



REVIEW REPORT 289-2019

SaskBuilds Corporation

July 13, 2020

Summary:

SaskBuilds Corporation (SaskBuilds) received an access to information request for the 10 year integrated capital planning list. SaskBuilds denied access to a portion of the record pursuant to subsection 16(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that subsection 16(1)(a) of FOIP applies and recommended that SaskBuilds continue to withhold the severed portions of the record.

I BACKGROUND

[1] On August 21, 2019, SaskBuilds Corporation (SaskBuilds) received the following access to information request from the Applicant:

Please provide the most current list of community capital project prioritized for funding for the next 10 years.

[2] SaskBuilds contacted the Applicant on August 21, 2019, and clarified they were seeking access to the 10 year integrated capital planning list. SaskBuilds also advised the Applicant that it does not have a community-based list.

[3] By letter dated August 26, 2019, SaskBuilds responded to the request denying access to a portion of the record pursuant to subsection 16(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[4] On September 4, 2019, the Applicant requested a review of SaskBuilds decision to deny access pursuant to subsection 16(1)(a) of FOIP.

[5] On September 10, 2019, my office notified SaskBuilds and the Applicant of my office's intention to undertake a review and invited both parties to make a submission.

II RECORD AT ISSUE

[6] The record is one page that SaskBuilds has withheld in part pursuant to subsection 16(1)(a) of FOIP.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction to review this matter?

[7] SaskBuilds qualifies as a government institution pursuant to subsection 2(1)(d)(ii) of FOIP and section 3 and PART I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations*. Therefore, my office has jurisdiction to review this matter.

2. Did SaskBuilds properly apply subsection 16(1)(a) of FOIP to the withheld record?

[8] SaskBuilds has withheld a portion of the 10 year integrated capital planning list table. It released the table's heading names and row numbers, but has withheld the contents of the table pursuant to subsection 16(1)(a) of FOIP.

[9] Subsection 16(1)(a) of FOIP provides:

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, proposal, recommendations, analyses or policy option to the Executive Council or any of its committees;

[10] As outlined in my office's *Guide to FOIP: Chapter 4* (updated February 4, 2020) (Guide to FOIP) starting on page 94, subsection 16(1)(a) of FOIP permits refusal of access in situations where release of a record could disclose a confidence of Cabinet including records created to present advice, proposals, recommendations, analyses or policy options to Cabinet or any of its committees.

[11] *Cabinet confidences* are 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.

[12] *Including* means that the list of information that follows is incomplete (non-exhaustive). The examples in subsection 16(1)(a) of FOIP are the types of information that could be presumed to disclose a confidence of the Executive Council (Cabinet).

[13] The Guide to FOIP starting at page 95 includes the following two part test to determine if subsection 16(1)(a) of FOIP applies to the information being withheld:

1. Does the record contain advice, proposals, recommendations, analyses or policy options?
2. Was the record created to present to Cabinet or any of its committees?

[14] I will now consider each part of the test.

1. Does the record contain advice, proposals, recommendations, analyses or policy options?

[15] In its submission, SaskBuilds asserts that the withheld information constitutes advice, recommendations and analyses. The Guide to FOIP starting at page 95 provides context around the meaning of each of these terms.

[16] *Advice* is guidance offered by one person to another. It can include 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 encompasses material that permits the drawing of

inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It can be an implied recommendation. The “pros” and “cons” of various options also qualify as advice. It should not be given a restricted meaning. Rather, it should be interpreted to include an opinion that involves exercising judgement and skill in weighing the significance of fact. It includes expert opinion on matters of fact on which a public body must make a decision for future action.

[17] *Advice* includes the views or opinions of a public servant as the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.

[18] A *recommendation* is a specific piece of advice about what to do, especially when given officially; a suggestion that someone should choose a particular thing or person that one thinks is particularly good or meritorious. Recommendations relate to a suggested course of action more explicitly and pointedly than advice. It can include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person(s) being advised. A recommendation includes suggestions for a course of action as well as the rationale or substance for a suggested course of action. A recommendation can be express or inferred.

[19] *Analyses* is a detailed examination of the elements or structure of something. It is the process of separating something into its constituent elements.

[20] SaskBuilds described its role and mandate in its submission. It advised it is a Treasury Board Crown with a mandate to integrate, coordinate and prioritize infrastructure spending of the Province of Saskatchewan. The Corporation provides advice and recommendations for infrastructure planning and delivery by advancing major projects through contract oversight, innovative approaches to development and alternative financing models such as public-private partnerships.

[21] In its submission, SaskBuilds further advised that the responsive record is the integrated capital plan list, which is a confidential document that is prepared by the Integrated Capital

Planning Review Committee (Committee). The Committee is comprised of members from the Ministries of Finance, Government Relations, Trade and Export Development, Central Services, Social Services and the Crown Investment Corporation. It notes that the record is prepared annually to present options and recommendations for budget purposes to the SaskBuilds Board, Treasury Board and Cabinet.

[22] Therefore, I am satisfied the withheld information constitutes a recommendation. As I am satisfied that the withheld information constitutes a recommendation, I do not need to consider if it is also advice or analysis.

[23] I will now consider the second part of the test.

2. Was the record created to present to Cabinet or any of its committees?

[24] The Guide to FOIP outlines records that contain advice, proposals, recommendations, analyses or policy options developed from sources outside of the Executive Council for presentation to the Executive Council are intended to be covered by the provision. In addition, a draft or final memorandum that was created for the purpose of presenting proposals and recommendations to Cabinet but that was never actually presented to Cabinet, remains a confidence.

[25] *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 commonly referred to as Cabinet.

[26] A *committee of the Executive Council*, also known as a Cabinet committee, includes one or more Cabinet ministers. The committee exercises some or all of the powers of Cabinet as a whole, or develops and provides recommendations to Cabinet. Also included in the definition is an entity or individual to which the Executive Council or any of its committees has delegated decision-making authority on their behalf. My office has formally found that the Treasury Board is a Cabinet committee.

[27] In its submission, SaskBuilds advised my office that the record is recognized as a decision making tool that forms several pieces of advice and recommendations to senior government officials, the SaskBuilds board and Cabinet, including the Treasury Board for budget purposes. I am satisfied that the second part of the test has been met.

[28] I find subsection 16(1)(a) of FOIP applies to the withheld portions of the record.

IV FINDING

[29] I find subsection 16(1)(a) of FOIP applies to the withheld portions of the record.

V RECOMMENDATION

[30] I recommend SaskBuilds continue to withhold the severed portions of the record.

Dated at Regina, in the Province of Saskatchewan, this 13th day of July, 2020.

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