



REVIEW REPORT 280-2020

Ministry of Environment

September 23, 2021

Summary: The Ministry of Environment (Environment) received an access to information request, and denied the Applicant access to the records pursuant to subsections 16(1), 17(1)(a), 17(1)(b)(i),(ii),(iii), 17(1)(c) and 17(1)(g) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found subsection 16(1) of FOIP did not apply to information in the record that is factual or publicly known, but that subsection 16(1) of FOIP did apply to the remaining severed portions of the record. As such, the Commissioner had no need to review the other exemptions Environment applied to the record. The Commissioner recommended Environment continue to withhold or release information accordingly.

I BACKGROUND

[1] On November 18, 2020, the Ministry of Environment (Environment) received an access to information request from the Applicant as follows:

Please provide the first four pages of all briefing notes prepared for the new minister.

[2] In correspondence dated December 15, 2020, Environment responded to the Applicant with the following:

Access to the records you have requested is denied pursuant to sections 16(1), 17(1)(a), 17(1)(b)(i),(ii),(iii), 17(1)(c) and 17(1)(g) of *The Freedom of Information and Protection of Privacy Act* (the Act). The reason for refusal is because the records were created to present analyses to Executive Council.

[3] On December 15, 2020, the Applicant asked my office to review Environment's decision.

[4] On December 18, 2020, my office notified the Applicant and Environment of my office’s intent to undertake a review of Environment’s decision to deny access to the records pursuant to subsections 16(1), 17(1)(a), 17(1)(b)(i),(ii),(iii), 17(1)(c) and 17(1)(g) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

II RECORDS AT ISSUE

[5] At issue are 25 briefing notes totalling 65 pages that Environment has withheld in full pursuant to subsection 16(1) of FOIP. Environment provided my office with a severed copy of the records, and I am able to see the information that has been severed. Environment applied its exemptions on the severed copy as follows:

Page	FOIP Exemption Applied	Category
1	16(1), 17(1)(a),(b)(i),(ii),(iii),(c),(g)	Briefing Note 1
4	16(1), 17(1)(a),(b)(i),(ii),(c),(g)	Briefing Note 2
6	16(1), 17(1)(a),(b)(i),(ii),(iii),(c),(g)	Briefing Note 3
10	16(1), 17(1)(a),(b)(i),(ii),(c),(g)	Briefing Note 4
13	16(1), 17(1)(a),(b)(i),(ii)	Briefing Note 5
15	16(1), 17(1)(a),(b)(i),(ii)	Briefing Note 6
17	16(1), 17(1)(a),(b)(i),(ii),(c)	Briefing Note 7
20	16(1), 17(1)(a),(b)(i),(ii),(c)	Briefing Note 8
24	16(1), 17(1)(a),(b)(i),(ii),(c)	Briefing Note 9
26	16(1), 17(1)(a),(b)(i),(ii),(c), 22(a)	Briefing Note 10
28	16(1), 17(1)(a),(b)(i),(ii)	Briefing Note 11
32	16(1), 17(1)(a),(b)(i),(ii)	Briefing Note 12
34	16(1), 17(1)(a),(b)(i),(ii)	Briefing Note 13
36	16(1), 17(1)(a),(b)(i),(ii),(c)	Briefing Note 14
38	16(1), 17(1)(a),(b)(i),(ii),(c)	Briefing Note 15

43	16(1), 17(1)(a),(b)(i),(ii),(c)	Briefing Note 16
45	16(1), 17(1)(a),(b)(i),(ii),(c)	Briefing Note 17
47	16(1), 17(1)(a),(b)(i),(ii)	Briefing Note 18
49	16(1), 17(1)(a),(b)(i),(ii),(iii),(c),(g)	Briefing Note 19
50	16(1), 17(1)(a),(b)(i),(ii)	Briefing Note 20
53	16(1), 17(1)(a),(b)(i),(ii),(c),(e)	Briefing Note 21
55	16(1), 17(1)(a),(b)(i),(ii)	Briefing Note 22
57	16(1), 17(1)(a),(b)(i),(ii)	Briefing Note 23
61	16(1), 17(1)(a),(b)(i),(ii)	Briefing Note 24
63	16(1), 17(1)(a),(b)(i),(ii), 29(1)	Briefing Note 25

[6] I note Environment included subsection 22(a) of FOIP on its index. Environment stated in its submission it would be providing separate arguments for subsection 22(a) of FOIP, which my office did not receive. I also note Environment does not appear to have marked on which portion of page 26 of the severed copy of the record it intended to claim subsection 22(a) of FOIP. Upon review of the entire copy of the severed record, I do not see that Environment has marked any portion with subsection 22(a) of FOIP. As such, I will not consider subsection 22(a) of FOIP in my analysis.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[7] Environment is a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did Environment properly apply subsection 16(1) of FOIP?

[8] Subsection 16(1) of FOIP 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).

[9] Subsection 16(1) of FOIP is a mandatory class-based provision. Subsections 16(1)(a) through (d) are not an exhaustive list. Therefore, even if none of the subsections are found to apply, the introductory wording of subsection 16(1) must still be considered – is the information a confidence of Executive Council (*Guide to FOIP, Chapter 4: Exemptions from the Right of Access*, Updated: April 30, 2021, at page 93 (Guide to FOIP))

[10] *Including* means the list of information that follows is incomplete (non-exhaustive). The examples in the provision are the types of information that could be presumed to disclose a confidence of the Executive Council (Cabinet) (Guide to FOIP, p. 94).

[11] *Executive Council* means the Executive Council appointed pursuant to *The Executive Government Administration Act*. It consists of the Premier and Cabinet Ministers. Executive Council is also referred to as “Cabinet”. Cabinet has also been defined as the committee of senior ministers (heading individual provincial government ministries) which acts collectively with the Premier to decide matters of government policy (Guide to FOIP, p. 100).

[12] The severed briefing notes include different topics meant to brief the new Minister. In its submission, Environment stated as follows:

Subsection 16(1) of FOIP has been applied to all the information responsive to this access request because the information was contained in a binder that was prepared for and presented to the new Minister of Environment in Cabinet on November 9, 2020. The exemption has been applied in full to pages 1 to 65. The briefing notes were provided to brief the new Minister of the Minister's responsibilities and new portfolio. While the Ministry recognizes that subsection 16(1) applies to all the information in its entirety given the circumstances under which it was presented to the new Minister, the exemption also has been applied specifically to certain pages because that information would reveal the substance of other deliberations of Cabinet. Subsection 16(1) has been applied in full to pages 1 to 3, 6 to 9 and 49 and in part to pages 20, 21 and 44. The exemption applies to those portions of the record because those portions would disclose a confidence of the Executive Council for additional reasons than because they are briefing notes that were in the transition binder provided to the new Minister during a Cabinet meeting.

[13] In Review Reports 023-2015, 021-2015 and 032-2015, I considered the application of subsection 16(1) of FOIP to briefing binders. In those reports, I stated this exemption applied only to the parts of a record that contained a *cabinet confidence*. In Review Report 023-2015 at paragraph [20], I defined *cabinet confidence* as follows:

[20] Cabinet confidences can be generally 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 p. 1-644.4)

[14] In those reports, I further outlined that, as a result, briefing binders may contain various types of documents that would not necessarily be caught by this exemption, including documents containing information that has already been revealed and is publicly available. Other documents may include organizational charts, financial information, information on mandate and mission of the government institution, senior management profiles, and documents containing information relating to the government institution, such as strategies and issues to address.

- [15] Paragraph [63] of my office’s Review Report F-2012-004, also stated that, “[b]ackground materials for Cabinet that contain essentially factual information usually should be available to the public and would not warrant the same confidentiality that applies to Cabinet confidences”. This type of information is often captured in the “background” section of a briefing note.
- [16] Upon review of the severed copy of the briefing notes provided by Environment, I note the following pages appear to contain information that may be publicly available, or may contain background information or information that is factual: 4, 5, 7, 10, 13, 15, 17, 24, 26, 28, 32, 34, 38, 43 to 47, 50, 53, 57, 59 and 60. I base this on my office having undertaken an Internet search for information contained in the briefing notes. I recommend Environment review these pages and release to the Applicant the portions containing publicly known or factual information.
- [17] I also note that if information is publicly available and/or factual, exemptions set out in Part III of FOIP (not just subsection 16(1) of FOIP) would not apply.
- [18] Upon review of the remainder of the severed briefing notes, I find the severed portions would qualify as a Cabinet confidence for the purposes of subsection 16(1) of FOIP. For example, I note page 6 contains information regarding matters likely to be considered by Cabinet in the future. I recommend Environment continue to withhold this information pursuant to subsection 16(1) of FOIP.
- [19] As stated previously in this Report, Environment severed portions of the briefing notes it provided to my office for review. This type of severing is my preference and indicates a government institution has given consideration to portions of a record it should withhold, and those portions it can release. This meets a government institution’s responsibility to conduct a line-by-line review of a record pursuant to section 8 of FOIP, which provides as follows:

8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

[20] As I have found subsection 16(1) of FOIP applies to the severed information in the record as I have outlined at paragraphs [15] and [17] of this Report, I do not need to consider Environment's application of subsections 17(1)(a), (b)(i),(ii),(iii), (c) and (g) of FOIP to the record.

IV FINDINGS

[21] I find that subsection 16(1) of FOIP does not apply, in full, to the record as some information is background factual information, or is publicly available, as I have outlined at paragraph [16] of this Report.

[22] I find subsection 16(1) of FOIP applies to the severed portions of the record as I have outlined at paragraphs [16] and [18] of this Report.

V RECOMMENDATION

[23] I recommend Environment release information as I have outlined at paragraph [16] of this Report, and continue to withhold information as I have outlined at paragraph [18] of this Report.

Dated at Regina, in the Province of Saskatchewan, this 23rd day of September, 2021.

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