SASKATCHEWAN

OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER

REVIEW REPORT LA-2012-004

Board of Education of the Saskatoon School Division No. 13

Summary: The Applicant made an access request to the Board of Education of the Saskatoon School Division No. 13 (the Board) for a contract between the Board and a Taxi Company. The Board released the majority of the contract to the Applicant, but withheld certain portions pursuant to sections 17(1)(d), 17(1)(f), 17(1)(g) and 18(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act.* The Commissioner found that in all cases the Board did not meet the burden of proof to demonstrate that the exemptions applied. The Commissioner recommended release of the withheld portions.

Statutes Cited: *The Local Authority Freedom of Information and Protection of Privacy Act,* S.S. 1990-91, c. L-27.1, ss. 2(f)(viii), 3(1), 7, 17(1)(d), 17(1)(f), 17(1)(g), 18(1)(c), 51; *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, s. 18(1)(d); Alberta's *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25, s. 16(1)(c)(iii); British Columbia's *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ss. 17(1)(d), 21(1)(c)(iii); Canada's *Access to Information Act*, RSC 1985, c. A-1, s. 20(1)(c); Manitoba's *The Freedom of Information and Protection of Privacy Act*, S.M. 1997, c. 50, s. 18(1)(c)(iii); Newfoundland and Labrador's *Access to Information and Protection of Privacy Act,* S.N. 2002, c.-A-1.1, s. 27(1)(c)(iii); Nova Scotia's *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, s. 21(1)(c)(iii); Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 17(1)(c); Prince Edward Island's *Freedom of Information and Protection of Privacy Act,* S.P.E.I. 2001, c. 37, s. 14(1)(c)(iii).

Authorities Cited: Saskatchewan OIPC Review Reports F-2006-002, F-2006-003, F-2006-004, F-2006-005, F-2007-001, F-2008-001, F-2010-002, F-2012-001/LA-2012-001, F-2012-003, LA-2010-002, LA-2011-001, LA-2012-003; British Columbia IPC Orders 00-10, 00-22, F10-39; Ontario IPC Orders PO-2180, PO-2843, MO-1705; *General Motors Acceptance Corporation of Canada, Limited v. Saskatchewan Government Insurance*, [1993] S.J. No. 601.

I BACKGROUND

[1] On an unknown date, the Applicant made an access to information request to the Board of Education of the Saskatoon School Division No. 13 (the Board) for a "copy of [sic] contract with [name of the Taxi Company]".

[2] By letter dated November 5, 2009, the Board replied to the Applicant and stated "[t]he lawyer has advised that we follow [the Taxi Company's] advice to not release contract information as it contains confidential financial information that, if released, would negatively affect [the Taxi Company's] ability to do business."

[3] On November 30, 2009, my office received the Applicant's Request for Review. My office commenced the review and sent notification letters to both the Board and the Applicant dated January 15, 2010.

[4] The first issue my office addressed in the notification letter was the Board's failure to comply with section 7 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).[1] I have discussed the requirements and importance of a fulsome section 7 response in my previous Review Reports.[2] We asked that the Board provide a new response compliant with section 7 of LA FOIP before February 5, 2010.

[1] *The Local Authority Freedom of Information and Protection of Privacy Act* (hereinafter LA FOIP), S.S. 1990-91, c. L-27.1.

[2] Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Review Reports F-2006-003 at [13] to [29], F-2006-004 at [70] to [75], F-2006-005 at [24] to [27], F-2007-001 at [15] to [50], F-2008-001 at [9] to [40], F-2010-002 at [30] to [38], LA-2010-002 at [123] to [132], LA-2012-003 at [46] to [54], all available at www.oipc.sk.ca/reviews.htm.

[5] On February 3, 2010, my office received a new copy of the Board's compliant section 7 response to the Applicant dated February 2, 2010. The Board denied the Applicant access to the record based on sections 17(1)(d), 17(1)(f), 17(1)(g) and 18(1)(c) of LA FOIP.

[6] On September 20, 2010, we wrote to the Applicant to confirm he was interested in pursuing the record after a proper section 7 response had been issued and the relevant exemptions had been identified. His interest was confirmed by my office on October 13, 2010.

[7] By letter dated October 14, 2010, my office notified the Board of my intention to proceed with a Review of the exemptions the Board was relying upon. We asked for a submission and a copy of the record.

[8] I received the record and submission from the Board on June 16, 2011.

[9] As the Board raised a third party exemption, my office invited the Third Party, the Taxi Company, to make representations. I received its submission dated September 21, 2012.

II RECORDS AT ISSUE

[10] The responsive record is a nine page contract between the Board and the Taxi Company. The Applicant has received a copy of the contract; however, portions of pages 1, 6, 7, 8 and 9 were severed.

[11] The Board has severed the address of the Taxi Company on pages 1 and 6. However, the address for the Taxi Company is general business contact information and is publicly available on the Internet. Section 3(1) of LA FOIP states that information that is publicly available is not subject to LA FOIP as follows:

> **3**(1) This Act does not apply to:
>
> (a) <u>**published material**</u> or material that is available for purchase by the public;

(b) **material that is a matter of public record**; or

(c) material that is placed in the custody of a local authority by or on behalf of persons or organizations other than the local authority for archival purposes.[3]

[emphasis added]

[12] Therefore the address will not be considered in this review.

[13] On page 7, the Board severed two words and five separate figures with respect to payment of services. It also severed six figures regarding costs for fuel adjustments. On page 8, the Board has severed a percentage regarding change of pricing, and a percentage and timeframe with respect to a discount for early payment. It appears that the Board has applied sections 17(1)(d), 17(1)(f), 17(1)(g) and 18(1)(c) of LA FOIP to these severed portions.

[14] Finally, the Board severed the signature of the representative of the Taxi Company. However, the Applicant is not interested in obtaining the signature therefore it is not at issue in this review.

III ISSUES

1. Did the Board of Education of the Saskatoon School Division No. 13 properly apply section 17(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record?

2. Did the Board of Education of the Saskatoon School Division No. 13 properly apply section 17(1)(f) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record?

[3] *Supra* note 1.

3. Did the Board of Education of the Saskatoon School Division No. 13 properly apply section 17(1)(g) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record?

4. Did the Board of Education of the Saskatoon School Division No. 13 properly apply section 18(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record?

IV DISCUSSION OF THE ISSUES

[15] The Board is a "local authority" pursuant to section 2(f)(viii) of LA FOIP as follows:

> **2** In this Act:
> ...
>
> (f) **"local authority"** means:
> ...
>
> (viii) any board of education or conseil scolaire within the meaning of *The Education Act*[4]

1. Did the Board of Education of the Saskatoon School Division No. 13 properly apply section 17(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record?

[16] Section 17(1)(d) of LA FOIP states:

> **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[5]

[4] *Ibid.*
[5] *Ibid.*

[17] This section is equivalent to section 18(1)(d) of *The Freedom of Information and Protection of Privacy Act* (FOIP).[6]

[18] In my Review Report F-2012-003, I outlined the test for section 18(1)(d) of FOIP as follows:

> [16] In order to be persuasive, the Ministry would need to provide the following:
>
> - Identify and provide details about the contractual or other negotiation;
> - Identify and provide details about the parties involved with the contractual or other negotiation; and
> - Detail how release of the record would interfere with the contractual or other negotiation.[7]

[19] In order for this exemption to apply the local authority must identify the contractual or other negotiation in which disclosure of the information may interfere. However, the Board has not identified any such negotiation. In this case, the Board has indicated in its submission letter of June 14, 2011 that the record is an agreement that resulted from a Request for Proposal (RFP). It stated:

> In early 2007, Saskatoon Public Schools issued a Request for Proposal with respect to small group student transportation.
>
> ...
>
> The information contained in the redacted clauses is directly from the proposal submitted by the successful applicant in response to the Request for Proposal for Saskatoon Public Schools. If this information is disclosed to the applicant, the contractual bargaining process of both the local authority and the third party will be seriously compromised.

[20] The Board has not specified which bargaining process it refers to in the above statement. A bargaining process would not typically follow a RFP. Further, as the record is a contract that has already been executed, it would appear that any negotiation would have been concluded.

---

[6] *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01.

[7] SK OIPC Review Report F-2012-003, available at www.oipc.sk.ca/reviews.htm.

[21] I considered whether section 18(1)(d) of FOIP could apply to information resulting from a RFP in my Review Report F-2012-001/LA-2012-001:

> [62] Section 18(1)(d) protects records from disclosure that could "reasonably be expected to interfere with contractual or other negotiations". Section 25(1)(c)(iii) of Alberta's FOIP is similar to section 18(1)(d) of Saskatchewan's FOIP. Alberta's *FOIP Guidelines and Practices 2009* states:
>
> > *Interfere with a contractual or other negotiations* means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement between the public body or the government and a third party.
>
> ...
>
> [64] British Columbia IPC Order 142-1997 considered the disclosure of a proposal during an ensuing period of negotiation in relation to the proposal:
>
> > The City argues that complex negotiations like the present one require a long time line, which should not be disrupted by premature disclosure of the records in dispute. It argues, for example, that disclosing the proposal of Pilot Pacific and the reports of Coriolis Consulting "could jeopardize the project by forcing all parties to negotiate in a public forum. Clearly this would seriously affect the ability of each party to fully present its negotiating position." (Submission of the City, p. 3) With respect, this argument does not make much sense, given the actual contents of the records in dispute, which I will describe further below. **There is nothing in these records that reports on any of the actual negotiations that have occurred** with Pilot Pacific before or after the signing of the Memorandum of Agreement. In addition, the skeletal outlines of any sensitive information in the proposals and related records can be readily severed.
> >
> > The records in dispute literally contain very little "information about negotiations carried on by or for a public body," in the language of section 17(1)(e), **because at the time of their preparation and submission almost no negotiations had occurred**, except to clarify the original proposals. The significant negotiations have taken place subsequent to the selection of Pilot Pacific as the winning contractor. In this connection, **I think that a useful distinction can be made between disclosure of records that provide the framework or basis for subsequent negotiations (but only in the most general terms) as opposed to information about actual negotiations**, which is what section 17(1)(e) is primarily intended to protect. The disclosure of information in the former category cannot reasonably be expected to harm the financial or economic interests of the City of Victoria in the context of this particular inquiry.
>
> [65] I adopt this analysis of the British Columbia IPC. As with the above case, I find no evidence that a negotiation took place between the Ministry and any other party.

> The Record at issue was simply a response to a RFP of the Ministry. The Ministry has therefore not met the burden of proof in asserting that section 18(1)(d) applies.[8]
>
> [emphasis added]

[22] Likewise, in this case the Board has not specified that any contractual or other negotiation was in play at the time of the request. Further, there does not appear to be any negotiation involved in a RFP process.

[23] Pursuant to section 51 of LA FOIP,[9] the local authority has the burden of proof to demonstrate that exemptions apply. The Board has not met the burden of proof as it did not provide anything to satisfy the three part test including identifying contractual or other negotiations in which disclosure of the information would interfere.

[24] Section 17(1)(d) of LA FOIP does not apply to the record.

2. Did the Board of Education of the Saskatoon School Division No. 13 properly apply section 17(1)(f) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record?

[25] Section 17(1)(f) of LA FOIP states:

> **17**(1) Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose:
>
> …
>
> (f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the local authority[10]

[26] In my Review Report F-2006-002, I commented on this section's FOIP equivalent 18(1)(f) as follows:

[8] SK OIPC Review Report F-2012-001/LA-2012-001, available at www.oipc.sk.ca/reviews.htm.
[9] Section 51 of LA FOIP states: "In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned".
[10] *Supra* note 1.

> [107] An earlier Report by this office is helpful as to what test is applicable to determine if the exemption will or will not apply. In OIPC Report F-2004–007**,** the relevant section is as follows:
>
> > [28] In Report 92/009, our office held that the disclosure of records of the Saskatchewan Liquor Board dealing with the leasing agreements for liquor stores would not prejudice the economic interests of the Board. The names of the specific landlords who were individuals should not be disclosed according to my predecessor. This decision was cited and followed by our office in Report 94/002 when the amount of rent paid by Saskatchewan Archives Board was found not to prejudice the government's economic interests and consequently it was recommended that SPMC [Saskatchewan Property Management Corporation] release those records.
> >
> > …
> >
> > [31] The Federal Court concluded speculation was not sufficient and that the landlord had to demonstrate a reasonable expectation of harm. The Court further concluded that the evidence of the landlord "remains in the realm of speculation". I have also considered a number of other decisions interpreting the federal provisions.
> >
> > …
> >
> > [35] The Saskatchewan Act does not qualify the harm as "probable" as does the Access to Information Act provision. Consequently, I find that the standard or threshold test is somewhat lower in Saskatchewan than that which exists under the Access to Information Act. **Nonetheless, I find that there could not be a reasonable expectation of harm in any event based on the facts as we understand them.**
> >
> > …
> >
> > [38] I find that SPMC has failed to meet its burden of proof of showing that the disclosure of the records in question could reasonably be expected to prejudice the economic interest of SPMC.
>
> [108] **The above demonstrates that SRC [Saskatchewan Research Council] does not have to prove that the harm is probable, but needs to show that there is a "reasonable expectation of harm" if any of the information/records are released**.[11]
>
> [emphasis added]

[27] In support of this exemption the Board wrote the following in its submission of June 14, 2011:

[11] SK OIPC Review Report F-2006-002, available at www.oipc.sk.ca/reviews.htm.

> Essentially, a disclosure of this information will allow the applicant or others with whom he may share the information to know another party's bid in response to the Request for Proposals and to alter its position in any future such requests in order to be the successful candidate. It is reasonably expected that the disclosure of this information would prejudice economic interest of the local authority and accordingly result in an undue benefit to the applicant.

[28] The Board appears to be arguing that the Applicant, knowing the current contract, may supply the Board with a better proposal than the current contract. This would not appear to prejudice the economic interest of the Board.

[29] Further, this exemption was intended to protect the competitive position of the local authority within a market share, which in not the case under these circumstances. This is highlighted in Ontario Information and Privacy Commissioner (IPC) Order PO-2843 which states:

> Section 18(1) states:
>
> > A head may refuse to disclose a record that contains,
> >
> > (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].[12]

[30] In addition, Ontario IPC Order MO-1705 details what is required to meet the burden of proof with exemptions such as these:

> Sections 11(c) and (d) of the *Act* read:
>
> > A head may refuse to disclose a record that contains,

[12]Ontario Information and Privacy Commissioner (hereinafter ON IPC) Order PO-2843 at p. 2, available at www.ipc.on.ca.

> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
>
> For this exemption to apply, the Board must demonstrate that disclosure of the information "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].
> ...
>
> I also agree with the appellant that the terms of the current deal between the Board and the affected party would likely have little effect on a future bidding process due to changes over time in the economic climate and the Board's "bottom line" needs.[13]

[31] As the Board has not demonstrated that disclosure of the record could reasonably be expected to prejudice the economic interest of the local authority, it has not met the burden of proof to demonstrate that section 17(1)(f) applies in these circumstances.

3. Did the Board of Education of the Saskatoon School Division No. 13 properly apply section 17(1)(g) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record?

[32] Section 17(1)(g) of LA FOIP states:

> **17**(1) Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose:
> …
>
> (g) information, the disclosure of which could reasonably be expected to result in an undue benefit or loss to a person.[14]

[33] The Board is arguing that release of the record would result in an undue benefit to the Applicant or others. It stated in its letter of June 14, 2011 that:

[13] ON IPC Order MO-1705 at pp. 27 to 31, available at www.ipc.on.ca.
[14] *Supra* note 1.

> Essentially, a disclosure of this information will allow the applicant or others with whom he may share the information to know another party's bid in response to a Request for Proposals and to alter its position in any future such requests in order to be the successful candidate. It is reasonably expected that the disclosure of this information would prejudice the economic interest of the local authority and accordingly result in an undue benefit to the applicant.

[34] This is not persuasive since the Third Party would have to submit a new bid in any new RFP process and that would not necessarily be identical to the bid that resulted in the contract.

[35] It is important to consider the purpose of LA FOIP when applying this section. Order F10-39 from the British Columbia IPC made the following comments on the equivalent section of British Columbia's *Freedom of Information and Protection of Privacy Act* (FIPPA):[15]

> [35] Order F08-22 encapsulates these matters aptly. On the issue of FIPPA's purposes in relation to s. 17 and the burden of proof, Commissioner Loukidelis stated:
>
>> [34] **One of FIPPA's twin purposes under s. 2(1) is to make public bodies more accountable to the public by giving the public a right of access to records, a goal that is further advanced by specifying limited exceptions to the rights of access to information in FIPPA.** The force of the right of access in s. 4 is reinforced for all non-personal information in contracts with public bodies by the fact that s. 57 puts the burden of proving the applicability of s. 17 or s. 21 on the public body or the third party contractor, not on the access applicant. Public body accountability through the public right of access to information is acutely important and especially compelling in relation to large-scale outsourcing to private enterprise of the delivery of public services, in this case aspects of hospital care.
>
> [36] I would add that the financial magnitude of the ASD [Alternative Service Delivery] contracts is increasing in significance. The Agreement here, as noted above, is worth $300 million over ten years. In addition, the Ministry's evidence is that government has now entered into nine ASD agreements worth a total of approximately $1.8 billion of taxpayers' money.

[15] British Columbia, *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, section 17(1)(d) states: "**17** (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:… (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party…".

> [37] Concerning the harms test under s. 17, Commissioner Loukidelis continued:
>
> > [48] In short, harms-based exceptions to disclosure operate on a rational basis that considers the interests at stake. **What is a reasonable expectation of harm is affected by the nature and gravity of the harm in the particular disclosure exception.** There is a sharp distinction between protecting personal safety or health and protecting commercial and financial interests. **There is also a justifiably high democratic expectation of transparency around the expenditure of public money, which is appropriately incorporated into the interpretation and application of s. 17(1) when a public body's and service provider's commercial or financial interests are invoked to resist disclosure of pricing components in a contract between them for the delivery of essential services to the public**.
> >
> > …
> >
> > [50] The threshold for harm under s. 17(1) **is not a low one met by any impact. Nature and magnitude of outcome are factors to be considered. If it were otherwise, in the context of s. 17(1) any burden, of any level, on a financial or economic interest of a public body could meet the test**. This would offend the purpose of FIPPA to make public bodies more accountable to the public by giving the public a right of access to records, subject to specified, limited exceptions. It would also disregard the contextual variety of the harms-based disclosure exceptions in FIPPA.[16]
>
> [emphasis added]

[36] These principles must be included in an analysis of this nature.

[37] I commented on a similar provision in my Review Report LA-2011-001 which is 18(1)(c), also at issue in this Review. I stated:

> [111] This provision has a harms test component. In my Report F-2005-003, after considering a test developed in Alberta and modifying it to reflect the wording of our FOIP, I set out the following test:
>
> > The three part test that should be applied in Saskatchewan consists of the following elements: (a) there must be a clear cause and effect relationship between the disclosure and the harm which is alleged; (b) the harm caused by the disclosure must be more than trivial or inconsequential; and (c) the likelihood of harm must be genuine and conceivable.[17]

[16]British Columbia Information and Privacy Commissioner (hereinafter BC IPC) Order F10-39, available at www.oipc.bc.ca.

[17]SK OIPC Report LA-2011-001, available at www.oipc.sk.ca/reviews.htm.

[38] In making a determination, I will apply this test.

Section 17(1)(g)

a) Is there a clear cause and effect relationship?

[39] British Columbia IPC Order F10-39 as cited earlier also considers what effect disclosure of contract information has on future RFP processes.

> [39] I have carefully considered the particular facts here and I can see no reason why the rationale of Orders F10-24 and F10-25 would not apply to this case. The kinds of records at issue here are similar to those in Orders F10-24 and F10-25. Like the contract in those two Orders, the Agreement here is an ASD contract. **The other obvious likeness between this case and those two Orders is that the provisions in dispute are largely of a similar character including the contractual terms "service levels", "gain sharing", pricing and penalty provisions.**
>
> [40] Moreover, the Ministry's arguments here parallel those the public body made in Orders F10-24 and F10-25. This includes submissions concerning the "unique" nature of ASD contracts. **The Ministry does not explicitly say so but I take it to argue that past cases, in which s. 17 did not apply to RFP type contracts, have no bearing here.**
>
> [41] Based on the evidence before me, it is my view that, while negotiations may be somewhat longer and perhaps more complex, ASD contracts, like the end product of other kinds of government-let contracts, are still instruments whereby government pays third parties to provide products and services at an agreed price. **Senior Adjudicator Francis came to the same conclusion in Order F10-24 opining that, "[t]he Ministry's evidence and arguments can be applied to any government contract, and to any term in any such contract…" She concluded that, "[i]n this respect, contracts done through the JSP process are not in my view qualitatively different from those done through negotiation in other RFP processes".**
> ...
>
> [44] On the second argument, Senior Adjudicator Francis said this in Order F10-24:
>
>> In this regard, FIPA makes a valid point when it states that, despite numerous cases in which claims for disclosure of negotiated contracts have been denied, the Ministry does not point to any instance where a public body could say it got a worse deal the next time a deal was negotiated or that its negotiating
>
> [45] **The Ministry did not offer evidence of a "worse deal" in this case either**. Indeed, this paucity of evidence on the part of public bodies is especially salient

> considering we are now edging towards two decades of experience with FIPPA. It is also worth restating the obvious point there is a high likelihood at least one potential vendor would already know the kind of terms the government would be prepared to grant in an ASD contract—one of those companies that has already entered into such a contract and seeks to enter another. Moreover, if each ASD contract is unique, as claimed, **it hardly supports the Ministry's argument that the terms of one contract would have relevance to another.**
> ...
>
> [47] For the reasons stated I find that ss. 17(1)(d) and (f) do not apply in this case.[18]
>
> [emphasis added]

[40] As such, there is precedent from other jurisdictions that demonstrates there is no clear cause and effect relationship between disclosures of contracts and an effect on future RFP type competitions. The Board has not included any persuasive evidence in its submission to cause me to come to a different conclusion.

[41] Therefore the cause and effect relationship has not been established.

b) Is the harm more than trivial or inconsequential?

[42] I must consider if the release of the document would result in an undue benefit or loss. This would entail harm to a third party that would be more than trivial or inconsequential.

[43] I must then consider what is contemplated by the term "undue". Order 00-10 from the British Columbia IPC offers the following guidance:

> **When is a financial gain or loss "undue"?** As is the case with the significant harm test under s. 21(1)(c)(i), this test obviously requires one to consider what loss or gain might be 'due' in trying to define what is 'undue'. **The ordinary meanings of the word "undue" include something that is unwarranted, inappropriate or improper. They can also include something that is excessive or disproportionate, or something that exceeds propriety or fitness. Such meanings have been approved regarding the similar provision in Alberta's freedom of information legislation.** See Order 99-018. The courts have also given 'undue' such meanings, albeit in relation to other kinds of legislation. See, for example, the judgement of

[18] *Supra* note 16.

Cartwright J. (as he then was) in *Howard Smith Paper Mills Ltd.* v. *The Queen* (1957), 29 C.P.R. 6 (S.C.C.), at p. 29.

As Cartwright J. noted in *Howard Smith*, above, interpretation of the word 'undue' is not assisted by simply substituting different adjectives for that word. **That which is undue can only be measured against that which is due**. The Legislature did not, however, provide such a frame of reference for the purposes of s. 21(1)(c)(iii). **It is necessary, therefore, to approach the issue of what is undue financial loss or gain in the circumstances of each case.** This analysis can to some extent be guided by decisions in previous similar cases, which will give some sense of what may be undue in the present situation.

...

This issue is considered in a number of my predecessor's decisions regarding s. 21. Although none of them explicitly offers any guidance on what is "undue" financial loss or gain, it is possible to conclude that David Flaherty considered the s. 21(1)(c)(iii) to be similar, in some ways, to the s. 21(1)(c)(i) test. They are, of course, different tests. The Legislature clearly created two tests under s. 21(1)(c) and each must be given different meaning.

Ontario's *Freedom of Information and Protection of Privacy Act* is similar to our Act. Section 17 of the Ontario legislation is similar to s. 21 of ours. Under s. 17(1)(c) of the Ontario Act, an institution must refuse to disclose information where the disclosure could reasonably be expected to "result in undue loss or gain to any person". The two provisions differ, clearly, in that the British Columbia version is expressly concerned only with undue "financial" loss or gain. The Ontario version is arguably wider, since it refers to loss or gain generally. Decisions respecting s. 17 of the Ontario Act certainly suggest it is wider, *e.g.*, that damage to reputation can be a loss even if financial value cannot be placed on that damage). See, for example, Order P-1175. (That decision – and Order P-340 – indicate, however, that it is difficult to prove loss of a non-financial kind.)

In any case, it is plain that the Ontario and British Columbia provisions both protect against financial gain or loss that is undue. Ontario decisions consistently show that if disclosure would give a competitor an advantage, usually by acquiring competitively valuable information, effectively for nothing, the gain to the competitor will be undue. See, for example, Ontario Orders 125, P-561, P-1105 and M-920. **In the last case, the City of Toronto denied access to its contract with a third party computer service provider. The third party successfully argued that disclosure of the contract's details – including the terms between the third party and its sub-contractors – would enable its competitors to "replicate the company's technologies and services" and thus would cause it undue loss. The inquiry officer did not find that the result would also be an undue gain to the competition, although such a finding would appear to be supportable in that case.**[19]

[19] BC IPC Order 00-10 at pp. 17 to 19, available at www.oipc.bc.ca.

[emphasis added]

[44] It appears that when determining what is an undue benefit or loss the unique circumstances of each case must be taken into consideration. Further, past decisions are useful in making such determinations.

[45] A former acting Saskatchewan Information and Privacy Commissioner had agreed that this exemption should apply in similar circumstances in Report 027/2001. However, the Report does not provide detailed analysis to help me understand the basis for his conclusion.

[46] For further guidance, I also looked to an Order from British Columbia IPC and one from Ontario IPC which considered whether the improvement of future proposals resulting from disclosure of pricing or other information constituted an undue benefit or loss.

[47] British Columbia IPC Order 00-22 provides the following analysis (CK and KH represent third parties):

> This leads me to the argument advanced by the Ministry and CK under s. 21(1)(c)(iii), *i.e.*, that disclosure of the information could reasonably be expected to result in undue financial loss or gain to "any person or organization".
>
> I agree that the phrase "any person or organization" is wide enough to include CK. I also accept that disclosure of the disputed information in the KH contract could in some sense affect the competitive field in which CK must operate in order to obtain health care service contracts. **The more information other contractors have about pricing methods successfully employed by KH – and perhaps now by CK as well – the more likely it is that they can more effectively compete amongst themselves and with CK.**
>
> **It does not follow, however, that these conditions or KH's employment of a former principal of KH, satisfy the requirement for "undue" financial loss or gain. In my view, s. 21(1)(c)(iii) is not an open door for the recognition of harm to business interests of a third party which could reasonably be expected to flow, in some way or to some degree, from the disclosure of confidential business information.** As I indicated in Order 00-10**,** the word "undue" must be given real meaning, determined in the circumstances of each case. Generally speaking, that

which is 'undue' can only be measured against that which is 'due'. Some assistance can be gained by considering previous cases.[20]

[emphasis added]

[48] Further, Ontario IPC Order PO-2180 makes a similar determination:

> Applying the harms test described in Order PO-1747, I find that unless the Ministry provides detailed and convincing evidence to establish a "reasonable expectation of probable harm" if the records are disclosed, its section 18(1)(c) and section 18(1)(g) exemption claims must fail.
>
> The Ministry's representations do not deal with the various section 18 exemptions individually. They consist of the following general submissions:
>
>> Although the Ministry informs [the affected party] of its marketing initiatives for staff planning purposes, it is not clear whether the impact on the number of callers to *Telehealth Ontario* is both predictable and measurable.
>>
>> There are several key performance standards that the Ministry monitors on an on-going basis and wait-time information is only one of many key performance indicators.
>>
>> Much of the reporting constitutes proprietary information supplied in confidence to the Ministry, and if released, may affect the future working relationship between the Ministry and [the affected party] and/or may jeopardize any future Request for Proposal bidding process on the *Telehealth Ontario* program.
>>
>> **The Request for Proposal (RFP) for the Telephone Health Advisory Service (THAS) for the new Family Health Networks was issued February 10, 2003. A decision to release this information to this single requester could potentially interfere with a fair and equitable RFP process by allowing a bidder to have greater insight into the telecare business model than do others.**
>
> ...
>
> In my view, the Ministry's representations fall far short of the detailed and convincing evidence necessary to establish either of the section 18(1)(c) or section 18(1)(g) harms. The specific submissions on section 18(1)(c) simply re-state the requirements of the exemption and offer no evidence whatsoever in support of the position that any harms could reasonably be expected to occur if the information is disclosed. I would reach this same conclusion even if I were to apply the lower standard in *Ontario (Ministry of Labour)*, which I specifically decline to do.

[20] BC IPC Order 00-22 at pp. 11 and 12, available at www.oipc.bc.ca.

> The Ministry's more general submissions do not speak directly to any of the harms described in sections 18(1)(c) or (g). The Ministry is not in a "competitive position" with respect to the delivery of its telehealth program and, based on the Ministry's representations, I have no basis for concluding that disclosure could reasonably be expected to prejudice the Ministry's "economic interests", as required in order to fall within the scope of section 18(1)(c). **Similarly, even after taking into account additional arguments included in the confidential portion of the Ministry's representations, I am not persuaded that disclosing the information contained in the reports could reasonably be expected to result in "premature disclosure of a pending policy decision" or "undue financial benefit or loss to a person". The February 2003 RFP process identified by the Ministry has presumably already been administered. In any event, I am not persuaded on the basis of the sketchy details provided by the Ministry that the harm under section 18(1)(g) could reasonably be expected to result even if the particular information at issue in this appeal had been disclosed before that separate competitive selection process was completed.**
>
> For these reasons, I find that the records do not qualify for exemption under either section 18(1)(c) or section 18(1)(g) of the *Act*.[21]
>
> [emphasis added]

[49] In following the analysis of the British Columbia and Ontario Commissioners, information that leads to more competitive proposals does not constitute an undue benefit or loss. Therefore this part of the test is not met.

c) Is there a likelihood of harm that is genuine and conceivable?

[50] As the first and second tests have not been met, there is no need to examine this test.

[51] As the harm suggested by the Board does not constitute an undue benefit or loss, and no cause and effect relationship has been established, I find section 17(1)(g) of LA FOIP does not apply in these circumstances.

4. Did the Board of Education of the Saskatoon School Division No. 13 properly apply section 18(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record?

[21] ON IPC Order PO-2180 at pp. 8 and 9, available at www.ipc.on.ca.

[52] Section 18(1)(c) of LA FOIP states:

> **18**(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; or[22]

[53] The argument of the Board in support of this exemption is the same as above which is:

> Essentially, a disclosure of this information will allow the applicant or others with whom he may share the information to know another party's bid in response to a Request for Proposals and to alter its position in any future such requests in order to be the successful candidate. It is reasonably expected that the disclosure of this information would prejudice the economic interest of the local authority and accordingly result in an undue benefit to the applicant.

[54] The Third Party made the following argument in its letter of September 21, 2012:

> Prior to entering into a contract with [the Board] there was a public Request for Proposals (RFP) that any business or persons with the required qualifications could bid on. Terms for the RFP were all made public. Interested parties put together their proposals and submitted them to [the Board] purchasing department for review. Proposals were submitted with confidential parameters as the contents of each proposal are based on the private operational practices of each bidding entity. At no time through the process were we made aware that the proposal would or could be made public.
>
> The confidential RFP process in any industry is important to ensure the requesting operation receives the most comprehensive bids for the most competitive price. If the details of any contract were to be released to a competitor or the public, future RFP's would be affected and make them less competitive. It would be a competitive advantage for other bidders to have our proprietary operational information with the [the Board] as this information is based on our day to day business principles, policy and procedures. In doing so, our existing contracts with current corporate customers

[22] *Supra* note 1.

> not part of [the Board] could be jeopardized. This would cause a drastic hardship on our business.

[55] The responsive record is not the Third Party's submission to the RFP but rather the contract entered into with the Third Party.

[56] Again, the harms test from my Review Report LA-2011-001 as described earlier is applicable for each subsection of section 18(1)(c).

Section 18(1)(c)(i)

a) Is there a clear cause and effect relationship?

[57] As noted above in my analysis of section 17(1)(g), it appears that there is no cause and effect relationship with respect to the consequences of disclosed contracts on future RFP processes. This test has not been met.

[58] The Third Party also argued that release of the contract could jeopardize other "existing contracts with our current corporate customers." Neither the Third Party, nor the Board have expanded on this issue. Therefore, there does not appear to be a clear cause and effect relationship.

b) Is the harm more than trivial or inconsequential?

[59] The harm contemplated by section 18(1)(c)(i) is financial loss.

[60] I note that unlike section 17(1)(g) there is no use of the term "undue". Upon a scan of the equivalent statutes in other Canadian jurisdictions, most use an adjective to qualify "financial loss" (i.e. the equivalent sections in the FOIP Acts of Alberta, British Columbia, Nova Scotia, Ontario and Prince Edward Island use the word "undue"; Manitoba and Newfoundland and Labrador use the term "significant; and the federal Act

uses the word "material").[23] This signifies that Saskatchewan's 18(1)(c)(i) contemplates a lower threshold.

[61] However, as a cause and effect relationship has not been established, there is no need to evaluate this test.

c) Is there a likelihood of harm that is genuine and conceivable?

[62] There is no need to evaluate this portion of the test as the first part has not been met.

[63] As the first part of the test has not been met, it appears that section 18(1)(c)(i) of LA FOIP does not apply to the record.

Section 18(1)(c)(ii)

[64] As noted above, the harms test is applicable for each subsection of section 18(1)(c) of LA FOIP. Further, a cause and effect relationship has not been established to meet the first part of the harms test. Therefore, section 18(1)(c)(ii) of LA FOIP does not apply to the record.

Section 18(1)(c)(iii)

[65] In terms of contractual or other negotiations, the same analysis as section 17(1)(d) as described above applies. Therefore, section 18(1)(c)(iii) of LA FOIP does not apply to the record.

[23] Alberta, *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25 at section 16(1)(c)(iii); British Columbia, *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, at section 21(1)(c)(iii); Nova Scotia, *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 at section 21(1)(c)(iii); Ontario, *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 at section 17(1)(c); Prince Edward Island, *Freedom of Information and Protection of Privacy Act,* S.P.E.I. 2001, c. 37 at section 14(1)(c)(iii); Manitoba, *The Freedom of Information and Protection of Privacy Act*, S.M. 1997, c. 50 at section 18(1)(c)(iii); Newfoundland and Labrador, *Access to Information and Protection of Privacy Act,* S.N. 2002, c.-A-1.1 at section 27(1)(c)(iii); Canada, *Access to Information Act*, RSC 1985, c A-1 at section 20(1)(c).

[66] The Board is required by LA FOIP to be transparent in its dealings with public funds. As the Saskatchewan Court of Appeal has declared:

> The [Freedom of Information and Protection of Privacy Act's] basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy is the dominant objective of the Act. That is not to say that the statutory exemptions are of little or no significance. We recognize that they are intended to have a meaningful reach and application. The Act provides for specific exemptions to take care of potential abuses. There are legitimate privacy interests that could be harmed by release of certain types of information. Accordingly, specific exemptions have been delineated to achieve a workable balance between the competing interests. The Act's broad provisions for disclosure, coupled with specific exemptions, prescribe the "balance" struck between an individual's right to privacy and the basic policy of opening agency records and action to public scrutiny.[24]

[67] The default is disclosure not secrecy as our highest court clarified in 1993. Although the Court was dealing with FOIP and not LA FOIP, I find that the quote is fully applicable to local authorities.

[68] Information relating to the expenditure of public funds can only be withheld if the local authority can establish on a balance of probabilities that one or more of the limited and specific exemptions apply. I have no hesitation in finding that none of the four exemptions cited by the Board apply to shield those portions of the contract that the Board withheld from public scrutiny.

V FINDINGS

[69] I find that the Board of Education of the Saskatoon School Division No. 13 did not meet the burden of proof to demonstrate that section 17(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* applies to the record.

---

[24] *General Motors Acceptance Corporation of Canada, Limited v. Saskatchewan Government Insurance* [1993] S.J. No. 601 at [11].

[70] I find that the Board of Education of the Saskatoon School Division No. 13 did not meet the burden of proof to demonstrate that section 17(1)(f) of *The Local Authority Freedom of Information and Protection of Privacy Act* applies to the record.

[71] I find that the Board of Education of the Saskatoon School Division No. 13 did not meet the burden of proof to demonstrate that section 17(1)(g) of *The Local Authority Freedom of Information and Protection of Privacy Act* does not apply to the record.

[72] I find that the Board of Education of the Saskatoon School Division No. 13 did not meet the burden of proof to demonstrate that section 18(1)(c)(i) of *The Local Authority Freedom of Information and Protection of Privacy Act* does not apply to the record.

[73] I find that the Board of Education of the Saskatoon School Division No. 13 did not meet the burden of proof to demonstrate that section 18(1)(c)(ii) of *The Local Authority Freedom of Information and Protection of Privacy Act* does not apply to the record.

[74] I find that the Board of Education of the Saskatoon School Division No. 13 did not meet the burden of proof to demonstrate that section 18(1)(c)(iii) of *The Local Authority Freedom of Information and Protection of Privacy Act* does not apply to the record.

VI RECOMMENDATIONS

[75] I recommend that the Board of Education of the Saskatoon School Division No. 13 release the entire record, except for the signature of the representative of the Taxi Company, to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 28th day of November, 2012.

R. GARY DICKSON, Q.C.
Saskatchewan Information and Privacy Commissioner