a) of FOIP does not apply to this redaction.

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

[12] Subsection 17(1)(b) of FOIP states:

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;

[13] This provision is meant to permit government institutions to consider options and act without constant public scrutiny.

[14] The Ministry applied subsection 17(1)(b)(i) and (ii) of FOIP to the second redaction.

[15] A consultation occurs when the views of one or more officers or employees of the public body are sought as to the appropriateness of a particular proposal or suggested action. A deliberation is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

[16] The second redaction is a factual statement and does not qualify as a consultation or deliberation. Subsection 17(1)(b) of FOIP does not apply to the second redaction.

3. Does subsection 18(1)(d) of FOIP apply to the balance of the record?

[17] Subsection 18(1)(d) of FOIP states:

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

...

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution;

[18] The Ministry has applied subsection 18(1)(d) of FOIP to the second redaction.

[19] The following test must be met in order for subsection 18(1)(d) of FOIP to be found to apply:

1. Identify and provide details about the contractual or other negotiations and the parties involved; and

2. Detail how release of the record could reasonably be expected to interfere with the contractual or other negotiations.

[20] In its submission, the Ministry stated disclosing certain information contained in the first and third redactions could interfere with negotiations between Yancoal and the Government of Saskatchewan. The Ministry did not detail how the release of the factual statement found in the second redaction would interfere with the negotiations. Further, the Ministry did not provide sufficient detail about what kind of negotiations would be taking place between Yancoal and the Government of Saskatchewan.

[21] I am not persuaded that subsection 18(1)(d) of FOIP applies to the record.

IV FINDINGS

[22] Subsection 17(1)(a) of FOIP applies to the first and third redactions.

[23] Subsections 17(1)(a), (b) and 18(1)(d) of FOIP do not apply to the second redaction.

V RECOMMENDATION

[24] I recommend that the Ministry release the second redaction to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 14th day of October, 2016.

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