



REVIEW REPORT 386-2019

Ministry of Education

September 4, 2020

Summary: The Applicant submitted an access to information request to the Ministry of Education (the Ministry). The Ministry provided some of the record but withheld a portion. The Ministry relied on subsections 17(1)(a), 17(1)(g), 18(1)(b)(i), 18(1)(b)(ii), 18(1)(f), 19(1)(c)(iii), and 19(1)(d) of *The Freedom of Information and Protection of Privacy Act* as its reasons for withholding a portion of the record. The Commissioner did not find that any of these exemptions applied to the record. The Commissioner recommended that the Ministry release the record at issue in its entirety to the Applicant.

I BACKGROUND

[1] On October 1, 2019, the Ministry of Education (Ministry) received the following access to information request:

Please provide most recently reported information received from each school division on:

- a) Division-wide Facility Condition Index (FCI)
- b) Value of deferred maintenance

[2] In a letter dated October 31, 2019, the Ministry responded to the Applicant. It provided the Applicant with a one-page record that contained a table featuring three columns. The first column was a list of the 27 school divisions, which was released. The third column was the “FCI” for each school division, which was also released. The second column (or the middle column) was redacted. The Ministry’s letter indicated that the Ministry was

relying on sections 17, 18, and 19 of *The Freedom of Information and Protection of Privacy Act* (FOIP) to refuse the Applicant access.

[3] On December 4, 2019, the Applicant requested a review by my office.

[4] Since the Ministry had cited section 19 of FOIP in its response to the Applicant, my office asked the Ministry for the contact information of the affected third party. The Ministry identified the province's 27 school divisions as affected third parties and provided my office with their contact information.

[5] On January 7, 2020, the Ministry sent a revised letter to the Applicant, indicating which specific subsections of FOIP it was relying on to refuse access to the Applicant. The Ministry indicated it was relying on subsections 17(1)(g), 18(1)(b)(i), 18(1)(b)(ii), 18(1)(f), 19(1)(c)(iii), and 19(1)(d) of FOIP to refuse the Applicant access.

[6] On January 9, 2020, my office notified both the Applicant and the Ministry that it would be undertaking a review. On that same day, my office invited the third parties to provide submissions.

[7] In its submission, the Ministry raised a new discretionary exemption, subsection 17(1)(a) of FOIP. The Ministry provided arguments only for subsections 17(1)(a), 17(1)(g), and 18(1)(f) of FOIP. It did not provide arguments for subsection 18(1)(b)(i), 18(1)(b)(ii), 19(1)(c)(iii), or 19(1)(d) of FOIP. My office did not receive arguments from any of the third parties.

II RECORD AT ISSUE

[8] As described above, the record at issue is a one-page record that contains a table featuring three-columns. The first and third columns were disclosed to the Applicant. The middle column was redacted.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[9] The Ministry qualifies as a “government institution” as defined by subsection 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did the Ministry properly apply subsection 17(1)(a) of FOIP?

[10] Subsection 17(1)(a) of FOIP 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:

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

[11] My office uses the following two-part test to determine if subsection 17(1)(a) of FOIP applies:

1. Does the information qualify as advice proposals, recommendations, analyses or policy options?
2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

[12] In its submission, the Ministry argued that the information in the middle column qualifies as “advice” and “recommendations”. Page 120 of my office’s *Guide to FOIP, Chapter 4: Exemptions from the Right of Access* (updated February 4, 2020) (Guide to FOIP) cites court decisions, decisions by Information and Privacy Commissioners from other jurisdictions, and access and privacy resources that have defined the term “advice”. “Advice” is guidance offered by one person to another. Advice can include 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.

[13] Page 121 of my office's Guide to FOIP defines "recommendation" as a specific piece of advice about what to do, especially when given officially. It is a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious. Recommendations relate to a suggested course of action more explicitly and pointedly than "advice". It can include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised. It includes suggestions for a course of action as well as the rationale or substance for a suggested course of action. A recommendation, whether express or inferable, is still a recommendation.

[14] In its submission, the Ministry argued that the column qualifies as "advice" to other officials in terms of the funding that could be allocated to the school division. Its submission said:

The column also qualifies as advice to other officials in terms of the funding that could be allocated to the school division (i.e. advice in relation to funding).

[15] In its submission, the Ministry argued that the withheld information qualifies as a "recommendation" for the amount that it would cost each school division to do all the maintenance a school building requires. It also argued that the amount is based on a calculation created internally and is used by various branches within the Ministry to determine a school division's budget and potential funding. It concluded its argument by stating that the numbers in the middle qualifies as a "recommendation" to other officials for an amount that could form part of the funding to a school. Its submission said:

The column that has been withheld contains information that has been calculated by the Ministry and is a recommendation for the amount that it would cost each school division to do all of the maintenance the school building requires. The amount found in the column is based on a calculation created internally. The amount is used by various branches within the Ministry of Education to determine a school division's budget and potential funding. As such, the numbers listed in the column qualify as a recommendation to other officials for an amount that could form part of the funding to a school.

[16] Based on a review of the record at issue, I find that the withheld information does not qualify as "advice" or as a "recommendation". First, the withheld information does not qualify as "advice" because the column merely contains numbers. It is difficult (or

impossible) from these numbers themselves to decipher what the “advice”, or guidance offered by one person to another, would be. Is the guidance to provide the full, a portion or none of the numbers listed?

[17] Similarly, the numbers themselves do not qualify as a “recommendation”. The numbers are not a suggested course of action. I cannot decipher what the recommendation is based on the numbers alone.

[18] I find that the first part of the two-part test for subsection 17(1)(a) of FOIP is not met. As both parts must be met, there is no need to continue. Therefore, I find that subsection 17(1)(a) of FOIP does not apply.

3. Did the Ministry properly apply subsection 17(1)(g) of FOIP?

[19] Subsection 17(1)(g) 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:

...

(g) information, including the proposed plans, policies or projects of a government institution, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

[20] My office uses the following two-part test to determine if subsection 17(1)(g) of FOIP applies:

1. Is it information of a government institution?
2. Could disclosure reasonably be expected to result in disclosure of a pending policy or budgetary decision?

[21] For the first part of the test, the Ministry indicated that the withheld information was “calculated internally to advise how much money it would cost to completely restore a building”.

[22] My office's Guide to FOIP explains that "information" means facts or knowledge provided or learned as a result of research or study. Since the Ministry asserted that it calculated the withheld information, I find that the information is of a government institution.

[23] For the second part of the test, the Ministry indicated the withheld information is used internally within the Ministry to determine the budget to allocate to each school division. The Ministry said the withheld information "may also form the basis of the Ministry's budgetary decisions". It said that the withheld information would impact the budget of the Ministry as well as the affected school divisions.

[24] Subsection 24(1)(g) of Alberta's *Freedom of Information and Protection of Privacy Act* (AB FOIP) is similar to subsection 17(1)(g) of FOIP. Subsection 24(1)(g) of AB FOIP provides:

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

...

(g) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision,

[25] In Order F2008-008, Alberta's Office of the Information and Privacy Commissioner (AB IPC) discussed subsection 24(1)(g) of AB FOIP. AB IPC emphasizes the term "pending" and the intent of subsection 24(1)(g) of AB FOIP which is to protect a decision that has already been made – and not merely any number of possible decisions. It states:

[para 57] Although the survey results might provide background information for future policy or budgetary decision decisions [sic], I do not find that they reveal any actual decision. In other words, the information gathered during the surveys might be used to support a variety of legislative and policy changes. In referring to a decision that is *pending*, I believe that the intent of section 24(1)(g) of the Act is to protect a decision that has already been made – and not merely any number of possible decisions. In other words, there is no actual decision that is revealed on the face of the survey results. Moreover, as in the context of section 24(1)(d) discussed above, the Public Body has shown me no particular policy or budgetary decision that it is trying to protect from disclosure (again, it could have elaborated *in camera* if necessary).

[26] Similarly, in my Review Report 042-2015, I had found that subsection 17(1)(g) of FOIP did not apply because the information in question was not a finalized policy. As such, I was not persuaded that the release of the information in question could reasonably be expected to result in the disclosure of a pending policy.

[27] In this case, there does not appear to be a decision that is “pending”. On the face of the record, there does not appear to be any decision that would be revealed if it were disclosed. The Ministry says the information “may” form the basis of the Ministry’s budgetary decision. This suggests that the withheld information is not a pending budgetary decision that needs to be protected. I find that subsection 17(1)(g) of FOIP does not apply to the redacted information.

4. Did the Ministry properly apply subsection 18(1)(f) of FOIP?

[28] Subsection 18(1)(f) of FOIP 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;

[29] When determining if this exemption applies, my office asks the question, “[c]ould disclosure reasonably be expected to prejudice the economic interests of the Government of Saskatchewan or a government institution?”

[30] At page 178 of the Guide to FOIP, the terms “prejudice” and “economic interest” are defined as follows:

Prejudice in this context refers to detriment to economic interests.

Economic interests refers to both the broad interests of a government institution and, for the government as a whole, in managing the production, distribution and consumption of goods and services. This also covers financial matters such as the management of assets and liabilities by a government institution and the government

institution's ability to protect its own or the government's interests in financial transactions.

- [31] In its submission, the Ministry explained that funding to school divisions is provided through a grant and is unconditional. It then argued that the release of the information may show that funding provided by the Ministry for deferred maintenance is not being allocated accordingly. As such, the release of the information "can negatively impact" the Government of Saskatchewan and school divisions. Its submission said:

The portion of the record in question contains budget information between the Ministry of Education and the school divisions, which can affect the budgetary funding the school divisions receive. Funding to the school divisions is provided through a grant and is unconditional. If released, the information may show that the funding provided by the Ministry for deferred maintenance funding is not being allocated accordingly. Release of this information can negatively impact the Government of Saskatchewan and the school divisions.

- [32] Based on the Ministry's submission, it is unclear what economic interest of the Government of Saskatchewan will be prejudiced if the withheld information is released. As such, I find that subsection 18(1)(f) of FOIP does not apply.

5. Did the Ministry properly apply subsections 18(1)(b)(i), 18(1)(b)(ii), 19(1)(c)(iii), and 19(1)(d) of FOIP?

- [33] The Ministry had also cited subsections 18(1)(b)(i), 18(1)(b)(ii), 19(1)(c)(iii), and 19(1)(d) of FOIP. The Ministry did not provide arguments for these exemptions. Section 61 of FOIP provides:

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

- [34] With no arguments from the Ministry or from the third parties, my office must determine if these exemptions apply on the face of the record. On the face of the record, I do not find that subsections 18(1)(b)(i), 18(1)(b)(ii), 19(1)(c)(iii), and 19(1)(d) of FOIP apply.

[35] Without arguments and because of section 61 of FOIP, I cannot find that subsections 18(1)(b)(i), 18(1)(b)(ii), 19(1)(c)(iii) and 19(1)(d) of FOIP applies to the record at issue.

[36] I note that certain information is publicly available through a tabled document of the Standing Committee on Public Accounts (PAC), dated September 25, 2019. Since certain information is publicly available, and because I have not found any of the exemptions it has raised applies, I recommend that the Ministry reconsider its position and release the record at issue in its entirety to the Applicant.

IV FINDINGS

[37] I find that subsection 17(1)(a) of FOIP does not apply to the record at issue.

[38] I find that subsection 17(1)(g) of FOIP does not apply to the record at issue.

[39] I find that subsection 18(1)(f) of FOIP does not apply to the record at issue.

[40] Without arguments and because of section 61 of FOIP, I cannot find that subsections 18(1)(b)(i), 18(1)(b)(ii), 19(1)(c)(iii) and 19(1)(d) of FOIP applies to the record at issue.

V RECOMMENDATION

[41] I recommend that the Ministry release the record at issue in its entirety to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 4th day of September, 2020.

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