Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 195-2019

Ministry of Health

January 13, 2022

Summary: The Applicant made an access to information request to the Ministry of Health (Health). In response, Health applied sections 13(1)(b), 14(a), 17(1)(a), (b), (c), 18(1)(d), (e), 19(1)(b), (c), 22(a), (b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP) withholding portions of the record. The Commissioner found that sections 18(1)(e), 19(1)(b) and 22(b) of FOIP applied to portions of the record and the other exemptions did not apply. He recommended that Health withhold parts of the record and release other parts to the Applicant.

I BACKGROUND

[1] On July 9, 2018, the Ministry of Health (Health) received the following access to information request from the Applicant:

> All meeting notes and reports created between January 1, 2017 and January 29, 2018 regarding meetings of the Pan-Canadian Pharmaceutical Alliance (pCPA) Council of the Federation and the Canadian Generic Pharmaceutical Alliance (CGPA) in relation to the agreement between the parties announced January 29, 2018…

[2] On November 19, 2018, Health provided a section 7 response to the Applicant. Health provided some records to the Applicant, but also indicated that portions of the record were being withheld pursuant to sections 13(1)(b), 14(a), 17(1)(a), (b)(i), (c), 18(1)(d), (e), 19(1)(b) and (c)(iii) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On April 2, 2019, the Applicant requested a review by my office of the exemptions relied on by Health. On April 25, 2019, my office provided notice to the Applicant, Health and two third parties of my intention to undertake a review.

[4] I note that this Report deals with records and exemptions similar to what was discussed in my office's Review Report 244-2018 involving Health. That report was appealed to the Court of Queen's Bench and my office delayed this review until a decision was rendered. I will discuss this decision in this Report. This decision has since been appealed to the Court of Appeal and it is unclear when the matter will be resolved. I have decided to proceed with this review in order to bring some resolution for the Applicant with our review process.

II RECORDS AT ISSUE

[5] The record responsive to the request is 50 pages. Health withheld information on 44 pages of the record. It applied sections 13(1)(b), 14(a), 17(1)(a), (b)(i), (c), 18(1)(d), (e), 19(1)(b) and (c)(iii) of FOIP to various pages of the record.

[6] On September 30, 2021, Health also informed the Applicant that it was also applying sections 22(a), (b) and (c) of FOIP to two bullet points on one page of the record.

[7] Finally, it severed one file path for being non-responsive to the request.

[8] See Appendix A of this Report for more detailed information.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[9] Health qualifies as a "government institution" pursuant to section 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to conduct this review.

2. Does section 18(1)(e) of FOIP apply to the record?

[10] Section 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;

[11] Health has applied section 18(1)(e) of FOIP to portions of 27 pages of the record. This includes background information, discussion papers, draft options, briefing and meeting notes related to meetings of the Pan-Canadian Pharmaceutical Alliance (pCPA) and the Canadian Generic Pharmaceutical Association (CGPA).

[12] The following test can be applied for section 18(1)(e) of FOIP:

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?

(IPC *Guide to FOIP*, Chapter 4, "Exemptions from the Right of Access", updated April 30, 2021 [*Guide to FOIP*, Ch. 4], pp. 178-179)

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

[13] Health's submission to my office indicated that the withheld portions of the record in question captures the jurisdictional representatives' plans, positions, procedures, instructions, and considerations regarding the negotiations of generic drugs.

[14] The *Guide to FOIP* 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.
>
> 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.
>
> (*Guide to FOIP*, Ch. 4, pp. 178-179)

[15] Upon review of the portions of the 27 pages to which section 18(1)(e) of FOIP has been applied, I agree that the majority of the information qualifies as considerations. These records relate to historical discussions of the Pan-Canadian Pharmaceutical Alliance (pCPA) Council of the Federation and the Canadian Generic Pharmaceutical Alliance (CGPA). These two groups jointly developed a new five-year initiative that will provide significant savings for all Canadians who use prescription generic drugs. A large amount of the material identifies the facts and circumstances connected to positions, and plans to anticipated negotiations which I will discuss below. This information meets the first part of the test.

[16] However, not all of the identified information would fall into the categories of plans, positions, procedures, instructions, and considerations as asserted by Health. For example, there are portions of the record that describe other portions of the record. In these cases, descriptions of the record have also been disclosed elsewhere in the record. In other places, Health has applied section 18(1)(e) of FOIP to parties involved in negotiations or direction set by the Council of the Federation, which I have found to be publicly available

information. Health also applied this exemption to a generic statement that describes a factual process which occurred that I would expect all governments to routinely undertake. Therefore, this information does not meet the first part of the test. As both parts of the test must be met, I find that section 18(1)(e) of FOIP does not apply to these portions of the record. I have identified this information in greater detail in Appendix A of this Report. I will also discuss this information further in this Report and refer to it as the 'leftover information'.

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?

[17] Health submitted that the role of the pCPA is to conduct joint provincial/territorial negotiations for brand name and generic drugs in Canada to achieve greater value for publicly funded drug programs and patients through the use of the combined negotiating power of multiple participating jurisdictions. Health indicated that the pCPA has conducted hundreds of drug negotiations since 2010 and continues to do so.

[18] I am satisfied that the second part of the test is met. Section 18(1)(e) of FOIP applies to portions of the record as described in Appendix A of this Report.

3. Does section 18(1)(d) of FOIP apply to the record?

[19] Section 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;

[20] Section 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 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 (*Guide to FOIP*, Ch. 4, pp. 173-174).

[21] The following two-part test can be used to determine if section 18(1)(d) of FOIP applies:

> 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?
>
> (*Guide to FOIP*, Ch. 4, pp. 174-175)

[22] I must consider if section 18(1)(d) of FOIP applies to the leftover information that I described earlier in this Report.

1. Are there contractual or other negotiations occurring involving the Government of Saskatchewan or a government institution?

[23] In its submission to my office, Health indicated that the negotiations in question are the generic drug negotiations by the pCPA, on behalf of Saskatchewan, as described earlier in this Report. On September 21, 2021, Health confirmed with my office that these negotiations were ongoing. The first part of the test has been met.

2. Could release of the record reasonably be expected to interfere with the contractual or other negotiations?

[24] A 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. The release of the information itself must give rise to a reasonable expectation of harm. Government institutions should not assume that the harm is self-evident. The harm must be described in a precise and specific way in order to support the application of the provision.

[25] The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- show how the disclosure of the information would cause harm;
- indicate the extent of harm that would result; and
- provide facts to support the assertions made.

(*Guide to FOIP*, Ch. 4, pp. 175-176)

[26] Health submitted that because the pCPA is in active generic drug negotiations, release of the information would reasonably be expected to interfere with the active negotiations as well as future negations and damage the combined negotiation powers of the pCPA's jurisdictional representatives. It did not provide further explanation.

[27] I am not persuaded that the release of the leftover information that I described earlier in this Report could be expected to interfere with the negotiations identified by Health. Section 18(1)(d) of FOIP does not apply to the leftover information.

4. Does section 17(1)(c) of FOIP apply to the record?

[28] Section 17(1)(c) of FOIP provides:

> **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;

[29] Health applied section 17(1)(c) of FOIP to one portion of the record where I have not already found that exemptions apply. The following two part test can determine if section 17(1)(c) of FOIP applies as follows:

> 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?
>
> (*Guide to FOIP*, Ch. 4, pp. 137-138)

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

[30] In its submission to my office, Health indicated that this portion of the record qualifies as plans, positions, procedures, instructions, and considerations regarding the negotiations of generic drugs. I have previously defined these terms under section 18(1)(e) of FOIP in this Report.

[31] I must consider if section 17(1)(c) of FOIP applies to two portions of the remaining leftover information: 1) the second bullet in the second severed paragraph on the first page and 2) the first two bullets of the third severed paragraph on page 2.

[32] I have already found that these portions of the record do not qualify as plans, positions, procedures, instructions, and considerations for the purpose of section 18(1)(e) of FOIP and for the same reasons they do not qualify for the purposes of section 17(1)(c) of FOIP. The reasons are they are either portions of the record that describe other portions of the record that have been disclosed elsewhere in the record or generic information that describes a process that I would expect all governments to routinely undertake.

[33] The first part of the test is not met. As both parts of the test must be met, there is no need to go further. I find that section 17(1)(c) of FOIP does not apply to the leftover information.

5. Does section 17(1)(a) of FOIP apply to the record?

[34] Section 17(1)(a) of FOIP provides:

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

> (a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;

[35] Section 17(1)(a) 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 advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council (*Guide to FOIP*, Ch. 4, p. 123).

[36] The two-part test for section 17(1)(a) of FOIP is as follows:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?

2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

(*Guide to FOIP*, Ch. 4, pp. 124-126)

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?

[37] In its submission to my office, Health indicated that various parts of the record qualified as advice, proposals, recommendations, analyses and policy options. The *Guide to FOIP* provides the following definitions:

> **Advice** is guidance offered by one person to another. It can include the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice encompasses material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It can be an implied recommendation. The "pros and cons" of various options also qualify as advice. It should not be given a restricted meaning. Rather, it should be interpreted to include an opinion that involves exercising judgement and skill in weighing the significance of fact. It includes expert opinion on matters of fact on which a government institution must make a decision for future action.
>
> Advice includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific

> recommendation on which option to take. Advice has a broader meaning than recommendations…
>
> A **recommendation** is a specific piece of advice about what to do, especially when given officially; it is a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious. Recommendations relate to a suggested course of action more explicitly and pointedly than "advice". It can include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised. It includes suggestions for a course of action as well as the rationale or substance for a suggested course of action. A recommendation, whether express or inferable, is still a recommendation.
>
> A **proposal** is something offered for consideration or acceptance.
>
> **Analyses** (or analysis) is the detailed examination of the elements or structure of something; the process of separating something into its constituent elements.
>
> **Policy options** are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant's identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.
>
> (*Guide to FOIP*, Ch. 4, pp. 124-125)

[38] I have reviewed the leftover information described earlier in this Report. As it is factual, available in public documents found on the Internet, or describes parts of the record that have been released, I do not agree that it qualifies as advice, proposals, recommendations, analyses or policy options.

[39] The first part of the test is not met. As both parts of the test must be met, there is no need to go further. I find that section 17(1)(a) of FOIP does not apply to the leftover information.

6. Does section 17(1)(b)(i) of FOIP apply to the record?

[40] Section 17(1)(b)(i) of FOIP provides:

> **17**(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:
>
> …
>
> (b) consultations or deliberations involving:

(i) officers or employees of a government institution;

[41] I must consider if section 17(1)(b)(i) of FOIP applies to the left over information.

[42] The *Guide to FOIP* sets out the following two-part test for section 17(1)(b)(i) of FOIP:

1. Does the record contain consultations or deliberations?

2. Do the consultations or deliberations involve officers or employees of a government institution, a member of the Executive Council, or the staff of a member of the Executive Council?

(*Guide to FOIP*, Ch. 4, pp. 132-133)

1. Does the record contain consultations or deliberations?

[43] The following definitions are relevant:

Consultation means:

- the action of consulting or taking counsel together: deliberation, conference;
- a conference in which the parties consult and deliberate.

A consultation can occur when the views of one or more officers or employees of a government institution are sought as to the appropriateness of a particular proposal or suggested action. It can include consultations about prospective future actions and outcomes in response to a developing situation. It can also include past courses of action. For example, where an employer is considering what to do with an employee in the future, what has been done in the past can be summarized and would qualify as part of the consultation or deliberation.

Deliberation means:

- the action of deliberating (to deliberate: to weigh in mind; to consider carefully with a view to a decision; to think over); careful consideration with a view to a decision;
- the consideration and discussions of the reasons for and against a measure by a number of councillors.

(*Guide to FOIP*, Ch. 4, p. 132)

[44] Health has applied section 17(1)(b)(i) of FOIP to the leftover information, which I have described as descriptions of the record which have also been disclosed elsewhere in the record, publicly available information or a generic statement that describes a factual process that occurred that I would expect all governments to routinely undertake.

[45] I am not persuaded that the leftover information qualifies as a consultation or deliberation. The first part of the test is not met. As both parts of the test must be met, there is no need to go further.

[46] I find that section 17(1)(b)(i) of FOIP does not apply to the leftover information.

7. Does section 22(b) of FOIP apply to the record?

[47] Section 22(b) of FOIP provides:

> **22** A head may refuse to give access to a record that:
> …
>
> (b) was prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel for a government institution in relation to a matter involving the provision of advice or other services by the agent or legal counsel; or

[48] The following two part test can be used to determine if section 22(b) of FOIP applies:

1. Were the records "prepared by or for" an agent or legal counsel for a government institution?

2. Were the records prepared in relation to a matter involving the provision of advice or other services by the agent or legal counsel?

(*Guide to FOIP*, Ch. 4, p. 278)

[49] Health applied section 22(b) of FOIP to one section on the second page of the record.

1. Were the records "prepared by or for" an agent or legal counsel for a government institution?

[50] "Prepared" means to be made ready for use or consideration. "By or for" means the person preparing the record must be either the person providing the legal advice or legal service or a person who is preparing the record in question on behalf of, or, for the use of, the provider of legal advice or legal related services. (*Guide to FOIP*, Ch. 4, p. 278)

[51] An "agent of the Attorney General for Saskatchewan" can include public prosecutions at the Ministry of Justice (*Guide to FOIP*, Ch. 4, p. 278).

[52] In general terms, the record describes a consensus was reached by the legal counsel of several of the participating jurisdictions of the pCPA on a specific issue. It specifically lists Saskatchewan. In its submission to my office, Health indicated that, at the time, Crown Counsel from the Ministry of Justice was assigned to provide advice to Health. It indicated that this advice is what is referenced in the record.

[53] I am satisfied that the information in the record was, in part, made ready by legal counsel for Health's consideration. The first part of the test is met.

2. Were the records prepared in relation to a matter involving the provision of advice or other services by the agent or legal counsel?

[54] "Legal advice" includes a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications (*Guide to FOIP*, Ch. 4, p. 278).

[55] Upon review of the record, I am satisfied that the information in question qualifies as legal advice. The second part of the test is met.

[56] I find that section 22(b) of FOIP applies to one section on the second page of the record. There is no need to consider sections 22(a) and (c) of FOIP for this same information.

8. Does section 19(1)(b) of FOIP apply to the record?

[57] Section 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;

[58] The following three-part test can be used to determine the application of section 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?

(*Guide to FOIP*, Ch. 4, pp. 198-202)

[59] Health identified two third parties. It identified the pCPA as the relevant third party for the left over information as well as additional information found on pages 48 to 50 of the record.

[60] Health also identified the Patented Medicine Prices Review Board (PMPRB) as the relevant third party for information severed on pages 30 to 37 and 42 to 47 of the record.

Records where Health has identified the pCPA as the third party

[61] Section 2(1)(j) of FOIP provides:

> **2**(1) In this Act:
>
> …

> (j) "third party" means a person, including an unincorporated entity, other than an applicant or a government institution.

[62] In its submission to my office, Health asserted that the pCPA qualified as a third party.

[63] In Review Report 244-2018 (paras. [94], [107]-[108]), I discussed whether the pCPA could qualify as a third party in the context of records to which Health also applied section 19(1)(b) of FOIP. I noted that Health was part of the pCPA and shares the governance equally with other provinces and territories in Canada. Health is a government institution; therefore, it could not be a third party pursuant to section 2(1)(j) of FOIP. I also discussed that not only was the role of the pCPA to negotiate on Health's behalf, Health had some control over the governance of pCPA. I reasoned that the information in question in Review Report 244-2018 could not be supplied for the purpose of section 19(1)(b) of FOIP by an organization or individual acting on a government institution's behalf or by an organization that the government institution has a measure of control over.

[64] Review Report 244-2018 was appealed to the Court of Queen's Bench and the decision agreed with this approach and stated, "[m]oreover, it is a cardinal rule that one cannot contract out of the law" (*West v Saskatchewan (Health)*, 2020 SKQB 244, para. 60).

[65] With respect to the records considered in this Report, the circumstances related to the pCPA are comparable to Review Report 244-2018. As such, the pCPA does not qualify as a third party for the purposes of section 19(1)(b) of FOIP. Section 19(1)(b) of FOIP does not apply to the information on pages 48 to 50 and the pCPA does not qualify as a third party.

Records where Health has identified the PMPRB as the third party

[66] The PMPRB qualifies as a third party pursuant to section 2(1)(j) of FOIP as it is not a government institution or the Applicant. As such, the only remaining information to consider under section 19(1)(b) of FOIP is pages 30 to 37 and 42 to 47.

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?

[67] In its submission to my office, Health did not indicate whether it thought the information on pages 30 to 37 and 42 to 47, specifically qualified as financial, commercial, scientific, technical or labour relations information of a third party.

[68] "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 (*Guide to FOIP*, Ch. 4, p.198).

[69] The information found on pages 30 to 37 and 42 to 47 of the record are tables, which contain figures about generic drug price ratios and costs in Canada. I classify this information as market research and, therefore, agree that it qualifies as commercial information. The first part of the test is met.

2. Was the information supplied by the third party to a government institution?

[70] Health did not specially address pages 30 to 37 and 42 to 47 of the record in its submission to my office. PMPRB was notified about this review with my office and was invited to make a submission. It did not do so.

[71] On September 22, 2021, my office asked Health to provide details about how the information was supplied to Health.

[72] On September 27, 2021, Health indicated that the information was requested by and provided to the pCPA office. It added that the pCPA represents the Government of Saskatchewan (as well as others) in the negotiations of generic drugs with pharmaceutical manufactures.

[73] With my earlier analysis that Health has some control over the governance of the records of the pCPA in mind, I am satisfied that the PMPRB supplied Health with the information in question.

3. Was the information supplied in confidence implicitly or explicitly?

[74] "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 (*Guide to FOIP*, Ch. 4, p. 202).

[75] "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 (*Guide to FOIP*, Ch. 4, p. 202).

[76] On January 6, 2022, Health provided my office with an email from PMPRB to employees dated April 27, 2017. Pages 30 to 37 and 42 to 47 of the record were attached. The email contained the following statement: "The PMPRB approves sharing of the information with CGPA for the purpose of informing dialogue on generic prices as part of the pCPA initiative. The information should not be distributed beyond this expressed purpose."

[77] I am satisfied that PMPRB supplied Health with the information found on pages 30 to 37 and 42 to 47 explicitly in confidence. The third part of the test is met

[78] I find that section 19(1)(b) of FOIP applies to pages 30 to 37 and 42 to 47 of the record and I recommend that Health withhold the record.

9. Does section 19(1)(c) of FOIP apply to the record?

[79] Section 19(1)(c) 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:
>
> (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;

[80] Health identified two third parties. It identified the pCPA as the relevant third party for the leftover information as well as additional information found on pages 48 to 50. As discussed earlier in this Report, I have found that the pCPA does not qualify as a third party in these circumstances. Therefore, section 19(1)(c) of FOIP does not apply to these portions of the record.

10. Does section 13(1)(b) of FOIP apply to the record?

[81] Section 13(1)(b) of FOIP provides:

> **13**(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:
>
> …
>
> (b) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;
>
> …
>
> unless the government or institution from which the information was obtained consents to the disclosure or makes the information public.

[82] Health applied section 13(1)(b) of FOIP to the leftover information described throughout this Report.

[83] The following test can be applied for section 13(1)(b) of FOIP:

1. Was the information obtained from the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions?
2. Was the information obtained implicitly or explicitly in confidence?
3. Is there consent to disclose the information or has the information been made public?

(*Guide to FOIP*, Ch. 4, pp. 22-25)

1. Was the information obtained from the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions?

[84] With respect to the first part of the test, Health described the make-up and purpose of the pCPA in its submission to my office. It pointed out that the pCPA is comprised of other provinces and territories of Canada and the records in question are that of the pCPA. Health submitted that the information is the collective records of other provincial, territorial, and federal governments. It submitted that this satisfies the requirement as being obtained from the government of another province or territory of Canada.

[85] In Review Report 244-2018, I reviewed Health's application of section 13(1)(b) of FOIP to different records related to pCPA. My analysis in that Report found the direction of the pCPA was not set solely by one jurisdiction, but governance was shared between all provinces and territories with input from the federal government. I considered that, although the pCPA office was hosted by the Government of Ontario, it took its direction from all of the provinces through the groups described above. I described this organization as a collective. I concluded that the information contained in the records was not obtained from the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions. Health had either had an equal part in generating the information or has equal ownership of the records as would any other provincial or territorial government in Canada.

[86] Review Report 244-2018 was then appealed to the Court of Queen's Bench. The decision did not go as far in entirely rejecting the application of section 13(1)(b) of FOIP to records related to pCPA. It found that if records pass through pCPA, it did not negate their origin, if created by another government. At the same time, some documents, depending on their purpose and content, might be considered as outside the scope of section 13(1)(b) of FOIP. The decision reasoned that, in some of its work, pCPA acts on behalf of all of participating governments, including sending and receiving correspondence. In this regard, it might be considered an agent of all of the participating governments. But pCPA can also generate advice of its own for the participating governments (*West v Saskatchewan (Health)*, 2020 SKQB 244, paras. 67-68).

[87] Upon review of the leftover information in question, and pages 48 to 50, the documents in which the information is found were created by the pCPA. The information is found either in a backgrounder or presentation prepared by the pCPA or meeting notes of what was discussed by the pCPA. Health participated in the creation of the records and has equal ownership. Therefore, I am not satisfied that section 13(1)(b) of FOIP applies to this information.

[88] I find that section 13(1)(b) of FOIP does not apply to the record.

11. Does section 14(a) of FOIP apply to the record?

[89] Section 14(a) of FOIP provides:

> **14** A head may refuse to give access to a record, the release of which could reasonably be expected to prejudice, interfere with or adversely affect:
>
> (a) relations between the Government of Saskatchewan and another government; or

[90] Section 14(a) of FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where the release of a record could reasonably be expected to prejudice,

interfere with or adversely affect relations between the Government of Saskatchewan and another government (*Guide to FOIP*, Ch. 4, p. 38).

[91] "Prejudice" in this context refers to detriment to intergovernmental relations. To "interfere with" means to obstruct or make much more difficult. To "adversely affect" is to have a harmful or unfavorable impact (*Guide to FOIP*, Ch. 4, pp. 38-39).

[92] To determine the level of harm, the Supreme Court of Canada (*Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner*, 2014 SCC 31) set out the standard of proof for harms-based provisions as follows:

> This Court in Merck Frosst adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in Merck Frosst emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…
>
> (*Guide to FOIP*, Ch. 4, p. 39)

[93] Government institutions should not assume that the harms are self-evident. The harm must be described in a precise and specific way in order to support the application of the provision (*Guide to FOIP*, Ch. 4, p. 39).

[94] Health has applied section 14(a) of FOIP to the leftover information and pages 48 to 50.

[95] In its submission to my office, Health indicated that all members of the pCPA expect confidentiality of the information shared with one another. It had consulted with other members of the pCPA when the access request was received and the consensus was that the records should not be released. It indicated that if it were to release the information, Health would cause great harm and loss of trust with its provincial, territorial, federal, and business partners by betraying their confidence. The relationship between the other

governments would be damaged, making collaborative work including but not limited to, drug negotiations, very difficult going forward and would have a substantial adverse effect on achieving the outcomes of the pCPA objectives.

[96] However, each jurisdiction is subject to its respective access to information legislation, and in turn, an oversight body such as my office. The jurisdictions can agree on what information should be withheld, but it falls on each jurisdiction to demonstrate that withholding the information complies with the respective legislation. A government institution cannot guarantee confidentiality if FOIP mandates disclosure. To me, it appears that Health is cooperating with other jurisdictions by consulting about what to release or withhold when an access to information request is received.

[97] In Review Report 244-2018, I came to similar conclusions regarding records related to the pCPA. That report also acknowledged confidentiality statements in agreements between pCPA members establishing the pCPA the MOU and the Amending Agreements. However, the report also concluded that government institutions cannot be relieved of their responsibilities under FOIP merely by agreeing via a confidentiality clause in a contract/agreement to keep matters confidential. I am not persuaded that section 14(a) of FOIP could be used as a mechanism to withhold information simply because all of the jurisdictions had agreed to do so.

[98] Review Report 244-2018 was appealed to the Court of Queen's Bench. This decision supported my conclusion. The decision agreed with the conclusions of the Report. It stated:

> The prospect of reasonable expectation of harm resulting from disclosure is not assumed, but must be established by the government claiming the exemption. With respect to the question of confidentiality, the executive cannot contract out of the law. Confidentiality statements may, however, be evidence that the information was obtained in confidence.
>
> (*West v Saskatchewan (Health)*, 2020 SKQB 244, para. 31)

[99] With respect to the leftover information, I am not persuaded that the disclosure could reasonably be expected to prejudice, interfere with or adversely affect relations between

the Government of Saskatchewan and another government. I find that section 14(a) of FOIP does not apply to the record.

[100] I recommend that Health release the leftover information and pages 48 to 50 to the Applicant as described in Appendix A of this Report.

12. Is there information not responsive to the access request?

[101] Health has severed a file path on page 29 of the record and indicated it was not responsive to the Applicant's access to information request.

[102] When determining what information is responsive, a government institution should consider the following:

- The request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive.
- A government institution can remove information as not responsive only if the applicant has requested specific information, such as the applicant's own personal information.
- The government institution may treat portions of a record as not responsive if they are **clearly separate and distinct and entirely unrelated to the access request**. However, use it sparingly and only where necessary.
- **If it is just as easy to release the information as it is to claim not responsive, the information should be released** (i.e. releasing the information will not involve time consuming consultations nor considerable time weighing discretionary exemptions).
- **The purpose of FOIP is best served when a government institution adopts a liberal interpretation of a request**. If it is unclear what the applicant wants, a government institution should contact the applicant for clarification. Generally, ambiguity in the request should be resolved in the applicant's favour.

[Emphasis added]

(IPC *Guide to FOIP*, Chapter 3, "Access to Records", updated June 29, 2021 [*Guide to FOIP*, Ch. 3], pp. 13-14)

[103] Health withheld file path information from one page of the record. This file path is at the end of a document that indicates where in the author's electronic system the document is kept. Health did not address why it marked this part of the record as not responsive in its submission to my office.

[104] The file path is part of the records related to meeting notes and reports regarding meetings of the pCPA, Council of the Federation and the CGPA. As such, it is responsive to the Applicant's request. This is consistent with my finding in Review Report 086-2018 involving Health (paras. [23]-[24]).

[105] Health should release this information to the Applicant.

IV FINDINGS

[106] I find that sections 18(1)(e), 19(1)(b) and 22(b) of FOIP apply to portions of the record as described in Appendix A of this Report.

[107] I find that sections 13(1)(b), 14(a), 17(1)(a), (b), (c), 18(1)(d) and 19(1)(c) of FOIP do not apply to the remaining portions of the record.

[108] I find that the file path found on page 29 is responsive to the Applicant's access to information request.

V RECOMMENDATION

[109] I recommend that Health withhold and release information as described in Appendix A of this Report.

Dated at Regina, in the Province of Saskatchewan, this 13th day of January, 2022.

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

APPENDIX A

Page	18(1)(e)	18(1)(d)	17(1)(c)	17(1)(a)	17(1)(b)	22(b)	22(a)	22(c)	19(1)(b)	19(1)(c)	13(1)(b)	14(a)	Not Responsive	Release or Withhold
1	Yes except second bullet of second redaction	No	No	No	No				No		No	No		Release second bullet of second redaction, withhold remainder
2	Yes except first two bullets of third redaction	No	No	No	No	Yes	NNR	NNR	No	No	No	No		Release first two bullets of third redaction, withhold remainder
3	Yes except first bullet of second redaction	No		No	No				No	No	No	No		Release first bullet of second redaction, withhold remainder
4	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
5	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
6	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
7	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
11	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
14	No	No		No	No				No	No	No	No		Release
15	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
16	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
17	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
19	No	No		No	No				No	No	No	No		Release
20	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
21	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
22	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
23	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
24	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
25	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
26	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
27	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
28	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
29	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR	No	Release file path, withhold remainder

NNR = No need to review

APPENDIX A (con't)

Page	18(1)(e)	18(1)(d)	17(1)(c)	17(1)(a)	17(1)(b)	22(a)	22(b)	22(c)	19(1)(b)	19(1)(c)	13(1)(b)	14(a)	Not Responsive	Release or Withhold
30									Yes	NNR	NNR	NNR		Withhold
31									Yes	NNR	NNR	NNR		Withhold
32									Yes	NNR	NNR	NNR		Withhold
33									Yes	NNR	NNR	NNR		Withhold
34									Yes	NNR	NNR	NNR		Withhold
35									Yes	NNR	NNR	NNR		Withhold
36									Yes	NNR	NNR	NNR		Withhold
37									Yes	NNR	NNR	NNR		Withhold
38	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
39	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
40	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
41	Yes	NNR		NNR	NNR				NNR	NNR	NNR	NNR		Withhold
42									Yes	NNR	NNR	NNR		Withhold
43									Yes	NNR	NNR	NNR		Withhold
44									Yes	NNR	NNR	NNR		Withhold
45									Yes	NNR	NNR	NNR		Withhold
46									Yes	NNR	NNR	NNR		Withhold
47									Yes	NNR	NNR	NNR		Withhold
48									No	No	No	No		Release
49									No	No	No	No		Release
50									No	No	No	No		Release

NNR = No need to review