



REVIEW REPORT 306-2016

Ministry of Highways and Infrastructure

January 30, 2017

Summary:

The Ministry of Highways and Infrastructure (the Ministry) applied subsections 19(1)(b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to an agreement it had with the Canadian Pacific Railway Company. The Commissioner found that the exemptions did not apply to the agreement and recommended that the Ministry release it to the Applicant. He also recommended that the record be released to an Applicant of a previous Review Report.

I BACKGROUND

- [1] On November 9, 2016, I issued Review Report 191-2016 which recommended that the Ministry of Highways and Infrastructure (the Ministry) release an agreement it had with the Canadian Pacific Railway Company (CP). In response to that report, the Ministry indicated that it would not comply with my recommendation.
- [2] On November 15, 2016, the Ministry received an access to information request from a different Applicant for the same record.
- [3] On November 28, 2016, the Ministry replied to the Applicant. It referred to the first report and simply indicated that access to the record was denied.
- [4] The Applicant was dissatisfied with the Ministry's response and, on December 12, 2016, requested a review by my office. According to procedure, my office contacted the Ministry and indicated that its response to the Applicant was deficient as it did not

include all of the elements required in a response to an access request required by section 7 of *The Freedom of Information and Protection of Privacy Act* (FOIP). Specifically, it did not list which exemption(s) the Ministry was relying on to withhold access. My office asked that the Ministry issue an amended response to the Applicant.

[5] On December 15, 2016, the Ministry issued a new, amended response to the Applicant's access request. It indicated that the record was being withheld pursuant to subsections 19(1)(b) and (c) of FOIP.

[6] On December 22, 2016, my office provided notification to the Ministry, Applicant and CP, who is a Third Party, to this review.

II RECORDS AT ISSUE

[7] The Applicant for Review Report 191-2016 made the following request to the Ministry:

- 1) all land sale agreements with CP Rail or any company acting on CP Rail's behalf related to land in or contiguous with the area now known as the Global Transportation Hub.
- 2) all agreements with CP Rail or any company acting on CP Rail's behalf related to commitments to provide infrastructure (roads, highways, water, sewer, etc.) for its warehouse property west of Regina.

[8] At that time, the Ministry represented to my office that there was one record responsive to both of the Applicant's requests. It is an agreement dated December 31, 2009 between the Ministry and CP. It is 12 pages. It describes what each party will contribute to the project of creating an Intermodal Facility at the Global Transportation Hub.

[9] In response to the current review, the Ministry has identified a second record. It is a two paged amending agreement dated December 17, 2013 and a one page e-mail string which summarizes the need for the amendment.

[10] The Ministry has applied subsections 19(1)(b) and (c) to the records.

[11] The Ministry did not provide a submission when requested but after receiving a draft copy of my report, it provided a submission. The submission was provided late in the process.

III DISCUSSION OF THE ISSUES

[12] The Ministry qualifies as a government institution pursuant to subsection 2(1)(d)(i) of FOIP.

1. Does subsection 19(1)(b) of FOIP apply to the record?

[13] Subsection 19(1)(b) of FOIP provides:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;

[14] My office has established a four part test for subsection 19(1)(b) of FOIP as follows:

1. Is the information financial, commercial, scientific, technical or labour relations information?
2. Was the information supplied by the third party to a public body?
3. Was the information supplied in confidence implicitly or explicitly?
4. Does the third party consent to release of the information?

[15] In its submission, CP has indicated that the information qualifies as commercial, financial and technical information. The Ministry indicated that portions of the record qualify as commercial and financial information.

[16] My office has established the following definitions:

Financial information is information regarding monetary resources, such as financial capabilities, assets and liabilities, past or present. Common examples are financial forecasts, investments strategies, budgets, and profit and loss statements. The financial information must be specific to a particular party that must demonstrate a proprietary interest or right of use of the financial information.

Commercial information is information relating to the buying, selling or exchange of merchandise or services. Types of information included in the definition of commercial information:

- offers of products and services a third-party business proposes to supply or perform;
- a third-party business' experiences in commercial activities where this information has commercial value;
- terms and conditions for providing services and products by a third party;
- lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises - such lists may take time and effort to compile, if not skill;
- methods a third-party business proposes to use to supply goods and services; and
- number of hours a third-party business proposes to take to complete contracted work or tasks.

Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. It will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information.

[17] CP asserts that the whole agreement qualifies as financial and commercial information. The Ministry submits that the “funding” portion of the agreement qualifies as financial information. I am not persuaded that any information would qualify as financial information of the third party. As per the definition above, financial information would typically describe a third party’s financial resources or assets and liabilities. It also must be specific to the third party. The record simply outlines what commitments each party has made with respect to achieving this common project.

[18] The Ministry asserted that the portions of the agreement that describe project contribution, land for the facility and the design and specifications would qualify as commercial information. The agreement does not relate to the buying and selling of merchandise or services, it relates to the commitments of each party to complete a project. The record does not qualify as commercial information.

[19] CP has submitted that the agreement qualifies as technical information. The entire agreement does not qualify as technical information. A specific review of the section on design and specifications to determine if that would qualify as technical information showed it did not contain technical information. It simply indicates which party will be responsible for the specifications and designs of certain features of the project and which party will have a right to review the specifications and designs. This does not qualify as technical information.

[20] I have also reviewed the amending agreement and the e-mail which explains the need for the amendment. I am not persuaded that the information in these documents would qualify as financial, commercial or technical information.

[21] The first part of the test is not met because the record does not qualify as financial, commercial or technical information. Subsection 19(1)(b) of FOIP does not apply to the record.

2. Does subsection 19(1)(c) of FOIP apply to the record?

[22] Subsection of 19(1)(c) of FOIP provides:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(c) information, the disclosure of which could reasonably be expected to:

(i) result in financial loss or gain to;

(ii) prejudice the competitive position of; or

- (iii) interfere with the contractual or other negotiations of;
a third party;

[23] In its submission, CP indicated that the parties mirrored section 19(1)(c) of FOIP in the Agreement's confidentiality provision. In other words CP indicated that the parties had expressly contracted into the third party disclosure exemption stated in section 19(1)(c) of FOIP. However, one cannot contract out of the obligations of FOIP or particularly into this exemption. For this provision to apply there must be objective grounds for believing that disclosing the information would result in the harm alleged. 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.

[24] For all of the subsections of this provision, the following criteria are used to determine whether disclosure of records or information could reasonably be expected to cause the harm alleged:

1. There must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
2. The harm caused by the disclosure must be more than trivial or inconsequential;
and
3. The likelihood of the harm must be genuine and conceivable.

[25] Before these criteria can be used to assess the harm, the harm must first be identified. In its submission, CP was vague about the type of harm that could result from the release of the agreement. In its submission it indicated that disclosing the terms of agreements with public bodies would significantly harm the competitive position of CP or harm its negotiating position with third parties. CP did not provide specific details about these third parties or negotiations.

[26] In support of this exemption, the Ministry explained that there is a great demand for rail transportation in this province and expansion is required. Although the Ministry stated

that it is not “privileged to what investments CP may be considering”, it believes that the agreement should remain confidential.

[27] I note that this agreement is seven years old and that the Intermodal Facility at the Global Transportation Hub is operational. I am not persuaded that any harm would result from release of the agreement, the amending agreement or the e-mail. Subsection 19(1)(c) of FOIP does not apply to the record.

IV FINDING

[28] I find that subsections 19(1)(b) and (c) of FOIP do not apply to the record.

V RECOMMENDATIONS

[29] I recommend that the Ministry release the entire record to the Applicant.

[30] I recommend that the Ministry release the amending agreement and e-mail string to the Applicant in Review Report 191-2016.

Dated at Regina, in the Province of Saskatchewan, this 30th day of January, 2017.

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