



REVIEW REPORT 215 to 217-2016

Global Transportation Hub Authority

August 25, 2017

Summary:

The Applicant requested records from the Global Transportation Hub Authority (GTH). GTH released some information and withheld other information citing subsections 16(1), 17(1)(a), (b), (c), 18(1)(b), (d), (e), (f), (h), 19(1)(c), 22(a), (b) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Upon review, the Commissioner found that subsections 18(1)(b) and 17(1)(b) of FOIP did not apply to some information. Further, the Commissioner found that subsections 17(1)(a), (b), 18(1)(e), 19(1)(c) and 22(b) of FOIP were appropriately applied to other information. The Commissioner recommended that some information be withheld and other information be released.

I BACKGROUND

[1] On July 11, 2016, the Applicant submitted three access to information requests to the Global Transportation Hub Authority (GTH) for:

Access to information request #1 (Review file 215-2016)

The Auditor General's Special Report: Land Acquisition Processes states: "The GTH Chair/Minister decided to try to buy East Parcels using willing seller/buyer approach. The GTH Minister (who was also the Minister of the Economy) asked one of his senior advisors to see if 3rd Party C was interested in selling the East Parcels based on a negotiated price."

Please provide all documentation regarding the senior advisor's work regarding the purchase of the East Parcel. Please include any email exchanges between the senior advisor and the GTH CEO regarding the purchase of the East Parcel.

Access to information request #2 (Review file 216-2016)

The Auditor General's Special Report: Land Acquisition Processes states: “The GTH Board, at GTH Chair/Minister’s direction, approved the GTH acquiring the East Parcels for \$21 million (average cost of \$103,000 per acre) based on the understanding that Cabinet had approved the purchase...”

Please provide all documentation regarding the GTH board’s decision including recommendations, decision items, backgrounders, Q & As, financial analysis, etc. Please provide the agenda and minutes for this meeting.

Access to information request #3 (Review file 217-2016)

The Auditor General’s Special Report: Land Acquisition Processes states: “The GTH Chair/Minister presented item to the GTH Board, with recommendation that the Government acquire the East Parcels for \$21.4 million (average cost of \$105,000 per acre) with surplus lands sold to the GTH for further development.

Please provide the board item described above and any supporting documents provided to the GTH board (e.g. backgrounders, Q&A, financial analysis, etc).

[2] By letters dated August 10, 2016, GTH provided its response to the Applicant’s requests indicating that access was partially granted. In addition, GTH advised that some information was being withheld pursuant to subsections 17(1)(a), 17(1)(b)(i), 18(1)(b) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On August 29, 2016, my office received three Requests for Review from the Applicant, in which he disagreed with GTH’s application of the above provisions. Through the early resolution process with my office, the Applicant advised that he did not need our office to review GTH’s application of subsection 29(1) of FOIP. In addition, GTH agreed to release additional information and emailed the Applicant a new version of the record on September 27, 2016. However, it appears to have changed the exemptions in some instances and also added additional ones to the information withheld which included subsections 16(1), 17(1)(c), 18(1)(d), (e), (f), (h), 19(1)(c), 22(a) and (b).

[4] On August 31, 2016, my office provided notification to GTH and the Applicant of my office’s intent to conduct three reviews. My office requested GTH provide an Index of Records (Index), a copy of the records at issue and a submission. The Applicant was also invited to provide a submission for my office’s consideration.

[5] On August 31, 2016, the Applicant provided submissions to my office. On October 25, 2016, GTH provided my office with its submission, an Index and a copy of the records.

II RECORDS AT ISSUE

[6] The original responsive record was 20 pages. Following additional release of information, the remaining record at issue consists of nine pages constituting emails and two decision items.

[7] The following pages remain at issue:

Page #	Description	Exemptions applied
3	Email chain – December 23, 2013 10:00 pm	17(1)(b)
4	Email dated December 19, 2013 3:35 pm	17(1)(b), 16(1)
7-8	Email chain - dated December 23, 2013 4:11 pm	17(1)(b), 22(a), 22(b)
14-15	Decision Item – Item #4	17(1)(a), 17(1)(b), 18(1)(b), (d), (h), 19(1)(b), (c)
17-19	Decision Item – Item #7	17(1)(a), (b), (c), 18(1)(b), (d), (e), (f), (h), 19(1)(b), (c)

III DISCUSSION OF THE ISSUES

[8] GTH is a “government institution” as defined by subsection 2(1)(d)(ii) of FOIP.

1. Did the GTH properly apply subsection 18(1)(b) of FOIP?

[9] Subsection 18(1)(b) of FOIP is a discretionary exemption and provides as follows:

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

...

(b) financial, commercial, scientific, technical or other information:

(i) in which the Government of Saskatchewan or a government institution has a proprietary interest or a right of use; and

(ii) that has monetary value or is reasonably likely to have monetary value;

[10] In order for subsection 18(1)(b) of FOIP to be found to apply, all three parts of the following test must be met:

1. Does the information contain financial, commercial, scientific, technical or other information?
2. Does the public body have a proprietary interest or a right to use it?
3. Does the information have monetary value for the public body or is it likely to?

[11] GTH applied subsection 18(1)(b) of FOIP to information on pages 14, 15, 17, 18 and 19. In all instances, GTH severed dollar amounts on all of the pages.

1. Does the information contain financial, commercial, scientific, technical or other information?

[12] In its submission, GTH asserted that the severed information constituted financial information.

[13] *Financial information* is information regarding monetary resources, such as financial capabilities, assets and liabilities, past or present. Common examples are financial forecasts, investment strategies, budgets, and profit and loss statements. The financial information must be specific to a particular party.

[14] From a review of the information, it appears the information qualifies as financial information. For example, the information severed on page 18 appears to be financial information as it refers to an amount GTH will pay for a deposit on land. The first part of the test has been met.

2. Does the public body have a proprietary interest or a right to use it?

[15] This means that the public body must be able to demonstrate rights to the information. Proprietary interest is the interest held by a property owner together with all appurtenant rights, such as a stockholder's right to vote the shares.

- [16] In this context, proprietary information is sensitive information that is owned by the public body and which gives it certain competitive advantages in the marketplace.
- [17] In its submission, GTH asserted that the severed dollar values are estimated values provided by third parties and developed within the GTH for the proprietary interest of GTH.
- [18] Based on the submission received from GTH and on the face of the record, I cannot see how GTH has a proprietary interest in the information. The information is dollar amounts paid for land. It's not clear how the information is sensitive to the extent that releasing it impacts GTH's competitive advantage in the marketplace.
- [19] In Ontario IPC Order MO-1282, a similar provision was considered and the following is helpful as it pertains to proprietary interest:

...The Assistant Commissioner has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

- [20] Therefore, I find that the second part of the test is not met. As all three parts have to be met, there is no need to proceed further. I find that subsection 18(1)(b) of FOIP does not apply to the dollar amounts severed on pages 14, 15, 17, 18 and 19. The GTH also applied subsection 17(1)(a), (c), 18(1)(e) and (f) to the information. I will consider the information again under those exemptions.

2. **Did the GTH properly apply subsection 17(1)(a) of FOIP?**

- [21] Subsection 17(1)(a) of FOIP is a discretionary exemption and provides as follows:

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;

[22] This exemption is meant to allow for candor during the policy-making process, rather than providing for non-disclosure of all forms of advice. All three parts of the following test must be met in order for subsection 17(1)(a) of FOIP to be found to apply:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. The advice, recommendations, proposals, analyses and/or policy options must:
 - i) be either sought, expected, or 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.
3. Was the advice, recommendations, analyses and/or policy options developed by or for the public body?

[23] GTH applied subsection 17(1)(a) of FOIP to information on pages 14, 15, 17, 18 and 19. The pages are part of two decision item documents.

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

[24] In its submission, GTH asserted that the information is related to the potential purchase of land, appraisal information, information related to current landowner and costing as well as high level cost estimates, and land valuation criteria. As such, it asserted, the information constitutes analyses and proposals.

- [25] *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.
- [26] *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.
- [27] *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.
- [28] Therefore, advice is the course of action put forward, while analyses refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals, and policy options as to a course of action.
- [29] The information severed on pages 14, 15, 17, 18 and 19 appears to qualify as analyses. The information constitutes an examination and evaluation of relevant information which forms the recommendations at the beginning of the decision items. Therefore, I find that the first part of the test is met.

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

- i) be either sought, expected, or 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.***

- [30] In its submission, GTH asserted that it is the responsibility of the GTH CEO to bring forward information related to the potential land purchase. The GTH board is required to approve all land purchases. Further, it asserted that the information is for the purpose of decision making by the GTH board with respect to the potential purchase of the land.

Finally, the documents were prepared and presented to the GTH board, responsible for evaluating and making necessary business decisions.

[31] Based on this, I find that the second part of the test has been met.

3. Was the advice, recommendations, analyses and/or policy options developed by or for the public body?

[32] In its submission, GTH asserted that the decision items were prepared exclusively for the GTH board of directors for decision making.

[33] Based on this, I find that the third part of the test has been met. As all parts have been met, I find that subsection 17(1)(a) of FOIP applies to the information severed on pages 14, 15, 17, 18 and 19.

3. Did the GTH properly apply subsection 17(1)(b) of FOIP?

[34] 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;

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

[36] 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.

- [37] 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.
- [38] 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.
- [39] GTH applied subsection 17(1)(b) of FOIP to information on pages 3, 4 and 7. In its submission, GTH asserted that some of the pages contain consultations and some contain deliberations.
- [40] From a review of the pages, the information severed on page 3 does not appear to constitute a consultation or deliberation. It does not appear that the views of one or more officers or employees of GTH are being sought as to the appropriateness of a particular proposal or suggested action. It appears to just be a statement outlining what steps the individual took. The provision is not meant to protect the bare recitation of facts, without anything further.
- [41] As the information does not constitute a consultation or deliberation, I find that subsection 17(1)(b) of FOIP does not apply. I recommend the information on page 3 be released.
- [42] The information on pages 4 and 7 constitute a consultation. The individual is seeking out advice from other individuals. Further, it would be part of the role of the individual seeking the advice and the action to be taken is concluding a purchase agreement. Therefore, I find that subsection 17(1)(b) of FOIP applies to the information on pages 4 and 7. I recommend the information continue to be withheld. As, this subsection has been found to apply, there is no need to address subsection 16(1) of FOIP on page 4.

4. Did the GTH properly apply subsection 18(1)(e) of FOIP?

[43] Subsection 18(1)(e) of FOIP is a discretionary exemption and provides:

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

...

(e) 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.

[44] The provision is meant to protect positions, plans, procedures, criteria, instructions and/or considerations developed for contractual or other negotiations. Examples of the type of information that could be covered by this exemption are the various positions developed by public body negotiators in relation to labour, financial and commercial contracts. All three parts of the following test must be met:

1. Does the record contain positions, plan, procedures, criteria, instructions or considerations?
2. Were they developed for the purpose of contractual or other negotiations?
3. Were they developed by or on behalf of the public body?

[45] GTH severed one piece of information on page 18 citing subsection 18(1)(e) of FOIP.

1. Does the record contain positions, plan, procedures, criteria, instructions or considerations?

[46] *Positions and plans* refer to information that may be used in the course of negotiations.

[47] *Procedures, criteria, instructions and considerations* are much broader in scope, covering information relating to the factors involved in developing a particular negotiating position or plan.

[48] In its submission, GTH asserted that the severed information is one criterion applied directly by the GTH in determining the price of land used for contractual negotiations related to land sales.

[49] It appears based on GTH's submission that it is asserting the information is criteria. The information severed is servicing costs per acre. I find that this would constitute criteria for purposes of this provision. Therefore, I find that the first part of the test has been met.

2. Were they developed for the purpose of contractual or other negotiations?

[50] In its submission, GTH asserted that the cost of servicing a parcel is a factor in determining the final price in the GTH pricing policy which acts as a framework for its land sales negotiations.

[51] The contractual or other negotiations can be concluded, ongoing or future negotiations. It appears GTH is referring to all of these as it uses the cost of servicing in its pricing policy which it relies on in all land sale negotiations. Therefore, I find that the second part of the test has been met.

3. Were they developed by or on behalf of the public body?

[52] In its submission, GTH asserted that the severed information was developed by the GTH and forms part of the GTH pricing policy.

[53] From a review of the information, it is clear that it was developed by GTH for its own use. Therefore, I find that the third part of the test is met.

[54] As all parts of the test have been met, I find that subsection 18(1)(e) of FOIP applies to the severed information on page 18.

5. Did GTH properly apply subsection 19(1)(c) of FOIP?

[55] Subsection 19(1)(c) of FOIP is a mandatory harms based exemption and provides:

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:

- (i) result in financial loss or gain to;
- (ii) prejudice the competitive position of; or
- (iii) interfere with the contractual or other negotiations of;

a third party;

[56] For my office to be satisfied that subsection 19(1)(c) of FOIP applies, 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 harm is probable, but need to show that there is a *reasonable expectation of harm* to the third party if any of the information were released. In determining this, my office relies on the following criteria:

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 harm must be genuine and conceivable.

[57] GTH applied subsection 19(1)(c) of FOIP to the name of the third party located in two places on pages 14 and 18. The third party provided a submission supporting the application of subsection 19(1)(c) of FOIP. In its submission, the third party asserted that release of its name would result in financial loss and prejudice the competitive position of the third party. It asserted that the losses would be reflected in terms of loss of revenue, loss of corporate reputation and potential loss of goodwill.

[58] The third party said in its submission that the information that has been released already is derived from the third party's appraisal which has not been released. Further, the third party asserted that what has been released would be clearly attributed to the third party and it is factually wrong. Finally, it asserted that releasing information that GTH was not authorized to possess by the third party, that is not explained insofar as qualification, is wrong and unfair to the third party but releasing inaccurate information was worse. Releasing the third party's name would associate it with what has been released already.

[59] In addition, the third party included the following arguments which I summarize below:

- Having the third party associated with the appraisal which contains highly subjective conclusions based on fact specific assumptions provided to the public without the proper context makes the third party appear to be uninformed and incompetent. This is a likely and probably outcome, which will cause significant harm to the company.
- Without a clear understanding of the context of the appraisal, it could appear to be flawed or inaccurate. The misapprehension of the content and conclusion of the appraisal will be lost. This is a concern especially given the circumstances given the media and political attention surrounding the issue of the GTH and the cost of the subject land. This will reduce the credibility of the third party's work, which in turn, prejudices its competitive position and corporate reputation. Once this damage is done, it will suffer a direct loss of revenue and goodwill.
- The third party is a local business that relies on its reputation in a small local market. Damage to its reputation could result in the loss of its only market, collapsing the viability of the business.
- A further consideration when looking at the potential harm in this matter is the fact that any release of essentially the information in the appraisal, will be contrary to law. The third party has a legal copyright to the appraisal; it has not released that right. Releasing the information will be a direct violation of the third party's rights.

[60] Generally, the name of a third party alone would not qualify as third party information. However, in this case, the content of the paragraph in which the name is contained has been released. This provided more information to the Applicant while protecting the third party. By severing the document this way, GTH was complying with section 8 of FOIP. I applaud GTH for this effort. Release of the name of the third party associates it

with the information that has already been released. In this case, it is not a question of whether the name alone would qualify but rather whether the name would when combined with what has already been released.

[61] The information released derives from the appraisal. The third party asserted that this released information is incorrectly represented from the original appraisal. I found previously in Review Report 077-2016 and 092-2016 that GTH was inappropriately provided a copy of the appraisal by another party. I accept that this third party has a legal copyright to the information in the appraisal. I also accept that the appraisal has not been made public by the third party.

[62] I find that the name of the third party when combined with the information already released in the paragraph could cause the harms alleged by the third party. Therefore, I find that subsection 19(1)(c) of FOIP was appropriately applied to the name of the third party on pages 14 and 18.

6. Did the GTH properly apply subsection 22(b) of FOIP?

[63] 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;

[64] 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.

[65] 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?

[66] GTH applied subsection 22(b) of FOIP to a portion of the content of one email on page 8.

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

[67] GTH asserted that the record contains information from legal counsel to GTH.

[68] From a review of the email, it is clear that it is an email from the GTH to legal counsel. Therefore, the first part of the test is met.

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

[69] GTH asserted that the record was prepared relating to the provision of legal advice and legal services by legal counsel.

[70] From a review of the information severed, it appears the information relates to legal services being provided by legal counsel. Therefore, the second part of the test has been met.

[71] As both parts of the test have been met, I find that subsection 22(b) of FOIP applies to the information severed on page 8.

[72] My office shared the preliminary findings and recommendations outlined below with GTH on August 16, 2017. GTH advised my office that it intends to comply with the recommendations.

IV FINDINGS

[73] I find that subsection 18(1)(b) of FOIP does not apply to the dollar amounts severed on pages 14, 15, 17, 18 and 19.

- [74] I find that subsection 17(1)(a) of FOIP applies to the dollar amounts severed on pages 14, 15, 17, 18 and 19.
- [75] I find that subsection 17(1)(b) of FOIP does not apply to the information severed on page 3.
- [76] I find that subsection 17(1)(b) of FOIP applies to the information severed on pages 4 and 7.
- [77] I find that subsection 18(1)(e) of FOIP applies to the information severed on page 18.
- [78] I find that subsection 19(1)(c) of FOIP applies to the name of the third party severed on pages 14 and 18.
- [79] I find that subsection 22(b) of FOIP applies to the information severed on page 8.

V RECOMMENDATIONS

- [80] I recommend GTH release the information severed on page 3.
- [81] I recommend GTH continue to withhold the information severed on pages 4, 7, 8, 14, 15, 17, 18 and 19.

Dated at Regina, in the Province of Saskatchewan, this 25th day of August, 2017.

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