



REVIEW REPORT 323-2021

Ministry of Highways

December 5, 2022

Summary: The Ministry of Highways (Highways) received an access to information request from the Applicant. Highways withheld portions of the records pursuant to subsections 17(1)(a), (b)(i), 19(1)(b), (c)(i), (ii), 22(a) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found Highways properly applied subsection 19(1)(b) of FOIP and subsection 17(1)(a) of FOIP to some parts but not others, and that it did not properly apply subsections 17(1)(b)(i), 22(a) and 29(1) of FOIP. The Commissioner recommended that Highways continue to withhold or release information accordingly.

I BACKGROUND

[1] On February 1, 2021, the Ministry of Highways (Highways) received an access to information request from the Applicant as follows:

Tender [number redacted]

All internal Ministry correspondence with respect to the award of Tender [number redacted], including contractor evaluation reports, scoring, internal memos, and recommendations. All written policies and procedures pertaining to the evaluation of how projects are scored and weighted.

All correspondence regarding control section selection/deletion specifically regarding [reference redacted] Oct. 15, 2020, to Nov. 23, 2020 [timeframe].

[2] Highways did not respond within the legislative timelines, as found in my office's [Review Report 021-2021, 022-2021, 023-2021](#) which was issued on August 31, 2021. The

recommendation in that report was that Highways complete processing the Applicant's three access to information requests, provide a properly executed section 7 decision in each case to the Applicant and to my office, and refund the deposits already paid by the Applicant. The section 7 decision was sent November 17, 2021. The section 7 decision indicated Highways was withholding access to records pursuant to subsections 17(1)(a), (b)(i), 19(1)(b), (c)(i), (ii), 22(a) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [3] On January 29, 2022, the Applicant submitted a request for review to my office.
- [4] On January 28, 2022, my office provided notification to the Applicant and to Highways and a third party (Morsky Construction) of my office's intention to undertake this review.
- [5] On March 28, 2022, the third party provided a submission to my office. On July 7, 2022, Highways provided my office with its submission. The Applicant provided a submission on September 29, 2022.

II RECORDS AT ISSUE

- [6] Highways has divided the records into 3 sets (A, B and C) and applied its redactions as follows:

	Page Number	Description	FOIP Exemption(s) Applied	Full or partial severance
A	165	Bid Submission (third party)	19(1)(b), 19(1)(c)	Partial
	166	Bid Submission (third party)	19(1)(b), 19(1)(c)	Partial
	172	Bid Submission (third party)	19(1)(b), 19(1)(c)	Partial
	175	Bid Submission (third party)	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii)	Full
	176	Bid Submission (third party)	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii)	Full

187	memo	19(1)(b), 19(1)(c)	Partial
188-240	CPE-WZTA	17(1)(a), 17(1)(b)(i)	Full
241-243	H30126 Memo	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii)	Partial
244	Bid Submission (third party)	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii)	Partial
245	Bid Submission (third party)	19(1)(b), 19(1)(c)	Partial
247	Bid Submission (third party)	19(1)(b), 19(1)(c)	Partial
248	Bid Submission (third party)	19(1)(b), 19(1)(c)	Partial
249	Bid Submission (third party)	19(1)(b), 19(1)(c)	Partial
250	Bid Submission (third party)	19(1)(b), 19(1)(c)	Partial
251	Bid Submission (third party)	19(1)(b), 19(1)(c)	Partial
254	Bid Submission (third party)	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii)	Full
255	Letter (third party name)	29(1)	Partial
255	Letter (third party)	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii)	Partial
258	Bid Submission (third party)	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii)	Partial
259	Bid Submission (third party)	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii)	Partial
261	Bid Submission (third party)	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii)	Partial
262	Bid Submission (third party)	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii)	Partial
263	Bid Submission (third party)	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii)	Partial
264	Bid Submission (third party)	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii)	Partial
265	Bid Submission (third party)	19(1)(b), 19(1)(c)	Partial
268	Bid Submission (third party)	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii)	Full
270	Attachment - contract details	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii)	Partial
271	Director's Resolution	19(1)(b), 19(1)(c)	Full
272	Director's Resolution	19(1)(b), 19(1)(c)	Full
273-274	Contract	17(1)(a), 17(1)(b)(i)	Full

B	25	Email	17(1)(a), 17(1)(b)(i)	Partial
	30	Attachment-spreadsheet	17(1)(a), 17(1)(b)(i)	Partial
	31	Attachment-spreadsheet	17(1)(a), 17(1)(b)(i)	Partial
	32	Attachment-spreadsheet with pivot tables	17(1)(a), 17(1)(b)(i)	Full
	42	Email	17(1)(a), 17(1)(b)(i)	Partial
	44	Email	17(1)(a), 17(1)(b)(i)	Partial
	46	Attachment - Pivot table	17(1)(a), 17(1)(b)(i)	Full
	47	Email	22(a)	Partial
	48	Email	22(a)	Partial
	49	Email	22(a)	Partial
C	1	Email	17(1)(a), 17(1)(b)(i),	Partial
	1	Email	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii)	Partial
	3	Email	17(1)(a), 17(1)(b)(i)	Partial
	Attachment 5	Estimate sheet	17(1)(a), 17(1)(b)(i)	Full
	38	Email	17(1)(a), 17(1)(b)(i)	Partial

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[7] Highways is a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Morsky Construction is a “third party” pursuant to subsection 2(1)(j) of FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did Highways properly apply section 17(1)(a) of FOIP?

[8] Highways severed Record A pages 188 to 240, 273, 274, Record B pages 32 and 46, and Attachment 5 in Record C in full. Highways also severed Record B pages 25, 30, 31, 42,

44, and Record C pages 1, 3 and 38, in part. Highways severed this information subject to subsection 17(1)(a) of FOIP, which provides:

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

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

[9] My office uses the following two-part test to determine if subsection 17(1)(a) of FOIP applies:

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

(*Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated April 30, 2021, pp. 124 to 126).

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

[10] Highways stated that the records in question involve advice, recommendations, analyses and proposals.

[11] “Advice” is guidance offered by one person to another. It can include the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice encompasses material that permits the drawing of inferences with respect to a suggested course of action, but which does not in itself make a specific recommendation. It can be an implied recommendation. The “pros and cons” of various options also qualify as advice. It should not be given a restricted meaning. Rather, it should be interpreted to include an opinion that involves exercising judgement and skill in weighing the significance of fact. It includes expert opinion on matters of fact on which a government institution must make a decision for future action (*Guide to FOIP*, Ch. 4, p. 124).

- [12] Advice includes the views or opinions of a public servant as to the range of policy options to be considered by the decision-maker even if they do not include a specific recommendation on which option to take. Advice has a broader meaning than recommendations. The legislative intention was for advice to have a distinct meaning from recommendations. Otherwise, it would be redundant. While “recommendation” is an express suggestion, “advice” is simply an implied recommendation (*Guide to FOIP*, Ch. 4, pp. 124 to 125).
- [13] 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 (*Guide to FOIP*, Ch. 4, p. 125).
- [14] “Analyses” (or analysis) is the detailed examination of the elements or structure of something; the process of separating something into its constituent elements (*Guide to FOIP*, Ch. 4, p.125).
- [15] A “proposal” is something offered for consideration or acceptance (*Guide to FOIP*, Ch. 4, p. 125).
- [16] In its submission, Highways provided the following:

The information withheld on pages 188-240 of Record A are performance evaluations and ratings of third-party contractors. Highways submits that this information qualifies as analyses. These analyses were developed by an official in the Ministry of Highways and in some cases in conjunction with a Highways consultant for Highways.

The information that is withheld on pages 273-274 of Record B contains advice and recommendations with respect to a Highways tender. The advice and recommendations were provided by Highways official for another official.

The information withheld on page 25 of Record B presents a projected estimate of cost for the advancement of three projects scheduled for two years out to be advanced to the current construction season. The estimate of cost prepared by a ministry official qualifies as advice, analyses, and recommendations from a ministry official to another official.

Pages 30-32 of Record B is a spreadsheet titled 2021 Medium and Light Program. The information withheld on pages 30-32 of Record B under nine of the columns present proposals and recommendations for planning projects for future years. The information also includes recommendations for the type of treatment and cost and budget estimates as such qualifies as advice, proposals, and recommendations. The information in the comment's column contains advice and recommendations regarding project specific aspects. The spreadsheet was developed by an official from Highways.

There is one small redaction on page 42 of Record B which is the proposal of budget cost of a project provided by an official of Highways.

The information withheld on page 44 of Record B is the proposal of costs for several projects. Proposal costs are an analysis of criteria, and a recommendation developed by an official of Highways.

The information withheld on page 46 of Record B contains recommendations on Level of Service developed by a Highways official.

The information withheld on page 1 of Record C presents Ministry project cost estimate which qualifies as advice, proposal and recommendation developed by a Highways official for another Highways official.

The information withheld on page 3 of Record C is an attachment listed in the email, titled Quantity Cost Sheet [Attachment 5]. The attachment, withheld in full, is a one-page Quantities and Cost Estimate sheet presenting analyses and recommendations of proposed quantities and costs for a project developed by a Highways official.

The information withheld on page 38 of Record C is the analyses and recommendation of a Highways official to another official in an email regarding recommended response to a question received.

Highways submits that the above mentioned information meets the requirements for an exemption from disclosure pursuant to s. 17(1)(a) and was withheld appropriately.

[17] Subsection 17(1)(a) of FOIP 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. Upon review of the record, most of the redacted portions where Highways applied this exemption contain advice, proposals, recommendations or analyses as follows:

- Pages 188 to 240 of Record A appear to be performance evaluations and ratings of third-party contractors conducted by Highways for the use of Highways. This information appears to be providing advice to Highways on which contractor to choose.
- Pages 273 and 274 of Record A appear to be a contract award. The document appears to be primarily advice and recommendations between Highways' employees.
- Pages 30 to 32 of Record B appear to be spreadsheets which include recommendations for the type of treatment and cost and budget estimates for a project. This information also appears to be providing advice as to costs and treatment options for Highway's projects.
- Page 38 of Record C is an email from one employee of Highways to another, one paragraph of which was severed. The severed email appears to be providing recommendations regarding Contractor Performance Evaluations.
- Attachment 5, which is a quantities and costs estimate sheet, with information on units, qualities, price, costs, and other information. On review of this attachment, it does appear to be analyses or recommendations of proposed quantities and costs for a project developed by a Highways' official.

[18] I am satisfied that the portions of pages 188 to 240, 273 and 274 of Record A, pages 30, 31, 32 of Record B and page 38 and Attachment 5 of Record C where Highways applied subsection 17(1)(a) of FOIP contain advice, proposals, recommendations or analyses, which meets the first part of the test, and I will consider the second part of the test. I note the following exceptions, which upon review of the record do not appear to contain advice, proposals, recommendations or analyses:

- The redaction on page 25 of Record B is a single sentence that is just a total dollar amount. In its submission, Highways asserted that this is a projected estimate of costs for the advancement of three projects scheduled for two years out to be

advanced to the current construction season. Highways asserted that this qualifies as advice, analyses, and recommendations, but did not go into detail about how it qualifies as such.

- The redaction on page 42 of record B is simply a dollar amount in a column marked “Approved Cost Budget”. In the submission, Highways did not state in what way this approved cost budget is advice, proposals, recommendations or analyses.
- The redaction on page 44 of Record B is the proposal of costs for several projects. This document only has a single sentence severed, describing the cost of projects and does not appear to be providing advice, proposals, recommendations or analyses.
- Highways redacted page 46 of Record B in its entirety. The explanation provided in the submission was solely that it contains recommendations on levels of service. Highways provided no additional arguments as to what recommendations are being forwarded. The page itself appears to be two pivot tables, and several lines with what appear to be random letters. No explanation was provided as to how this table qualifies as analysis or recommendations.
- Highways redacted a single row of a spreadsheet on page 1 of Record C. Highways redacted the Bidder, the bid amount, site occupancy days and dollar amount, and the total. Highways asserts that Ministry project cost estimates qualifies as advice, proposal and recommendation developed by a Highways official for another Highways official. While Highways has asserted this, it did not explain who developed it, what it was developed for, or provide evidence that this estimate is in fact advice, proposals, or recommendations.
- Highways also severed one of the names of the attachments to an email on page 3 of Record C. The other links to the other attachments are not severed, and the single attachment name does not appear to provide any information not found in the unredacted body of this email. Highways stated, “the attachment, withheld in full, is a one-page Quantities and Cost Estimate sheet presenting analyses and recommendations of proposed quantities and costs for a project developed by a Highways official.” However, it provided no argument as to why the name of the attachment should be considered advice, proposals, or recommendations.

[19] As the portions I mentioned above have not met the first part of the test, there is no need to consider the second part of the test. I will, however, consider Highways’ application of subsection 17(1)(b)(i) of FOIP to these same portions. Before doing that, I have to consider the application of the second part of the test under subsection 17(1)(a) of FOIP as it applies to 188 to 240, 273 and 274 of Record A, pages 30, 31, 32 of Record B and page 38 and Attachment 5 of Record C.

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?

[20] The advice, proposals, recommendations, analyses and/or policy options can be developed by or for a government institution other than the one relying on the exemption (*Guide to FOIP*, Ch. 4, p.126).

[21] “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 the government institution and at its request (*Guide to FOIP*, Ch. 4, p.126).

[22] Having reviewed the record, I am satisfied that the portions of pages 188 to 240, 273 and 274 of Record A, pages 30, 31, 32 of Record B and page 38 of Record C were created or developed for a government institution or member of the Executive Council. The documents appear to have been created by Highways’ officials and were used by the Highways’ officials in evaluating contracts. For example, the document on pages 273 to 274 appears to have been created by an employee of Highways and includes discussion and recommendation between various Highways employees on the course of action to be taken. I am satisfied that the second part of the test applies to these portions of the records.

[23] As both parts of the test are met, I find that Highways properly applied subsection 17(1)(a) of FOIP to pages 188 to 240, 273 and 274 of Record A, pages 30, 31, 32 of Record B and page 38 and Attachment 5 of Record C. I recommend Highways continue to withhold this information pursuant to subsection 17(1)(a) of FOIP. As I found that subsection 17(1)(a) of FOIP did not apply to portions of pages 25, 42 and 44, the entirety of 46 of Record B, a single row on page 1 and the name of the attachment on page 3 of Record C, I will consider the application of subsection 17(1)(b)(i) to those portions next.

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

[24] Subsection 17(1)(b)(i) of FOIP provides:

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

...

(b) consultations or deliberations involving;

(i) officers or employees of a government institution;

[25] My office uses the following two-part test when deciding whether subsection 17(1)(b)(i) of FOIP applies:

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

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

[26] “Consultation” means:

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

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

[27] A consultation can occur when the views of one or more officers or employees of a government institution are sought as to the appropriateness of a particular proposal or suggested action. It can include consultations about prospective future actions and outcomes in response to a developing situation. It can also include past courses of action. For example, where an employer is considering what to do with an employee in the future, what has been done in the past can be summarized and would qualify as part of the consultation or deliberation (*Guide to FOIP*, Ch. 4, p. 132).

[28] “Deliberation” means:

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

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

[29] Highways provided the following:

The information withheld on page 25 of Record B presents a projected estimate of cost for the advancement of three projects scheduled for two years out to be advanced to the current construction season. The projected estimate and project advancement is the subject of Highways officials' deliberations.

...

There is one small redaction on page 42 of Record B which is the proposal of budget cost of a project. These proposal budget costs include the consultations and deliberations by Highways' officials.

The information withheld on page 44 of Record B is the proposal of costs for several projects and reached through open consultations with Highways' officials to make decisions.

The information withheld on page 46 of Record B contains recommendations on Level of Service. The deliberation of these recommendations Highways officials developed; an informed decision would be made.

The information withheld on page 1 of Record C presents Ministry project cost estimates that are developed through consultation and deliberations with Highways officials which qualifies as reasonably expected to disclose consultations and deliberations of Highways officials.

The information withheld on page 3 of Record C is an attachment listed in the email, titled Quantity Cost Sheet. The attachment is withheld in full, and is a one-page Quantities and Cost Estimate sheet presenting analyses and recommendations of proposed quantities and costs for a project developed by a Highways official. The information included in the Estimate sheet is the substance of Highways officials' deliberations.

[30] The entire explanation of the application of subsection 17(1)(b)(i) to the remaining portions of the record is replicated above. Highways bears the burden of proof when it claims that access should or must be refused under FOIP. Subsection 61 of FOIP provides 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.

[31] The explanations provided by Highways has not gone into sufficient detail to meet the burden of proof that there are consultations or deliberations involving officers or employees of a government institution. For example, the redaction on page 25 of Record B is just a total dollar amount, which is not enough information to conclude that it is or was a part of a consultation or deliberation.

[32] Highways has also not sufficiently explained how the cost on page 42 of Record B constitutes consultations or deliberations. The severed information on this page is simply a dollar amount. A dollar amount could potentially be a consultation or deliberation, but argument and evidence would be required to make this conclusion. Simply asserting this severed portion is a proposal of budget cost of a project is insufficient.

[33] As I stated earlier in this Report, the redaction on page 44 of Record B is the proposal of costs for several projects. This document only has a single sentence severed which includes a dollar amount. Highways has not shown how this sentence is a consultation or a deliberation.

[34] Highways redacted page 46 of Record B in its entirety stating that this page contained recommendations on level of service, and that the deliberation of these recommendations were developed by officials to facilitate an informed decision. Again, as stated in my analysis of the application of subsection 17(1)(a) of FOIP above, this page appears to be two pivot tables, and several lines with what appear to be random letters. Highways has not provided sufficient explanation as to how this would be considered consultations or deliberations. It has asserted that this document contains “recommendations on Level of

Service”, but did not provide evidence of this, or an explanation in what way it is or if it contains recommendations.

[35] Highways redacted a single row of a spreadsheet on page 1 of Record C. Highways redacted the bidder, the bid amount, site occupancy days and dollar amount, and the total. Highways asserts that the information withheld on page 1 of Record C presents Highways’ project cost estimates that are developed through consultation and deliberations with Highways officials which could be reasonably expected to disclose their consultations and deliberations. It is not clear that deliberations were being undertaken or by who. The severed portions appear to be the bidder, bid amount and site occupancy. While this may be included in a deliberation of some sort, Highways has not provided sufficient evidence to conclude that it was used in a consultation or deliberation.

[36] As above, Highways severed one of the names of the attachment to an email on page 3 of Record C. No argument was provided as to how the name of the attachment can be considered a consultation or deliberation.

[37] As the first part of the test has not been met for pages 42, 44 and 46 of Record B and pages 1 and 3 of Record C, I find that Highways did not properly apply subsection 17(1)(b) of FOIP to these pages and recommend it release them.

4. Did Highways properly apply subsection 19(1)(b) of FOIP?

[38] Highways applied subsection 19(1)(b) of FOIP to parts of pages 165, 166, 172, 187, 241 to 243, 244, 245, 247 to 251, 255, 258, 259, 261 to 265, and 270 of Record A, and to a portion of a table on page 1 of Record C. It also severed pages 175, 176, 254, 268, 271 and 272 in full pursuant to subsection 19(1)(b) of FOIP.

[39] Subsection 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;

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

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?
2. Was the information supplied by the third party to a government institution?
3. Was the information supplied in confidence implicitly or explicitly?

(*Guide to FOIP*, Ch. 4, pp. 200-201)

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

[41] Regarding its reliance on subsection 19(1)(b) of FOIP, Highways stated as follows:

The bid documents contain confidential commercial information, specifically they contain unit estimates to complete the work and unit pricing to perform work. Including costs associated with managing Covid 19 on site.

[42] “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).

[43] The *Guide to FOIP* provides an example of a similar case to this one:

In Review Report 054-2015 and 055-2015, the Commissioner considered the equivalent provision, subsection 18(1)(b), in LA FOIP. An applicant had made an access to information request to the City of Regina (City) for a tender and contract related to a street infrastructure project. The records involved were two documents titled, Form of Tender. The applicant was only interested in the unit prices and total prices severed from the two documents. The City withheld this information in part under subsection 18(1)(b). The City asserted that the unit prices disclosed pricing and

pricing practices of the third parties involved in a competitive contract award process. **The Commissioner found the unit prices and total prices constituted commercial and financial information of the third parties.** The City asserted that the tender package supplied by the City to bidders contained a blank Form of Tender. Bidders entered their specific data in Schedule A of the form and returned it to the City as part of their bid package. Based on this, the Commissioner found that the third parties supplied the unit prices and total prices. The City asserted that clause 19 of the Instructions to Bidders issued by the City indicated that financial and commercial information supplied by bidders would be supplied in confidence. Based on this, the Commissioner found that the unit pricing and total prices were supplied explicitly in confidence. As all three parts of the test were met, the Commissioner found that subsection 18(1)(b) of LA FOIP was appropriately applied (*Guide to FOIP*, Ch. 4, p. 206).

[Emphasis added]

- [44] In addition, in my office's [Review Report 336-2017](#) concerning Chinook School Division No. 211, I stated as follows at paragraph [27]:

The information recorded in the table that the School Division identified as responsive to the Applicant's request is data provided by the third party vendors in the bids submitted. The information submitted by the vendors in response to the Invitation to Tender qualifies as financial and commercial information.

- [45] The portions to which Highways applied subsection 19(1)(b) of FOIP include documents such as "Bid Forms" or "Director's Resolution". Attached to them are supplementary documents or information regarding conditions for providing the service. It appears that various companies submitted proposals regarding a resurfacing job.

- [46] In my office's [Review Report 031-2015](#) concerning Saskatchewan Government Insurance (SGI), I stated as follows at paragraph [32]:

I considered all of the submissions received. The Applicant argues that SGI should apply severing to the third party's proposal packages. However, it is clear that the contents of the proposals as a whole were created by the third parties with the aim of winning contracts with SGI. Commercial information relates to a commercial enterprise, but it need not be proprietary in nature or have an independent market or monetary value. It is sufficient if the information is associated with the buying, selling or exchange of the entity's goods or services. **The information in the proposals relates to the buying or selling of goods and services. Therefore, I find that the entire proposal packages submitted by the third parties to SGI constitute third**

party commercial information. This approach is consistent with other jurisdictions (e.g. BC IPC Order F09-22, Ontario IPC Order MO-3179).

[Emphasis added]

[47] Upon review of the record, the information where Highways applied subsection 19(1)(b) of FOIP appears to be bid information that relates to the exchange of services, and so is commercial in nature. I am satisfied that commercial information is involved and will consider the second and third parts of the test.

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

[48] “Supplied” means provided or furnished (*Guide to FOIP*, Ch. 4, p. 200).

[49] Third parties who were interested in the competition related to this matter “supplied” information to Highways, a government institution, for consideration. In my office’s [Review Report 236-2017](#) concerning Water Security Agency (WSA), I considered a similar circumstance at paragraph [39] whereby third-party vendors supplied bid information to WSA for consideration. I am satisfied the information was “supplied” by a third-party to Highways, which meets the second part of the test.

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

[50] In order for the third part of the test to apply, the information must have been supplied in confidence either implicitly or explicitly. “Implicitly” means that confidentiality is understood, even though there is no actual agreement or statement of confidentiality. “Explicitly” means confidentiality has been clearly stated, such as through documentary evidence showing the information was supplied with the understanding the government institution would keep it confidential. The expectation of confidentiality must be reasonable and have an objective basis (*Guide to FOIP*, Ch. 4, p. 202).

[51] Regarding this part of the test, Highways provided the following:

Unit estimates and unit prices are closely guarded secrets in the roadbuilding industry. Each contractor creates its estimates (and its unit prices) using a combination of experience and industry knowledge unique to that contractor. Harm would result from disclosure and production of the Bid Documents; the disclosure and production would put the contractor at a significant competitive disadvantage. More specifically, contractor's internal estimates-derived from its years of experience and industry knowledge as a successful road builder and micro surfacing contractor-would be exposed to an unidentified third party, the applicant, who may be one of the contractors' competitors.

Estimates to properly manage Covid-19 on a worksite can be a significant variable in pricing between bidders. Disclosure and production of the contractors estimates to manage Covid-19 for the Work would invariably assist the contractors' competitors in anticipating bids and obtaining an advantage over the contractor in the bid evaluation process.

Even if the unidentified applicant is not a competitor, the disclosure and production of the Bid Documents would strip contractor's unit estimates and pricing of their confidentiality, leaving it open to competitors to obtain the same information. This would cause significant commercial harm to the contractor.

...

Bid Documents were supplied in confidence.

...

Included with SaskBuilds' call for tenders was the Contract. **It expressly promised confidentiality for all bidders.** The only exceptions to the promises of confidentiality were: (i) for the successful bidder, who would be publicly identified; and (ii) the "apparent Total Amount of Bid" for all bidders. These promises of confidentiality were included in the following provisions of the Contract (as included with SaskBuilds' call for tenders):

[Emphasis added]

- [52] Highways then went on to quote part of the contract which it says is included with all SaskBuilds' call for tenders:

1100.11 BID RESULTS

1100.11.1 Bids will not be publicly opened. Upon award, Bid results will be posted on www.sasktenders.ca. This will include the name of the Bidder and the apparent Total Amount of Bid for all bids. Unit prices will not be announced.

1200.12 CONFIDENTIALITY

1200.12.1 Except as provided for in Subsection 1100.11.1, all Bids will be kept confidential.

[53] Highways provides a compelling case. It appears to me that a third-party entering a competitive process with the Government of Saskatchewan would understand, given what is expressly stated in materials such as the bid form and procurement guidelines, that confidentiality is expected and should be mutually understood. As such, I am satisfied that information supplied by third parties in the context is supplied explicitly in confidence.

[54] As all three parts are met, I find Highways properly applied subsection 19(1)(b) of FOIP as I have described in paragraph [38] of this Report. I recommend it continue to withhold this information pursuant to subsection 19(1)(b) of FOIP. Because I found subsection 19(1)(b) of FOIP applies to this information, I do not need to consider Highways application of subsections 19(1)(c)(i) or (ii) of FOIP to these same portions

5. Did Highways properly apply subsection 22(a) of FOIP?

[55] Highways applied subsection 22(a) of FOIP to three emails sent from the same individual who does not appear to be a solicitor. Highways severed a single sentence on page 47, two sentences on page 48, and a single sentence on page 49 of Record B. Subsection 22(a) of FOIP provides:

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;

[56] There are several types of privilege. The only privilege that appears to be presented in Highways' submission is common interest privilege. In its submission, Highways provides:

The information withheld on pages 47-49 of Record B contains a sentence on each page the substance of which, is reference to a Highways contracts dispute negotiation. Negotiation regarding a contract dispute is managed through legal counsel for all parties involved.

Common interest privilege is also a privilege that is available within the meaning of s. 22(a). **It is submitted that common interest privilege is applied to prevent solicitor-**

client privilege from being waived that it is therefore presumed to be *prima facie* confidential pursuant to s. 22(a). A head may refuse to give access to information that is subject to common law privilege pursuant to s. 22(a).

[Emphasis added]

[57] “Common interest privilege” is a privilege that exists when records are provided among parties where several parties have a common interest in anticipated litigation. Disclosure of privileged information to outsiders generally constitutes as a waiver of privilege. However, if there is a sharing of information between parties where the parties have a sufficient “common interest”, then the privilege is preserved (or not waived). The following two-part test can be applied:

1. Does the record contain information that is subject to any privilege that is available at law?
2. Do the parties who share the information have a “common interest”, but not necessarily an identical interest, in the information

(*Guide to FOIP*, Ch. 4, pp. 268-269)

[58] For the first part of the test, the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under subsection 22(a) of FOIP (*Guide to FOIP*, Ch. 4, p. 269).

[59] The records in question involve three email exchanges. The emails appear to be between an engineer working for Highways, and Highway’s staff members. In searching the government directory and the Law Society of Saskatchewan website, none of the individuals appear to be solicitors. Even if this information was gathered from a solicitor, this information is being used in a communication between parties who are not the solicitor. Further, it is not clear how the withheld portions are discussing any legal advice, and while Highways stated the withheld information involves contract dispute negotiations, it provided no further details on such negotiations.

[60] As the first part of the test is not met, I find that Highways did not properly apply subsection 22(a) of FOIP to pages 47, 48 or 49 of Record B. As Highways applied no other exemptions to these pages, I recommend it release this information.

6. Did Highways properly apply subsection 29(1) of FOIP?

[61] Highways applied subsection 29(1) of FOIP to a name on page 255 of Record A. Subsection 29(1) of FOIP provides:

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.

[62] Subsection 29(1) of FOIP protects the privacy of individuals whose personal information may be contained within records responsive to an access to information request made by someone else (*Guide to FOIP*, Ch. 4, p. 281).

[63] When dealing with information in a record that appears to be personal information, the first step is to confirm the information indeed qualifies as personal information pursuant to subsection 24 of FOIP (*Guide to FOIP*, Ch. 4, p. 281).

[64] Subsection 24(1) of FOIP defines “personal information” and provides some examples of the types of information that can be considered personal information. The list of examples of personal information is not exhaustive. To qualify as personal information, the information must, 1) be about an identifiable individual, and 2) be personal in nature.

[65] Highways submitted as follows:

The information withheld on page 255 of Record A is the personal name to which the letter is addressed and qualifies as identifiable personal information.

[66] The information released to the Applicant indicates that this letter was provided to “Morsky Construction”. The name of the individual the letter was addressed to was severed. In

numerous past reports, I have stated that such information when used in a business context is not personal information. I find, then, Highways did not properly apply subsection 29(1) of FOIP to the name on page 255 of Record A and recommend Highways release the information where it applied subsection 29(1) of FOIP.

IV FINDINGS

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

[68] I find Highways properly applied subsection 17(1)(a) of FOIP as I have outlined at paragraph [23] of this Report.

[69] I find Highways did not properly apply subsection 17(1)(b) of FOIP as I have outlined at paragraph [37] of this Report.

[70] I find Highways properly applied subsection 19(1)(b) of FOIP as I have outlined at paragraph [54] of this Report.

[71] I find Highways did not properly apply subsection 22(a) of FOIP as I have outlined at paragraph [60] of this Report.

[72] I find Highways did not properly apply subsection 29(1) of FOIP as I have outlined at paragraph [66] of this Report.

V RECOMMENDATIONS

[73] I recommend Highways continue to withhold the information where it applied subsection 17(1)(a) of FOIP as I have outlined at paragraph [23], and where it applied subsection 19(1)(b) of FOIP as I have outlined at paragraph [54].

[74] I recommend Highways release the information in the records where it applied subsection 17(1)(b)(i) of FOIP as I have outlined at paragraph [37], where it applied subsection 22(a) of FOIP as I have outlined at paragraph [60], and where it applied 29(1) of FOIP as I have outlined at paragraph [66] within 30 days of issuance of this Report.

Dated at Regina, in the Province of Saskatchewan, this 5th day of December, 2022.

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