SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT F-2007-002

Saskatchewan Government Insurance

Summary: The applicant requested a review of the decision of Saskatchewan Government Insurance (SGI) to deny access to nine documents in the applicant's file under *The Freedom of Information and Protection of Privacy Act* (the Act). SGI claimed sections 17(1)(b)(i) and 22 of the Act to support the decision to deny access. The Commissioner found that SGI did not meet the burden of proof mandated by section 61 of the Act and recommended release of the withheld records.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act* [S.S. 1990-91, c. F-22.01 as am], ss. 2(1)(d), 17(1)(b)(i), 22, and 61.

Authorities Cited: SK Reports F-2004-001, F-2004-002, F-2004-007, F-2005-002, F-2005-004, F-2005-005, F-2006-004, and F-2006-005.

Other Sources Cited: *Helpful Tips*, available at www.oipc.sk.ca under the *Resources* tab.

I BACKGROUND

[1] The Applicant advised that he requested "*… all information pertaining to my drivers licence suspension*" from Saskatchewan Government Insurance (SGI). On August 12, 2005, SGI provided a complete copy of the Applicant's file with the exception of nine documents. SGI advised our office on January 31, 2006 that it was "*… unable to locate the original Access to Information Request form.*"

[2] On January 27, 2006, the Applicant requested a review of SGI's denial of the nine documents responsive to his Access Request.

[3] On February 6, 2006, SGI provided the record to this office and advised that it relied on subsection 17(1)(b)(i) and section 22 of *The Freedom of Information and Protection of Privacy Act* (the Act) for not disclosing the documents. SGI advised our office on July 13, 2006 and again on August 2, 2006 that "*SGI will not be making any further submissions with respect to the exemptions claimed*."

II RECORDS AT ISSUE

[4] The Record consists of nine documents identified as follows:

1. SGI Memorandum (internal) dated October 28, 1991;
2. Fax cover page from SGI to Ombudsman's Office dated 19/02/99;
3. Internal SGI e-mail dated March 5, 1999;
4. Internal SGI e-mail dated March 4, 1999;
5. E-mail from SGI to the Ombudsman's Office dated 3/21/00;
6. E-mail from SGI to the Ombudsman's Office dated May 3, 1999;
7. SGI file memorandum dated 01/04/99;
8. SGI Debtor Notes created February 9, 1999; and
9. SGI Debtor Notes created March 12, 1999.

III ISSUES

1. Did SGI properly apply section 17(1)(b)(i) of the Act to the records withheld?

2. Did SGI properly apply section 22 of the Act to the records withheld?

IV DISCUSSION OF THE ISSUES

Burden of Proof

[5] SGI is a "government institution" within the meaning of section 2(1)(d) of the Act and, therefore, subject to the Act.

[6] It is important to remember that section 61 of the Act clearly places the burden of justifying the exemption on the government institution. Section 61 of the Act reads as follows:

> ***Burden of proof***
> ***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.*

[7] As previously noted in Report F-2004-007,

> *[45] SPMC has argued that "there has been nothing demonstrated by the applicant or otherwise that would suggest an overriding public interest or benefit that would arise from the release of records". Such an argument is at odds with the well established rule that disclosure is the norm and withholding records is the exception and the fact that the burden of proof is on the government institution and not on the applicant.*

[8] I provided guidance on what this office requires in order for the government institution to meet the legislative burden of proof in the *Helpful Tips* sheet, available on our website, www.oipc.sk.ca, under the *Resources* tab. In the *Helpful Tips* sheet, we advised consideration of the following information:

> *A government institution or local authority has the burden of proof if it claims that access should or must be refused under the FOIP Act or LA FOIP Act. The burden is not on the applicant to establish that an exemption does not apply. This means that it is not enough to write the Commissioner and simply say "Access is denied because of section 19 [or some other mandatory or discretionary exemption]". It is up to the government institution or local authority to 'make the case' that a particular exemption(s) applies. That means presenting reasons why the exemption is appropriate for the part of the record that has been withheld.*
>
> *The government institution or local authority usually attempts to make the case by supplementing the record with a written submission.*
>
> *The purpose of the submission is to inform the Commissioner and other parties to the review about the main issues of the case. A submission should contain the following:*
>
> *1. Table of Contents.*
>
> *2. Summary of arguments.*
>
> *3. Supporting documents, authorities and other relevant information.*
>
> *4. Appendices (e.g. Affidavits) if necessary.*
>
> *Information that would be useful to the Commissioner includes:*
>
> *(i) Excerpts from relevant legislation or regulations that apply to the operations of the government institution or local authority and that relate to decisions exercised by the head.*
>
> *(ii) Excerpts from policy manuals that set out practices or policies followed by the government institution or local authority that relate to the decisions exercised by the head.*
>
> *(iii) Relevant court decisions or past decisions of the Saskatchewan Information and Privacy Commissioner. The Saskatchewan OIPC will be publishing on its website the reports and recommendations*

issued when it concludes a review of a decision of a government institution or local authority.

(iv) Decisions made by Information and Privacy Commissioners in other jurisdictions that may be of assistance to the Commissioner in his consideration of the issues.

[9] We also addressed the issue of burden of proof in our Reports F-2006-005 and F-2005-005. For example, in Report F-2006-005, we provided guidance as follows:

> *[27] I determined in Report F-2006-003 that to invoke section 12 of the Act, the burden of proof of establishing an appropriate basis to extend the time to respond to an applicant under the Act should be borne by the government institution[1].*
>
> …
>
> *[77] A statement of the decision made by the government institution and paraphrasing the statutory provision is insufficient for me to assess the appropriateness of that decision. I find that asserting an opinion by the head of SaskTel or designate without particularizing the reasons for such an opinion fails to discharge the burden of proof.*
>
> …
>
> *[79] SGI provided somewhat more detail and did attempt to support its decision with information upon which the decision was based. It was somewhat skeletal and could have been bolstered considerably with additional information particularizing the additional work necessitated by the access request.*
>
> *[80] I find that SGI failed to meet the burden of proof with respect to section 12(1)(b) of the Act.*
>
> …
>
> *[82] SaskEnergy did provide a more detailed response compared with that received from the other three Crown corporations involved in this Review. This included an outline of the steps involved, the process followed and the nature of the unusual legal issues that required additional research and study. Legislative privilege is something out of the ordinary and would not normally be encountered by a Crown corporation in routine activities under the Act.*
>
> *[83] Nonetheless, the submission was lacking sufficient particulars to enable me to make the determination that section 12(1)(b) of the Act had been properly involved. I find that SaskEnergy failed to meet the burden of proof with respect to section 12(1)(b) of the Act.*

Did SGI properly apply section 17(1)(b)(i) of the Act to the records withheld?

[10] SGI claimed section 17(1)(b(i) of the Act to support its denial of the withheld records. Section 17(1)(b(i) reads as follows:

> ***Advice from officials***
> ***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;*
>
> *…*
>
> *(2) This section does not apply to a record that:*
>
> *…*
>
> *(b) is an official record that contains a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;*

[11] We examined the criteria required to rely on this exemption in Reports F-2004-001, F-2004-002, F-2005-004 and F-2006-004. In Report F-2006-004, we stated:

> *[30] The Commission applied section 17(1)(b) of the Act to 71 documents. To determine if the exemption applies to any of these records or parts thereof, firstly, I need to revisit the criteria for determining what constitutes "consultations" or "deliberations" under this provision.*
>
> *[31] In our Report F-2004-001, I determined that,*
>
> *[12] A "consultation" occurs when the views of one or more officers or employees of a government institution are sought as to the appropriateness of a particular proposal or suggested action. (Alberta Order F2003-016 [20]) A "deliberation" is a discussion of the reasons for and against an action by the persons described in this section. (Alberta Order 2001-010 [32]) …*
>
> *[13] In order to justify withholding a record on a basis of section 17(1)(b)(i), the opinions solicited during a "consultation" or "deliberation" must:*
>
> *a) either be sought or expected, or be part of the responsibility of the person from whom they are sought;*
>
> *b) be sought for the purpose of doing something, such as taking an action or making a decision; and*
>
> *c) involve someone who can take or implement the action. (Alberta Orders 96-006 [p.10], 99-013[48])*

[12] On July 13, 2006, SGI advised that "*SGI will not be making any further submissions with respect to the exemptions claimed*."

[13] On August 1, 2006, we wrote to SGI as follows:

> *You indicated that you do not intend to make any submissions in support of the exemptions you have claimed. On the face of it, it appears that you have not met the burden of proof in section 61 of The Freedom of Information and Protection of Privacy Act.*
>
> *Please be advised that we will be proceeding with our review and to report in due time.*

[14] SGI responded on August 2, 2006 as follows:

> *Thank you for your letter of August 1, 2006. In your letter you indicate that SGI does "not intend to make any submissions in support of the exemptions you have claimed." This is not the case. If you look to my letter of July 13, 2006, to … your office, I state that SGI would not be making any "further submissions with respect to the exemptions claimed."*
>
> *Going back to my letter to your office of February 6, 2006, you will see that SGI is relying on sections 17(1)(b)(i) and 22 of the Act for not disclosing the documents.*

[15] With respect, simply claiming that a discretionary exemption applies without supporting explanation as to how or why it applies is insufficient to meet the burden of proof imposed by the Act. SGI has not provided me with the clear, direct evidence required to make a finding that this section applies.

Did SGI properly apply section 22 of the Act to the records withheld?

[16] SGI claimed section 22 of the Act to support its denial of the withheld records. Section 22 reads as follows:

> ***Solicitor-client privilege***
> ***22*** *A head may refuse to give access to a record that:*
>
> *(a) contains information that is subject to solicitor-client privilege;*
>
> *(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; or*

> *(c) contains correspondence between an agent of the Attorney General for Saskatchewan or legal counsel for a government institution and any other person in relation to a matter involving the provision of advice or other services by the agent or legal counsel.*

[17] We provided direction on the application of section 22 of the Act in Report F-2005-002.

[18] Again, simply claiming that a discretionary exemption applies without any explanation as to how or why it applies is insufficient to meet the burden of proof imposed by the Act. SGI has not provided me with the clear, direct evidence required to make a finding that this section applies.

[19] I find that SGI has not provided any evidence to meet the burden of proof required under the Act to rely on the exemptions claimed.

V RECOMMENDATIONS

[20] I recommend SGI release all documents in the Record to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 28th day of March, 2007.

R. GARY DICKSON, Q.C.
Information and Privacy Commissioner for Saskatchewan