



## **REVIEW REPORT 229-2016**

### **Crown Investments Corporation**

**February 1, 2017**

**Summary:** The Applicant requested records from Crown Investment Corporation (CIC) related to a land transaction west of Regina. CIC provided the Applicant with some records but withheld information in other records citing subsection 19(1)(c) and section 22 of *The Freedom of Information and Protection of Privacy Act* (FOIP). Upon review, the Commissioner found that subsection 19(1)(c) of FOIP did not apply and recommended release of the information. In addition, the Commissioner found that subsection 22(a) of FOIP applied to other information and recommended that it continue to be withheld.

### **I BACKGROUND**

[1] On July 20, 2016, Crown Investments Corporation (CIC) received an access to information request from the Applicant for:

...all emails written to or from the President of CIC and the Chief Financial Officer related to the possibility of CIC assisting the Global Transportation Hub in purchasing land...from September 2012 until December 2012.

[2] CIC responded to the Applicant by a letter dated August 25, 2016 indicating that access to responsive records was partially granted. In addition, CIC advised that “[p]ersonal information and information subject to exemptions have been redacted where appropriate, and reports mentioned (CDI, Appraisal Reports) have been withheld on the basis of Section 16” of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [3] On September 19, 2016, my office received a Request for Review from the Applicant.
- [4] My office notified CIC and the Applicant of our intent to undertake a review on September 27, 2016. My office notified the third party of the review on December 13, 2016.
- [5] On October 5, 2016, CIC provided my office with its submission and a copy of the records at issue. A submission was received from the third party on January 5, 2017.
- [6] On November 25, 2016, CIC agreed to release additional information in the records to the Applicant. Following this release, only subsection 19(1)(c) and section 22 of FOIP remained at issue.

## **II RECORDS AT ISSUE**

- [7] The remaining records consist of a string of emails totalling 5 pages. CIC severed portions of the emails.

## **III DISCUSSION OF THE ISSUES**

- [8] CIC is a “government institution” as defined by subsection 2(1)(d)(ii) of FOIP.
- [9] The third party is a private business and qualifies as a “third party” as defined by subsection 2(1)(j) of FOIP.

### **1. Did CIC properly apply subsection 19(1)(c) of FOIP to the information in question?**

- [10] 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;

[11] 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.

[12] CIC applied subsection 19(1)(c) of FOIP to the name of the third party found in two sentences in two emails. The remainders of the sentences were released to the Applicant leaving only the name removed. The third party was opposed to the release of its name.

[13] In its submission, the third party indicated that it represented the Global Transportation Hub Authority (GTH) in a land purchase. In addition, it asserted that its engagement with the GTH was strictly confidential and its name must remain confidential as release would interfere with its contractual obligations with the GTH. Nothing further was provided.

[14] Based on the third party's arguments, it appears it is asserting that subsection 19(1)(c)(iii) of FOIP applies. 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. Completed negotiations are not normally subject to the exemption. It is not clear how the release of the third party's name would interfere with contractual or other negotiations of the third party. The third party did not explain this.

Further, the third party has not explained how harm to its existing obligations falls within what is contemplated by subsection 19(1)(c) of FOIP. If the third party entered into a contract with the GTH, most government contracts are accessible to the public and the government cannot contract out of its FOIP obligations.

[15] In its submission, CIC asserted that “an investigative report [by the media] on what is purported to be suspicious activity surrounding a public land deal, in which private companies could be associated, raises the distinct possibility of adverse effects on the private companies thereby exposed”. CIC did not provide any further details as to what the harm would be other than its broad assertion of “adverse effects”.

[16] CIC did not tie the name of the business to the context of the email and to the harm alleged. There is no clear cause and effect relationship between the disclosure and the harms alleged. Further, the harms (adverse effects and interference with contractual obligations) appear to be speculative rather than genuine and conceivable. I have not been provided sufficient arguments from CIC or the third party to be convinced that the harms alleged would reasonably be expected to occur. Therefore, I find that subsection 19(1)(c) of FOIP does not apply to the name of the third party found in the two emails.

**2. Did CIC properly apply subsection 22(a) of FOIP to the information in question?**

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

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

(a) contains information that is subject to solicitor-client privilege;

[18] CIC applied subsection 22(a) of FOIP to three paragraphs of information spread between two emails. In its submission to my office it asserted that:

...With respect to the application of section 22, CIC notes only two records contained such exemption. The first was correspondence from the Deputy Minister of Justice to the then President of CIC, outlining legal advice with respect to this issue. In our view this whole correspondence could have been withheld, but an effort was made to disclose what could reasonably be done in the circumstances.

The second was a memo that [Name] (President CIC) emailed to himself. In this email [Name] outlines his understanding of the extant situation and recounts legal advice on same. CIC posits that a note to self is inherently confidential, and in all other respects the application of this exemption meets the test as provided by your office...

[19] Subsection 22(a) of FOIP is meant to protect information that is subject to solicitor-client privilege. In *Solosky v. Canada* (1980), Justice Dickson regarded the rule of solicitor-client privilege as a “fundamental civil and legal right” that guaranteed clients a right to privacy in their communications with their lawyers. In *Descoteaux et al. v. Mierzwinski*, (1982), Justice Lamer outlined a very liberal approach to the scope of the privilege by extending it to include all communications made “within the framework of the solicitor-client relationship.” The protection is very strong, as long as the person claiming the privilege is within the framework. Subsection 22(a) of FOIP ensures that the government, as the client, has the same protection for its legal documents as persons in the private sector.

[20] In order to qualify for this exemption, the withheld information must meet all three parts of the following test established in *Solosky v. Canada*, (1980):

1. The record must be a communication between solicitor and client;
2. The communication must entail the seeking or giving of legal advice; and
3. The communication must be intended to be confidential.

***i. The record must be a communication between solicitor and client***

[21] For the email dated Tuesday December 4, 2012 at 2:32pm, the email was sent by the then Deputy Minister of Justice. The email is to the then President of CIC and the then Deputy Minister to the Premier. It appears the client is CIC, a government body. It does not matter whether the client is an individual, corporation or government body when applying the rule of solicitor-client privilege. Further, based on the content of the severed information, it appears that the Ministry of Justice is acting as solicitor. The Ministry of Justice acts as legal advisors for all departments of government. As such, I find that the

severed information qualifies as a communication between solicitor and client. The first part of the test is met.

[22] For the email, dated Wednesday November 28, 2012 at 9:34am, it was sent by the then President of CIC to himself. The email appears to serve as a memo or note-to-file. The information appears to recount telephone calls and interactions which involved CIC's internal legal counsel. As such, I find that the severed information qualifies as communication between solicitor and client. The first part of the test is met.

***ii. The communication must entail the seeking or giving of legal advice;***

[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.

[24] Based on this definition and from reviewing the severed information in both emails, I agree that the information withheld constitutes both the seeking and giving of legal advice. Therefore, the second part of the test is met.

***iii. The communication must be intended to be confidential***

[25] In *Descoteaux et al. v. Mierzwinski*, (1982), Mr. Justice Lamer set out the substantive rule of confidentiality:

1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

[26] Further, the nature of the records themselves can imply confidentiality. For both emails, it appears the communication would have been intended to be confidential based on its content. Therefore, I find that the third part of the test has been met. As all parts of the test have been met, I find that CIC appropriately applied subsection 22(a) of FOIP to the information in the emails.

[27] On January 11, 2017, my office shared its preliminary findings and recommendations with CIC as outlined below. On January 19, 2017, my office received a response from CIC indicating that it agreed in part with my office's findings but disagreed with its finding regarding subsection 19(1)(c) of FOIP. CIC advised that it would confer with the third party and reach a final determination on release in the near future.

#### **IV FINDINGS**

[28] I find that subsection 19(1)(c) of FOIP does not apply to the name of the third party found in the two emails.

[29] I find that CIC appropriately applied subsection 22(a) of FOIP to the information in the emails.

#### **V RECOMMENDATIONS**

[30] I recommend that CIC release the name of the third party found in the two emails.

[31] I recommend that CIC continue to withhold the information subject to subsection 22(a) of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 1<sup>st</sup> day of February, 2017.

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