



REVIEW REPORT 203-2016

Ministry of the Economy

October 28, 2016

Summary: The Ministry of the Economy applied subsections 14(a), 19(1)(b) and 19(1)(c)(iii) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to an agreement between SkipTheDishes and the Government of Manitoba. The Commissioner found that the exemptions did not apply and recommended release of the record.

I BACKGROUND

- [1] On May 10, 2016, the Ministry of the Economy (the Ministry) received an access to information request for “all documentation Skipthedishes submitted to the Ministry of Economy in order to qualify for government funding. January 1, 2015 until March 30, 2016.”
- [2] On July 26, 2016, the Ministry responded to the Applicant. It provided some responsive records to the Applicant, but indicated that some portions were withheld pursuant to subsections 14(a), 17(1)(a), (b)(i), (c), 19(1)(b) and (c)(iii) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [3] The Applicant was dissatisfied with the Ministry’s response and, on August 17, 2016, he requested a review by my office of the Ministry’s application of subsections 14(a) and 19(1)(b) and (c)(iii) of FOIP to a certain portion of the record.

[4] On August 22, 2016, my office provided notification to both the Ministry and the Applicant of our intention to undertake a review. As SkipTheDishes Restaurant Services Inc. (SkipTheDishes) and the Government of Manitoba have third party interests in the record, my office notified them of the review and invited them to make submissions.

II RECORDS AT ISSUE

[5] The Applicant requested that my office review exemptions applied to 22 pages of the record. It is a funding agreement dated August 1, 2015 between the Government of Manitoba and SkipTheDishes.

[6] The Ministry has withheld the record in full pursuant to subsections 14(a), 19(1)(b) and 19(1)(c)(iii) of FOIP.

III DISCUSSION OF THE ISSUES

[7] The Ministry qualifies as a government institution pursuant to subsection 2(1)(d)(i) of FOIP.

1. Is the record responsive to the Applicant's request?

[8] In its submission, the Ministry suggested that this record is not responsive to the Applicant's request. I note that the Ministry had originally identified this record as being responsive to the Applicant's request. It also made the Applicant aware of the record's responsiveness by applying exemptions when it responded to his access request. It was not until the Applicant requested a review by my office that the Ministry questioned the record's responsiveness.

[9] 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 "not-responsive".

- [10] My office's resource *IPC Guide to Exemptions* provides a list of items to consider when making a determination as to whether a record would be responsive to an access request. One is to consider the purpose of FOIP which is best served when a public body adopts a liberal interpretation of a request. If it is unclear what the applicant wants, a public body should contact the applicant for clarification.
- [11] The Applicant's request was for "all documentation Skipthedishes submitted to the Ministry of Economy in order to qualify for government funding."
- [12] The Ministry's submission stated the following:
- The Manitoba Government requests that we do not release the document. They "... don't feel this is relevant to an information request for the province of Saskatchewan." Our first argument; therefore, is the record is **not responsive** to the request as the purpose for Skipthedishes supplying the record was not for eligibility for funding but solely for providing a model to assist [the Ministry] in drafting a similar agreement with Skipthedishes."
- [13] Upon requesting this review, the Applicant shared other parts of the responsive record released by the Ministry with my office. One is an e-mail string between the Ministry and SkipTheDishes. In the last e-mail of the string, dated January 29, 2016, SkipTheDishes attached the agreement at issue in this review. In one of the earlier e-mails in the chain of the same date, the Deputy Minister asked "I believe we could meet the offer from Manitoba. Is it possible to see the specific details? It would be easier to articulate an offer then."
- [14] I do not agree by the Ministry's account that the agreement was "solely for providing a model to assist [the Ministry] in drafting a similar agreement". The record was requested by the Ministry before the terms of the offer were decided upon. It appears to have had some influence in the Ministry's decision making. This fits in the realm of information supplied to the Ministry "in order to qualify for government funding".
- [15] Further, the Applicant's interest in this record was clarified when it was singled out for the purpose of this access request.

[16] I find that the record is responsive to the Applicant's access request.

2. Does subsection 14(a) of FOIP apply to the record?

[17] Subsection 14(a) of FOIP states:

14 A head may refuse to give access to a record, the release of which could reasonably be expected to prejudice, interfere with or adversely affect:

(a) relations between the Government of Saskatchewan and another government;

[18] For this provision to apply there must be objective grounds for believing that disclosing the information would result in the harm alleged. The Ministry does not have to prove that the harm is probable, but needs to show that there is a "reasonable expectation" the harm will occur if any of the information or records are released. For both subsections of this provision, the following criteria are used:

1. There must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
2. The harm caused by the disclosure must be more than trivial or inconsequential; and
3. The likelihood of the harm must be genuine and conceivable.

[19] SkipTheDishes supplied the agreement to the Ministry, not the Government of Manitoba. In its submission, the Ministry indicated that it consulted the Government of Manitoba for the purposes of the Applicant's request. The Government of Manitoba requested that the Ministry not release the record. In support of this exemption, the Ministry's submission stated:

Saskatchewan is not a party to the agreement Skipthedishes has with Manitoba and, given Manitoba's request to not release the record, ECON should not publically release an agreement between Manitoba and a private party when the parties want to keep it confidential.

[20] The Ministry did not discuss how release of the record would prejudice, interfere with or adversely affect relations between the Government of Saskatchewan and the Government of Manitoba. As such, I am not persuaded that subsection 14(a) of FOIP applies to the record.

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

[21] Subsection 19(1)(b) of FOIP states:

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

...

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

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

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

[23] In its submission, the Ministry did provide many details in support of this exemption. Both the Government of Manitoba and SkipTheDishes were invited to make a submission for the exemption. SkipTheDishes did not provide a submission. The Government of Manitoba did not specifically address this test.

[24] My office has defined financial information as information regarding monetary resources, such as financial capabilities, assets and liabilities, past or present. The record is an agreement that describes monetary resources that are received by SkipTheDishes. I agree that the agreement qualifies as financial information.

- [25] Upon reviewing the information already released to the Applicant, it appears that the record was supplied by SkipTheDishes to the Ministry. The second part of the test is also met.
- [26] However, in order to meet the third part of the test, it must be shown that the record was supplied in confidence.
- [27] The Ministry indicated that it exchanged e-mails with both the Government of Manitoba and SkipTheDishes after the access request was received. In these e-mails, the third parties expressed their views about why the agreement should be held in confidence. The Ministry also pointed out a confidentiality clause in the agreement between the Government of Manitoba and SkipTheDishes. In its submission, the Government of Manitoba stated that “the agreement in question has not been made public in Manitoba and is therefore still a confidential document.”
- [28] In confidence describes a situation of mutual trust in which private matters are relayed or reported; in this case the parties are the Ministry and SkipTheDishes. Information obtained in confidence means that the supplier of the information has stipulated how the information can be disseminated. In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the public body and the third party providing the information. It must also be shown that both parties intended the information be held in confidence at the time the information was supplied. The e-mails described by the Ministry cannot serve this function retroactively. There is nothing in the material provided to my office that demonstrates that there was any situation of mutual trust in which private matters are relayed or reported when SkipTheDishes supplied the information to the Ministry. As such, this part of the test has not been met.
- [29] Subsection 19(1)(b) of FOIP does not apply to this record.

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

[30] Subsection 19(1)(c)(iii) of FOIP states:

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

...

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

...

(iii) interfere with the contractual or other negotiations of;

a third party;

[31] To interfere with contractual or other negotiations means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement involving a third party.

[32] For this provision to apply, the third party or public body should identify and provide details about the contractual or other negotiations and the parties involved. Also, there must be objective grounds for believing that disclosing the information would result in the harm alleged. The parties do not have to prove that a harm is probable, but need to show that there is a “reasonable expectation of harm” if any of the information were to be released.

[33] In its submission, the Ministry stated that “Skipthedishes continues to grow and expand into new markets and expect to negotiate agreements with other jurisdictions”. It did not explain how release of the record would interfere with these negotiations. I also note that SkipTheDishes was willing to provide the record to the Ministry for the purpose on negotiating a funding agreement with Saskatchewan.

[34] As noted, SkipTheDishes has not made a submission.

[35] I am not persuaded that subsection 19(1)(c)(iii) of FOIP applies to the record.

IV FINDING

[36] I find that subsections 14(a), 19(1)(b) and 19(1)(c)(iii) of FOIP do not apply to the record.

V RECOMMENDATION

[37] I recommend that the Ministry release the record to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 28th day of October, 2016.

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