



REVIEW REPORT 318-2021

Public Service Commission

July 20, 2022

Summary:

The Applicant submitted an access to information request under *The Freedom of Information and Protection of Privacy Act* (FOIP) to the Public Service Commission (PSC). After consulting with a third party, LifeWorks, PSC made the decision to withhold the responsive record from the Applicant. PSC cited sections 19(1)(b) and (c) of FOIP as its reasons. The Applicant appealed to the Commissioner. In the course of the review, PSC made the decision to no longer rely on any exemptions in FOIP to withhold the record and indicated it was prepared to release the record to the Applicant. However, the third party opposed the release of the record and provided arguments to the Commissioner supporting its position. The Commissioner found that sections 19(1)(b) and (c) of FOIP did not apply to the responsive record. The Commissioner recommended the release of the record.

I BACKGROUND

[1] On September 10, 2021, the Public Service Commission (PSC) received the following access to information request from the Applicant:

I would appreciate receiving:

- a) the AGGREGATE cost in fiscal year 2019-20 spent by the Public Service Commission to fund the EFAP (administrative salary, annual contract fee, counselling expenses, etc.)
- b) I would also like to receive a copy of the 2019-20 EFAP Annual Report.

- [2] In a letter dated October 4, 2021, PSC sent a letter to the Applicant indicating that it would be extending the 30-day response period set out in section 7 of *The Freedom of Information and Protection of Privacy Act* by an additional 30 days pursuant to section 12(1)(c) of FOIP. PSC explained it was going to provide notice to a third party pursuant to section 34(1) of FOIP.
- [3] In a letter dated October 21, 2021, LifeWorks (the third party) provided representations to PSC.
- [4] In a letter dated November 2, 2021, PSC responded to the Applicant's access to information request. First, PSC indicated it did not have records responsive to the first part of the Applicant's access request pursuant to section 7(2)(e) of FOIP. However, it provided information within the letter itself to respond to the first part of the access request (i.e., the aggregate cost for fiscal year 2019-2020). Next, PSC indicated that it was withholding the record responsive to the second part of the access request pursuant to section 19(1)(b) and (c) of FOIP. PSC indicated it came to this decision after receiving a representation from the third party.
- [5] On November 22, 2021, my office received a request for review from the Applicant.
- [6] On December 8, 2021, my office notified PSC, the Applicant, and LifeWorks that my office would be undertaking a review.
- [7] On January 10, 2022, my office received a submission from the Applicant.
- [8] On February 1, 2022, my office received a submission from LifeWorks. LifeWorks provided arguments as to why it believed sections 19(1)(b) and (c) of FOIP applied to the record. It said it was opposed to the disclosure of the record.
- [9] On February 7, 2022, my office received a submission from PSC indicating that it was no longer relying on any exemption in FOIP. It said it was prepared to release the record to the Applicant.

[10] Due to the third party's objection to the disclosure of the record, my office continued with its review.

II RECORD AT ISSUE

[11] The record at issue is a 19-page report entitled, "Year 1 EFAP Overview June 1, 2019 – May 31, 2020". It contains statistical reporting, including in the form of bar graphs, that reflects different aspects of the Employee and Family Assistance Program (EFAP). It also describes the different subject areas that the EFAP program offers.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[12] The PSC qualifies as a "government institution" as defined by section 2(1)(d)(ii) of FOIP and section 3(a) and Part I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations*. Further, LifeWorks qualifies as a "third party" as defined by section 2(1)(j) of FOIP. Therefore, I find that I have jurisdiction to conduct this review.

2. Does section 19(1)(b) of FOIP apply?

[13] Section 19(1)(b) of FOIP provides:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;

[14] My office applies the following three-part test to determine if section 19(1)(b) of FOIP applies to a record:

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

2. Was the information supplied by the third party to a government institution?
3. Was the information supplied in confidence implicitly or explicitly?

(IPC *Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated September 30, 2021 [*Guide to FOIP*, Ch. 4], pp. 198-199)

[15] Since the PSC indicated that it is no longer relying on any exemption to withhold the record, I will only consider the third party’s arguments below.

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

[16] “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. The financial information be specific to a third party (*Guide to FOIP*, Ch. 4, p. 198).

[17] “Commercial information” is information relating to the buying, selling or exchange of merchandise or services. This can include third party associations, past history, references and insurance policies and pricing structures, market research, business plans, and customer records” (*Guide to FOIP*, Ch. 4, p. 198).

[18] “Scientific information” is information exhibiting the principles or methods of science. The information could include designs for a product and testing procedures or methodologies. It is information belonging to an organized field of knowledge in the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information (*Guide to FOIP*, Ch. 4, pp. 198-199).

[19] “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 (*Guide to FOIP*, Ch. 4, p. 199).

[20] “Labour relations information” is information that relates to the management of personnel by a person or organization, whether or not the personnel are organized into bargaining units. It includes relationships within and between workers, working groups and their organizations as well as managers, employers and their organizations. Labour relations information also includes collective relations between a public body and its employees. Common examples of labour relations information are hourly wage rates, personnel contracts and information on negotiations regarding collective agreements (*Guide to FOIP*, Ch. 4, p. 199).

[21] In its submission, LifeWorks argued that the record contains “data design, methodology and metrics” as well as “financial, strategic, and competitive information.” It said:

This report includes data design, methodology and metrics form [sic] our own proprietary case management system, called Symphoni. As this is a custom reporting is based on our own case management tool, this would be also seen as being detrimental to our competitive advantage, as the detail and outline of this information is owned by LifeWorks. This type of reporting can be found on slides 3, 4, 5, 6, 7, 8, 9, 10, 11, 13.

...

The Report contains financial, strategic, and competitive information of LifeWorks and the services it offers to its clients. This includes information relating to the utilization of LifeWorks’ services, which is ultimately related to how these services are priced for clients.

[22] Based on a review of the record at issue, statistical reporting in the form of bar graphs and percentages on different aspects of the EFAP program appear. While there likely was a methodology to derive such statistics, the information within the record itself does not reveal the methodology. I find that such statistical reporting does not reveal financial, commercial, scientific, technical, or labour relations information as I have defined above.

[23] I find that the first part of the three-part test is not met. There is no need to consider the other parts of the three-part test. I find that section 19(1)(b) of FOIP does not apply to the record at issue.

3. Does section 19(1)(c) of FOIP apply?

[24] Section 19(1)(c) of FOIP provides:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...
(c) information, the disclosure of which could reasonably be expected to:

- (i) result in financial loss or gain to;
 - (ii) prejudice the competitive position of; or
 - (iii) interfere with the contractual or other negotiations of;
- a third party;

[25] LifeWorks did not specify precisely which subsection of section 19(1)(c) of FOIP it was claiming to apply. Its submission to my office appears to argue all three sections of 19(1)(c) of FOIP applies. Its submission said:

The following specific harms will result if such information is disclosed:

- I. It would negatively impact our ability to negotiate services agreements with future clients, resulting in significant harm to LifeWorks' competitive position in the industry (especially if released to competitors or potential clients).
- II. If a competitor or future client of LifeWorks were to obtain this confidential and sensitive business information, they could use it to their advantage in future competitive endeavors, including competitive procurement initiatives, which would result in material financial loss to LifeWorks and prejudice our competitive position within our industry.
- III. Finally, given the importance of confidentiality in the EFAP industry in general, the disclosure of any confidential client information exposes LifeWorks to the

risk of reputational damage if there is a perception within the industry that LifeWorks is not able to maintain the confidentiality of its clients' information.

[26] I will consider each subsection of 19(1)(c) of FOIP below:

a. Does section 19(1)(c)(i) of FOIP apply?

[27] My office uses the following two-part test to determine if section 19(1)(c)(i) of FOIP applies to a record:

1. What is the financial loss or gain being claimed?
2. Could the release of the record reasonably be expected to result in financial loss or gain to a third party?

[28] Below is an analysis to determine if the two-part test is met.

1. What is the financial loss or gain being claimed?

[29] “Financial loss or gain” must be monetary, have a monetary equivalent, or value (e.g. loss of revenue or loss of corporate reputation) (*Guide to FOIP*, Ch. 4., p. 211).

[30] In its submission, as quoted above, LifeWorks argued the release of the information could result in a “material financial loss.” However, without any further information, it is unclear what financial loss or gain that LifeWorks is claiming. Therefore, I find that the first part of the two-part test is not met. There is no need to consider the second part of the test. I find that section 19(1)(c)(i) of FOIP does not apply to the record at issue.

b. Does section 19(1)(c)(ii) of FOIP apply?

[31] My office uses the following two-part test to determine if section 19(1)(c)(ii) of FOIP applies to a record:

1. What is the prejudice to a third party's competitive position that is being claimed?

2. Could the release of the record reasonably be expected to result in the prejudice?

[32] Below is an analysis to determine if the two-part test is met.

1. *What is the prejudice to a third party's competitive position that is being claimed?*

[33] "Prejudice" in this context refers to detriment to the competitive position of a third party (*Guide to FOIP*, Ch. 4, p. 216).

[34] "Competitive position" means the information must be capable of use by an existing or potential business competitor, whether or not the competitor currently competes for the same market share. For example:

- Information that discloses the profit margin on a private company's operations;
- Marketing plans, including market research surveys, polls; or
- Information that reveals the internal workings of a private company.

(*Guide to FOIP*, Ch. 4, p. 216).

[35] In its submission, as quoted above, LifeWork claims its competitive position in the industry will be harmed if the information is released to competitors or potential clients. However, LifeWorks has not described how the information within the record at issue would be used by a competitor. Therefore, it is unclear what prejudice to its competitive position is being claimed. I find the first part of the two-part test is not met. There is no need to consider the second part of the test. I find that section 19(1)(c)(ii) of FOIP does not apply.

- c. **Does section 19(1)(c)(iii) of FOIP apply?**

[36] My office uses the following two-part test to determine if section 19(1)(c)(iii) of FOIP applies to a record:

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

[37] Below is an analysis to determine if the two-part test is met.

1. Are there contractual or other negotiations occurring involving a third party?

[38] A “negotiation” is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings conducted between two or more parties for the purpose of reaching an understanding. It connotes a more robust relationship than “consultation.” It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion (*Guide to FOIP*, Ch. 4, p. 221).

[39] Prospective or future negotiations could be included within this exemption, as long as they are foreseeable. It may be applied even though negotiations have not yet started at the time of the access to information request, including when there has not been any direct contact with the other party or their agent. However, a vague possibility of future negotiations is not sufficient. There must be a reasonable fact-based expectation that the future negotiations will take place (*Guide to FOIP*, Ch. 4, p. 221).

[40] In its submission, as quoted earlier, LifeWorks did not identify any contractual or other negotiations that were occurring. Furthermore, it did not identify any prospective or future negotiations that were foreseeable.

[41] As such, I find that the first part of the two-part test is not met. There is no need to consider the second part of the two-part test. I find that section 19(1)(c)(iii) of FOIP does not apply.

[42] Since PSC indicated it is prepared to release the record to the Applicant, and since the third party, LifeWorks, has not demonstrated that either sections 19(1)(b) and (c) of FOIP apply to the record at issue, I recommend that PSC release the record at issue to the Applicant.

IV FINDINGS

[43] I find that section 19(1)(b) of FOIP does not apply to the record at issue.

[44] I find that section 19(1)(c) of FOIP does not apply to the record at issue.

V RECOMMENDATION

[45] I recommend that PSC release the record at issue to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 20th day of July, 2022.

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