



REVIEW REPORT 307-2016

Global Transportation Hub Authority

October 23, 2017

Summary: The Applicant requested records from the Global Transportation Hub Authority (GTH) related to land sale agreements with SaskPower. GTH provided the Applicant with a portion of the records but withheld information citing subsections 16(1)(a), 17(1)(a), (b), (f), 18(1)(b), (d), (f), 22(a) and 29(1) *The Freedom of Information and Protection of Privacy Act* (FOIP). Upon review, the Commissioner found that subsections 16(1)(c) and 17(1)(b) of FOIP were not appropriately applied to some of the information. Further, the Commissioner found that subsections 16(1)(a), (c), 17(1)(b), (f), 22(b) and 18(1)(f) of FOIP were appropriately applied to some of the information. The Commissioner recommended that information be withheld or released as per Appendix A of this Review Report.

I BACKGROUND

[1] On May 26, 2016, the Applicant submitted an access to information request to the Global Transportation Hub Authority (GTH) for:

...the work product (notes, memoranda, records of conversations etc.) related to land sale agreements with SaskPower from January 1, 2013 until December 31, 2013. Please provide in electronic form to reduce costs.

[2] By letter dated August 9, 2016, the GTH provided its response to the Applicant's request indicating that access was denied pursuant to subsections 16(1)(a), 17(1)(a), (b), (f), 18(1)(b), (d), (f), 22(a) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [3] On December 22, 2016, my office received a request for review from the Applicant in which he disagreed with the GTH’s application of the above provisions.
- [4] On December 29, 2016, my office provided notification to the GTH and the Applicant of my office’s intent to conduct a review. My office requested the GTH provide an Index of Record (Index), a copy of the records at issue and its submission in support of the exemptions applied. The Applicant was also invited to provide a submission for my office’s consideration.
- [5] In a letter dated March 13, 2017, the GTH released an additional 60 records in full and 27 partial records to the Applicant.
- [6] On July 31, 2017, the GTH provided my office with its submission, an Index and a copy of the records at issue. The GTH indicated in its submission that it released nine additional records in whole or in part to the Applicant on July 25, 2017.

II RECORDS AT ISSUE

- [7] The responsive record totaled 424 pages. The following records remain at issue and will be addressed in this review. Records withheld in full are noted with the remaining withheld in part:

Record #	Page #	Description	Exemptions applied
2a	4-8	Briefing Note	Withheld in full 16(a),(d), 18(1)(f), 17(1)(a)
11	29-30	Emails	17(1)(b)(i)
17	38	Email	Non-responsive
18	39-40	Emails	17(1)(a), (b)(i)
19	41	Emails	22(a), (b)
20	42-43	Emails	22(a), (b)
21	49	Email	22(a), (b)
22	50	Email	22(a), (b)

23(a)	52-76	Draft Agreement of Purchase and Sale	18(1)(f), 22(a), (b)
25	81-82	Emails	22(a), (b), (c)
25a	83-11	Draft Agreement of Purchase and Sale	18(1)(f), 22(a),(b),(c)
25b	112-136	Draft Agreement of Purchase and Sale	18(1)(f), 22(a),(b),(c)
26	137	Emails	18(1)f)
29	141	Emails	17(1)(b)(i)
30	145-147	Emails	17(1)(b)(i), 22(a), (b)
32	152-154	Emails	18(1)(b), 22(a), (b)
36	217	Emails	17(1)(a), (b)
37a	219-221	Recommendation for Order in Council	Withheld in full 16(1)(a)
40	228-230	Board Minutes	Withheld in full 17(1)(f)(i)
41a	232-257	Agreement of Purchase and Sale	18(1)(f)
42	258	Email	17(1)(a), (b)
42a	259	Parcels Map	Withheld in full 17(1)(a), (b)
43	26	Email	22(a), (b), (c)
43a	261-287	Agreement of Purchase and Sale	18(1)(f), 22(a), (b), (c)
45	296-299	Decision Item	Withheld in full 17(1)(a), (b)
46a	301-326	Agreement of Purchase and Sale	18(1)(f)
47	327	Email	22(a), (b)
49	333-335	Emails	17(1)(a), (b)
50	336-338	Decision Item	Withheld in full 17(1)(a), (b), 18(109f)
56	391-392	Emails	17(1)(b)(i)
59	397-398	Emails	22(a), (b), (c)
61	401-402	Emails	22(a), (b), (c)
62	403-405	Emails	17(1)(a), (b)
63	406	Emails	Withheld in full 16(1)(c), 17(1)(a), (b),
64	407-411	Decision Item	Withheld in full 17(1)(a), (b)(i), 18(1)(d), (f)
65	412-413	Emails	22(a), (b)
66	414-415	Emails	22(a), (b), (c)
67	416	Emails	17(1)(a), (b)

69	421-422	Board Minutes	Withheld in full 17(1)(f)
70	423-424	Board Minutes	Withheld in full 17(1)(f)

III DISCUSSION OF THE ISSUES

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

1. Did the GTH properly apply subsection 16(1)(a) of FOIP?

[9] Subsection 16(1)(a) of FOIP is a mandatory class-based exemption and provides as follows:

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

(a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;

[10] *Executive Council* consists of the Premier and Cabinet Ministers. Executive Council is also referred to as “Cabinet” (Government of Saskatchewan, Cabinet Secretariat, Executive Council, *Executive Government Processes and Procedures in Saskatchewan: A Procedures Manual*, 2007, at p. 16).

[11] *Cabinet confidences* can generally be defined as:

...in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public.

(*Federal Access to Information and Privacy Legislation Annotated 2015* (Canada: Thomas Reuters Canada Limited, 2014) at page 1-644.4)

[12] The GTH withheld records 2a and 37a in full citing subsection 16(1)(a) of FOIP. For record 2a, the GTH asserted in its submission that the record was a briefing note and question and answer prepared by SaskPower for its Minister. Further, it asserted that it

constituted recommendations and proposals. It asserted that as per the *IPC Guide to Exemptions*, this record was a briefing note from a deputy minister to a minister concerning a matter that is or will be considered by Cabinet.

[13] For record 37a, the GTH asserted that the record was a recommendation for an Order in Council made by a minister and addressed to the premier and all cabinet ministers. The GTH asserted that the record constituted recommendations and was a cabinet submission.

[14] Records that contain advice, proposals, recommendations, analyses or policy options developed from sources outside of the Executive Council for presentation to the Executive Council are intended to be covered by the provision.

[15] *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.

[16] *Proposals and analyses or policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages or disadvantages of particular courses of action.

[17] From a review of records 2a and 37a, I find that the records qualify for subsection 16(1)(a) of FOIP because the records were clearly created for the purpose of providing information to Cabinet and contain recommendations and proposals.

2. Did the GTH properly apply subsection 16(1)(c) of FOIP?

[18] Subsection 16(1)(c) of FOIP is a mandatory class-based exemption and provides as follows:

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

...

(c) records of consultations among members of the Executive Council on matters that relate to the making of government decisions or the formulation of government policy, or records that reflect those consultations;

[19] This provision protects records used for, or records that reflect, consultations amongst members of the Executive Council on matters relating to the making of government decision or the formulation of government policy.

[20] The GTH applied subsection 16(1)(c) of FOIP to record 63. In its submission, the GTH asserted that record 63 is correspondence between then GTH Board Chair and Minister responsible for the GTH and the then interim CEO of the GTH. The GTH asserted further that the email string, including the forward to the Vice President Business Development, constituted a consultation.

[21] From a review of record 63, it appears the email chain includes the GTH Board Chair who was also the Minister responsible for the GTH at the time. The content of the email appears to pertain to a GTH board decision. It is unclear if the matter involves members of Executive Council as the Minister appears to have been functioning in his role as GTH Board Chair when he sent the email. Therefore, I find that subsection 16(1)(c) of FOIP does not apply to the record. The GTH also applied subsection 17(1)(b) of FOIP to the record so I will consider it further under that provision.

3. Did the GTH properly apply subsection 17(1)(b) of FOIP?

[22] Subsection 17(1)(b) 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;
 - (ii) a member of the Executive Council; or
 - (iii) the staff of a member of the Executive Council;

- [23] This provision is meant to permit public bodies to consider options and act without constant public scrutiny.
- [24] The GTH withheld records 11, 18, 29, 30, 36, 42, 42a, 45, 49, 50, 56, 62, 63, 63, 64 and 67 in full and in part citing subsection 17(1)(b) of FOIP. In its submission, the GTH asserted that the records contain both consultations and deliberations.
- [25] 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.
- [26] 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.
- [27] 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.
- [28] From a review of the records, the information severed appears to constitute consultations and/or deliberations. For example, record 11 is an email chain. The GTH released most of the email chain but withheld a portion. The GTH asserted that the withheld portion was part of deliberations that were occurring. It is clear on the face of the record that a deliberation is occurring regarding key messages related to a public announcement. In addition, it appears the deliberation is occurring between individuals involved in communications. Therefore, I find that subsection 17(1)(b) of FOIP was appropriately applied to records 18, 29, 30, 36, 42, 42a, 49, 56, 62, 63, 63 and 67.
- [29] Records 45, 50 and 64 are decision items. The GTH withheld them in full. However, certain sections of the decision items would not qualify as the information is factual material. I find that the information under the headings *Decision*, *Opportunity* and

Background, should be released. The remainder of the decision items would qualify for exemption under subsection 17(1)(b) of FOIP.

4. Did the GTH properly apply subsection 22(b) of FOIP?

[30] Subsection 22(b) of FOIP is a discretionary exemption and 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;

[31] This exemption is meant to capture records prepared by or for legal counsel (or an agent of the Attorney General) for a public body in relation to the provision of advice or services by legal counsel.

[32] In order for subsection 22(b) of FOIP to apply, there are two criteria that 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?

[33] GTH applied subsection 22(b) of FOIP to portions of records 19, 20, 21, 22, 23a, 25, 25a, 25b, 30, 32, 43, 43a, 47, 59, 61, 65 and 66.

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

[34] In order to qualify, the person preparing the record must be either the person providing the legal advice or service or a person who is preparing the record in question on behalf of, or, for use of, the provider of legal advice or legal related services.

[35] GTH asserted that the records were prepared by or for legal counsel for the GTH.

[36] From a review of the records, it is clear that all of the records were either prepared by or for legal counsel for the GTH. Therefore, the first part of the test is met.

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

[37] GTH asserted that the record was prepared relating to the provision of legal advice and legal services by legal counsel.

[38] *Legal advice* includes a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.

[39] *Legal service* includes any law-related service performed by a person licensed to practice law.

[40] The prepared record does not have to constitute legal advice or legal services to qualify for this part of the test. However, it must relate back to a matter that involves the provision of legal advice or services. The public body should explain how the record relates to a matter involving legal advice or legal services provided by its legal counsel.

[41] From a review of the information severed in the records, it appears the information relates to legal services and advice being provided by legal counsel. Therefore, the second part of the test has been met.

[42] As both parts of the test have been met, I find that subsection 22(b) of FOIP was appropriately applied to records 19, 20, 21, 22, 23a, 25, 25a, 25b, 30, 32, 43, 43a, 47, 59, 61, 65 and 66.

5. Did the GTH properly apply subsection 18(1)(f) of FOIP?

[43] 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;

[44] For this provision to be found 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.

[45] *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.

[46] The public body does not have to prove 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. All three parts of the following 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 prejudice genuine and conceivable?

[47] GTH applied subsection 18(1)(f) of FOIP to records 23a, 25a, 25b, 26, 41a, 43a and 46a.

[48] Records 23a, 25a, 25b, 41a, 43a and 46a are different draft versions of an agreement between GTH and SaskPower. The GTH severed a piece of information in section 3.02 (a) and all of section 11.04 of the draft agreements. Record 26 is an email chain which has the same information as section 3.02(a) reproduced in an email. The GTH severed that information.

[49] In its submission, the GTH asserted that I had previously agreed that the same severed information could be redacted in Review Report 308 & 309-2016. I note that the same record was at issue in that Review Report. I also note that I found that the same information was appropriate to redact in Review Report 159-2016.

[50] Based on GTH's submission and previous findings of this office, I find that subsection 18(1)(f) of FOIP was appropriately applied to records 23a, 25a, 25b, 26, 41a, 43a and 46a.

6. Did the GTH properly apply subsection 17(1)(f) of FOIP?

[51] Subsection 17(1)(f) of FOIP is a discretionary exemption and provides as follows:

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);

[52] This provision is intended to protect agendas and/or meeting minutes as they relate to decision-making within the bodies listed in the provision. The government institution 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. Both parts of the following test must be met:

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

- ii. a committee of a board, commission, Crown corporation or other body that is a government institution as prescribed in the FOIP *Regulations*?

[53] The GTH applied this exemption to all of the information in records 40, 69 and 70. In its submission, the GTH asserted that the records constituted GTH board meeting minutes. Further, that it is a government institution, as it is listed in the Appendix at Part 1 of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Accordingly, it asserted, the minutes were properly classified as minutes of a meeting of a government institution under subsection 17(1)(f) of FOIP.

[54] Based on a review of the records and on the GTH's submission, it is clear the records are minutes from GTH board meetings. Further, I agree that the GTH is a government institution under FOIP. Therefore, both parts of the test are met. I find that subsection 17(1)(f) of FOIP was appropriately applied to records 40, 69 and 70.

IV FINDINGS

[55] I find that subsection 16(1)(a) of FOIP was appropriately applied to records 2a, and 37a.

[56] I find that subsection 16(1)(c) of FOIP was not appropriately applied to record 63.

[57] I find that subsection 17(1)(b) of FOIP was appropriately applied to records 18, 29, 30, 36, 42, 42a, 45, 49, 50, 56, 62, 63, 63, 64 and 67.

[58] I find that subsection 17(1)(b) of FOIP was not appropriately applied to some information in records 45, 50 and 64.

[59] I find that subsection 22(b) of FOIP was appropriately applied to records 19, 20, 21, 22, 23a, 25, 25a, 25b, 30, 32, 43, 43a, 47, 59, 61, 65 and 66.

[60] I find that subsection 18(1)(f) of FOIP was appropriately applied to records 23a, 25a, 25b, 26, 41a, 43a and 46a.

[61] I find that subsection 17(1)(f) of FOIP was appropriately applied to records 40, 69 and 70.

V RECOMMENDATIONS

[62] I recommend the GTH release the information in the records as indicated in Appendix A.

[63] I recommend the GTH continue to withhold the information in the records as indicated in Appendix A.

Dated at Regina, in the Province of Saskatchewan, this 23rd day of October, 2017.

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

APPENDIX A

Record #	Page #	Description	Release or Withhold
2a	4-8	Briefing Note	Withhold - 16(a)
11	29-30	Emails	Withhold - 17(1)(b)
17	38	Email	Not addressed in this Report
18	39-40	Emails	Withhold - 17(1)(b)
19	41	Emails	Withhold - 22(b)
20	42-43	Emails	Withhold - 22(b)
21	49	Email	Withhold - 22(b)
22	50	Email	Withhold - 22(b)
23(a)	52-76	Draft Agreement of Purchase and Sale	Withhold - 22(b) & 18(1)(f)
25	81-82	Emails	Withhold - 22(b)
25a	83-11	Draft Agreement of Purchase and Sale	Withhold - 22(b) & 18(1)(f)
25b	112-136	Draft Agreement of Purchase and Sale	Withhold - 22(b) & 18(1)(f)
26	137	Emails	Withhold - 18(1)(f)
29	141	Emails	Withhold - 17(1)(b)
30	145-147	Emails	Withhold - 17(1)(b) & 22(b)
32	152-154	Emails	Withhold - 22(b)
36	217	Emails	Withhold - 17(1)(b)
37a	219-221	Recommendation for Order in Council	Withhold - 16(a)
40	228-230	Board Minutes	Withhold 17(1)(f)
41a	232-257	Agreement of Purchase and Sale	Withhold 18(1)(f)
42	258	Email	Withhold - 17(1)(b)
42a	259	Parcels Map	Withhold - 17(1)(b)
43	26	Email	Withhold - 22(b)
43a	261-287	Agreement of Purchase and Sale	Withhold - 22(b) & 18(1)(f)
45	296-299	Decision Item	Partial withhold - 17(1)(b). Release portion as indicated in report
46a	301-326	Agreement of Purchase and Sale	Withhold 18(1)(f)
47	327	Email	Withhold - 22(b)
49	333-335	Emails	Withhold - 17(1)(b)
50	336-338	Decision Item	Partial withhold - 17(1)(b). Release portion as indicated in report
56	391-392	Emails	Withhold - 17(1)(b)
59	397-398	Emails	Withhold - 22(b)
61	401-402	Emails	Withhold - 22(b)

62	403-405	Emails	Withhold - 17(1)(b)
63	406	Emails	Withhold - 17(1)(b)
64	407-411	Decision Item	Partial withhold - 17(1)(b). Release portion as indicated in report
65	412-413	Emails	Withhold - 22(b)
66	414-415	Emails	Withhold - 22(b)
67	416	Emails	Withhold - 17(1)(b)
69	421-422	Board Minutes	Withhold 17(1)(f)
70	423-424	Board Minutes	Withhold 17(1)(f)