

SASKATCHEWAN
OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER

REPORT F-2012-003

Ministry of Government Services

Summary:

The Applicant made two separate access to information requests to the Ministry of Government Services pertaining to the sale of Crown land. Included in the responsive material were 14 documents that the Ministry withheld in full or in part pursuant to sections 18(1)(d), 19(1)(b), 19(1)(c)(i), 19(1)(c)(ii), 19(1)(c)(iii), 22(a), 22(b) and 22(c) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that the Ministry had not met the burden of proof in applying section 18(1)(d) of FOIP as it did not demonstrate that disclosure could reasonably be expected to interfere with contractual or other negotiations. Further, he found that the Ministry had not identified the affected Third Parties and as such sections 19(1)(b), 19(1)(c)(i), 19(1)(c)(ii) and 19(1)(c)(iii) of FOIP did not apply. Finally he upheld the Ministry's decision to withhold certain documents pursuant to sections 22(a) and 22(c) of FOIP.

Statutes Cited:

The Freedom of Information and Protection of Privacy Act (hereinafter FOIP), S.S. 1990-91, c. F-22.01 ss. 18(1)(d), 19(1)(b), 19(1)(c)(i), 19(1)(c)(ii), 19(1)(c)(iii), 22(a), 22(c), 49(4), 61; *The Local Authority Freedom of Information and Protection of Privacy Act* (hereinafter LA FOIP), S.S. 1990-91, c. L-27.1 s. 17(1)(d); *Alberta's Freedom of Information and Protection of Privacy Act*, R.S.A 2000, c. F-25 ss. 27(1)(a), 27(1)(c)

Authorities Cited:

Saskatchewan OIPC Reports F-2010-001, F-2005-002, F-2004-007, F-2004-006, F-2012-001/LA-2012-001, LA-2011-001, LA-2010-001, LA-2007-001, Investigation Report H-2007-001; AB IPC Order F2006-027, 98-016, 98-005, 96-017; *General Motors Acceptance Corporation of*

Canada, Limited v. Saskatchewan Government Insurance [1993] S.J. No. 601

Other Sources

Cited:

SK OIPC, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review*; Access and Privacy Branch, Service Alberta, *FOIP Guidelines and Practices* (2009); Office of the Information Commissioner of Canada, *Investigators Guide to Interpreting the ATIA*; K. Klein and D. Kratchanov: *Government Information: The Right to Information and the Protection of Privacy in Canada, Second Edition* (Toronto: Carswell Press, 2009)

I BACKGROUND

- [1] The Applicant made two separate access to information requests to the Ministry of Government Services (formerly Saskatchewan Property Management (SPM) and Saskatchewan Property Management Corporation (SPMC)¹).

OIPC File: 061/2007 – FOI/AI
Ministry File: SPM06/06G
(Hereinafter Review #1)

- [2] In the first request, dated September 19, 2006, the Applicant requested:

All documents, records, memoranda between SPMC and the promoters, partners, members of Echo Valley Limited Partnership (E.V. Resorts) with respect to the disposition/acquisition of the Echo Valley Centre lands situated at Fort San, Sk.

- [3] The Ministry responded to the Applicant in a letter dated December 14, 2006. The Ministry identified 10 documents totalling 49 pages that are responsive to this request (Record #1). It provided the Record to the Applicant, however 6 of the 10 documents were either withheld in full or severed pursuant to sections 18(1)(d), 19(1)(c)(ii), 19(1)(c)(iii) 22(a) and 22(c) of *The Freedom of Information and Protection of Privacy Act* (FOIP).²

¹ Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC), Investigation Report H-2007-001 at [15], available at www.oipc.sk.ca/reviews.htm.

² *The Freedom of Information and Protection of Privacy Act* (hereinafter FOIP), S.S. 1990-91, c. F-22.01.

- [4] My office received a Request for Review and we undertook the Review.
- [5] We received a submission from the Ministry dated January 9, 2008. In its submission, the Ministry claimed additional exemptions, 22(b) and 19(1)(b). My office wrote to the Ministry on January 14, 2008. We determined that, notwithstanding the Ministry failed to identify those two exemptions two years earlier when it responded to the original access request, those sections would be considered in this Review for the following reasons. Since section 22(a) and 22(c) were originally raised there would be no prejudice to the Applicant to include subsection 22(b). Section 19(1)(b) is a mandatory exemption, which my office would normally consider during a Review even if it is not raised by the government institution in its original section 7 response to the Applicant.

OIPC File: 005/2008 – FOI/AI
Ministry File: SPM03/07G
(Hereinafter Review #2)

- [6] In the second request dated September 10, 2007, the Applicant requested:
- all documents, records and memoranda between SPMC and Echo Valley Resorts Limited and/or [Individual B], [Individual A] and [Individual D] with respect to the sale/disposition of the Sanatorium at Fort San, Sask.
- [7] The Ministry received the request on September 17, 2007. It sent a letter to the Applicant dated October 16, 2007 which stated:
- Certain records you have requested contain third party information subject to confidentiality provisions in subsection 19(1) of *The Freedom of Information and Protection of Privacy Act*. However, pursuant to subsection 19(3) of the Act a decision may be made to give access to one or more of the records subject to hearing any objections the third party may have. Therefore, we have given notice to the affected third party as required under section 34 of the Act. The third party has until 20 days after receiving our notice which is approximately November 7, 2007, to provide our office with representations why access to the records should not be given. Once the third party has had an opportunity to respond to our notice, Saskatchewan Property Management will make a decision regarding your access request for these records and notify you of the decision.

[8] The Ministry further responded to the Applicant in a letter dated November 16, 2007. It identified 8 documents which portions would be withheld pursuant to sections 19(1)(c)(i) and 19(1)(c)(iii) of FOIP. The letter indicated that a Third Party had interests in these documents and that it had given notice to the Third Party of its intention to release the majority of the documents. As such, the Third Party would be given 20 days to appeal the decision pursuant to section 49 of FOIP³ as follows:

In accordance with the foregoing I hereby give you notice of my intention to release these records to the Applicant unless, within 20 days after the date I advised the third party of my intention to do so, the Third Party requests a review pursuant to section 49 of the Act.

Both the Third Party and the Applicant are entitled to a request for review of my decision pursuant to section 49 of the Act within 20 days of this Notice.

[9] The Ministry also indicated that there were several e-mails with Crown counsel being withheld pursuant to section 22 of FOIP. In total there were 15 documents totalling 56 pages that are responsive to the Applicant's request (Record #2). The Ministry is withholding 8 of the documents either partially or in their entirety.

[10] The Applicant requested a Review by my office.

II RECORDS AT ISSUE

Record of Review #1 (Record #1)

Page #	Description	Exemptions
1-2	E-mail between SPM officials and Crown Counsel involving partnership of Echo Valley Ltd.	22(a), 22(b) and 22(c) applied to everything but e-mail header
4-5	E-mail between SPM officials, Crown Counsel and Echo Valley Resorts Limited Partnership	18(1)(d) applied to entire document 22(a) and 22(c) applied to everything but e-mail heading

³ Section 49(4) of FOIP states: "A third party may make an application pursuant to subsection (3) within 20 days after being given notice of the decision."

Page #	Description	Exemptions
23-25	Fax cover sheet and letter from Echo Valley Resorts Ltd to SPM dated Sept. 30, 2005	19(1)(b) – applied to 3 paragraphs partially or fully severed 18(1)(d) – applied to 3 paragraphs partially or fully severed
26-43	Draft Memorandum of Understanding between Town of Fort Qu’Appelle, SPM and Echo Valley Resorts Limited Partnership	18(1)(d) 19(1)(b) 19(1)(c)(ii), 19(1)(c)(iii) 22(c)
44-47	Cover e-mail and corporate CV for [a Company]	19(1)(b) 19(1)(c)(ii), 19(1)(c)(iii)
48-49	Agenda prepared by Echo Valley Resorts for meeting with SPM officials	19(1)(b) 19(1)(c)(ii), 19(1)(c)(iii)

Record of Review #2 (Record #2)

Page #	Description	Exemptions
1-22	Option & Transfer Agreement dated February 13, 2006 between SPM & the Town of Fort Qu’Appelle	19(1)(c)(i) and 19(1)(c)(iii)
29-30	Amending agreement dated July 31, 2007 between Government of Saskatchewan & the Town of Fort Qu’Appelle	19(1)(c)(i), 19(1)(c)(iii) applied to one figure on page 29.
38-40	E-mails dated July 30, 2007 between SPM officials and Crown Counsel regarding July 31, 2007 Amending Agreement and July 27, 2007 email from legal counsel for Echo Valley Resorts Limited Partnership	22(a), 22(b) and 22(c)
41-44	E-mails dated July 31, 2007 between SPM officials and Crown Counsel regarding option agreements and assignments and email communications dated July 31, July 30 and July 26, 2007 with legal counsel of Echo Valley Resorts Limited Partnership, legal counsel for The Town of Fort Qu’Appelle and Crown Counsel	22(a), 22(b) and 22(c)
45	E-mails dated August 7, 2007 between SPM officials, Crown Counsel, and legal counsel of Echo Valley Resorts Limited Partnership regarding specific inclusions in the proposed amending agreement	22(a), 22(b) and 22(c)

Page #	Description	Exemptions
46-49	Two e-mails dated August 3, 2007 (11:17 A.M.) and August 2, 2007 between SPM officials, Crown Counsel and legal counsel for The Town of Fort Qu'Appelle and legal counsel for Echo Valley Resorts Limited Partnership regarding July 31, 2007 Amending Agreement a draft of which is included as part of August 3, 2007 email	22(a), 22(b) and 22(c)
50-54	Two e-mails dated August 3, 2007 (8:59 A.M.) and August 2, 2007 (same version as page 47 of the record) between SPM officials, Crown Counsel, legal counsel for The Town of Fort Qu'Appelle and legal counsel for Echo Valley Resorts Limited Partnership regarding July 31, 2007 Amending Agreement a draft of which is included as part of August 3 email	22(a), 22(b) and 22(c)
55-56	Two e-mails dated August 2, 2007 and August 1, 2007 between SPM's Crown Counsel, legal counsel for The Town of Fort Qu'Appelle and legal counsel of Echo Valley Resorts Limited Partnership regarding July 31, 2007 Amending Agreement	22(a), 22(b) and 22(c)

[11] Pages 1 to 22 of Record #2 have been disclosed to the Applicant through a different process and are no longer at issue.

III ISSUES

- 1. Did the Ministry of Government Services properly apply section 18(1)(d) of *The Freedom of Information and Protection of Privacy Act* to portions of Record #1?**
- 2. Did the Ministry of Government Services properly apply sections 19(1)(b), 19(1)(c)(i), 19(1)(c)(ii) and 19(1)(c)(iii) of *The Freedom of Information and Protection of Privacy Act* to portions of Record #1 and Record #2?**
- 3. Did the Ministry of Government Services properly apply sections 22(a), 22(b) and 22(c) of *The Freedom of Information and Protection of Privacy Act* to portions of Record #1 and Record #2?**

IV DISCUSSION OF THE ISSUES

1. Did the Ministry of Government Services properly apply section 18(1)(d) of *The Freedom of Information and Protection of Privacy Act* to portions of Record #1?

[12] The Ministry applied this exemption to pages 4 to 5, three paragraphs on pages 23 to 25 and pages 26 to 43 of Record #1.

[13] Section 18(1)(d) of FOIP states:

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

...

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution...⁴

[14] I have commented on section 18(1)(d) of FOIP in my Report F-2004-007 involving SPMC (now the Ministry of Government Services). The Report stated:

[21] SPMC's concern has been that parties may extrapolate from Package A specific lease amounts and use those as negotiating levers with SPMC in future lease negotiations. SPMC contends that it may be advantageous to keep lease rates, tenant inducements and concessions as private negotiated matters. Even if that is so, and it is not necessary to make that determination, I find that the aggregate information in Package A does not disclose lease rates, tenant inducements or concessions. SPMC further asserts that, as a property management company, the publication of financial information pertaining to leases could severely prejudice the corporation and possibly its tenants. In fact, the costs evident in Package A relate to the entire building and not to specific lease agreements or to specific tenants.

[22] In my view, the right of public access must not be frustrated except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure. There may well be a possibility of harm but in our view, that possibility is not sufficient to meet the threshold test.⁵

⁴ *Supra* note 2 s. 18(1)(d).

⁵ SK OIPC Report F-2004-007 at [21] to [22], available at www.oipc.sk.ca/reviews.htm.

[15] I also made the following comment on the equivalent to section 18(1)(d) in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP)⁶ in my Report LA-2007-001:

[132] The University has made reference to a matter under grievance with the University Faculty Association. The University has submitted that there was a related grievance process underway at the time of the application and that this related to negotiations with a bargaining unit on campus. The statutory exemption however requires “interference” and that surely connotes something more than the simple fact that there is a grievance pending. In addition, the University has provided no particulars of the grievance, the grievance process or the interference that would ensue if access was granted to the applicant. **My job is not to speculate about possible interference in the absence of evidence from the University.**

[133] There is no evidence of contractual or other negotiations of the University in respect of which there would be a reasonable expectation of interference. The arguments of the University are vague and speculative.

[134] I see no prejudice or interference with any contractual negotiations generally or with any grievance pending. I find that the University has not discharged the burden of proof of establishing that the disclosure of the record to the Applicant could reasonably be expected to interfere with contractual or other negotiations of the local authority.

[135] The University, quite properly, acknowledged in its September 20, 2004 letter to this office however that “*matters have now been administratively resolved*”. In the submission, the Applicant contended that the section 17(1)(d) exemption should no longer apply to the record.

[136] In any event, I find that there has been no persuasive evidence that there is a reasonable expectation that disclosure of the letter from A would in any way interfere with contractual or other negotiations of the University.⁷

[emphasis added]

[16] In order to be persuasive, the Ministry would need to provide the following:

⁶ *The Local Authority Freedom of Information and Protection of Privacy Act* (hereinafter LA FOIP), S.S. 1990-91, c. L-27.1. Section 17(1)(d) of LA FOIP is similar to section 18(1)(d) of FOIP. Section 17(1)(d) states:

17(1) Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the local authority...

⁷ SK OIPC Report LA-2007-001 at [132] to [136], available at www.oipc.sk.ca/reviews.htm.

- Identify and provide details about the contractual or other negotiation;
- Identify and provide details about the parties involved with the contractual or other negotiation; and
- Detail how release of the record would interfere with the contractual or other negotiation.

[17] I also note that section 61 of FOIP places the burden of proof on a government institution as follows:

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.⁸

a) Record #1 - Pages 4 to 5

[18] The Ministry describes pages 4 through 5 as:

...an e-mail from [a law firm], the solicitor for Echo Valley Resorts Limited Partnership and [name of Counsel], Crown Counsel for SPM and [name of counsel], legal counsel for the Town of Fort Qu'Appelle. The record provides information on the members of the Limited Partnership and Echo valley Resorts Ltd. The record also references the Memorandum of Understanding prepared by Echo Valley Resorts Limited Partnership. Additionally the record references activities that the writer feels need to be completed.

[19] In support of this exemption, the Ministry simply states:

Section 18(1)(d) covers the exemption for release of a record, which could be expected to interfere with negotiations of SPM. The attached memorandum of understanding was a draft that was never entered into by the parties.

[20] The Ministry references a draft Memorandum of Understanding (MOU), however, this is not part of pages 4 to 5 of the record.

[21] The Ministry has not detailed with what negotiations the information could interfere, however, it appears that the subject matter of the Record is a sale of Crown land. However, as stated above, it is not my role to speculate.

⁸ *Supra* note 2 s. 61.

[22] The Ministry has not demonstrated how disclosure of the existence of a draft MOU would interfere with negotiations that have not been identified by the Ministry.

b) Record #1 – Pages 23 to 25

[23] The Ministry described Pages 23 to 25 of Record #1 as:

... a faxed letter from Individual A of Echo Valley Resorts Ltd. dated September 30, 2005 to [Name of Deputy Minister], Deputy Minister of SPM. The letter discusses the development of agreements between SPM, The Town of Fort Qu'Appelle and Echo Valley Resorts Ltd. The letter also presents Echo Valley Resorts Ltd. position on maintaining parts of the property within the development as well as some discussion of the concept for development.

[24] In support of this exemption, the Ministry stated:

The exemption is applied as the exempted items include negotiation positions that SPM may or may not accept and if publically known could influence negotiations with other parties for the properties in question.

[25] The Ministry has not identified the other parties involved with the negotiation. Nor has it explained how the negotiations would be influenced if the information was made public. Further, I note “to influence” is not synonymous with “to interfere”.

c) Record #1 – Pages 26 to 43

[26] The Ministry describes this portion of the record as “... a draft agreement prepared by Echo Valley Resorts Ltd. The agreement was never signed by the parties named in the draft agreement.”

[27] In support of this exemption, the Ministry states:

As noted above 18(1)(d) is claimed as the it [sic] can reasonably be expected that SPM's negotiation position could be influenced if the contents where [sic] released. It is reasonable to expect the information if released could be seen as something SPM has negotiated which is not the case. The release could influence future negotiations by setting a false basis for negotiations for other parties.

[28] The Ministry is arguing that the disclosure of this record would interfere with future negotiations even though the agreement was never signed.

[29] Although the Alberta counterpart to Saskatchewan's section 18(1)(d) is based on a probable harms test whereas ours is a reasonable expectation of interference, Alberta's Information and Privacy Commissioner (IPC) Order 98-005 is useful in this case. This Order found that specific information from a record must be the cause of harm and therefore, in those circumstances, could not have an impact on future negotiations.

[para 52] The Public Body has specifically relied on section 24(1)(c), which reads:

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:

- (c) information the disclosure of which could reasonably be expect to
 - (i) result in financial loss to;
 - (ii) prejudice the competitive position of, or
 - (iii) interfere with contractual or other negotiations of, the Government of Alberta or a public body;

[para 53] In support of this submission the Public Body argued that:

1. Disclosing land agreements without the consent of the land owners could interfere with negotiations;
2. If land agreements were routinely disclosed, it would expose the personal financial situation of the land owner to public scrutiny;
3. Negotiation with land owners may become more difficult and time consuming;
4. The land owners may even refuse to negotiate with the Public Body resulting in the need to expropriate land. Expropriation is costly and time consuming and any delay in construction could add hundreds of thousands of dollars on certain projects; and,
5. Because there are some terms in the Record that are not completely fulfilled, negotiations between the parties are ongoing and releasing the Record will reduce

the flexibility which the parties have to reach a resolution without resorting to further legal proceedings.

[para 54] I will first deal with the test that the Public Body has to meet to satisfy the requirements of section 24 and then address each of the Public Body's supporting arguments individually.

[para 55] Section 24 is a discretionary exception. In Orders 97-005, 96-013 and 96-012, I stated that while the public body may present evidence to show that the information falls within section 24(1)(c), the public body must still present evidence to show that the information falls within the general rule under section 24(1). To meet that general rule, the Public Body must show that the information "could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy".

[para 56] As I indicated in Order 96-003, the courts have applied a threshold test in interpreting "reasonable expectation of harm" by considering the following three factors: 1) there must be a clear cause and effect relationship between the disclosure and harm; 2) the disclosure must cause harm and not simply interference or inconvenience; and, 3) the likelihood of harm must be genuine and conceivable.

[para 57] In Order 96-003, I also referred to the decision *Canada (Information Commissioner) v. Canada (Prime Minister)* [1992] F.C.J. No. 1054 ("*Canada (Information Commissioner)*"), which held that the evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue.

[para 58] **The wording of section 24(1) implies that it is the specific information itself that must be capable of causing harm if the information is disclosed.** When I look at the kinds of information listed in section 24(1)(a)-(d), two things appear clear: (i) the legislature had very specific kinds of information in mind when it was contemplating what information had the potential to cause harm if disclosed; and (ii) **there must be a direct link between disclosure of that specific information and the harm resulting from disclosure; in other words, there must be something in the information itself capable of causing the harm alleged.**

[para 59] In Order 96-016, I adopted the reasoning in *Canada (Information Commissioner)* wherein the court considered the issue of "direct" harm in dealing with a similar section of the federal access legislation and found that (i) there must be a clear and direct linkage between the disclosure of the specific information and the harm alleged, and (ii) **the court must be given an explanation of how or why the harm alleged would result from disclosure of the specific information.**

[para 60] **I find that, on the whole, the evidence presented by the Public Body does not demonstrate how disclosing the information in this *specific* Record to the Applicant could reasonably be expected to bring about the harm alleged.** The

Public Body's arguments, for the most part, relate to the harm that may ensue if land agreements in general are disclosed. Accordingly, I find unconvincing and speculative the Public Body's submission that disclosing land agreements could interfere with negotiations by making them more difficult and time consuming and perhaps result in future landowners refusing to negotiate with the Public Body. The Public Body has not met any of the tests set out in section 24(1)(c).

[para 61] Does the information nevertheless fall within the general rule under section 24(1)? The only argument raised by the Public Body that could meet the first part of the direct harm test is the allegation that releasing the Record would interfere with the ongoing negotiations between the Third Parties and the Public Body in view of the fact that a number of terms of the Record remain unfulfilled. While I understand the argument, I cannot agree with Public Body's position that negotiations are ongoing as the contract was entered into between the parties approximately two years ago. Once a contract is executed, negotiation is no longer required to secure performance of the terms of the contract. If one party has not fulfilled its obligations under the contract, the other party to the contract has a legal remedy to compel the other's performance. Thus, even though the Public Body addressed the harm that may result from specifically disclosing the Record, I find the harm alleged insufficient to meet the requirements of section 24(1).

[para 62] **In summary, the Public Body's arguments speculate that future negotiations with landowners would be hindered if land agreements generally could be accessed by the public and I find this insufficient evidence to meet the first part of the test set out in section 24(1).**⁹

[emphasis added]

[30] In this case, the Ministry is arguing that a "draft agreement" that was never signed could give a false basis to future similar negotiations. To even consider this argument, one would have to ignore the fact that the agreement was never signed. We cannot overlook this fact however. As such, it does not seem likely that the specific information in the agreement would interfere with future negotiations. The Ministry has made no representation regarding negotiations presently underway or concluded.

[31] My view is that the Ministry has not met the burden of proof to demonstrate that disclosure of pages 4 to 5, 23 to 25 or 26 to 43 of Record #1 could reasonably be expected to interfere with contractual or other negotiations within the meaning of 18(1)(d) of FOIP.

⁹ Alberta Information and Privacy Commissioner (hereinafter AB IPC) Order 98-005 at [52] to [62], available at <http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1998>.

2. Did the Ministry of Government Services properly apply sections 19(1)(b), 19(1)(c)(i), 19(1)(c)(ii) and 19(1)(c)(iii) of *The Freedom of Information and Protection of Privacy Act* to portions of Record #1 and Record #2?

[32] Section 19 of FOIP states:

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

(a) trade secrets of a third party;

(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;

(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;

(d) a statement of a financial account relating to a third party with respect to the provision of routine services from a government institution;

(e) a statement of financial assistance provided to a third party by a prescribed Crown corporation that is a government institution; or

(f) information supplied by a third party to support an application for financial assistance mentioned in clause (e).

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.¹⁰

[33] Below is a list of the Record with corresponding Third Parties as indicated by the Ministry.

Pages	Description	Third Party as identified in Ministry's submissions	Exemptions
Record #1 23-25	Letter from Echo Valley Resorts Ltd to SPM dated Sept. 30, 2005	Echo Valley Resorts Ltd.	19(1)(b) [also 18(1)(d)]
Record #1 26-43	Draft Memorandum of Understanding between Town of Fort Qu'Appelle, SPM and Echo Valley Resorts Limited Partnership	Echo Valley Resorts Limited Partnership	19(1)(b) 19(1)(c)(ii) 19(1)(c)(iii) [also 18(1)(d) and 22(c)]
Record #1 44-47	Cover e-mail and corporate CV for Individual A's company	Echo Valley Resorts Ltd.	19(1)(b) 19(1)(c)(ii) 19(1)(c)(iii)
Record #1 48-49	Agenda prepared by EV Resorts Ltd. for meeting with SPM officials	Echo Valley Resorts Ltd	19(1)(b) 19(1)(c)(ii) 19(1)(c)(iii)
Record #2 29-30	Amending Agreement dated July 31, 2007 between the Government of Saskatchewan and Town of Fort Qu'Appelle	Echo Valley Resorts Limited Partnership	19(1)(c)(i) 19(1)(c)(iii)

a) Identifying the Third Parties

[34] Essential to any analysis of a third party exemption is a preliminary identification of the affected third parties. My office has attempted on several occasions during the course of this Review to clarify with the Ministry who were the Third Parties. As I will outline, I

¹⁰ *Supra* note 2 s. 19.

was unable to establish individuals who have authority to make binding representations on any Third Party's behalf.

i) Echo Valley Resorts Ltd.

[35] Echo Valley Resorts Ltd. has been identified as the Third Party by the Ministry for pages 23 to 25, 44 to 47 and 48 to 49 of Record #1.

[36] Appendix A of the Ministry's submission for Record #1 is a letter dated November 29, 2006 from Individual A on behalf of Echo Valley Resorts Ltd. to the Ministry objecting to the release of portions of Record #1.

[37] Our office wrote to Echo Valley Resorts Ltd. via Individual A on September 4, 2009 asking for representation on this matter. We sent reminder letters dated October 20, 2009, November 24, 2009 and February 2, 2010. We received a letter dated February 16, 2010 from a different company not identified by the Ministry as a third party objecting to the release of the information within the Record. The letter states "[Name of different company] was involved in Echo Valley Resorts Ltd. in 2005 and it continues to have an economic interest in the success of the development".

[38] The problem is the Ministry did not identify the company indicated at [37] as a third party. In addition, it is unclear as to whether the different company has authority to represent Echo Valley Resorts Ltd. in this matter.

ii) Echo Valley Resorts Limited Partnership

[39] Echo Valley Resorts Limited Partnership has been identified as the Third Party by the Ministry for pages 26 to 43 of Record #1 and 29 to 30 of Record #2.

[40] Appendix A of the Ministry's submission for Record #2 is a letter dated November 6, 2007 from an Individual B, who appeared to be Director of Echo Valley Resorts Ltd., to the Ministry objecting to the release of portions of Record #2. This is confusing as Echo

Valley Resorts Ltd. is not named as a Third Party by the Ministry for Record #2 – only Echo Valley Resorts Limited Partnership is named. Nevertheless, the letter of November 6, 2007 clearly references the Ministry file SPM03/07G (Record #2) and specific portions of the record therein. Further, there is no similar representation from Echo Valley Resorts Limited Partnership in the Ministry's submission for Record #1.

[41] I note Echo Valley Resorts Limited Partnership is sometimes referred to as 'Echo Valley Limited Partnership' or 'EV Resorts' in the Index of Records and in documents within the Records themselves.

[42] My office wrote to Echo Valley Resorts Limited Partnership via Individual B on September 4, 2009 asking for representation on this matter. We sent reminder letters dated October 20, 2009, November 24, 2009 and February 2, 2010.

[43] We contacted the Ministry via e-mail on April 6, 2009 to ask if it was their understanding that Individual B was the contact for Echo Valley Resorts Limited Partnership and asking for updated contact information. The Ministry returned our e-mail the same day advising that it had no updated contact information.

[44] My office then wrote to Individual A of Echo Valley Resorts Ltd. on April 14, 2010. We asked:

...before we proceed with our analysis, we must hear from a second third party who we are having trouble locating. The other Third Party is Echo Valley Limited Partnership. Given the nature of the record in this file and the similarity between the name of the Third Party and your organization's name, we wonder what if any relationship exists between the two, to your knowledge.

We would appreciate any information you could offer us.

[45] In response, we received a letter from a lawyer from a law firm dated April 29, 2010. It stated:

We have been provided with a copy of your letter of April 14, 2010 addressed to Echo Valley Resorts Ltd. to the attention of [Individual A].

This is to advise that the correct person to contact in this regard is [Individual B] of Fort Qu'Appelle, Saskatchewan.

- [46] My office then wrote again to Individual B on May 14, 2010 asking for a submission no later than June 14, 2010.
- [47] My office received a phone call on May 31, 2010 from an Individual C. He advised that he represented Echo Valley Resorts Limited Partnership, not Individual B. He advised he would send representation. On June 4, 2010 my office received a letter from Individual C dated June 1, 2010 objecting to release of the record. I note that the letter is not on any kind of letterhead, although it is indicated by address block at top of letter that it is from Echo Valley Limited Partnership. The letter is signed by Individual C, no title. I also note that the address block states Echo Valley Limited Partnership and not Echo Valley Resorts Limited Partnership.
- [48] What is also noteworthy is that the Ministry confirmed in its letter of February 21, 2012 that Echo Valley Resorts Ltd. was the general partner of Echo Valley Resorts Limited Partnership.
- [49] Further, page 20 of Record #1 is a "Release of info – concent.doc [sic]" document dated November 28, 2005 and signed by the lawyer from the aforementioned law firm which states:

On behalf of all the limited Partners of Echo Valley Resorts Limited Partnership, **I hereby waive the requirement that the proposal respecting the sale of Echo Valley Conference Centre submitted by the Town of Fort Qu'Appelle and the limited Partnership be kept in confidence by the Department of Property Management of the Government of Saskatchewan.** I further consent to the public disclosure of other information relating to the proposal, including the proponents of the proposal, and the names of individuals who are principals of any corporate entities that may be involved.

[emphasis added]

iii) Identifying the Third Parties and Burden of Proof

- [50] When a third party exemption is applied, it is the invariable practice of my office to contact the third party to invite them to make a submission.¹¹ The problem I have encountered is that I have been unable to identify who has the capability to bind the Third Parties. With respect to Record #1, I am unable to ascertain that Individual A, as originally indicated by the Ministry, has the ability to bind Echo Valley Resorts Ltd. as his communication has been on letterhead of what appears to an entirely different corporation as noted at [37]. Further, the letter states that this company is no longer involved in Echo Valley Resorts Ltd.
- [51] In the case of Record #2, I have contacted Individual B, who the Ministry identified as responsible for the Third Party, Individual A who is named as a director and vice president of the general partner of the Third Party, and the lawyer who appeared from review of the Record to be counsel of the Third Party. None of them accepted any representative responsibility for Echo Valley Resorts Limited Partnership. Unexpectedly, Individual C contacted my office claiming to have responsibility even though I have not come across his name in the submission from the Ministry.
- [52] These problems persist as I delve into specific analysis of the applied sections. To show that section 19(1)(b) applies to a record, it must be clear which third party supplied the record to the government institution. Likewise, it must be clear which third party will be affected by release of the record in order for section 19(1)(c) to apply to a record. The vagueness of the Ministry's submissions does not assist in demonstrating these exemptions apply.
- [53] Further, it is not responsibility to determine which Third Party applies to each portion of the Record. Section 61 of FOIP clearly places the burden of proof on the government institution to establish that access to a record must be denied. In terms of third party exemptions, the onus is on government institutions to demonstrate that they apply.

¹¹ SK OIPC, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* at p. 6, available at <http://www.oipc.sk.ca/resources.htm>.

Fundamentally, I expect the government institution to clearly identify the third party in order to proceed.

[54] The Saskatchewan Court of Appeal has held that the principle is transparency subject to only limited and specific exemptions. Implicit in that statement is that if third party interests are involved the government institution must identify that third party.¹²

[55] My office asked the Ministry in a letter dated January 5, 2011 to clarify who has responsibility for the Third Parties. We also alerted the Ministry to the “Release of info – concent.doc [sic]” document referenced above. We sent several reminders to the Ministry throughout 2011.¹³ On November 1, 2011, we sent an e-mail advising that my office was going ahead with the analysis for these files and offered one more chance to respond within the week. Nothing was subsequently received.

[56] My office proceeded and shared our preliminary analysis with the Ministry on December 8, 2011. On February 21, 2012 we received responses to both our analysis and our questions about the third parties.

[57] The Ministry’s letter of February 21, 2012 stated:

It also appears evident, from the information contained in the responsive records, that Echo Valley Resorts Ltd. has changed leadership/ownership over the years. The most recent information in our files is from July 2007, indicating that [Individual C], [Individual D] and [Individual B] were the directors of EV Resorts. Along with EV Resorts, there were also a number of limited liability partners which together constituted the Echo Valley Resorts Ltd. Partnership.

[58] In this letter, the Ministry effectively further complicates the matter by introducing a fourth individual who now ostensibly represents Echo Valley Resorts Ltd., and alluding to others. However, the responsive record as supplied by a third party would crystallize on the date the original access request was received by the government institution. It

¹² *General Motors Acceptance Corporation of Canada, Limited v. Saskatchewan Government Insurance* [1993] S.J. No. 601 at [11].

¹³ Reminder e-mails were sent to the Ministry on March 1, 2011, April 7, 2011, May 31, 2011, July 12, 2011 as well as a reminder letter dated September 27, 2011.

would not matter if the shareholders of Echo Valley Resorts Ltd. have changed since that date. The Ministry has not clarified this for the purpose of this Review. In the result, the Ministry has failed to meet its requirement to identify the Third Party at the material time, i.e. when the request for access was received by the Ministry.

[59] In terms of Echo Valley Resorts Limited Partnership, the Ministry commented in its letter of February 21, 2012 as follows:

Echo Valley Resorts Ltd. is a corporation – and is one of the partners that comprises Echo Valley Resorts Limited Partnership. Echo Valley Resorts Limited Partnership is a partnership registered under The Partnerships Act. It is made up of a number of limited partners (of which are likely not the same as they were when the FOIP application was first made) and a general partner – Echo Valley Resorts Ltd. A partnership is not a legal entity like a corporation or individual is – it is simply a collection of the partners that make it up. However, in a limited partnership the general partner can bind the limited partner in most instances.

[60] It appears as though the Ministry is indicating that Echo Valley Resorts Ltd. has authority to act for Echo Valley Resorts Limited Partnership. However, it still remains unclear who has the ability to make representations binding on Echo Valley Resorts Ltd.

[61] The Ministry goes on in its letter of February 21, 2012 to break down which Third Party is relevant to each portion of the Record as follows:

- [Pages 23 to 25 of Record #1] – Similar to the previous record, the fax cover sheet used was from [different company indicated at [37]], however, the letter is from Echo Valley Resorts Ltd.

[62] The Third Party may be Echo Valley Resorts Ltd.; however I am still unclear as to who has authority to bind Echo Valley Resorts Ltd.

- [Page 44 to 47 of Record #1] – The third party is **most likely** [different company indicated at [37]] which could be interpreted to be one of the “promoters” (per the request) of Echo Valley Resorts Limited Partnership.
- [Page 48 to 49 of Record #1] – Just by the title it appears to be Echo Valley Resorts Ltd. **but depends on the contents.**

[emphasis added]

[63] Again, I am not in a position to speculate. The burden of proof rests with the Ministry.

- [Pages 29 to 30 of Record #2] – The third party in the agreements is the Town of Fort Qu’Appelle. However, the agreements have been assigned to Echo Valley Resorts Limited Partnership who now have a third party interest in the record through the assignment.

[64] The Ministry has not raised the Town of Fort Qu’Appelle as a Third Party previously. Regardless, I found in my Report F-2012-001/LA-2012-001 that a local authority could not be a third party for purposes of section 19 of FOIP.¹⁴ I am no closer to understanding who represents Echo Valley Resorts Limited Partnership even after the Ministry’s most recent letter of February 21, 2012.

[65] Fundamental to any meaningful analysis of section 19 is to identify the third party in question and then to proceed to identify the interests of that identified third party. Given the inability of the Ministry to isolate and identify the third party(ies) in this case, there is no foundation upon which we can proceed with a section 19 analysis. Without a ‘third party’, section 19 of FOIP is simply not engaged.

3. Did the Ministry of Government Services properly apply sections 22(a), 22(b) and 22(c) of *The Freedom of Information and Protection of Privacy Act* to portions of Record #1 and Record #2?

a) Section 22(a) of FOIP

[66] Section 22(a) of FOIP states:

22 A head may refuse to give access to a record that:

(a) contains information that is subject to solicitor-client privilege...¹⁵

[67] In my Report LA-2011-001, I discussed the solicitor-client exemption found in LA FOIP that is almost identical to that in FOIP. The report stated:

¹⁴ SK OIPC Report F-2012-001/LA-2012-001at [43] to [53], available at www.oipc.sk.ca/reviews.htm.

¹⁵ *Supra* note 2 s. 22(a).

[49] My Report F-2005-002 focused largely on legal fees, but the reference in that Report to the principles set out in Former Commissioner Rendek's Report 2003/004 is relevant:

- a) all communications, verbal or written, of a confidential character, between a client and a legal advisor directly related to the seeking, formulating or giving of legal advice or legal assistance ... are privileged; and
- b) all papers and materials created or obtained specifically for the lawyer's 'brief' for litigation, whether existing or contemplated are privileged.

[50] Also in my Report F-2005-002, the court decision of Descoteaux v. Mierzwinski was discussed: "Mr. Justice Lamer advocated a very liberal approach to the scope of privilege by extending it to include all communications made 'within the framework of the solicitor-client relationship'."

[51] I referenced Alberta Adjudication Order #3 dated March 13, 2003 in my Report F-2005-002. Mr. Justice McMahon stated that "Where legal advice of any kind is sought ... the communications relating to the purpose, made in confidence by the client, are at his instance permanently protected from disclosure ...".

[52] The primary court case on solicitor-client privilege is Canada v. Solosky, which established the following three part test:

- i) a communication between solicitor and client;
- ii) which entails the seeking or giving of legal advice; and
- iii) which is intended to be confidential by the parties.¹⁶

[68] I will apply this test to the portions Records identified as being exempt pursuant to section 22(a) by the Ministry.

- i) Is it a communication between solicitor and client?*

[69] Only two of the eight identified portions of the Records would qualify as a communication between a solicitor and a client. This would be pages 1 to 2 of Record #1 and pages 38 to 40 of Record #2. Both documents are e-mail exchanges between Crown Counsel at Saskatchewan Justice (Justice) and Ministry Officials.¹⁷ Page 40 of Record #2 contains an e-mail from a lawyer for a Third Party. However, it appears that since the e-

¹⁶ SK OIPC Report LA-2011-001 at [49] to [52], available at www.oipc.sk.ca/reviews.htm.

¹⁷ Saskatchewan Justice is now the Ministry of Justice and Attorney General.

mails between Crown Counsel and Ministry Officials that follow seem to discuss the contents of that e-mail, it would qualify as privileged as well. This is supported by Alberta's *FOIP Guidelines and Practices (2009)* that stated:

Solicitor-client privilege applies to attachments to communications between a solicitor and his or her client when the attachments are part of the continuum of the legal advice. (see *IPC Orders 98-004* and *99-005*).¹⁸

[70] None of the other portions of the Records identified by the Ministry as being subject to 22(a) are between a client and solicitor, rather they are between solicitors of different parties and therefore this section would not apply.

[71] There are a number of different kinds of legal privilege defined by common law. In some jurisdictions, such as Alberta, the exemption for purposes of access to information is cast much more broadly to capture not just solicitor-client privilege but also other forms of privilege.¹⁹ The Saskatchewan Legislative Assembly has however identified only solicitor-client privilege in addition to two different circumstances which involve advice provided by an agent of the Attorney General for Saskatchewan or legal counsel for a government institution.

ii) Do these portions of the Records entail the seeking or giving of legal advice?

[72] Pages 1 to 2 of Record #1 appear to constitute the provision of legal advice by Crown Counsel. However, the entire record does not constitute advice. Originally, the Ministry had disclosed one of the three e-mail headers found in these pages. It did not provide any explanation as to why one of the e-mail headers was released while the other two were severed.

¹⁸ Access and Privacy Branch, Service Alberta, *FOIP Guidelines and Practices (2009)* at p. 198, available at: <http://www.servicealberta.ca/foip/resources/chapter-4.cfm>.

¹⁹ Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 as am states:

27(1) The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege...

[73] I found in my Report LA-2010-001 that headers of e-mails did not contain advice from officials in relation to section 16(1)(a) of LA FOIP as follows:

[25] The record consists of a variety of different kinds of documents including email discussion threads composed of text and header information (i.e. date, to, from, subject, etc).

[26] The following excerpts from Alberta's IPC Order F-2004-026 provide clarification on the application of this type of provision to information specifically contained in headings or headers:

[para 82] A **decision of the Ontario Office of the Information and Privacy Commissioner (PO-2328) supports the idea that headings** (in that case of agendas) that, in the words of the Ministry "*would reveal that advice and recommendations were being formulated or given*" in respect of a matter, **cannot be excepted from disclosure.** The Assistant Commissioner said that "Clearly this is not sufficient to establish the requirements of section 13(1) [the section in the Ontario legislation dealing with advice and recommendations]". **I agree that the mere statement of a topic about which advice or a recommendation is given or a discussion is being held does not in itself necessarily advise or recommend. Neither does it reveal the substance of a consultation or deliberation.**

[para 83] As well, I note Ontario Order PO-2087-I. This case involved an extensive review and analysis of records relative to the section (section 13(1)) discussed in the preceding paragraph. After reviewing which parts of records could be withheld on the basis that they revealed advice and recommendations, the Adjudicator stated:

Other information on these memoranda, such as the "to" and "from" lines, date and so on can be severed from the "content" of each record and to do so provides the appellant with information about the process without revealing exempt information. In my view, although the amount of information is small, it cannot be characterized as "worthless" or "meaningless" or "disconnected snippets" (as discussed above), and should therefore be disclosed to the appellant.

[para 84] In an order of the British Columbia Privacy Commissioner, B.C. Order 01-25, the B.C. legislation under consideration permitted public bodies to withhold information that would reveal advice or recommendations developed by or for a public body or Minister. The Public Body argued that this section applies to the identity of an employee who wrote a memorandum on the basis that "the document inherently recommends that one option available to the Board is that the author or the author's office take certain actions with respect to the Appeal Division matter." The Commissioner wrote:

Even if the record did contain advice or recommendations, which it does not, I fail to see how the identity of the employee who wrote the memorandum "inherently" reveals advice or recommendations.

In the same case, the B.C. Commissioner also cited an earlier decision of his own office. In British Columbia Order No. 193-1997, the former Commissioner wrote with respect to the same legislation:

The applicant submits that this section cannot be used to protect the names of public servants who may have participated in a meeting, or their names generally, from government records.

The Ministry replies that disclosing the names and positions may reveal "a recommendation that a matter be dealt with at a particular level." ... The Ministry has not provided any evidence as to how the disclosure would reveal recommendations in this case. I note that names of public servants were disclosed to the applicant. **The fact that a particular person provided advice or recommendations does not, in this case, in and of itself reveal the advice or recommendations. There may be sensitive issues where the very fact that a particular person has given advice on a particular date reveals the advice or recommendations. I am unable to conclude that in this case the names and positions withheld would reveal advice or recommendations.**

...

[para 88] Finally, I reject any suggestion by the Public Body that I ought to defer to the Head of the Public Body to decide whether an inference as to the substance of advice or discussions can be drawn from other factors, as he is in the best position to do this. **If the Public Body wishes to rely on section 24(1)(a) or (b) on this basis, it must satisfy me that this condition is met for every document for which the condition is claimed.**

Conclusions under section 24

[para 89] I find, therefore, that the Public Body is entitled to withhold under sections 24(1)(a) and 24(1)(b) only the records or parts of them that reveal substantive information about the matter or matters on which advice was being sought or given (Bill 27), or about which the consultations or deliberations were being held. **The remainder of the information cannot be withheld under section 24(1)(a) or (b). The latter includes the names of correspondents, dates and, in many cases, subject lines, as well as documents or parts of documents that express the fact that advice is being sought or given or that information is being conveyed, without revealing any substantive content.** A great many of the documents include such information.

[27] I adopted the above noted approach in Report F-2006-004. To the extent that email headers (i.e. correspondents, dates, subject lines, etc), or similar information contained on fax cover sheets or other transmittal documents, do not appear to

indicate anything substantive about those named individuals' involvement or the particular advice given, I recommended release of said information.²⁰

[emphasis added]

[74] Further, records subject to solicitor-client privilege may also be subject to severance. A publication entitled *Investigators Guide to Interpreting the ATIA* by the Office of the Information Commissioner of Canada stated:

Another exception to the privilege is that the privilege does not protect from disclosure certain facts occurring during the course of the solicitor/client relationship. For example, accounts submitted by the solicitor can be severed in order to remove from it the nature of the advice and then the amounts reflected in the account can be disclosed.²¹

[75] As well the resource *Government Information: The Right to Information and the Protection of Privacy in Canada* stated:

In several decisions interpreting the federal access Act, the Federal Court of Appeal has carved out from the privilege, what it calls “general identifying information” and which includes the description of the document (for example, the “memorandum” heading and internal file identification), the name, title and address of the person to whom the communication was directed, the subject line and generally innocuous opening and closing words of the communication, and the signature block. While the Court recognized that such information can sometimes be protected by privilege, **there is a need for the party asserting the privilege to provide evidence to the effect that the disclosure of this information would reveal the nature of the legal advice sought or provided.** This principle has been repeatedly affirmed by the Federal Court of Appeal in a series of cases involving the same applicant.²²

[emphasis added]

[76] Further, I found the signature lines did not contain legal advice either. Therefore, they would not qualify for exemption under section 22(a) of FOIP.

²⁰ SK OIPC Report LA-2010-001 at [25] to [27], available at www.oipc.sk.ca/reviews.htm.

²¹ Office of the Information Commissioner of Canada, *Investigators Guide to Interpreting the ATIA*, available at http://www.oic-ci.gc.ca/eng/inv_inv-gui-ati_gui-inv-ati_section_23.aspx.

²² K. Klein and D. Kratchanov: *Government Information: The Right to Information and the Protection of Privacy in Canada, Second Edition* (Toronto: Carswell Press, 2009) at pp. 4-56 to 4-57.

[77] We provided this analysis to the Ministry on December 8, 2011. It has agreed with my analysis and it is my understanding that headers and signature lines of all withheld e-mails contained within the withheld portions of the Records have been released to the Applicant.

[78] Pages 38 to 40 of Record #2 also contain legal advice.

iii) Are these portions of the record intended to be confidential by the parties?

[79] The Ministry has not provided a submission on the issue of confidentiality in this case.

[80] There is a statement that appears at the end of the legal counsel's e-mails which states:

CONFIDENTIALITY NOTICE:

This e-mail (and any attachment) was intended for a specific recipient. It may contain information that is privileged, confidential or exempt from disclosure. Any privilege that exists is not waived.

[81] In the past such a statement that is routinely put on e-mails would not pass the "in confidence" test. However, given the breadth of 22(b) and 22(c), the wording of the statement and the content of the message, I am satisfied that the intention was confidentiality.

[82] Section 22(a) of FOIP applies to pages 1 to 2 of Record #1 and pages 38 to 40 of Record #2. Therefore, there is no need to include these portions of the Records in the analysis of sections 22(b) and 22(c).

[83] I now find that it is useful to jump to the analysis of section 22(c) of FOIP.

b) Section 22(c) of FOIP

[84] Section 22(c) of FOIP states:

22 A head may refuse to give access to a record that:

...

(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.²³

[85] Section 27(1)(c) of Alberta's FOIP Act is a similar provision to section 22(c) which states:

27(1) The head of a public body may refuse to disclose to an applicant

...

(c) information in correspondence between

(i) the Minister of Justice and Attorney General,

(ii) an agent or lawyer of the Minister of Justice and Attorney General, or

(iii) an agent or lawyer of a public body,

and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or by the agent or lawyer.²⁴

[86] The test set out for this exemption is found in Alberta IPC Order F2006-027 as follows:

[para 49] I will first consider whether section 27(1)(c) of FOIP applies. In order for section 27(1)(c) of FOIP to apply, the following two criteria must be met:

- The record must be correspondence between an agent or lawyer of the Minister of Justice and Attorney General or a public body and any other person; and
- The information in the correspondence must be in relation to a matter involving the provision of advice or other services by the agent or lawyer (Order 98-016 (para 17)).²⁵

[87] I will adopt this test for these Records.

²³ *Supra* note 2 s. 22(c).

²⁴ Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 as am, section 27(1)(c).

²⁵ AB IPC Order F2006-027 at [49], available at http://www.oipc.ab.ca/Content_Files/Files/Orders/F2006-027.pdf

Record #1 – Pages 4 to 5

Record #2 – Pages 41 to 44; 45; 46 to 49; 50 to 54; 55 to 56

[88] All of these portions of the Records are e-mails.

[89] The Ministry has identified that pages 4 to 5 of Record #1 should be withheld pursuant to section 22(c) of FOIP with the exception of two e-mail headers and the words “FOR YOUR INFO AND ATTENTION. [NAME OF AN INDIVIDUAL]”.

[90] The Ministry has identified that pages 41 to 44, 45, 46 to 49, 50 to 54 and 55 to 56 of Record #2 in its entirety can be withheld pursuant to section 22(c) of FOIP.

[91] In order to meet the test for section 22(c) as outlined above we must first answer the following:

i) *Who qualifies as an agent of the Attorney General for Saskatchewan or legal counsel for a government institution?*

[92] In my Report F-2005-002, I stated:

[26] We confirmed that the Department of Justice acts as the legal advisor for all departments of government including the Department of Finance. It does not matter that Justice was providing legal services instead of an outside law firm. In this regard, I rely on the assertion that appears in *The Law of Evidence in Canada*:

Lawyers who are employed by a corporation and therefore have only one client are covered by the privilege, provided they are performing the function of a solicitor

[27] In the same text appears the following statement:

*When a solicitor-client communication is once privileged, it is always privileged.*²⁶

[93] Therefore, Justice can serve in the role of legal counsel for all ministries and executive government.

²⁶ SK OIPC Report F-2005-002 at [26] to [27], available at www.oipc.sk.ca/reviews.htm.

[94] All of the e-mails listed above involve one of two lawyers of Justice that appear to have served as legal counsel for the Ministry. This is indicated in the Ministry's submission. Therefore it appears the first part of the test is satisfied.

ii) What constitutes the provision of advice or other services by the agent or lawyer?

[95] In my Report F-2005-002, I stated:

[36] I recognize that in the Alberta legislation the exemption is broader than the solicitor client exemption in our section 22. The Alberta provision is as follows:

27(1) The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,

(b) information prepared by or for

(i) the Minister of Justice and Attorney General

(ii) an agent or lawyer of the Minister of Justice and Attorney General, or

(iii) an agent or lawyer of a public body, in relation to a matter involving the provision of legal services, or

(c) information in correspondence between

(i) the Minister of Justice and Attorney General,

(ii) an agent or lawyer of the Minister of Justice and Attorney General, or

(iii) an agent or lawyer of a public body,

and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or by the agent or lawyer.²⁷

[96] In relation to the above section of Alberta's FOIP Act, the *FOIP Guidelines and Practices (2009)* states the following in relation to the above highlighted section:

²⁷ *Ibid.*, at [36].

Section 27(1)(b) is broader in scope than section 27(1)(a) (see *IPC Order F2003-017*). Section 27(1)(b) gives a public body the discretion to withhold information that is prepared by or for the Minister of Justice and Attorney General, his or her agent or lawyer, or an agent or lawyer of a public body in relation to a matter involving the provision of legal services.

The Commissioner has said that, in order for the exception to apply, the information in the records must contain “information prepared” – as those words are commonly understood – by or for an agent or lawyer of the Minister of Justice and Attorney General or of a public body, and the records must indicate that the information was prepared by or for such a person (see *IPC Order 99-027*).

The term *legal services* includes any law-related service performed by a person licensed to practise law (see *IPC Order 96-017*).

For example, in *IPC Order 98-016*, some of the records under review were memoranda written to file by Crown prosecutors assigned to the file. They contained a Crown prosecutor’s own comments on the case, noting weaknesses, problems with respect to witnesses, etc. They were prepared by lawyers of the Minister of Justice in relation to the criminal prosecution of the applicant. The Commissioner held that section 27(1)(b) applied to those records.²⁸

[97] A closer look at Alberta IPC Order 96-017 (noted above) shows:

[23.] In Ontario Order 210, [1990] O.I.P.C. No. 71, “legal advice” has been defined to include “a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.” I accept that definition.

...

[38.] Section 26(1)(b) allows an exception for information prepared *in relation to* [my emphasis] a matter involving the provision of legal services. As such, the section is broader than solicitor-client privilege. Neither British Columbia nor Ontario has a similar section in its legislation.²⁹

[98] In addition, Alberta IPC Order 98-016 (also noted above) stated:

[para 13.] In Order 96-017, I said that I intend to give “legal services” its ordinary dictionary meaning. As such, “legal services” would include any law-related service performed by a person licensed to practice law. I also said that section 26(1)(b)

²⁸ Access and Privacy Branch, Service Alberta, *FOIP Guidelines and Practices* (2009) at pp. 201 to 203, available at: <http://www.servicealberta.ca/foip/documents/chapter4.pdf>.

²⁹ AB IPC Order 96-017 at [23] to [38], available at <http://www.oipc.ab.ca/downloads/documentloader.aspx?id=1891>

allows an exception for information prepared *in relation to* a matter involving the provision of legal services.³⁰

[99] The subject matter of the e-mails appears to be negotiations regarding and preparation of contracts such as the Opinion and Transfer document as well as Amending Agreements. The lawyers appear to be negotiating and preparing these contracts. As such, it qualifies as a legal service.

[100] These e-mails appear to meet the second part of the test for section 22(c) of FOIP. As both parts of the test are satisfied, I find that section 22(c) of FOIP applies to these e-mails.

Record # 1 – Pages 26 to 43

[101] The Ministry describes this portion of the record as “... a draft agreement prepared by Echo Valley Resorts Ltd. The agreement was never signed by the parties named in the draft agreement.”

[102] The Ministry has applied section 22(c) to the entire Record. No other solicitor-client exemptions under section 22 have been applied to this record.

[103] In support of this exemption, the Ministry wrote:

Section 22(c) is claimed as this record is the attachment to the record on page 4 and 5 of this submission. This record is an attachment to an e-mail from [a lawyer], the solicitor for Echo Valley Resorts Limited Partnership and [Justice lawyer], Crown Counsel for SPM and [a lawyer], legal counsel of the Town of Fort Qu’Appelle. It is exempt from release, as it is correspondence between [Justice lawyer], Crown Counsel for SPM and others in relation to a matter involving the provision of advice or other service by a legal counsel.

[104] The question is as follows: Does the record constitute correspondence between an agent or lawyer of Justice or a public body and any other person?

³⁰ AB IPC Order 98-016 at [13], available at <http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1929>

[105] The Ministry claims this document is the attachment of the e-mail that is pages 4 to 5 of Record #1. As demonstrated above, attachments of correspondence are usually included in the solicitor client privilege continuum.

[106] Upon review of both portions of the record, section 22(c) of FOIP appears to apply to pages 4 to 5 of Record #1, therefore, it follows that section 22(c) would also apply to the attachment, pages 26 to 43 of Record #1, as per the above reference to Alberta IPC Orders 98-004 and 99-005.

c) Section 22(b) of FOIP

[107] As all of the portions of the Records which were withheld by the Ministry under section 22(b) qualify for exemption under either section 22(a) or 22(c) of FOIP, there is no need to consider section 22(b) of FOIP.

d) Solicitor-Client Privilege and Discretion

[108] Section 22 is a discretionary exemption. In regards to section 22, I said in my Report F-2010-001:

[107] In my Report F-2007-002, I observed that “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.” As section 22 is discretionary, clear, direct evidence is required to make a finding that this section applies.³¹

[109] The Ministry has made no mention of its exercise of discretion regarding these records.

[110] In Report F-2004-006, I stated:

[24] This is a discretionary exemption. Even if this section applies, the government institution may still decide to disclose the information. To exercise its discretion properly, the government institution must show that it considered the objects and purposes of the Act (one of which is to allow access to information) and did not

³¹ SK OIPC Report F-2010-001at [107], available at www.oipc.sk.ca/reviews.htm.

exercise its discretion for an improper or irrelevant purpose. The objects and purposes of the Act were considered by this office in Report 2004-03, [5] to [11].³²

[111] The Ministry should exercise its discretion and consider releasing the records subject to sections 22(a) and 22(c) of FOIP.

V FINDINGS

[112] The Ministry has not met the burden of proof to show that section 18(1)(d) of *The Freedom of Information and Protection of Privacy Act* applies to pages 4 to 5, 23 to 25 or 26 to 43 of Record #1.

[113] The Ministry has not identified the Third Parties and in the result has not met the burden of proof in demonstrating that sections 19(1)(b), 19(1)(c)(i), 19(1)(c)(ii) or 19(1)(c)(iii) of *The Freedom of Information and Protection of Privacy Act* apply to the Records.

[114] Section 22(a) of *The Freedom of Information and Protection of Privacy Act* applies to pages 1 to 2 of Record #1 and 38 to 40 of Record #2.

[115] Section 22(c) of *The Freedom of Information and Protection of Privacy Act* applies to pages 4 to 5 and 26 to 43 of Record #1 and pages 41 to 56 of Record #2.

VI RECOMMENDATIONS

[116] The Ministry should release pages 23 to 25, 44 to 47 and 48 to 49 of Record # 1 and pages 29 to 30 of Record #2 in their entirety to the Applicant.

[117] The Ministry should exercise its discretion and consider releasing the records subject to sections 22(a) and 22(c) of *The Freedom of Information and Protection of Privacy Act*.

³² SK OIPC Report F-2004-006 at [24], available at www.oipc.sk.ca/reviews.htm.

Dated at Regina, in the Province of Saskatchewan, this 29th day of March, 2012.

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