



REVIEW REPORT 103-2022

Town of Rockglen

January 16, 2023

Summary:

The Applicant was dissatisfied with the response they received from the Town of Rockglen (Town) regarding their access to information request, so requested a review by the Commissioner. The Commissioner found subsection 18(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) applies to the bid document, and that it should continue to withhold the bid document pursuant to subsection 18(1)(b) of LA FOIP. However, the Commissioner recommended that The Town release the amount it received for the sale of the land to the Applicant within 30 days.

I BACKGROUND

[1] The Applicant made an access to information request to the Town of Rockglen (Town), which it received on March 16, 2022, for the following:

With reference to the Tender by advertisement for Lots [location redacted]:

- 1) The amount of the winning bid; and
- 2) Any terms or conditions attached to the winning bid.

[2] By letter dated April 18, 2022, the Mayor of the Town responded to the Applicant denying access to the requested information pursuant to subsection 18(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[3] On May 25, 2022, the Applicant requested that my office review that decision.

[4] By email on June 20, 2022, my office notified the Applicant, the Town and the third party of my office’s intention to undertake a review and invited all parties to make a formal submission. My office received a submission from the Applicant on August 16, 2022, the third party on August 17, 2022 and the Town on August 18, 2022.

II RECORDS AT ISSUE

[5] The record at issue is a one-page tender bid that the Town has denied access to in full pursuant to subsection 18(1)(b) of LA FOIP.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[6] The Town is a “local authority” pursuant to subsection 2(f)(i) of LA FOIP. The third party is a “third party” pursuant to subsection 2(k) of LA FOIP. Therefore, I find I have jurisdiction to conduct this review.

2. Did the Town properly apply subsection 18(1)(b) of LA FOIP?

[7] Subsection 18(1)(b) of LA FOIP provides:

18(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to the local authority by a third party;

[8] LA FOIP defines a “third party” as a person, including an unincorporated entity, other than the applicant or a local authority. The provision is intended to protect the business interests of third parties and to ensure that local authorities are able to maintain the confidentiality necessary to effectively carry on business with the private sector (*Guide to LA FOIP*,

Chapter 4: “Exemptions from the Right of Access”, updated: April, 29, 2021 [*Guide to LA FOIP*, Ch. 4]), at page 166.

[9] Although local authorities need to be open and accountable, they also need to conduct business and enter into business relationships. In doing so, they must be able to assure their private sector partners that their trade secrets and commercial and financial secrets will not be readily disclosed to competitors and the public (*Guide to LA FOIP*, Ch. 4, pp 166-167).

[10] Subsection 18(1)(b) of LA FOIP permits refusal of access in situations where a record contains financial, commercial, scientific, technical or labour relations information that was supplied in confidence to a local authority by a third party (*Guide to LA FOIP*, Ch. 4, p. 170).

[11] In order to determine if subsection 18(1)(b) of LA FOIP applies to the record, the following three-part test can be applied:

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

(*Guide to LA FOIP*, Ch. 4, pp. 170-176)

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

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

[13] In their respective submissions, the Town and the third party have asserted that the withheld information qualifies as third party financial and commercial information.

[14] “Financial information” is information regarding monetary resources, such as financial capabilities, assets and liabilities, past or present. Common examples are financial

forecasts, investment strategies, budgets, and profit and loss statements. The financial information must be specific to a third party (*Guide to LA FOIP*, Ch. 4, p. 170).

[15] “Commercial information” is information relating to the buying, selling or exchange of merchandise or services. This can include third party associations, past history, references and insurance policies and pricing structures, market research, business plans, and customer records (*Guide to LA FOIP*, Ch. 4, p. 170).

[16] Types of information included in the definition of commercial information can include:

- Offers of products and services a third-party business proposes to supply or perform.
- A third-party business’ experiences in commercial activities where this information has commercial value.
- Terms and conditions for providing services and products by a third party.
- Lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises - such lists may take time and effort to compile, if not skill.
- Methods a third-party business proposes to use to supply goods and services.
- Number of hours a third-party business proposes to take to complete contracted work or tasks.

(*Guide to LA FOIP*, Ch. 4, pp. 170-171)

[17] In their submission, the third party asserts, in part, the following:

...

The Tender Bid is information regarding the amount of money offered by [third party] to purchase the Property from [Town], and is therefore information regarding monetary resources specific to particular parties. [Third party] submits the Tender Bid is clearly “financial information” within the meaning of s. 18(1)(b) of LA FOIP.

...

The Tender Bid is the amount of money offered by [third party] to buy the Property from [Town] and is therefore information related to the buying and selling of

merchandise. [Third party] submits the Tender Bid is unquestionably “commercial information” within the meaning of s. 18(1)(b) of LA FOIP.

- [18] The record is the tender bid amount that the third party submitted to the Town that represented what the third party was bidding to pay for the property.
- [19] In my office’s [Review Report 028-2020](#) at paragraphs [12] and [13], I commented on commercial information. In that case, it was clear that the contents of the proposal as a whole were created by the involved third parties with the aim of winning contracts and that the information in the proposals relates to the buying or selling of goods and services. I found that the entire proposal packages submitted by the third parties constituted commercial information. In [Review Report 011-2018](#) at paragraph [11], I concluded the information in tender bid forms relates to the buying and selling of goods and services. As such, I found that the information in the tender bid form qualifies as commercial information.
- [20] Likewise, in this case the tender bid was created by the third party with the aim of being the successful bid to purchase the property from the Town. Further, the information in the tender bid forms relates to the buying and selling of land. Therefore, the withheld information qualifies as commercial information.
- [21] I will now consider the next part of the test.

2. *Was the information supplied by the third party to a local authority?*

- [22] “Supplied” means provided or furnished. Information may qualify as “supplied” if it was directly supplied to a local authority 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 (*Guide to LA FOIP*, Ch. 4, p. 172).
- [23] The Town submitted that the third party was/is a holding company. In their submission, the third party added, “the Tender Bid was supplied by [third party] to the Town in response to the Town’s Tender Bid advertisement.” As per LA FOIP’s definition of “third party”,

the third party in this matter is neither the Town nor the Applicant. I agree, then, that a third party supplied the tender bid to the Town. Therefore, the second part of the test has been met.

[24] I will now consider the final part of the test.

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

[25] “In confidence” usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained in confidence means that the supplier of the information has stipulated how the information can be disseminated. In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the local authority and the third party providing the information (*Guide to LA FOIP*, Ch. 4, p. 174).

[26] “Implicitly” means 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 (*Guide to LA FOIP*, Ch. 4, p. 174).

[27] In order for subsection 18(1)(b) of LA FOIP to apply, a local authority must show that both parties intended the information be held in confidence at the time the information was supplied (*Guide to LA FOIP*, Ch. 4, p. 175).

[28] One of the factors when determining whether a document was supplied in confidence “implicitly” is considering if there was a “mutual understanding” that the information would be held in confidence. “Mutual understanding” means that the local authority and the third party both had the same understanding regarding the confidentiality of the information at the time it was supplied. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been supplied in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist in addition (*Guide to LA FOIP*, Ch. 4, p. 175).

[29] An additional factor one can consider is if the local authority requested the information be supplied in a sealed envelope and/or outlined its confidentiality intentions to the third party prior to the information being supplied (*Guide to LA FOIP*, Ch. 4, p. 176).

[30] The Town has asserted in its submission, in part, “in this case the Advertisement required tenders be submitted in a sealed envelope marked “Property Tenders”.

[31] My office was advised by both the Town and the third party that the property sale was made pursuant to section 32 of *The Tax Enforcement Act* (TEA) as one of the interested parties was a municipal official. Section 32 of the TEA lays out the rules and processes for the purchase of land by a municipal official. Specifically, subsection 32(5) of the TEA provides:

32(5) Where a councillor, treasurer or other official proposes to purchase a parcel pursuant to subsection (4), all bids that are tendered shall be submitted to the auditor of the municipality and no person other than the auditor shall be entitled to open and inspect the bids.

[32] The TEA required that the bids were only to be opened by the auditor. Further, from a review of the “Sale by Tender” advertisement, it clearly stated that “a tender must be submitted in a sealed envelope marked “Property Tender” addressed to [accounting firm removed]”.

[33] The third party added as follows:

9. ... the tendering process had to be conducted in compliance with [*The Tax Enforcement Act* - TEA]. Subsection 32(5) of [TEA] provides that where an official submits a tender bid to purchase land acquired by the municipality, no person other than the auditor is entitled to open and inspect the tendered bids.

10. The Advertisement stated that all tender bids must be submitted in a sealed envelope marked “Property Tender”....

11. [Third party] submits that ss. 32(5) of [TEA] and the Advertisement demonstrate that the Tender Bid was obtained with the understanding that it would be kept confidential. The requirement for the Tender Bid to be kept confidential was clearly expressed, distinctly stated and made definite in both ss. 32(5) of [TEA] and the Advertisement.

[34] Based on these factors, including that this matter involves a copy of the bid form document, there was a mutual understanding of implicit confidentiality between the third party and the Town. Therefore, the third part of the test has been met.

[35] As all three parts of the test have been met, I find subsection 18(1)(b) of LA FOIP applies to the bid document and that the Town should continue to withhold it pursuant to subsection 18(1)(b) of LA FOIP.

[36] I recognize, however, that subsection 18(1)(b) of LA FOIP may apply to the bid document itself, but will also consider that the Applicant sought information on the “amount of the winning bid” and any terms or conditions attached to this.

[37] The Town is subject to *The Municipalities Act* (Municipalities Act). Section 186 of the Municipalities Act provides:

186(1) A municipality shall submit its financial statements and the auditor’s report on the financial statements to the minister by July 1 of the year following the financial year for which the financial statements and report have been prepared.

(2) If requested to do so by the minister, a municipality shall submit information respecting the financial affairs of the municipality for the financial year ending on December 31 of the year preceding the year in which the request was made.

(3) A municipality shall submit the information requested pursuant to subsection (2) promptly after receiving the request.

[38] It appears the Minister can request information regarding a municipality’s financial affairs pursuant to subsection 186(2) of *The Municipalities Act*. The Government of Saskatchewan’s [*Municipal Accounting Manual*](#) outlines the types of financial transactions a municipality must report to the Minister. This appears to include transactions such as the amount the Town received through the sale of the land in question. This then becomes part of the Town’s audited financial statements, or information intended to be reported publicly.

[39] Further, while conducting this review my office considered practices of other municipalities for sales of land under close tendered bid. The Town of Shaunavon

(Shaunavon) held a sealed bid tender for two parcels of commercial land from January 25, 2022 to February 25, 2022. The advertisement indicated that the sealed tenders were to be sent to the auditor for the municipality and provided the address for the accounting firm of the auditor. In its March 1, 2022 town council [meeting minutes](#), Shaunavon posted the amount of both tender bids it received and the amount of the winning tender bid.

[40] In this review, the Town provided my office with a copy of its November 10, 2021 Town Council meeting minutes, and I note item 190-2021 addressed the accepted bid, but that the Town did not include the amount.

[41] Based on these factors, it appears the amount the Town eventually received for the sale of the land is not something that is intended to be confidential information. Including this amount in meeting minutes would demonstrate a high level of openness and transparency, and is a practice that the Town should adopt. I would also note that in my view, the justification to publicly report this information is even greater as the successful bidder was a municipal official.

[42] Therefore, I recommend the Town release the amount it received through the land sale to the Applicant within 30 days.

IV FINDINGS

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

[44] I find subsection 18(1)(b) of LA FOIP applies to the record.

V RECOMMENDATION

[45] I recommend the Town continue to withhold the bid document in full pursuant to subsection 18(1)(b) of LA FOIP, but recommend it release the amount it received through the land sale to the Applicant within 30 days.

Dated at Regina, in the Province of Saskatchewan, this 16th day of January, 2023.

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