



REVIEW REPORT 301-2023

Saskatchewan Power Corporation

July 22, 2024

Summary:

The Applicant made an access to information request to the Saskatchewan Power Corporation (SaskPower). SaskPower withheld the records, in full, pursuant to subsections 16(1)(a), 17(1)(a), (b)(i), (c), (f)(i), (g), 18(1)(a), (b)(i)(ii), (d), (f) and 22(a), (b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that subsection 16(1)(a) of FOIP applies to some pages and recommended that SaskPower continue to withhold those pages pursuant to subsection 16(1)(a) of FOIP. Regarding the remainder of the record, the Commissioner found that SaskPower had either not met the burden of proof pursuant to section 61 of FOIP that some of its exemptions apply, and that it did not properly apply others. The Commissioner recommended that SaskPower release information to the Applicant accordingly within 30 days of the issuance of this Report as outlined in the Appendix. The Commissioner also found that SaskPower undertook a reasonable search for records and recommended it take no further action regarding search. The Commissioner also recommended that SaskPower release to the Applicant, within 30 days of the issuance of this Report, any non-responsive and duplicate records subject to any exemptions found to apply.

I BACKGROUND

[1] On September 12, 2023, Saskatchewan Power Corporation (SaskPower) received the following access to information request (access request) from the Applicant:

- 1) Plans to build nuclear reactors in Estevan SK including cost, name of company supplying/building the reactors and timeline
- 2) Compensation to be paid to Estevan coal miners and coal plant workers when coal mining/electricity [sic] stops

- [2] The Applicant's timeframe was for records dated between January 1, 2023, to September 11, 2023.
- [3] In correspondence dated November 8, 2023, SaskPower advised the Applicant that records were being withheld, in full, pursuant to subsections 16(1)(a), 17(1)(a), (b)(i), (c), (f)(i), (g), 18(1)(a), (b)(i)(ii), (d), (f) and 22(a), (b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Pursuant to subsection 7(2)(b) of FOIP, SaskPower also directed the Applicant to several documents available online that it believed to be responsive.
- [4] On November 9, 2023, the Applicant asked my office to undertake a review of SaskPower's decision.
- [5] On December 8, 2023, my office provided notice of review to the Applicant and SaskPower. At issue is SaskPower's decision to withhold the record, in full, pursuant to subsections 16(1)(a), 17(1)(a), (b)(i), (c), (f)(i), (g), 18(1)(a), (b)(i)(ii), (d), (f) and 22(a), (b) and (c) of FOIP and SaskPower's assertion that records do not exist.
- [6] The Applicant provided a response on January 29, 2024. SaskPower provided its submission on February 7, 2024.

II RECORDS AT ISSUE

- [7] The records at issue are outlined in the Appendix, along with my recommendations. SaskPower had divided the records into two parts. Part 1 is 387 pages and part 2 is 621 pages, for a total of 1,008 pages. SaskPower stated that pages 497 to 621 of part 2 are duplicate records and did not mark any exemptions on these pages; I will address these pages separately later in this Report. Later in this Report, I will also address pages that SaskPower claims are non-responsive.

[8] I also note there are some discrepancies between SaskPower’s index of records (index) and its submission regarding where it stated certain exemptions apply. My review is based on SaskPower’s index rather than its submission. I have reproduced SaskPower’s index in the Appendix, making slight changes for ease of reference.

[9] I add that SaskPower has withheld the records in full, citing multiple exemptions in what I have referred to in past reports as a “shotgun” approach (see, for example, [Review Report 118-2020](#)). This is when a public body does not apply its exemptions in a limited and specific manner as required by FOIP or draw its arguments to specific portions of a record. Section 61 of FOIP places the burden of proof on a government institution as follows:

61 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[10] Government institutions need to be deliberate in how they apply their exemptions, taking a line-by-line approach, which is required by section 8 of FOIP as follows:

8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

[11] I will consider if SaskPower met the burden of proof in establishing that any content in the records falls within the scope of the exemptions on which it is relying.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[12] SaskPower is a “government institution” pursuant to section 2(1)(d)(ii) of FOIP and section 3 and PART I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations*. Therefore, I have jurisdiction to conduct this review.

Discretionary Exemptions

2. Did SaskPower properly apply subsection 17(1)(a) of FOIP?

[13] Subsection 17(1)(a) 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:

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

[14] Subsection 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*, Chapter 4, “Exemptions from the Right of Access”, updated April 8, 2024 [*Guide to FOIP*, Ch. 4], p. 128).

[15] Pages 128 to 131 of the *Guide to FOIP*, Ch. 4, outline the following two-part test my office uses to determine if a government institution has properly applied this exemption:

1. Does the 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?

[16] SaskPower applied subsection 17(1)(a) of FOIP to all portions of part 1 and part 2 up to page 497. Regarding both parts of the test, SaskPower stated as follows:

12. SaskPower submits that the records outlined ((a) to (s)) above were prepared by SaskPower employees and consultants for the purpose of providing recommendations and analyses on siting criteria, costings to stakeholders, the SaskPower Executive and Boards that have a vested interest.

13. SaskPower submits that the records were intended for the members of the SaskPower Executive and the Board, who are responsible for SaskPower’s business

plan and strategies and are in a position to influence the Government on the policy options that will be pursued by the Government of Saskatchewan on small modular reactor development.

14. SaskPower submits that the Records were developed explicitly by and for SaskPower.

[17] From SaskPower's submission, it appears it is claiming the records contain recommendations and analyses that were created or intended for SaskPower board members and executive. Pages 129 to 131 of the *Guide to FOIP*, Ch. 4, offer these definitions:

- 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.
- “Analyses” (or analysis) is the detailed examination of the elements or structure of something; the process of separating something into its constituent elements.
- “Developed by or for” means the advice, proposals, recommendations, analyses and/or policy options must have been created either: 1) within the government institution, or 2) outside the government institution but for a government institution and at its request (for example, by a service provider or stakeholder). For information to be developed by or for a government institution, the person developing the information should be an official, officer or employee of the government institution, be contracted to perform services, be specifically engaged in an advisory role (even if not paid) or otherwise have a sufficient connection to the government institution. The advice, proposals, recommendations, analyses and/or policy options should be either sought or expected or be part of the responsibility of whoever prepared the record, for the purpose of doing some, or be intended for someone who can take or implement the action.

[18] Subsection 17(1)(a) of FOIP uses the term “could reasonably be expected to”. The meaning of the phrase “could reasonably be expected to” in terms of harm-based exemptions was considered by the Supreme Court of Canada in [*Ontario \(Community Safety and Correctional Service\) v. Ontario \(Information and Privacy Commissioner\)*, \(2014\)](#).

Although section 17 of FOIP is not a harms-based provision, the threshold provided by the Court for “could reasonably be expected to” is instructive:

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”...

[19] Given SaskPower’s limited arguments and because it did not provide detail regarding which specific parts of the records contain recommendations and analyses, I find it did not meet the burden of proof pursuant to section 61 of FOIP and demonstrate that subsection 17(1)(a) of FOIP applies. SaskPower also applied subsection 17(1)(b) of FOIP to all portions of the record; I will review this exemption next.

3. Did SaskPower properly apply subsection 17(1)(b) of FOIP?

[20] Subsection 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;

[21] Subsection 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. The provision is intended to allow persons having the responsibility to make decisions to freely discuss the issues before them 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. 136).

[22] Pages 136 to 138 of the *Guide to FOIP*, Ch. 4, outline the following two-part test my office uses to determine if a government institution has properly applied subsection 17(1)(b) 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?

[23] Regarding both parts of the test, SaskPower submits as follows:

18... SaskPower submits that the redactions involved relate to the views of one or more employees of SaskPower as to the appropriateness of a particular proposal or suggested action. These documents discuss measures in dealing with any concerns with project work done on Siting efforts (Records - A, B, C, F, H, I, J, L, Q, R, S) or technology development + Construction (Q, R, S), budget/costing (Records - D, E, G, I, K) involved. records [sic] in this category meet the requirements to be designated a "consultation." Further, any presentations, reporting and decision items that discuss future courses of action with the SMR Project all contain deliberations or views towards making a decision regarding land purchases, technology use and any issues that they have been brought forward in relation to project work done by SaskPower.

Records outlined above as siting efforts, budget/costs, and technology development/construction review, discuss, and attempt to provide consensus on indicators that will be used to determine areas of highest suitability in relation to siting options. Including but not limited to social, technical, environmental, cost. This information was developed and compiled as it relates to the views of subject matter experts within SaskPower and - 13 - consultants hired to provide recommendations and analysis based on exhaustive research. These records meet the requirements to be designated a "deliberation." The first part of the test is therefore met.

19. All records are exclusively between SaskPower employees, Consultants and/or members of executive on information yet to be approved which meets the second part of the test for section 17(1)(b)(i).

[24] It appears that SaskPower is stating that “consultations” and “deliberations” are involved and involving SaskPower employees or hired consultants. Pages 136 to 138 of the *Guide to FOIP*, Ch. 4, offer the following definitions:

- “Consultation” means the act of taking counsel together or deliberating or having conference. It can also mean a conference in which parties consult or 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 future or past courses of action.
- “Deliberation” means the act of deliberating or carefully considering with a view to making a decision. It includes consideration and discussions of the reasons for and against a measure by a number of councillors. A deliberation can occur when there is discussion or consideration of the reasons for or against an action. It can refer to discussions conducted with a view towards making a decision.
- “Involving” means including.
- “Officers or employees of a government institution” means an individual employed by a government institution, including those who are contracted.

[25] In my office’s [Review Report 142-2023](#), concerning the Ministry of Social Services, I stated the following at paragraph [44] regarding subsection 17(1)(b) of FOIP:

[44] I note that subsection 24(1)(b) of Alberta’s *Freedom of Information and Protection of Privacy Act* (AB FOIP) is similar to subsection 17(1)(b) of FOIP. In [Order F2013-13](#), the Office of the Information and Privacy Commissioner of Alberta (AB IPC) said the following explaining what “consultations” and “deliberations” are:

[para 146] I agree with the interpretation Commissioner Clark assigned to the terms “consultation” and “deliberation” generally. However, as I stated in Order F2012-10, section 24(1)(b) differs from the section 24(1)(a) in that section 24(1)(a) is intended to protect communications developed for a public body by an advisor, while **section 24(1)(b) protects communications involving decision makers. That this is so is supported by the use of the word deliberation: only a person charged with making a decision can be said to deliberate that decision.** Moreover, **“consultation” typically refers to the act of seeking advice regarding an action one is considering taking, but not to giving advice in relation to it.** Information that is the subject of section 24(1)(a) may be voluntarily or spontaneously provided to a decision maker for the decision maker’s use because

it is the responsibility of an employee to provide information of this kind; however, such information cannot be described as a “consultation” or a “deliberation”. Put simply, section 24(1)(a) is concerned with the situation where advice is given, section 24(1)(b) is concerned with the situation where advice is sought or considered.

[Emphasis added]

[26] As with subsection 24(1)(b) of Alberta’s *Freedom of Information and Protection of Privacy Act*, subsection 17(1)(b) of FOIP protects communications involving decision makers. Where subsection 17(1)(a) of FOIP is concerned with situations where an employee of a government institution may give advice, subsection 17(1)(b) of FOIP concerns situations where advice is sought or considered with an eye towards making a decision. It should be clear, then what is being consulted or deliberated on, and who the decision makers are.

[27] Again, given SaskPower’s limited arguments and the fact that it did not clearly indicate where on the records consultations or deliberations were occurring and what decisions were being made and by whom, I find that it did not meet the burden of proof pursuant to section 61 of FOIP that subsection 17(1)(b) of FOIP applies. Next, I will consider subsection 17(1)(c) of FOIP.

4. Did SaskPower properly apply subsection 17(1)(c) of FOIP?

[28] Subsection 17(1)(c) of FOIP provides as follows:

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

...

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

[29] Subsection 17(1)(c) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose

positions, plans, procedures, criteria, or instructions developed for the purpose of contractual or other negotiations by or on behalf of a government institution. It also covers considerations related to those negotiations. Examples of the type of information that could be covered by this exemption are the various positions developed by a government institution's negotiators in relation to labour, financial and commercial contracts. Subsection 17(1)(c) of FOIP protects as a class the strategies and tactics employed or contemplated by government institutions for the purpose of negotiations. Such information can be protected from disclosure even after the negotiations have been completed (*Guide to FOIP*, Ch. 4, p. 142).

[30] Pages 142 to 145 of the *Guide to FOIP*, Ch. 4, outlines the following test that my office uses to determine if a government institution properly applied subsection 17(1)(c) of FOIP:

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

[31] As stated earlier, I noted there are discrepancies between SaskPower's index and its submission regarding where it states certain exemptions apply. As I am following SaskPower's index, I am only reviewing subsection 17(1)(c) of FOIP on pages 229 to 387 of part 1. Regarding subsection 17(1)(c) of FOIP, SaskPower stated as follows:

21. SaskPower submits that the record(s) described above contain information that will be used in defining land determinants to be used for future negotiations on land acquisitions. This information carries proprietary and financial implications as it provides insights into regulatory and operational needs of the land and technology that SaskPower will be attempting to obtain.

22. Accordingly, SaskPower submits that the Records were properly withheld based on subsection 17(1)(c).

[32] SaskPower did not state whether positions, plans, procedures, criteria or instructions were involved, but did state the records relate to future negotiations. Page 144 of the *Guide to*

FOIP, Ch. 4, defines a “negotiation” as 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 between two or more parties for the purpose of reaching an understanding. It is a more robust relationship than a consultation, signifying a measure of bargaining power and a process of back-and-forth or give-and-take discussion.

[33] Without describing if positions, plans, procedures, criteria or instructions are involved, SaskPower has not met the first part of the test. I find that pursuant to section 61 of FOIP SaskPower has not met the burden of proof that subsection 17(1)(c) of FOIP applies. I now move on to discuss subsection 17(1)(f) of FOIP.

5. Did SaskPower properly apply subsection 17(1)(f) of FOIP?

[34] Subsection 17(1)(f) 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:

...

(f) agendas or minutes of:

(i) a board, commission, Crown corporation or other body that is a government institution; or

(ii) a prescribed committee of a government institution mentioned in subclause (i); or

[35] Subsection 17(1)(f) 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 agendas or minutes of a board, commission, Crown corporation or other body that is a government institution or a prescribed committee of a government institution. The provision is intended to protect agendas and/or meeting minutes as they relate to decision-making within the bodies listed (*Guide to FOIP*, Ch. 4, p. 153).

[36] Pages 153 and 154 of the *Guide to FOIP*, Ch. 4, outline the following two-part test that my office uses to determine if a government institution has properly applied subsection 17(1)(d) of FOIP:

1. Is the record an agenda of a meeting or minutes of a meeting?
2. Are the agendas or minutes of: a) a board, commission, Crown corporation or other body that is a government institution; or b) a prescribed committee of a board, commission, Crown corporation or other body that is a government institution?

[37] SaskPower applied subsection 17(1)(f) of FOIP to all of part 1 and part 2 (up to page 497). Regarding its reliance on this provision, SaskPower submitted as follows:

24. SaskPower submits that the record(s) identified above are agenda items created for the sake of providing analysis and information for consultations with the board of a Crown corporation. The release of these proprietary documents would disrupt SaskPower boards and executives' ability to execute approvals as well as provide instruction on project budget, contracts, and pending policy.

25. Accordingly, SaskPower submits that the Records were properly withheld based on subsection 17(f)(i).

[38] An agenda is a list of items to be done, or in this context a list of items to be discussed at a meeting, usually arranged in order of consideration. In my office's [Review Report 186-2019](#) concerning the Ministry of Central Services, I stated as follows at paragraph [14]:

[14] Ontario Information and Privacy Commissioner Order PO-1725 made the following comment related to agendas of a Cabinet meeting:

I also want to comment on the important distinction between the term “agenda” as it appears in the exemption at section 12(1)(a) of the [Act](#), and entries such as those appearing in the records at issue in these appeals. The word “agenda” in section 12(1)(a) refers to a specific record, created as an official document of Cabinet Office, which identifies the actual items to be considered at a particular meeting of Cabinet or one of its committees. In my view, an entry appearing in another record which describes the subject matter of an item considered or to be considered by Cabinet is not an “agenda” as this term is used at section 12(1)(a)...

[39] SaskPower has not pointed out specific portions that fit the definition of an “agenda”. A document such as a project update that has appendices may be something used during a meeting or referred to on an agenda, but such documents are not agendas. As the first part of the test is not met, I find that SaskPower did not properly apply subsection 17(1)(f) of FOIP. I will carry on reviewing subsection 17(1)(g) of FOIP.

6. Did SaskPower properly apply subsection 17(1)(g) of FOIP?

[40] Subsection 17(1)(g) 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:

...

(g) information, including the proposed plans, policies or projects of a government institution, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

[41] Subsection 17(1)(g) 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 information, including the proposed plans, policies or projects of a government institution, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision. The provision allows government institutions to prevent premature disclosure of a policy or budgetary decision. Once a policy or budgetary decision has been taken and is being implemented, the information can no longer be withheld under this exemption. A decision has been implemented once those expected to carry out the activity have been authorized and instructed to do so (*Guide to FOIP*, Ch. 4, p. 156).

[42] Pages 157 and 158 of the *Guide to FOIP*, Ch. 4, outline the following two-part test my office uses to consider if a government institution properly applied subsection 17(1)(g) of FOIP:

1. Is it information of a government institution?

2. Could disclosure reasonably be expected to result in disclosure of a pending policy or budgetary decision?

[43] Subsection 17(1) of FOIP includes the requirement that access can be refused where it “could reasonably be expected to disclose” the protected information listed in the exemptions. I previously discussed this threshold in my review of subsection 17(1)(a) of FOIP.

[44] SaskPower applied subsection 17(1)(g) of FOIP to all of part 1 and part 2 (up to page 497). In terms of its arguments, SaskPower submitted as follows:

27. SaskPower submits that the record(s) identified above were developed for the purpose of informing and ultimately obtaining approvals needed to proceed with future project work and/or policy options. This includes costing, siting decisions & technology choices not yet approved. This information explicitly outlines SaskPower’s current plans from 2021 to 2028 in areas such as land acquisition, technology selection, capital costs, budgetary options for building an SMR in Saskatchewan, this is project documentation build specifically for and to be used for a government institution.

SaskPower has until 2029 to make a final decision on the go/no go of building of an SMR. The information involved directly ties to our ability to make that decision and the release of this information would harm SaskPower’s ability to negotiate with property owners, development companies as well as initiate consultations with 3rd parties charged with providing proprietary information to SaskPower.

Accordingly, SaskPower submits that the Records were properly withheld on the basis of subsection 17(1)(g).

[45] SaskPower has not discussed in any detail what plans, policies or projects are being considered. On the face of the record, it is obvious that the information is SaskPower’s and that it relates to SaskPower’s considerations for a small modular reactor. SaskPower, however, needed to point out where in the records the plans, policies or projects that affect pending budgetary or policy decisions exist. SaskPower did not do this. As such, I find that SaskPower did not meet the burden of proof pursuant to section 61 of FOIP that subsection 17(1)(g) of FOIP applies. I will now consider subsection 18(1)(a) of FOIP.

7. Did SaskPower properly apply subsection 18(1)(a) of FOIP?

[46] Subsection 18(1)(a) of FOIP provides as follows:

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

(a) trade secrets;

[47] Subsection 18(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 trade secrets. The *Guide to FOIP*, Ch. 4, at pages 167 and 168 provides the following two-part test that my office uses to determine if a government institution properly applied this provision:

1. Does the information constitute a trade secret?
2. Could release reasonably be expected to disclose the trade secret?

[48] Although SaskPower included subsection 18(1)(a) of FOIP in its section 7 decision, it did not include this provision in its index. It also did not make any arguments in support of this provision, although I note it included subsection 18(1)(a) of FOIP on page 2 of part 2. Given that SaskPower has not made any arguments in favour of subsection 18(1)(a) of FOIP, I find that it has not met the burden of proof pursuant to section 61 of FOIP that subsection 18(1)(a) of FOIP applies. I will now consider subsection 18(1)(b) of FOIP.

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

[49] Subsection 18(1)(b) of FOIP provides as follows:

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;

[50] Subsection 18(1)(b) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose financial, commercial, scientific, technical or other information which the Government of Saskatchewan or a government institution has a proprietary interest or a right of use and which has monetary value or reasonably likely to have monetary value. Pages 170 to 173 outline the following three-part test my office uses to determine if a government institution properly applied subsection 18(1)(b) of FOIP:

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

[51] SaskPower is relying on subsection 18(1)(b) of FOIP for parts 1 and 2 (up to page 497). I note that SaskPower provided separate arguments for subclauses (i) and (ii). These subclauses are conjoined by the word “and”, and so are meant to be read together, meaning both conditions need to be met together for the exemption to be found to apply. This is how I will review subsection 18(1)(b) of FOIP. In support of subsection 18(1)(b), SaskPower submits as follows:

30.... SaskPower submits that the redactions involved relate to the views of one or more employees of SaskPower as to the appropriateness of a particular proposal or suggested action. These documents discuss measures in dealing with any concerns with project work done on Siting efforts (Records - a, b, c, f, h, I, j, l, q, r, s,) or technology development + Construction (q, r, s,) , budget/costing (Records- (d), (e), (g), (i), (k)) involved. records in this category meet the requirements to be designated a “consultation.” Further, any presentations, reporting and decision items that discuss future courses of action with the SMR Project all contain deliberations or views towards making a decision regarding land purchases, technology use and any issues that they have been brought forward in relation to project work done by SaskPower, which is all highly proprietary.

Records outlined above (a, b, c, f, h, i, j, l, q, r, s,) review, discuss and attempt to provide consensus on indicators that will be used to determine areas of highest suitability in relation to siting options. Including but not limited to social, technical, environmental, cost. This information was developed and compiled as it relates to the views of subject matter experts within SaskPower and consultants hired to provide recommendations and analysis based on exhaustive research SaskPower submits that the records identified above reveal SaskPower's intention to purchase land and enter into agreements for sharing and obtaining nuclear technologies in a very specific area detailed in the above-mentioned reports and analysis. SaskPower would be entering contract negotiations, as well regulatory approvals based on this information. The information was developed for and to be used only for confidential purposes and is only offered on a need-to-know basis to SaskPower employees involved with the project. As these are working documents, they are not shared publicly. The information and data are the intellectual property of SaskPower and are tailored to carrying out SaskPower executive and board approval as well as regulatory approval.

31. Accordingly, SaskPower submits that the Records were properly withheld based on subsection 18(1)(b)(i).

...

33... SaskPower submits that the records identified above explicitly cover capital costs, budgeting, and speculative spending on work yet to be or is to be completed within the scope of the project. This information is the intellectual property of SaskPower and has monetary value as it details the subsequent financial responsibilities associated with land options and project budget, capital costs and technology options created for SaskPower use and therefore passes the test for exemption. This same information has been captured and provided within the noted Decision Items, Information Items and Executive Items to deliver necessary analysis needed to make further decision on policy and budgetary approvals.

34. Accordingly, SaskPower submits that the Records were properly withheld on the basis of subsection 18(1)(b)(ii).

[52] It appears that SaskPower is stating there is financial and technical information involved. Pages 170 and 171 of the *Guide to FOIP*, Ch. 4, offer the following definitions:

- “Financial information” is information regarding monetary resources, such as financial capabilities, assets, and liabilities, past or present. Common examples are financial forecasts, investment strategies, budgets and profit and loss statements.
- “Technical information” is information relating to a particular subject, craft or technique. Examples are system design specifications and the plans for an engineering project. It is information belonging to an organized field of knowledge, which would fall under the general categories of applied sciences or mechanical

arts. Examples of these fields would include architecture, engineering, or electronics. It will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information.

[53] Regarding the second and third parts of the test, pages 172 and 173 of the *Guide to FOIP*, Ch. 4, offer the following definitions:

- “Proprietary” means of, relating to or holding as property. “Proprietary interest” is the interest held by a property owner together with all appurtenant rights, such as a stockholder’s right to vote the shares. It signifies simply “interest as an owner” or “legal right or title”.
- “Owner” means someone who has the right to possess, use and convey something; a person in whom one or more interests are vested.
- “Right of use” means a legal, equitable or moral title or claim to the use of property, or authority to use.
- “Monetary value” requires that the information itself have an intrinsic value. This may be demonstrated by evidence of potential for financial return to the government institution. 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.

[54] SaskPower did not point to any specific portions of the record that contain financial or technical information, but the record could be said to contain information that appears both financial and technical in nature.

[55] However, the question is whether SaskPower has demonstrated a proprietary interest in such information that would have monetary value for SaskPower. In my office’s [Review Report 132-2023](#) concerning the Saskatchewan Health Authority, I said the following at paragraph [26] about subsection 17(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act*, which is an equivalent provision:

[26] Ontario’s [Freedom of Information and Protection of Privacy Act](#) subsection 18(1)(a) is similar to Saskatchewan’s, but instead of proprietary interest or right of use, it uses the phrase “that belongs to the Government of Ontario or an institution.” In

Ontario Information and Privacy Commissioner Office's (IPC) [Order MO-1746](#), the phrase "belongs to" was found to mean "ownership" which makes it relevant for Saskatchewan's subsection 17(1)(b) of LA FOIP. In Order MO-1746, the adjudicator stated the following:

The Assistant Commissioner has thus determined that **the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right to simply possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trademark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.** Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, **there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information** (*Guide to LA FOIP*, Ch 4, pp. 139-140).

[Emphasis added]

[56] Subsection 18(1)(b) of FOIP is intended to protect a government institution's competitiveness in the marketplace in the same way a private corporation's competitiveness would be protected. You might have a tech company, for example, invest in research and development to build a particular technology that it can then patent and market and monetize. The tech company then has a proprietary use of (or interest in) the technology it developed that helps it be competitive in the marketplace and make money. SaskPower has not demonstrated that this is the type of relationship that exists in this matter, and so has not met the second and third parts of the test. I find, therefore, that SaskPower did not properly apply subsection 18(1)(b) of FOIP. I will now consider its reliance on subsection 18(1)(d) of FOIP.

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

[57] Subsection 18(1)(d) of FOIP provides as follows:

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

...

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution;

[58] Subsection 18(1)(d) of FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution. This exemption is intended to protect a government institution's ability to negotiate effectively with other parties. Pages 180 and 181 of the *Guide to FOIP*, Ch. 4, outline the following two-part test my office uses to determine if a government institution properly applied subsection 18(1)(d) of FOIP:

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

[59] SaskPower is relying on subsection 18(1)(d) of FOIP for parts 1 and 2 (up to page 497). Regarding its reliance on this provision, SaskPower submits as follows:

49... SaskPower submits that the records identified above have been created and developed for the purpose of providing SaskPower with options and analysis for currently ongoing and future contract negotiations. These negotiations consist currently of land acquisitions, but will expand to technology sharing/production, construction, funding and budgetary approvals. The release of the above noted information would harm SaskPower's ability to negotiate fairly with sellers, developers and those who feel SaskPower is a risk to their proprietary information. Accordingly, SaskPower submits that the Records were properly withheld on the basis of subsection 18(1)(d).

[60] I discussed the definition of a "negotiation" in my review of subsection 17(1)(c) of FOIP. Page 181 of the *Guide to FOIP*, Ch. 4, states that "interfere" means to hinder or hamper. This provision requires that disclosure of the record "could reasonably be expected" to have

the intended outcome, which means there needs to be a reasonable expectation of harm. The government institution should not assume the harm is self-evident; the harm must be described in a precise and specific way. Government institutions should also indicate the extent of the harm that would occur and provide facts to support its assertion. Under review with my office, some key questions a government institution should answer under are:

- What negotiations would be affected by disclosure?
- Are these negotiations ongoing?
- Have the negotiations concluded?
- At what stage are the negotiations?
- How long have negotiations been going on?
- What is the subject matter of the negotiations?
- How specifically would disclosure interfere with the negotiations?
- Does the information relate to issues already resolved in the negotiations?
- Is the information current? How old is the information?
- Is the information commonly known or reasonably available elsewhere?

[61] SaskPower did not point to any specific portions of the record that contain information on the claimed negotiations, or clearly describe the negotiations. SaskPower also did not provide evidence to support the notion that disclosure of the record would interfere with any contractual or other negotiations. Recent news stories have touted SaskPower's agreements with companies such as GE Hitachi and have also indicated that the location for a future nuclear reactor has been narrowed down to the Estevan area. This calls into question whether any portions of the record contain information that is already publicly known and so should be released.

[62] The threshold here is "could reasonably be expected", which requires more than a mere assertion that the intended effect could occur; the harm must be probable, describable, and supported by evidence. My office cannot speculate on what the harm may be. SaskPower has not provided such information or evidence to support its claim. I find, therefore, that SaskPower has not met the burden of proof pursuant to section 61 of FOIP that subsection

18(1)(d) of FOIP applies. I now consider SaskPower's reliance on subsection 18(1)(f) of FOIP.

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

[63] Subsection 18(1)(f) of FOIP provides as follows:

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

...

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

[64] Subsection 18(1)(f) 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 prejudice the economic interest of the Government of Saskatchewan or a government institution. The following test can be applied:

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

(Guide to FOIP, Ch. 4, p. 188)

[65] SaskPower is relying on subsection 18(1)(f) of FOIP for parts 1 and 2 (up to page 497). Regarding its reliance on this provision, SaskPower submits as follows:

50.... SaskPower submits that the records identified above prejudice the economic interests of SaskPower and the Government of Saskatchewan. The release of project documentation and confidential information contained, could hinder any further work that has been established in regard to obtaining regulatory approval and eventually licensing, as well as burden the relationships and contract negotiations with those tasked to provide confidential nuclear information and technologies, as well as any future agreements/provisions to provide power to other jurisdictions. The decision-making process is not limited to identifying an issue and using the project team to initiate RFP's and build contracts. A project of this magnitude has a series of high-level red tape before anything can be finalized, or technology can even be selected. The

release of this information would harm SaskPower's ability to establish working relationships with the contractors and service providers in the near future.

Accordingly, SaskPower submits that the Records were properly withheld on the basis of subsection 18(1)(f).

[66] This is another provision that uses the threshold "could reasonably be expected to", so a finding that the exemption applies requires more than a mere assertion that disclosure could lead to the intended outcome. Again, the government institution needs to describe the harm, show how disclosure would cause harm, demonstrate the extent to which it would occur, and provide facts or evidence to support its assertions. Also, a government should not assume that the harm is self-evident. Page 190 of the *Guide to FOIP*, Ch. 4, also offers the following definitions:

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

[67] Examples of harm to economic interests include:

- Information in budget preparation documents which could result in segments of the private sector taking actions affecting the government's ability to meet economic goals (Note: approved budgets are not included as they are tabled in the Legislature as public documents).
- Background material to be used in establishing land costs which if released would affect revenue from the sale of the land.

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

[68] In my office's [Review Report 205-2023](#) concerning Saskatchewan Telecommunications, I stated the following at paragraphs [20] to [22] regarding subsection 18(1)(c) of FOIP and the general purposes of section 18 of FOIP:

- [20] [Section 18 of Ontario's Freedom of Information and Protection of Privacy Act](#) (ON FIPPA) contains clauses that are substantially similar to those found in section 18 of FOIP. In particular, subsection 18(1)(c) of ON FIPPA states as follows:

18(1) A head may refuse to disclose a record that contains,

...

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

- [21] In [Order PO-3594](#), the Ontario Information and Privacy Commissioner (ON IPC) considered that the general purpose of section 18 of ON's FIPPA is to protect certain economic interests to the extent that commercially valuable information may be exempt. The ON IPC added that the intent of subsection 18(1)(c) of ON's FIPPA is to "protect the ability of institutions to earn money in the marketplace." **The ON IPC added that subsection 18(1)(c) of ON's FIPPA recognizes that government institutions may have economic interests where it competes for business with other public or private sector entities. A refusal to disclose information must be to protect the government institution from its ability to compete. The ON IPC added that there must be clear evidence to show that the alleged harm could reasonably be expected to occur.** Again, it does not need to be a certainty that it will.

- [22] **Similarly, section 18 of FOIP is intended to protect commercially valuable information, while subsection 18(1)(f) of FOIP protects information, the disclosure of which can prejudice a government institution's economic interests.**

[Emphasis added]

- [69] Again, SaskPower has not pointed to any specific portions of the records where this exemption would apply. SaskPower also did not describe what harm would occur, what economic interests would be prejudiced, or how the information in the record would be of such commercial value to SaskPower that disclosure would limit its ability to compete. SaskPower has not provided sufficient arguments and evidence to support its assertions. I find, therefore, that SaskPower has not met the burden of proof pursuant to section 61 of FOIP that subsection 18(1)(f) of FOIP applies. I now consider its reliance on subsections 22(a), (b) and (c) of FOIP.

11. Did SaskPower properly apply subsections 22(a), (b) and (c) of FOIP?

[70] According to its index, SaskPower is relying on subsections 22(a), (b) and (c) of FOIP to withhold pages 176 to 186 and page 218 of part 2. Subsections 22(a), (b), (c) of FOIP provide as follows:

22 A head may refuse to give access to a record that:

(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

(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

(c) contains correspondence between an agent of the Attorney General for Saskatchewan or legal counsel for a government institution and any other person in relation to a matter involving the provision of advice or other services by the agent or legal counsel.

[71] I will assess each subsection separately.

Subsection 22(a) of FOIP

[72] Subsection 22(a) of FOIP is a discretionary, class-based exemption. It permits refusal of access in situations where a record contains information that is subject to any legal privilege, including solicitor-client privilege. Pages 263 to 267 of the *Guide to FOIP*, Ch. 4, outline the following three-part test my office uses to determine if a government institution properly applied subsection 22(a) of FOIP:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Did the parties intend for the communication to be treated confidentially?

[73] SaskPower submitted as follows regarding subsection 22(a) of FOIP:

SaskPower submits that the records identified above are established and prepared by SaskPower's General Counsel for the purposes of site selection and advancing a recommendation to the Government of Saskatchewan on triggering SaskPower's Duty to Consult. These records were developed for minister's use only and provide legal advice.

[74] Subsection 22(a) of FOIP can be found to apply if information in a record would reveal the substance of communications between a solicitor and client. Pages 263 to 268 of the *Guide to FOIP*, Ch. 4, provide the following definitions:

- A "communication" is the process of bringing an idea to another's perception; the message or ideas so expressed or exchanged; the interchange of messages or ideas by speech, writing, gestures or conduct.
- "Solicitor" means a lawyer who is duly admitted as a member and whose right to practice is not suspended. Lawyer means a member of the Law Society and includes a law student registered in the Society's pre-call training program.
- A "client" means a person who consults a lawyer and on whose behalf the lawyer renders or agrees to render legal service.
- "Legal advice" means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.

[75] There must be an expectation on the part of the government institution that the communication will be confidential. Not every aspect of relations between a lawyer and a client is necessarily confidential. Conduct which is inconsistent with an expectation of confidentiality can constitute a waiver of privilege.

[76] SaskPower did not explicitly state who its lawyer is in this matter, and the records do not state the name of a lawyer who is in good standing. Upon review, pages 176 to 186 contain a briefing that does not appear to have been prepared by SaskPower's lawyer. Page 218 is a screenshot of the covering page from a law firm. Neither indicate who the lawyer is in this matter, nor indicate that a communication occurred between SaskPower and its lawyer,

which is required by the first part of the test. As such, I find SaskPower has not met the burden of proof pursuant to section 61 that subsection 22(a) of FOIP applies.

Subsection 22(b) of FOIP

[77] Subsection 22(b) of FOIP is a discretionary, class-based exemption. It permits refusal of access in situations where a record was prepared by or for legal counsel (or an agent of the Attorney General) for a government institution in relation to the provision of advice or services by legal counsel (or an agent of the Attorney General). This provision is broader in scope than subsection 22(a). Pages 90 and 91 of the *Guide to FOIP*, Ch. 4, outlines the following two-part test my office applies to determine if a government institution properly applied subsection 22(b) of FOIP:

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?

[78] Regarding its reliance on subsection 22(b) of FOIP, SaskPower submits as follows:

SaskPower submits that the records identified above are prepared by SaskPower’s General Counsel for the purposes of site selection and advancing a recommendation to the Government of Saskatchewan on triggering SaskPower’s Duty to Consult. These records were produced for minister’s use only and provide explicit legal advice.

[79] Regarding both parts of the test the *Guide to FOIP*, Ch. 4, at pages 290 and 291 provides the following definitions:

- “Prepared” means to be 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 provide or legal advice or legal related services.

- “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.
- “Legal service” includes any law-related service performed by a person engaged by a government institution and who is licensed to practice law.

[80] Again, SaskPower has not stated who the lawyer is in this instance. On the face of the record, it appears this portion was completed by a SaskPower employee who is not a lawyer, and there is no indication they prepared it for use by SaskPower’s lawyer. As such, the first part of the test is not met. I find, therefore, that SaskPower has not met the burden of proof pursuant to section 61 that subsection 22(b) of FOIP applies.

Subsection 22(c) of FOIP

[81] Subsection 22(c) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where a record contains correspondence between the government institution’s legal counsel (or an agent of the Attorney General) and any other person in relation to a matter that involves the provision of advice or services by legal counsel (or an agent of the Attorney General). This provision is broader in scope than subsection 22(a) of FOIP. The *Guide to FOIP*, Ch. 4 at pages 292 and 293, outlines the following two-part test my office uses to determine if a government institution properly applied subsection 22(c) of FOIP:

1. Is the record a correspondence between the government institution’s legal counsel (or an agent of the Attorney General) and any other person?
2. Does the correspondence relate to a matter that involves the provision of advice or other services by the agent or legal counsel?

[82] In terms of its reliance on subsection 22(c) of FOIP, SaskPower submits as follows:

SaskPower submits that the records identified above are explicit advice for the ministers to take into consideration, developed by SaskPower’s General Counsel for the purposes of site selection and advancing a recommendation to the Government of

Saskatchewan on triggering SaskPower's Duty to Consult. These records are meant to correspond directly with the minister's officer and solicit recommendations.

[83] I already provided definitions for "legal advice" and "legal service", but regarding the two-part test, pages 292 and 293 of the *Guide to FOIP*, Ch. 4, offer the additional definitions:

- "Correspondence" means letters sent or received. It is an interchange of written communication.
- "Any other person" was an intentional and inclusive phrase to capture just that – any other person. The government institution must make it sufficiently clear, as to what the nature of that other person's role in the correspondence was.

[84] In past reports (e.g., [Review Report 171-2019](#), [Review Report 081-2023](#)), I have held that for subsection 22(c) of FOIP to be found to apply, there must be communications involving a lawyer and, as the provision states, anyone else. SaskPower has not identified who the lawyer is in this case, nor has it identified any communications involving its lawyer. This portion of the record itself does not appear to contain a correspondence between SaskPower and its lawyer. As such, I find it has not met the burden of proof pursuant to section 61 of FOIP that subsection 22(c) of FOIP applies. I move on, now, to review the mandatory exemptions applied by SaskPower.

Mandatory Exemptions

12. Did SaskPower properly apply subsection 16(1)(a) of FOIP?

[85] Subsection 16(1)(a) of FOIP provides as follows:

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

- (a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;

[86] Subsection 16(1)(a) of FOIP is a mandatory class-based exemption. It permits refusal of access in situations where release of a record could disclose a confidence of Cabinet

including records created to present advice, proposals, recommendations, analyses, or policy options to Cabinet or any of its committees (*Guide to FOIP*, Ch. 4, p. 99).

[87] Page 100 of the *Guide to FOIP*, Ch. 4, offers the following definitions:

- “Cabinet confidences” are defined as, in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Legislature and the public.
- “Including” means the list of information that follows is not complete (non-exhaustive). The examples in the provision are the types of information that could be presumed to disclose a confidence of Executive Council (Cabinet).

[88] Pages 100 to 102 of the *Guide to FOIP*, Ch. 4, outline the following two-part test my office uses to determine if this exemption has been properly applied:

1. Does the record contain advice, proposals, recommendations, analyses or policy options?
2. Was the record created to present to Cabinet or any of its committees?

[89] SaskPower applied subsection 16(1)(a) of FOIP to all documents in part 2 (up to page 497). Although it claimed this exemption, SaskPower has not submitted any arguments in support of subsection 16(1)(a) of FOIP. Since it is a mandatory exemption, I will consider if it applies by reviewing the records.

[90] The first part of the test requires a record to contain advice, proposals, recommendations, analyses or policy options.

[91] Part two of the test requires that the advice, proposals, recommendations, analyses or policy options be prepared for Cabinet or one of its committees. Records that contain these from sources outside of the Executive Council for presentation to the Executive Council are intended to be covered by the provision. A draft memorandum that was created for the purpose of presenting proposals and recommendations to Cabinet but were never actually presented to Cabinet remains a confidence. Equally, a memorandum in final form is a

confidence even if it has not been presented to Cabinet. “Executive Council” means the Executive Council appointed pursuant to *The Executive Government Administration Act*. It consists of the Premier and Cabinet Ministers. Executive Council is also referred to as “Cabinet”. Cabinet has also been defined as the committee of senior ministers (heading individual provincial government ministries) which acts collectively with the Premier to decide matters of government policy. A “committee of the Executive Council”, also known as a Cabinet committee, includes one or more Cabinet ministers. The committee exercises some or all of the powers of Cabinet as a whole or develops and provides recommendations to Cabinet. Also included in the definition is an entity or individual to which the Executive Council or any of its committees has delegated decision-making authority on their behalf (*Guide to FOIP*, Ch. 4, p. 103).

[92] Upon review of part 2, I note the following pages involve briefings (with appendices) indicating that they are confidential and for the use of Ministers: 176 to 181 and 227 to 249. These records appear to contain analyses of what the current state was at the time. The *Guide to FOIP*, Ch. 4, p. 102 states that an “analysis” is the detailed examination of the structure of something, or the process of separating something into its constituent elements. As the briefings contain analysis prepared for the use of Ministers, both parts of the test would be met. I find, then, that subsection 16(1)(a) of LA FOIP applies to pages 176 to 181 and 227 and 249 of part 2. I recommend that SaskPower withhold these pages pursuant to subsection 16(1)(a) of FOIP (see the Appendix). I will now consider the application of subsection 29(1) of FOIP.

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

[93] Subsection 29(1) of FOIP provides as follows:

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

- [94] Section 29 of FOIP prohibits the disclosure of personal information unless the individual about whom the information pertains consents to its disclosure, or if the disclosure without consent is authorized by one of the enumerated subsections of 29(2) or section 30 of FOIP (*Guide to FOIP*, Chapter 6, “Protection of Privacy”, updated January 18, 2023 [*Guide to FOIP*, Ch. 6], p. 183).
- [95] To withhold information pursuant to subsection 29(1) of FOIP, the information must qualify as “personal information” as defined by subsection 24(1) of FOIP. To qualify as personal information as defined by subsection 24(1) of FOIP, the information must: 1) be about an identifiable individual; and 2) be personal in nature. Information is about an “identifiable individual” if the individual can be identified from the information (e.g., their name is provided) or if the information, when combined with information otherwise available, could reasonably allow the individual to be identified. To be “personal in nature” means the information provides something identifiable about the individual (*Guide to FOIP*, Ch. 6, pp. 32-33).
- [96] SaskPower did not provide arguments in support of subsection 29(1) of FOIP, but it claimed this exemption on page 289 of a document in part 1 it calls, “SaskPower_workbook_ESTEVAN 2022-12-09 v3-2 JR”. It is not clear on page 289 what data SaskPower is applying subsection 29(1) of FOIP to, but I assume it is to the names and contact information (phone numbers and email addresses) for 10 individuals involved in a certain task or project. These individuals all appear to be involved in a professional capacity, and their contact information appears to belong to the organization they represent or is used for business purposes. In multiple past reports (e.g., [Review Report 103-2024](#), [Review Report 161-2023](#) and [Review Report 337-2021](#)), I have stated that this type of information does not qualify as “personal information” as defined by FOIP. Accordingly, I find that SaskPower did not properly apply subsection 29(1) of FOIP.
- [97] In summary, my recommendations for my findings on the exemptions SaskPower has claimed are outlined in the Appendix to this Report.

14. Did SaskPower conduct a reasonable search for records?

[98] Regarding the existence of records that SaskPower claims do not exist, the Applicant submits as follows (second part of their access request):

So at this stage SaskPower has openly promoted its vision to build nuclear reactors, has already started charging customers on each electrical bill for the development of nuclear power but it claims to have no records as per 7(2)(b) regarding the compensation to be paid to Estevan coal miners and coal plants when coal mining/electricity stops? Eliminating coal generated electricity is one of the advertised reasons SaskPower is pursuing nuclear reactors but they have no records about what happens to those coal workers who get eliminated? I don't believe that SaskPower has 0 records about this and it needs to provide access to them.

[99] Subsection 5.1(1) of FOIP requires a government institution to respond to an applicant's access to information request openly, accurately and completely. This means that government institutions should make reasonable effort to not only identify and seek out records responsive to an applicant's access to information request, but to explain the steps in the process. The threshold that must be met is one of "reasonableness". In other words, it is not a standard of perfection, but rather what a fair and rational person would expect to be done or consider acceptable (*Guide to FOIP*, Chapter 3, "Access to Records", updated May 5, 2023 [*Guide to FOIP*, Ch. 3] at p. 12).

[100] My office reviews a government institution's efforts to search for records when it responds to an Applicant's access request by indicating that records do not exist. The focus of a search review by my office is whether the government institution conducted a reasonable search. As noted above, a reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the request. A reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances (*Guide to FOIP*, Ch. 4, pp. 14-15).

[101] Pages 14 and 15 of the *Guide to FOIP*, Ch. 3, outline the following details a government institution may provide my office when explaining its search efforts:

- For personal information requests – explain how the individual is involved with the government institution (i.e., client, employee, former employee etc.) and why certain departments/divisions/branches were included in the search.
- For general requests – tie the subject matter of the request to the departments/divisions/branches included in the search. In other words, explain why certain areas were searched and not others.
- Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
- Explain how the records management system is organized (both paper & electronic) in the departments/divisions/branches included in the search.
- Describe how records are classified within the records management system. For example, are the records classified by alphabet, year, function and/or subject?
- Consider providing a copy of your organization’s record schedule and screen shots of the electronic directory (folders & subfolders).
- If the record has been destroyed, provide copies of record schedules and/or destruction certificates.
- Explain how you have considered records stored off-site.
- Explain how records that may be in the possession of a third party but in the government institution’s control have been searched such as a contractor or information management service provider.
- Explain how a search of mobile electronic devices was conducted (i.e., laptops, smart phones, cell phones, tablets).
- Explain which folders within the records management system were searched and how these folders link back to the subject matter requested. For electronic folders – indicate what key terms were used to search if applicable.
- Indicate the calendar dates each employee searched, for how long they searched and the results.
- Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided.

[102] In past reports, I have also considered if a government institution has provided reasonable explanations for why a record does not exist. Regardless, a government institution still needs to demonstrate that it undertook efforts to search for the record requested.

[103] SaskPower submits that it provided a redacted copy of the Applicant's access request to 10 different individuals within SaskPower, including the CEO/President, a couple Executive Vice Presidents, Directors for the law, land & privacy unit, corporate relations and communications and business solutions. SaskPower also forwarded the query to individuals within its nuclear development unit, including a Director, Manager and Senior Business Advisor and to the Director for employee relations, health & wellness. These individuals all conducted searches. The Records and Information Management unit also described the individuals they spoke with or interviewed and provided copies of correspondence they had with them. Evidence suggests that if those individuals did not have answers or responses, they forwarded the communication to someone who may be able to provide one.

[104] Of note, one of the conversations included the following:

Further to our conversation, there is not a current approved plan or decision regarding compensating Estevan staff if the plants shut down. As I mentioned any plan is still in development and/or subject to collective bargaining. Any questions let me know.

[105] News articles, [such as this one](#), quote the Minister responsible for SaskPower as saying that a decision on small modular reactors for Saskatchewan isn't expected until 2029. It seems reasonable to me that any discussion on what may or may not happen with coal workers would be premature since final decisions are pending, and since such discussions would likely need to occur in conjunction with the union. It is not apparent that any such discussions have taken place.

[106] Given SaskPower's explanations and supporting evidence, I find it has conducted a reasonable search for records and recommend it take no further action regarding search.

15. Did SaskPower properly withhold information as non-responsive?

[107] On its index, SaskPower identified information in both parts 1 and 2 of the record that is non-responsive to the Applicant's access request (see the Appendix). SaskPower did not state in its section 7 decision to the Applicant that this was the case. In past reports (e.g., [Review Report 290-2023](#) concerning the Ministry of Justice and Attorney General), I stated that if a government institution determines records are non-responsive, it should state so in its section 7 decision. Going forward, SaskPower should be mindful of doing so.

[108] As per my office's *Guide to FOIP*, Ch. 6 at page 26, when a government institution receives an access to information request, it must determine what information is responsive to the request. "Responsive" means relevant. The term describes anything that is reasonably related to the request. It follows that any information or records that do not reasonably relate to an applicant's request will be considered "not responsive".

[109] Pages 27 and 28 of the *Guide to FOIP*, Ch. 6, list the factors that should be considered when determining what information is responsive. The request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive. Also importantly, 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.

[110] Upon review of the portions of the record that SaskPower claims are non-responsive, it appears to me that SaskPower is claiming such information is non-responsive because it does not pertain to the location the Applicant identifies – Estevan. This is the same for other portions of the record that SaskPower has identified as non-responsive; that is, these portions do not specifically pertain to Estevan. I find, then, that based on the Applicant's wording, there is information that is non-responsive (see Appendix). To be consistent with my blog, "[What About the Responsive Record?](#)," I recommend that within 30 days of the

issuance of this Report that SaskPower release to the Applicant any information it identifies as non-responsive subject to any exemptions that may apply.

16. What should SaskPower do with duplicate records?

[111] I previously stated in this Report that when a government institution receives an access request, it is obligated pursuant to subsection 5.1(1) of FOIP to respond openly, accurately, and completely. This is part of its duty to assist and includes explaining to an applicant when there are duplicate records. I have stated in past reports (e.g., [Review Report 130-2020](#) concerning the Ministry of Highways) that responding “completely” means a response has all its parts, is entire or finished, or has all its parts. If there are duplicate records, then, a government institution should provide those, subject to whatever exemptions are found to apply.

[112] Alternatively, if a government institution is going to leave out duplicate records, then part of its duty to assist is to provide an applicant with an explanation for doing so. For example, if pages are exact duplicates and there will be a cost to the applicant to provide those duplicates (e.g., reproduction costs), then the government institution should provide that explanation to the applicant. The applicant, for their part, may insist on receiving the duplicates. Upon review, it does appear that what SaskPower identified as duplicate records in its index are indeed duplicates and so find that there are duplicates.

[113] Because SaskPower is not charging a fee, cost is not a factor for the Applicant. As such, I recommend that within 30 days of the issuance of this Report that SaskPower release to the Applicant any duplicate records subject to any exemptions found to apply.

IV FINDINGS

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

[115] I find that subsection 16(1)(a) of FOIP applies to pages 176 to 181 and 227 to 249 of part 2.

[116] I find that SaskPower has not met the burden of proof pursuant to section 61 of FOIP that subsections 17(1)(a), (b), (c), (g), 18(1)(a), (d), (f), 22(a), (b) and (c) of FOIP apply.

[117] I find that SaskPower has not properly applied subsections 17(1)(f), 18(1)(b) and 29(1) of FOIP.

[118] I find that SaskPower conducted a reasonable search for records.

[119] I find that based on the wording of the Applicant's access request, there are non-responsive records.

[120] I find that there are duplicate records.

V RECOMMENDATIONS

[121] I recommend that SaskPower continue to withhold pages 176 to 181 and 227 to 249 of part 2 pursuant to subsection 16(1)(a) of FOIP.

[122] I recommend that SaskPower release the remaining information in the record to the Applicant within 30 days of the issuance of this Report as outlined in the Appendix.

[123] I recommend that SaskPower take no further action regarding search.

[124] I recommend that within 30 days of the issuance of this Report that SaskPower release non-responsive records to the Applicant subject to any exemptions found to apply.

[125] I recommend that within 30 days of the issuance of this Report that SaskPower release any duplicate records to the Applicant subject to any exemptions found to apply.

Dated at Regina, in the Province of Saskatchewan, this 22nd day of July, 2024.

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

Appendix

Pages	Exemptions Applied (by SaskPower)	Title (provided by SaskPower)	Details (provided by SaskPower)	Commissioner's Recommendation
Part One				
1 to 14	17(1)(a), (b), (g), 18(1)(b), (d), (f)	1.0 SP0005.3 Phase 2 Regional Siting Criteria and Scoring v2-03	Contractor produced Regional Siting and scoring report	Release
15 to 78	17(1)(a), (b), (g), 18(1)(b), (d), (f); non-responsive pages 70, 74 to 77	3.0 SP0005.3 Indicator Workbook Working Copy v1-0	Contractor produced report on Regional Site indicators	Release
79 to 86	17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)	SMR LCOE Update	Privileged Costing Information	Release
87	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)	[part of Update]	[more costing information]	Release
88 to 102	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)	2022 02 24 SaskPower SMR Cashflow Chart1	Proprietary information on cost forecasting and budget	Release
103 to 129	17(1)(a), (b), (f), (g), 18(1)(b), (d), (f); non-responsive pages 106, 107, 110, 112, 126; release pages 104, 105, 108, 109,	[presentation]	[presentation regarding modular reactor project]	Release
130 to 147	17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)	AGM October 2023-SKB	Stakeholder Annual General Meeting Update Report- Site Evaluation Details	Release
148 to 212	17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)	KPMG Report on Construction Cost Drivers	Consultant built Assessment on Cost Drivers	Release
213 to 221	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)	Next Steps- Regional Evaluation Process -Briefing Note Draft V6	Briefing Note- Next Steps on SMR- Evaluations and Rankings (222-228)	Release

222 to 228	17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)	Regional and Site Scoresheet-Full Criteria List	Reginal Definitions and Ranking Notes	Release
229 to 290	17(1)(a), (b), (c), (f), (g), 18(1)(b), (d), (f), 29(1)	SaskPower workbook ESTEVAN 2022-12-09 v3-2 JR [29(1) of FOIP applied only to page 289)		Release
291 to 294	17(1)(a), (b), (c), (f), (g), 18(1)(b), (d), (f)	[workplan]	[workplan describing what needs to be done]	Release
295	17(1)(a), (b), (c), (f), (g), 18(1)(b), (d), (f)	SMR Project Planning Phase Budget Estimate - Final	Budget Forecasting	Release
296 to 321	17(1)(a), (b), (c), (f), (g), 18(1)(b), (d), (f)	SP-0005.3-01 Siting Review Report v1-0 -	3rd Party/Consultant built Study	Release
322 to 367	17(1)(a), (b), (c), (f), (g), 18(1)(b), (d), (f)	2023-04-24 - Estevan Study Area Intro Meeting v2	Contractor produced report on Reginal Site indicators	Release
368 to 375	17(1)(a), (b), (c), (f), (g), 18(1)(b), (d), (f)	2023 06 14 SMR Capital Cost	Proprietary information on costing and budget	Release
376 to 387	17(1)(a), (b), (c), (f), (g), 18(1)(b), (d), (f)	[update presentation] including: <ul style="list-style-type: none"> • SMR Site Selection Updated 2020 (p. 379) and • SMR Siting Update - Nov. 11 21 		Release
Part 2				
1 to 30	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f); non-responsive pages 1, 3 to 9, 13 to 20, 25 to 29,	[Appendices A to K]		Release

31	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)	[project estimate]		Release
32	Non-responsive	[approved deliverables]		Release
33 to 37	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f); non responsive page 37	2021-06-Quarterly Project Update (Board Information Item)	Board Information Item	Release
38 to 43	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)	2021-09-Regional Siting Update (Board Information Item)	Appendix 1 and 2	Release
44 to 53	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)		Appendix 3 [to above]	Release
54 to 61	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f); non-responsive pages 57 to 59	2022-03-Project Authorization [decision item]		Release
62	Non-responsive	Appendix A		Release
63	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)	Appendix B		Release
64 to 87	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f); non-responsive pages 66 to 69, 73 to 79, 81 to 86	Appendix C summary		Release
88 to 90	Non-responsive	[appendix and org chart]		Release
91 to 110	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f); non-responsive	[appendix E]	Appendix E – Planning Phase Authorization Information	Release

	pages 94, 94, parts of 95, 99 to 103, 105, 108, 109			
111 to 160	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)	2022-03-Technology Selection (Decision Item)		Release
161 to 175	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)	2022-03-Quarterly Project Update (Board Information Item)	Information/Decision Item	Release
176 to 186	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f), 22(a), (b), (c)	Appendix 3	[appendix to update]	Withhold pages 176 to 181 pursuant to subsection 16(1)(a) of FOIP
187 to 195	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)	Appendix 4	[appendix to update]	Release
196 to 218	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f), (b), (c); non-responsive pages 202, 204 to 210, 217 [22(a) applied to page 218 only]	Appendix 5	[appendix to update]	Release
219 to 226	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)	2022-11-Quarterly Project Update, Appendix 1, Appendix 2		Release
227 to 249	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f)	[briefing notes with appendix]		Withhold pages 227 to 249 pursuant to subsection 16(1)(a) of FOIP
250 to 308	Non-responsive	SaskPower SMR/Subsidiary-Business Plan – Does Not Pertain to Requested Information		Release

309 to 370	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f); non-responsive pages 317, 322 to 324, 327 to 334, 337 to 345, 347, 349, 352 to 370	2022-03-SMR Development Project Authorizations [with Appendix A, B, C, D, E, Schedule E, Schedule F]		Release
371 to 479	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f); non-responsive pages 376 to 378, 463 to 466, 470, 471, 473, 474, 476 to 479	2023-03-Quarterly Project Update [with Appendix 1, 2, 3, 4, 5, 6, 7, 8]		Release
480 to 496	16(1)(a), 17(1)(a), (b), (f), (g), 18(1)(b), (d), (f); non-responsive pages 485 to 491 (portions of), 493 to 496	04-2023-SMR Reactor Update [with Appendix 1, 2, 3, 4, 5]		Release
497 to 617	[identified as duplicate information with no redaction marks]	AMPS SMR Update	Duplicate Records from previous reports	Release
618 to 621	[identified as duplicate information with no redaction marks]	CII-SMR Siting Selection, Appendix 1-4	Duplicate records from previous reports	Release