Office of the
Saskatchewan Information
and Privacy Commissioner

# REVIEW REPORT 068-2024

## Saskatchewan Power Corporation

**September 26, 2024**

**Summary:** The Applicant submitted an access to information request to Saskatchewan Power Corporation (SaskPower). SaskPower disclosed records to the Applicant but withheld portions pursuant to subsections 18(1)(b), (d), (e), (f), 19(1)(a), (b), and (c)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant requested a review by the Commissioner. The A/Commissioner found that SaskPower did not demonstrate the exemptions applied to the records at issue. He recommended that SaskPower disclose the records at issue in their entirety.

## I BACKGROUND

[1] On January 29, 2024, Saskatchewan Power Corporation (SaskPower) received the Applicant's access to information request, which was as follows:

> 1) CEO Rupen Pandya's employment contract including incentives/bonuses for SaskPower's solar, wind and other renewable sources of electricity generation, incentives/bonuses for reducing coal and/or natural gas electricity generation
>
> 2) Power sale arrangements with Manitoba Hydro
>
> 3) Land purchases (including cost) for location of Iyuhana solar facility

[2] In a letter dated February 1, 2024, SaskPower indicated to the Applicant that it was extending the 30-day response period pursuant to subsection 12(1)(c) of *The Freedom of Information and Protection of Privacy Act* (FOIP), which provides:

> **12**(1) The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

> ...
> (c) where a third party notice is required to be given pursuant to subsection 34(1).

[3] Then, in a letter dated March 4, 2024, SaskPower responded to the Applicant. It said:

> Responding to each question in turn
>
> 1) This record was filed and made public by the Clerk of the Legislative Assembly, We [sic] have attached a copy for your convenience. As for incentives for SaskPower's "solar, wind and other renewable sources of electricity generation, incentives/bonuses for reducing coal and/or natural gas electricity generation" Records do not exist.
>
> 2) Please find attached records responsive to your request. Please note that a portion of the information contained in the attached records has been redacted. We have made this redaction in accordance with 18(1)(b)(i), 18(1)(b)(ii), 18(1)(d), 18(1)(e), 18(1)(f), 19(a) [sic], 19(1)(b), 19(1)(c)(ii), 29(1) of *The Freedom of Information and Protection of Privacy Act* (the "Act"). A copy of the above Sections of the Act is attached for your reference in Appendix A.
>
> 3) This is a public record. We have attached the Orders-in-council that are relevant to the purchase of the land for your convenience.

[4] On March 6, 2024, the Applicant requested a review by my office.

[5] On March 8, 2024, my office notified SaskPower and the Applicant that my office would be undertaking a review. My office also notified Manitoba Hydro, as a third party, of the review.

[6] On June 7, 2024, the Applicant provided their submission to my office.

[7] On June 14, 2024, Manitoba Hydro provided its submission to my office.

[8] On June 18, 2024, SaskPower provided their submission to my office.

[9] On September 13, 2024, SaskPower provided a supplemental submission to my office.

## II RECORDS AT ISSUE

[10] The records at issue are as follows:

- Amended and restated 2020 – 2040 System Power Sale Agreement between the Manitoba Hydro-Electric Board and Saskatchewan Power Corporation
- 25 MW System Power Sale Agreement, dated June 30, 2014 as amended on December 19, 2016, May 1, 2017, April 24, 2018 and September 7, 2021.

[11] SaskPower paginated both the index of records and records at issue from 1 to 221 as one PDF document for my office's review. Pages 1 to 17 are the index of records. Then, pages 18 to 221 are the records at issue.

[12] Before I proceed further, Manitoba Hydro's submission referred my office to Manitoba Hydro's website. Specifically, it referred my office to the Regulatory Affairs section of the website, which contains redacted draft versions of the records at issue. These records were a part of Manitoba Hydro's 2017/18 & 2018/19 General Rate Application submitted to Manitoba's Public Utilities Board's (PUB) for PUB's public review process. I note that it was Manitoba Hydro who applied the redactions (not SaskPower) to the records available on Manitoba Hydro's website. While the redacted draft versions of the records on Manitoba Hydro's website are not identical to the records at issue in my office's review, I note that SaskPower should consider what has already been publicly disclosed when it is applying exemptions to the records at issue. Pages 63, 130 to 131, 157 and 172 are examples of pages of the records at issue that contains information that was redacted by SaskPower but is publicly available on Manitoba Hydro's website.

## III DISCUSSION OF THE ISSUES

### 1. Do I have jurisdiction?

[13] SaskPower is a "government institution" pursuant to subsection 2(1)(d)(ii) of FOIP and section 3 and PART I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations*. Further, Manitoba Hydro qualifies as a "third party" pursuant to subsection 2(1)(j) of FOIP. Therefore, I find that I have jurisdiction to conduct this review.

## 2. Did SaskPower properly apply subsection 18(1)(b) of FOIP?

[14] Based on its submission, it appears that SaskPower considered subclauses 18(1)(b)(i) and (ii) separately, or as if they are two separate provisions. As I said at paragraph [14] in my office's Review Report 053-2024, subclauses (i) and (ii) are conjoined by the word "and", so my office considers that conditions in both subclauses (i) and (ii) must be read, and satisfied, together for subsection 18(1)(b) of FOIP to apply.

[15] SaskPower applied subsection 18(1)(b) of FOIP to pages 19, 37, 38, 42 to 47, 49, 50, 56 to 63, 69 to 74, 80, 94,95, 129 to 131, 157, 172 to 182, 198 and 199.

[16] Subsection 18(1)(b) 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 financial, commercial, scientific, technical or other information which the Government of Saskatchewan or a government institution has a proprietary interest or a right of use and which has monetary value or reasonably likely to have monetary value (*Guide to FOIP*, Chapter 4: "Exemptions from the Right of Access", updated April 8, 2024 [*Guide to FOIP*, Ch. 4], p. 170). Subsection 18(1)(b) of FOIP provides:

> **18**(1) A head may refuse to give access to a record that could reasonably be expected to disclose:
>
> ...
> (b) financial, commercial, scientific, technical or other information:
>
> (i) in which the Government of Saskatchewan or a government institution has a proprietary interest or a right of use; and
>
> (ii) that has monetary value or is reasonably likely to have monetary value;

[17] My office uses the following three-part test to determine if a government institution properly applied subsection 18(1)(b) of FOIP:

1. Does the information contain financial, commercial, scientific, technical or other information?

2. Does the government institution have a proprietary interest or a right to use it?

3. Does the information have monetary value for the government institution or is it reasonably likely to?

(*Guide to FOIP*, Ch. 4, pp. 170 to 173)

[18] In its submission, SaskPower said:

> SaskPower submits that the redactions involved relate to a contract with a third party for the purchase of power. These contracts contain information that was part of the successful Power Sale Agreement contract and the financial agreements of those contracts. Further, the agreement has technical information about SaskPower and the third party's power grid operations and their connections to each other. The cost of individual contracts as well as technical information about the power system in Saskatchewan is all highly proprietary.
>
> Information in these documents is considered confidential. The disclosure of the redacted information would be harmful to SaskPower and could pose a substantial legal risk if lost or shared beyond SaskPower employees and the third party, as it would undermine future power agreement RFPs, as well as expose SaskPower to legal liability by the third party in this case.
> ...
> SaskPower submits that the records identified above explicitly cover cost of power purchases for a specific supplier. This information is the intellectual property of SaskPower and has monetary value as it details the results of a successful contract.

[19] In its supplemental submission, SaskPower said:

> (a) **The Redacted Portions contain commercial information.** As outlined in the Guide, commercial information means information relating to the buying, selling or exchange of merchandise or services, including pricing structures. Past records of the OIPC have also found commercial information to include dollar amounts and/or financial information related to the provision of services. In this case, the Redacted Portions of the Power Contracts contain amounts to be paid by Manitoba Hydro for new transmission services, electric energy capacity pricing and related formulas, energy pricing and related formulas, energy true-up calculations and related formulas, the hourly amount of electric energy to be provided measured on a megawatt per hour basis, and the monthly amounts that SaskPower will pay to Manitoba Hydro for electric energy. It is SaskPower's position that this information is commercial information within the meaning of the Act.
>
> (b) **The Redacted Portions contain technical information.** As outlined in the Guide, technical information is information relating to a particular subject, craft or technique.

It is information belonging to an organized field of knowledge, which would fall under the general categories of applied sciences or mechanical arts. The Redacted Portions of the Power Contracts include technical information regarding SaskPower's power grid operations and its connections to other power grids. Such information belongs to the field of electrical engineering, and it relates to the operation and maintenance of Saskatchewan's power grid. For example, the Redacted Portions include the calculation of transmission dependent energy, curtailment of electric energy criteria, electric energy delivery points, electric energy reduction calculations and formula used for the calculation of electric energy capacity. It is SaskPower's position that this information is technical information within the meaning of the Act.

(c) **SaskPower has a proprietary interest in and right to use such information.** The financial and technical information contained within the Redacted Portions of the Power Contracts constitutes SaskPower's confidential business information and SaskPower has a proprietary right (including related intellectual property rights) in such information. The development of this information required the skill and effort of SaskPower personnel and contractors, and SaskPower has treated this information in a confidential manner, which is demonstrated by the robust confidentiality provisions in the Power Contracts. The definition of Confidential Information in each of the Power Contracts includes the agreement itself and "all information and any idea in whatever form, tangible or intangible, whether disclosed to or learned by the recipient pertaining in any manner to the business of the discloser or to the discloser's affiliates, consultants, business associates or customers." As the owner and operator of electric generation and transmission facilities, SaskPower has a substantial interest in protecting this information from misappropriation by another party.

(d) **The commercial and technical information in the Redacted Portions has monetary value for SaskPower and is reasonably likely to continue having monetary value.** As outlined in this submission above, the Power Contracts provide for the sale and purchase of electric energy until 2040. SaskPower has invested a considerable amount of time and resources into the development of such commercial and financial information. While the Power Contracts themselves may not have monetary value to SaskPower, the commercial and financial information in the Redacted Portions does have monetary value as such information contains SaskPower proprietary processes, formulas, practices and procedures. As an owner and operator of electric generation and transmission facilities, that also engages in the generation, transmission, distribution and sale of electric energy, SaskPower is reasonably likely to reuse, modify, create derivative works based on or even sell or license such proprietary information in the future.

[Emphasis in original]

[20] Pages 170 to 173 of the *Guide to FOIP*, Ch. 4, provide the following definitions:

- "Commercial information" means information relating to the buying, selling or exchange of merchandise or services.

- "Technical information" is information relating to a particular subject, craft or technique.

- "Proprietary" means of, relating to or holding as property.

- "Proprietary interest" is the interest held by a property owner together with all appurtenant rights, such as a stockholder's right to vote the shares. It signifies simply "interest as an owner" or "legal right or title".

- "Owner" means someone who has the right to possess, use and convey something; a person in whom one or more interests are vested.

- "Right of use" means a legal, equitable or moral title or claim to the use of property, or authority to use.

- "Monetary value" requires that the information itself have an intrinsic value. This may be demonstrated by evidence of potential for financial return to the government institution.

- "Reasonably likely to" implies that the question be considered objectively.

[21] Regarding the first part of the three-part test, SaskPower asserted that the information in the records at issue qualify as commercial and technical information. Upon review of the portions redacted in the records at issue, I find that the information qualifies as commercial information, as it relates to the buying and selling of power. Therefore, I find that the first part of the three-part test is met.

[22] Regarding the second part of the three-part test, SaskPower asserted that it "has a proprietary right (including related intellectual property rights) in such information". It asserted that it "has a substantial interest in protecting this information from misappropriation by another party".

[23] As noted at page 172 of the *Guide to FOIP*, Ch. 4, subsection 18(1)(a) of Ontario's *Freedom of Information and Protection of Privacy Act* (ON FIPPA) is similar to subsection 18(1)(b) of FOIP:

**Ontario's *Freedom of Information and Protection of Privacy Act* subsection 18(1)(a) is similar to Saskatchewan's but instead of proprietary interest or right of use, it uses the phrase "that belongs to the Government of Ontario or an institution".** In Ontario Order MO-1746, the phrase "belongs to" was found to mean "ownership" which makes it relevant for Saskatchewan's subsection 18(1)(b) of FOIP. In Order MO-1746, the Adjudicator stated:

> The Assistant Commissioner has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right to simply possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. [See, for example, *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.), and the cases discussed therein].
>
> [Emphasis added]

[24] In Order PO-4347, Ontario's Office of the Information and Privacy Commissioner (ON IPC) contemplated whether Ontario Power Generation (OPG) properly withheld portions of an agreement between OPG and an affected party pursuant to subsection 18(1)(a) of Ontario's FIPPA). It said:

> [27] Previous orders have been clear that records consisting of mutually-generated agreements, the product of negotiations, do not constitute the intellectual property of and, therefore, do not "belong to" an institution in the sense contemplated by this exemption. **These orders have stated that information that is produced in the course of negotiations and included in mutually generated agreements belongs as much to the parties on the other side of those agreements as it does the institution and is not the type of information "in the nature of a trade secret" that the courts would protect from misappropriation.** I adopt these findings for the purposes of this appeal and apply them below.

[Emphasis added]

[25] Upon review of the redacted portions of the records, I find that the redacted portions contain information such as the rights, obligations and commitments of the parties to the agreement. Given that that records at issue are agreements between SaskPower and Manitoba Hydro, then the agreements are mutually generated. The information belongs as much to Manitoba Hydro as it does to SaskPower and is not the type of information that the courts would protect from misappropriation. The second part of the two-part test is not met. I find that SaskPower did not properly apply subsection 18(1)(b) of FOIP to the records at issue. Since SaskPower applied multiple exemptions to the same portions of the records, I will make a recommendation after I have analyzed all of the exemptions cited by SaskPower.

**3. Did SaskPower properly apply subsection 18(1)(d) of FOIP?**

[26] SaskPower applied subsection 18(1)(d) of FOIP to the same pages to which it applied subsection 18(1)(b) of FOIP.

[27] Subsection 18(1)(d) of FOIP provides:

> **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;

[28] Subsection 18(1)(d) of FOIP is a discretionary harm-based exemption. It 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. 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 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?

[29] In its submission, SaskPower said:

> SaskPower submits that the records identified above are the final versions of a successful Power Sale Agreements and they were the result of contracts negotiated with the third party. The redacted records contained the financial and non-financial terms of the successful negotiation of these contracts with the third party. The release of the above noted information would harm SaskPower's ability to negotiate fairly with sellers, and those who may feel SaskPower is a risk to their proprietary information.
>
> Accordingly, SaskPower submits that the Records were properly withheld on the basis of subsection 18(1)(d).

[30] In its supplemental submission, SaskPower said:

> (a) **It is reasonably foreseeable that there will be prospective or future negotiations involving SaskPower and other sellers or purchasers of electric energy.** SaskPower is engaged in the transmission, distribution and sale and purchase of electric energy. In addition to Manitoba Hydro, SaskPower currently has interconnections with Alberta, and the Southwest Power Pool, which manages the power grid and wholesale power market for the central United States. In the future, SaskPower is planning to build more interconnections to buy and sell power with, among others, Alberta, North Dakota and Manitoba. Please see the publicly available information on SaskPower's website regarding its electric energy interconnections. Undoubtedly, such future sale and/or purchase of electric energy will require the negotiation of further contracts similar to the Power Contracts.
>
> (b) **The release of the Redacted Portions could reasonably be expected to interfere with such contractual or other negotiations between SaskPower and other purchasers or sellers of electric energy.** The Redacted Portions contain information regarding contractual remedies and consequences for failure to deliver or receive electric energy, the total amounts paid for new transmission and delivery of electric energy, remedies in the event of a failure to take delivery of electric energy, Manitoba Hydro's right to curtail, restrict or reduce the sale and supply of energy, requirements for reporting environmental attributes of supplied energy, exceptions to events of force majeure and other key legal terms addressing each party's obligations and legal

> remedies. The release of this information could reasonably be expected to interfere with, hinder or hamper future negotiations between SaskPower and other sellers or purchasers of electric energy (e.g., Alberta or North Dakota) as access to this information would provide such third-parties or competitors of SaskPower with an unfair advantage and make it difficult for SaskPower to negotiate freely. This information would reveal or provide such third parties with SaskPower negotiating positions, previously accepted contractual obligations/remedies, options, pricing criteria and pricing formulas to use for a negotiation that are not otherwise available in a free market negotiation. In any contract negotiation sharing what is paid to others or what was accepted in terms of legal risk apportionment in similar circumstances may hinder the ability to negotiate based on true market factors. In other words, SaskPower's standard negotiation positions or standard legal terms may be undercut by a third party who knows what SaskPower previously agreed to in the Power Contracts. In applying its redactions to the responsive records, SaskPower has tried to focus on the portions of the Power Contracts that would be the most damaging to SaskPower in a future negotiation.
>
> [Emphasis in original]

[31] SaskPower's supplemental submission included a footnote that referenced a webpage from SaskPower's website regarding its interconnections with Manitoba, Alberta, and Southwest Power Pool.

[32] In their submission, the Applicant said:

> SaskPower has relied extensively on sections in 18 and 19 of FOIP. I do not believe these exemptions apply as the negotiations for these agreements are complete. Rate payers in Saskatchewan are ultimately on the hook for these agreements by paying their electricity bills. How can the public have confidence in these agreements when they can't see the financial details?
>
> Given all the promotion and spending SaskPower is currently undertaking regarding power generation (ie. everything from coal, solar, natural gas, wind, nuclear and power purchases from the United States and Manitoba) shouldn't SaskPower be transparent with the public on such signed agreements?
>
> For these reasons, I believe sections 18 and 19 as cited by SaskPower are not valid.

[33] Pages 180 to 181 of the *Guide to FOIP*, Ch. 4, provide the following definitions:

- A "negotiation" is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. Prospective or future negotiations could be included within this exemption, as long as they are

> foreseeable. It may be applied even though negotiations have not yet started at the time of the access to information request, including when there has not been any direct contact with the other party or their agent. However, a vague possibility of future negotiations is not sufficient. There must be a reasonable fact-based expectation that the future negotiations will take place.
>
> - "Interfere" means to hinder or hamper.

[34] SaskPower argued that there will be prospective or future negotiations involving itself and other sellers or purchases of electric energy. Since SaskPower is in the business of buying and selling power, it is reasonable that SaskPower will be involved in negotiations in the future regarding the buying and selling of power.

[35] However, SaskPower argued that disclosing the redacted portions in the records at issue would undercut SaskPower because they would reveal SaskPower's "standard negotiation positions" or "standard legal terms".

[36] Subsection 25(1)(c)(iii) of Alberta's *Freedom of Information and Protection of Privacy Act* is similar to that of subsection 18(1)(d) of FOIP. In Order F2005-030, Alberta's Office of the Information and Privacy Commissioner (AB IPC) said:

> [para 95] I will deal with one other possible basis for relying on section 25 – **that disclosures of particular positions taken by the Public Body in the contract would harm its ability to negotiate with other persons or organizations relative to similar matters. I am not sure section 25 applies to such situations. It does not necessarily follow from the fact a position is taken in one case that it would be obliged to take it in another, or that there would be pressure on the Public Body to take it that it could not resist.** Even if the provision is applicable, in my view, any elements of the Agreement that could potentially have such an effect have already been disclosed in the press releases with a sufficient particularity that disclosure of the Agreement itself could not exacerbate such consequences to any significant degree. As well, I note the Public Body did not make an argument specifically with reference to future negotiations with other persons relative to specific subjects covered by the Agreement. Thus presumably it did not exercise its discretion to withhold on this basis.
>
> [Emphasis added]

[37] Further, in Order F2009-028, the AB IPC said that a public body is not bound to take the same positions in future negotiations as it took in negotiations with a particular third party:

> [para 91] Finally, even if other tenants or potential tenants were to seek the same terms as the Third Party, there is no reason to expect that the Public Body would agree to those terms unless satisfied with them. **As the Commissioner noted in Order F2005-030, cited above: "It does not necessarily follow from the fact a position is taken in one case that [a party] would be obliged to take it in another." The Public Body has not established that it would be bound to take the same positions that it took in negotiations with the Third Party in future negotiations with the Third Party or any other party,** nor that it would lose cost savings, or otherwise suffer a financial loss if the information in the records at issue is disclosed. I find that the Public Body has not established a linkage between disclosure of the information to which it applied section 25(1) and the harms it projects would result from disclosure.
>
> [Emphasis added]

[38] As mentioned in its supplemental submission, SaskPower wishes to negotiate based on true market factors but its position is that the disclosure of the records at issue would prevent it from doing so. I disagree. SaskPower is not bound by the terms it negotiated with Manitoba Hydro with any other party in future negotiations. SaskPower can still negotiate based on true market factors in future negotiations even if it has disclosed the records at issue. Therefore, I find that it cannot be reasonably be expected that the release of the record would interfere with future negotiations. The second part of the two-part test is not met.

[39] I find that SaskPower has not properly applied subsection 18(1)(d) of FOIP.

**4. Did SaskPower properly apply subsection 18(1)(e) of FOIP?**

[40] SaskPower applied subsection 18(1)(e) of FOIP to the same pages it applied subsection 18(1)(b) and (d) of FOIP.

[41] Subsection 18(1)(e) of FOIP provides:

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

[42] 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, outline 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?

[43] In its submission, SaskPower said:

> SaskPower submits that the records identified above have been created as the product of negotiations with a third party and contain information relating to the SaskPower planning of power use and operation of the power grid and the interconnection with Manitoba Hydro. The release of the above noted information would harm SaskPower's ability to negotiate fairly with sellers, developers and would risk further negotiation.

[44] SaskPower did not provide arguments for subsection 18(1)(e) of FOIP in its supplementary submission.

[45] Pages 184 to 186 of the *Guide to FOIP*, Ch. 4 provides the following definitions:

- 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.

- A "procedure" is an established or official way of doing something; a series of actions conducted in a certain order or manner.

- "Criteria" are standards, rules or tests on which a judgement or decision can be based or compared; a reference point against which other things can be evaluated.

- "Instructions" are directions or orders.

- "Developed" means to start to exist, experience or possess.

- "For the purpose of" means intention; the immediate or initial purpose of something.

- "On behalf of" means "for the benefit of". A person does something "on behalf of" another, when he or she does the thing in the interest of, or as a representative of, the other person.

- A "negotiation" is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter.

[46] I note that in my office's Review Report 053-2024, SaskPower had cited subsection 18(1)(e) of FOIP as a reason for refusing the Applicant access to records. In that report, I said:

> SaskPower has not stated, as per the first part of the test, if the record contains positions, plans, procedures, criteria, instructions, or considerations. As the first part of the test is not met, I find SaskPower did not properly apply subsection 18(1)(e) of FOIP. I will now consider subsection 18(1)(f) of FOIP.

[47] Similarly, in this case, SaskPower's submission does not identify whether the records at issue contains positions, plans, procedures, criteria, instructions or considerations. That alone is enough for me to find that subsection 18(1)(e) of FOIP does not apply since the burden of proof is upon SaskPower pursuant to section 61 of FOIP. However, I note that SaskPower asserted that the agreements are a "product of negotiations". Since they are a

"product of negotiations", then it is obvious that the records at issue do not contain positions, plans, procedures, criteria, instructions, or considerations that are "for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution". SaskPower has not met either part of the two-part test. I find that SaskPower has not properly applied subsection 18(1)(e) of FOIP.

## 5. Did SaskPower properly apply subsection 18(1)(f) of FOIP?

[48] SaskPower applied subsection 18(1)(f) of FOIP to the same pages it applied subsection 18(1)(b), (d), and (e) of FOIP.

[49] Subsection 18(1)(f) of FOIP provides:

> **18**(1) A head may refuse to give access to a record that could reasonably be expected to disclose:
>
> ...
> (f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution;

[50] 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?

[51] The *Guide to FOIP*, Ch. 4 at page 190, offers the following definitions:

- "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.

[52] The *Guide to FOIP*, Ch. 4 at page 190, offers the following examples of harm to economic interests:

- 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.

[53] In its submission, SaskPower provided the same arguments as it did in my office's Review Report 053-2024. It said:

> SaskPower submits that the records identified above prejudice the economic interests of SaskPower and the Government of Saskatchewan. The release of Power Purchase agreements and confidential information contained therein, could reasonably be expected to hinder any work on taking new RFPs to market for new Power Purchase Agreements. Releasing the successful financial agreements would undermine SaskPower's ability to negotiated Power Agreements in the future. The release of this information would also harm SaskPower's ability to establish working relationships with the contractors and service providers.
>
> Accordingly, SaskPower submits that the Records were properly withheld on the basis of subsection 18(1)(f).

[54] In its supplement submission, SaskPower provided arguments in two parts. The first part of its argument said:

> (a) **The Release of the Redacted Portions could reasonably be expected to prejudice the economic interests of SaskPower.** Similar to the reasons outlined above in this submission, it is SaskPower's position that the release of the Redacted Portions in the Power Contracts would prejudice the economic interests of SaskPower by requiring SaskPower to disclose its proprietary and confidential commercial and technical information. Such information's monetary value is largely based on the fact that it is confidential, and the release of this information is likely to hamper or prevent any future selling or licensing of such proprietary information. In addition, to the extent that the release of the Redacted Portions hinders the ability of SaskPower to negotiate

> future electric energy sale or purchase contracts based on true market factors (as outlined in this submission above) it can reasonably be expected that such hinderance or interference will result in less favorable negotiated terms from SaskPower's perspective. This includes SaskPower having to potentially pay a higher price for the purchase of electricity from other third parties (e.g., Alberta or North Dakota) than what it may otherwise have negotiated with such third parties if the Redacted Portions were not disclosed.
>
> [Emphasis in original]

[55] Based on the above, it appears that SaskPower is reiterating its arguments for subsection 18(1)(b) and (d) of FOIP. Earlier, in my analysis of subsection 18(1)(b) of FOIP, I had found that the information at issue is not proprietary. Further, in my analysis of subsection 18(1)(d) of FOIP, I had found that the disclosure of the redacted information would not hinder the ability of SaskPower to negotiate based on true market factors because SaskPower is not bound by terms it negotiated with Manitoba Hydro with any other party in future negotiations.

[56] The second part of SaskPower's arguments in its supplemental submission is as follows:

> (b) **The release of power purchase contracts similar to the Power Contracts has previously been recognized as prejudicial to SaskPower.** During a September 29, 2005, meeting of the Standing Committee on Crown and Central Agencies, the committee passed a motion providing that the Treasury Board's payee disclosure policy for government departments and other agencies does not apply to, "payments made pursuant to SaskPower power purchase contracts or power agreements." The committee decided to exempt SaskPower power purchase contracts from this payee disclosure requirement on the basis that the release of payments in such agreements would hurt SaskPower's competitiveness in purchasing commodities on behalf of the people of Saskatchewan, and that SaskPower needs to be able to make such purchases with the confidentiality that's required to work with some of these providers. While this motion was not directly related to section 18(1)(f) of the Act, SaskPower submits that the decision of the committee to exempt payments in contracts like the Power Contracts from disclosure in the payee disclosure report demonstrates that it is well understood that the release or disclosure of payment related information in power agreements would have a [sic] economic prejudicial effect on SaskPower.
>
> [Emphasis in original]

[57] Each fiscal year, Crown Corporations must prepare a report that discloses amounts paid by Crown Corporations during the fiscal year. This is in accordance with the *Fifth Report of*

*the Standing Committee on Crown Corporations* dated June 18, 2003, which provided as follows:

> After receiving further input from Crown Investments Corporation, the Office of the Provincial Auditor and the Acting Information and Privacy Commissioner, your Committee further deliberated on the issue and agreed to the following recommendation. Your Committee, although acknowledging the spirit and intent of the Provincial Auditor's recommendations, agreed to adopt its own recommendation noted as follows:
>
> That the CIC Crown Corporations and related agencies that are called to appear before the Standing Committee on Crown Corporations publicly disclose the following payee information to the Standing Committee on Crown Corporations:
>
> - Board expenses (Currently provided)
>   A list of amounts paid to and on behalf of each person on the board of a Crown Corporation including base retainer, all other remuneration and benefits, and out-of-province travel costs;
>
> - Ministerial expenses (Currently provided)
>   Out-of-province travel expenses for the Minister(s) and ministerial staff undertaken on behalf of the Crown Corporation;
>
> - Employee remuneration (New)
>   A list of all employees and the amounts they were paid for salaries, and other expenses with a minimum threshold of $50,000. (Threshold as recommended by the Provincial Auditor);
>
> - Grants, contributions, donations and sponsorships (New)
>   A list of all grants, contributions, donations, and sponsorships with a minimum threshold of $5,000. (Threshold consistent with Public Accounts);
>
> - Payments to consultants (Currently provided)
>   Payments to consultants (including legal and advertising fees) totalling over $10,000;
>
> - Supplier and other payments (New)
>   A list of payments for goods and services with a minimum threshold of $50,000, threshold recommended by the Provincial Auditor, except those items and categories where:
>
>   1) there is a legitimate need to protect commercially sensitive information;
>
>   2) disclosure could reasonably be expected to prejudice the competitive position of or interfere with the contractual obligations of the Crown corporation or a third party; or

3) disclosure is prohibited by law, including the provisions of the [sic] *Freedom of Information and Privacy Act*.

Your Committee is pleased to report that the adoption of this new practice has the support of all parties that were consulted.

[58] Based on the above, payments of $50,000 or more is to be disclosed by Crown corporations. However, in its supplemental submission, SaskPower included a link to Minute No. 23 of the Standing Committee on Crown and Central Agencies dated September 29, 2005 (minutes). Paragraph 11 of the minutes provided that certain payee information of Crown corporations is excluded from disclosure:

11. It was moved by Mr. Yates:

That the payee disclosure policy does not apply to the following:

Payments made to or on behalf of SGI claimants
Payments made to SGI reinsurers or reinsurance brokers
**Payments made pursuant to SaskPower power purchase contracts or power agreements**
Payments made pursuant to SaskEnergy gas supply contracts; and payments made pursuant to arrangements with SGI brokers, SaskTel dealers and SaskEnergy network partners;

And that, the Crown Corporations assemble appropriate sufficient documentation to support individual payee exemptions.

[Emphasis added]

[59] SaskPower also included a link to *Hansard Verbatim Report* (No. 23 – September 29, 2005) of the Standing Committee on Crown and Central Agencies, where the fill-in for a member of the committee explained the rationale for excluding payments made pursuant to SaskPower power purchase contracts or power agreements:

**Mr. Yates:** — Thank you. What I did was . . . In going back again to the original discussions and going back to the conversations that took place a number of years ago, we wanted to make sure of two things or three things, but two major principles here, one that we didn't want to hurt the commercial competitiveness of those small businesses that represent us throughout Saskatchewan and are in competition with others.

> We didn't want to hurt the competitiveness of our major Crown corporations on issues like power purchases, gas purchases, because that information creates sensitivity in the public. It can create problems in purchasing, in our competitiveness in purchasing some of those commodities that they're purchasing on behalf of the people of this province, and we need to be able to do that with the confidentiality that's required in order to work with some of these companies. So I've laid out four basic exemptions of those types of things that by virtue of them being made public could create problems for the companies and result in increased costs in many cases to us, the consumer, or hurt those small businesses that are out there representing us, selling SGI products, selling SaskTel products, throughout the province. And in any other case, in any other case, then they would have to provide adequate documentation and sufficient proof if they don't disclose it.

[60] While I note that "payments made pursuant to SaskPower power purchase contracts or power agreements" are excluded from the payee disclosure policy, the information that has been redacted from the records at issue are not "payments" or payee information. As described earlier, the redacted portions in the records at issue contain information such as the rights, obligations and commitments of the parties to the agreement. The records at issue do not provide any detail of money spent by SaskPower. So, while SaskPower provided arguments as to why it believes the disclosure of payment information could reasonably be expected to prejudice the economic interests of the Government of Saskatchewan or a government institution, it has not provided arguments as to how the disclosure of redacted information could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution.

[61] SaskPower has not demonstrated how subsection 18(1)(f) of FOIP applies to the redacted information. Therefore, I find that SaskPower has not properly applied subsection 18(1)(f) of FOIP.

**6. Did SaskPower properly apply subsection 19(1)(a) of FOIP?**

[62] SaskPower applied subsection 19(1)(a) of FOIP to page 117. Page 117 is an Appendix A to the Amended 2020 - 2040 System Power Sale Agreement. The redacted content is a list of Manitoba Hydro's capacity resources.

[63] Subsection 19(1)(a) of FOIP provides:

> **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;

[64] Subsection 19(1)(a) of FOIP is a mandatory, class-based exemption. It permits refusal of access in situations where a record contains the trade secrets of a third party. Page 201 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:

> Does the record contain trade secrets of a third party?

[65] Page 201 of the *Guide to FOIP*, Ch. 4 defines the term "trade secret" as a plan or process, tool, mechanism or compound, which possesses each of the four following characteristics:

i. The information must be secret in an absolute or relative sense (is known only by one or a relatively small number of people)

ii. The possessor of the information must demonstrate he/she has acted with the intention to treat the information as secret.

iii. The information must be capable of industrial or commercial application.

iv. The possessor must have an interest (e.g., an economic interest) worthy of legal protection.

[66] The information must meet all the above criteria to be considered a trade secret.

[67] SaskPower did not provide any arguments as to how subsection 19(1)(a) of FOIP applies to page 117.

[68] Manitoba Hydro provided the following argument as to how the information on page 117 qualifies as a trade secret:

> The contract values, terms and conditions of the 25MW and 100MW Agreements is strategic business information and/or a specialized compilation of information which meets the four essential characteristics of a trade secret namely;

- The information is secret in the relative sense that it is known only to the parties and a small number of others (i.e. PUB experts and panel members).

- Manitoba Hydro has demonstrated a consistent intention and expended considerable effort and resources to maintain the secrecy of its trade secret information.

- The information is used for a commercial application.

- Export contracts are of significant financial benefit to Manitoba Hydro and securing the most advantageous contract terms is in the public interest giving Manitoba Hydro an interest which is worthy of legal protection.

The information must meet all the above criteria to be considered a trade secret.

The redacted information has significant economic value specifically because it is not generally known but a trade secret is protected only as long as it remains a secret. Whether intentional, malicious, innocent or inadvertent, once a trade secret is exposed, its protection is lost forever. For this reason, Manitoba Hydro makes every effort to protect the confidentiality of export contract values, terms and conditions.

[69] What Manitoba Hydro fails to demonstrate is that the information is a plan or process, tool, mechanism or compound. Well-known examples of trade secrets are the process of how Cadbury gets the caramel in the Caramilk bar or KFC's (previously known as Kentucky Fried Chicken) secret mix of herbs and spices that make up the coating mix on its fried chicken. The information on page 117 is not a plan, process, tool, mechanism or compound, and so the test is not met. I find that SaskPower has not properly applied subsection 19(1)(a) of FOIP to page 117.

**7. Did SaskPower properly apply subsection 19(1)(b) of FOIP?**

[70] SaskPower applied subsection 19(1)(b) of FOIP to pages 117 and 118. As described earlier, page 117 is Appendix A to the Amended 2020 – 2040 System Power Sale Agreement, which is a list of Manitoba Hydro's capacity resources. Page 118 is Appendix B to the same agreement. The redacted content on page 118 is the banking information of Manitoba Hydro.

[71] Subsection 19(1)(b) of FOIP provides:

> **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;

[72] 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*, Ch. 4, p. 203). My office uses the following three-part test 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?

[73] In its submission, SaskPower said:

> The third party in this request was contacted to review the Power Purchase Agreements in this to review their rights under Section 19 of The Act. The were sent the agreements for Review on February 1, 2024 and responded on February 21, 2024. They identified several sections that they requested redacted under Section 19(1)(b). These sections constitute both financial and commercial information and was supplied in confidence. The agreement included several financial requirements for the winning the contract and included pricing for services negotiated during contract negotiations.

[74] SaskPower did not provide further arguments for subsection 19(1)(b) of FOIP in its supplemental submission.

[75] In its submission, Manitoba Hydro indicated it was no longer relying on subsection 19(1)(b) of FOIP:

> In its response to SaskPower, Manitoba Hydro relied on this exemption however it now concedes that the records resulted from negotiation of the parties and must therefore be

> considered as mutually generated rather than supplied by Manitoba Hydro. Accordingly, Manitoba Hydro no longer relies on this exception.

[76] Since Manitoba Hydro is no longer relying on subsection 19(1)(b) of FOIP, I must consider SaskPower's arguments. Since SaskPower asserted that the information is "supplied" but Manitoba Hydro conceded that the information isn't, I will consider the second part of the three-part test. If the second part of the three-part test is not met, then I would find that subsection 19(1)(b) of FOIP does not apply.

[77] Page 205 of the *Guide to FOIP*, Ch. 4 defines "supplied" as "provided or furnished".

[78] Page 206 of the *Guide to FOIP*, Ch. 4 provides that the contents of a contract will not normally qualify as having been supplied by a third party as follows:

> The contents of a contract involving a government institution and a third party will not normally qualify as having been supplied by a third party. The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.

[79] There are two exceptions to the general rule of "mutually generated" information in contracts:

i. Inferred disclosure – where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the public body; and

ii. Immutability – information the third party provided that is immutable or not open or susceptible to change and was incorporated into the contract without change, such as the operating philosophy of a business, or a sample of its products.

[80] SaskPower has not provided arguments as to how the redacted information on pages 117 and 118 meets one of the two exceptions to information being "mutually generated". Therefore, the second part of the three-part test is not met. There is no need to consider the first or third part of the test. I find that SaskPower has not properly applied subsection 19(1)(b) of FOIP.

## 8. Did SaskPower properly apply subsection 19(1)(c)(ii) of FOIP?

[81] SaskPower applied subsection 19(1)(c)(ii) of FOIP to pages 19 to 21, 25 to 26, 29 to 30, 32 to 39, 42 to 44, 46 to 47, 49 to 57, 61 to 64, 68 to 74, 77 to 83, 89, 94 to 95, 117, 122, 128 to 129, 132 to 134, 140 to 147, 149, 151 to 152, 155 to 156, 159 to 160, 162 to 163, 166 to 168, 171, 174 to 182, 186 to 187, 199 and 220.

[82] Subsection 19(1)(c)(ii) of FOIP provides:

> **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:
>
> ...
> (ii) prejudice the competitive position of;
>
> ...
>
> a third party;

[83] Subsection 19(1)(c)(ii) of FOIP is a mandatory, harm-based exemption. It permits refusal of access in situations where disclosure of information could reasonably be expected to prejudice the competitive position of a third party (*Guide to FOIP*, Ch. 4, p. 221). My office uses the following two-part test to determine if a government institution has properly applied subsection 19(1)(c)(ii) of FOIP:

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?

[84] Pages 221 and 222 of the *Guide to FOIP*, Ch. 4 provides the following 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 private company's operations.
    - Marketing plans, including market research surveys, polls.
    - Information that reveals the internal workings of a private company.
- "Could reasonably be expected to" means there must be a reasonable expectation that disclosure could prejudice the competitive position of a third party.

***a. SaskPower's submission***

[85] In its submission, SaskPower said:

> The third party in this request was contacted to review the Power Purchase Agreements to review their rights under Section 19 of The Act. They were sent the agreements for Review on February 1, 2024 and responded on February 21, 2024. They identified several sections that they requested be redacted under Section 19(1)(c)(ii). These sections constitute both financial and commercial information. **The agreements included several financial requirements for the winning the contract and included pricing for services negotiated through contract negotiations. Release of this information could result in competitors using this information to compete on electricity price or give potential clients an advantageous bargaining position with the third party.**
>
> [Emphasis added]

[86] SaskPower did not provide arguments for subsection 19(1)(c)(ii) of FOIP in its supplemental submission.

[87] In my office's Review Report 195-2015, 196-2015, the government institution had withheld the hourly rate charged by the third party in a contract between itself and a third party. The government institution in that case argued that releasing the hourly rate could result in competitors having the ability to provide a lower rate for future contracts and result in undue loss to the third party and prejudice its competitive position. However, I said that

withholding the hourly rate could jeopardize a competitive bidding process and I found that subsection 19(1)(c) of FOIP did not apply to such information as follows:

> [43] Both Central Services and Solvera Solutions asserted that releasing the hourly rates could result in competitors having the ability to provide a lower rate for future contracts and result in undue loss to Solvera Solutions and prejudice its competitive position.
>
> [44] Bids are evaluated based on a number of criteria. The RFP for a Master Resource Arrangement 2011 which impacted Solvera Solutions suggested that proposals were evaluated using three stages. Stage one rated the proposal's compliance with the RFP requirements. Stage two rated the written proposal on the supplier's experience, proposed resource experience and the proposals clarity. Stage three involved reference checks. Any supplier receiving over 70% may have become part of a new Resource Arrangement. Further, proposals were also evaluated utilizing the following criteria:
>
> - Resource qualifications, past performance, experience and suitability pertaining to the work requirement(s);
> - Availability date of the submitted resource(s);
> - Hourly and daily rate(s); and
> - Additional criteria requested in the Request for Resources document.
>
> [45] Therefore, selection is not based on price alone. So, I fail to see the harm in other bidders undercutting the hourly rates proposed by the third parties in this case. The RFP process is inherently competitive. Arguably, informed bidders are the best way to assure competitiveness in the RFP bid process. **Keeping these rates from the public, including other future bidders, could jeopardize a competitive bidding process.**
> ...
> [47] Therefore, **I find that subsection 19(1)(c) of FOIP does not apply to the hourly rates withheld in the record.** Again, this line of reasoning is consistent with my recent Review Report 007-2015 where I found that similar arguments to justify withholding hourly rate information in contracts were not persuasive.
>
> [Emphasis added]

[88] Further, in Order F13-06, British Columbia's Office of the Information and Privacy Commissioner (BC IPC), the adjudicator considered whether the information within a signed contract between a public body ("District") and a third party ("First Class") could be withheld pursuant to subsection 21(1)(c)(i) of BC' *Freedom of Information and Protection of Privacy Act*, which is similar to subsection 19(1)(c)(ii) of FOIP. The

information that the adjudicator considered were amounts to be paid for contract services, cost to collect garbage from city garbage cans, residential disposal rates, commercial container rates:

> [25] The District submits that the severed information contains "component costs" and "contractual service rates" that were supplied in confidence and whose release would be expected to harm the competitive position of the third party. It does not give details or explain further.
>
> [26] First Class submits that disclosure would harm its competitive position and cause it undue financial harm. Although it does not elaborate, it says that the release of the withheld information will disclose information about its earnings, and that commonly used industry formulas could be applied to determine its profit margins. It also submits that disclosure will undermine its position in future bidding events because competitors will be able to avoid the cost of doing their own analysis when preparing a proposal and it will also allow them to under-bid First Class.
>
> [27] The applicant disputes that First Class's future negotiations and profit margin will be negatively impacted by disclosure of the withheld information. She submits that the dollar figures are only relevant to today's business climate and there are many factors that will play a role in pricing future contracts, such as labour costs, volumes of refuse and recyclables, cost of living increases, and what the District is willing and able to pay.
>
> [28] In considering the circumstances of this case and in reviewing previous orders and case law, I am reminded of the overarching principle here, articulated by former Commissioner Loukidelis in Order 04-06:
>
> > When interpreting and applying the s. 21(1) disclosure exception, the stated purposes of the Act to make public bodies more accountable, by giving the public a right of access to records that is subject to specified limited exceptions, must be kept in sight. **The overarching principle is that contracts with public bodies should be available to the public, subject only to specified and limited disclosure exceptions in the circumstances of each case.**
>
> [29] I have considered the submissions and evidence as well as the records themselves, and I find that the District has failed to prove that there is a reasonable expectation that disclosure will result in the harm outlined in s. 21(1)(c)(ii) and (iii). The harm that the District and First Class assert will result from disclosing the withheld information is vague, speculative and lacking in evidentiary support. No details are provided about the anticipated financial loss, even in general terms, from which I could reach any conclusion about whether there would be a loss, undue or otherwise. For example, no information was provided about the marketplace and competitors or any explanation of the commonly used industry formulas that could allegedly be applied to determine First Class's profit margins and undercut it in any future bidding. Based on the material before me, it is not at all apparent how the disputed information could directly or

> indirectly reveal First Class's fixed costs and, potentially, its profit margin. **Furthermore, I agree with the sentiment expressed by former Commissioner Loukidelis in Order F07-15 that the disclosure of existing contract pricing and related terms that may result in the heightening of competition for future contracts is not a significant harm or an interference with competitive or negotiating positions. Having to price services competitively is not a circumstance of unfairness or undue financial loss or gain; rather it is an inherent part of the bidding and contract negotiation process.**
>
> [30] In summary, the submissions and evidence fail to demonstrate a clear and direct connection between disclosure of the withheld information and the anticipated harm, and for this reason I find that the District has not established that disclosure could reasonably be expected to result in harm under s. 21(1)(c).
>
> [Emphasis added]

[89] In Order PO-2435, ON IPC considered whether information in a contract between the Ministry of Health and Long-Term Care and a third party could reasonably expect to result in harm to the third party's competitive position. ON IPC said:

> I also accept that the disclosure of this information could provide the competitors of the contractors with details of contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs. However, in my view, **a distinction can be drawn between revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed. The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.**
>
> [Emphasis added]

[90] Similar to BC IPC, I agree that the release of information, including pricing information, heightens competition for future contracts and is not a significant harm or an interference with competitive or negotiating positions. Further, similar to ON IPC, I agree that subjecting a third party to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice the third party's position or result in undue loss to them. Before I make a finding, I will consider Manitoba Hydro's submission.

***b. Manitoba Hydro' submission***

[91] In its submission, Manitoba Hydro said it has exclusive jurisdiction and authority over the sale of power within Manitoba, except for rates which must be approved by Manitoba's PUB. Manitoba Hydro explained the PUB conducts public reviews but there is a process in which Manitoba Hydro may request that information be held in confidence by PUB.

[92] Manitoba Hydro noted that PUB had requested copies of the records at issue in 2017 as part of PUB's public review process. In a letter dated September 7, 2017, Manitoba Hydro requested that portions of the records at issue be withheld in confidence. It provided the following arguments to PUB:

> **Long-term contracts contain confidential information and are protected by mutual non-disclosure agreements/confidentiality terms as between Manitoba Hydro and the respective counterparty. These contracts require parties to the contract to hold the confidential information in strict confidence and not to disclose the confidential information to any third party without prior written consent. Manitoba Hydro has received the required consents to file the SaskPower 25MW and 100MW power sales contracts with the PUB, provided the commercially sensitive information identified therein is not disclosed on the public record.**
>
> Manitoba Hydro has never disclosed pricing or other contract specific terms and conditions contained in export contracts in a public forum. During the NFAT process Manitoba Hydro filed export contracts and term sheets in confidence with the PUB. Counterparty consent was obtained and counterparties worked with Manitoba Hydro to provide redacted versions for the public record.
>
> Compelling disclosure of contract specific terms without counterparty consent would harm the Corporation's relationship with the counterparty and cause reputational harm to Manitoba Hydro. Manitoba Hydro's relationship with counterparties has been established by building trust over many years. Manitoba Hydro has consistently acted in good faith and with the understanding of the intent under which these contracts and clauses were negotiated. **The triggering of notice of forced disclosure under these contracts in order to protect the counterparty's Commercially Sensitive Information would cause irreparable harm to these relationships and impact future sales negotiations. Counterparties may be reluctant to deal with Manitoba Hydro or share critical information if they lack confidence that such information will be protected**. Public awareness that Manitoba Hydro cannot always meet its confidentiality commitments would extend such negative impacts industry wide.
>
> [Emphasis added]

[93] Ultimately, PUB approved Manitoba Hydro's request and allowed Manitoba Hydro to disclose certain information at an in-camera hearing, which is documented in PUB's Order No. 59/18:

> The line is being constructed to facilitate a 100 MW export power sale from Manitoba Hydro to SaskPower Corporation. The power sale agreement begins June 1, 2020 and ceases May 31, 2040. **The pricing terms of the power sale agreement are confidential and commercially sensitive but were disclosed to the Board at an *in-camera* hearing.** Manitoba Hydro indicates that the environmental attributes, such as carbon-free energy produced by Manitoba Hydro's hydroelectric generating stations, are transferred to SaskPower. The price paid by SaskPower includes these environmental attributes as there is no explicit pricing of environmental attributes.
>
> [Emphasis added]

[94] In its submission, Manitoba Hydro asserted "that deference should be given to the findings of the PUB regarding commercially sensitive information".

[95] My office is not bound by the decisions of PUB. So even though PUB found that it was proper to withhold information in the records at issue in its public review process, I must still consider whether my office's two-part test for subsection 19(1)(c)(ii) of FOIP is met. PUB may have found the information to be "commercially sensitive", but I need to determine if the disclosure of the information could reasonably be expected to prejudice the competitive position of Manitoba Hydro in order to find that subsection 19(1)(c)(ii) of FOIP applies.

[96] In its submission, Manitoba Hydro argued:

> In a complex and highly competitive market, any information about past, current and proposed export contracts, contract values and terms and conditions is of commercial value to a party looking buy or sell power products from Manitoba Hydro and access to such information will give them a competitive advantage in negotiating such transactions. Manitoba Hydro submits that disclosure of the redacted information will impair its competitive position in the energy market and accordingly, the redacted information is exempt from disclosure pursuant to section 19(1)(c)(ii) of FOIP.

[97] Earlier, I found that the release of information, including pricing information, heightens competition for future contracts and is not a significant harm or an interference with

competitive or negotiating positions. Further, the fact that Manitoba Hydro may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice its competitive position or result in undue loss to it.

[98] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC3 (CanLII), [2012] 1 SCR 23 (*Merck Frosst)*, the Supreme Court of Canada considered subsection 20(1)(c) of the federal *Access to Information Act* (ATIA), which is similar to subsection 19(1)(c)(ii) of FOIP. Subsection 20(1)(c) of the ATIA provides as follows:

> **20**(1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part that contains
> ...
> (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party;

[99] In *Merck Frosst*, the Supreme Court of Canada provided that a third party must provide evidence there there is direct link between the disclosure and the harm claimed. It said:

> [199] I would affirm the Canada Packers formulation. **A third party claiming an exemption under s. 20(1)(c) of the Act must show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur.** This approach, in my view, is faithful to the text of the provision as well as to its purpose.
> ...
> [220] I conclude that as a matter of principle, the disclosure of information that is not already in the public domain and that could give competitors a head start in product development, or which they could use to their competitive advantage, may be shown to give rise to a reasonable expectation of probable harm or prejudice to the third party's competitive position. The question here is whether Merck's evidence did so.
>
> [Emphasis added]

[100] In that case, the third party (Merck Frosst) did not convince the Supreme Court of Canada that there were grounds for subsection 20(1)(c) of the ATIA to apply.

[101] The Court of King's Bench, in *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKQB 362 (CanLII) (*Canadian Bank Note*), relied on the criteria set out

in *Merck Frosst*. The applicant in that case had submitted an access to information request to Saskatchewan Government Insurance (SGI) for information in a contract, between SGI and a third party (Veridos). Among other types of information, the applicant sought unit price information that appeared in the contract.

[102] In *Canadian Bank Note*, the Court of King's Bench considered whether subsection 19(1)(c)(ii) of FOIP applied to the records and relied on the criteria set out in *Merck Frosst*. In that case, the third party provided evidence that a Request for Proposal (RFP) had been issued in Alberta. The third party provided evidence that the disclosure of information could reasonably be expected to prejudice the competitive position of the third party:

> [56] The facts and circumstances deposed to in the Owens and those portions of the Mazzeo affidavits to which I have referred satisfy me that the Unit Price information sought by CBN will give it and potentially the small group of Veridos' other competitors a competitive advantage over Veridos to the prejudice of its competitive position. No better example exists than that proffered by Mr. Mazzeo in para. 33 of his affidavit. It notes that the neighbouring province of Alberta, as Exhibit "H" to the Mazzeo affidavit further clearly illustrates, has issued an RFP seeking services and product "very similar to that of the SGI RFP". Disclosure of the Unit Price in Saskatchewan could reasonably be expected to prejudice the competitive position of Veridos. Financial loss could reasonably be expected to result from the non-securing of this and perhaps other future contracts because a competitive position is compromised. (See *Merck* para 220 above)

[103] If I take the same approach set out in *Merck Frosst* and *Canadian Bank Note*, then I must consider whether the third party, Manitoba Hydro, has provided evidence that the disclosure of the redacted information would prejudice its competitive position. In this case, when I consider Manitoba Hydro's submission (as quoted above), it has not provided my office with evidence that there is a direct link between the disclosure of the information and the harm claimed. It has merely asserted that the disclosure of the information would give its competitors a "competitive advantage". It has not provided any evidence to support that assertion.

[104] Based on the above, SaskPower has not demonstrated that subsection 19(1)(c)(ii) of FOIP applies to the records at issue. I find that SaskPower has not properly applied subsection 19(1)(c)(ii) of FOIP.

## 9. Did SaskPower properly apply subsection 29(1) of FOIP?

[105] SaskPower applied subsection 29(1) of FOIP to pages 108 to 110, 116, 126, 137,138, 148, 218, 219, and 221. The redacted information on these pages includes the name, job titles, work email addresses of Manitoba Hydro employees, signatures and initials of SaskPower employees, and banking information for Manitoba Hydro.

[106] Subsection 29(1) of FOIP provides:

> **29**(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[107] Section 29 of FOIP prohibits the disclosure of personal information unless the individual about whom the information pertains consents to its disclosure, or if the disclosure without consent is authorized by one of the enumerated subsections of 29(2) or section 30 of FOIP (*Guide to FOIP*, Chapter 6, "Protection of Privacy", updated January 18, 2023 [*Guide to FOIP*, Ch. 6], p. 183).

[108] In order to withhold information pursuant to subsection 29(1) of FOIP, the information must qualify as "personal information" as defined by subsection 24(1) of FOIP.

[109] Subsection 24(1) of FOIP provides:

> **24**(1) Subject to subsections (1.1) and (2), **"personal information"** means personal information about an identifiable individual that is recorded in any form,...

[110] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual (*Guide to FOIP*, Ch. 6, p. 48). In other words, personal information should be just that – personal.

[111] In its submission, SaskPower said:

> SaskPower submits that it properly redacted part of this record as 29(1) as the contract contained personal signatures of several individuals, as well as the names and contact information from several people who are not Saskatchewan Government employees and qualify to have their information redacted.

[112] Based on review of the information to which SaskPower redacted pursuant to subsection 29(1) of FOIP, I find that none of it qualifies as personal information as defined by subsection 24(1) of FOIP. The information is about individuals in their professional, not personal, capacity. Further, the banking information that appears on page 221 is not information linked to any individual.

[113] I find that SaskPower has not properly applied subsection 29(1) of FOIP.

[114] Since I have found that SaskPower has not properly applied any of the exemptions it cited, I recommend that SaskPower release the records at issue in their entirety to the Applicant.

## IV FINDINGS

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

[116] I find that SaskPower did not properly apply subsection 18(1)(b) of FOIP to the records at issue.

[117] I find that SaskPower has not properly applied subsection 18(1)(d) of FOIP.

[118] I find that SaskPower has not properly applied subsection 18(1)(e) of FOIP.

[119] I find that SaskPower has not properly applied subsection 18(1)(f) of FOIP.

[120] I find that SaskPower has not properly applied subsection 19(1)(a) of FOIP to page 117.

[121] I find that SaskPower has not properly applied subsection 19(1)(b) of FOIP.

[122] I find that SaskPower has not properly applied subsection 19(1)(c)(ii) of FOIP.

[123] I find that SaskPower has not properly applied subsection 29(1) of FOIP.

## V RECOMMENDATION

[124] I recommend that SaskPower disclose the records at issue in their entirety.

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

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