



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 274-2021

Ministry of Education

September 1, 2022

Summary:

The Ministry of Education (Education) received an access to information request and denied the Applicant access to the records, in full, pursuant to sections 13(1)(a), 14(a), 17(1)(a) and (b) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Education also advised the Applicant, pursuant to section 7(2)(c) of FOIP, that some records would be made public within 90 days. The Commissioner found that as most of the information in the records was now public, Education could not rely on section 13(1)(a) of FOIP. The Commissioner also found that Education did not properly apply sections 14(a), 17(1)(a) and (b) of FOIP, and that it did not meet its objective pursuant to section 7(2)(c) of FOIP. The Commissioner recommended Education release records accordingly, and that it revisit its policies and procedures to ensure it understands how to comply with section 7(2) of FOIP, as well as to assess why it did not comply with section 7(2) of FOIP in this matter.

I BACKGROUND

- [1] On July 22, 2021, the Ministry of Education (Education) received an access to information request from the Applicant as follows:

Correspondence regarding the Saskatchewan child care proposal, between Ministry of Education officials and the federal government since January 1, 2021.

- [2] In correspondence to the Applicant dated August 17, 2021, Education advised them that it was extending its time to respond by an additional 30 days pursuant to section 12(1)(c) of FOIP as it needed to provide third party notice pursuant to section 34(1) of FOIP.

- [3] In correspondence dated October 8, 2021, Education responded to the Applicant that it was denying access to the records, in full, pursuant to sections 13(1)(a), 14(a), 17(1)(a) and (b) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Education also advised the Applicant that, pursuant to section 7(2) of FOIP, the final “Canada-Saskatchewan Canada-Wide Early Learning and Child Care Agreement” would be published within 90 days. Education added it would provide a link to the Applicant when it became available, which it provided to the Applicant on December 8, 2021.
- [4] On November 3, 2021, the Applicant asked my office to undertake a review.
- [5] On December 1, 2021, my office notified the Applicant and Education of my office’s intention to undertake a review. At issue are how Education believes it met its obligation pursuant to section 7(2)(c) of FOIP, and its reliance on sections 13(1)(a), 14(a), 17(1)(a) and (b) of FOIP.
- [6] On February 9, 2022, Education provided my office with the responsive records and its index of records. On April 4, 2022, Education provided my office with its submission. The Applicant did not provide a submission.

II RECORDS AT ISSUE

- [7] At issue are 39 pages which Education has denied the Applicant access to, in full, as follows:

Page Numbers	Description	FOIP Exemptions Applied
1 to 4	Email correspondence between Minister of Families, Children and Social Development and Minister of Education; one attachment	13(1)(a), 14(a), 17(1)(a) and (b)
5, 6	Email correspondence chain	13(1)(a), 14(a), 17(1)(a) and (b)
7 to 39	Email Correspondence with three attachments	13(1)(a), 14(a), 17(1)(a) and (b)

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[8] Education is a “government institution” pursuant to section 2(1)(d)(i) of FOIP; therefore, I have jurisdiction to conduct this review.

2. Did Education comply with its obligation pursuant to section 7(2)(c) of FOIP?

[9] Section 7(2)(c) of FOIP provides as follows:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

...

(c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;

[10] Section 7(2)(c) of FOIP provides that if the record requested will be published within 90 days, the government institution can advise the applicant of this and provide the approximate date of publication (*Guide to FOIP*, Chapter 3, “Access to Records”, updated September 30, 2021 [*Guide to FOIP*, Ch. 3], p. 31).

[11] The 90 days starts to run on the date the applicant’s access to information request is received by the government institution (*Guide to FOIP*, Ch. 3, p. 32).

[12] Education received the Applicant’s access to information request on July 22, 2021, and advised the Applicant in its October 8, 2021 response that the document would be published within 90 days pursuant to section 7(2)(c) of FOIP. Education did not provide this notice within the first 30 days as required by this provision, and when it did respond on October 8, 2021, it still noted it could not provide an exact release date as the Government of Canada did not know. If Education was to rely on section 7(2)(c) of FOIP, it needed to provide an approximate date of publication within the first 30 days of receiving the Applicant’s access to information request. While Education did not do this, when it did respond, it still did not

know the approximate date of publication or that publication would occur within 90 days. As such, it should not have invoked this provision. Based on all this, I find Education did not comply with its obligation pursuant to section 7(2)(c) of FOIP.

- [13] I recommend Education revisit its policies and procedures to ensure it understands how to comply with section 7(2)(c) of FOIP, and to also assess why it did not comply with section 7(2)(c) in this matter.

3. Did Education properly apply section 13(1)(a) of FOIP?

- [14] Section 13(1)(a) of FOIP provides as follows:

13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:

(a) the Government 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.

- [15] Section 13(1)(a) of FOIP is a mandatory class-based exemption. It permits refusal of access to information in a record where the information was obtained in confidence, implicitly or explicitly from the Government of Canada unless there is consent to release or the information was made public. It includes the Government of Canada's agencies, Crown corporations and other institutions (*Guide to FOIP*, Chapter 4, "Exemptions from the Right of Access", updated April 30, 2021 [*Guide to FOIP*, Ch. 4], p. 17).

- [16] The following three-part test can be applied:

1. Was the information obtained from the Government 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?

- [17] As stated previously, Education applied section 13(1)(a) of FOIP, in full, to all 39 pages of the records.

1. Was the information obtained from the Government of Canada or its agencies, Crown corporations or other institutions?

- [18] For this exemption to apply, the agencies in question must qualify as either “Government of Canada or its agencies, Crown corporations or other institutions”. Because of the possessive pronoun in this clause, “agencies” and “other institutions” it should be understood as federal agencies and federal institutions. For “other institutions”, it should be either federal government institutions as defined by the federal *Access to Information Act* or institutions controlled by the federal government (*Guide to FOIP*, Ch. 4, pp. 17-18).
- [19] Education stated the Government of Canada agency at question is Employment and Social Development Canada (Department). Schedule 1 (section 3) of the federal [*Access to Information Act*](#) provides a list of federal government institutions. Upon review, I note that the Department is defined as a federal government institution pursuant to Schedule 1 (Section 3) of the federal *Access to Information Act*. I am satisfied that a federal government institution is involved.
- [20] I will now consider what information from the 39 pages, if any, Education obtained from the Department.
- [21] In this context, “information” means facts or knowledge provided or learned as a result of research or study. The word “obtained” means to acquire in any way; to get possession of, procure, or get hold of by effort (*Guide to FOIP*, Ch. 4, p. 18).
- [22] From review of the records, I note that all of page 5 and the top of page 6 contains two emails written by Education to the Department. This is not information Education obtained from the Department, so does not meet the first part of the test. As such I find Education

did not properly apply section 13(1)(a) of FOIP to these two emails; however, I will still consider them under the other exemptions Education has applied to them.

- [23] With respect to the remainder of the records, I note pages 1, bottom portion of page 6, and all of page 7 contain emails the Department sent to Education. The emails refer to four attachments the Department created and provided to Education (pages 2 to 4, 8 to 10, 11 to 28 and 29 to 39). This qualifies as information provided by the Department to Education, which meets the first part of the test, so I will consider the second and third parts of the test on this information.

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?

- [24] “In confidence” usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained in confidence means that the provider of the information has stipulated how the information can be disseminated. 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 party that provided the information (*Guide to FOIP*, Ch. 4, pp. 18-19).
- [25] “Implicitly” means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential. Factors to consider include if there was a mutual understanding that the records would be held in confidence (*Guide to FOIP*, Ch. 4, p. 19).
- [26] “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 obtained with the understanding that it would be kept confidential (*Guide to FOIP*, Ch. 4, p. 20).

- [27] “Consent” in this context means there is an agreement, approval or permission to disclose the information (*Guide to FOIP*, Ch. 4, p. 20).
- [28] Education stated documents were stamped “confidential”, and that in a letter dated October 5, 2021, the Department recommended, “the records be withheld in their entirety”. Education stated it emailed the Department on March 2, 2022, to seek confirmation if Education should continue to withhold the documents, but as of that date had received no response from them.
- [29] Regarding the attachments to the emails, which I described at paragraph [23] of this Report, I note the majority of the information contained within them is now accessible to the public at [Canada-Saskatchewan Early Learning and Child Care Agreement -2020-2021 - Canada.ca](#). Section 13(1)(a) of FOIP no longer applies once information has become “public”, or open to view by the public (*Guide to FOIP*, Ch. 4, p. 21). As such, I find Education has not properly applied section 13(1)(a) of FOIP as I outlined to the attachments as described at paragraph [23] of this Report. I recommend Education review this information with an eye towards which information it can now release.
- [30] With respect to the emails as described at paragraph [23] of this Report, the email at page 7 outlines some of the contents of the attachments. I note the first sentences of paragraphs one and three of the email at page 7 appear to contain information that is now publicly known (or that would have revealed the contents of the attachments) and so section 13(1)(a) of FOIP would no longer apply to these sentences. As such, I find Education did not properly apply section 13(1)(a) of FOIP to the email at page 7 as I have described in this paragraph, and recommend Education review this email with an eye towards what information it can now release.
- [31] Regarding the remaining portions of the email on page 7, and the emails on pages 1 and 6, I am not clear how they would carry either an implicit or explicit expectation of confidentiality. I note the Department does not include a standard confidentiality clause on its email footer, and the portions of these emails themselves do not otherwise reveal what the contents of the attachments would have been. For example, the email at page 1 is

essentially a cover letter stating what is attached to it. I find, therefore, Education did not properly apply section 13(1)(a) of FOIP as I have described in this paragraph, but will still consider these portions of the records under the other exemptions Education has applied to them.

4. Did Education properly apply section 14(a) of FOIP?

[32] Section 14(1)(a) of FOIP provides as follows:

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

[33] 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).

[34] “Prejudice” in this context refers to detriment to intergovernmental relations (*Guide to FOIP*, Ch. 4, p. 38).

[35] To interfere with means to obstruct or make much more difficult (*Guide to FOIP*, Ch. 4, p. 38).

[36] To adversely affect is to have a harmful or unfavorable impact (*Guide to FOIP*, Ch. 4, p. 39).

[37] The term relations in this context are intended to cover both formal negotiations and more general exchanges and associations between the Government of Saskatchewan and other governments (*Guide to FOIP*, Ch. 4, p. 39).

- [38] The government institution should not assume the harms are self-evident. The government institution must describe the harm in a precise and specific way. The expectation of harm must be reasonable, but it need not be a certainty. The government institution should provide facts to support its assertion (*Guide to FOIP*, Ch. 4, p. 39).
- [39] I only need to consider Education's application of section 14(a) of FOIP on the emails at pages 1, 5, top of page 6 and portions of the email at page 7 that do not contain public information as I outlined at paragraphs [30] and [31] of this Report.
- [40] Education stated that portions of the records were stamped "confidential", although given its submission, Education appears to only state this about the attachments. Outside of that, Education's emails have a confidentiality disclaimer, while the Department's do not. Education added that negotiations, at the time, were ongoing, and that disclosure of the information would interfere with those negotiations, or of negotiations occurring between the Department and other provinces/territories. While Education has stated this, it has not explained what that actual negotiation was or how release of any of the emails themselves would specifically harm any negotiations. As such, I find Education did not properly apply section 14(a) of FOIP to the emails as I have outlined at paragraph [31] of this Report but will still consider Education's application of sections 17(1)(a) and (b) of FOIP to these emails.

5. Did Education properly apply section 17(1)(a) of FOIP?

- [41] Section 17(1)(a) provides as follows:

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

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

- [42] 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).

[43] The following two-part test can be applied:

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)

[44] I only need to consider Education's application of section 17(1)(a) of FOIP on the emails at pages 1, 5, top of page 6 and portions of the email at page 7 that do not contain public information as I outlined at paragraphs [30] and [31] of this Report.

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

[45] Education submitted as follows:

Thus, the record is comprised *entirely* of correspondence between various government institutions and officials. Further, the advice and proposals that appear within the record were developed *by* or *for* various government institutions.

[46] It appears Education is stating the records contain advice and proposals.

[47] "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 (*Guide to FOIP*, Ch. 4, p. 124).

[48] A “proposal” is something offered for consideration or acceptance (*Guide to FOIP*, Ch. 4, p. 125). In my office’s [Review Report 086-2018](#), I stated at paragraph [48] as follows:

...
Proposals, analyses and policy options are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

[49] Education has not provided more details regarding the emails than those quoted at paragraph [45] of this Report. I note the emails in question are between Education and the Department and outline the purpose of the attachments or discuss matters such as next steps. It does not appear that any advice is being given, and although the word “proposed” is used in one email, it does not appear to be used in a way that invites response. As such, the first part of the test is not met, and I have no need to go further. I find, therefore, Education has not properly applied section 17(1)(a) of FOIP as I have outlined at paragraph [44] of this Report. I will still, however, consider Education’s reliance on section 17(1)(b) of FOIP to this same information prior to making a recommendation.

6. Did Education properly apply section 17(1)(b) of FOIP?

[50] Section 17(1)(b) of FOIP provides as follows:

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

- ...
- (b) consultations or deliberations involving:
 - (i) officers or employees of a government institution;
 - (ii) a member of the Executive Council; or

(iii) the staff of a member of the Executive Council;

[51] Section 17(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 consultations or deliberations involving 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, p. 131).

[52] The provision is intended to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is to allow such persons to address an issue without fear of being wrong, looking bad, or appearing foolish if their frank deliberations were to be made public (*Guide to FOIP*, Ch. 4, p. 131).

[53] The following two-part test can be applied:

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)

[54] I only need to consider Education's application of section 17(1)(b) of FOIP on the emails at pages 1, 5, top of page 6 and portions of the email at page 7 that do not contain public information as I outlined at paragraphs [30] and [31] of this Report.

1. Does the record contain consultations or deliberations?

[55] Education claims the records contain consultations as follows:

Yes, the records are consultations... all of the correspondence within the record should be considered an ongoing consultation. In the first page of the record [name redacted] begins formal discussion, by providing [name redacted] with a template, term sheet and letter from... In the email [name redacted] suggests a potential "first step" and writes that they look forward to working with [name redacted] and [their] team (p.1). This

signals future formal discussions, or consultations, expected to take place between Employment and Social Development Canada and the ministry.

[56] “Consultation” means to consult or take counsel together. It can also mean to deliberate, or a conference in which the parties consult or deliberate. A deliberation can occur when there is a discussion or consideration of the reasons for or against an action. It can refer to discussions conducted with a view towards making a decision (*Guide to FOIP*, Ch. 4, pp. 132-133).

[57] As I review the emails in question, however, I am not convinced they contain consultations for the purposes of this exemption. Rather, they appear to be instructive and do not appear to solicit any sort of back-and-forth interaction. For example, the email on page 7 states that the Department would explain a process to officials at Education, and it appears that process would have already been determined by the Department. The records themselves do not demonstrate Education’s exact role in the process, or “negotiation”, or what input the Department required from Education at that stage. As stated earlier in this Report, Education has not stated exactly what negotiation was taking place. As such, the first part of the test is not met, and I have no need to go further. I find, therefore, Education has not properly applied section 17(1)(b) of FOIP as I have outlined at paragraph [54] of this Report.

[58] As I find Education has not properly applied sections 14(a), 17(1)(a) and (b) of FOIP, I recommend it release the emails on pages 1, 5, top of page 6 and the portions of the email at page 7 that do not contain public information as I outlined at paragraphs [30] and [31] of this Report.

IV FINDINGS

[59] I find Education did not meet its objective pursuant to section 7(2)(c) of FOIP.

[60] I find Education did not properly apply sections 13(1)(a), 14(a), 17(1)(a) and (b) of FOIP.

V RECOMMENDATIONS

- [61] I recommend Education revisit its policies and procedures to ensure it understands how to comply with section 7(2)(c) of FOIP, and to also assess why it did not comply with section 7(2)(c) in this matter.
- [62] I recommend Education release the records where it applied section 13(1)(a) of FOIP as I have described at paragraphs [29] and [30] of this Report with an eye towards which information is now public.
- [63] I recommend Education release the emails on pages 1, 5, top of page 6 and the portions of the email at page 7 that do not contain public information as I outlined at paragraphs [30] and [31] of this Report.

Dated at Regina, in the Province of Saskatchewan, this 1st day of September, 2022.

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