



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT

291-2017, 347-2017, 234-2018, 235-2018

Ministry of Trade and Export Development
Ministry of Immigration and Career Training

February 4, 2019

Summary:

The Applicant submitted an access to information request to the former Ministry of the Economy, now the Ministry of Trade and Export Development and the Ministry of Immigration and Career Training (the Ministries). The Ministries denied access to a portion of the record pursuant to subsections 17(1)(a), 17(1)(b)(i), 17(1)(c), 18(1)(d) and 18(1)(f) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant requested a review by my office of the use of these exemptions and the search conducted by the Ministries. The Commissioner found that the search conducted was adequate and recommended the Ministries take no further action regarding the search. The Commissioner found some of the exemptions were appropriately applied to information, while others were not. The Commissioner recommended the Ministries release some of the withheld information and continue to withhold the information where exemptions were properly applied.

I BACKGROUND

[1] At the time of the access to information request, the Ministry of the Economy was a single ministry. However, during the course of the review, the Ministry of the Economy was split into three ministries: the Ministry of Energy and Resources, the Ministry of Trade and Export Development and the Ministry of Immigration and Career Training. My office has been advised that the records involved with this review are now in the possession and under the control of both the Ministry of Trade and Export Development (Trade and Export

Development) and the Ministry of Immigration and Career Training (Immigration and Career Training). This report will refer to both as the Ministries.

[2] The Applicant submitted an access to information request that was received by the Ministries on May 26, 2017, requesting access to:

Please provide all records which mention [Person A] and/or [Person B] and/or [Person C] and/or [Person D]. January 1, 2013 to present.

[3] On June 8, 2017, the Ministries contacted the Applicant to clarify the request and see if it was able to narrow the scope of the request with the Applicant. The Applicant responded indicating the files and accounts of the following employees were to be search:

- [former Deputy Minister of the Economy]
- [former Executive Director of Immigration Services]
- [Director, Greater China]

[4] By letter dated August 31, 2017, the Ministries responded to the request. In the response, they indicated they were denying access to a portion of the information pursuant to subsections 17(1)(b)(i), 17(1)(c) and 18(1)(f) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[5] My office received a Request for Review from the Applicant on November 14, 2017. On the form, the Applicant indicated the reason for the review was that partial or full access to the record was denied.

[6] On November 21, 2017, my office notified the Applicant and the Ministries of our intention to undertake a review of this matter pursuant to Part VII of FOIP and invited both parties to make a submission.

[7] On November 30, 2017, the Ministries released three additional pages to the Applicant after realizing there was a spelling error in one of the search terms when they initially responded to the request. The Ministries withheld a portion of the information pursuant to subsections 17(1)(a), 17(1)(b), 17(1)(c), 18(1)(d) and 18(1)(f) of FOIP.

- [8] On December 27, 2017, the Applicant advised my office that the original request for review also outlined that he would like the search efforts reviewed. Upon review of the covering email provided to our office by the Applicant, it was determined this was an oversight by my office.
- [9] On December 28, 2017, my office notified the Applicant and the Ministries that we would also be conducting a review of the search efforts undertaken to locate the records requested by the Applicant. My office invited both parties to make a submission.
- [10] When the Ministries replied to the Applicant, they relied on subsection 17(1)(b) of FOIP as a reason to withhold portions of information. In its submission, the Ministries clarified this and advised they were relying on subsection 17(1)(b)(i) of FOIP. Therefore, this review will consider whether the Ministries appropriately applied subsections 17(1)(a), 17(1)(b)(i), 17(1)(c), 18(1)(d) and 18(1)(f) of FOIP to the record.
- [11] Through emails with the FOIP Officer, my office realized that the responsive records now belonged to two ministries instead of one. Therefore, my office opened two additional files so I am able to make recommendations to the head of each Ministry.

II RECORDS AT ISSUE

- [12] The Ministries have withheld information found on six pages of the responsive record. This includes four pages of information provided to the Applicant in release #1 on August 31, 2017 (information found on pages 1.1, 1.2, 1.5 and 1.6) and two pages of information provided to the Applicant in release #2 on November 30, 2017 (information found on pages 2.1 and 2.2). My office will also review the Ministries' search efforts.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[13] The Ministries are each considered a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Thus, I have authority to conduct this review.

2. Did the Ministries conduct an adequate search?

[14] Section 5 of FOIP provides an individual the right to access records of a government institution. This section is clear that access to records must be granted if they are in the possession or control of a government institution subject to any exemptions under Part III of FOIP. Section 5 of FOIP provides:

5 Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the possession or under the control of a government institution.

[15] FOIP does not require a public body to prove with absolute certainty that records responsive to an access to information request do not exist. However, it must demonstrate that it has conducted a reasonable search in order to locate the records.

[16] The focus of a search review is whether or not the public body conducted a reasonable search. A reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to located records related to the record. A reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances.

[17] When a public body is demonstrating search efforts, the following can be included in the public body’s submission to outline its search strategy. I would like to note this is not an exhaustive list when demonstrating search efforts:

- For personal information requests – explain how the individual is involved with the public body (i.e. client, employee, former employee, etc.) and why certain departments/divisions/branches were included in the search.
- For general requests – tie the subject matter of the request to the departments/divisions/branches included in the search. In other words, explain why certain areas were searched and not others.
- Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
- Explain how the records management system is organized (both paper and electronic) in the departments/divisions/branches included in the search:
 - Describe how records are classified within the records management system. For example, are the records classified by:
 - alphabet
 - year
 - function
 - subject
 - Consider providing a copy of your organizations record schedule and screen shots of the folders and sub-folders of the electronic directory. If the record has been destroyed, provide copies of record schedules and/or destruction certificates.
 - Explain how you have considered records stored offsite.
 - Explain how records that may be in the possession of a third party but in the public body's control have been searched such as contractor or information service provider.
 - Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Which folders within the records management system were searched and explain how these folders link back to the subject matter requested?
 - For electronic folders – indicate what key terms were used to search if applicable.
- On what dates did each employee search?
- How long did it take for each employee to search?

- What were the results of each employee's search?
 - Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided. For more on this, see the IPC resource, *Using Affidavits in a Review with the IPC* available on our website.

[18] The above list is meant to be a guide. Providing the above details is not a guarantee that this office will find that the search efforts are reasonable. Each case will require different search strategies and details depending on the records requested.

[19] I note that the Applicant's request is limited to the records of the former Deputy Minister of the Economy, the former Executive Director of Immigration Services, and the Director, Greater China.

[20] In its submission, the Ministries outlined that they received 16 Access to Information requests, all referring or relating to the same or similar information. Therefore, it was determined that a meeting with all of the affected officials was needed to learn where potential overlap in records may occur and to determine who and what areas were responsible for the records for each of the 16 requests. During that meeting, they were able to determine which divisions were associated with each of the 16 requests.

[21] Further, the divisions were advised to use the *Responsive Records Search Log* (Search Log) to document the search efforts. The Ministries noted that the Search Log, at the time, was being introduced to the Ministries as a new process. The Ministries advised my office that the purpose of the Search Log is to ensure that divisions with records conduct a thorough search for records when an Access to Information request is received. The Search Log details the search, when the search was conducted, how long it took, what was searched and why. The Search Log also ensures that in the event that a request for review is pursued by the Applicant, there is proper documentation in place to support the search conducted. In an earlier report, I have commented favorably on use of a Search Log and have encouraged other public bodies to adopt this practice.

[22] The search was conducted by the Assistant to the former Deputy Minister of the Economy, the former Executive Director of Immigration Services and the Director, Greater China. For each search that was conducted, the Search Log was completed. The three completed Search Logs provided my office with the following detail including the length of time to conduct each type of search:

- the computer's directories;
- email accounts;
- calendars;
- paper records (if records were retained this way); and
- offsite storage.

[23] As noted above, there was a spelling mistake made for one of the names when the Assistant to the former Deputy Minister of the Economy conducted the original search. The Ministries also provided my office with a second Search Log outlining that a new search was conducted for that particular name and that additional pages were located. The spelling error was a result of human error, but I commend the Ministries for recognizing and rectifying it.

[24] Finally, three additional employees conducted searches for records and completed the Search Log even though they were not specifically named in the request. The Ministries informed me that this ensured a thorough search was conducted of the network drives for former employees that previously occupied the positions. As I noted in Review Report 292-2017, 348-2017:

[29] It is a good practice for public bodies to have more than one area searched, even for requests that are directed at records of one official. This provides an extra assurance that all the responsive records are located.

[25] From the information the Ministries provided to my office, I am satisfied they conducted a reasonable search for records. Therefore, I find the Ministries conducted an adequate search for the responsive records.

3. Did the Ministries properly apply subsection 17(1)(a) of FOIP to the record?

[26] The Ministries applied subsection 17(1)(a) of FOIP to portions of information found on pages 1.1, 1.2, 2.1 and 2.2.

[27] Subsection 17(1)(a) 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:

(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;

[28] The exemption is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice or all records related to the advice. The object of the provision includes maintaining an effective and neutral public service capable of producing full, free and frank advice.

[29] In order to be found to apply, all three parts of the following test must be met:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. Were the advice, recommendations, proposal, analyses and/or policy options:
 - i. sought, expected, or part of the responsibility of the person who prepared the record; and
 - ii. prepared for the purpose of doing something, for example, taking an action or making a decision; and
 - iii. involved or intended for someone who can take or implement the action?
3. Was the advice, recommendations, analyses and/or policy option developed by or for the public body?

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

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

- [31] *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 the facts. Advice includes the views or opinions of a public servant as to 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.
- [32] *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.
- [33] *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.
- [34] In summary, 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 a course of action.
- [35] In its submission, the Ministries have outlined that the information found on the bottom of page 1.1 that continues to the top of page 1.2 qualifies as advice based upon an employee's interpretation of a policy. Upon review of the record, the redacted information is not analysis, but a recommendation as an official has recommended a course of action. As recommendations are included in this provision, the first part of the test has been met.
- [36] The Ministries have withheld a portion of information on the top of page 2.1. In its submission it asserts that the information qualifies as advice as it is an analysis of a situation and a presentation of options. From a review of the record, I disagree. This information does not analyze a situation, it presents factual information. For example, a portion of the

information that has been redacted is a list of participants. The remaining information is also factual. Therefore, the first part of the test has not been met for this information.

[37] The Ministries have withheld a portion of information on page 2.2. In its submission, the Ministries assert that this information is recommended key messages, and a suggested course of action for the purpose of a meeting. From a review of the record, I agree that this information is a recommendation, therefore the first part of the test has been met for this information.

[38] I will now consider the second part of the test for the information found on the bottom of pages 1.1, 1.2 and 2.2.

Were the advice, recommendations, proposal, analyses and/or policy options:

- i. sought, expected, or part of the responsibility of the person who prepared the record; and*
- ii. prepared for the purpose of doing something, for example, taking an action or making a decision; and*
- iii. involved or intended for someone who can take or implement the action?*

[39] For this part of the test to be met, the information does not have to have been received by the person who can take or implement the action in order to qualify as advice, recommendations, proposals, analyses and/or policy options.

[40] Drafts and redrafts of advice, recommendations, proposals, analyses and/or policy options may be protected by the exemption. A public servant may engage in writing any number of drafts before communicating part or all of their content to another person. The nature of the deliberative process is to draft and redraft advice or recommendations until the writer is sufficiently satisfied that he is prepared to communicate the results to someone else. All the information in those earlier drafts informs the end result even if the content of any one draft is not included in the final version. For example, in Review Report 216-2017, I found that edits and comments (track changes) within draft policies qualified as recommendations.

[41] In its submission, the Ministries have outlined that the information found on the bottom of page 1.1 that continues to the top of page 1.2 was prepared by a Global Transportation Hub Authority (GTHA) employee as part of the employee's responsibilities. From a review of the record, I agree. Further, this information was prepared for the purpose of doing something and was intended for someone who can take or implement the action, the President of the GTHA. Therefore the second part of the test has been met for this record.

[42] For the information found on page 2.2, the Ministries have noted the information was prepared by a GTHA employee whose responsibility is to provide key messages for these types of meetings. From a review of the record, I agree that the key messages were prepared by the GTHA employee as recommended key messages for the meeting. Therefore, the second part of the test has been met for this information.

[43] As the second part of the test has been met for the information found on pages 1.1, 1.2 and 2.2, I will now consider the third part of the test.

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

[44] For information to be developed by or for a public body, the person developing the information should have one of the following relationships with the public body:

- be an official, officer or employee;
- be contracted to perform services;
- be specifically engaged in an advisory role, even if not paid; or
- have a specific connection.

[45] Further, the role of the individual(s) involved should be explained by the public body and the information must have been developed by or for a government institution or a member of Executive Council.

[46] The provision is not meant to protect the bare recitation of facts, without anything further. It does not generally apply to records or parts of records that in themselves reveal only the following:

- that advice was sought or given;
- that particular persons were involved in the seeking or giving of advice; or
- that advice was sought or given on a particular topic or at a particular time.

[47] The information found on pages 1.1 and 1.2 is a recommendation prepared by a GTHA employee for the GTHA President. The GTHA is a government institution, however it is separate from the Ministries. Further, the email in which this recommendation appears is between the two GTHA officials and not outside officials. Just over 30 minutes after that email was sent, the President of the GTHA forwarded it to officials within the Ministries, referencing the information he sought. From a review of the record, I note that the GTHA and the Ministries were interconnected on this particular issue.

[48] As noted above, for information to be developed by or for a public body, the person developing the information should have one of the noted relationships with the public body. These relationships include having a specific connection with the public body. As the recommendation was forwarded to the Ministries and the GTHA and the Ministries were interconnected on this issue, the third part of the test has been met for this information.

[49] The information found on page 2.2 was prepared by a GTHA employee for several officials, including officials in the Ministries. Therefore, the third part of the test has been met.

[50] I find subsection 17(1)(a) of FOIP applies to the portions of information found on pages 1.1, 1.2 and 2.2.

3. Did the Ministries properly apply subsection 18(1)(f) of FOIP to the record?

[51] The Ministries have applied subsection 18(1)(f) of FOIP to portions of information found on pages 1.1, 1.5, 1.6, 2.1 and 2.2. I would like to note that the same information has been redacted on pages 1.5 and 1.6.

[52] Subsection 18(1)(f) 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:

...

(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution;

[53] In this context, *prejudice* refers to detriment to economic interests. *Economic interest* refers to both the broad interests of a public body and for the government as a whole, in managing the production, distribution and consumption of goods and services. The term also covers financial matters such as the management of assets and liabilities by a public body and the public body's ability to protect its own or the government's interests in financial transactions.

[54] For this provision to apply there must be objective grounds for believing that disclosing the information could result in prejudice.

[55] The Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner)*, 2014, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) set out the standard of proof for harms-based provisions as follows:

This Court in *Merk Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could be reasonably expected to” language is used in access to information statutes. As the Court in *Merk Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how

much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and the “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”...

- [56] The parties do not have to prove that a harm is probable, but need to show that there is a “reasonable expectation of harm” if any of the information were to be released. In *British Columbia (Minister of Citizens’ Services) v. British Columbia (Information and Privacy Commissioner)*, 2012, 2012 BCSC 875 (CanLII), Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.
- [57] Public bodies should not assume that the prejudice is self-evident. Particularity in describing the prejudice is needed to support the application of the provision.
- [58] For the information that has been withheld on page 1.1, the Ministries have not provided enough detail to describe why there would be a reasonable expectation of harm if the information was released. It has stated that it could have some impact on upcoming land sales but not how. Therefore, I have not been persuaded that subsection 18(1)(f) of FOIP was properly applied to this information.
- [59] As noted above, the same information has been withheld under this exemption on pages 1.5 and 1.6. In its submission, the Ministries have outlined that the name of the company, if released, would link the company to Brightenvue and that it could have a negative impact on the company given the recent media attention. Further, it notes that releasing this information could put the company in a situation where they no longer want to negotiate for inclusion at the GTHA. It was not outlined in the submission if there was a relationship between the company and Brightenvue. For example, was the company entering into a partnership at the GTHA or was the company simply at the same meeting with Brightenvue? Lacking sufficient detail, the Ministries have not persuaded me that subsection 18(1)(f) of FOIP was properly applied.
- [60] In response to the draft report, the Ministries noted that one of the findings (paragraph [105] below) may be in conflict with Review Report 157-2016 (GTHA). The Ministries asserted that it was their understanding that the information found on pages 1.5 and 1.6 is similar in

nature to information that was found to be accurately redacted in Review Report 157-2016. They asserted that paragraph [52] of Review Report 157-2016 supports the redaction of this information from the GTHA pursuant to subsection 18(1)(f) of FOIP.

[61] Each review is conducted on a case-by-case basis. In Review Report 157-2016, the GTHA included arguments in its submission that supported the use of the exemption. However in this review, the Ministries did not include arguments that persuaded my office that the exemption applied.

[62] Finally, the Ministries noted they believe there should be consistency in the recommendations from my office. To that, I remind the Ministries that section 61 of FOIP places the burden on government institutions to prove that an exemption applies. That burden is not placed on my office. Section 61 of FOIP provides:

61 In any proceeding pursuant to the Act, the burden of establishing that access to the record applied for may or must be refused or granted **is on the head concerned**. [Emphasis added].

[63] For each case, in order for an exemption to be found to apply, public bodies must successfully demonstrate that the exemption applies. The exception would be if my office was considering a mandatory exemption. However, subsection 18(1)(f) of FOIP is a discretionary exemption, therefore, that is a moot point in this case.

[64] For the information that has been withheld on page 2.1 of the record, the Ministries have asserted in the submission that if released, this information could have a negative economic impact because of its potential to influence negotiations with Brightview or the willingness of the company to proceed with a land purchase at all. From a review of the record, there is information in the email that has already been released to the Applicant that specifically asks GTHA staff for the names of the Brightview team that will be at the meeting. The information that has been redacted are the names of the participants and their roles with the organization. These individuals are meeting in their official capacity as members of the organization, and I reiterate, that the Applicant has already been provided

information that this meeting took place. The officials cannot expect confidentiality placed on their names. Therefore, subsection 18(1)(f) of FOIP does not apply to this information.

[65] For the information that has been withheld on page 2.2, the Ministries have indicated that the information is a list of proposed future projects that may be entered into by Brightenvision. They further note that if this information is released, it could cause the projects to be withdrawn. The Ministries have demonstrated the reasonable expectation of harm should this information be released.

[66] I find that subsection 18(1)(f) of FOIP does not apply to the information withheld on pages 1.1, 1.5, 1.6 and 2.1, but does apply to the withheld information on the bottom of page 2.2.

4. Did the Ministries properly apply subsection 17(1)(c) of FOIP to the record?

[67] The Ministries applied subsection 17(1)(c) of FOIP to information withheld on pages 1.1 and 2.1.

[68] 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;

[69] The provision covers positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the public body. It also covers considerations related to the 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. In order to apply, all three parts of the following 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 the public body?

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

Does the record contain positions, plans, procedures, criteria, instructions or considerations that relate to the contractual or other negotiations?

[71] A *plan* is a formulated and especially detailed method by which a thing is to be done; a design or scheme. *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.

[72] For the information being withheld on page 1.1, the Ministries have advised in its submission that if released this information would reveal a plan for future negotiations on behalf of a government institution. The Ministries have explained how this is a plan. Further, as noted above a plan is formulated and especially detailed. What has been withheld here is only a few words, which do not formulate a plan. Therefore, the Ministries have not made the argument that this exemption applies. As such, the first part of the test has not been met.

[73] For the information being withheld on page 2.2, the Ministries advised that the information was a plan which was formulated for the purposes of a meeting, developed for the purposes of negotiations. Further, it advised that the release of this information may interfere with future negotiations with Brightenvue, as it includes a subjective ranking of the participants in a scheduled meeting.

[74] In the email that appears directly before this that has already been released to the Applicant, an official has requested the names of the Brightenvue team that will be at the meeting

and for that list to be ranked in terms of the participant's importance. To qualify, the information must be a plan that is formulated or especially detailed. Alternatively, the information must be procedures, criteria, instructions and consideration that cover information relating to the factors involved in developing a particular negotiating position or plan.

[75] The information that has been withheld on page 2.1 has been presented as a factual list of attendees. Further, the Applicant is already aware what organization has been met with, so why would the Ministries need to protect the officials that are being met with? Based on a review of the record the information does not fall under subsection 17(1)(c) of FOIP. Therefore, the first part of the test has not been met.

[76] I find that subsection 17(1)(c) of FOIP does not apply to the information withheld on pages 1.1 and 2.1.

5. Did the Ministries properly apply subsection 17(1)(b)(i) of FOIP to the record?

[77] The Ministries have applied subsection 17(1)(b)(i) of FOIP to information found on page 1.1.

[78] Subsection 17(1)(b)(i) 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;

[79] The provision is meant to permit public bodies to consider options and act without constant public scrutiny. A *consultation* occurs when the views of one or more officers or employees of a public body are sought as to the appropriateness of a particular proposal or suggested action. 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.

[80] 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 persons 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.

[81] Public bodies should identify those individuals involved in the consultations or deliberations, include the job title of each, list organization affiliation and clarification as to each individuals role in the decision making process. As the Ministries have claimed subsection 17(1)(b)(i) of FOIP, the deliberations must involve officers or employees of a government institution.

[82] The provision is not meant to protect the bare recitation of facts, without anything further. Further, the exemption does not generally apply to records or parts of records that in themselves reveal only the following:

- that a consultation or a deliberation took place at a particular time;
- that particular persons were involved; or
- that a particular topic was involved.

[83] In cases where this is an exception, the public body must demonstrate why. In Review Report 042-2015, the Commissioner found that Excel Workbooks that contained only raw numerical data did not fit the definition of a consultation or deliberation.

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

Were the opinions solicited during a consultation or deliberation sought, expected, or part of the responsibility of the person who prepared the record?

[85] In its submission, the Ministries have advised that the information withheld was part of a consultation with employees of a government institution. This is not enough information to persuade my office that this exemption applies. From a review of the record, the information that has been withheld is factual information and not a consultation or deliberation. Therefore, the first part of the test has not been met.

[86] I find that subsection 17(1)(b)(i) of FOIP does not apply to the information withheld on page 1.1.

6. Did the Ministries properly apply subsection 18(1)(d) of FOIP to the record?

[87] The Ministries have applied subsection 18(1)(d) of FOIP to information found on page 2.1.

[88] Subsection 18(1)(d) 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:

...

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution;

[89] In order for this exemption to be found to apply, both parts of the following test must be met:

1. Are the contractual or other negotiations occurring?
2. Could release of the record reasonably be expected to interfere with the contractual or other negotiations?

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

Are the contractual or other negotiations occurring?

[91] When providing submissions for this part of the test, public bodies should detail what is occurring and what parties are involved.

[92] When specifically addressing how this exemption applies, in its submission the Ministries did not state that the company was in negotiations with the Ministries. However, from other portions of the submission, I am able to conclude that there are contractual negotiations occurring. Therefore, the first part of the test has been met.

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

Could the release of the record reasonably be expected to interfere with the contractual or other negotiation(s)?

[94] 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 the public body.

[95] Subsection 18(1)(d) of FOIP is a harms-based provision. During my analysis of subsection 18(1)(f) of FOIP (see paragraphs [55] and [56] of this report), I described the standard of proof for harms-based provisions as set by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner)*, 2014, [2014] 1 SCR 674, 2014 SCC 31 (CanLII). That standard of proof is also applied to this section. As noted above, the parties do not have to prove that a harm is probable, but need to show that there is a “reasonable expectation of harm” if any of the information were to be released.

[96] Public bodies should not assume that the interference is self-evident. Particularity in describing the interference is needed to support the application of this provision.

[97] I would like to note that prospective or future negotiations could be included within this exemption, as long as they are foreseeable. Once a contract is executed, negotiation is concluded and then the exemption would generally not apply.

[98] In its submission, the Ministries advised that if the information is released it could have a negative impact because of the potential to influence negotiations with Brightenvue or the willingness of that company to proceed with a land purchase at all. It has not provided me with any particularity in describing the interference, which is a requirement of this test.

[99] In Review Report 311-2017, 312-2017, 313-2017, 316, 2017, 340-2017, 341-2017, 342-2017 (GTHA), I noted:

[75] One of the purposes of FOIP is to ensure government institutions are transparent and accountable to the public. While third parties are not subject to FOIP, a risk to third parties for entering into agreements with government is that information exchanged may be released under FOIP....Third parties, including Brightenvue, should not have an expectation that it can conduct business with government institutions in a vacuum without public scrutiny that is facilitated by FOIP....

[100] In this case, it is the Ministries raising the exemption and not the third party. However, the cost of doing business with government also includes that names of officials that are representing a private business may be made available under FOIP. I would also like to reiterate that the Applicant is aware that the meeting with Brightenvue occurred, so I cannot see the harm of releasing the name of the officials that were set to participate in the meeting.

[101] When public bodies are entering into agreements with the private sector, the public bodies should inform the organization that information subject to the agreement, contract, or in this case a list of meeting participants may be released. The underlying purpose of FOIP is to ensure that public bodies are open, transparent and accountable to the public.

[102] I find that subsection 18(1)(d) of FOIP does not apply to the information withheld on page 2.1.

IV FINDINGS

- [103] I find the Ministries conducted an adequate search for the responsive records.
- [104] I find subsection 17(1)(a) of FOIP applies to the portions of information found on page 1.1, 1.2 and 2.2.
- [105] I find that subsection 18(1)(f) of FOIP does not apply to the information withheld on pages 1.1, 1.5, 1.6 and 2.1, but does apply to the withheld information on the bottom of page 2.2.
- [106] I find that subsection 17(1)(c) of FOIP does not apply to the information withheld on pages 1.1 and 2.1.
- [107] I find that subsection 17(1)(b)(i) of FOIP does not apply to the information withheld on page 1.1.
- [108] I find that subsection 18(1)(d) of FOIP does not apply to the information withheld on page 2.1.

V RECOMMENDATIONS

- [109] I recommend that the Ministries take no further action regarding search.
- [110] I recommend that the Ministries continue to withhold the information found on the bottom of page 1.1 and the top of page 1.2.
- [111] I recommend that the Ministries continue to withhold the information found on page 2.2.
- [112] I recommend that the Ministries release the information withheld on pages 1.5 and 1.6.

[113] I recommend that the Ministries release the information withheld on the second last paragraph of page 1.1.

[114] I recommend that the Ministries release the information withheld on page 2.1.

Dated at Regina, in the Province of Saskatchewan, this 4th day of February, 2019.

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