



## **REVIEW REPORT 204-2016**

### **Executive Council**

**May 30, 2017**

#### **Summary:**

The Applicant requested records from Executive Council related to a land transaction west of Regina. Executive Council provided the Applicant with some records but withheld information in other records citing subsections 17(1)(b)(i), 22(a), (b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Upon review, the Commissioner found that subsection 17(1)(b)(i) of FOIP applied to some of the information in the record and recommended it continue to be withheld. In addition, the Commissioner found that subsection 22(b) of FOIP applied to other information and recommended that it continue to be withheld. However, the Commissioner also found that subsection 22(b) of FOIP did not apply to the email headers and signature line in the emails. He recommended they be released.

#### **I BACKGROUND**

- [1] On March 8, 2016, Executive Council received the following access to information request from the Applicant:

Provide all internal correspondence – including but not limited to emails and texts – related to [Applicant name and company] regarding stories about GTH land transactions along the West Regina Bypass and/or [name] from February 3, 2016 until March 5, 2016.

- [2] By letter dated May 9, 2016, Executive Council provided its response to the Applicant indicating that access was partially granted. In addition, Executive Council advised that some of the information was being withheld pursuant to subsections 17(1)(b)(i), 22(a), (b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [3] On August 17, 2016, my office received a Request for Review from the Applicant in which he disagreed with Executive Council's application of the above provisions.
- [4] On August 23, 2016, my office notified Executive Council and the Applicant of my office's intent to undertake a review and invited all parties to provide submissions.
- [5] On October 25, 2016, Executive Council provided my office with its submission and a copy of the records at issue. Submissions were received from the Applicant on August 30, 2016 and September 12, 2016.

## **II RECORDS AT ISSUE**

- [6] The record consists of three documents totalling seven pages. The documents are emails and a briefing note.

## **III DISCUSSION OF THE ISSUES**

- [7] Executive Council is a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP.

### **1. Did Executive Council properly apply subsection 17(1)(b)(i) of FOIP?**

- [8] Subsection 17(1)(b) of FOIP is a discretionary exemption and 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;

- [9] This provision is meant to permit public bodies to consider options and act without constant public scrutiny.

- [10] 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.
- [11] 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.
- [12] In order to qualify, the opinions solicited during a “consultation” or “deliberation” 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, such as taking an action, making a decision or a choice.
- [13] Executive Council applied subsection 17(1)(b)(i) to information on one page of the record. The page constitutes an email exchange. Executive council severed the body of the emails and released the email headers.
- [14] In its submission, Executive Council asserted that the exchange constituted a consultation. Further, it asserted that the consultation was amongst employees of Executive Council and explained the roles of the individuals involved.
- [15] It is clear from the record and Executive Council’s submission that the exchange constitutes a consultation. The individuals involved also clearly have a role in the consultation and decision that was being made.
- [16] Therefore, I find that Executive Council appropriately applied subsection 17(1)(b)(i) of FOIP to the information on page 1 of the record.

**2. Did Executive Council properly apply subsection 22(b) of FOIP?**

- [17] Subsection 22(b) of FOIP is a discretionary exemption and provides:

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

...

(b) was prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel for a government institution in relation to a matter involving the provision of advice or other services by the agent or legal counsel;

[18] This exemption is meant to capture records prepared by or for legal counsel (or an agent of the Attorney General) for a public body in relation to the provision of advice or services by legal counsel.

[19] In order for subsection 22(b) of FOIP to apply, there are two criteria that must be met.

1. Were the records “prepared by or for” an agent or legal counsel for a public body?
2. Were the records prepared in relation to a matter involving the provision of advice or other services by the agent or legal counsel?

[20] Executive Council applied subsection 22(b) of FOIP to information on pages 2 through 7. Executive Council withheld all of the information on these pages except for the name of the then Deputy Minister to the Premier at the top of page 2. Pages 2 through 4 constitute emails. Pages 5 through 7 are an attachment to an email which is a briefing note.

***1. Were the records “prepared by or for” an agent or legal counsel for a public body?***

[21] In its submission, Executive Council asserted that the record is exempt under subsection 22(b) of FOIP as it is a record that was prepared by officials of the Ministry of Justice and Attorney General for Saskatchewan (lawyers for Executive Council) in relation to matters on which they are providing legal services to the government. With regards to the attached briefing note, Executive Council asserted that it was also prepared by lawyers within the Ministry of Justice.

[22] In his submission of August 30, 2016, the Applicant asserted that the email is from the then Deputy Minister to the Premier and therefore, it is not “prepared by or for” an agent or legal counsel for a public body.

- [23] From a review of the record, page 2 is the first page of an email chain which the then Deputy Minister to the Premier printed off from his email account which is why his name appears at the top of the page. Below his name is an email header. Executive Council severed the email header lines throughout pages 2 through 4 which included the “to” and “from” lines, “cc” line, “sent” line, “subject” and “attachment” lines. Executive Council also removed the signature line of one of the individuals who sent an email on page 3.
- [24] Executive Council submitted that the email headers should be withheld because releasing them would disclose that legal advice was sought by Executive Council; whom it was sought from and the date and topic upon which it was requested. Executive Council asserted that the sanctity of, and what is included within the ambit of solicitor-client privileged information has been made clear in *Canada (National Revenue) v Thompson*, 2016 SCC 21, and highlighted particular portions as follows:

[19] Although *Descoteaux* appears to limit the protection of the privilege to communications between lawyers and their clients, this Court has since rejected a category-based approach to solicitor-client privilege that distinguishes between a fact and a communication for the purpose of establishing what is covered by the privilege (*Maranda*, at para. 30). While it is true that not everything that happens in a solicitor-client relationship will be a privileged communication, facts connected with that relationship (such as the bills of account at issue in *Maranda*) must be presumed to be privileged absent evidence to the contrary (*Maranda*, at paras. 33-34; see also *Foster Wheeler*, at para 42). This rule applies regardless of the context in which it is invoked (*Foster Wheeler*, at para 34; *R v Gruenke*, [1991] 3 S.C.R. 263, at p. 289).

- [25] Executive Council also cited paragraphs [39] and [40] of *Canada (Attorney General) v Chambre des notaires du Quebec*, 2016 SCC 20, and highlighted particular portions as follows:

[39] ...where professional secrecy is in issue, what matters is not the context in which a privileged document or privileged information could be disclosed to the state, but rather the fact that the document or information in question is privileged. It is important that a client consulting a legal adviser feel confident that there is little danger that information or documents shared by the client will be disclosed in the future regardless of whether the consultation takes place in the context of an administrative, penal or criminal investigation: “The lawyer’s obligation of confidentiality is necessary to preserve the fundamental relationship of trust between lawyers and clients” (*Foster Wheeler*, at para. 34).

[40] From this perspective, it is not appropriate to establish a strict demarcation between communications that are protected by professional secrecy and facts that are not so protected (*Maranda*, at paras. 30-33; *Foster Wheeler*, at para. 38). The line between facts and communications may be difficult to draw (S. N. Lederman, A.W. Bryant and M.K. Fuerst, *The Law of Evidence in Canada* (4<sup>th</sup> ed. 2014), at p. 941). For example, there are circumstances in which non-payment of a lawyer's fees may be protected by professional secrecy (*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 30). The Court has found that "[c]ertain facts, if disclosed, can sometimes speak volumes about a communication" (*Maranda*, at para. 48). This is why there must be a rebuttable presumption to the effect that "all communications between client and lawyer and the information they shared would be considered prima facie confidential in nature" (*Foster Wheeler*, at para. 42).

[26] Upon review of the decisions cited by Executive Council, neither involves an access to information matter or deals with the type of material under consideration here (email headers and signature lines). Section 8 of FOIP provides for disclosure of any part of a record which can reasonably be severed from the material exempt from disclosure. *Blank v. Canada (Minister of Justice)*, (2005) 1 FCR 403, 2004 FCA 287, deals with the federal *Access to Information Act* (ATIA), solicitor-client privilege and severance of records. Paragraph [66] of that decision states:

[66]An earlier contention of the respondent that a record that is subject to solicitor-client privilege is not subject to the severance provision in section 25 has been unequivocally rejected by this Court in *Blank v. Canada (Minister of the Environment)* (2001), 2001 FCA 374 (CanLII), 41 C.E.L.R. (N.S.) 59 (F.C.A.), at paragraph 13: see also *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), [2003] 2 W.W.R. 279 (B.C.C.A.), at paragraphs 65-68. The words "[n]otwithstanding any other provision of this Act" employed in section 25 make it a paramount section: see *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, 1988 CanLII 5656 (FCA), [1989] 1 F.C. 265 (C.A.), at page 271. Therefore, general identifying information such as the description of the document, the name, title and address of the person to whom the communication was directed, the closing words of the communication and the signature block can be severed and disclosed. As this Court pointed out in *Blank*, at paragraph 23, this kind of information enables the requester "to know that a communication occurred between certain persons at a certain time on a certain subject, but no more".

[27] Alberta has a similarly worded provision in its FOIP Act. Subsection 27(1)(b) of Alberta's FOIP Act provides that:

27(1) The head of a public body may refuse to disclose to an applicant

- ...
- (b) information prepared by or for
    - (i) the Minister of Justice and Solicitor General,
    - (ii) an agent or lawyer of the Minister of Justice and Solicitor General, or
    - (iii) an agent or lawyer of a public body,in relation to a matter involving the provision of legal services, or

[28] In Alberta IPC Order F2013-13, the Adjudicator held that the term “prepared” in subsection 27(1)(b) of the Alberta FOIP Act was not intended to refer to information that was not substantive, such as dates, letterhead, names and business contact information of the sender and recipient of the information. As such, these are not items of information that were “prepared” as the provision requires. Finally, the Adjudicator found that the provision would only apply to this type of non-substantive information if it revealed the substantive content found elsewhere in the record.

[29] Based on *Blank* and Alberta IPC Order F2013-13, I find that subsection 22(b) of FOIP does not apply to the email headers and signature line. I recommend this information be released to the Applicant.

[30] The remainder of the information in pages 2 through 7 was also withheld. From a review of the information, it is clear based on the individuals involved that the records were prepared by legal counsel with the Ministry of Justice for Executive Council. Therefore, the first part of the test has been met for this information.

**2. *Were the records prepared in relation to a matter involving the provision of advice or other services by the agent or legal counsel?***

[31] In its submission, Executive Council asserted that the Ministry of Justice provides legal advice and services to the Government of Saskatchewan and has provided legal services in relation to land transactions. Further, it asserted that the records were prepared in relation to those matters and involved the provision of legal advice, analysis and assistance.

- [32] *Legal advice* includes a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.
- [33] *Legal service* includes any law-related service performed by a person licensed to practice law.
- [34] The prepared record does not have to constitute legal advice or legal services to qualify. However, it must relate “to a matter involving the provision advice or other services”.
- [35] Based on the content of the emails and in consideration of Executive Council’s submission, I find that the second part of the test is met. The emails do relate to a matter involving the provision of legal advice and legal services. As such, I find that subsection 22(b) of FOIP was appropriately applied to the remainder of the information in pages 2 through 7. I recommend Executive Council continue to withhold the information.
- [36] As I have found that subsection 22(b) of FOIP applies, there is no need to consider subsections 22(a) and (c) of FOIP.

#### **IV FINDINGS**

- [37] I find that subsection 17(1)(b)(i) of FOIP was appropriately applied.
- [38] I find that subsection 22(b) of FOIP was appropriately applied to some of the information and not appropriately applied to other information.

#### **V RECOMMENDATIONS**

- [39] I recommend that Executive Council continue to withhold the information on pages 1 through 7.
- [40] I recommend that Executive Council release the email headers on pages 2 through 4 and the signature line on page 3.



Dated at Regina, in the Province of Saskatchewan, this 30<sup>th</sup> day of May, 2017.

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