



REVIEW REPORT 327-2023

Ministry of Environment

March 11, 2024

Summary: The Applicant submitted an access to information request to the Ministry of Environment (Environment). Environment refused the Applicant access to the record at issue in its entirety. Environment cited subsections 16(1)(a), (c), (d)(i) and (ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant appealed to the Commissioner. The Commissioner found that Environment properly applied subsection 16(1)(d)(i) of FOIP to the record at issue. The Commissioner recommended that Environment continue to withhold the record in its entirety pursuant to subsection 16(1)(d) of FOIP.

I BACKGROUND

[1] On May 4, 2023, the Ministry of Environment (Environment) received the following access to information request from the Applicant:

Feasibility Analysis prepared for the Impacted Sites Code Chapters – Red Tape Review

[2] In a letter dated June 1, 2023, Environment responded to the Applicant. It said it was denying the Applicant access to the record pursuant to subsections 16(1)(a), (c), (d)(i) and (ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On December 8, 2023, the Applicant requested a review by my office.

[4] On January 3, 2024, my office notified Environment and the Applicant that my office would be undertaking a review.

[5] On January 18, 2024, the Applicant provided a submission to my office. On February 9, 2024, the Applicant provided a supplemental submission.

[6] On March 1, 2024, Environment provided a submission to my office.

II RECORDS AT ISSUE

[7] The record at issue is entitled, “Red Tape Reduction Committee Regulatory Review Feasibility Analyst 2022/23.” It is a nine-page document regarding the review of the five chapters of the Saskatchewan Environmental Code by the Government of Saskatchewan’s “Red Tape Reduction Committee.” At the beginning of the document, it has two sections subtitled “Purpose” and “Background.” Then, the remainder of the document is divided into different parts that outline issues to be considered.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

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

2. Did Environment properly apply subsection 16(1) of FOIP?

[9] Environment applied subsections 16(1)(a), (c), (d)(i) and (ii) of FOIP to withhold the record in its entirety from the Applicant. Subsection 16(1) of FOIP provides:

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;

...

(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;

(d) records that contain briefings to members of the Executive Council in relation to matters that:

(i) are before, or are proposed to be brought before, the Executive Council or any of its committees; or

(ii) are the subject of consultations described in clause (c).

[10] Subsection 16(1) of FOIP is a mandatory class-based provision. Subsections 16(1)(a) through (d) of FOIP are not an exhaustive list. Therefore, even if none of the subsections are found to apply, the introductory wording of subsection 16(1) of FOIP must still be considered. In other words, is the information a confidence of Executive Council? (*Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access,” updated October 18, 2023 [*Guide to FOIP*, Ch. 4], p. 95).

[11] Pages 96 to 98 of the *Guide to FOIP*, Ch. 4, provide the following definitions:

- “Cabinet confidences” are generally 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.
- “Including” means that the list of examples of what could be considered a Cabinet confidence following the introductory wording at subsection 16(1) is non-exhaustive.

[12] Environment applied subsection 16(1)(d) of FOIP as one its reasons for withholding the record at issue in its entirety. I will begin my analysis by reviewing this exemption first.

[13] My office uses the following two-part test to determine if subsection 16(1)(d) of FOIP applies. However, only one of the questions needs to be answered in the affirmative for the exemption to apply. There may be circumstances where both questions apply and can be answered in the affirmative.

1. Does the record contain briefings to members of Cabinet in relation to matters that are before, or are proposed to be brought before, Cabinet or any of its committees?
2. Does the record contain briefings to members of Cabinet on matters that relate to the making of government decisions or the formulation of government policy?

(*Guide to FOIP*, Ch. 4, pp. 114-116)

[14] Since only one part of the two-part test needs to be answered in the affirmative in order for subsection 16(1)(d) of FOIP to apply, I will consider the second part of the two-part test.

2. ***Does the record contain briefings to members of Cabinet on matters that relate to the making of government decisions or the formulation of government policy?***

[15] Pages 116 to 117 of *Guide to FOIP*, Ch. 4, provides the following definitions.

- “Briefing” means a written summary of short duration; concise, using few words; a summary of facts or a meeting for giving information or instructions.
- “Executive Council” means the Executive Council appointed pursuant to *The Executive Government Administration Act*. It consists of the Premier and Cabinet Ministers. Executive Council is also referred to as “Cabinet.” Cabinet has also been defined as the committee of senior ministers (heading individual provincial government ministries) which acts collectively with the Premier to decide matters of government policy.
- “In relation” to has been found to have a similar meaning as “in respect of.”
- A “decision” is a determination after consideration of the facts.
- “Formulation” means to create or prepare methodically.
- A “policy” is a standard course of action that has been officially established by government.

[16] In their submission, the Applicant asserted that the record does not contain briefings to Cabinet, but merely contains the “opinions and views of various stakeholders.” They said:

Lastly, the requested record is not a record that contains briefings to members of the Executive Council in relation to matters that are before, or are proposed to be brought before, the Executive Council or any of its committees; or are the subject of consultations described above. The requested record is a summary of the opinions and

views of various stakeholders and [name of organization] is not requesting anything further than those records.

- [17] In its submission, Environment explained that the record at issue is indeed a briefing to members of Cabinet:

Feasibility Analysis documents prepared for the Red Tape Review Committee contain analysis and proposed actions that frequently recommend regulatory or even legislative amendments. The committee considers the proposed actions and either endorses them or provides feedback and/or alternative direction. Proposed actions also go before the Cabinet Committee on Government Operations in the form of minutes from the Red Tape Reduction Committee. Government Operations may approve the Red Tape Reduction Committee's recommendations as presented and direct that they proceed to Cabinet for review and approval as a regulatory/legislative package and it has Cabinet confidence and privilege of the Legislative Assembly members. Any recommendations, directions or approvals are not final, and still need to be crafted and approved at the Cabinet level.

- [18] Based on a review, my office noted that the record is indeed a briefing to members of Cabinet that contains proposed actions. Therefore, the second part of the two-part test is met. I find that Environment properly applied subsection 16(1)(d) of FOIP to the record in its entirety and recommend it continue to withhold the record in its entirety pursuant to subsection 16(1)(d) of FOIP.

- [19] However, I would like to address the Applicant and their assertion that they merely sought records that summarized the opinions and views of various stakeholders. They said they were not requesting anything further than those records. I note that on their access to information form, as summarized in the background of this Report, they specifically sought the "Feasibility Analysis prepared for the Impacted Sites Code Chapters – Red Tape Review." It appears that the Applicant was seeking the feasibility analysis and not merely a summary of the opinions and views of various stakeholders. I note that the record at issue in this review indeed references feedback the Red Tape Reduction Committee received from stakeholders. However, the record at issue contained much more than the references to the feedback from stakeholders. If the Applicant is indeed only seeking "a summary of the opinions and views of various stakeholders" and "is not requesting anything further," I suggest that the Applicant contact Environment about submitting another access to

information request. If the Applicant contacts Environment, then the Applicant should be clear as to what they are seeking. For example, are they seeking a copy of the responses Environment received in response to a [survey](#) sent to stakeholders? If the Applicant makes a new application, I suggest that Environment fulfill its duty to assist pursuant to section 5.1 of FOIP and assist the Applicant on the wording of their access to information request so that the Applicant may access the record (or records) they seek, subject to any exemptions that may apply.

IV FINDINGS

[20] I find that I have jurisdiction to conduct this review.

[21] I find that Environment properly applied subsection 16(1)(d) of FOIP to the record in its entirety.

V RECOMMENDATIONS

[22] I recommend that Environment continue to withhold the record pursuant to subsection 16(1)(d) of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 11th day of March, 2024.

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