



REVIEW REPORT 206-2016

The Global Transportation Hub Authority

January 16, 2017

Summary:

The Global Transportation Hub Authority (GTH) applied subsections 17(1)(b)(i), 22(a) and (b) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to records responsive to the Applicant's request. The Commissioner found that subsection 17(1)(b)(i) of FOIP does not apply to the first sentence of the email dated Friday, May 25, 2012 at 6:04 a.m., and recommended its release to the Applicant. The Commissioner also found that the GTH appropriately applied subsections 17(1)(b)(i) and 22(b) of FOIP to the remaining records. The GTH advised the Commissioner it intends to comply with the recommendation.

I BACKGROUND

- [1] The Applicant submitted an access to information request to the GTH on July 11, 2016, requesting access to, "*...all documentation related to a call received by the Minister of Economy/Minister responsible for the GTH in which the caller was offering to sell the GTH some land between April and May 2012.*"
- [2] The GTH responded to the Applicant by letter dated August 15, 2016, denying access to a portion of the records pursuant to subsections 17(1)(b)(i), 22(b), and 29(1) of FOIP.
- [3] On August 18, 2016, my office received a Request for Review from the Applicant. My office notified the Applicant and the GTH of our intention to undertake a review on August 24, 2016 and invited each party to provide a submission.

- [4] The GTH contacted my office after the notification was sent on August 24, 2016 and advised us that there was an error in its response to the Applicant. The GTH had also applied subsection 22(a) of FOIP to the record but missed noting it in the covering letter to the Applicant. My office contacted the Applicant to advise him of this and confirmed that he would like subsection 22(a) of FOIP included in the review. We advised the GTH and the Applicant that our review would also include subsection 22(a) of FOIP.
- [5] Once this review commenced, the GTH reconsidered the application of some of the exemptions and on September 27, 2016 it released additional information to the Applicant. As a result, the GTH was no longer applying subsection 29(1) of FOIP to the record and the Applicant no longer wished to have subsection 29(1) of FOIP reviewed.
- [6] On October 13, 2016, my office emailed the GTH and the Applicant to advise that my office would be reviewing subsections 17(1)(b)(i), 22(a) and 22(b) of FOIP.
- [7] My office received a submission from the GTH on October 17, 2016 and from the Applicant on October 20, 2016.

II RECORDS AT ISSUE

- [8] The records at issue are the redactions applied to a three page email chain sent between Friday, May 25, 2012 and Thursday, May 31, 2012.
- [9] This review will address subsection 17(1)(b)(i) of FOIP which the GTH applied to a portion of the email chain, and subsections 22(a) and (b) of FOIP which were applied to approximately one page of the email chain.

III DISCUSSION OF THE ISSUES

- [10] The GTH is a “government institution” pursuant to subsection 2(1)(d)(ii) of FOIP.

1. Did the GTH properly apply subsection 17(1)(b)(i) of FOIP to the record?

[11] The GTH applied subsection 17(1)(b)(i) of FOIP to three sentences within the email chain dated Friday, May 25, 2012 at 6:04 a.m. sent from the former President and Chief Executive Officer (CEO) of the GTH to the former Chief Operating Officer (COO) of the GTH.

[12] Subsection 17(1)(b)(i) 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) consultation or deliberations involving:

(i) officers or employees of a government institution;

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

[14] 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 of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision. Subsection 17(1)(b)(i) of FOIP would involve consultations or deliberations between officers or employees of a government institution.

[15] In order to qualify a two part test must be met. The opinions solicited during a consultation or deliberation must:

1. be either sought, expected, or be part of the responsibility of the person who prepared the record; and
2. be prepared for the purpose of doing something, such as taking an action, making a decision or a choice.

[16] In its submission, the GTH describes the nature of the communications and states how the former CEO needs, “...to make a decision regarding how to proceed.”

[17] Based on a review of the records, in the first sentence the former CEO is assigning a task to the former COO and consultations or deliberations have not been engaged. Therefore, the first sentence would not qualify under subsection 17(1)(b)(i) of FOIP.

[18] The second and third sentences were prepared as part of the responsibility of the former CEO for the purpose of making a decision. If released, these sentences would reveal what the CEO is making the decision about. Therefore, these sentences would qualify under subsection 17(1)(b)(i) of FOIP.

2. Did the GTH properly apply subsection 22(b) of FOIP to the record?

[19] The GTH applied subsection 22(b) of FOIP to approximately one page of an email sent Friday, May 25, 2012 at 12:27 a.m. from Crown Counsel with the Civil Law Division, Ministry of Justice sent to the former CEO of the GTH.

[20] 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;

[21] 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.

[22] 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.

[23] *Legal advice* means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. Communications, verbal or written, that are directly related to the seeking, formulating or giving of legal advice or legal assistance are privileged. This can include the legal adviser's working papers or materials created or obtained specifically for the lawyer's brief for litigation, whether litigation is existing or contemplated. *Legal service* includes any law-related service performed by a person licensed to practice law.

[24] This email was prepared by Crown Counsel with the Civil Law Division of the Ministry of Justice. Part of the role of the Civil Law Division is to provide legal advice and legal services to the Government of Saskatchewan, including the GTH.

[25] In its submission the GTH confirmed that this email was prepared for the GTH by [legal counsel] who is Crown Counsel for the Civil Law Division. Therefore, I find the first part of this test to be met.

[26] In its submission, the GTH has outlined specifically what this legal advice was in relation to. However, in his submission the Applicant asserts:

[legal counsel] clearly says that he intends to first "make certain I have the factual background on this accurate."

[27] In a review of the records there is factual information stated, however it is difficult to separate the factual information from the legal advice in a way that it would not disclose what legal advice was being provided. Therefore, the second part of the test has been met.

[28] As the GTH has met this two part test, I am satisfied it has appropriately applied subsection 22(b) of FOIP to the portion of the email dated Friday, May 25, 2012 at 12:27 a.m.

[29] As I have found subsection 22(b) of FOIP to apply I do not need to consider subsection 22(a) of FOIP.

[30] On January 13, 2017, the GTH advised my office it intends to fully comply with the recommendation.

IV FINDINGS

[31] I find that subsection 17(1)(b)(i) of FOIP does not apply to the first sentence of the email dated Friday, May 25, 2012 at 6:04 a.m.

[32] I find that the GTH appropriately applied subsections 17(1)(b)(i) and 22(b) of FOIP to the remaining records.

V RECOMMENDATION

[33] I recommend the GTH release the first sentence of the email dated Friday, May 25, 2012 at 6:04 a.m.

Dated at Regina, in the Province of Saskatchewan, this 16th day of January, 2017.

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