



REVIEW REPORT 118-2020

City of Moose Jaw

March 26, 2021

Summary:

The Applicant made an access to information request for records, to which the City of Moose Jaw (City) denied access to portions pursuant to subsections 16(1)(a), (b), (c), 17(1)(d), (e), 18(1)(b), (c), 21(a), (b), (c) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner found the City properly applied subsection 16(1)(a) of LA FOIP to some portions of the records and not others, and that it properly applied subsections 16(1)(c), 21(c) and 28(1) of LA FOIP. The Commissioner further found the City did not properly apply subsection 17(1)(e) of LA FOIP. The Commissioner recommended the City continue to withhold or release records accordingly. Finally, the Commissioner found the City conducted a reasonable search for records.

I BACKGROUND

[1] On February 12, 2020, the City of Moose Jaw (City) received the following access to information request from the Applicant for the timeframe January 1, 2014 to December 31, 2018:

Anything to do with Carpere Canada.

[2] In correspondence dated April 14, 2020, the City responded, denying access to portions of the records pursuant to subsections 16(1)(a), (b), (c), 17(1)(d), (e), 18(1)(b), (c), 21(a), (b), (c) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[3] On May 7, 2020, the Applicant asked my office to review the City’s decision to deny access to portions of the records pursuant to LA FOIP, as well as the City’s search efforts.

[4] On May 28, 2020, my office notified the City and the Applicant of my office’s intent to undertake a review.

II RECORDS AT ISSUE

[5] At issue are 56 pages, which I have put into the following modified index for reference:

| Tab | Description | Number of Pages | Exemptions Applied |
|-----|--|-----------------|---|
| 1 | Letter of Communication – Offer to Purchase; December 10, 2018 | 8 | 16(1)(a), (b), (c) 17(1)(d), (e) |
| 2 | Letter of Communication – Offer to Purchase; January 21, 2019 | 12 | 16(1)(a), (b), (c) 17(1)(d), (e) |
| 3 | Communication #EC-2019-0219; October 22, 2019 plus attachment one and attachment two (letters) | 8 | 16(1)(a), (b), (c) 17(1)(d), (e) 21(b), (c) |
| 4 | Communication #EC-2020-0041; January 29, 2020 | 5 | 16(1)(a), (b), (c) 17(1)(d), (e) |
| 5 | Communication #EC-2020-0043; February 12, 2020 | 8 | 16(1)(a), (b), (c) 17(1)(d), (e) 21(b), (c) |
| 6 | Communication #EC-2020-0050; February 19, 2020 | 4 | 16(1)(a), (b), (c) 17(1)(d), (e) 21(b), (c) |
| 7 | Email Communications | 7 | 18(1)(b), (c), 28(1) |
| 8 | Email Communications | 26 | 17(1)(e), 28(1), 16(1)(a) |
| 9 | Email Communications | 4 | 28(1) |

[6] The City indicated it initially applied subsections 18(1)(b) and (c) of LA FOIP to portions of the records at Tabs 8 and 9, but stated it would withdraw its reliance on these subsections at Tabs 8 and 9 and release those portions to the Applicant. As such, I will not review subsections 18(1)(b) and (c) for Tabs 8 and 9. I recommend the City release to the

Applicant, if it has not already done so, those portions of Tabs 8 and 9 where it applied subsection 18(1)(b) and (c) of LA FOIP unless other exemptions are found to apply to those same portions.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[7] The City qualifies as a “local authority” pursuant to subsection 2(f)(i) of LA FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did the City conduct a reasonable search for records?

[8] Section 5 of LA FOIP provides 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.

[9] Section 5 of LA FOIP is clear that access to records must be granted if they are in the possession or under the control of the local authority subject to any exemptions that may apply pursuant to LA FOIP.

[10] Local authorities must grant access to records in their possession or control subject to any exemptions in Parts III and IV of LA FOIP. LA FOIP does not require a local authority to prove with absolute certainty that records do not exist, but it must demonstrate it has conducted a reasonable search to locate the records.

[11] A reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records reasonably related to the access to information request. A reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends

on the request and related circumstances. Examples of information to support its search efforts that local authorities can provide to my office include the following:

- For personal information requests – explain how the individual is involved with the local authority (i.e. client, employee, former employee etc.) and why certain departments/divisions/branches were included in the search.
- For general requests – tie the subject matter of the request to the departments/divisions/branches included in the search. In other words, explain why certain areas were searched and not others.
- Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
- Explain how the records management system is organized (both paper & electronic) in the departments/divisions/branches included in the search.
- Describe how records are classified within the records management system. For example, are the records classified by:
 - alphabet
 - year
 - function
 - subject
- Consider providing a copy of your organization’s record schedule and screen shots of the electronic directory (folders & subfolders).
- If the record has been destroyed, provide copies of record schedules and/or destruction certificates.
- Explain how you have considered records stored off-site.
- Explain how records that may be in the possession of a third party but in the local authority’s control have been searched such as a contractor or information management service provider.
- Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Explain which folders within the records management system were searched and how these folders link back to the subject matter requested. For electronic folders – indicate what key terms were used to search if applicable.

- Indicate the calendar dates each employee searched.
- Indicate how long the search took for each employee.
- Indicate what the results were for each employee's search.
- Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided. For more on this, see my office's resource, *Using Affidavits in a Review with the IPC* available on my office's website.

[12] The preceding list is intended to be a guide. Each case will require different search strategies and details depending on the records requested.

[13] With respect to records the Applicant believes the City has not provided, the Applicant stated as follows:

In the FOI package city hall gave me, there is not one single email from city administration from March 26, 2019 to March 3, 2020. This time frame is when the city signed the deal with the company and then when the company eventually pulled out of the deal...

[14] With respect to its search efforts, the City provided the following details:

- It should be noted that the search for records is performed by the City Departments who would be reasonably be expected to possess responsive records.
- On February 13, 2020, the City Clerk's Office communicated to the Department of Planning and Development Services with respect to the access to information request. All point of enquiries with respect to land negotiations are through the Department of Planning & Development Services. Specifically, the Department of Planning and Development Services was requested to provide all emails and hard copies of reports relating to this request. The Department was also requested to provide a detailed list of the search parameters used, the employees who conducted the searches, and the time taken to complete the search.
- On March 9, 2020, the Director of Planning and Development Services provided a response, which indicated the following: the search time consumed 4 hours of employee time; the search parameters were the words [keywords] and the employees who conducted the search were [names of employees]; the search

methods were emails and documents from the City's server and hard copies of files located in filing cabinets.

- In addition, the City Clerk/Solicitor's Office also conducted a search for electronic and hard copy report materials filed within their Office. The search parameters used were [keywords]; search methods used were City Clerk electronic files and filing cabinets; areas searched were City of Moose Jaw website and the City server for electronic records; time frame (2018 to 2020).
- On April 14, 2020, the City of Moose Jaw communicated to [Applicant] by letter and attached the records responsive to his request. The Applicant in the letter also was provided the additional information, which included; the search terms, search methods, areas searched and time frame.
- On April 22, 2020, [Applicant] emailed [City employee] the Assistant City Clerk, requesting clarification regarding the timeline from 2015 to 2020 and why it was shortened. [City employee] advised that there was an error in relaying the date to the Department of Planning & Development Services. [City employee] indicated in a response email to [Applicant] that [they] would enquire to the Department of Planning & Development Services for clarification with respect to the original timeframe of 2015 to 2020.
- On April 22, 2020, [City employee] received the response from the Department of Planning and Development Services, which indicated that there was no communication prior to mid 2018. This information was immediately forwarded to the Applicant. The Applicant responded, "Ok, thanks for the clarification." It should be noted that the Applicant made no enquiry to any other timelines for records or questioned timelines of documents received. The City of Moose Jaw would have made every effort to assist the Applicant and at no time was given another opportunity by the Applicant to provide clarification or assistance. For example, the Applicant did not contact the City indicating that [they] believed there were other emails between City Administration and Carpere for the timeline of March 26, 2019 to March 3, 2020. The City would have worked with the Applicant by requesting clarification on the Administration he felt was excluded from the search. The City views this as part of the duty to assist, however, there must be communication from the Applicant as well.

[15] I stated in Review Report 159-2019 at paragraph [16] that, "it is the applicant who sets the parameters of the access request, so that the trustee is able to conduct an adequate search for records". In this matter, according to the information available to me, the Applicant set the timeframe of "January 1, 2014 to December 31, 2018" as the parameter of the City's search efforts for records. The Applicant, however, questions the existence of records dated "March 26, 2019 to March 3, 2020", which falls outside the parameter they originally

set. I have no information before me either from the City or the Applicant that they agreed to amend the timeframe, and the Applicant has not questioned the City's search efforts for the records received dated between January 1, 2014 and December 31, 2018. Therefore, I am satisfied the City conducted a search for records using the appropriate keywords and searching appropriate departments for the timeframe "January 1, 2014 to December 31, 2018". As such, I find the City conducted a reasonable search for records and recommend it take no further action.

3. Did the City properly apply subsection 16(1)(a) of LA FOIP?

[16] I first note the City applied multiple exemptions across entire portions of the records without indicating on which *specific* portions of the records it was applying those exemptions. As well, its arguments or reasons for applying its exemptions were not clearly drawn to the portions of the records where it applied its exemptions. Section 51 of LA FOIP places the onus on a local authority to prove access to a record may or must be refused. Section 51 of LA FOIP provides as follows:

51 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[17] In this matter, this means the burden of proof is on the City to establish, on a balance of probabilities, that the content of the records falls within the parameters of the exemption it applied. In my office's resource, *A Guide to Submissions* (September 2020), at pages 12 to 14, I discuss best practices for public bodies when considering which exemptions apply and how they apply them. This includes focusing on your strongest exemptions and arguments and being "specific regarding each exemption applied" and not taking a "shotgun approach" to applying exemptions. The City did not apply its exemptions in a specific manner, or draw its arguments to the specific portions of the records where it applied its exemptions. Because of this, it became necessary for my office to review the majority of the records line-by-line to determine if, on the face of the records, each of the exemptions would apply. I caution the City against taking this same approach in the future, and ask that it be more deliberate in how it applies its exemptions and draws its arguments as section 8 of LA FOIP requires a line-by-line consideration. I suggest the City review

the resources available to public bodies on my office's website that can assist it in preparing a stronger submission and in meeting its section 8 obligations. I will now proceed with my analysis of subsection 16(1)(a) of LA FOIP as the City has applied it to the records.

[18] Subsection 16(1)(a) of LA FOIP provides as follows:

16(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority;

[19] Subsection 16(1)(a) of LA FOIP is a discretionary, class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose advice, proposals, recommendations, analyses or policy options developed by or for the local authority.

[20] The two part test for subsection 16(1)(a) of LA FOIP, found in my office's *Guide to FOIP, Chapter 4: Exemptions from the Right of Access* (February 4, 2020) (Guide to FOIP) at page 120 is as follows:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for a local authority?

[21] The City applied subsection 16(1)(a) of LA FOIP to the records in Tabs 1 to 6, and to two email attachments at Tab 8.

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?

[22] *Advice* is guidance offered by one person to another. It can include the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice encompasses material that permits the drawing of

- inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It can be an implied recommendation. The “pros and cons” of various options also qualify as advice. It should not be given a restricted meaning. Rather, it should be interpreted to include an opinion that involves exercising judgement and skill in weighing the significance of fact. It includes expert opinion on matters of fact on which a government institution must make a decision for future action.
- [23] Advice includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.
- [24] Advice has a broader meaning than recommendations. The legislative intention was for advice to have a distinct meaning from recommendations. Otherwise, it would be redundant. While “recommendation” is an express suggestion, “advice” is simply an implied recommendation.
- [25] A *recommendation* is a specific piece of advice about what to do, especially when given officially; it is a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious. Recommendations relate to a suggested course of action more explicitly and pointedly than “advice”. It can include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised. It includes suggestions for a course of action as well as the rationale or substance for a suggested course of action. A recommendation, whether express or inferable, is still a recommendation.
- [26] A *proposal* is something offered for consideration or acceptance.
- [27] An *analysis* is the detailed examination of the elements or structure of something; the process of separating something into its constituent elements.
- [28] *Policy options* are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant’s

identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.

[29] Records containing policy options can take many forms. They might include the full range of policy options for a given decision, comprising all conceivable alternatives, or may only list a subset of alternatives that in the public servant's opinion are most worthy of consideration. They can also include the advantages and disadvantages of each option. The list can also be less fulsome and still constitute policy options. For example, a public servant may prepare a list of all alternatives and await further instructions from the decision maker for which options should be considered in depth. Or, if the advantages and disadvantages of the policy options are either perceived as being obvious or have already been canvassed orally or in a prior draft, the policy options might appear without any additional explanation. As long as a list sets out alternative course of action relating to a decision to be made, it will constitute policy options.

[30] The City described Tabs 1 and 2 as follows:

The contents of the report provided advice, recommendations, and proposals and analyses of the benefits of a potential land sale and the negotiations regarding this matter. City Administration identified advice that included the analysis of a situation of an issue, which required action of City Administration officials and provided options for future action to be considered by Executive Committee. The analysis also related to the concise setting out of the advantages and disadvantages of the particular course of action in relation to the potential land sale negotiation and how this land sale would benefit the City. City Administration also identified the steps that would be required to develop a proposal that meets the needs of the Carpere Investment Group and the City of Moose Jaw. The recommendations related to a recommended course of action as well as the rationale for the suggested course of action. Therefore, the recommendation was for City Council to accept the Offer to Purchase and to draft a Purchase and Service Agreement with Carpere Canada.

[31] For Tab 3, the City stated as follows:

The contents of the report provided updated advice, recommendations and proposals and analyses of the benefits of a potential land sale and the negotiations regarding this matter. City Administration identified advice that included the analysis of a situation of an issue, which required action of City Administration officials and presented options for future action to be considered by Executive Committee. For the past several

months, City Administration had been working closely with Carpere Canada to finalize the Purchase Agreement for the [sic] both the industrial and residential lands.

[32] For Tab 4, the City stated as follows:

City Administration identified advice that included the analysis of a situation of an issue, which required action of City Administration officials and presented options for future action to be considered by Executive Committee. For the past several months, City Administration had been working closely with Carpere Canada to finalize the Purchase Agreement for the [sic] both the industrial and residential lands. However, there were several major changes that the City Administration required further direction.

[33] For Tab 5, the City stated as follows:

The contents of the report provided updated advice, recommendations and proposals and analyses regarding the substantial content changes to the agreement. City Administration identified advice that included the analysis of a situation of an issue, which required action of City Administration officials and presented options for future action to be considered by Executive Committee.

[34] For Tab 6, the City stated as follows:

The purpose of this report is to update Council on the most recent developments regarding the land purchase and development agreements the City entered into with Carpere Moose Jaw.

[35] For Tab 8, the City withheld attachments to emails as follows: 1) a document attached to an email dated December 13, 2018 titled, "REPORTS TO COUNCIL Carpere v3.docx"; and 2) a document attached to an email dated July 21, 2018 titled, "Industrial Park Overview", plus one sentence from the email. The City clarified the "REPORTS FOR COUNCIL" document attached to the December 13, 2018 email is the same as the Communication document from Tab 1 that is dated December 10, 2018, so I will review this document as part of Tab 1. This leaves me to consider the "Industrial Park Overview" and email dated July 31, 2018 in Tab 8.

[36] The City stated that Tabs 1 to 6 invariably involve records that contain *advice*, *recommendations*, *proposals*, *analyses* and *policy options*, but has not stated directly which

parts of the records in Tabs 1 to 6 contain any of these for the purposes of subsection 16(1)(a) of LA FOIP. Because the City did not specifically indicate on which portions of Tabs 1 to 6 it was relying on subsection 16(1)(a) of LA FOIP, it is necessary for me to review the City's application of this subsection on the face of the records, which I will do in the paragraphs that follow.

[37] Tab 1 (Offer to Purchase – Land for Industrial Development) – it is clear that a portion at the bottom of page 1 appears to contain recommendations, or suggested actions. The numbered portions on page 5 and all of page 5 appear to contain analysis, or factors to consider (considerations). The top of page 6 contains options, which are alternative courses of action that could be taken should the plan at question not materialize. I am satisfied these portions of Tab 1 meet the first part of the test and I will consider them under the second part of the test. The remaining portions of Tab 1 do not meet the first part of the test, so I find the City has not properly applied subsection 16(1)(a) of LA FOIP to these remaining portions of Tab 1.

[38] Tab 2 (Offer to Purchase – Land for Industrial Development) – it is clear a portion at the bottom of page 1 appears to contain recommendations, or suggested actions. The numbered portions on page 6 up to the bottom of page 9 appear to contain analysis of the recommendation, or factors to consider. The numbered portion at the bottom of page 9 and the top of page 10 appear to contain options, or alternative courses of action to the plan. I am satisfied these portions of Tab 2 meet the first part of the test and I will consider them under the second part of the test. The remaining portions of Tab 2 do not meet the first part of the test, so I find the City has not properly applied subsection 16(1)(a) of LA FOIP to these remaining portions of Tab 2.

[39] Tab 3 (Communication #EC-2019-0219, attachment one, attachment two) – it is clear a portion at the bottom of page 1 appears to contain recommendations, or suggested actions. Page 2 at the bottom appears to contain an option, or alternative course of action to the plan. A portion at the top of page 3 that speaks to financial matters appears to contain analysis, or factors to consider regarding the recommendation (considerations). All of the letter at page 6 (attachment 1) appears to contain a proposal, or something for

consideration. I am satisfied these portions of Tab 3 meet the first part of the test and I will consider them under the second part of the test. The remaining portions of Tab 3 do not meet the first part of the test, so I find the City has not properly applied subsection 16(1)(a) of LA FOIP to these remaining portions of Tab 3.

[40] Tab 4 (Communication #EC-2020-0041) – it is clear a portion at the bottom of page 1 appears to contain recommendations, or a suggested action. All of pages 2 to 5 appear to contain analysis and recommendations, as well as some advice from City administration regarding the recommendation. I am satisfied that all of pages 2 to 5 of Tab 4 meets the first part of the test and I will consider them under the second part of the test. The remaining portions of Tab 4 do not meet the first part of the test, so I find the City has not properly applied subsection 16(1)(a) of LA FOIP to these remaining portions of Tab 4.

[41] Tab 5 (Communication #EC-2020-0043) – it is clear a portion at the bottom of page 1 appears to contain recommendations, or a suggested action. The numbered portions of page 2 that carry through to the middle of page 6 appear to contain analyses, or considerations regarding the proposal. These same portions also appear to contain advice from City administration on courses of action. The bottom portion of page 6 appears to contain options, and the top portion of page 7 appears to contain financial matters or analysis of the plan, while I note that page 8 has been released to the Applicant in full. I am satisfied that all of pages 1 to 7 of Tab 5 meets the first part of the test and I will consider them under the second part of the test. The remaining portions of Tab 3 do not meet the first part of the test, so I find the City has not properly applied subsection 16(1)(a) of LA FOIP to these remaining portions of Tab 5.

[42] Tab 6 (Communication #EC-2020-0050) – it is clear a portion at the bottom of page 1 appears to contain a recommendation, or a suggested action. A portion at the middle of page 3 appears to contain financial matters or analysis of the plan. I am satisfied that these portions of Tab 6 meet the first part of the test and I will consider them under the second part of the test. The remaining portions of Tab 6 do not meet the first part of the test, so I find the City has not properly applied subsection 16(1)(a) of LA FOIP to these remaining portions of Tab 6.

[43] Tab 8 - the “Industrial Park Overview” is a 25-page document, prepared and identified by the City as a “proposal”. However, upon review of the document, I do not find any indication that it was prepared specifically in relation to the matter at hand as a proposal; rather it appears to be a document prepared to provide information to a third party. With respect to the sentence in the email dated January 31, 2018, it also does not fit the definition of a “proposal” for the purposes of subsection 16(1)(a) of LA FOIP; rather, it appears to be relaying information about the report to the third party. As such, the first part of the test is not met, and I find the City has not properly applied subsection 16(1)(a) of LA FOIP to the “Industrial Park Overview” document and to the one sentence in the email dated July 31, 2018. As the City has not applied any other exemptions to these portions of the records, I recommend the City release to the Applicant the “Industrial Park Overview” document and the portion of the email dated July 31, 2018, which it withheld pursuant to subsection 16(1)(a) of LA FOIP.

[44] I will, however, continue to apply the second part of the test to the records at Tabs 1 to 6 as I have outlined in paragraphs [37] to [42].

2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for a local authority?

[45] *Developed by or for* means the advice, proposals, recommendations, analyses and/or policy options must have been created either: 1) within the local authority; or, 2) outside the local authority, but for the local authority (for example, by a service provider or stakeholder). For information to be developed by or for a local authority, the person developing the information should be an official, officer or employee of the local authority, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the local authority (Guide to FOIP, page 122).

[46] To put it another way, in order to be “developed by or for” the local authority, the advice, proposals, recommendations, analyses and/or policy options should:

- i. be either sought, be expected, or be part of the responsibility of the person who prepared the record; and
- ii. be prepared for the purpose of doing something, for example, taking an action or making a decision; and
- iii. involve or be intended for someone who can take or implement the action.

[47] The City indicated the records in Tabs 1 to 6 were prepared by City administration for presentation or consideration by the Executive Committee and were “authored by City Administration”. The City did not state who was involved in authoring each record, but upon review of the portions released to the Applicant, my office is able to determine they were either completed or submitted by the Manager of Economic Development, Director of Planning and Development, City Planner, Legal Counsel or City Manager. My office is also able to determine they were prepared for the purposes of taking action or making a decision. Therefore, the third part of the test is met. As such, I find the City properly applied subsection 16(1)(a) of LA FOIP to the portions of the records as I have outlined at paragraphs [37] to [42] of this Report. I recommend it continue to withhold these portions pursuant to subsection 16(1)(a) of LA FOIP.

[48] I will consider the portions of the records that I have not outlined at paragraphs [37] to [42] of this Report pursuant to the other exemptions of LA FOIP as the City has applied to them.

[49] I note that factual material does not qualify for an exemption if it would not reveal the content or substance of the advice, proposals, recommendations, analyses or policy options. The Guide to FOIP at page 124, states *factual material* means a cohesive body of facts, which are distinct from advice, proposals, recommendations, analyses and/or policy options. A local authority can only withhold factual material or assertions of fact under subsection 16(1)(a) of LA FOIP if the factual information is sufficiently interwoven with other advice, proposals, recommendations, analyses or policy options so that it cannot reasonably be considered separate and distinct. In Review Report 025-2017, concerning Saskatchewan Power Corporation, I considered the parallel provision subsection 17(1)(a) from *The Freedom of Information and Protection of Privacy Act* (FOIP). In that Report, I stated:

[17] Subsection 17(1)(a) of FOIP would not apply where disclosure of the information would not reasonably be expected to reveal advice, recommendations, proposals, analyses or policy options. In addition, it would not apply to the names, dates and subject lines that do not reveal advice or substantive information.

[50] I acknowledge the City has released some factual material from the records at Tabs 1 to 6 to the Applicant, such as the title page information, dates and who signed the records. The City could have also released information such as the titles throughout each of the documents in Tabs 1 to 6, and dates of meetings or other events that would not reveal the substance of withheld information. I recommend the City release to the Applicant this additional type of factual material contained in the records at Tabs 1 to 6.

4. Did the City properly apply subsection 16(1)(c) of LA FOIP?

[51] Subsection 16(1)(c) of LA FOIP provides as follows:

16(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the local authority, or considerations that relate to those negotiations;

[52] Subsection 16(1)(c) of LA FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of a local authority. It also covers considerations related to the negotiations. Examples of the type of information that could be covered by this exemption are the various positions developed by a local authority's negotiators in relation to labour, financial and commercial contracts.

[53] The two-part test for subsection 16(1)(c) of LA FOIP from the Guide to FOIP at page 127 is as follows:

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

[54] As I found subsection 16(1)(a) of LA FOIP applies to the records as I have outlined at paragraphs [37] to [42] of this Report, I only need to consider subsection 16(1)(c) of LA FOIP on the remaining portions of Tabs 1 to 6.

1. Does the record contain positions, plans, procedures, criteria, instructions or considerations that relate to the negotiations?

[55] The definitions for *positions, plans, procedures, criteria, instructions or considerations* are found in the Guide to FOIP, Chapter 4, at pages 132 and 133.

[56] A *position* is a point of view or attitude. An opinion; stand; a way of regarding situations or topics; an opinion that is held in opposition to another in an argument or dispute.

[57] A *plan* is a formulated and especially detailed method by which a thing is to be done; a design or scheme. A detailed proposal for doing or achieving something; an intention or decision about what one is going to do.

[58] A *procedure* is an established or official way of doing something; a series of actions conducted in a certain order or manner.

[59] *Criteria* are standards, rules, or tests on which a judgement or decision can be based or compared; a reference point against which other things can be evaluated.

[60] *Instructions* are directions or orders.

[61] Subsection 16(1)(c) of LA FOIP extends beyond positions, plans, procedures, criteria or instructions to include considerations that relate to the negotiations. To qualify, the

information must constitute considerations and they must relate to the negotiations. A *consideration* is a careful thought, or fact taken into account when making a decision. *To relate* to means that there must be some connection between the information and the negotiations.

[62] The City has not provided specific arguments for how these portions of the records at Tabs 1 to 6 constitute *positions, plans, procedures, criteria, instructions or considerations* for the purposes of subsection 16(1)(c) of LA FOIP. As such, I will conduct my analysis on the face of the records in the paragraphs that follow.

[63] Tab 1 (Offer to Purchase – Land for Industrial Development) – it is clear that the portions of Tab 1 where subsection 16(1)(a) of LA FOIP was not found to apply appear to contain plans, positions, criteria and considerations with respect to the offer to purchase of the land. I am satisfied the first part of the test is met for these portions and will consider them under the second part of the test.

[64] Tab 2 (Offer to Purchase – Land for Industrial Development) – it is clear that the portions of Tab 2 where subsection 16(1)(a) of LA FOIP was not found to apply appear to contain plans, positions, criteria and considerations with respect to the offer to purchase of the land. I am satisfied the first part of the test is met for these portions and will consider them under the second part of the test.

[65] Tab 3 (Communication #EC-2019-0219, attachment one, attachment two) – it is clear that the portions of Tab 3 where subsection 16(1)(a) of LA FOIP was not found to apply appear to contain plans, positions, criteria and considerations with respect to the offer to purchase of the land. Page 6 (attachment one) appears to contain considerations related to negotiating something. I am satisfied the first part of the test is met for these portions and will consider them under the second part of the test.

[66] Tab 4 (Communication #EC-2020-0041) – it is clear that the portions of Tab 4 where subsection 16(1)(a) of LA FOIP was not found to apply appear to contain plans and

positions with respect to the purchase of the land. I am satisfied that the first part of the test is met for this portion and will consider it under the second part of the test.

[67] Tab 5 (Communication #EC-2020-0043) – it is clear that the portions of Tab 5 where subsection 16(1)(a) of LA FOIP was not found to apply appear to contain plans and positions with respect to the purchase of the land. I am satisfied that the first part of the test is met for these portions and will consider them under the second part of the test.

[68] Tab 6 (Communication #EC-2020-0050) – it is clear that the portions of Tab 6 where subsection 16(1)(a) of LA FOIP was not found to apply appear to contain plans, positions, criteria and considerations with respect to the offer to purchase of the land. I am satisfied that the first part of the test is met for these portions and will consider them under the second part of the test.

[69] I will now consider the portions of Tabs 1 to 6 as I have outlined in paragraphs [63] to [68] under the second part of the test.

2. Were the positions, plans, procedures, criteria, instructions or considerations developed for the purpose of contractual or other negotiations by or on behalf of the local authority?

[70] The Guide to FOIP at page 134, discusses what is meant by the terms and phrases *developed, for the purpose of, on behalf of* and *negotiation*.

[71] *Developed* means to start to exist, experience or possess. Use of the word “developed” suggests the Legislature’s intention was for the provision to include information generated in the process leading up to the contractual or other negotiations (for example, draft versions). Drafts and redrafts of positions, plans, procedures, criteria, instructions or considerations may be protected by the exemption. A public servant may engage in writing any number of drafts before communicating part or all of their content to another person. The nature of the deliberative process is to draft and redraft until the writer is sufficiently satisfied that they are prepared to communicate the results to someone else. All the

information in those earlier drafts informs the end result even if the content of any one draft is not included in the final version.

[72] *For the purpose of* means intention; the immediate or initial purpose of something. The negotiations can be conducted by the local authority or on behalf of the local authority.

[73] *On behalf of* means “for the benefit of”. A person does something “on behalf of” another, when he or she does the thing in the interest of, or as a representative of, the other person.

[74] A *negotiation* is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings conducted between two or more parties for the purpose of reaching an understanding. It connotes a more robust relationship than “consultation”. It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion. The contractual or other negotiations can be concluded, ongoing or future negotiations.

[75] The City has not directly stated upon which argument it is relying in support of its application of subsection 16(1)(c) of LA FOIP, but I note it stated the following:

The City of Moose Jaw is of the opinion that release of this information would significantly cause harm for future land negotiations, specifically, in the opportunities to negotiate land sale agreements with other third-party interests. It should be noted that the City has received significant enquiries with respect to the potential of land development in the South East industrial park. [Name of corporation] has contacted City Administration with a new proposal for a land sale proposal but nothing has commenced to this date.

[76] In Review Report 258-2016 concerning Kelsey Trail Regional Health Authority, my office also considered subsection 16(1)(c) of LA FOIP. At paragraphs [47] and [48] of that Report, I stated:

[47] Upon review of page 141, the information clearly lays out a plan and includes instructions to those included in the email. In addition, the information appears to be in preparation for a meeting with the Applicant where negotiations were planned.

[48] The federal *Access to Information Act* (ATIA) has a similar provision. In the Office of the Information Commissioner of Canada's resource titled, *Investigators Guide to Interpreting the ATIA*, subsection 21(1)(c) of ATIA states that in order to qualify for this provision the negotiations must involve the government and an outside party. This requirement is also noted in the federal Treasury Board Secretariat's resource titled, *Access to Information Manual*. This resource states that subsection 21(1)(c) of ATIA only covers negotiations with parties outside the federal government and does not apply to such activities when carried on among government institutions.

[77] At Tabs 1 to 6 where subsection 16(1)(a) of LA FOIP was not found to apply, the remaining portions describe that the City was planning to enter into an agreement to sell a parcel of land to Carpere, an outside party. What occurred, and what the information in the records describes, are the positions, plans, criteria and considerations necessary for this process of entering an agreement, as well as the back and forth communication between the City and Carpere in terms of amendments and other matters. The records, then, appear to outline a consensual bargaining process whereby the parties attempted to reach an agreement, which is a *negotiation*. I find, therefore, the City properly applied subsection 16(1)(c) of LA FOIP as I have outlined at paragraphs [63] to [68] of this Report, and recommend the City continue to withhold these portions pursuant to subsection 16(1)(c) of LA FOIP.

[78] As I found that subsections 16(1)(a) and (c) of LA FOIP apply to the records at Tabs 1 to 6, I do not need to consider the City's application of subsections 16(1)(b), 17(1)(d), (e) and 21(b), (c) of LA FOIP as it has applied these subsections to Tabs 1 to 6. The only exception to this is attachment 2 at Tab 3, which is a letter. I will review this letter in the next section of this Report pursuant to subsection 21(c) of LA FOIP.

5. Did the City properly apply subsection 21(c) of LA FOIP?

[79] Subsection 21(c) of LA FOIP provides as follows:

21 A head may refuse to give access to a record that:

...

(c) contains correspondence between legal counsel for the local authority and any other person in relation to a matter involving the provision of advice or other services by legal counsel.

[80] Subsection 21(c) of LA FOIP is a discretionary class-based exemption. It permits refusal of access in situations where a record contains correspondence between the local authority's legal counsel and any other person in relation to a matter that involves the provision of advice or services by legal counsel. Subsection 21(c) of LA FOIP is intended to allow parties to correspond freely in relation to matters about which they need to speak in order to allow the lawyer's advice or services to be provided.

[81] The following two part-test from the Guide to FOIP, Chapter 4, at page 263 can be applied:

1. Is the record a correspondence between the local authority's legal counsel and any other person?
2. Does the correspondence relate to a matter that involves the provision of advice or other services by legal counsel?

[82] I only need to consider subsection 21(c) of LA FOIP on attachment 2 at Tab 3, which I have already described as a letter.

1. Is the record a correspondence between the local authority's legal counsel and any other person?

[83] The Guide to FOIP at page 263 discusses what is meant by the terms *correspondence* and *any other person*.

[84] *Correspondence* means letters sent or received. It is an interchange of written communication. A memorandum or note from one employee of a local authority to another summarizing a conversation between that employee and the local authority's lawyer may meet the criteria for this provision.

[85] *Any other person* was an intentional and inclusive phrase to capture just that – any other person. The local authority must make it sufficiently clear, as to what the nature of that other person's role in the correspondence was.

[86] Attachment 2 at Tab 3 is a two-page letter written on behalf of the purchaser, and it is addressed to the City's legal counsel. Upon review of the Law Society of Saskatchewan's website, I note that the City's legal counsel is a member of the Law Society of Saskatchewan. As the letter is written by someone who is not employed by the City, the letter qualifies as correspondence between City's legal counsel and any other person, which meets the first part of the test. I will now consider the letter under the second part of the test.

2. Does the correspondence relate to a matter that involves the provision of advice or other services by legal counsel?

[87] The Guide to FOIP at page 263 states what is meant by the terms *in relation to* and *legal advice*.

[88] *In relation to* has been found to have a similar meaning as "in respect of". It was considered in *Nowegijick v. The Queen*, [1983] 1 SCR 29, 1983 CanLII 18 (SCC) at [39]:

The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject-matters.

[89] *Legal advice* includes a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. The Guide goes on to state that *legal service* includes any law-related service performed by a person licensed to practice law. The local authority should explain how the correspondence relates to a matter involving advice or other services provided by legal counsel.

[90] The City did not directly address the letter at Tab 3, but stated the following in regards to Tab 3 in general:

It should be noted that legal counsel for the City of Moose Jaw was in attendance at the meeting as [they] had assisted in the review and recommendations of the report and verbally answered questions of Executive Committee. These questions mainly concerned the procedures for execution of amending agreements. The analysis also related to the concise setting out of the advantages and disadvantages of a particular

course of action in relation to the potential land sale negotiation and how this land sale would benefit the City. The recommendations related to a recommended course of action as well as the rationale for the suggested course of action...

[91] Upon review of the letter, it appears the City's legal counsel was receiving information relating to the matter at hand. In turn, the City's legal counsel would have used this information to advise the City. This meets the second part of the test. Therefore, I find the City properly applied subsection 21(c) of LA FOIP to attachment 2 at Tab 3. I do not need to consider the City's application of subsection 21(b) of LA FOIP to this portion of the records at Tab 3.

[92] While the City may continue to withhold attachment 2 at Tab 3 (the letter) pursuant to subsection 21(c) of LA FOIP, in the past I have recommended that public bodies release innocuous portions of such documents, including sender, recipient, subject lines and signatures, which I recommend the City do in this matter. This would be in keeping with section 8 of LA FOIP, which provides as follows:

8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

6. Did the City properly apply subsection 17(1)(e) of LA FOIP?

[93] Subsection 17(1)(e) of LA FOIP provides as follows:

17(1) Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(e) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the local authority, or considerations that relate to those negotiations;

[94] Subsection 17(1)(e) of LA FOIP is a discretionary, class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose positions, plans, procedures, criteria or instructions developed for the purpose of

contractual or other negotiations by or on behalf of a local authority. It also covers considerations related to the negotiations.

[95] The two part test for subsection 17(1)(e) of LA FOIP from the Guide to FOIP at page 173 is as follows:

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

[96] The City applied subsection 17(1)(e) of LA FOIP at Tab 8 only to an email dated November 16, 2018. The subject line of the email, which was released to the Applicant, states, “RE: Vancouver trip”.

- 1. Does the record contain positions, plans, procedures, criteria, instructions or considerations that relate to the negotiations?***

[97] The Guide to FOIP provides definitions for *positions, plans, procedures, criteria, instructions* or *considerations* at page 173.

[98] A *position* is a point of view or attitude. An opinion, stand; a way of regarding situations or topics; an opinion that is held in opposition to another in an argument or dispute.

[99] A *plan* is a formulated and especially detailed method by which a thing is to be done; a design or scheme. A detailed proposal for doing or achieving something; an intention or decision about what one is going to do.

[100] A *procedure* is an established or official way of doing something; a series of actions conducted in a certain order or manner.

[101] *Criteria* are standards, rules, or tests on which a judgement or decision can be based or compared; a reference point against which other things can be evaluated.

[102] *Instructions* are directions or orders.

[103] A *consideration* is a careful thought; a fact taken into account when making a decision.

[104] The City did not provide an argument for its application of subsection 17(1)(e) of LA FOIP to the email dated November 16, 2018 with the subject line, “RE: Vancouver trip”. As such, it did not meet its burden of proof pursuant to section 51 of LA FOIP, which I discussed earlier on in this Report. On the face of the records, it is not apparent that any of what the City has redacted would qualify as *positions, plans, procedures, criteria, instructions* or *considerations* for the purposes of subsection 17(1)(e) of LA FOIP. As such, the first part of the test is not met, and I find the City did not properly apply subsection 17(1)(e) of LA FOIP to the email at Tab 8 dated November 16, 2018 that has the subject line, “RE: Vancouver trip”; as such, I recommend it release this email to the Applicant.

7. Did the City properly apply subsection 28(1) of LA FOIP?

[105] First, on various pieces of information throughout Tabs 8 and 9, the City applied subsections 18(1)(b) and 28(1) of LA FOIP. As I stated at paragraph [6], the City’s intent was to remove its reliance on subsection 18(1) of LA FOIP from Tabs 8 and 9 and to release those portions to the Applicant. As such, I will only consider its application of subsection 28(1) of LA FOIP to these portions of Tabs 8 and 9. Having stated this, however, I may find that some of the portions of information where the City applied subsections 18(1)(b) and 28(1) of LA FOIP should still be withheld by the City pursuant to subsection 28(1) of LA FOIP.

[106] Subsection 28(1) of LA FOIP provides as follows:

28(1) No local authority shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 29.

[107] Subsection 28(1) of LA FOIP protects the privacy of individuals whose personal information may be contained within records responsive to an access to information request made by someone else. Subsection 28(1) of LA FOIP requires a local authority to have the consent of the individual whose personal information is in the record prior to disclosing it. When dealing with information in a record that appears to be personal information, the first step is to confirm the information indeed qualifies as personal information pursuant to section 23 of LA FOIP.

[108] The City applied subsection 28(1) of LA FOIP to portions of the records at Tabs 7, 8 and 9. The City has not provided arguments for its application of subsection 28(1) of LA FOIP. I will, however, consider subsection 28(1) of LA FOIP on the face of the records, because it is a mandatory provision.

[109] Tab 7 includes emails dated June 18, 2018, and October 1, 4, 5, 9 and 10, 2018. The email exchanges are between the City, Carpere and another third party, which I will refer to as Party B.

[110] At Tab 7, the City applied subsection 28(1) of LA FOIP to the email address of a Carpere representative, and to the name and email address of Party B. The email addresses of both the Carpere representative and Party B that have been withheld appear to be their personal email addresses. In Review Report 157-2016 concerning the Global Transportation Hub, I stated that personal email addresses used in the course of doing business are personal information. With respect to this matter, the personal email address of the Carpere representative and Party B would be their personal information pursuant to subsection 23(1)(e) of LA FOIP, which provides as follows:

23(1) Subject to subsections (1.1) and (2), “**personal information**” means personal information about an identifiable individual that is recorded in any form, and includes:

...

(e) the home or business address, home or business telephone number or fingerprints or blood type of the individual;

- [111] Based on the aforementioned, I find the City properly applied subsection 28(1) of LA FOIP to the personal email addresses of the Carpere representative and to Party B and recommend it continue to withhold this information pursuant to subsection 28(1) of LA FOIP.
- [112] Tab 8 includes emails dated July 31, 2018, August 1, 17, 2018, September 25, 2018, October 7, 15, 16, 18, 22, 23, 24, 30, 2018, November 5, 13, 15, 27, 28, 29, 2018, and December 5, 2018. The exchanges involve the City and Carpere.
- [113] At Tab 8, the City applied subsection 28(1) of LA FOIP to the work email addresses and work telephone numbers of Carpere representatives throughout Tab 8 (e.g. the emails at November 29, 2018 and December 15, 2018). At Tab 8, the City has also withheld the name of the director of Carpere Canada pursuant to section 28(1) of LA FOIP. In Review Report 277-2016, as well as numerous other reports, I have stated that *business card information*, or information typically found on a business card (e.g. name, job title, work address, work telephone number and email address) is not generally personal in nature, and so would not be considered personal information. I find, therefore, the City did not properly apply subsection 28(1) of LA FOIP to the work email addresses and work telephone numbers of the Carpere representatives, and to the name of the director for Carpere Canada, throughout Tab 8 and recommend it release this information to the Applicant.
- [114] Tab 9 includes emails dated October 18, 19, 22, 24, 2018, and November 5, 2018. The exchanges involve the City and Carpere. There are also exchanges at Tab 9 that include individuals employed by a different local authority.
- [115] At Tab 9, the City applied subsection 28(1) of LA FOIP to the email addresses of Carpere representatives, which I have already stated is not personal information for the purposes of subsection 28(1) of LA FOIP. I find the City did not properly apply subsection 28(1) of LA FOIP to the email addresses of the Carpere representatives at Tab 9, and recommend the City release this information to the Applicant.

[116] Also at Tab 9, the City applied subsection 28(1) of LA FOIP to the names and email addresses of individuals employed by a different local authority who appear to have been engaged in the process with Carpere. The City has not provided an argument for why it feels such information would qualify as personal information pursuant to LA FOIP, and it is not clear if they did so because they believed these individuals to be third parties. In Review Report 082-2019, 083-2019, I considered whether the names, specialties and total 2018 payment amounts of physicians, considered third parties in that matter, were personal information. In that report, I found that such information related to them in a professional capacity and, therefore, was not personal information. Similar to this matter, I am also of the view that the names and email addresses of the individuals employed by the local authority relate to them in a professional capacity and is, therefore, not personal information. I find the City did not properly apply subsection 28(1) of LA FOIP to the names and email addresses of the individuals employed by a local authority as they appear at Tab 9 and recommend the City release this information to the Applicant.

IV FINDINGS

[117] I find the City conducted a reasonable search for records.

[118] I find the City properly applied subsection 16(1)(a) of LA FOIP as I have outlined at paragraphs [37] to [42] of this Report.

[119] I find the City properly applied subsection 16(1)(c) of LA FOIP as I have outlined at paragraphs [63] to [68] of this Report.

[120] I find the City properly applied subsection 21(c) of LA FOIP to attachment 2 at Tab 3 (the letter) that is to the attention of the City's legal counsel.

[121] I find the City did not properly apply subsection 17(1)(e) of LA FOIP to the email at Tab 8 dated November 16, 2018 that has the subject line, "RE: Vancouver trip".

[122] I find the City properly applied subsection 28(1) of LA FOIP to the personal email addresses of the Carpere representative and to Party B at Tab 7.

[123] I find the City did not properly apply subsection 28(1) of LA FOIP to the work email addresses and work telephone numbers of the Carpere representatives at Tabs 8 and 9, to the name of the director for Carpere Canada at Tab 8, and to the names and email addresses of individuals employed by a different local authority at Tab 9.

V RECOMMENDATIONS

[124] I recommend the City release to the Applicant, if it has not already done so, those portions of Tabs 8 and 9 where it applied subsections 18(1)(b) and (c) of LA FOIP to the Applicant unless other exemptions are found to apply to those same portions.

[125] I recommend the City continue to withhold the portions of the records as I have outlined at paragraphs [37] to [42] of this Report pursuant to subsection 16(1)(a) of LA FOIP.

[126] I recommend the City continue to withhold the portions of records as I have outlined at paragraphs [63] to [68] of this Report pursuant to subsection 16(1)(c) of LA FOIP.

[127] I recommend that while the City may continue to withhold attachment 2 at Tab 4 pursuant to subsection 21(c) of LA FOIP, it release to the Applicant the innocuous portions including sender, recipient, subject lines and signatures.

[128] I recommend the City release to the Applicant the email at Tab 8 dated November 16, 2018 that has the subject line, "RE: Vancouver trip" where it applied subsection 17(1)(e) of LA FOIP.

[129] I recommend the City continue to withhold the personal email addresses of the Carpere representative and Party B at Tab 7 pursuant to subsection 28(1) of LA FOIP.

[130] I recommend the City release to the Applicant the work email addresses and work telephone numbers of the Carpere representatives at Tabs 8 and 9, the name of the director for Carpere Canada at Tab 8, and to the names and email addresses of individuals employed by a different local authority at Tab 9.

Dated at Regina, in the Province of Saskatchewan, this 26th day of March, 2021.

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