



REVIEW REPORT 048-2024

Ministry of SaskBuilds and Procurement

July 26, 2024

Summary: The Applicant requested records from the Ministry of SaskBuilds and Procurement (SaskBuilds). SaskBuilds initially withheld the record in full, but eventually released the record, but with portions withheld pursuant to subsections 17(1)(a), (b), (c), 18(1)(d), (e), (f), 19(1)(b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that SaskBuilds properly applied subsection 19(1)(b) of FOIP to some portions of the record but failed to demonstrate that the remaining exemptions applied to other portions. The Commissioner recommended that SaskBuilds continue to withhold or release information accordingly. Where the Commissioner recommended release, he recommended that SaskBuilds do so within 30 days of the issuance of this Report.

I BACKGROUND

[1] On January 23, 2024, the Ministry of SaskBuilds and Procurement (SaskBuilds) received the following access to information request from the Applicant for the timeframe, “January 1, 2019 – present”:

Please provide a copy of the documents, emails, or memos listing all of the companies that submitted proposals to develop the EBUMPS system together with the comparative rating of the proposals including the comparative bid costs.

[2] On February 20, 2024, SaskBuilds issued its section 7 decision to the Applicant. SaskBuilds indicated it was withholding the records, in full, pursuant to subsections 17(1)(a), (b), (c), 18(1)(d), (e), (f), 19(1)(a), (b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On February 21, 2024, the Applicant asked my office to undertake a review of SaskBuilds' decision.

[4] On April 17, 2024, my office provided notices of the review to SaskBuilds and the Applicant. My office also provided notices to five third parties.

[5] In an email dated May 22, 2024, SaskBuilds advised the Applicant accordingly:

The Ministry of SaskBuilds and Procurement was notified by the Information and Privacy Commissioner's office (IPC) on April 17, 2024, of their intent to review our decision with respect to your access to information request [internal file number]. As a result of the IPC review, I have had an opportunity to review the exemptions applied in the record responsive to your request. The ministry has decided to withdraw the application of exemptions from information within the record that is not responsive to your request.

I have attached a copy of the redacted record for your information. I have copied the analyst from the IPC who is conducting the review.

[6] My office asked SaskBuilds to confirm how it had modified its response to the Applicant. On June 10, 2024, SaskBuilds confirmed with my office that it had originally withheld the record in its entirety, but upon review decided to release the record, withholding portions pursuant to subsections 17(1)(a), (b), (c), 18(1)(d), (e), (f), 19(1)(b) and (c) of FOIP. SaskBuilds copied my office on the email it sent to the Applicant in which it attached a redacted copy of the record. On the same day, my office confirmed with the Applicant, by email, the scope of the review would be only on the withheld portions.

[7] SaskBuilds provided its submission and updated records and index of records on June 17, 2024. The Applicant did not provide a submission. One third party provided a submission in correspondence dated June 10, 2024, and a second one provided its submission on June 17, 2024. The remaining three third parties did not provide submissions.

II RECORDS AT ISSUE

[8] At issue is a four-page record; SaskBuilds withheld portions of three of the four pages, in part, as follows:

Page No.	Severance No.	FOIP Exemption(s) Applied	Description
1	1	17(1)(c), 18(1)(d), (e), (f), and 19(1)(c) of FOIP	Competition selection recommendation
2	1	17(1)(c), 18(1)(d), (e), (f), and 19(1)(c) of FOIP	Competition selection recommendation
2	2	17(1)(c), 18(1)(d), (e), (f), 19(1)(b), and (c) of FOIP	Competition selection recommendation
2	3	17(1)(c), 18(1)(d), (e), (f), 19(1)(b), and (c) of FOIP	Competition selection recommendation
2	4	17(1)(c), 18(1)(d), (e), (f), 19(1)(b), and (c) of FOIP	Competition selection recommendation
2	5	17(1)(c), 18(1)(d), (e), (f), 19(1)(b), and (c) of FOIP	Competition selection recommendation
2	6	17(1)(a), (b), (c), 18(1)(d), (e), (f), 19(1)(b), and (c) of FOIP	Competition selection recommendation
3	1	17(1)(a), (b), (c), 18(1)(d), (e), (f), 19(1)(b), and (c) of FOIP	Competition selection recommendation
3	2	17(1)(a), (b), (c), 18(1)(d), (e), (f), 19(1)(b), and (c) of FOIP	Competition selection recommendation
3	3	17(1)(a), (b), (c), 18(1)(d), (e), (f), 19(1)(b), and (c) of FOIP	Competition selection recommendation
3	4	17(1)(a), (b), (c), 18(1)(d), (e), (f), 19(1)(b), and (c) of FOIP	Competition selection recommendation

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[9] SaskBuilds qualifies as a “government institution” pursuant to section 2(1)(d)(i) of FOIP. Each third party qualifies as a “third party” pursuant to subsection 2(1)(j) of FOIP. Therefore, I have jurisdiction to undertake this review.

2. Did SaskBuilds properly apply subsection 19(1)(b) of FOIP?

[10] Subsection 19(1)(b) of FOIP provides as follows:

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

...

(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;

[11] Subsection 19(1)(b) of FOIP is a mandatory, class-based exemption. It permits refusal of access in situations where a record contains financial, commercial, scientific, technical, or labour relations information that was supplied in confidence to a government institution by a third party (*Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated April 8, 2024 [*Guide to FOIP*, Ch. 4], p. 203).

[12] Pages 203 to 207 of the *Guide to FOIP*, Ch. 4, outline the following three-part test my office uses to determine if a government institution has properly applied subsection 19(1)(b) of FOIP:

1. Is the information financial, commercial, scientific, technical, or labour relations information of a third party?
2. Was the information supplied by the third party to a government institution?
3. Was the information supplied in confidence implicitly or explicitly?

[13] I need to review SaskBuilds’ reliance on subsection 19(1)(b) of FOIP to:

- Page 2 – severances 2 to 6; and
- Page 3 – severances 1 to 4.

[14] Regarding the first part of the test, SaskBuilds submits that these portions of the record contain financial and commercial information. The *Guide to FOIP*, Ch. 4 at page 204, provides these definitions:

- “Financial information” is information regarding monetary resources, such as financial capabilities, assets and liabilities, past or present. Common examples are

financial forecasts, investment strategies, budgets and profit and loss statements. The financial information must be specific to a third party.

- “Commercial information” is information relating to the buying, selling or exchange of merchandise or services. This can include third party associations, past history, references and insurance policies and pricing structures, market research, business plans, and customer records.

[15] Relevant definitions for parts two and three of the test can be found in the *Guide to FOIP*, Ch. 4 at pages 205 to 207, as follows:

- “Supplied” means provided or furnished. Information may qualify as “supplied” if it was directly supplied to a government institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.
- “In confidence” usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained in confidence means that the supplier of the information has stipulated how the information can be disseminated. In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the government institution and the third party providing the information.
- “Implicitly” means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential.
- “Explicitly” means that the request for confidentiality has been clearly expressed, distinctly stated, or made definite. There may be documentary evidence that shows that the information was supplied on the understanding that it would be kept confidential.

[16] SaskBuilds provided the following arguments regarding parts two and three of the test:

96. The information withheld on Page 2, severance 2 is the bid cost submitted by each proponent for the competition. The winning bid from Deloitte has been released. The bid costs of the unsuccessful proponents was withheld as it is the financial information of those third parties that was supplied explicitly in confidence to SBP.

97. The information withheld on Page 3 presents whether a proponent passed or failed the evaluation along with the points/score awarded to each bid proposal and the ranking of the proponents. This information is the commercial information of a third party.

98. Even if the unidentified applicant is not a competitor, the disclosure and production of the evaluation summary would strip the third party's pricing and proposal information of their confidentiality, leaving it open to competitors to obtain the same information. This would cause significant commercial harm to the third party.

99. The Negotiated Request for Proposal competition documents for this competition... included a confidentiality statement which stated:

6.5.3 Confidential Information of Proponent

Submissions will be accepted in confidence, as they contain financial, commercial, scientific, technical and/or labour relations information...

[17] Upon review, I note that portions of the record disclosed to the Applicant reveal that severances 2 to 5 on page 2 contain total "cost model evaluation" as part of the pricing evaluation. In my office's [Review Report 167-2023](#) concerning the Ministry of Highways (Highways), I considered at paragraph [22] similar types of pricing information. In that report, I continued an approach where "total price bids submitted by third parties qualify as commercial information." I continue this approach here and am satisfied that severances 2 to 5 on page 2 are commercial information and so meet the first part of the test.

[18] Regarding severance 6 on page 2 and severances 1 to 4 on page 3, upon review I note these contain an evaluation based on pricing. In my office's Review Report 167-2023 at paragraph [23], I also continued an approach where I considered that evaluative scores also qualify as commercial information as the evaluation score is derived from the pricing information. I continue this approach here and am satisfied that severance 6 on page 2 and severances 1 to 4 on page three are commercial information and so meet the first part of the test.

[19] Regarding the second part of the test, the pricing information for severances 2 to 5 on page 2 was provided to SaskBuilds as part of a procurement process. Again, in Review Report 167-2023, I considered that this type of information was supplied to Highways by the third parties who submitted their bids. In the same report, I also considered that the evaluation scores, since they were derived from information provided by the third parties in their bids, was also supplied. Circumstances in this matter are similar, and so I am satisfied that the

information for these severances was supplied to SaskBuilds by the third parties, and so it meets the second part of the test.

[20] Regarding the third part of the test, in [Review Report 323-2021](#) concerning Highways, I accepted that SaskBuilds' calls for tender have an expectation of confidentiality stated within the call. In addition to what SaskBuilds submits regarding confidentiality, I note that its [Procurement Guide](#) also lays out the expectation of confidentiality by evaluation committees, including the expectation that they not "discuss the proposals or disclose their contents to anyone." This suggests that the information in this matter was supplied by the third parties explicitly in confidence, which meets the third part of the test.

[21] As all three parts of the test are met, I find that SaskBuilds properly applied subsection 19(1)(b) of FOIP to severances 2 to 6 on page 2, and on severances 1 to 4 on page 3. I recommend SaskBuilds continue to withhold this information pursuant to subsection 19(1)(b) of FOIP.

[22] As I have found subsection 19(1)(b) of FOIP applies to this information, I do not need to review any other exemptions SaskBuilds has applied to it. This leaves me to consider severance 1 on page 1, and severance 1 on page 2, which contain lists of the names of the vendors involved.

3. Did SaskBuilds properly apply subsection 17(1)(c) of FOIP?

[23] As stated, I need to consider subsection 17(1)(c) of FOIP to the lists of the names of the vendors involved at severance 1 on page 1 and severance 1 on page 2. Subsection 17(1)(c) of FOIP provides as follows:

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of

Saskatchewan or a government institution, or considerations that relate to those negotiations;

[24] Subsection 17(1)(c) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose positions, plans, procedures, criteria, or instructions developed for the purpose of contractual or other negotiations by or on behalf of a government institution. It also covers considerations related to those negotiations. Examples of the type of information that could be covered by this exemption are the various positions developed by a government institution's negotiators in relation to labour, financial and commercial contracts. The *Guide to FOIP*, Ch. 4 at pages 142 to 45, outlines the following test my office uses to determine if a government institution properly applied subsection 17(1)(c) of FOIP:

1. Does the record contain positions, plans, procedures, criteria, or instructions?
 - a. Developed for the purpose of contractual or other negotiations.
 - b. By or on behalf of the government institution.
2. Or does the record contain considerations that relate to those negotiations?

[25] SaskBuilds states that positions and plans are involved. The *Guide to FOIP*, Ch. 4, offers the following definitions at page 143:

- A “position” is a point of view or attitude. An opinion; stand; a way of regarding situations or topics; an opinion that is held in opposition to another in an argument or dispute.
- A “plan” is a formulated and especially detailed method by which a thing is to be done; a design or scheme. A detailed proposal for doing or achieving something; an intention or decision about what one is going to do.

[26] The names of the vendors are neither positions nor plans, nor would disclosure reveal any positions or plans. As such, the first part of the test is not met, and I find that SaskBuilds did not properly apply subsection 17(1)(c) of FOIP to this information. I will review the other exemptions SaskBuilds has applied to it.

4. Did SaskBuilds properly apply subsections 18(1)(d), (e) and (f) of FOIP?

[27] Subsections 18(1)(d), (e) and (f) of FOIP provide as follows:

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;

(e) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution, or considerations that relate to those negotiations;

(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution;

[28] Section 18 of FOIP is a discretionary class-based and harm-based provision, meaning, it contains both class and harm-based exemptions. It refers to the Government of Saskatchewan as a whole, and recognizes that government institutions, individually or collectively, may hold significant amounts of financial and economic information that is critical to the management of the provincial economy. The Government of Saskatchewan is responsible for managing many aspects of the province's economic activities in the interests of the people of Saskatchewan, by ensuring that an appropriate economic infrastructure is in place and by facilitating and regulating the activities of the marketplace. In general, it protects the Government of Saskatchewan's economic interests, which the *Guide to FOIP*, Ch. 4 defines at page 166, as follows:

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

[29] I need to determine if withholding the names of the vendors can fit within the scope of subsections 18(1)(d), (e) and (f) of FOIP.

Subsection 18(1)(d) of FOIP

[30] Subsection 18(1)(d) of FOIP permits refusal of access in situations where release of a record could reasonably be expected to disclose 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. This exemption is intended to protect a government institution's ability to negotiate effectively with other parties. It provides similar protection as is provided third parties under subsection 19(1)(c)(iii) of FOIP. Pages 180 and 181 of the *Guide to FOIP*, Ch. 4, outline the following two-part test my office uses to determine if a government institution has properly applied subsection 18(1)(d) of FOIP:

1. Are there contractual or other negotiations occurring involving the Government of Saskatchewan or a government institution?
2. Could release of the record reasonably be expected to interfere with the contractual or other negotiations?

[31] SaskBuilds submits as follows:

Procurement Management Division of SBP facilitates all procurement competitions on behalf of Executive Government for the purposes of contractual negotiations and establishes the best value procurement processes and practices for the Government of Saskatchewan. Such is the case with the competition that is subject to this review. The top-rated proponent moved to the negotiation phase and was awarded the contract.

[32] The *Guide to FOIP*, Ch. 4 at page 180, states that a "negotiation" is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings conducted between two or more parties for the purpose of reaching an understanding. It connotes a more robust relationship than "consultation". It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion. Prospective or future negotiations could be included within this exemption if they are foreseeable. A vague possibility of future negotiations is not

sufficient. There must be a reasonable fact-based expectation that the future negotiations will take place. Once a contract is executed, negotiation is concluded. The exemption would generally not apply unless, for instance, the same strategy will be used again, and it has not been publicly disclosed. “Interfere” means to hinder or hamper.

[33] In its submission, SaskBuilds acknowledges that the contract has already been awarded in this matter, and so there are no current negotiations occurring. SaskBuilds adds that disclosure of such information could “discourage IT vendors from providing SBP with detailed information because manufacturers would know their information could be released...” However, disclosure of the names of the vendors in this instance subsequent to the contract being executed would not disclose any sort of strategy that SaskBuilds may use in the future. If it could, SaskBuilds has not successfully argued how. As such, the first part of the test is not met, and so I find SaskBuilds has not properly applied subsection 18(1)(d) of FOIP. I will move on to consider the application of subsection 18(1)(e) of FOIP.

Subsection 18(1)(e) of FOIP

[34] Subsection 18(1)(e) of FOIP permits refusal of access in situations where release of a record could reasonably be expected to disclose positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of a government institution. It also covers considerations related to the negotiations. Examples of the type of information that could be covered by this exemption are the various positions developed by a government institution’s negotiators in relation to labour, financial and commercial contracts. Subsection 18(1)(e) of FOIP is worded the same as subsection 17(1)(c) of FOIP. Although the context of the larger provisions is different (advice from officials versus economic and other interests), the same definitions and test can be applied. Pages 184 to 186 of the *Guide to FOIP*, Ch. 4, outlines the following two-part test my office uses to determine if a government institution has properly applied this exemption:

1. Does the record contain positions, plans, procedures, criteria, instructions, or considerations that relate to the negotiations?

2. Were the positions, plans, procedures, criteria, instructions, or considerations developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution?

[35] In support of subsection 18(1)(e) of FOIP, SaskBuilds submits that the record contains positions and considerations. I previously defined positions; the *Guide to FOIP*, Ch. 4, defines “considerations” at page 185, as follows:

- A “consideration” is a careful thought; a fact taken into account when making a decision. Thus, a record identifying the facts and circumstances connected to positions, plans, procedures, criteria or instructions could also fall within the scope of this provision.

[36] As with my review of subsection 17(1)(c) of FOIP, the names of the vendors do not constitute positions. Nor would disclosure of the names on their own constitute a consideration as contemplated by this provision. As the first part of the test is not met, I find SaskBuilds did not properly apply subsection 18(1)(e) of FOIP to this information. I will consider the application of subsection 18(1)(f) of FOIP.

Subsection 18(1)(f) of FOIP

[37] Subsection 18(1)(f) of FOIP permits refusal of access in situations where release of a record could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution. Page 188 of the *Guide to FOIP*, Ch. 4, outlines the following test my office uses to determine if a government institution has properly applied this exemption:

Could disclosure reasonably be expected to prejudice the economic interests of the Government of Saskatchewan or a government institution?

[38] In support of its position, SaskBuilds states that harm to the economic interests of the Government of Saskatchewan due to disclosure is probable. SaskBuilds adds that the economic interests that are “involved in this specific competition and resulting negotiations would be prejudiced by the disclosure...” SaskBuilds outlines that the prejudice to the economic interests of the Government of Saskatchewan are threefold: 1) loss of bargaining

power; 2) loss of competitive advantage; and 3) loss of confidence in the Government of Saskatchewan. SaskBuilds stresses that the “general procurement rule is that we do not disclose information that would lessen the competitive tension between bidders.”

[39] SaskBuilds also submits as follows:

84. There are expectations from the information technology industry that the proposals provided to the Government and the evaluations of their proposals will be kept confidential. If the information is released, IT vendors could determine their market share by showing which proponents have the capacity to bid for the bulk of contracts and therefore could decide there is no need to get more competitive...

85. In a small pool of specialized competitors and a competitive environment like the information technology industry, disclosure of the information could cause competitors to undercut their rivals for the purpose of driving those opponents out of the market ultimately lessening competition. Again, this would less the Government’s negotiating power...

[40] The *Guide to FOIP*, Ch. 4 at pages 188 to 190, offers the following definitions:

- “Could reasonably be expected to” means there must be a reasonable expectation that disclosure could prejudice the economic interests of the government institution or the Government of Saskatchewan. The government institution does not have to prove that a harm is probable but needs to show that there is a “reasonable expectation of harm” if any of the information were to be released.
- “Prejudice” in this context refers to detriment to economic interests.
- “Economic interests” refer to both the broad interests of a government institution and, for the government as a whole, in managing the production, distribution and consumption of goods and services. This also covers financial matters such as the management of assets and liabilities by a government institution and the government institution’s ability to protect its own or the government’s interests in financial transactions.

[41] Examples of harm to economic interests can include:

- Information in budget preparation documents which could result in segments of the private sector taking actions affecting the government’s ability to meet economic goals (Note: approved budgets are not included as they are tabled in the Legislature as public documents).

- Background material to be used in establishing land costs which if released would affect revenue from the sale of the land.

(Guide to FOIP, Ch. 4, p. 190)

[42] Again, I am only considering subsection 18(1)(f) of FOIP to the names of the vendors. Most of SaskBuilds' arguments centre around disclosure of the pricing information in the proposals and how it was evaluated. Based on SaskBuilds' reasoning, it is not clear to me how disclosure of the vendor names could cause harm to Saskatchewan's economic interests in the context of this provision. As the test is not met, I find that SaskBuilds has not properly applied subsection 18(1)(f) of FOIP to this information. I will consider if subsection 19(1)(c) of FOIP applies.

5. Did SaskBuilds properly apply subsections 19(1)(c) of FOIP?

[43] I am considering SaskBuilds' reliance on subsection 19(1)(c) of FOIP to the names of the vendors. Subsection 19(1)(c) of FOIP provides as follows:

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

...

(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;

[44] Subsection 19(1)(c) of FOIP is a mandatory, harm-based provision. It permits refusal of access in situations where disclosure could reasonably be expected to result in the harms outlined at subclauses (i), (ii) and (iii). Government institutions and third parties should not assume that the harms are self-evident. The harm must be described in a precise and specific way to support the application of the provision (*Guide to FOIP, Ch. 4, p. 215*).

Subsection 19(1)(c)(i)

[45] Subsection 19(1)(c)(i) of FOIP permits refusal of access in situations where disclosure of information could reasonably be expected to result in financial loss or gain to a third party. Page 216 of the *Guide to FOIP*, Ch. 4, outlines the two-part test my office uses to determine if a government institution properly applied this exemption:

1. What is the financial loss or gain being claimed?
2. Could release of the record reasonably be expected to result in financial loss or gain to a third party?

[46] SaskBuilds appears to have argued subclauses (i), (ii) and (iii) together, or has provided arguments in support of all three subclauses as if they would be read together. Some of what SaskBuilds submits for all three subclauses, then, includes as follows:

107. The information withheld at Page 1, severance no. 1 and Page 2, severance no. 1 is a list of the vendors who submitted proposals for this competition. SPB's standard procurement procedures for information technology competitions is not to release the names of the vendors who bid on the competition. One of the reasons is because FOIP requires written consent from the participant if they are named as an individual rather than as an organization. Some procurements (e.g., construction) can be structured in a way that "plan takers list" or "bidders lists" or attendees at a site visit/proponents' meeting may be released, although participants should be aware of this process (i.e. because it's a common construction practice or is disclosed in the solicitation, noting that written consent is required for releasing individual's names). The other reason is because the IT industry is very competitive and IT vendors consider this information to be commercially sensitive. They do not want their competitors to know what projects their company has the capacity to bid on.

[47] Regarding the third-party submissions, one did not argue any exemptions should apply, while the other stated in support of subsection 19(1)(c)(i) of FOIP that competitors could use its information to leverage their own proposals in future bids.

[48] I previously defined what is meant by "could reasonably be expected to." Pages 216 and 217 of the *Guide to FOIP*, Ch. 4, offer this additional definition:

- "Financial loss or gain" must be monetary, have a monetary equivalent or value (e.g., loss of revenue or loss of corporate reputation).

[49] It is not clear how disclosing the names of the third parties could lead to financial loss or gain for them. Neither SaskBuilds nor the third party have described what the financial loss or gain would be and what harm would follow disclosure. I have no doubt the IT industry is competitive, but I would also suspect that many in the IT world expect their rivals to bid on contracts. Disclosing the details of their bids may cause harm or affect their ability to compete, but I am not convinced that disclosing only their names could have the same effect. Or, rather, the ensuing harm from doing so is speculative at best given the lack of evidence provided by SaskBuilds, and so the threshold for “could reasonably be expected to” is not met. Neither is the first part of the test. As such, I find that SaskBuilds did not properly apply subsection 19(1)(c)(i) of FOIP.

Subsection 19(1)(c)(ii)

[50] Subsection 19(1)(c)(ii) of FOIP permits refusal of access in situations where disclosure of information could reasonably be expected to prejudice the competitive position of a third party. Pages 221 and 222 of the *Guide to FOIP*, Ch. 4, outline the following two-part test my office uses to determine if a government institution properly applied this exemption:

1. What is the prejudice to a third party’s competitive position that is being claimed?
2. Could release of the record reasonably be expected to result in the prejudice?

[51] SaskBuilds submits as follows:

119. In Bank Note [a decision], the Court held that disclosure and production of a third party’s unit pricing estimates submitted in response to a call for tenders could reasonably be expected to result in both financial loss to the third party, and prejudice its economic position. The Court noted that if there is a reasonable expectation of prejudice to a third party’s economic position, then “it’s likely or at least it could reasonably be expected to result in financial loss to it”: at para 50.

120. Disclosure and production of the evaluations of their bid proposals could reasonably be expected to prejudice the contractor’s competitive position.

121. Like the industry in which the affected third party in Bank Note operated, there are very few IT vendors to have the capacity to deliver a project of this magnitude. For this competition, there were only five bidders.
- [52] As previously stated, one third party did not provide any arguments in favour of any exemption. The other third party did not provide an argument in support of subsection 19(1)(c)(ii) of FOIP.
- [53] I have previously discussed “could reasonably be expected to.” Page 221 of the *Guide to FOIP*, Ch. 4, offers these additional definitions:
- “Prejudice” in this context refers to detriment to the competitive position of a third party.
 - “Competitive position” means the information must be capable of use by an existing or potential business competitor, whether that competitor currently competes for the same market share. For example, information that discloses the profit margin on a company’s operation, a company’s marketing plans, or information that reveals a company’s internal workings or operations.
- [54] In the *Bank Note* decision that SaskBuilds references ([*Canadian Bank Note Limited v Saskatchewan Government Insurance, 2016 SKQB 362*](#)), the Court did consider whether the disclosure of a third party’s unit prices could prejudice its competitive position to the extent that it could reasonably be expected to experience financial loss. The matter involved Saskatchewan Government Insurance’s (SGI) reliance on withholding vendor information from a procurement process pursuant to subsection 19(1)(c)(ii) of FOIP. The Court considered affidavits provided by the vendors in which they described how very few vendors were qualified to provide the type of software SGI sought, which appears to have been facial recognition software. The Court went on to add that the vendor’s affidavit spoke to the prejudice it “perceives respecting its competitive position and the potential financial implications including loss to...” In other words, the Court was satisfied that the vendor demonstrated the prejudice that would ensue from the disclosure of the information, and how it would affect the vendor’s competitive position.

[55] In the matter before me, neither SaskBuilds nor the third party have described the prejudice that would affect a vendor's competitiveness as it relates to this matter, and my office cannot assume what that might be. As such, the first part of the test is not met, and I find that SaskBuilds has not properly applied subsection 19(1)(c)(ii) of FOIP.

Subsection 19(1)(c)(iii)

[56] Subsection 19(1)(c)(iii) of FOIP permits refusal of access in situations where disclosure of information could reasonably be expected to interfere with the contractual or other negotiations of a third party. Pages 226 and 227 of the *Guide to FOIP*, Ch. 4, outlines the following two-part test my office uses to determine if a government institution properly applied this exemption:

1. Are there contractual or other negotiations occurring involving a third party?
2. Could release of the record reasonably be expected to interfere with the contractual or other negotiations of a third party?

[57] I previously quoted SaskBuilds as stating that a contract related to this procurement process was awarded; SaskBuilds disclosed the name of the winning bidder to the Applicant. The third party mentioned previously did not provide any discussion in support of subsection 19(1)(c)(iii) of FOIP.

[58] In my review of subsection 18(1)(d) of FOIP, I discussed what a negotiation is, as well as what is meant by "interfere". Prospective or future negotiations can be captured by this exemption if they are foreseeable; there must be a reasonable, fact-based expectation that future negotiations will take place (*Guide to FOIP*, Ch. 4, p. 227).

[59] While SaskBuilds acknowledges that the current procurement process is concluded, it has not described any future contractual or other negotiations involving a third party. As such, the first part of the test is not met. I find, therefore, that SaskBuilds did not properly apply subsection 19(1)(c)(iii) of FOIP.

[60] Because SaskBuilds has not demonstrated that subsections 17(1)(c), 18(1)(d), (e), (f) and 19(1)(c) of FOIP would apply to severance 1 on page 1 and severance 1 on page 2, I recommend it release this information to the Applicant within 30 days of the issuance of this Report.

IV FINDINGS

[61] I find that I have jurisdiction to conduct this investigation.

[62] I find that SaskBuilds properly applied subsection 19(1)(b) of FOIP to severances 2 to 6 on page 2, and severances 1 to 4 on page 3.

[63] I find that SaskBuilds has not properly applied subsections 17(1)(c), 18(1)(d), (e), (f) and 19(1)(c) of FOIP to severance 1 on page 1 and severance 1 on page 2.

V RECOMMENDATIONS

[64] I recommend that SaskBuilds continue to withhold severances 2 to 6 on page 2, and severances 1 to 4 on page 3 pursuant to subsection 19(1)(b) of FOIP.

[65] I recommend that SaskBuilds release the information under severance 1 on page 1 and under severance 1 on page 2 to the Applicant within 30 days of the issuance of this Report.

Dated at Regina, in the Province of Saskatchewan, this 26th day of July, 2024.

Ronald J. Kruzeniski, KC
A/Saskatchewan Information and Privacy
Commissioner