

**SASKATCHEWAN**  
**OFFICE OF THE**  
**INFORMATION AND PRIVACY COMMISSIONER**

**REPORT F-2012-001/LA-2012-001**

**Ministry of Government Services**  
**Resort Village of Fort San**

**Summary:**

Access requests were made by the same Applicant to both the Ministry of Government Services (formerly Saskatchewan Property Management) and the Resort Village of Fort San (RVFS or the Village) for similar records.

The Ministry decided to withhold part of a responsive record, a proposal, relying on sections 13(2), 19(1)(b), 18(1)(d) and 18(1)(f) of *The Freedom of Information and Protection of Privacy Act*. The Commissioner undertook a review and found that section 13(2) did not apply because there was insufficient evidence to demonstrate that the proposal was obtained in confidence from RVFS. The Commissioner concluded section 19(1)(b) could not apply as a local authority, RVFS, cannot constitute a Third Party. He also found that the Ministry had not met the burden of proof to demonstrate that sections 18(1)(d) and 18(1)(f) applied in the circumstances to any of the responsive records in question. The Commissioner therefore recommended release of the withheld information in full to the Applicant.

In the second case, even though RVFS disclosed 32 responsive records to the Applicant, he was dissatisfied as he asserted that there should be additional responsive records. The Commissioner undertook this second review to determine if there were additional responsive records in the possession or under the control of RVFS pursuant to section 5 of *The Local Authority Freedom of Information and Protection of Privacy Act*. The Commissioner found that RVFS had not performed an adequate search for records. The Commissioner made several recommendations related to the records management system of RVFS. Also, based on evidence taken from the 32 disclosed records and from the other review involving the Ministry, the Commissioner concluded that there were additional records under the control of RVFS. He recommended that

RVFS obtain a copy of those records and provide the Applicant with a new section 7 response.

**Statutes Cited:** *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, ss. 2(1)(j), 13(2), 18(1)(d), 18(1)(f), 19(1)(b), 61; *The Freedom of Information and Protection of Privacy Regulations*, c. F-22.01 Reg. 1, s. 2(2); *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1, ss. 2(f)(i), 2(1)(k), 5; *The Municipalities Act*, S.S. 2005, c.M-36.1, ss. 143 and 144.

**Authorities Cited:** Saskatchewan OIPC Reports F-2010-001, F-2008-002, F-2008-001, F-2006-002, F-2005-003, H-2008-002, LA-2011-001, LA-2010-002, LA-2009-001, Investigation Report H-2007-001; Alberta IPC Orders F-2002-002, 97-013; British Columbia IPC Orders F-09-22, 03-33, 142-1997; Ontario IPC Orders M-904, MO-2522, MO-2588, P-1465, PO-2180, PO-2602-R; *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, [2010] 3 SCR 3.

**Other Sources Cited:**

Saskatchewan OIPC, *Helpful Tips: Best Practices for Public Bodies/Trustees for the Processing of Access Requests*; BC IPC, *Tips for DMIPS and Freedom of Information and Privacy Coordinators: Conducting an Adequate Search Investigation under the Freedom of Information and Protection of Privacy Act*; Saskatchewan Ministry of Government Affairs, *Types of Municipalities and Municipal Directory*; Saskatchewan *Hansard*, April 22, 1991, June 18, 1991; Access and Privacy Branch, Service Alberta, *FOIP Guidelines and Practices* (2009), K. Klein and D. Kratchanov: *Government Information: The Right to Information and the Protection of Privacy in Canada*, Second Edition, Toronto: Carswell Press, 2009; *Black's Law Dictionary*, 9th Ed., USA: Thomson Reuters, 2009.

## I BACKGROUND

[1] Our office received from the Applicant a request for review of a decision by the Ministry of Government Services (formerly Saskatchewan Property Management (SPM) and Saskatchewan Property Management Corporation (SPMC)<sup>1</sup>) under *The Freedom of Information and Protection of Privacy Act* (FOIP)<sup>2</sup> to deny access to certain records. In addition, the same Applicant also submitted a request for review of a decision by the Resort Village of Fort San (RVFS or Village) in respect to same records that appeared to be similar under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).<sup>3</sup> Given the nature of the records at issue and requests that involve the same Applicant, I decided to consolidate both reviews into one Report. This is the simplest way to deal with all of the various arguments and exemptions noted. A further consideration is that, as both reviews have taken an unreasonable amount of time for reasons that will be discussed below, there is a compelling need to resolve these matters without further delay.

[2] The Applicant made his first access request to the RVFS on February 12, 2007 for the following:

Agreement between the Resort Village of Fort San and the Third party (aka. San Echo Group), and SPM relating to the acquisition of and the disposition of the Echo Valley Conference Centre (also known as the old Fort San Property);

All records and correspondence (written or electronic), from all members of Fort San council/officers, Saskatchewan Cabinet Ministers, Saskatchewan Property Management, memoranda, records, documents from & to/or between the Resort Village of Fort San and the Third party (aka. San Echo Group) promoters, partners and/or Sask. Property Management, including names of third party directors, investors and promoters.

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<sup>1</sup>Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC), Investigation Report H-2007-001 at [15], available at: [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

<sup>2</sup>*The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01.

<sup>3</sup>*The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1.

- [3] On March 13, 2007, RVFS responded to the access request by releasing 32 records responsive to the Applicant's request. It appeared as though the responsive records had been released in full without RVFS claiming any exemptions.
- [4] On April 30, 2007, my office received a request for review from the Applicant. The Applicant alleged that RVFS had not released all of the responsive records. My office proceeded to undertake the review. On May 7, 2007, my office provided notification to RVFS and asked for a submission regarding the disclosure of all of the responsive records.
- [5] On May 25, 2007, my office received a submission dated May 24, 2007 from RVFS. On June 27, 2007 my office received from RVFS a copy of the responsive record as provided to the Applicant.
- [6] On July 3, 2007, the Ministry (at the material time SPM) received an access request from the Applicant. Details of the request were clarified by the Ministry by telephone call to the Applicant on July 10, 2007. The records the Applicant requested were noted by the Ministry in its section 7 response as follows:
- Any proposal(s) from the San Echo Group (may be under a similar but different name) for the acquisition of the Fort San property as well as the names of principals, partners, shareholders, directors, promoters or investors in the San Echo Group. Additionally provide records of any modifications or changes to the proposal or the names of the principals, partners, shareholders, directors, promoters or investors in the San Echo Group.
- [7] By letter dated July 30, 2007, the Ministry denied the Applicant access to the responsive records in full. The Ministry denied access to the records pursuant to sections 13(2), 19(1)(b), 18(1)(d), 18(1)(f) and 29(1) of FOIP.
- [8] My office received a request for review from the Applicant on September 11, 2007. By letters dated October 16, 2007, my office notified the Ministry and the Applicant of my intention to undertake a review.

- [9] On January 21, 2008 my office received a submission from the Ministry with respect to this matter. This submission raised the following exemptions to support denial of the record: sections 13(2), 19(1)(b), 18(1)(d), 18(1)(f), 29(1) of FOIP. They also provided us a copy of the responsive record.
- [10] The Ministry had raised a third party exemption, 19(1)(b) of FOIP. As such, my office's procedure is to contact the Third Party and invite them to make a submission.<sup>4</sup> As the Ministry's submission did not name the Third Party, we asked by letter dated October 2, 2009 for the Ministry to identify the Third Party in this case. We received an e-mail dated October 28, 2009 from the Ministry indicating that the Mayor of RVFS, and another individual who I will refer to as 'the second principal' were third parties. The Ministry also indicated that they did not have current contact information for these individuals.
- [11] On November 25, 2009, my office wrote to the Mayor of RVFS to ask for a Third Party submission. On December 11, 2009 we received a submission from the Mayor dated December 9, 2009. The Mayor signed it in his capacity as Mayor of RVFS. On January 5, 2011, my office wrote to the Mayor of RVFS to ask for contact information for the second principal. On February 18, 2011 I received a letter from the Mayor indicating that he would not provide the contact information for the second principal.

## II RECORDS AT ISSUE

- [12] The responsive record under the possession or control of the Ministry consisted of 3 documents:
- Page 1: A cover letter from the Mayor of RVFS to the Minister of SPM dated May 30, 2005 transmitting a proposal from SanEcho Development Inc. which was released to the Applicant in the course of this Review. RVFS also released this letter to the Applicant as a responsive record. This letter is no longer at issue.

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<sup>4</sup>SK OIPC, *Helpful Tips: Best Practices for Public Bodies/Trustees for the Processing of Access Requests*, p. 6, available at [www.oipc.sk.ca/resources.htm](http://www.oipc.sk.ca/resources.htm).

- Pages 2 to 20: A proposal from SanEcho Development Inc. which is undated. The Ministry is withholding it pursuant to sections 13(2), 19(1)(b), 18(1)(d) and 18(1)(f).
- Pages 21 to 23: A briefing note prepared for the Minister of Property Management on the purchase of proposals for the disposal of the Echo Valley Conference Centre dated May 16, 2006. Originally, the Ministry withheld the entire document pursuant to section 29(1) of FOIP and later disclosed more of the document severing only personal information upon advice from our office. This briefing note is no longer at issue.

[13] RVFS contends that it gave the Applicant access to all the responsive records within its possession or control. The Applicant alleged however that there should be more responsive material. As such, it is unclear what records may have been withheld. However, the proposal portion of the Record withheld by the Ministry is evidence that there could be more responsive records that have not been identified by RVFS. I have also found evidence that there may have been a second proposal that neither the Ministry nor RVFS has identified as responsive. Neither the Ministry nor RVFS has explained why this second proposal was not responsive.

### III ISSUES

1. **Did the Ministry of Government Services properly apply section 13(2) of *The Freedom of Information and Protection of Privacy Act* to the withheld records?**
2. **Did the Ministry of Government Services properly apply section 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* to the withheld records?**
3. **Did the Ministry of Government Services properly apply sections 18(1)(d) and 18(1)(f) of *The Freedom of Information and Protection of Privacy Act* to the withheld records?**
4. **Did the Resort Village of Fort San undertake an adequate search for responsive records?**

**5. Does the Resort Village of Fort San have possession or control of additional responsive material?**

**IV DISCUSSION OF THE ISSUES**

[14] The Ministry of Government Services is a “government institution” within the meaning of section 2(1)(d) of FOIP and therefore is subject to the Act.<sup>5</sup>

**1. Did the Ministry of Government Services properly apply section 13(2) of *The Freedom of Information and Protection of Privacy Act* to the withheld records?**

[15] The Ministry has applied section 13(2) of FOIP to the proposal portion of the record as it was obtained from RVFS. Section 13(2) of FOIP states:

(2) A head may refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from a local authority as defined in the regulations.<sup>6</sup>

[16] In order for this exemption to apply, three criteria must be met:

1. Is RVFS a local authority as defined in the FOIP Regulations?
2. Was the record obtained from the local authority?
3. Was the record obtained ‘implicitly or explicitly in confidence’ from a local authority?

[17] Section 2(2) of *The Freedom of Information and Protection of Privacy Regulations* states:

(2) For the purposes of these regulations and subsection 13(2) of the Act, “local authority” means a local authority as defined in *The Local Authority Freedom of Information and Protection of Privacy Act*.<sup>7</sup>

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<sup>5</sup>SK OIPC, Investigation Report H-2007-001 at [17], available at: [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

<sup>6</sup>*Supra* note 2 s. 13(2).

<sup>7</sup>*The Freedom of Information and Protection of Privacy Regulations*, c. F-22.01 Reg. 1, s. 2(2).

[18] Section 2(f)(i) of LA FOIP states:

2 In this Act:

...

(f) “local authority” means:

(i) a municipality<sup>8</sup>

[19] The website of the Ministry of Municipal Affairs for the Government of Saskatchewan states:

### **Types of Municipalities**

Saskatchewan currently has 786 urban, rural and northern municipalities. For listings, see the Municipal Directory. Of the 786 municipalities, 466 are considered **urban**. These include:

- 15 cities;
- 145 towns;
- 266 villages; and
- 40 resort villages.<sup>9</sup>

[20] The RVFS is listed as a municipality on the Municipal Directory.<sup>10</sup> As such, RVFS is a local authority and is subject to LA FOIP.

[21] Secondly, I must determine if the record had been obtained from the local authority. I previously defined “obtained” in my Report F-2006-002.<sup>11</sup> The cover letter that accompanied the proposal demonstrates that the proposal was obtained by the Ministry from RVFS.

[22] Most importantly, I must determine if the record was obtained implicitly or explicitly in confidence from RVFS. The Ministry’s submission dated January 16, 2008 stated:

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<sup>8</sup>*Supra* note 3 s. 2(f)(i).

<sup>9</sup>Saskatchewan Ministry of Government Affairs, *Types of Municipalities*, available at: <http://www.municipal.gov.sk.ca/Programs-Services/Municipalities-Types>.

<sup>10</sup>Saskatchewan Ministry of Government Affairs, *Municipal Directory*, available at: <http://www.mds.gov.sk.ca/apps/Pub/MDS/muniDetails.aspx?cat=4&mun=1969>.

<sup>11</sup>SK OIPC, Report F-2006-002 at [37] to [39], available at: [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

The proposal documents were provided to us in confidence by the Resort Village. In the past we have sought the consent of the Resort Village for the public disclosure of its proposal, however, such has been refused by the Resort Village. The proposal documents constitute records that were obtained in confidence from the Resort Village of Fort San, and as such access to such information is authorized to be refused under subsection 13(2) of the Act...

[23] This is the only representation the Ministry provided on this subject but it does not explain how the proposal was obtained in confidence.

[24] I also look to the representation from RVFS. This letter dated December 9, 2009 stated:

As you are aware, the R.V. of Fort San's involvement with SanEcho Development Inc was solely to transmit and advance the SanEcho Development Inc proposal to the then "Saskatchewan Property Management Corporation" to meet their requirements as set out in the Saskatchewan Property Management Disposal Policy. In acting as a transmittal conduit, the Resort Village of Fort San agreed to accept the SanEcho Development Inc request for "confidentiality" respecting all aspects of the intent and content of their proposal. In consideration of this agreement for confidentiality, the R.V. of Fort San intends to honor this commitment.

**In view of the foregoing, it is believed that the RV of Fort San is not in the position to lift the "confidentiality" associated with the SanEcho proposal.**

[emphasis added]

[25] RVFS contends that it was simply a conduit for the proposal while the Ministry named it as a Third Party. The ambiguity of RVFS' role with respect to the proposal has caused confusion and delay in both reviews. In a letter providing analysis to the Ministry dated September 23, 2010, my office posed the question: If RVFS was simply a conduit, how could it stipulate that the record must be held in confidence by the Ministry?

[26] In response, the Ministry answered via letter dated May 12, 2011 that it does not agree that the proposal was obtained by the Ministry solely by the local authority. Its letter stated:

The record was obtained by the ministry in implicit confidence from the RVFS which is a local authority pursuant to section 13(2) of FOIP, *and*, the record was also supplied to the ministry in implicit confidence, indirectly from SanEcho Developments Inc., who is a third party pursuant to section 19(1)(b) of FOIP... The

ministry does not have direct knowledge of the relationship between the RVFS and SanEcho Development Inc. and relies on what was communicated to the ministry in the covering letter submitted with the proposal, that being the proposal:

- was provided “On behalf of the Resort Village of Fort San *and* SanEcho Development Inc. ...” [emphasis added];
- references the “Resort Village of Fort San, its partner associates...”; and
- references “On behalf of all those involved in this project...”

[27] The Ministry also listed other such references from the proposal itself to support its conclusion that the proposal was obtained from both entities. They have not been reproduced as they are repetitive and I would not normally reproduce portions of a record in a Report.

[28] I will deal with the third party issue under the discussion of section 19(1)(b) of FOIP later in this Report. Under consideration now is whether there is evidence of the explicit or implicit expectation of confidentiality from the local authority pursuant to section 13(2) of LA FOIP.

[29] The tests I rely upon to determine if a document was obtained in confidence explicitly or implicitly are found in my Report F-2006-002 as follows:

[56] The *Annotated Alberta Freedom of Information and Protection of Privacy Act* (Alberta’s Annotated FOIP Act) publication offers definitions of the above-noted terms as listed below:

Page 5-16-5, discusses “provided in confidence, implicitly or explicitly”.

*In the past, factors that have been cited to support a finding that information has been supplied to a public body by a third party in confidence include:*

- a. the existence of an express condition of confidentiality in an agreement between a public body and the third party (Orders 97-013 [23-27], 2001-008 [54], 2001-019 [15]);*
- b. the fact that the public body requested the information be supplied in a sealed envelope (Order 97-013 [23-27]);*
- c. the third party’s evidence that it considered the information to have been supplied in confidence (Order 97-013 [23-27]);*

- d. *the fact that the third party supplying the information was promised by the public body that he or she would not be identified (Order 2000-003 [122]); and*
- e. *the passing of a motion that the information remain private (Order 2001-019 [15]).*

[57] Also, the same tool defines “implicitly” as meaning,

*that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential. In such cases, all relevant facts and circumstances need to be examined to determine whether or not there is an understanding of confidentiality including whether the information was:*

- a. *communicated to the public body on the basis that it was confidential and that it was to be kept confidential;*
- b. *treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body;*
- c. *not otherwise disclosed or available from sources to which the public has access; or*
- d. *prepared for a purpose which would not entail disclosure.*<sup>12</sup>

[30] The Ministry has provided no evidence to support the claim of explicit or implied confidentiality other than the “CONFIDENTIAL” banner on every page of the document. The transmittal letter from the Mayor of RVFS to the Ministry makes no reference to confidentiality. Since the proposal being submitted was apparently in response to a Request for Proposals (RFP) it would have been useful for the Ministry to produce that RFP and any other notes or memoranda or evidence of past dealings which would have either supported or not supported the claim of confidentiality.

[31] I now must consider if the information was obtained ‘in confidence’. The Ministry argued in its letter of May 12, 2011 that: “The proposal was implicitly obtained in confidence given that it was marked with a “Confidential” banner on each page”. Is this marking sufficient to meet the ‘in confidence’ test?

[32] I first note Ontario Information and Privacy Commissioner (IPC) Order PO-2180 which addresses what is reasonable in terms of expectations of the supplier of the information.

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<sup>12</sup>*Ibid.* at [56] to [57].

With respect to whether the information was supplied “in confidence”, part 2 of the test requires a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the affected party expects that the information would be treated confidentially; this expectation **must be reasonable**, and must have an **objective basis**. The expectation of confidentiality can arise implicitly or explicitly [Order M-169].<sup>13</sup>

[emphasis added]

[33] I then note the following comment in *Government Information: The Right to Information and the Protection of Privacy in Canada*:

Marking Information as Confidential

**The designation of information submitted to the government as confidential can be overplayed, at some risk to the third party.** A blanket claim of confidentiality is often made by a person providing information to an institution for a broad range of material some of which is plainly not confidential. Such a claim, when considered in the context of an access request, is likely to lack credibility. It may, therefore, be ignored by the government institution in receipt of the request, defeating the very purpose of the confidential designation. **Accordingly, a supplier of information to a government institution would be wise to develop a systematic and considered plan for the use of any “confidential” marking, having regard to the nature of the information being so classified.**

There is a like danger if a third party exaggerates or overextends the portrayal of harm that would come from disclosure of information submitted to a government institution.

A page-by-page analysis of information to determine what is confidential, or potentially harmful, and what is not will usually be impractical. Some general classifications of the types of information to be marked as confidential are therefore, necessary and likely to be acceptable. **But a counsel of caution that would have a third party allege that material of all kinds supplied to the government consists of protected third party information is likely to be ineffective and potentially counterproductive.**<sup>14</sup>

[emphasis added]

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<sup>13</sup>Ontario Information and Privacy Commissioner (hereinafter ON IPC), Order PO-2180, p. 3.

<sup>14</sup>K. Klein and D. Kratchanov: *Government Information: The Right to Information and the Protection of Privacy in Canada, Second Edition* (Toronto: Carswell Press, 2009) at p. 4-46.

[34] I have also discussed such confidential markings in my Reports H-2008-002 and LA-2011-001 where I found that they do not carry much weight unless supported by evidence to prove the information is treated in a consistent manner.<sup>15</sup>

[35] In considering this criterion of the test at paragraph [29], it was helpful to scan decisions from other jurisdictions in regard to the treatment of proposals supplied in confidence in the context of access requests. In all of the following listed Orders, the proposals were withheld on the basis of third party exemptions as they all appear to be supplied directly from a third party. Office of the Information and Privacy Commissioner (IPC) of Alberta Orders F-2002-002 and 97-013 and British Columbia IPC Orders F09-22 and 142-1997 upheld the decision to withhold proposals as each proposal had an explicit confidentiality statement or clause.<sup>16</sup> The proposal in British Columbia IPC Order 03-33 was withheld because the province's 'Request for Proposals' contained an explicit statement saying all proposals would be held in confidence.<sup>17</sup> Ontario IPC Order M-904 dealt with several proposals. Although only some of the proposals had explicit confidentiality statements, others did not:

I have no difficulty in reaching the conclusion that the records were supplied by the affected parties to the Board. I find that the affected parties have provided me with sufficient evidence to conclude that the records were supplied to the Board with a reasonably held expectation of confidentiality, either explicitly stated in the proposals which were submitted; **or implicitly, taking into account the circumstances surrounding the tendering process.** I find, accordingly, that the second part of the section 10(1) test has been met.<sup>18</sup>

[emphasis added]

[36] It is important to remember, however, that in each of the cases, the information was supplied by a third party, not a local authority. In the case at hand, RVFS argued that a third party wrote the proposal and the information within it, while RVFS acted only as a

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<sup>15</sup>SK OIPC, Report H-2008-002 at [70] to [74] and Report LA-2011-001 at [105], both available at: [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

<sup>16</sup>Office of the Information and Privacy Commissioner of Alberta (hereinafter AB IPC), Orders F-2002-002 and 97-013; Office of the Information and Privacy Commissioner for British Columbia (hereinafter BC IPC) Orders F09-22 and 142-1997.

<sup>17</sup>BC IPC, Order 03-33.

<sup>18</sup>ON IPC, Order M-904, p. 2.

conduit. If this were true, it was the third party that placed the banner on the document, not RVFS. However, later in this Report, I discuss evidence that demonstrates RVFS did have a role in the development of the proposal.

[37] Nonetheless, I am not persuaded that a simple ‘confidential banner’ is sufficient to establish that the Ministry obtained the proposal in confidence, implicitly or explicitly.

[38] Section 61 of FOIP establishes that the burden of proof for demonstrating that access to the record may be refused is on the government institution.<sup>19</sup>

[39] The Ministry has not met the burden of proof in demonstrating the proposal was obtained implicitly or explicitly in confidence from RVFS as the confidential banner and mere assertions are insufficient evidence in the circumstances. I find section 13(2) of FOIP therefore does not apply.

**2. Did the Ministry of Government Services properly apply section 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* to the withheld records?**

[40] The Ministry argued that section 19(1)(b) of FOIP also applied to the proposal portion of the record. This provision states:

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**<sup>20</sup>

[emphasis added]

[41] The Ministry’s submission of July 30, 2007 stated:

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<sup>19</sup>*Supra* note 2 s. 61.

<sup>20</sup>*Supra* note 2 s. 19(1)(b).

Further, the proposal documents contain commercial and financial information supplied in explicit and implicit confidence by a third party to the Department of Property Management. As such, the Department is required by the Act to refuse access to those portions of the records under clause 19(2)(b)...

[42] My office has clarified that the Ministry is referring to section 19(1)(b) of FOIP. As noted in the Background section of this Report, the Ministry did not clearly identify the Third Party(s) in this case. The two names that the Ministry suggested were the Mayor of RVFS and another individual who we refer to as the second principal.

[43] First, I will deal with the Mayor of RVFS as a third party. As noted above, there is ambiguity surrounding the role of the Mayor. However, the Mayor signed the transmittal letter in his capacity as mayor of the RVFS. I must then assess if a local authority can be considered a third party as the Mayor.

[44] Section 2(1)(j) of FOIP states:

(j) “third party” means a person, including an unincorporated entity, other than an applicant or a government institution.<sup>21</sup>

[45] Section 2(1)(k) of LA FOIP states:

(k) “third party” means a person, including an unincorporated entity, other than an applicant or a local authority.<sup>22</sup>

[46] I have commented on this issue of who qualifies and does not qualify as a third party in my Report LA-2009-001 as follows:

[21] A helpful resource, *Government Information Access and Privacy* by McNairn and Woodbury (McNairn), offers the following general description of what constitutes “third party information”:

All of the access statutes provide exemptions for various kinds of information provided to the government by other, **non-governmental persons**, or affecting such persons in specified ways. This type of information is known as third party information.

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<sup>21</sup>*Supra* note 2 s. 2(1)(j).

<sup>22</sup>*Supra* note 3 s. 2(1)(k).

...

[25] Though referencing *The Freedom of Information and Protection of Privacy Act*, not LA FOIP, in my Report F-2006-002, I clarified the following with respect to third party status:

[75] A third party cannot be another provincial government institution since section 2(1)(j) of the Act provides that: “*third party*” means a person, including an unincorporated entity, other than an applicant or a government institution.”

[26] Similarly, “third party” is defined by LA FOIP as “a person, including an unincorporated entity, other than an applicant or a local authority.” As with the above analysis, I find that the University of Saskatchewan (U of S or the University), as a local authority, cannot be a third party to which section 18 of LA FOIP may apply.<sup>23</sup>

[emphasis added]

[47] It is my view that the two Acts must be considered together. Both Acts started out as consecutive Bills receiving first reading in the Legislative Assembly on April 19, 1991. On June 18, 1991 the Lieutenant Governor spoke to prorogation and stated as follows:

Widespread consultations also revealed a significant element of demand for a less partisan government, the protection of democratic rights, and the accountability of elected governments. This spring the rules of the Legislative Assembly were changed and the first Speaker elected, to respond to the first of these concerns. The government’s comprehensive package of legislation, including *The Referendum and Plebiscite Act*, *The Freedom of Information and Protection of Privacy Act*, and *The Local Authority Freedom of Information and Protection of Privacy Act*, are reforms introduced to make government more open and allow people to play a more direct role in the government.... Finally, the two freedom of information Acts provide the public with the right to know the activities of government as it touches their personal lives....<sup>24</sup>

[48] It is useful to consider what was said in Hansard by the Minister who initiated debate at second reading on April 22, 1991 on Bill No. 70 – *An Act respecting a right of access to documents of the Government of Saskatchewan and a right of privacy with respect to the personal information held by the Government of Saskatchewan*. The Honourable Mr. Lane commenced his debate as follows:

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<sup>23</sup>SK OIPC, Report LA-2009-001 at [21] to [26], available at: [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

<sup>24</sup>Saskatchewan *Hansard*, June 18, 1991, available at <http://docs.legassembly.sk.ca/legdocs/Legislative%20Assembly/Hansard/21L4S/910618e.PDF>.

Thank you, Mr. Speaker. I'm pleased today to rise to move second reading of The Freedom of Information and Protection of Privacy Act. **This Bill is part of the government's legislative package of democratic reforms.** It will ensure that the Government of Saskatchewan continues to operate in the climate of openness and accountability.<sup>25</sup>

[emphasis added]

- [49] Just minutes later, the same Minister Lane initiated debate on Bill 71 – *An Act respecting a right of access to documents of local authorities and a right of privacy with respect to personal information held by local authorities*. This time he stated:

Thank you, Mr. Deputy Speaker. This Bill, like *The Freedom of Information and Protection of Privacy Act* **is part of the government's package of democratic reforms.** It was introduced to enhance the spirit of open and accountable government at both the provincial and local levels.

[emphasis added]

- [50] Given that background, it is my view that the two Acts must be considered together. The apparent intention of the Legislative Assembly was that public bodies (both government institutions and local authorities), with their transparency obligations under Parts II and III of FOIP and LA FOIP cannot qualify as a third party.

- [51] My view is reinforced by the existence of section 13(2) of FOIP that provides:

(2) A head may refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from a local authority as defined in the regulations.

- [52] If the Legislative Assembly intended to treat a local authority as a third party there would be no reason for the inclusion of section 13(2) in FOIP since the same result would be achieved by section 19. To hold otherwise would be inconsistent with the primary purpose the Court of Appeal has ascribed to FOIP. The same primary purpose must be ascribed to LA FOIP. In other words, to hold otherwise would lead to an absurd result since the purpose of both laws is to promote openness and accountability of public

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<sup>25</sup>Saskatchewan *Hansard*, April 22, 1991, available at <http://docs.legassembly.sk.ca/legdocs/Legislative%20Assembly/Hansard/21L4S/910422.PDF>.

bodies. In this regard, I rely on the analysis and discussion in Ontario IPC Orders PO-2602-R, MO-2588, MO-2522 and the Supreme Court of Canada decision in *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, [2010] 3 SCR 3.<sup>26</sup>

[53] RVFS therefore cannot constitute a third party since it is a local authority.

[54] As mentioned above, the Ministry's submission of May 12, 2011 argued that the proposal was obtained from RVFS and supplied indirectly from a Third Party. The letter stated:

The record was obtained by the ministry in implicit confidence from the RVFS which is a local authority pursuant to section 13(2) of FOIP, *and*, the record was also supplied to the ministry in implicit confidence, indirectly from SanEcho Developments Inc, who is a third party pursuant to section 19(1)(b)... The ministry does not have direct knowledge of the relationship between the RVFS and SanEcho Development Inc. and relies on what was communicated to the ministry in the covering letter submitted with the proposal, that being that the proposal:

- was provided "On behalf of the Resort Village of Fort San *and* SanEcho Development Inc. ..." [emphasis added];
- references the "Resort Village of Fort San, its partner associates..."; and
- references "On behalf of all those involved in this project."

[55] I must now consider if the second principal is a Third Party. The Ministry was not able to give us contact information for the second principal. RVFS was not willing to provide that information either. The total absence of any correspondence from San Echo Development Inc. contributes to the confusion regarding this third party.

[56] In my Report F-2006-002, I commented on the difference between *supply* and *obtain* as follows:

Because section 19(1)(b) of the Act which was cited as a justification for exemption by SRC, is similarly worded to that of section 13(1)(a), we will analyze similar terms and phrases concurrently. Both provisions refer to "information" that is "contained in a record" "obtained in confidence, implicitly or explicitly" (section 13) or "supplied in confidence, implicitly or explicitly" (section 19). While section 13 uses the term "obtained" section 19 uses the term "supplied". Different words in a statute mean

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<sup>26</sup>ON IPC Orders PO-2602-R, MO-2588, MO-2522 and *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, [2010] 3 SCR 3.

different things. It would appear that “obtain” is about receiving, whereas “supplied” would infer giving. In either case, the information comes into the possession of the government institution, in this case, SRC.<sup>27</sup>

[57] Accordingly, I also noted in my Report F-2005-003 that:

[17] Of additional assistance is Ontario’s Information and Privacy Commissioner’s (Ontario/IPC) Final Order MO-1846-F. It provides:

*“The requirement that information be “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].*

*Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].*

*The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706].”*

...

[19] We agree with the consistent approach taken by the other Commissioners in interpreting “supplied to”.<sup>28</sup>

[58] What the Ministry references in its submission is the RFP of the Ministry and documentation in response to that RFP. That would not normally constitute an agreement since the response to the RFP is in the nature of an offer. I note that the Ministry may have been able to bolster its arguments by providing my office with a copy of the RFP, but has not done so.

[59] Given the ambiguity of the role of the Mayor of RVFS, the cover letter on RVFS letterhead, the inability of the Ministry to locate or identify the Third Party and the fact that RVFS cannot constitute a third party, I must conclude that the Ministry has not met the burden of proof to show section 19(1)(b) of FOIP applies to the record.

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<sup>27</sup>Supra note 11 at [37].

<sup>28</sup>SK OIPC, Report F-2005-003 at [17] to [19], available at: [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

**3. Did the Ministry of Government Services properly apply sections 18(1)(d) and 18(1)(f) of *The Freedom of Information and Protection of Privacy Act* to the withheld records?**

[60] Finally, the Ministry is arguing that sections 18(1)(d) and 18(1)(f) of FOIP apply to the proposal portion of the record. These sections state:

18(1) 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 Government of Saskatchewan or a government institution;

...

(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution<sup>29</sup>

[61] The Ministry provided the following representation to support these exemptions in its submission of January 16, 2008:

Finally, the proposal documents were obtained in response to a proposed disposition of the lands and buildings that comprise the Echo Valley Conference Centre following SPM's disposal process (described above). The disposition process essentially involves a competitive process amongst bidders, and the Department is concerned that the disclosure of unsuccessful proposals or bids received through these types of processes, without the consent of the submitter, will result in parties becoming reluctant to respond to such competitions, and ultimately impacting the government's ability to conduct these dispositions.

[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:

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<sup>29</sup>*Supra* note 2 ss. 18(1)(d) and 18(1)(f).

*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.<sup>30</sup>

[emphasis added]

[63] The Ministry challenged this view in its letter of May 12, 2011 which stated:

While the Ministry of Government Services has only been asked to take action as per the ‘Suggested Course of Action’ portion of the said letter, the ministry would like to comment on the section 18 part of the OIPC’s letter. The first deals with a “contractual or other negotiation” and the comment that the call for proposals does not appear to be the same as a negotiation of a contract or other sort of agreement.

The call for proposals is only one step in a process which is expected to culminate in the negotiation of a contract or agreement. In other words the call for proposals is part of the negotiation process despite the fact that it is at an early part of that process.

[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**

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<sup>30</sup>Access and Privacy Branch, Service Alberta, *FOIP Guidelines and Practices* (2009), p. 192, available at: <http://foip.alberta.ca/resources/guidelinespractices>.

**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.<sup>31</sup>

[emphasis added]

[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.

[66] I now shift to section 18(1)(f) of FOIP. I commented on this section in my Report F-2006-002 as follows:

[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**

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<sup>31</sup>BC IPC, Order 142-1997.

**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 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.**<sup>32</sup>

[emphasis added]

[67] The arguments put forth by the Ministry in its submissions amounts to speculation only. The Ministry has not provided evidence to support such speculation.

[68] Furthermore, the Ministry had already asked RVFS to make this document public. As noted in its January 16, 2008 submission in support of exemption 13(2) of FOIP, the Ministry stated:

In the past we have sought the consent of the Resort Village for the public disclosure of its proposal, however, such has been refused by the Resort Village.

[69] As such, my office asked the following question of the Ministry in our letter of September 23, 2010: Why would the Ministry ask RVFS to make this proposal public if they believed it would harm the economic interest of the Government of Saskatchewan or a government institution?

[70] In response, the Ministry’s letter of May 12, 2011 stated:

The answer to this is that there is no chilling effect on the future receipt of proposals where a proponent controls the dissemination of its own confidential information – if that proponent is of the view that confidentiality is no longer required and they waive their confidentiality rights then proponents will not be concerned about submitting future proposals because they are in control of their own confidential information. Thus, it is the position of the ministry that section 18(1)(d) and (e) properly applies.

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<sup>32</sup>Supra note 11 at [107] to [108].

[71] It appears that the Ministry meant section 18(1)(f), not section 18(1)(e). However, I am not persuaded that the Ministry has provided sufficient evidence to demonstrate that there is a “reasonable expectation of harm.” Therefore, the Ministry has not met the burden of proof to show section 18(1)(f) of FOIP is applicable to the record under the circumstances.

**4. Did the Resort Village of Fort San undertake an adequate search for responsive records?**

[72] As noted in the Background section of this Report, in response to the access request, RVFS released some 32 records. Since the Applicant claims that there are more records in the possession or control of RVFS that have not been released it became necessary to consider whether there may be additional responsive records and whether the RVFS undertook an adequate search for responsive records.

[73] The Applicant asserted that the RVFS should have had a copy of a proposal although the Mayor denies that RVFS retained a copy.

[74] Also, it is curious that in the package of responsive material that was released to the Applicant and disclosed to my office there is no correspondence between RVFS and San Echo Development Inc. This suggests that there may well be more records that have not been produced by RVFS.

[75] The relevant provision of LA FOIP for the matter at hand is section 5 as follows:

5 Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are **in the possession or under the control** of a local authority.<sup>33</sup>

[emphasis added]

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<sup>33</sup>Supra note 3 s. 5.

[76] As such, I must determine if the local authority had ‘possession or control’ of additional responsive records at the material time. I commented on this issue in my Report F-2008-002:

[17] ...It should be clarified that this response does not imply that the record in question does not exist at all. Justice never claimed as much, nor would it be possible for a public body to make such a sweeping statement about the general existence of a record.

[18] How then, should the term “exist” in section 7(2)(e) be understood? A section 7(2)(e) response must be interpreted in light of section 5 which states that “every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are **in the possession or under the control** of a government institution” (emphasis added). The term “exist” in section 7(2)(e) then, is a function of being possessed or controlled by the public body to which the access request is being made.”

...

[25] In order for a record to be subject to an access to information request, the public body need only have possession or control, not both. This is demonstrated through the legislature’s choice to join the two terms with ‘or’, rather than ‘and’.<sup>34</sup>

[77] In order to determine if a local authority had possession or control of a record, it must have performed an adequate search for the record. I stated in my Report F-2008-001 that a public body does not have to prove with absolute certainty that the record does not exist. However, it must demonstrate it has performed an adequate search for the records. For guidance on adequate searches, my office has produced *Helpful Tips: Best Practices for Public Bodies/Trustees for the Processing of Access Requests (Helpful Tips)* in which we stated:

#### **Adequate Search for Records**

The public body/trustee has a duty to search for, identify and consider all responsive records. We highly recommend that public bodies/trustees thoroughly document their search efforts. To ensure a complete and adequate search, the public body/trustee should utilize a search strategy which considers the following:

- Were records in any form or format considered (i.e. electronic, paper, other)?
- Is the original access request very broad and could include information developed over a wide open time period? If so, how did you define the search?
- How did you search for records in the public body’s possession?

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<sup>34</sup>SK OIPC, Report F-2008-002 at [17] to [25], available at: [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

- Did you search yourself?
- Did you delegate others to do the search? If so, how can you be sure that the search was comprehensive?
- Did you send out an email to other units, etc?
- Could records also exist that are responsive to this access request that are not in your possession, but in your control?
  - Did agents, consultants or other contracted services have any role in the project the access request is referencing?
  - If yes, are these records included in the package provided to the OIPC?

There have been instances where instead of providing the applicant with responsive records, public bodies/trustees offer summaries of the information requested, thus creating new records. This may be in fact what the applicant is looking for. However, a formal access request under either the FOIP or LA FOIP entitles the applicant to documents in their original form. FOIP and LA FOIP are clear that access rights under these laws is to “*records that are in the possession or under the control*” of that public body. In other words, the access provisions in both Acts are “record-driven” and not “information-driven.” There is no responsibility under either Act to create records that do not otherwise exist.<sup>35</sup>

[78] In my Report F-2008-001, I also referenced a document entitled *Tips for DMIPS and Freedom of Information and Privacy Coordinators: Conducting an Adequate Search Investigation under the Freedom of Information and Protection of Privacy Act* prepared by the Office of the Information and Privacy Commissioner of British Columbia.<sup>36</sup> This document states:

*Determine what steps were taken during the initial search for records and whether, based on the applicant’s complaint, further searches are warranted. Take the applicant’s concerns to the individuals who conducted the search and determine and document your answers to the following questions.*

Ask yourself or staff:

- Who conducted the search?
- Which files or departments were searched?
- Which ones weren’t searched and why not?
- How much time was spent searching for records?

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<sup>35</sup>*Supra* note 4 at p. 6.

<sup>36</sup>SK OIPC, Report F-2008-001 at [64], available at: [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

- Based on the applicant's concerns, are there any additional program areas that should be searched in order to ensure that every reasonable effort was made?
- Have staff searched electronic records, or files held apart from the main department files (such as those held by individual employees), or records stored off-site?

*Conduct additional searches if it is possible that certain program areas were overlooked or that the initial search for records was incomplete, rushed or based on a narrow interpretation of the request. Staff that carry out further searches should provide written confirmation of the results, including their explanation of why there are no records if none are found.*<sup>37</sup>

[79] I expect local authorities and government institutions to document searches so that they will be able to provide detailed representations in the course of a review such as this.

[80] The Applicant requested from RVFS "Agreement between the Resort Village of Fort San and the Third party (aka. San Echo Group) and SPM". In the first submission our office received from RVFS dated May 24, 2007, it stated that "there is no agreement, between the Resort village of Fort San, San Echo and SPM" and all the responsive records had been released to the Applicant.

[81] It is my position that local authorities and government institutions have a duty to assist all applicants and interpret access requests broadly, quite different from the application of an exemption which needs to be interpreted narrowly. Our office has also explained this position in the *Helpful Tips* document.

FOIP and LA FOIP do not stipulate a duty to assist applicants. The OIPC however takes the position that there is an implied duty on the part of public bodies to take reasonable steps to ensure that they respond to access requests openly, accurately and completely. The duty to assist is explicit in HIPA.

While applicants have a responsibility to "*specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject matter to identify the record,*" many applicants do not have detailed knowledge about the types of records a public body/trustee

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<sup>37</sup>BC OIPC, *Tips for DMIPS and Freedom of Information and Privacy Coordinators: Conducting an Adequate Search Investigation under the Freedom of Information and Protection of Privacy Act*, p. 3, available at: [www.oipc.bc.ca/advice/Guidelines\\_for\\_Adequate\\_Search\\_Investigations.pdf](http://www.oipc.bc.ca/advice/Guidelines_for_Adequate_Search_Investigations.pdf).

maintains. In our view this kind of implied duty to assist is essential to meet the purpose of FOIP and LA FOIP. This is the standard that is clearly stated in HIPA.

It may be useful for a FOIP/HIPA Coordinator to contact an applicant directly to determine (a) if what the applicant is looking for is clear; (b) if the request can be accommodated informally outside of the FOIP, LA FOIP or HIPA; and (c) if the request can be clarified in the interests of focusing on certain key records and avoiding unnecessary costs to the applicant.<sup>38</sup>

[82] I believe the request made by the Applicant should be interpreted to capture antecedent and related documents including the RFP response submitted by the Mayor of RVFS to the Ministry. Therefore, the proposals in question would qualify as a responsive record.

[83] My office asked RVFS for further representation in our letter of December 11, 2008. Below is a summary of the issues in which we sought clarification from RVFS and the responses from its submission dated January 21, 2009:

OIPC: “the Resort Village did not retain a copy of the *Request for Proposal* submission to the Saskatchewan Property Management, now known as the Ministry of Government Services, owing to the fact that it was not involved with or connected to the third party but was acting as an agent of the third party.”

RVFS Response: “The R.V. of Fort San was not provided a copy of the purchase proposal for its records or retention. The involvement of the R.V. of Fort San was solely to serve as a transmittal vehicle to meet the requirements as set out in the Saskatchewan Property Management disposal policy.”

OIPC: “all information provided by the Resort Village of Fort San to the Applicant was provided in its entirety”

RVFS Response: “To my knowledge, all information and/or documentation in the possession of the R.V. of Fort San respecting the unsuccessful acquisition by the SanEcho Group, has been provided to the Applicant.”

OIPC: “copies of all records and correspondence both written and electronic that are contained in the village files were provided”

RVFS Response: “To my knowledge all records and correspondence (written and computerized) that is or ever was in the possession of R.V. of Fort San were provided.”

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<sup>38</sup>*Supra* note 4 p. 5.

OIPC: “the village does not have any record of the third party directors, investors and promoters of San Echo. Mayor [name removed] was councils’ contact and Mayor [name removed]’s contact was one person involved in the San Echo Group”

RVFS Response: “To my knowledge the R.V. of Fort San does not now, or at any time in the past, have any records of the unsuccessful SanEcho Group investors, directors and/or promoters. To my knowledge I, as Mayor, was the only R.V. of Fort San contact with the SanEcho Group and my contact was with only one member of that Group. My contact and involvement was solely to accompany and deliver the SanEcho purchase request to meet the requirement of the Saskatchewan Property Management disposal policy as those requirements were interpreted.”

[84] My office then asked RVFS to provide more detail regarding its search effort in an affidavit. In a letter dated July 23, 2009 we asked further questions of RVFS and received the answers from the Village Clerk in a letter dated August 10, 2009.

[85] Because the letter dated August 10, 2009 from RVFS did not include an affidavit as requested, we again wrote to the Village and asked them to answer our questions in sworn affidavits. I received an affidavit from the Clerk dated September 1, 2009 and the Mayor dated September 16, 2009. RVFS failed to provide enough information regarding its search. My office asked for supplemental affidavits in letters dated October 2, 2009 to both the Clerk and the Mayor. Each was instructed as to which questions required further details. The Mayor provided a supplemental affidavit dated October 13, 2009 and the Clerk dated October 5, 2009.

[86] My office asked: “Who searched for the records and was that individual(s) properly instructed?”

[87] The RVFS Clerk answered in her letter of August 10, 2009: “The search for the records was conducted by Mayor [name removed] in his personal files and myself in the office files. The search results were then cross checked. [The Applicant] was provided copies of all documents on March 13, 2007...” In her affidavit of September 1, 2009, she added:

That the search for the records in response to [the Applicant’s] request for information under the Local Authority Freedom of Information and Protect [sic] of

Privacy Act was conducted by Mayor [name removed] with respect to his personal files and myself with respect to the village office files. The search results were then cross checked and [the Applicant] was provided copies of **all** documents on March 13, 2007. In addition your office was provided copies of all the documents on June 27, 2007, receipt of which your office acknowledged by letter on September 28, 2007.

[88] RVFS's Mayor answered in his affidavit dated October 13, 2009:

That the search for the records in response to [the Applicant's] request for information under the Local Authority Freedom of Information and Protection of Privacy Act was conducted by [name of RVFS Clerk], Clerk with respect to the village files and by myself with respect to my personal files. **We reviewed the requirements of the Act together before beginning our searches.** The search results were then cross checked.

[emphasis added]

[89] A simple 'review' of the requirements of LA FOIP would not be sufficient to understand the requirements for a proper search. Although the Mayor and the Clerk would be the best individuals to search for the record, as they should be most familiar with the Village office, both should have been able to provide much greater detail to satisfy the burden but failed to do so even after repeated requests to do so.

[90] I have commented in my Report F-2010-001 that:

[23] Further in formulating my views as to what is compensable in terms of search efforts, I found the following statement in Ontario's Information and Privacy Commissioner's (IPC) Order PO-1943 persuasive:

In previous orders of this office dealing with the reasonableness of an institution's search for responsive records, it has been well established that the search which an institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located (see, for example, Order M-624).<sup>39</sup>

[91] My office asked: "When did the search occur?" and "How long did the search take?"

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<sup>39</sup>SK OIPC, Report F-2010-001 at [23], available at: [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

[92] The RVFS Clerk responded in her affidavit of September 1, 2009 “That the search occurred between February 12 and March 13, 2007... The amount of time spent on the search was not tracked or documented...” She answered in her affidavit of October 5, 2009 as follows:

As previously indicated the time spent on the search was not tracked or documented. This is more than two years after the search with a question that at the time would not have even been considered as relevant. Depending on the interruption I would imagine that although the search would not have taken more than one working day, it may have occurred over more than one calendar day.

[93] The Mayor’s affidavit of September 16, 2009 stated that “The search for documents as related to this “request for information” occurred in late February and/or early March of 2007 and included all personal and other files.” His affidavit of October 13, 2009 stated: “Although no time records were kept, I estimate the search of my records took 2-3 hours. [RVFS Clerk] and I would have spent 1-2 hours two [sic] cross checking the information.”

[94] RVFS admits that it did not document its search. The Clerk’s estimate of time spent searching appears to be unrealistic. The Clerk estimated that it took her about a full work day to search for the record. However, as detailed below, she states that only the Village’s file cabinet and e-mails were searched.

[95] When estimating time to search for paper records, Ontario’s IPC estimated five minutes per drawer to be reasonable.<sup>40</sup> RVFS has not provided specific representation regarding the file cabinet, but assuming it has four drawers with an average amount of documents, it should have only taken about 20 minutes to search the file cabinet. With search functions, it should have taken less time to search the e-mail.

[96] My office asked RVFS to describe where they physically searched for records.

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<sup>40</sup>ON IPC, Order P-1465.

[97] The RVFS Clerk answered as follows in her September 1, 2009 affidavit: “Records were searched for in the village files and computer and Mayor [name removed] personal files and personal computer.” In her affidavit of October 5, 2009, she expanded as follows:

This is a small resort village which has one filing cabinet and one email account on one computer. While there is a network, the other computer did not have access to email or the email account as it was installed as a stand alone program on the one computer. Nothing was deleted from the email account unless it was printed out and everything was stored in the in box or sent box and nothing was saved in folders. There were no relevant documents on my personal email account on my home computer as nothing from work was sent to or via my personal email account. I do not access my personal email account using the office computer nor do I access the office email account using my home computer.

[98] The Mayor stated in his October 13, 2009 affidavit:

**I searched my personal files at my home** which are contained in one file cabinet and my personal email accounts of which I have one. I do not have access to the village email account on my personal home computer.

[emphasis added]

[99] I am concerned with RVFS’s practice of keeping the local authority’s files at the personal home of the Mayor. This also raises red flags regarding the RVFS’ record management system and practices.

[100] In my letter of October 2, 2009 my office asked:

Were any records that may have been responsive to the access request disposed of? If so, what were the authorities/guidelines followed to dispose of the records? This includes any final documents, as well as draft documents, handwritten notes, electronic documents, etc.

[101] The Mayor stated in his affidavit of October 13, 2009: “To my knowledge no records which would have been responsive to the request were disposed of.” This assertion was made by the RVFS Clerk in her affidavit of September 1, 2009: “To the best of my knowledge no records that may have been responsive to the access request were disposed of.”

[102] RVFS does not mention a record retention/disposition schedule which would have assisted in answering this question.

[103] It appears that the RVFS's search for the responsive records was not adequate for the following reasons:

- The Mayor and the Clerk of RVFS did not understand the requirements of LA FOIP and best practices in responding to access to information requests.
- The Mayor and the Clerk did not keep notes of the search for responsive records.
- The RVFS Clerk seems to have taken an excessive amount of time to search one file cabinet and the electronic e-mail account.
- RVFS contends that they did not destroy any responsive records, but did not reference any record retention/disposition schedule.

[104] Nonetheless, RVFS contends that all responsive records in the possession of RVFS were provided.

[105] In a letter to RVFS dated September 13, 2010, my office advised the Mayor of these conclusions and commented on the practice of keeping RVFS files at his house. We made the following recommendations:

- The officers and employees of RVFS seek training on LA FOIP;
- The Mayor of RVFS immediately cease storing Village records within his personal files at his residence;
- The officers and employees of RVFS document searches for records in regard to all future requests for information; and
- The Village adopt a record retention/disposition schedule. This should include guidance on the type of documents that should be retained by RVFS.

[106] A letter from the lawyer representing RVFS dated September 30, 2010 responded to the first recommendation regarding training as follows:

Next, as you know, the council of the resort village is made up of individuals who are very near to volunteer status. They receive little remuneration for their work. They can be classified as a "part-time" mayor and council.

...

I have requested some type of booklet, or a pamphlet, that explains the duty of the mayor and council to keep proper records and to follow the Provincial laws respecting freedom of information. I will give a copy of that document to the mayor and council, and I will urge them to read it and take it seriously.

[107] In response, my office provided more detailed advice to the lawyer regarding training in a letter dated October 12, 2010. We advised that the Mayor, the office staff and council seek training from the Access and Privacy Branch at the Ministry of Justice and Attorney General and to look on my office's website for resources and tools. We asked that they confirm such steps no later than December 1, 2010.

[108] In regard to our recommendations about future requests, the lawyer wrote on September 30, 2010:

In the event that there are future requests for information, I am recommending to the Mayor that he should include in his response something along the lines of, "The entire records of the village are contained in one filing cabinet **and several shelves**. I have examined all of those records and as a result of the examination I have located the following documents..."

[emphasis added]

[109] Parenthetically, this was the first and only reference to records on "several shelves". There was no such reference to shelves in any of the affidavits.

[110] In his letter of September 30, 2010, the lawyer did not address the practice of storing RVFS files at the home of the Mayor or adopting a retention/disposition schedule. I was not satisfied with the September 30, 2010 response of the lawyer on behalf of RVFS. The lawyer responded that his client had provided "a complete response" and he was instructed "not to spend any more time on this matter".

[111] Again, I find RVFS has not conducted an adequate search for the responsive records.

**5. Does the Resort Village of Fort San have possession or control of additional responsive material?**

[112] As noted earlier, section 5 of LA FOIP gives every person a right to access records that are in the possession or under the control of a local authority.

[113] As detailed earlier, I know that the Village physically held the proposals at one time because it sent a proposal to the Minister of SPM on both January 14, 2005 and May 30, 2005. I have learned this because the covering letters from the Mayor of RVFS were responsive records released to the Applicant as a result of his access request and one of them is one of the records at issue in the Ministry Review. Even though it appears that RVFS did have possession of the proposals at one time, the Mayor stated in his letter of January 21, 2009 that:

To my knowledge, all records and correspondence (written and computerized) that is **or ever was in the possession** of the R.V. of Fort San were provided.

[emphasis added]

[114] Given the inadequacy of the search for responsive records on the part of RVFS, it is difficult to determine if the Village had possession of additional responsive material.

[115] In my Report F-2008-002, I outlined the following test to determine if the Ministry of Justice and Attorney General had control of a record:

[27] Based on my examination of various decisions of Information and Privacy Commissioners in Alberta, British Columbia and Ontario, I have identified the following list of five factors in assessing whether control exists:

1. How is the author of the record connected to the public body?
2. What are the circumstances surrounding the creation, use and retention of the record?
3. Given the public body's mandate and functions, how closely is the record integrated with other records held by the public body?
4. Is there any agreement that limits the use or disclosure of the record?

5. Does the right to compel records from the Council give the Superintendent control over such records?<sup>41</sup>

[116] I have since outlined additional criteria used to determine control in my Report LA-2010-002.<sup>42</sup> However, for the matter at hand, the test at [115] will suffice to determine if RVFS has control of the proposals. I will not consider the fifth question as is not applicable in this case.

*1. How is the author of the record connected to RVFS?*

[117] At first, it appeared that the author of the proposal was SanEcho Development Inc. In its submission of January 21, 2009, RVFS stated:

The R.V. of Fort San did assist the SanEcho Group by delivering the SanEcho purchase proposal to Saskatchewan Property Management. **This was done to try and meet the “Municipal” intent of the Saskatchewan Property Management disposal policy and disposal program... The involvement of the R.V. of Fort San was solely to serve as a transmittal vehicle to meet the requirements as set out in the Saskatchewan Property Management disposal policy.**

[emphasis added]

[118] The Mayor of RVFS echoes this statement in his affidavit of September 16, 2009:

The involvement of the R V of Fort San with the San Echo Group was solely to serve as a transmittal vehicle and meet the requirements as set out in the Saskatchewan Property Management Disposal Policy.

[119] My office requested that RVFS provide me with a copy of the “Saskatchewan Property Management Disposal Policy” in a letter dated June 24, 2010. It was provided by RVFS on August 5, 2010. Parenthetically, it is not clear what requirements the Mayor was alluding to since a review of the Saskatchewan Property Management Disposal Policy addresses the policy, objectives, guidelines and process of the Ministry. It does not require anything of any other body by the Ministry. RVFS did not provide any representations or submissions to accompany the policy.

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<sup>41</sup>*Supra* note 34 at [27].

<sup>42</sup>SK OIPC, Report LA-2010-002 at [61], available at: [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

[120] Further, I found ample evidence in the package provided to both my office and the Applicant by RVFS to demonstrate that the Village had a considerably more significant role in the existence of the SanEcho proposal than just as a “transmittal vehicle”.

[121] On May 20, 2004 RVFS received a letter from the Ministry to ask if the Village was interested in acquiring the Echo Valley Conference Centre. RVFS responded in a letter of June 10, 2004 signed by the Mayor as follows:

To assist with this detailed development and analysis of the feasibility of the proposal, it would be appreciated if your office could share any and all data it has with respect to EVCC operations including such as detailed staffing components, detailed budgets, detailed financial inputs, current assessments and what, if any assistance SPMC would be prepared to make available to accommodate such an undertaking. As soon as the “Proposal” is fleshed-out in a more appropriate way, the Principals will be contacting your office to discuss it in detail.

[122] A RVFS Council resolution from November 14, 2004 states:

Be It Resolved:

That the Resort Village of Fort San **join as a partner with SanEcho Development Inc.** serving as the broker for the Resort Village of Fort San in the execution of all negotiations and acquisition agreements relating thereto.

[emphasis added]

[123] An e-mail to a Ministry official from what appears to be a personal e-mail address belonging to the Mayor of Fort San and his wife dated July 27, 2004 stated:

As I mentioned to your secretary, I will be in Regina tomorrow, July 28, for a meeting at 1:00 PM. I hope to pick up the “Topographical Map” of the San property as that time. When would it be most convenient to pick up the map and **meet with you for a few minutes...**

[emphasis added]

[124] The e-mail is signed with the Mayor’s first name. If RVFS is simply a conduit for the proposal, it is not clear why the Mayor would need to pick up a map in person and meet with the Ministry official.

[125] A letter dated September 3, 2004, from the Ministry official to the Mayor of RVFS stated:

Further to our meeting on August 27/04 identified below is the information you requested regarding the Echo Valley Conference Centre...

Thank you for meeting with us and showing interest in the facility. If you require further information, please feel free to call me at the above number. **We look forward to further discussions regarding this initiative and receiving your proposal on behalf of the Village of Fort San.**

[emphasis added]

[126] A letter dated January 14, 2005, from the Mayor of RVFS on Village letterhead to the Minister of SPM:

**Further to my last correspondence, I can now advise that the principals of the Municipal/SanEcho Partnership have met and reviewed your recent letter and enclosed documentation.** After analysis and review, the Proposal has now been completed and is submitted herewith.... The Partnership thanks you for your input and looks forward to finalizing the transfer of the property and to the start of the redevelopment of this historic property.

[emphasis added]

[127] A letter from the Mayor on RVFS letterhead to a Ministry Official dated February 22, 2005 stated:

I am pleased that SPMC is now inviting the principals of SanEcho Development Inc to meet and discuss further the contents of its Proposal with SPMC officials.

[128] A letter from the Mayor on RVFS letterhead to the Ministry Official dated May 30, 2005 stated:

**On behalf of the Resort Village of Fort San and SanEcho Development Inc.,** I have the pleasure to provide your office with the enclosed document, our completed proposal respecting our vision and plans for the acquisition and development of the Echo Valley Conference Centre property.

As you will appreciate this project is a bold undertaking. **An undertaking which the Resort Village of Fort San, its partner associates** and the greater valley community very much look forward to with eager excitement.

[emphasis added]

[129] There have been two proposals submitted to the Ministry, one on January 14, 2005 and one on May 30, 2005. Yet, only one proposal has been identified as responsive by either the Ministry or RVFS.

[130] Another letter from the Mayor on Village letterhead dated September 5, 2005 to the Minister stated:

The Council and I are anxious to protect the interests of our Village and its tax base, and to act in the best interests of the Valley Region and the Province with respect to the attraction of visitors and tourists.

[131] I note there is an e-mail from the Mayor to the Minister dated January 17, 2006. Again, it appears to be from the Mayor's personal e-mail address even though the Mayor signed it using his title. It stated:

**The Resort Villages commercial partners in the Fort San / SanEcho proposal submitted before the Governments May 31, 2005 deadline**, having reviewed recent correspondence with the Government, have asked the Village Council to make NO OFFERS to the Government to lift the confidentiality requirements, conditionally or otherwise. Under this circumstance, i have no alternative but to rule out entirely that possibility.

[emphasis added]

[132] It is clear to me that the Village has assumed a greater role in the development of the proposal than that represented by the Mayor.

[133] Further, I have seen conflicting evidence in regards to the Mayor's role in San Echo Development Inc. The Mayor stated in his letter to our office dated January 21, 2009 that:

My contact and involvement was **solely to accompany and deliver the SanEcho purchase** request to meet the requirement of the Saskatchewan Property Management disposal policy as those requirements were interpreted.

[emphasis added]

[134] In his affidavit of September 16, 2009, the Mayor stated:

To my knowledge I, as mayor was the only R V of Fort San contact with the SanEcho Group **and my involvement was solely to accompany and deliver the SanEcho purchase request.**

[emphasis added]

[135] Finally, the lawyer representing RVFS stated in a letter dated August 11, 2010 that: “The Mayor had no personal involvement in the matter, nor did any of the individuals on council.”

[136] Additional contrary evidence is evident in the material that was provided to the Applicant by RVFS as a result of his access request, and subsequently to my office, as found in minutes of a Council meeting on November 16, 2004. What is noteworthy is the following taken from those minutes:

[The Mayor] **declared a pecuniary interest in the next item to be discussed by Council.**

[Name removed] took the chair as Deputy Mayor.

E.V.C.C. [Name removed]: Whereas the Resort Village of Fort San has a interest in the disposition of the Saskatchewan Government property known as the Echo Valley Conference Centre (E.V.C.C.) both from a financial standpoint and out of concern for a future development within the Village which is generally acceptable to Village citizens, therefore

Be It Resolved:

**That the Resort Village of Fort San join as a partner with SanEcho Development Inc. serving as the broker for the Resort Village of Fort San in the execution of all negotiations and acquisition agreements relating thereto.**

CARRIED

[emphasis added]

[137] *Black's Law Dictionary* has defined financial interest as an “interest involving money or its equivalent; esp., an interest in the nature of an investment. – Also termed *pecuniary interest*.”<sup>43</sup>

[138] Furthermore, *The Municipalities Act* defines pecuniary interest as follows:

143(1) Subject to subsection (2), a member of council has a pecuniary interest in a matter if:

(a) the member or someone in the member’s family has a controlling interest in, or is a director or senior officer of, a corporation that could make a financial profit from or be adversely affected financially by a decision of council, a council committee, a controlled corporation, or other body established by the council pursuant to clause 81(a); or

(b) the member of council or a closely connected person could make a financial profit from or be adversely affected financially by a decision of council, a council committee, a controlled corporation, or other body established by the council pursuant to clause 81(a).

(2) A member of council does not have a pecuniary interest by reason only of any interest:

...

(b) that the member or a closely connected person may have by reason of being appointed:

(i) by the council as a director of a company incorporated for the purpose of carrying on business for and on behalf of the municipality; or

(ii) as the representative of the council on another body;

(c) that the member or a closely connected person may have with respect to any allowance, honorarium, remuneration or benefit to which the member or person may be entitled by being appointed by the council to a position described in clause (b);

...

(i) that the member or a closely connected person may hold in common with the majority of voters of the municipality or, if the matter affects only part of the municipality, with the majority of voters in that part;...<sup>44</sup>

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<sup>43</sup> *Black's Law Dictionary, 9th Ed.* (USA: Thomson Reuters, 2009), p. 885.

<sup>44</sup> *The Municipalities Act, S.S. 2005, c.M-36.1, s. 143.*

[139] *The Municipalities Act* continues as follows:

144(1) If a member of council has a pecuniary interest in a matter before the council, a council committee or a controlled corporation of which the member is a director, the member shall, if present:

- (a) declare the pecuniary interest before any discussion of the matter;
  - (b) abstain from voting on any question relating to the matter;
  - (c) subject to subsection (4), abstain from any discussion of the matter; and
  - (d) subject to subsections (3) and (4), leave the room in which the meeting is being held until discussion and voting on the matter are concluded.
- (2) No member of a council shall attempt in any way, whether before, during or after the meeting, to influence the voting on any question involving a matter in which the member of council has a pecuniary interest.
- (3) If the matter with respect to which a member of council has a pecuniary interest is the payment of an account for which funds have previously been committed, it is not necessary for the member of council to leave the room.
- (4) If the matter with respect to which a member of council has a pecuniary interest is a question on which, pursuant to this Act or another enactment, the member, as a taxpayer, voter or owner, has a right to be heard by the council:
- (a) the member shall leave his or her place at the council table, but is not required to leave the room; and
  - (b) the member may exercise a right to be heard in the same manner as a person who is not a member of the council.
- (5) The administrator shall record any abstention or disclosure made in accordance with subsection (1) in the minutes of the meeting.<sup>45</sup>

[140] RVFS and the Mayor acted as more than just a conduit for the proposal. The proposal itself states that the Village has had a hand at crafting the document and that it also has a voice on the board. I am sufficiently concerned with the representations of the Mayor and/or RVFS on this issue to signal that this warrants further inquiry.

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<sup>45</sup>*Ibid.* s.144.

*2. What are the circumstances surrounding the creation, use and retention of the record?*

***Creation***

[141] The proposal was created for the purpose of acquiring the Echo Valley Conference Centre from the Government of Saskatchewan. From review of the proposal, it is apparent that RVFS was instrumental in creating this record.

***Use***

[142] The record was sent to the SPM on May 30, 2005 by the Mayor of RVFS.

[143] The Mayor's affidavit dated September 16, 2009 stated:

To meet the "Municipal" intent of the Saskatchewan Property Management disposal policy and disposal program I, as mayor of the Resort Village of Fort San, did assist the SanEcho Group by delivering the SanEcho purchase proposal to the Saskatchewan Property Management Corporation.

***Retention***

[144] The Mayor of RVFS contends that they were given a copy of the proposal solely for the purpose of sending it to the Ministry and did not retain a copy for their records. RVFS' submission of January 21, 2009 stated:

The R.V. of Fort San was not provided a copy of the purchase proposal for its records or retention. The involvement of the R.V. of Fort San was solely to serve as a transmittal vehicle to meet the requirements as set out in the Saskatchewan Property Management disposal policy.

[145] The Mayor's affidavit dated September 16, 2009 stated:

To my knowledge the R V of Fort San was not provided a copy of the purchase proposal for its records or retention.

[146] In his affidavit dated October 13, 2009, the Mayor added:

The Resort Village of Fort San, its employees, and officers have never, either now or in the past, had a copy of the written proposal presented to Saskatchewan Property Management **on behalf of the Resort Village of Fort San** and the SanEcho Development Group in their possession or control in any form, including e-mail, draft documents, memorandums, or other reports.

[emphasis added]

[147] Notwithstanding these assertions the Mayor, an officer of the Village, appears to have had possession<sup>46</sup> of the proposal when he sent it to the Minister on May 30, 2005.

[148] Furthermore, in her affidavit dated September 1, 2009, the Village Clerk adds:

The Resort Village of Fort San employees and, to the best of my knowledge the members of council, either now or in the past, have not had a copy of the written proposal presented to the Saskatchewan Property Management in their possession or control in any form including email, draft documents, memorandums, or other reports. From the initial meeting to discuss the partnership to the unsuccessful completion of the bid to acquire the property, any written material of SanEcho was retained by SanEcho and members of council were not given copies nor were copies provided for the village files.

[149] RVFS did have possession of the document at one time, contrary to its assertions. Because it did not provide a record retention/disposition schedule, the fact it did not retain a copy raises questions. I consider it standard business practice to retain copies of attachments of letter that are sent by a local authority.

[150] RVFS helped create, used, and at one time, had possession of the record.

*3. Given the RVFS' mandate and functions, how closely is the record integrated with other records held by the public body?*

[151] As stated above, the Mayor of RVFS sent the record to SPM. The Village kept a copy of the transmittal letter, but claims it did not keep a copy of the record that they had attached.

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<sup>46</sup>See SK OIPC Report LA-2010-002 at [56].

[152] Furthermore, the Village Council manages the finances of RVFS. As it was a stakeholder in the project, it is questionable that they did not keep better records regarding this potential investment.

*4. Is there any agreement that limits the use or disclosure of the record?*

[153] As I determined above, the Ministry did not present a persuasive case in showing that the Ministry obtained the proposal in confidence.

[154] Further, it appears that the fairness of the acquisition process was being questioned, therefore the Ministry was asking RVFS if the confidentiality clause could be lifted and the proposal released to the public. The following released responsive records illustrate this:

- A letter dated January 8, 2006 from the Mayor of RVFS to the Minister of Government Services. It stated:

In this conversation [Ministry employee] requested that the confidentiality provision be lifted from the Village/SanEcho proposal. Despite the obvious considerations described in the previous paragraph, [Ministry employee] was told that the Village and the principals of SanEcho **WOULD BE PREPARED** to lift the provision as soon as they were provided with reasonable assurance that the [Town of Fort Qu'Appelle] proposal, upon which the Government based its disposition decision, had been received by SPM on, or prior to, May 31, 2005.

- An e-mail dated January 17, 2006 from the Mayor of RVFS to the Minister of Government Services. It stated:

The Resort Villages commercial partners in the Fort San/SanEcho proposal submitted before the Governments May 31, 2005 deadline, having reviewed recent correspondence with the Government, have asked the Village Council to make **NO OFFERS** to the Government to lift the confidentiality requirements, conditionally or otherwise. Under this circumstance, I have no alternative but to rule out entirely that possibility.

[155] After review of these documents, it appears that the Village has some interest and role regarding the disclosure of the record.

[156] In summary, RVFS has served as more than just a conduit between the San Echo Development Group and the provincial government, as argued by the Village. RVFS helped create, used, and at one time, had possession of two proposals. RVFS has influence when it comes to lifting the “confidentiality provision” of at least one of the proposals.

[157] Accordingly, I find RVFS had possession *and* has control of the proposals.

[158] In our letter of September 13, 2010, my office recommended that RVFS obtain a copy of the proposal from the SanEcho Development Inc. and issue a new section 7 response to the Applicant.

[159] The lawyer advised in his letter of September 30, 2010 that:

The Mayor only knows 1 person from the San/Echo Group. He asked that person for a copy of the proposal. That person has told the Mayor that there is no copy. Any papers respecting the proposal were discarded when the proposal was rejected.

[160] My office countered in a letter dated October 12, 2010:

...the Mayor did send a copy on to the Ministry of Government Services (formerly Saskatchewan Property Management). The Mayor should ask the Ministry to return a copy of the proposal to RVFS and proceed to issue a new section 7 response to the Applicant.

[161] However, according to correspondence from the lawyer dated November 18, 2010, he was “instructed not to spend any more time on this matter.”

## V FINDINGS

[162] I find the Ministry of Government Services has not met the burden of proof to show the proposal was obtained in confidence from a local authority pursuant to section 13(2) of *The Freedom of Information and Protection of Privacy Act*.

[163] I find the Ministry of Government Services has not met the burden of proof to show section 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* applies to the record, including the briefing note.

[164] I find the Ministry of Government Services has not met the burden of proof to show that section 18(1)(d) of *The Freedom of Information and Protection of Privacy Act* applies to the record.

[165] I find the Ministry of Government Services has not met the burden of proof to show that the release of the record would prejudice an economic interest of the government pursuant to section 18(1)(f) of *The Freedom of Information and Protection of Privacy Act*.

[166] I find the officers and employees of the Resort Village of Fort San have not had appropriate training in regard to *The Local Authority Freedom of Information and Protection of Privacy Act*.

[167] I find the Resort Village of Fort San's search for responsive records was not well documented and it has not shown that the search was adequate.

[168] I find the Resort Village of Fort San had possession and still maintains control of the proposal that would be responsive to the Applicant's request.

## VI RECOMMENDATIONS

- [169] I recommend that the Ministry of Government Services release the entire record to the Applicant.
- [170] I recommend that the officers and employees of the Resort Village of Fort San seek training on *The Local Authority Freedom of Information and Protection of Privacy Act*.
- [171] I recommend that the Mayor of the Resort Village of Fort San immediately cease storing Village records within his personal files at his residence.
- [172] I recommend that officers and employees of the Resort Village of Fort San document searches for records in regard to all future requests for information.
- [173] I recommend that the Resort Village of Fort San adopt a record retention/disposition schedule. This should include guidance on the type of documents that should be retained by the Resort Village of Fort San.
- [174] I recommend that the Resort Village of Fort San should obtain a copy of the proposal from the San Echo Group and issue a new section 7 response to the Applicant.
- [175] I recommend that the Minister of Justice consider whether an offence has been committed pursuant to section 56(3)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act*.

Dated at Regina, in the Province of Saskatchewan, this 6<sup>th</sup> day of January, 2012.

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