



REVIEW REPORT 134-2017

Saskatchewan Polytechnic

August 24, 2018

Summary:

The Applicant submitted an access to information request to Saskatchewan Polytechnic (SaskPolytech). SaskPolytech denied access to the requested information pursuant to subsections 17(1)(d), 18(1)(b) and 18(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Through the course of the review, SaskPolytech released a portion of the information to the Applicant. The Commissioner found that subsection 17(1)(d) of LA FOIP applied to a portion of the withheld information and subsection 18(1)(b) of LA FOIP applied to the remaining information. The Commissioner recommended that SaskPolytech continue to withhold the information.

I BACKGROUND

[1] The Applicant submitted an access to information request pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) which was received by Saskatchewan Polytechnic (SaskPolytech) on December 20, 2016, requesting access to:

...the education agent agreement (for the purpose of international student recruitment) which exists between SaskPolytech and IDP Global Philippines.

[2] By letter dated January 10, 2017, SaskPolytech responded to the Applicant advising that access to the request was denied pursuant to subsections 17(1)(d), 18(1)(b) and 18(1)(c) of LA FOIP.

- [3] My office received a request for review from the Applicant on June 27, 2017. As there are third party exemptions involved in this review, my office requested contact information for the third party from SaskPolytech.
- [4] My office provided notification to SaskPolytech, IDP Education Ltd. (third party) and the Applicant of our intention to conduct the review on July 11, 2017. My office received a submission from SaskPolytech and the third party.
- [5] On August 13, 2018, SaskPolytech released a portion of the requested information to the Applicant. Therefore, this review will focus on the portions of information that SaskPolytech continues to withhold from the Applicant.

II RECORDS AT ISSUE

- [6] The record at issue consists of two documents that are seven pages in total. The first document is five pages entitled *Student Recruitment Services Agreement* (pages one to five) and the second is two pages entitled *IDP Recruitment Agreement – Variation* (pages six and seven).
- [7] SaskPolytech fully released pages 1, 2, 5 and 7 to the Applicant on August 13, 2018. It continues to withhold portions of information found on pages 3, 4 and 6 pursuant to subsections 17(1)(d), 18(1)(b) and 18(1)(c) of LA FOIP.
- [8] If through the course of the review I find an exemption applies to portions of the information, I will not consider the other exemptions SaskPolytech applied to those same portions of information.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[9] SaskPolytech is a “local authority” pursuant to subsection 2(f)(x) of LA FOIP. Thus, I have authority to conduct this review.

2. Does subsection 17(1)(d) of LA FOIP apply to this record?

[10] SaskPolytech applied subsection 17(1)(d) of LA FOIP to the withheld portions of information, including:

- Clauses (i), (ii), (iii) and (iv) of 14(1)(a) found on pages 3 and 4.
- Clause (i) of 14(1)(b) found on page 4.
- A portion of clause (ii) of 14(1)(b) found on page 4.
- Clause (i) and (ii) of 14(1)(c) found on page 4.
- Clause (i) of 2.1(a) found on page 6.
- A portion of clause (f) of 2.1(b) found on page 6.

[11] Subsection 17(1)(d) of LA FOIP is a discretionary exemption and provides:

17(1) Subject to subsection (3), 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 local authority;

[12] In order for this exemption to be found to apply, the following test must be met:

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

[13] I will now consider if SaskPolytech has met each part of the test.

1. Are there contractual or other negotiations occurring?

[14] For this part of the test to be found to apply, public bodies should detail what is occurring and what parties are involved.

[15] In its submission, SaskPolytech advised contractual negotiations with other international student recruitment agents are regularly being negotiated and that applications for contracts are reviewed monthly. It also advised that there are approximately 90 international student recruitment agent contracts in place with SaskPolytech. These contracts typically are re-negotiated every one to three years, with some exceptions.

[16] From what has been provided from SaskPolytech, I am satisfied there are contract negotiations occurring on an ongoing basis. Therefore, the first part of the test has been met.

2. Could the release of the record reasonably be expected to interfere with the contractual or other negotiations?

[17] To interfere with contractual or other negotiations means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement involving the public body. The public body does not have to prove that interference is probable, but needs to show there is a reasonable expectation of interference if any of the information or records were to be released. The public body should also demonstrate the following:

1. The clear cause and effect relationship between the disclosure and the interference which is alleged.
2. Demonstrate the interference caused by the disclosure is more than trivial or inconsequential.
3. Demonstrate the likelihood of interference is genuine and conceivable.

[18] Public bodies should not assume that the interference is self-evident. Particularity in describing the interference is needed to support the application of this provision. Prospective or future negotiations could be included within this exemption, as long as they

are foreseeable. However, once a contract is executed, negotiation is concluded, the exemption would generally not apply.

[19] In its submission, SaskPolytech outlined that the third party is a reputable organization that has demonstrated effectiveness in student recruitment and therefore, it is in SaskPolytech's interest to attain its recruitment services.

[20] SaskPolytech also asserted that international student recruitment is a highly competitive market. Further, it outlined that details of contract are negotiated regularly and knowledge of certain details of another agent's contract would be inappropriate in contract negotiations.

[21] SaskPolytech outlined in its submission the approximate amount of yearly tuition that is generated through student recruitment. Because of this, it asserted the need for strong contracts with international student recruiters is not a trivial or inconsequential matter.

[22] In Order PO-3805, Northern College of Applied Arts and Technology, the Adjudicator with the Information and Privacy Commissioner of Ontario stated a paragraph [43]:

...I find that the below withheld portions deal with concessions or incentives for the two parties, the college and the affected party, to enter into such an agreement. If revealed, such concessions or incentives would prejudice the college's competitive position in future negotiations. As such, I find the following withheld portions of the agreement to be exempt under section 18(1)(c):

- the amount of licensing fees paid by the affiliates to the college
- the commission rates paid to international agents (including the terms of payment of those commissions)
- the amount of security deposit
- the terms of negotiation of the security deposit
- compensation for student transfers
- sharing of losses for student withdrawals
- marketing in certain regions of the world
- geographic locations covered by the agreement
- the amount of student fees.

[23] Most of the information that has been withheld by SaskPolytech are the commission rates paid to the third party, including the terms of payment and refunds. I agree with the adjudicator in the above order that the release of this type of information could prejudice a college's competitive position in negotiations. Therefore, subsection 17(1)(d) of LA FOIP applies to this information.

[24] However, the portion of the information that has been withheld under clause (ii) of 14(1)(b) on page 4 would not qualify under subsection 17(1)(d) of LA FOIP as this information is the bank account information of the third party and, if released, would not interfere with contractual or other negotiation.

[25] I find subsection 17(1)(d) of LA FOIP applies to the information found in clauses (i), (ii), (iii) and (iv) of 14(1)(a) found on pages 3 and 4, clause (i) of 14(1)(b) found on page 4, clauses (i) and (ii) of 14(1)(c) found on page 4, clause (i) of 2.1(a) found on page 6 and the withheld information in clause (f) of 2.1(b) found on page 6.

3. Does subsection of 18(1)(b) of LA FOIP apply to this record?

[26] SaskPolytech applied subsection 18(1)(b) of LA FOIP to the withheld portions of information in this record. As I have found that subsection 17(1)(d) of LA FOIP applies to portions of the information as outlined above, I will only consider this provision for the information that has been withheld under clause (ii) of 14(1)(b) found on page 4.

[27] Section 18 of LA FOIP is intended to protect the business interests of third parties and ensure that public bodies are able to maintain the confidentiality necessary to effectively carry on business with the private sector. Although public bodies need to be open and accountable, they also need to conduct business and enter into business relationships. In doing so they must be able to assure their private sector partners that their trade secrets and commercial and financial secrets will not be readily disclosed to competitors and the general public. However, this is balanced against the need for public accountability in the expenditure of public funds. Third parties must understand that certain information regarding how the public body meets its financial obligations will be made public.

[28] Subsection 18(1)(b) of LA FOIP is a mandatory exemption and provides:

18(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 the local authority by a third party;

[29] For information to qualify under this exemption, the following three part test must be met:

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

[30] I will now consider each part of the test.

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

[31] From a review of the information, there is information that may constitute financial information of the third party. It does not appear that any of the information I am considering could be commercial, scientific, technical or labour relations information of the third party.

[32] *Financial information* is information regarding monetary resources, such as financial capabilities, assets, liabilities, past or present. Common examples are financial forecasts, investment strategies, budgets, and profit and loss statements. The financial information must be specific to a particular party and must demonstrate a proprietary interest or right of use of the financial information.

[33] The information that is being considered under this exemption is the bank account information of the third party. Bank account information of a third party would qualify as financial information. Therefore, this information meets the first part of the test.

2. Was the information supplied by the third party to a public body?

[34] The requirement that it be shown that the information was supplied to the public body reflects the purpose of subsection 18(1) of LA FOIP of protecting the informational assets of third parties.

[35] The information that has been withheld is the bank account information of the third party. The third party supplied this to SaskPolytech so it could be paid for its services. Therefore, the second part of the test has been met.

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

[36] *In confidence* usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained in confidence means that the supplier of the information has stipulated how the information can be disseminated. In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the public body and the third party providing the information. Further, a public body must show that both parties intended the information to be held in confidence at the time the information was supplied.

[37] The expectation of confidentiality must have a reasonable and objective bases. One of the factors to consider when assessing whether information was implicitly supplied in confidence includes determining what the nature of the information is and if a reasonable person would regard it as confidential.

[38] In the case of the bank account information that has been withheld, a reasonable person would consider that type of information confidential. Therefore, the third part of the test has been met.

[39] I find that subsection 18(1)(b) of LA FOIP applies to the information that has been withheld under clause (ii) of 14(1)(b) found on page 4.

IV FINDINGS

[40] I find subsection 17(1)(d) of LA FOIP applies to the information found in clauses (i), (ii), (iii) and (iv) of 14(1)(a) found on pages 3 and 4, clause (i) of 14(1)(b) found on page 4, clauses (i) and (ii) of 14(1)(c) found on page 4, clause (i) of 2.1(a) found on page 6 and the withheld information in clause (f) of 2.1(b) found on page 6.

[41] I find that subsection 18(1)(b) of LA FOIP applies to the information that has been withheld under clause (ii) of 14(1)(b) found on page 4.

V RECOMMENDATION

[42] I recommend that SaskPolytech continue to withhold the information found in clauses (i), (ii), (iii) and (iv) of 14(1)(a) found on pages 3 and 4, clause (i) of 14(1)(b) found on page 4, clauses (i) and (ii) of 14(1)(c) found on page 4, clause (i) of 2.1(a) found on page 6, the withheld information in clause (f) of 2.1(b) found on page 6 and the withheld information under clause (ii) of 14(1)(b) found on page 4.

Dated at Regina, in the Province of Saskatchewan, this 24th day of August, 2018.

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