



REVIEW REPORT 305-2016

Executive Council

June 8, 2017

Summary: The Applicant requested that the Commissioner review Executive Council's search efforts and its use of subsections 17(1)(a) and 17(1)(b)(i) of FOIP to withhold portions of the responsive record. The Commissioner found Executive Council qualified as a government institution pursuant to FOIP, but the Premier's Office did not. He found that Executive Council should complete another search in the office of the Deputy Minister. He also found that subsection 17(1)(a) applied to the record but subsection 17(1)(b)(i) of FOIP did not. The Commissioner recommended that Executive Council reconsider its exercise of discretion.

I BACKGROUND

- [1] Executive Council received an access to information request on September 30, 2016 for "all internal Executive Council correspondence, electronic and otherwise, related to the Husky Energy Inc. oil spill – July 20, 2016 to July 30, 2016."
- [2] On October 31, 2016, Executive Council notified the Applicant that the response period would be extended by 30 days.
- [3] Executive Council provided the Applicant with a response on November 29, 2016. It attached one record that was responsive to the Applicant's request. Portions of the record were redacted pursuant to subsections 17(1)(a) and 17(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[4] On December 12, 2016, the Applicant requested a review by my office. On December 21, 2016, my office provided notification to both the Applicant and Executive Council of my intention to undertake a review.

II RECORDS AT ISSUE

[5] Executive Council applied subsection 17(1)(b)(i) of FOIP to the subject line of a one page e-mail. It also applied subsections 17(1)(a) and 17(1)(b)(i) of FOIP to the main body of the e-mail.

[6] The Applicant also asked that our office review Executive Council's search efforts as he was unsatisfied that only one record had been identified.

III DISCUSSION OF THE ISSUES

1. How does FOIP apply?

[7] FOIP applies to government institutions. Executive Council qualifies as a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP, which states:

2(1)(d) "government institution" means, subject to subsection (2):

(i) the office of Executive Council or any department, secretariat or other similar agency of the executive government of Saskatchewan;

[8] However, subsection 2(2)(b) of FOIP states that an office of a member of the Executive Council does not qualify as a government institution:

2(2) "Government institution" does not include:

...

(b) the Legislative Assembly Service or offices of members of the Assembly or members of the Executive Council;

[9] The Premier's Office does not qualify as a government institution pursuant to subsection 2(2)(b) of FOIP.

- [10] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306, the Supreme Court noted that if a government institution controls a record in a Minister's office, the record falls within the scope of the federal Access to Information Act. If it falls within the scope of the Act, the head of the government institution must facilitate access to it. The decision stated:

The fact that Ministers' offices are separate and different from government institutions does not mean that a government institution cannot control a record that is not in its premises. If a government institution controls a record in a Minister's office, the record falls within the scope of the Act. If it falls within the scope of the Act, the head of the government institution must facilitate access to it on the basis of the two-part control test as stated in the reasons of Charron J. If the record holder is the Minister, the fact that his or her office is not part of the government institution he or she oversees may weigh in the balance. The reality that Ministers wear many hats must also be taken into account. A Minister is a member of Cabinet who is accountable to Parliament for the administration of a government department, but is usually also a Member of Parliament in addition to being a member of a political party for which he or she performs various functions and, finally, a private person. It is conceivable that many records will not fall neatly into one category or another. The head of a government institution is responsible for determining whether such hybrid documents should be disclosed. The first step in the assessment is to consider whether the records fall within the scope of the Act. If they do, the head must then perform the second step of the assessment process: to determine whether the records fall under any of the exemptions provided for in the Act. Depending on which exemption applies, the head may or may not have the discretion to disclose the document.

- [11] The same principal would apply to records that may be under control of Executive Council but are found in the Premier's Office.

2. Did Executive Council conduct a reasonable search?

- [12] Section 5 of FOIP provides the right of access as follows:

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.

- [13] Section 5 is clear that access can be granted provided the records are in the possession or under the control of the government institution. FOIP does not require a government institution to prove with absolute certainty that records do not exist. It must however, demonstrate that it has made a reasonable effort to identify and locate responsive records.
- [14] A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request. The threshold that must be met is one of “reasonableness”. In other words, it is not a standard of perfection, but rather what a fair and rational person would expect to be done or consider acceptable.
- [15] The level of detail that can be provided to my office is outlined in my office’s resource, *IPC Guide to Exemptions*. Each case requires different search strategies and details depending on the nature of the records and the way an organization manages them.
- [16] With respect to a search strategy, Executive Council noted that an employee experienced in the organization coordinated the search. This was the Executive Director of Corporate Services for Executive Council that has been with the organization for approximately 20 years. She sent an e-mail to some of the branches of the organization to ask for a search of records. In addition, the access request was discussed at a weekly senior management meeting.
- [17] Further, Executive Council noted that, given the specific topic and the short time frame of the request, the search was easy to conduct.
- [18] The following is a list of branches in Executive Council and the results of the search as described by Executive Council:

Cabinet Secretariat: The Assistant Cabinet Secretary indicated that this branch was not involved in the file and was certain there would be no responsive records. However, he and the three Cabinet Officers conducted a search of their records. The Assistant Cabinet Secretary replied verbally to the Executive Director of Corporate Services that no records were found.

Cabinet Planning: The Assistant Deputy Minister of Cabinet Planning knew that none of his Senior Policy Advisors were assigned to work on this file. He replied to

the Executive Director of Corporate Services by e-mail that “I don’t have any material related to this”.

Intergovernmental affairs: The Deputy Minister of Intergovernmental Affairs indicated that his branch was not involved in this file. However, a Corporate Analyst contacted key officials in this branch to confirm that records did not exist. The branch replied by e-mail to the Executive Director of Corporate Services that there was no documentation.

Corporate Services: This branch was not searched as the Executive Director who coordinated the search knew that the branch was not involved in this file.

Francophone Affairs and Lieutenant Governor’s Office: This branch was not searched as it was not involved in the file.

Deputy Minister’s Office: Executive Council reported that a senior administrative assistant in the Deputy Minister’s office with several years of experience led the search in this office. However, she is no longer with the organization. Executive Council said it would be “reasonable to assume” she searched Outlook e-mail folders of both herself and the Deputy Minister with search terms such as Husky, oil and oil spill. It also reported that a search of paper records was also completed; however, noted that 99% of its work is done electronically. Further, Executive Council follows the Administrative Records Management System (ARMS) which makes it easier to search. One record was found which will be addressed later in this Report.

Premier’s Office: Executive Council noted that the Premier’s Office is not covered by FOIP. However, the Deputy Chief of Staff to the Premier conducted a search of the Premier’s office so any records found there could be cross-checked to see if any responsive records were overlooked. No responsive records were found as a result of this search.

[19] In addition, Executive Council briefly described the electronic filing systems of Executive Council and the Office of the Premier. It indicated that that each branch in Executive Council has its own electronic folders. Employees of Executive Council can only access electronic folders of their own branch. Further, it noted that the Premier’s Office has its own records management and storage process. Electronic files of the Premier’s Office are not accessible by Executive Council employees and vice versa.

[20] I am satisfied with Executive Council’s explanation of which branches may have responsive records and its efforts to cross check with records in the Office of the Premier.

[21] However, I am not satisfied with Executive Council's assumption of how records were searched in the Deputy Minister's office.

[22] When a FOIP Coordinator has established a search strategy that involves asking other employees to search for records, he/she should give detailed direction to those performing the search. This would include suggested key words for electronic searches. Also direction should be given on where to search. For example, the FOIP coordinator might request that all employees' e-mail accounts and correspondence files be searched. It should also be indicated that the employee asked to search should include any other search strategies that may be relevant. This direction is important because it ensures consistency in the search in areas across the organization. It also serves as a type of checklist and guidance for the level of detail that should be communicated back to the FOIP coordinator. Without this type of detail, a FOIP coordinator cannot be certain that a search has been performed consistently and thoroughly.

[23] In this case, the e-mail requesting the search quoted the access request and asked "Would you please check with your areas of responsibility to see if you have any documentation that may be responsive to this request and let me know by October 19, 2016". The e-mails that were provided in return only provided one sentence answers. Some replied verbally. This is not enough to demonstrate that a reasonable search has been conducted. With respect to the Deputy Minister's office, where it was most likely to be responsive records, the FOIP Coordinator assumed how a search was performed.

[24] I recommend that Executive Council search the Deputy Minister's office again and provide a detailed description of its search to my office and to the Applicant within seven days.

3. Does subsection 17(1)(a) of FOIP apply to the record?

[25] Subsection 17(1)(a) of FOIP 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;

[26] My office has considered this exemption many times in the past. It is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice. All three parts of the following test must be met:

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

[27] The e-mail in question includes a draft of a message intended for the entire public service. It also discusses how to send the message to the public service. Executive Council submitted that the e-mail qualifies as advice and recommendations.

[28] Advice includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice has a broader meaning than recommendations. 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.

[29] I agree that the first part of the body of the e-mail qualifies as a recommendation. The writer is recommending how to disseminate a message to the public service. This is a

suggested course of action as well as the rationale for the action. The first part of the test is met.

[30] The second part of the e-mail can be described as a draft message for the public service. Executive Council submitted that it qualified as advice or a recommendation.

[31] My office has stated that drafts and redrafts of advice, recommendations, proposals, analyses and/or policy options would also be protected by the exemption.

[32] Executive Council drew parallels between the draft portion of the e-mail and the record I considered in Report 165-2015, which was “talking points” for a Minister. I agree with the similarities between the two records and find this portion of the record at issue qualifies as advice.

[33] Executive Council’s submission indicated that the advice and recommendation was prepared by someone who has the responsibility of preparing communications for the Deputy Minister to the Premier, was prepared for the purpose of communicating the issue to all government employees, and was sent to the Deputy Minister to the Premier. From a review of the record, I agree. The second and third parts of the test have been met. Subsection 17(1)(a) of FOIP applies to the e-mail.

Exercise of Discretion

[34] When applying discretionary exemptions, the public body must first determine if the circumstances meet the test, as discussed above. The head then should exercise his/her discretion when deciding whether to withhold records pursuant to a discretionary exemption.

[35] Some factors that should be taken into account when exercising discretion include:

- the general purposes of the Act (i.e. public bodies should make information available to the public, and individuals should have access to personal information about themselves);
- the wording of the discretionary exception and the interests which the exception attempts to protect or balance;

- whether the applicant's request may be satisfied by severing the record and providing the applicant with as much information as is reasonably practicable;
- the historical practice of the public body with respect to the release of similar types of records;
- the nature of the record and the extent to which the record is significant or sensitive to the public body;
- whether the disclosure of the information will increase public confidence in the operation of the public body;
- the age of the record;
- whether there is a definite and compelling need to release the record; and
- whether Commissioner's Orders have ruled that similar types of records or information should or should not be disclosed.

[36] The Supreme Court of Canada ruling *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exemption and to return the matter for reconsideration by the head of a public body.

[37] The Supreme Court also considered the following factors to be relevant to the review of discretion:

- the decision was made in bad faith;
- the decision was made for an improper purpose;
- the decision took into account irrelevant considerations; or
- the decision failed to take into account relevant considerations.

[38] During a review of a discretionary exemption, I may recommend that the head of a public body reconsider its exercise of discretion if the head feels one of these factors played a part in the original decision to withhold records. I will not, however, substitute my own discretion for that of the institution.

[39] In this case, I would ask the head of Executive Council to reconsider the exercise of discretion for withholding this e-mail. The advice in this instance is not about a proposed policy or direction of the government or organization; it is about the best way to communicate a particular message to public servants. Executive Council's decision may have failed to take into account the nature of the record and the extent to which the record

is significant or sensitive to the public body. I encourage the head to reconsider the use of this discretionary exemption on this record.

4. Does subsection 17(1)(b)(i) of FOIP apply to the record?

[40] I have already found that subsection 17(1)(a) of FOIP applies to the main body of the e-mail in question. Therefore, I will only consider whether subsection 17(1)(b)(i) of FOIP applies to the subject line of the e-mail.

[41] Subsection 17(1)(b)(i) states:

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;

[42] 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 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.

[43] In order to qualify, the opinions solicited during a consultation or deliberation must:

i) be either sought, expected, or be part of the responsibility of the person who prepared the record; and

ii) be prepared for the purpose of doing something, such as taking an action, making a decision or a choice.

[44] The subject line of the e-mail is three words. Upon review, these words do not qualify as a consultation or deliberation. Subsection 17(1)(b)(i) of FOIP does not apply to the subject line.

IV FINDINGS

[45] I find that Executive Council qualifies as a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP and the Premier’s Office does not qualify as a government institution pursuant to subsection 2(2)(b) of FOIP.

[46] I find that a further search of the Deputy Minister’s office should be conducted.

[47] I find that subsection 17(1)(a) of FOIP applies to the record.

[48] I find that subsection 17(1)(b)(i) of FOIP does not apply to the subject line on the record.

V RECOMMENDATIONS

[49] I recommend that Executive Council search the Deputy Minister’s office again and provide a detailed description of its search to my office and to the Applicant within 7 days.

[50] I recommend that Executive Council release the subject line to the Applicant.

[51] I recommend that the head of Executive Council reconsider the use of discretion in withholding the body of the e-mail in the record from the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 8th day of June, 2017.

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