



REVIEW REPORT 295-2016

Global Transportation Hub Authority

August 24, 2017

Summary:

The Applicant requested a review of an access to information request in which the Global Transportation Hub Authority (GTH) denied access to the record in full pursuant to subsection 20(a) of FOIP. Through the course of the review, the GTH provided the Applicant with portions of the record. It continued to rely on subsections 17(1)(a), 17(1)(b)(i), 17(1)(c), 17(1)(f), 18(1)(f), 22(a) and 22(b) of FOIP to deny access to the remaining severed portions. The Commissioner found the exemptions did not apply to the dates withheld in the *Date* column and recommended the GTH release those dates. He determined that subsections 17(1)(b)(i), 17(1)(f)(ii) and 22(a) of FOIP did not apply to the record. Further, he found subsection 22(b) of FOIP to apply to a portion of the information the GTH withheld, however recommended that the GTH should reconsider the harm in releasing as the information being withheld is widely known. The Commissioner determined that subsection 17(1)(f)(i) of FOIP applied and recommended the GTH continue withholding the information. Finally, the Commissioner found subsections 17(1)(a) of FOIP and 18(1)(f) of FOIP not to apply to some of the withheld information but that it did apply to other parts of the withheld information, and recommended the GTH continue to withhold the portions in which it applied. The Commissioner did not need to consider subsection 17(1)(c) of FOIP.

I BACKGROUND

- [1] The Applicant submitted an access to information request pursuant to *The Freedom of Information and Protection of Privacy Act* (FOIP) to the Global Transportation Hub Authority (GTH) that was received on May 3, 2016 requesting access to:

...all lists of documents and/or table of contents the Ministry has provided to the Provincial Auditor as part of her investigation in the GTH land deal and the surrounding transactions.”

- [2] By letter dated July 18, 2016, the GTH denied access to the record pursuant to subsection 20(a) of FOIP.
- [3] On December 15, 2016, my office received a Request for Review from the Applicant, in which he disagreed with being denied access to the records.
- [4] Through my office’s early resolution process, the GTH agreed to release a portion of the record to the Applicant and did so by letter dated January 6, 2017. This letter outlined that the GTH was no longer relying on subsection 20(a) of FOIP. However, the GTH severed information from portions of the record pursuant to subsections 16(1)(a), 16(1)(d), 17(1)(a), 17(1)(b)(i), 17(1)(c), 17(1)(f), 22(a) and 22(b) of FOIP.
- [5] On January 12, 2017, my office provided notice to the GTH and the Applicant of my office’s intention to undertake a review of this request and invited all parties to provide a submission. My office received a submission from the GTH.
- [6] The GTH reconsidered its position on some of the exemptions it applied, and by letter dated February 7, 2017 it provided additional information to the Applicant. The GTH continued to deny access to some information pursuant to subsections 16(1)(a), 16(1)(d), 17(1)(a), 17(1)(b)(i), 17(1)(c), 17(1)(f), 18(1)(f), 22(a) and 22(b) of FOIP.
- [7] Through the course of this review, the GTH advised my office that it will no longer be relying on subsections 16(1)(a) and 16(1)(d) of FOIP.
- [8] The Applicant informed my office that he wished to continue with the review of the information that the GTH continues to withhold.

II RECORDS AT ISSUE

[9] The records at issue is a four page document entitled *GTH East Land Transactions* that is a timeline and list of 44 documents provided to the Provincial Auditor during her audit of the GTH East Land Transaction. This document consists of columns, with the column headings titled *Date* and *Activity*. Of the 44 documents listed, the GTH continues to withhold dates and/or activity descriptions in line items 3, 8, 9, 11, 14, 16, 17 and 25. This relates to the Provincial Auditor's Special Report: Land Acquisition Processes, June 30, 2016 (Auditor's Report).

III DISCUSSION OF THE ISSUES

[10] The GTH is a "government institution" as defined by subsection 2(1)(d)(ii) of FOIP.

1. Do the exemptions apply to the dates?

[11] The GTH has applied various exemptions to dates found in the *Date* columns of line items 3, 9, 16, 17 and 25. It has released 39 of 44 dates found in the remaining rows. In its submission, the GTH has not addressed why the exemptions apply to the dates.

[12] By releasing the dates, it does not provide the Applicant with the substance of what has occurred; it simply provides a date that an event related to the GTH east land transactions occurred. Lacking arguments as to why these dates have been withheld, the GTH has not demonstrated to this office how the exemptions apply to the dates. Therefore, I find the exemptions do not apply to the dates withheld in the *Date* column of line items 3, 9, 16, 17 and 25.

[13] As I have found that the exemptions do not apply to the dates, I will not be addressing the dates in the remainder of this report.

2. Does subsection 22(a) of FOIP apply to this record?

[14] The GTH applied subsection 22(a) of FOIP to line item 3 and withheld the information under the Activity column. Subsection 22(a) of FOIP provides:

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

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

[15] This provision 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. This provision ensures that a public body, as the client, has the same protection for its legal documents as persons in the private sector.

[16] In order for subsection 22(a) of FOIP to apply, the following three part test must be met:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Was the communication intended to be confidential?

[17] I will now determine if each part of the test is met.

1. Is the record a communication between solicitor and client?

[18] For this part of the test to be met, the public body should make it clear who is the solicitor and who is the client. It is important to note that the Ministry of Justice can act as legal advisors for all areas of provincial government.

[19] In its submission, the GTH asserted that the communication is between the GTH and its legal advisor. However, the information being withheld is not the communication itself. It is a reference to the communication. Therefore, I find the first part of the test has not

been met. As the first part of the test has not been met, I find that subsection 22(a) of FOIP does not apply to the record.

3. Does subsection 22(b) of FOIP apply to this record?

[20] The GTH also applied subsection 22(b) of FOIP to line item 3 and withheld the information under the *Activity* column. Subsection 22(b) of FOIP provides:

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

...

(b) was prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel for a government institution in relation to a matter involving the provision of advice or other services by the agent or legal counsel;

[21] This provision is broader than subsection 22(a) of FOIP and is meant to capture records that have been prepared by or for legal counsel for a public body in relation to the provision of advice or services by legal counsel.

[22] In order for subsection 22(b) of FOIP to apply the following two part test must be met:

1. Were the records prepared by or for an agent or legal counsel for a public body?
2. Were the records prepared in relation to a matter involving the provision of advice or other services by the agent or legal counsel?

[23] I will now determine if each part of the test is met.

1. Were the records prepared by or for an agent or legal counsel for a public body?

[24] In its submission, the GTH asserted that the exemption has been claimed as it applies to the underlying record. I would like to note that the underlying record is not a responsive record of the Applicant's original access request.

[25] The first portion of the information found in the *Activity* column that has been severed would reveal nothing substantive as it is simply a high level description of the underlying record. In fact, what this portion of the sentence says would actually support that a portion of the sentence could fall under subsection 22(b) of FOIP without revealing the nature of the advice. Therefore, the first part of the test has not been met for the first portion of the sentence in the *Activity* column. As such, I find that subsection 22(b) does not apply to the first part of the sentence in the *Activity* column for line item 3.

[26] The last portion of the sentence in the *Activity* column provides a summary of the legal advice that, if released, would reveal the conclusion of the legal advice that was provided. I can confirm that the underlying record was prepared by a lawyer in his capacity to provide legal advice to the GTH and what is found in the summary is the conclusion of the lawyer's legal advice on the particular issue. Therefore, the first part of this test has been met for that portion of the information.

2. Were the records prepared in relation to a matter involving the provision of advice or other services by the agent or legal counsel?

[27] *Legal advice* includes a legal opinion about a legal issue, and a recommended course of action, based on legal consideration, regarding a matter with legal implications. The GTH has provided me with the underlying document to which this action relates, and I can confirm that the underlying document would fit within the description of legal advice.

[28] The prepared record does not have to constitute legal advice to qualify for this part of the test. However, it must relate back to a matter that involved the provision of legal advice. In its submission, the GTH does relate this back to the legal advice that was provided. Further, as the GTH provided my office with a copy of the underlying record, a review of which shows that the conclusion of the legal advice is the same as what has been briefly outlined in the summary. Therefore the second part of the test is met.

[29] Although I find subsection 22(b) of FOIP to apply, I would like to note that it is a discretionary exemption. The topic on which the GTH sought the legal advice is publicly known as it has been referenced in the Auditor's Report and in the media. Therefore, although subsection 22(b) of FOIP would apply, I am unable to see the harm in the GTH releasing the portion of the sentence. It would not disclose the legal analysis that went into formulating the legal advice – this would be found in the underlying document. It would simply outline the widely known conclusion.

[30] Therefore, I find that subsection 22(b) of FOIP applies to the second part of the sentence in the *Activity* column for line item 3, although the information being withheld is widely known.

4. Does subsection 17(1)(f) of FOIP apply to this record?

[31] The GTH applied subsection 17(1)(f) of FOIP to a portion of the information found under line item 8 in the *Activity* column and the full contents of the *Activity* column for line item 17. This is the only exemption the GTH applied to this information.

[32] Subsection 17(1)(f) 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.

...

(f) agendas or minutes of:

(i) a board, commission, Crown corporation or other body that is a government institution; or

(ii) a prescribed committee of a government institution mentioned in subclause (i);

[33] This exemption allows a government institution to withhold agendas and minutes of meetings because the meetings to which they relate provide the focus for decision-making within these types of bodies. To apply a public body must demonstrate that the

agenda or minutes are those of one of the bodies noted in the provision and it can only be applied to the records of that body.

[34] I would note that as of the date of this Report, the FOIP Regulations do not include a list of prescribed committees of a government institution. As such, subsection 17(1)(f)(ii) of FOIP cannot apply at this time and I find that subsection 17(1)(f)(ii) does not apply to this record. Therefore, I will consider if subsection 17(1)(f)(i) applies to this information.

[35] In order for subsection 17(1)(f)(i) of FOIP to apply, the following two part test must be met:

1. Is the record an agenda of a meeting or minutes of a meeting?
2. Was it a meeting of a board, commission, Crown corporation or other body that is a government institution?

[36] I will now determine if each part of the test is met.

1. Is the record an agenda of a meeting or minutes of a meeting?

[37] For line items 8 and 17, as part of its submission the GTH has included a copy of the underlying records that are not subject to this request. A review of the records does confirm that they are minutes of meetings of the Board of the GTH for both line item 8 and 17.

[38] Therefore, I must consider if the summary of the GTH Board Minutes that are found in the *Activity* column would qualify under this exemption. The responsive record for this is a summary of the documents provided to the Provincial Auditor to conduct the audit. Although these activity summaries are not the minutes themselves they summarize the actions that occurred in these meetings. Therefore, I find the first part of the test to have been met. I will now consider if the second part of the test is met.

2. Was it a meeting of a board, commission, Crown corporation or other body that is a government institution?

[39] As noted above, the GTH is prescribed as a provincial government institution under subsection 2(1)(d)(ii) of FOIP. Subsection 13(1) of *The Global Transportation Authority Act* (GTHA) provides:

13(1) A board of directors, consisting of those persons who are appointed to constitute the authority pursuant to section 7, shall manage the affairs and business of the authority.

[40] A review of the responsive record and the underlying record that *Action* summaries relate show that this information does relate to a meeting of the Board of Directors of the GTH. As outlined above, the GTHA outlines the responsibilities of the Board of Directors as being, “...*manage the affairs and business of the authority...*” Therefore, I find the second part of the test to be met.

[41] As both parts of the test have been met, I find that subsection 17(1)(f)(i) of FOIP applies to the information being withheld under the *Activity* column for line items 8 and 17.

5. Does subsection 17(1)(b)(i) of FOIP apply to this record?

[42] The GTH applied subsection 17(1)(b)(i) of FOIP to the following:

- Line item 9: The information found under the *Activity* column.
- Line item 11: A portion of the information found under the *Activity* column.
- Line item 14: A portion of the information found under the *Activity* column.
- Line item 16: A portion the information found under the *Activity* column.
- Line item 25: The information found under the *Activity* column.

[43] 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;

[44] This 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 the public body are sought as to the appropriateness of a particular proposal or suggested action. A *deliberation* is a discussion or consideration by officers or employees of a government institution.

[45] In order to qualify, a two part test must be met. The opinions solicited during a consultation must:

1. be either sought, expected, or be part of the responsibility of the person who prepared the record; and
2. be prepared for the purpose of doing something, such as taking an action, making a decision or a choice.

[46] The GTH asserts that these summaries and the underlying records contain consultations or deliberations by and between employees of the GTH. From a review of the submission, the arguments put forward by the GTH relate to the underlying records that are not responsive to this request. Although the underlying records are helpful in providing context and can at times support the exemption being claimed, those records are not the subject of this review.

[47] The withheld information in line items 9, 11 and 16 appear to be a statement of information. The withheld information in line item 14 appears to be outlining a recommendation that is being made. The withheld information in line item 25 is providing a status update and is not a consultation or deliberation.

[48] Therefore, I find subsection 17(1)(b)(i) of FOIP does not apply to this record. I recommend the GTH release the information it has withheld in line item 16 as this is the only exemption the GTH has applied to this information.

6. Does subsection 17(1)(a) of FOIP apply to this record?

[49] The GTH applied subsection 17(1)(a) of FOIP to the following:

- Line item 9: The information found under the *Activity* column.
- Line item 11: A portion of the information found under the *Activity* column.
- Line item 14: A portion of the information found under the *Activity* column.
- Line item 25: The information found under the *Activity* column.

[50] 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 or the Executive Council.

[51] This exemption is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice. In order for this exemption to apply, the following three part test must be met:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. The advice, recommendations, proposals, and/or policy options must be either sought, expected, or be part of the responsibility of the person who prepared the record and be prepared for the purpose of doing something and 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?

[52] I will now determine if each part of the test is met.

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

[53] The GTH asserts that the information that has been withheld in line item 9 as the information in the summary is a result of market analysis developed by the GTH. I

disagree; from a review of the record it appears to be a statement of information and not analysis. Therefore, the first part of this test has not been met and subsection 17(1)(a) of FOIP does not apply to this information.

[54] The GTH asserts that the information that has been withheld in line item 11 is advice and analyses prepared by the GTH to support the assembly of land and that it would disclose policy options and recommendations. A review of the record shows that the withheld information is a statement of fact and not a policy option or recommendation. Therefore, the first part of this test has not been met and subsection 17(1)(a) of FOIP does not apply to this information.

[55] The GTH asserts that the information that has been withheld in line item 14 would disclose a recommendation. *Recommendations* relate to a suggested course of action. Upon a review of this record I agree that the information that has been withheld would qualify as a recommendation. Therefore, the first part of the test has been met.

[56] The GTH asserts that the information that has been withheld in line item 25 contains advice and analyses. I disagree; a review of the record provides an update of information. Therefore, the first part of this test has not been met and subsection 17(1)(a) of FOIP does not apply to this information.

[57] As the first part of the test has not been met, I find that subsection 17(1)(a) of FOIP does not apply to the information withheld in line items 9, 11, and 25.

[58] The first part of the test has been met for the information that has been withheld in line item 14, therefore I will move to the second part of the test.

2. The advice, recommendations, proposals, and/or policy options must be either sought, expected, or be part of the responsibility of the person who prepared the record and be prepared for the purpose of doing something and involve or be intended for someone who can take or implement the action.

[59] A review of the information withheld in line item 14 summarizes a recommendation made to the GTH Board of Directors. As outlined above, the GTHA outlines the responsibilities of the Board of Directors as being, “...*manage the affairs and business of the authority...*” These responsibilities would include decision making powers. Therefore, the second part of the test is met.

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

[60] A review of the record summarizes a recommendation made to the GTH Board of Directors. In a review of the underlying record, it confirms that a particular recommendation was being made. Although the information found in line item 14 is a brief summary of the underlying record, the summary does reveal that it was developed for a Board Meeting of the GTH where the board members would have decision making powers. Further, this summary would reveal what was being presented to the Board of Directors to make a decision on. Therefore, the third part of the test has been met and I find that subsection 17(1)(a) applies to the information withheld in line item 14.

[61] As subsection 17(1)(a) of FOIP applies to the information being withheld in line item 14, I do not need to consider if subsection 17(1)(c) of FOIP applies to this record.

7. Does subsection 18(1)(f) of FOIP apply to this record?

[62] The GTH applied subsection 18(1)(f) of FOIP to the following:

- Line item 9: The information found under the *Activity* column.
- Line item 11: A portion of the information found under the *Activity* column.
- Line item 25: The information found under the *Activity* column.

[63] 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.

[64] For this provision to apply there must be objective grounds for believing that disclosing the information would result in prejudice. *Prejudice* in this context 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. It 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.

[65] The public body does not have to provide that prejudice is probable, but needs to show that there is a reasonable expectation of prejudice if any of the information were to be released. In order for this provision to apply a three part test must be met:

1. Is there a clear cause and effect relationship between the disclosure and the prejudice which is alleged?
2. Is the prejudice caused by the disclosure more than trivial or inconsequential?
3. Is the likelihood of the prejudice genuine and conceivable?

[66] I will now determine if each part of the test is met.

1. Is there a clear cause and effect relationship between the disclosure and the prejudice which is alleged?

[67] In its submission, the GTH outlines that the information withheld in line items 9, 11 and 25, if disclosed, could reasonably compromise its broader economic interests.

[68] Line item 9 contains two sentences that are distinct from one another. The GTH has stated that if disclosed, the information in line item 9 could impact future negotiations. In its submission, the GTH has demonstrated to this office the cause and effect relationship between the disclosure and the alleged prejudice for the first sentence. However, from a review of the second sentence this has not been demonstrated. Therefore, the first part of the test has been met for the first sentence but it has not been met for the second sentence.

[69] The GTH has provided me with arguments as to why subsection 18(1)(f) of FOIP would apply to the underlying record for line items 11 and 25. However, from a review of the information being withheld, the GTH has not demonstrated the cause and effect relationship between the disclosure and the alleged prejudice. In a review of the withheld information, I disagree that its release would prejudice the economic interest of the GTH or a government institution, which is required in order for this exemption to apply.

[70] Therefore, I find that subsection 18(1)(f) does not apply to the information being withheld in line items 11, 25 and the second sentence being withheld in the *Activity* column of line item 9.

2. Is the prejudice caused by the disclosure more than trivial or inconsequential?

[71] In its submission the GTH has demonstrated the prejudice caused by the disclosure for the first sentence in the *Activity* column of line item 9. Further, it has provided this office with examples of how this type of information in the past has prejudiced the economic interest of the GTH. Through these examples, the GTH has demonstrated the clear cause and effect relationship and I am satisfied that the prejudice would not be trivial or inconsequential. Therefore, the second part of the test is met.

3. Is the likelihood of the prejudice genuine and conceivable?

[72] The GTH has described in its submission the likelihood of the prejudice caused by the disclosure of the information found in the first sentence in the *Activity* column of line item 9. In addition, the GTH has described to this office the associated risks if this

information was released. I am satisfied that if the information was released it could prejudice current or future business negotiations of the GTH and the third part of the test has been met. Therefore, I find subsection 18(1)(f) of FOIP to apply to the information being withheld in the first sentence of the *Activity* column of line item 9.

[73] My office provided the GTH with a draft report on August 14, 2017. In its response to the draft report, the GTH advised my office it intends to comply with all of the recommendations.

IV FINDINGS

[74] I find the exemptions do not apply to the dates withheld in the *Date* column of line items 3, 9, 16, 17 and 25.

[75] I find that subsection 22(a) of FOIP does not apply to the record.

[76] I find that subsection 22(b) does not apply to the first part of the sentence in the *Activity* column for line item 3.

[77] I find that subsection 22(b) of FOIP applies to the second part of the sentence in the *Activity* column for line item 3, although the information being withheld is widely known.

[78] I find that subsection 17(1)(f)(ii) does not apply to the record.

[79] I find that subsection 17(1)(f)(i) of FOIP applies to the information being withheld under the *Activity* column for line items 8 and 17.

[80] I find that subsection 17(1)(b)(i) of FOIP does not apply to this record.

[81] I find that subsection 17(1)(a) of FOIP does not apply to the information withheld in line items 9, 11, or 25.

[82] I find subsection 17(1)(a) of FOIP applies to the information that has been withheld in line item 14.

[83] I find subsection 18(1)(f) of FOIP does not apply to the information being withheld in line items 11, 25 and the second sentence being withheld in the *Activity* column of line item 9.

[84] I find subsection 18(1)(f) of FOIP to apply to the information being withheld in the first sentence of the *Activity* column of line item 9.

V RECOMMENDATIONS

[85] I recommend the GTH release the dates withheld in the *Date* column of line items 3, 9, 16, 17 and 25.

[86] I recommend the GTH release the first part of the sentence found in the *Activity* column for line item 3.

[87] I recommend the GTH reconsider if there is harm in releasing the information found in the second part of the sentence in the *Activity* columns for line item 3 and if the harm does not exist it should consider releasing.

[88] I recommend the GTH continue to withhold the information within the *Activity* column for line items 8 and 17.

[89] I recommend the GTH release the information it has withheld in line item 16.

[90] I recommend the GTH continue to withhold the information in line item 14.

[91] I recommend the GTH release the information found in line items 11 and 25 and the second sentence in the *Activity* column of line item 9.

[92] I recommend the GTH continue to withhold the information in the first sentence of the *Activity* column of line item 9.

Dated at Regina, in the Province of Saskatchewan, this 24th day of August, 2017.

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