



REVIEW REPORT 225-2022

Saskatchewan Liquor and Gaming Authority

March 21, 2023

Summary: The Applicant submitted an access to information request to the Saskatchewan Liquor and Gaming Authority (SLGA). SLGA denied access to the information pursuant to subsections 18(1)(b), (d) and 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that subsections 18(1)(b), (d) and 17(1)(a) of FOIP did not apply to the responsive records. The Commissioner recommended that SLGA release the records within 30 days of issuance of this Report.

I BACKGROUND

[1] The Saskatchewan Liquor and Gaming Authority (SLGA) received an access to information request under *The Freedom of Information and Protection of Privacy Act* (FOIP) from the Applicant on November 1, 2022. The Applicant sought access to the following information:

Revenue data for all SLGA stores, broken out by store, including:

- Store location
- Net income
- Net sales
- Operating expenses and wholesales costs from 2016 to present.

The 2022-23 first quarter report forecasts a total of \$450.0 million in net income from SLGA. I would like to request a breakdown of the revenues contributing to that total, including the forecast net income for SLGA Retail Inc.

- [2] On November 21, 2022, SLGA issued a decision in accordance with section 7 of FOIP denying access to the information responsive to the revenue data pursuant to subsections 18(1)(b) and (d) of FOIP. It also denied access to the forecast information pursuant to subsection 17(1)(a) of FOIP.
- [3] On November 22, 2022, my office received a request for review from the Applicant.
- [4] On December 7, 2022, my office notified the Applicant and SLGA that my office would be undertaking a review and invited them to provide a submission.
- [5] My office received a submission from SLGA on January 30, 2023. The Applicant did not file a submission.

II RECORDS AT ISSUE

- [6] SLGA provided my office with six Excel spreadsheets (Records 1 to 6) described as Store Operating Summary Splits for the years from 2017 to 2022 that are responsive to the portion of the request related to revenue data. It also provided my office with an Excel spreadsheet (Record 7) described as 2022-23 Quarter 1 Summary Financial Update which contains information responsive to the request for revenues contributing to forecasted net income.
- [7] In this Report, the request for revenue information will be referred to as part one of the request and the request for revenues contributing to the forecast will be referred to as part two of the request.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[8] SLGA is a “government institution” as defined by subsection 2(1)(d)(ii) of FOIP and subsection 3(a) and Part I of *The Freedom of Information and Protection of Privacy Regulations*. Therefore, I find that I have jurisdiction to conduct this investigation.

2. Does subsection 18(1)(b) of FOIP apply to the records?

[9] SLGA claimed that Records 1 to 6 were exempt pursuant to subsection 18(1)(b) of FOIP. This exemption contains two requirements which are set out in subsections 18(1)(b)(i) and (ii) of FOIP.

[10] 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;

[11] Subsection 18(1)(b) of FOIP permits refusal of access in situations where release of a record could reasonably be expected to disclose financial, commercial, scientific, technical or other information, in 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 30, 2021, [*Guide to FOIP*, Ch. 4] at p. 164).

[12] Subsection 18(1)(b) of FOIP applies to a record if all three parts of the following test are met:

1. Does the information contain financial, commercial, scientific, technical or other information?
2. Does the public body have a proprietary interest or a right to use it?
3. Does the information have monetary value for the public body or is it likely to?

(*Guide to FOIP*, Ch. 4, pp. 164-166)

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

- [13] With respect to part one of the test for the application of subsection 18(1)(b) of FOIP, SLGA asserted that Records 1 to 6 contain financial and commercial information. It asserted:

SLGA's records containing net income, net sales and operating expenses as requested by the applicant clearly fall within the IPC's definition of financial information. The records contain financial performance and forecasts for each SLGA retail store and cumulatively for the overall operation.

...

The records requested by the applicant also meet the IPC's definition of commercial information. The record shows sales and expense information, net income, gross profit and expenses as percentages of sales. In a competitive marketplace such as the one in which SLGA retail stores operate, this commercial information needs to be confidential to the company.

- [14] "Financial information" is information regarding monetary resources, such as financial capabilities, assets, liabilities, past or present. Common examples are financial forecasts, investment strategies, budgets, and profit and loss statements (*Guide to FOIP*, Ch. 4, p. 164).

- [15] "Commercial information" means information relating to the buying, selling or exchange of merchandise or services. This includes 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. 164).

- [16] The context for this access to information request is as follows. SLGA operated all retail liquor stores, among other activities, until 2016 when the Saskatchewan Government decided to “move to an enhanced private liquor retailing model that resulted in the closure of 39 SLGA liquor retail stores.” In 2016, SLGA created a subsidiary (SLGA Retail Inc.) to operate the liquor retail stores and hold the retail liquor permits.
- [17] On October 27, 2022, the Saskatchewan Government announced that it would be closing the remaining 34 SLGA retail liquor stores by March 31, 2023, and selling the retail store permits through an auction process. In its submission dated January 30, 2023, SLGA asserted that it is “currently in the process of closing those stores, selling the retail permits associated with them and generally winding down the business operations...” Subsequent to providing its submission, SLGA confirmed to my office that by February 24, 2023, all retail store permits had been sold by auction.
- [18] SLGA asserted that since 2016 it has published SLGA’s Retail Inc.’s financial statements as part of its Annual Report. However, liquor income is “comprehensive” or is not broken down by store.
- [19] Based on a review of Records 1 to 6, I find that they qualify as financial and commercial information, because they contain information about profits, losses, sales, expenses, and income by store of SLGA’s retail liquor stores. Therefore, part one of the test has been met.

2. Does SLGA have a proprietary interest in or a right to use the information?

- [20] “Proprietary” means of, relating to, or holding as property (*Guide to FOIP*, Ch. 4, p. 165).
- [21] “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” (*Guide to FOIP*, Ch. 4, p. 165).
- [22] “Owner” means someone who has the right to possess, use, and convey something; a person in whom one or more interests are vested (*Guide to FOIP*, Ch. 4, p. 165).

[23] SLGA asserted that it has a proprietary interest in the information contained in the records requested by the Applicant. It claimed that information is directly related to SLGA's commercial operation of retail stores. It added that the information is relied on to make operational decisions for the stores, including but not limited to, retail margins, hours of operation, and capital investments.

[24] I find that SLGA has established that it has a proprietary interest in the financial and commercial information contained in Records 1 to 6. Accordingly, part two of the test has been met.

3. Does the information have monetary value for SLGA or is it likely to?

[25] Part three of the test requires that the information at issue have or is reasonably likely to have monetary value for the SLGA. To meet this part of the test, SLGA must establish that the information has an intrinsic value. This may be demonstrated by evidence of potential for financial return to the government institution. An example of information that is reasonably likely to have monetary value might include a course developed by a teacher employed by a school board (*Guide to FOIP*, Ch. 4, pp. 166-167).

[26] "Reasonably likely to" implies that the question is to be considered objectively. This means that there must be evidence that will, on a balance of probabilities, support the necessary finding (*Guide to FOIP*, Ch. 4, p. 167).

[27] SLGA's argument that the information has or is reasonably likely to have monetary value is based on the claim that many individuals or organizations have sought access to this information since the sale of its liquor permits was announced. It added that in the context of a "commercial environment," the fact that the information is being sought demonstrates that there is value in the information. SLGA asserted that "while that value is difficult to quantitate, the businesses that are seeking it out clearly believe it is valuable as they make commercial business decisions."

[28] In other words, it appears to argue that given the commercial context in which SLGA operates and the significant interest in gaining access to the information, the information is reasonably likely to have monetary value. SLGA has not explained how it would be deprived of monetary gain if this information were released. Nor has it explained how the information might generate a financial return for SLGA. Moreover, there is nothing on the face of the records that would suggest that SLGA would be or is reasonably likely to be deprived of monetary gain if this information were released.

[29] By itself, the fact that multiple individuals or organizations are seeking access to information is not sufficient to establish that the information has or is reasonably likely to have monetary value. This is the case even where the public body has a mandate to provide goods or services in a commercial context. Individuals or organizations may seek access to the records for multiple purposes unrelated to the use of the information for monetary gain.

[30] Further, even if an argument could be made that the information had monetary value to SLGA, the information would not have any value as of the date of this Report given that according to SLGA the last group of retail liquor permits were sold by auction on February 24, 2023.

[31] Based on the information provided by SLGA, I find that SLGA has not met part three of the test because it has not established that SLGA would be or is reasonably likely to be deprived of monetary gain if Records 1 to 6 were released.

[32] As all three parts of the test must be met, I find that subsection 18(1)(b) of FOIP does not apply to Records 1 to 6.

3. Does subsection 18(1)(d) of FOIP apply to Records 1 to 6?

[33] SLGA claimed that Records 1 to 6 are also exempt pursuant to subsection 18(1)(d) of FOIP. That subsection 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;

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

[35] My office has established the following two-part test for this exemption:

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)

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

[36] A “negotiation” is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings conducted between two or more parties for the purpose of reaching an understanding. It connotes a more robust relationship than “consultation.” It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion (*Guide to FOIP*, Ch. 4, p. 174).

[37] Prospective or future negotiations could be included within this exemption, as long as they are foreseeable. The exemption 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 (*Guide to FOIP*, Ch. 4, p. 174).

- [38] As noted above, SLGA asserted that the Government of Saskatchewan announced it was selling the retail liquor store permits for SLGA Retail Inc.'s liquor stores on October 27, 2022. The sale of permits was to be completed by March 31, 2023, and the price for the retail store permits was set through a public auction process. Sales to the highest bidder were made conditional on the signing of a standard agreement, payments being made under the agreement and obtaining regulatory approval to hold the permit.
- [39] SLGA noted that no negotiations for the sale of the retail store permits were ongoing at the date of the access to information request and the response to the request. However, negotiations were foreseeable at that time. In its submission, dated January 30, 2023, SLGA asserted that it is “in the process of closing” stores, “selling the retail store permits and winding down this segment of its business.”
- [40] On March 1, 2023, in response to questions posed by my office, SLGA stated that the last group of retail liquor permits were sold by auction on February 24, 2023. According to a [news release](#) issued by SLGA on February 27, 2023, “winning bidders will now begin the application process for the retail store permit.”
- [41] It is not necessary for me to decide if a conditional sale by auction qualifies as a “contractual or other negotiation” because as of the date of this Report, the auctions for the sale of the retail liquor permits have concluded.
- [42] Therefore, SLGA may have properly claimed that the negotiations were occurring for some of the permits at the time that it issued its decision pursuant to section 7 of FOIP and at the time it filed its submission. However, the circumstances have changed.

[43] In considering the potential application of harms-based exemptions, it is appropriate to take into account the circumstances that exist as of the date of the inquiry. This is the approach taken by the Office of the British Columbia Information and Privacy Commissioner as described in [Order F22-35](#) and [Order F15-37](#) and I will follow it here. In the latter Order, which involved a claim that information was exempt pursuant to two harms-based exemptions, the adjudicator stated:

[50] The issue before me with regards to ss. 17 and 21 is whether disclosure of the information in dispute could reasonably be expected to result in the harms specified in those sections. In my view, given the purposes of FIPPA and the access to information process that leads to an inquiry, it is appropriate to consider harm-based exceptions to disclosure as of the date of the inquiry. **To require or authorize a public body to withhold information at inquiry on the basis of circumstances and harms that no longer exist at the time of the inquiry would be inconsistent with the objectives of FIPPA. For the above reasons, I find that the appropriate date for considering harm in this case is as of the date of the inquiry.**

[Emphasis added]

[44] In the discussion that follows, I set out my findings and the reasons for my decision. I will first consider the information about retail liquor permits for which all conditions for the sale have been satisfied, and then the information about permits for which the conditions have not been satisfied.

Transferred Retail Liquor Permits

[45] Given that some of the retail permits were offered by auction in February 2022, it appears that for some of the retail permits, all conditions for the transfer may have been completed. My office asked SLGA to provide it with a list of retail permits for which the conditions have been met. As of the date of this report, SLGA did not provide my office with this information.

[46] To the extent that auctions have been held and the conditions for transferring retail liquor permits have been met, SLGA cannot claim that there are any prospective or future “negotiations” anticipated for those permits. Therefore, part one of the test has not been met for these permits and subsection 18(1)(d) of FOIP would not apply to the information

about these permits. I recommend that SLGA release to the Applicant the portions of Records 1 to 6 that relate to any retail permits that have been transferred to new owners.

Permits for which there are Outstanding Conditions

- [47] For the remaining retail permits, SLGA admitted that the sale of the permits by auction has been completed. However, it claimed that the conditions necessary to complete the transfers have not been met. In correspondence with my office, it claimed that it “may have to undertake a new process” such as “holding a new auction” for any permit for which there are outstanding conditions.
- [48] My office asked SLGA to provide more information about how it will respond to a successful bidder’s failure to comply with conditions. My office also asked if policies had been developed to address this eventuality and if SLGA had encountered a situation to date where a successful bidder had not satisfied the conditions. In recent correspondence, SLGA stated that if conditions were not met, SLGA will “offer the opportunity to apply for a permit to the next highest bidder” from the last auction. SLGA added that the process for completing these sales may take several weeks.
- [49] Given that SLGA acknowledged that if the conditions are not met it will sell the permit(s) to the second highest bidder, it appears that it will not hold any further auctions in the future. Accordingly, I am not satisfied that future negotiations are foreseeable.
- [50] For all of these reasons, I find that SLGA has not met part one of the test for the application of subsection 18(1)(d) of FOIP to information about this group of retail permits.
- [51] As both parts of the test for the application of subsection 18(1)(d) of FOIP must be met, it is not necessary for me to consider whether part two of the test has been met. I find that subsection 18(1)(d) of FOIP does not apply to Records 1 to 6. As no other exemptions have been applied to these records, I recommend that SLGA release them to the Applicant within 30 days of issuance of this Report.

4. Does subsection 17(1)(a) of FOIP apply to Record 7?

[52] SLGA applied subsection 17(1)(a) of FOIP to Record 7 which is a breakdown of revenues contributing to the 2022-23 first quarter report forecasts of \$450 million in net income for SLGA. Record 7 also includes a description of how the forecast was arrived at and the assumptions on which it is based.

[53] Subsection 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;

[54] As stated in my office's [Review Report 047-2018](#), this exemption is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice or all records related to the advice. The object of the provision includes maintaining an effective and neutral public service capable of producing full, free and frank advice.

[55] My office has established the following two-part test for the application of this exemption:

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?

[56] In its submission, SLGA asserted that Record 7 contained analyses. My office's *Guide to FOIP* defines analyses (or analysis) as the detailed examination of the elements or structure of something; the process of separating something into its constituent elements (*Guide to FOIP*, Ch. 4, p.125).

[57] Part two of the test requires that the advice, proposals, recommendations, analyses and/or policy options be developed by or for a government institution other than the one relying

on the exemption. “Executive Council” means the Executive Council appointed pursuant to *The Executive Government Administration Act* and consists of the Premier and Cabinet Ministers. Executive Council is often referred to as “Cabinet” (*Guide to FOIP*, Ch. 4, p. 126).

[58] “Developed by or for” means the advice, proposals, recommendations, analyses and/or policy options must have been created either within the government institution or outside the government institution but for the government institution and at its request (*Guide to FOIP*, Ch. 4, p. 126).

[59] The advice, proposals, recommendations, analyses, and/or policy options should:

- Be either sought, be expected, or be part of the responsibility of the person who prepared the record,
- Be prepared for the purpose of doing something, for example, taking an action or making a decision and
- Involve or be intended for someone who can take or implement the action.

(*Guide to FOIP*, Ch. 4, p. 127)

[60] SLGA asserted that the forecasted net income by business line represents the “process of separating something into its constituent elements.” It also asserted that the comprehensive first quarter forecast was developed by and for SLGA in order to provide information to be included in the Government of Saskatchewan’s 2022-23 First Quarter Financial Report, issued by the Minister of Finance.

[61] In my office’s [Review Report 042-2015](#), I considered SLGA’s application of subsection 17(1)(a) of FOIP to numerical data in an Excel Workbook. I stated as follows:

[12] Most of the Excel Workbooks contain raw data with no textual analysis or an indication about a course of action. Without any sort of written context there is no way of knowing what advice is being given or what policy options have been proposed. Although SLGA may refer to this data as analysis, it is purely numerical data. It would not qualify as analysis in the context of this subsection because it does not set out advantages or disadvantages or reference any particular course of action.

[13] SLGA argues that these numbers were provided to the Minister in addition to the advice which should allow it to qualify. In its submission of May 19, 2015, it stated “That analysis was used to support the information in Appendix G and H in the budget submission. While some may be numbers, it is financial analysis that was used to formulate the advice.” I agree with SLGA’s description. However, subsection 17(1)(a) of FOIP is meant to protect the actual advice, not the information used to formulate the advice.

...

[15] Again, what is protected by this exemption is the advice surrounding the pros and cons of each course of action that is proposed to the decision maker. As noted by SLGA, potential actions have not yet been determined. As such, subsection 17(1)(a) cannot apply.

[62] I followed Review Report 042-2015 in [Review Report 196-2020](#) and found that Ministry of Highways’ projections about the cost of a project did not qualify as advice, analyses or recommendation. In that case, I noted that the Ministry of Highways had not provided any evidence that the cost projections were used by a decision maker to weigh the pros and cons of a decision.

[63] Similarly, in my office’s [Review Report 051-2015](#), I found that Ministry of Finance’s forecasts of royalty revenue and information explaining the breakdown of the forecasts did not qualify as analyses because it did not set out advantages of disadvantages or reference any course of action.

[64] I appreciate that the process of arriving at the forecasts and the information and assumptions underlying the forecasts, such as the breakdown by retail store and the views about the future market for products, would involve the expertise of staff in analyzing and evaluating financial and economic data. However, the reported forecasts and the information used to arrive at the forecasts by themselves do not qualify as analyses as that term is used in subsection 17(1)(a) of FOIP, because the information was not provided for the purpose of arriving at a decision or course of action.

[65] Record 7 includes statements of fact or opinion about the future financial and commercial circumstances of SLGA for inclusion in the SLGA Annual Report. It was not provided to

support decision making or a particular course of action. For these reasons, SLGA has not met both parts of the test for the application of subsection 17(1)(a) of FOIP.

[66] Accordingly, I find that subsection 17(1)(a) of FOIP does not apply to Record 7. I recommend that SLGA release Record 7 within 30 days of issuance of this Report.

IV FINDINGS

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

[68] I find that subsection 18(1)(b) of FOIP does not apply to Records 1 to 6.

[69] I find that subsection 18(1)(d) of FOIP does not apply to Records 1 to 6.

[70] I find that subsection 17(1)(a) of FOIP does not apply to Record 7.

V RECOMMENDATION

[71] I recommend that SLGA release Records 1 to 7 to the Applicant within 30 days of issuance of this Report.

Dated at Regina, in the Province of Saskatchewan, this 21st day of March, 2023.

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