



## REVIEW REPORT 261-2016 & 284-2016

### Ministry of Central Services

April 11, 2017

**Summary:** The Applicant requested records from the Ministry of Central Services (Central Services) related to a land transaction west of Regina. Central Services extended its response time an additional 30 days citing subsection 12(1)(a)(i) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Central Services also withheld information in the responsive records citing subsections 16(1)(c), (d), 17(1)(a), (b), (c) and 18(1)(e) of FOIP. Upon review, the Commissioner found that the extension applied by Central Services was not necessary and not in keeping with FOIP. In addition, he found that subsections 16(1), 17(1)(a) and (b) of FOIP did not apply to some of the information in the record. He also found that these subsections, along with subsection 17(1)(c) of FOIP, applied to other information in the record and recommended the information continue to be withheld. Finally, the Commissioner recommended Central Services consider issuing fee estimates within the first three to ten days of receiving an access to information request.

### I BACKGROUND

[1] On October 4, 2016, the Ministry of Central Services (Central Services) received an access to information request from the Applicant for:

...all emails and attachments written to or from [name] and/or [name] related to the possibility of the Global Transportation Hub purchasing land...March 1, 2012 to December 31, 2012.

[2] By letter dated November 2, 2016, Central Services provided the Applicant with an estimate of costs in the amount of \$706.00. In the letter, Central Services advised the Applicant that if he wished to proceed, it would require a deposit of \$353.00.

- [3] By letter dated November 9, 2016, Central Services provided an amended fee estimate following the Applicant clarifying and narrowing the scope of his access request. The amended fee estimate was \$120.00. Central Services requested a deposit of \$60.00 to proceed.
- [4] By separate letter dated November 9, 2016, Central Services advised the Applicant that the 30 day response period was being extended an additional 30 days pursuant to subsection 12(1)(a)(i) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [5] On November 9, 2016, my office received a Request for Review from the Applicant, in which he disagreed with Central Services' extension and application of subsection 12(1)(a)(i) of FOIP.
- [6] On November 21, 2016, my office notified Central Services and the Applicant of my office's intent to conduct a review of Central Services application of subsection 12(1)(a)(i) of FOIP. This review is file number 261-2016.
- [7] Central Services continued to process the Applicant's access request. By letter dated November 25, 2016, Central Services advised the Applicant that certain records contained third party information. In addition, it advised the Applicant that section 34 of FOIP required that it provide notification to the third parties. Further, that the third parties had 20 days to provide representations to Central Services. Central Services advised that once it received these representations, it would provide its decision to the Applicant regarding access to records. Central Services sent letters to three separate third parties.
- [8] By letter dated December 6, 2016, Central Services provided its response to the Applicant indicating that access to responsive records was partially granted. In addition, Central Services advised that some of the information was being withheld pursuant to subsections 16(1)(c), (d), 17(1)(a), (b), (c) and 18(1)(e) of FOIP.

- [9] By letter dated December 6, 2016, Central Services advised three third parties that it would be releasing the third party information unless the third parties or the Applicant requested a review of its decision within 20 days. Central Services also noted in the letters that the third parties had indicated no concerns with the release of the information.
- [10] On December 12, 2016, my office received a Request for Review from the Applicant, in which he disagreed with Central Services application of the above provisions. The Applicant advised that he had received no records with the December 6, 2016 decision letter from Central Services.
- [11] On December 13, 2016, my office advised Central Services that if it had the consent of the third parties, it could release the third party information pursuant to subsection 19(2) of FOIP. No 20 day waiting period was required. Central Services agreed to release the records once the Applicant paid the requested deposit. On December 14, 2016, my office was advised by Central Services that the Applicant paid the requested deposit on December 14, 2016 and records were provided to him.
- [12] On December 15, 2016, my office notified Central Services and the Applicant of my office's intent to conduct a review of Central Services application of subsections 16(1)(c), (d), 17(1)(a), (b), (c) and 18(1)(e) of FOIP. This review is file number 284-2016.

## **II RECORDS AT ISSUE**

- [13] The record consists of emails and one attachment totalling 13 pages. Nine of those pages have information withheld. Four pages were released in full.

## **III DISCUSSION OF THE ISSUES**

- [14] Central Services is a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP.

**1. Did Central Services process the request in compliance with FOIP?**

[15] As noted above, Central Services received the access request on October 4, 2016. Central Services calculated its 30 day response time as November 3, 2016. On November 2, 2016, Central Services issued a fee estimate to the Applicant. In its fee estimate letter, Central Services advised the Applicant that:

If you wish to proceed with your access request, our office will require a deposit of... We will continue to process your access request once this is received...

[16] When it comes to processing an access request, the statutory 30 day timeline for responding to an Applicant is stopped where a fee estimate is issued pursuant to subsection 9(3) of FOIP. This provision provides as follows:

**9(3) Where an estimate is provided pursuant to subsection (2), the time within which the head is required to give written notice to the applicant pursuant to subsection 7(2) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application.**

[emphasis added]

[17] Subsection 9(4) of FOIP provides a discretionary authority for the head to require a deposit prior to commencing a search for records. Subsection 9(4) of FOIP provides:

**9(4) Where an estimate is provided pursuant to subsection (2), the head may require the applicant to pay a deposit of an amount that does not exceed one-half of the estimated amount before a search is commenced for the records for which access is sought.**

[emphasis added]

[18] The Applicant paying a deposit signals to the public body that the Applicant wishes to proceed with the request. Once the Applicant pays the deposit, the clock continues from where it left off. In this case, the Applicant paid the required deposit on December 13, 2016. As such, the clock was stopped from November 2, 2016 until December 13, 2016.

[19] Prior to the Applicant providing a deposit, Central Services applied a 30 day extension citing subsection 12(1)(a)(i) of FOIP which provides as follows:

**12(1)** The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

(a) where:

(i) the application is for access to a large number of records or necessitates a search through a large number of records;

...

and completing the work within the original period would unreasonably interfere with the operations of the government institution;

[20] In its submission, Central Services advised that:

When preparing the revised estimate of costs we were on day 29 of the initial response time frame and realized that an extension of time notification would be necessary.

[21] Central Services only had one day left to process the access request. It took 29 days to issue a fee estimate. The Access and Privacy Branch of the Ministry of Justice recommends that public bodies take three to 10 days to issue a fee estimate (*Access Request Checklist*, publications.gov.sk.ca). I agree with this recommendation. It allows time to process the request once the deposit is made and allows for time to notify third parties.

[22] Central Services requested a fee deposit from the Applicant and it had not yet been paid when the extension was applied. As such, the extension was premature. Pursuant to subsections 9(3) and (4) of FOIP, the clock had stopped and the search for records was to commence after the deposit was paid. Therefore, I find that the extension applied by Central Services was not necessary and not in keeping with FOIP.

## **2. Did Central Services properly apply subsection 16(1) of FOIP?**

[23] Subsection 16(1) of FOIP is a mandatory class-based exemption and provides as follows:

**16(1)** A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

- (a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;
- (b) agendas or minutes of the Executive Council or any of its committees, or records that record deliberations or decisions of the Executive Council or any of its committees;
- (c) records of consultations among members of the Executive Council on matters that relate to the making of government decisions or the formulation of government policy, or records that reflect those consultations;
- (d) records that contain briefings to members of the Executive Council in relation to matters that:
  - (i) are before, or are proposed to be brought before, the Executive Council or any of its committees; or
  - (ii) are the subject of consultations described in clause (c).

[24] Subsections 16(1)(a) through (d) are not an exhaustive list. Therefore, even where none of the subsections are found to apply, the introductory wording of the provision must still be considered. In other words, what must be determined is whether the information is a confidence of Executive Council.

[25] *Executive Council* consists of the Premier and Cabinet Ministers. Executive Council is also referred to as “Cabinet” (Government of Saskatchewan, Cabinet Secretariat, Executive Council, *Executive Government Processes and Procedures in Saskatchewan: A Procedures Manual*, 2007, at p. 16).

[26] *Cabinet confidences* can generally be defined as:

...in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public.

(*Federal Access to Information and Privacy Legislation Annotated 2015* (Canada: Thomas Reuters Canada Limited, 2014) at page 1-644.4)

[27] Central Services withheld information on pages 6, 9, 10, 11 and 12 citing subsections 16(1)(c) and (d) of FOIP. The records are all email chains.

- [28] Subsection 16(1)(c) of FOIP is intended to protect records used for, or records that reflect, consultations amongst members of the Executive Council on matters relating to the making of government decisions or the formulation of government policy.
- [29] A *consultation*, in this context, occurs when one or more members of Executive Council discuss matters related to making government decisions or formulating government policy.
- [30] For subsection 16(1)(d) of FOIP to apply, the records must contain briefings and be intended for Executive Council. In addition, one of the requirements are that subsections 16(1)(d)(i) or (ii) must apply. The purpose for which the record was prepared is key. The records must be for the purpose of briefing a minister in relation to matters before Cabinet or for use in a discussion with other ministers.
- [31] In its submission, Central Services asserted that the information withheld on page 6 refers to a Cabinet Committee meeting.
- [32] From a review of page 6, the information withheld appears to contain an agenda item of Cabinet. I find that the severed information, if released, would reveal cabinet confidence. Therefore, I find that Central Services appropriately applied subsection 16(1) of FOIP to the information on page 6. I recommend the information continue to be withheld.
- [33] In its submission, Central Services asserted that the information withheld on pages 9 to 12 constituted deliberations in the form of discussions and considerations regarding the purchase strategy of land and the briefing of the minister in charge. Further, that the pages discuss items that were included in a briefing to a minister. As such, it asserted, the emails reflect consultations among members of the Executive Council on a matter that relates to the making of a government decision.
- [34] For page 12, Central Services asserted that the project manager consulted the Deputy Minister regarding next steps and matters related to the land purchase. Further, the project manager provided speculation on market value estimates and considerations

regarding current land owners. Finally, the project manager was seeking direction related to the Global Transportation Hub (GTH) requirements for the land purchase.

[35] From a review of pages 9 to 11, they appear to contain discussions back and forth between senior leadership within the GTH and the Deputy Minister of Central Services. The information severed includes opinions and recommendations for items to discuss with the minister responsible. According to the emails, a meeting with the minister was scheduled to occur around the time of the emails. I find that the severed information, if released, would reveal cabinet confidences such as analysis, deliberations and decisions of Cabinet. Therefore, I find that Central Services appropriately applied subsection 16(1) of FOIP to the information on pages 9 to 11. I recommend the information continue to be withheld.

[36] Page 12 does not appear to contain any information that if released, would reveal a confidence of cabinet. In fact, the email refers to preparation for a meeting between the Deputy Minister and the GTH. There is no reference to meeting with Cabinet or briefing the minister in this email. Therefore, I find that subsection 16(1) of FOIP was not appropriately applied to this page. Central Services also applied subsections 17(1)(a), (b) and (c) to this email. I will consider the information further under these provisions.

### **3. Did Central Services properly apply subsection 17(1)(a) of FOIP?**

[37] 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;

[38] 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?

[39] Central Services applied subsection 17(1)(a) of FOIP to pages 2, 3, 4 and 12. Pages 2 and 3 are an attachment to an email. The attachment is titled, *Work Plan for the Global Transportation Hub Proposed Land Acquisitions*. Central Services withheld portions of the attachment. Pages 4 and 12 are emails. Central Services withheld the body of the emails.

[40] In its submission, Central Services asserted that the information withheld on pages 2 and 3 describe proposed initial steps in the development of a work plan for Central Services to provide realty services to GTH to purchase three adjoining sites. Further, Central Services asserted that the information withheld on pages 4 and 12 constitutes advice, recommendations and analyses to senior officials regarding the commercial speculation pertaining to the subject property. Finally, the information was provided to support strategic decision-making.

[41] Central Services is asserting that the information withheld on pages 2, 3, 4 and 12 constitutes advice, recommendations, analyses and proposals.

[42] *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.

- [43] *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.
- [44] *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.
- [45] 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.
- [46] From a review of pages 2 and 3, the information severed does not appear to fit any of the definitions noted above. Page 2 contains steps to be taken going forward with the purchase and page 3 appears to be factual information about the cost of a particular parcel of land. Therefore, I find that pages 2 and 3 do not meet the first part of the test. As such, Central Services did not appropriately apply subsection 17(1)(a) of FOIP to the information on these pages. Central Services also applied subsections 17(1)(b), (c) and 18(1)(e) of FOIP to this information. I will consider this information further under those provisions.
- [47] Pages 4 and 12 are emails. The information severed appears to constitute analyses, advice and recommendations as defined above. Therefore, the information meets the first part of the test. In addition, the emails were sent by a project manager and would have been part of the responsibility of this employee. It appears to have been prepared for the purpose of taking an action and making a decision with regards to the purchase of the land. Further, it appears to have been prepared for Central Services as it was its employee that wrote and sent the emails. Therefore, the second and third parts of the test have been met. As such, I find that Central Services appropriately applied subsection 17(1)(a) of FOIP to pages 4 and 12. I recommend Central Services continue to withhold the information on these pages.

**4. Did Central Services properly apply subsection 17(1)(b) of FOIP?**

[48] 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;

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

[50] 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.

[51] 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.

[52] 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.

[53] Central Services applied subsection 17(1)(b) of FOIP to information on pages 2, 3 and 13. Pages 2 and 3 have already been described above. In its submission, Central Services asserted that pages 2 and 3 constitute a consultation as the project manager consulted the Deputy Minister regarding the proposed initial steps for Central Services to provide real estate services to the GTH.

[54] Based on the definition above, I do not find that the information on pages 2 and 3 constitute a consultation. The project manager has laid out four initial work plan steps on page 2. The information on page 3 appears to be factual information about the cost of a parcel of land. There does not appear to be any consultation or deliberation involved. The work plan appears to be in its final format and is being shared with the Deputy Minister. The project manager does not appear to be requesting approval or feedback. The email which included the work plan attachment speaks about other tasks the project manager will be moving on to complete. Therefore, I find that pages 2 and 3 do not qualify as consultations or deliberations. As such, I find that Central Services did not appropriately apply subsection 17(1)(b) of FOIP to these pages. Central Services also applied subsections 17(1)(c) and 18(1)(e) of FOIP to these pages. I will consider this information further under those provisions.

[55] Page 13 is an email. Central Services withheld the content of the email. In its submission, it asserted that the project manager was consulting the Deputy Minister about the requirements of the GTH in relation to the land purchase.

[56] From a review of this page, it appears the project manager needed certain information from the GTH and was discussing this with the Deputy Minister. I agree with Central Services that the information constitutes a consultation. Therefore, I find that Central Services appropriately applied subsection 17(1)(b) of FOIP to this information. I recommend Central Services continue to withhold it.

## **5. Did Central Services properly apply subsection 17(1)(c) of FOIP?**

[57] Subsection 17(1)(c) 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:

...  
(c) 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.

- [58] In order for subsection 17(1)(c) of FOIP to apply, the following three part test must be met:
1. Does the record contain positions, plans, procedures, criteria, instructions or considerations that relate to the contractual or other negotiations?
  2. Were they developed for the purpose of contractual or other negotiations?
  3. Were the contractual or other negotiations being conducted by or on behalf of a public body?
- [59] Only pages 2 and 3 remain for consideration in this review. Central Services applied subsection 17(1)(c) of FOIP to the information on these pages. The information has already been described earlier in this report.
- [60] In its submission, Central Services asserted that page 2 contained a plan regarding the land purchase strategy prepared by the project manager for the Deputy Minister. Page 3 includes considerations used in the negotiation of land which included information about the subject property.
- [61] A *plan* is a formulated and especially detailed method by which a thing is to be done; a design or scheme.
- [62] *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.
- [63] From a review of the information on pages 2 and 3, I agree with Central Services. Page 2 constitutes the plan and page 3 contains considerations. Therefore, I find that the first part of the test is met.
- [64] Central Services asserted that the plan and considerations were developed for the purpose of land sale negotiations. Further, the negotiations were a joint effort between Central Services and the GTH. The negotiations were with the land owners.

[65] Based on these arguments and a review of the information in the record, I find that the second and third parts of the test are met. Therefore, I find that subsection 17(1)(c) of FOIP has been appropriately applied. As such, I recommend that Central Services continue to withhold the information.

#### **IV FINDINGS**

[66] I find that the extension applied by Central Services was not necessary and not in keeping with FOIP.

[67] I find that subsection 16(1) of FOIP was appropriately applied to some of the information and inappropriately applied to other information.

[68] I find that subsection 17(1)(a) of FOIP was appropriately applied to some of the information and inappropriately applied to other information.

[69] I find that subsection 17(1)(b) of FOIP was appropriately applied to some of the information and inappropriately applied to other information.

[70] I find that subsection 17(1)(c) of FOIP was appropriately applied by Central Services to some of the information.

#### **V RECOMMENDATIONS**

[71] I recommend that Central Services consider issuing fee estimates within the first three to ten days of an access to information request being received so that it still has processing time after the deposit is paid.

[72] I recommend that Central Services continue to withhold the information on the nine pages.

Dated at Regina, in the Province of Saskatchewan, this 11<sup>th</sup> day of April, 2017.

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