



REVIEW REPORT 324-2021

Ministry of Highways

November 8, 2022

Summary:

The Ministry of Highways (Highways) received an access to information request from the Applicant that was subject to a review by the Commissioner. In Review Report 021-2021, 022-2021, 023-2021, the Commissioner recommended that Highways complete processing the requests made by the Applicant and provide a section 7 response. With respect to one of those access to information requests, Highways responded to the Applicant on November 21, 2021. Highways withheld portions of the records pursuant to subsections 17(1)(a), (b)(i), (c), 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, but that it did not properly apply subsection 29(1) of FOIP. Regarding the remaining exemptions, which were discretionary, the Commissioner found that Highways did not meet the burden of proof in demonstrating that those exemptions applied. The Commissioner recommended that Highways continue to withhold information in the records where it applied subsection 19(1)(b) of FOIP, and that it release the remaining information.

I BACKGROUND

[1] On August 31, 2021, my office issued Review Report 021-2021, 022-2021, 023-2021 requesting that Highways complete processing the Applicant's three access to information requests and provide a properly executed section 7 response including the Applicant's request, 20-028G, that requested the following:

Tender [number redacted]

All internal Ministry correspondence with respect to the award of [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] With respect to the Applicant's request 20-028G, on November 21, 2021, Highways responded indicating it 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 December 2, 2021, the Applicant asked my office for a review of Highways' decision.
- [4] On January 28, 2022, my office provided notification to the Applicant, Highways and a third party of my office's intention to undertake a review.
- [5] On January 26, 2022, Highways provided my office with copies of the records and its index of records (index). I note Highways additionally applied subsection 17(1)(c) of FOIP to one part of the records and its index.
- [6] The Applicant provided a submission on September 29, 2022.
- [7] My office's notification of January 26, 2022 initially requested Highways provide its submission to my office by March 29, 2022. My office asked Highways several times for an update regarding when Highways would forward its submission. On September 28, 2022, my office advised Highways that my office would proceed without Highways' submission if Highways did not provide one by September 30, 2022. As of this date, my office has not received a submission from Highways. As such, I am proceeding with my review without a submission from Highways.

II RECORDS AT ISSUE

[8] Highways divided the records into 4 sets (A, B, C and D) and applied its redactions as follows to records A, B and C (Highways released records D in full to the Applicant):

Record	Page Range	Description	FOIP Exemptions Applied	Partial or Full
A9	74 to 82; 84, 85	Bid Submission (third party)	19(1)(b), (c)(i)(ii)	Partial
A11	96-148	CPE WZTA	17(1)(a)	Full
A12	149	Memo	17(1)(a)	Partial
A13	150 to 153	Memo	17(1)(a), (c)	Partial
A14	154, 155, 157 to 161, 164 to 166, 169 to 172, 175	Bid Submission (third party)	19(1)(b), (c)(i)(ii)	Partial
A15	176, 177	Director's Resolution	19(1)(b), (c)(i)(ii)	Full
A16	178	Letter	19(1)(b), (c)(i)(ii), 29(1)	Partial
A17	182 to 185, 187 to 191, 194	Letter Bid/Submission (third party)	19(1)(b), (c)(i)(ii), 29(1) (29(1) applied only to page 178)	Partial
A24	259	Screenshot	17(1)(a), (b)(i)	Full
B2	7, 12 to 14	Email	17(1)(a), (b)(i)	Partial (page 14 full)
B7	34	Email	17(1)(a), (b)(i)	Partial
B9	47, 48	Email	17(1)(a), (b)(i)	Partial
B10	55	Email	17(1)(a), (b)(i)	Partial
B11	61, 65, 55	Email	17(1)(a), (b)(i)	Partial
B14	76, 80	Email	22(a)	Partial
B16	85	Email	17(1)(a), (b)(i)	Partial
B17	90	Email	22(a)	Partial
C1	1	Email	17(1)(a), 19(1)(b), (c)(i)(ii)	
C2	3	Email	17(1)(a), (b)(i)	Partial
	Attachment 4	Attachment	17(1)(a), (b)(i)	Full
C5	41 to 46, 48 to 52, 55 to 58	Attachments	19(1)(b), (c)(i)(ii)	Partial or Full
C6	60	Email	17(1)(a), (b)(i)	Partial

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

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

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

[10] 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.

[11] 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. Subsection 29(1) of FOIP requires the government institution to have the consent of the individual whose personal information is in the record prior to disclosing it (*Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated April 30, 2021 [*Guide to FOIP*, Ch. 4], p. 281).

[12] 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 section 24 of FOIP (*Guide to FOIP*, Ch. 4, p. 281). Although I do not have a submission from Highways, as is a mandatory exemption, I will still review Highways’ reliance on subsection 29(1) of FOIP.

[13] Highways applied subsection 29(1) of FOIP to A16 (page 178), A17 (page 182) and C5 (page 56). The information released to the Applicant indicates these are all letters provided to the third party. Highways sent each letter to a company official. 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

these portions of the records and recommend Highways release the information where it applied subsection 29(1) of FOIP.

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

[14] Subsection 19(1)(b) of FOIP provides as follows:

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;

[15] Subsection 19(1)(b) of FOIP is a mandatory exemption. As previously noted in this Report, I do not have a submission from Highways. Because these are mandatory exemptions, however, I will conduct my analysis on the face of the records.

[16] 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)

[17] Highways applied subsection 19(1)(b) of FOIP as follows:

Group	Page Numbers
A9	74 to 82; 84, 85
A14	154, 155, 157 to 161, 164 to 166, 169 to 172, 175
A15	176, 177
A16	178
A17	182 to 185, 187 to 191, 194
C1	1

C5	41 to 46, 48 to 52, 55 to 58
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1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?

[18] On the face of the records, the portions of group A records where 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. These appear to relate to proposals submitted by various companies in relation to a resurfacing job. Group C records contain copies of some of the same information as contained in Group A records (specifically pages 41 to 58 where subsection 19(1)(b) of FOIP appears). Page 1 of group C records contains a table that summarizes individual bidder item amounts that Highways appears to have taken from the bidding documents.

[19] In my office’s [Review Report 031-2015](#), I stated as follows at paragraph [32]:

[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).

[20] “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). Similar to what I stated in Review Report 031-2015, the information where Highways applied subsection 19(1)(b) of FOIP is bid information that relates to the exchange of services, and so I am satisfied that I am dealing with commercial information. As such, I will consider the second and third parts of the test.

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

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

[21] Next, “supplied” means provided or furnished (*Guide to FOIP*, Ch. 4, p. 200). Information that does not qualify includes the contents of a contract.

[22] Third parties who were interested in the competition related to this matter supplied information to Highways for consideration. I am satisfied the information was supplied by a third party to Highways.

[23] The information, then, 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).

[24] Without arguments from Highways, I need to consider whether the records themselves were somehow marked in a way that makes the information explicitly confidential, or if confidentiality would be understood based on the content or context of the records (or on something else). I note the following, which was released to the Applicant, was stated in a bid form:

13.13.3 Bidders may make inquiries on matters they consider to be confidential. Bidders must designate such inquiries as “confidential” in subject line. If the Ministry agrees with the Bidder’s designation of an inquiry as confidential, the Ministry will provide a response only to the Bidder that submitted the confidential inquiry. If the Ministry does not agree with the Bidder’s designation of an inquiry as confidential, it will advise the Bidder of its decision and decline to answer the question or resubmit as not confidential. Notwithstanding the foregoing, if the Ministry determines, in its sole discretion, that an inquiry designated as confidential is of general application or would provide a significant clarification to the General Provisions, Special Provisions or Bid Form, the Ministry may issue a clarification that deals with the same subject matter.

[25] I further note that the Government of Saskatchewan's [Procurement Guidelines](#) state as follows regarding confidentiality:

Suppliers may request clarification related to the RFP. The role of the contact person is to ensure that all non-proprietary questions that are raised, and responses given, are documented and shared with all participating suppliers in a timely manner.

Questions related to a proprietary solution should be held in confidence and not be disclosed to other suppliers without the owning supplier's permission. This allows suppliers to ask questions they normally might not if they knew the information would be revealed.

As the contact person is entrusted with or has access to information governed by the *Freedom of Information and Protection of Privacy Act* or the *Health Information Protection Act*, this individual must ensure the necessary confidentiality of public entity and third party information.

...

The evaluation committee is expected to adhere to the highest of standards of confidentiality and is not to discuss proposals or findings with any parties other than the evaluation committee or officials specifically authorized to be granted access to the evaluation materials or results.

[26] 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 of a bid or competition is supplied explicitly in confidence.

[27] As all three of the parts are met, I find Highways properly applied subsection 19(1)(b) of FOIP where it applied this exemption in record groups A and C as I have outlined at paragraph [17] of this Report. I recommend Highways 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 sections 19(1)(c)(i), and (ii) to these same portions.

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

[28] Subsection 22(a) of FOIP provides 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;

[29] 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 (*Guide to FOIP*, Ch. 4, p. 255).

[30] Highways applied subsection 22(a) of FOIP to pages 76, 80 and 90 of the group B records. In three emails between Highways employees, Highways withheld a line of information in each email pursuant to subsection 22(a) of FOIP; these emails are contained within an email chain. Highways completely blacked out these portions, meaning my office cannot tell what information is being withheld. Normally, I would consider that a public body intended to make a *prima facie* case that subsection 22(a) applies. However, Highways withheld the same lines of information in the same three emails on a different file involving the same Applicant (IPC File #323-2021) pursuant to subsection 22(a) of FOIP. In those records, my office is able to tell what information Highways withheld (i.e., Highways did not completely black out the information on what it provided to my office), and so I can review subsection 22(a) of FOIP in this matter using those records. As such, my review will be on the face of the records.

[31] Subsection 22(a) of FOIP applies to situations where a record contains information that is subject to any legal privilege, including solicitor-client privilege. Though it did not offer a submission on its application, I note in its section 7 response dated November 22, 2021 letter to the Applicant, Highways indicates “records have been deleted because if released would disclose ... solicitor-client privileged [sic]...”. My office applies the following three-part test when solicitor-client privilege is claimed:

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?

(Guide to FOIP, Ch. 4, p. 221-225)

[32] Regarding part one of the test, “communication” is the process of bringing ideas to another’s perception, or the interchange of messages or ideas by speech, writing, gestures or conduct (*Guide to FOIP, Ch. 4, p. 258*). The records are copies of emails, and an email is a type of communication.

[33] The communication must occur between a solicitor and their client. In this matter, the client is Highways. On the face of the records, it is not clear how there is a solicitor involved in the communication, which is a detail that informs the first part of the test. The portions of the records released to the Applicant indicate the names of the individuals involved in the communications, and none of them appear to be lawyers, even with checking the Law Society of Saskatchewan website. One individual, who is the author of some emails within the entire chain, appears to be an engineer. Based on a lack of information, however, it cannot be established that solicitor-client privilege exists in the circumstances.

[34] I note section 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.

[35] I find Highways did not meet the burden of proof, and therefore, did not properly apply subsection 22(a) of FOIP to pages 76, 80 and 90 of group B records. As Highways has applied no other exemptions to these portions of the records, I recommend it release the information in the records where it applied subsection 22(a) of FOIP.

5. Did Highways properly apply subsections 17(1)(a), (b)(i) and (c) of FOIP?

[36] Subsections 17(1)(a), (b)(i) and (c) of FOIP provide 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;

(b) consultations or deliberations involving:

(i) officers or employees of a government institution;

...

(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;

[37] Section 17 of FOIP is a discretionary class-based provision. It is intended to allow for candor during the decision-making process (*Guide to FOIP*, Ch. 4, p. 121).

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

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

(*Guide to FOIP*, Ch. 4, pp. 123-126)

[39] Subsection 17(1)(b)(i) of FOIP 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. The following two-part test can be applied:

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

(*Guide to FOIP*, Ch. 4, pp. 131-133)

[40] Subsection 17(1)(c) of FOIP 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 the negotiations. The following two-part test can be applied:

1. Does the record contain positions, plans, procedures, criteria, instructions or considerations that relate to the negotiations?
2. Were the positions, plans, procedures, criteria, instructions or considerations developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution?

(Guide to FOIP, Ch. 4, pp. 137-138)

[41] Highways applied these exemptions as follows:

Group	Page Numbers	FOIP Exemption Applied
A11	96 to 148	17(1)(a)
A12	149	17(1)(a)
A13	150 to 153	17(1)(a), (c)
A24	259	17(1)(a), (b)(i)
B2	7, 12 to 14	17(1)(a), (b)(i)
B7	34	17(1)(a), (b)(i)
B9	47, 48	17(1)(a), (b)(i)
B10	55	17(1)(a), (b)(i)
B11	61, 65, 55	17(1)(a), (b)(i)
C2	3	17(1)(a), (b)(i)
Attachment 4	Attachment (Spreadsheet)	17(1)(a), (b)(i)
C6	60	17(1)(a), (b)(i)

[42] Again, Highways did not provide my office with arguments for how subsections 17(1)(a), (b)(i) and (c) of FOIP would apply to the records at issue. As such, Highways has not established how it met the burden of proof that these exemptions apply. I find, therefore, that it did not properly apply subsections 17(1)(a), (b)(i) and (c) of FOIP as outlined at paragraph [41] of this Report. I recommend Highways release the information in the records where it applied these exemptions.

IV FINDINGS

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

[44] I find Highways properly applied subsection 19(1)(b) of FOIP as I have outlined at paragraph [27] of this Report.

[45] I find Highways did not properly apply subsection 29(1) of FOIP as I have outlined at paragraph [13] of this Report. I also find it did not meet the burden of proof or properly apply subsection 22(a) of FOIP as I have outlined at paragraph [35] of this Report, and subsections 17(1)(a), (b)(i) and (c) of FOIP as I have outlined at paragraph [42] of this Report.

V RECOMMENDATIONS

[46] I recommend Highways continue to withhold the information in the records as I have outlined at paragraph [27] of this Report pursuant to subsection 19(1)(b) of FOIP.

[47] I recommend that within 30 days of issuance of this Report: Highways release the information in the records to the Applicant where it applied subsection 29(1) of FOIP as I have outlined at paragraph [13] of this Report; that it release records where it applied subsection 22(a) of FOIP as I have outlined at paragraph [35] of this Report; and that it release records where it applied subsections 17(1)(a), (b)(i) and (c) of FOIP as I have outlined at paragraph [42] of this Report.

Dated at Regina, in the Province of Saskatchewan, this 8th day of November, 2022.

Ronald J. Kruzeniski, K.C.

Saskatchewan Information and Privacy
Commissioner