



REVIEW REPORT 121-2021

Rural Municipality of McKillop No. 220

January 13, 2022

Summary:

The Applicant asked for records, which the Rural Municipality of McKillop No. 220 (RM) denied access to pursuant to sections 16(1)(a), (c), 18(1)(c) and 22(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The RM also stated that records related to one part of the Applicant's access to information request did not exist. The Commissioner found the RM did not properly apply sections 18(1)(c) and 22(1)(c) of LA FOIP, and that it did not meet the burden of proof pursuant to section 51 of LA FOIP in demonstrating that sections 16(1)(a) and (c) of LA FOIP applied. The Commissioner found, however, that section 28(1) of LA FOIP applied to portions of the ethics complaints. The Commissioner further found the RM did not conduct a reasonable search for records, and that its response to the Applicant was not compliant with section 7 of LA FOIP. The Commissioner recommended the RM release to the Applicant some of the records related to the ethics complaints (item 1), and all the records related to items 2 and 4 from the access to information request. The Commissioner also recommended that within 30 days of receiving the Report, that the RM conduct a search for records related to item 3 of the Applicant's access to information request and provide the results of that search to his office and to the Applicant in a new section 7 response. Finally, the Commissioner recommended the RM ensure its responses to applicants in the future are compliant with section 7 of LA FOIP, and that it ensure its policies and procedures include best practices for responding openly, accurately and completely.

I BACKGROUND

[1] On April 8, 2021, the Rural Municipality of McKillop No. 220 (RM) received an access to information request from the Applicant as follows:

- 1) Ethics and Conflict of Interest Complaints filed against any Councillor since January 2018 and decisions on those complaints
- 2) Applications submitted to the RM from Glamping/Northshore Development since January 2020
- 3) Quotes received by the RM since January 2020 for Livestreaming
- 4) Document discussed at Feb 23 council meeting when deciding to hire a RM soliciter [sic].

[2] On May 3, 2021, the RM responded to the Applicant as follows:

The RM of McKillop No. 220 received your Access to Information Request Form on April 8, 2021 and offers the following in response to your inquiry:

1. Code of Ethic Complaints are considered private information because of the way they are handled. Decisions are public and are available in the meeting minutes. Meeting minutes are published on our website.
2. Development Permit Applications submitted by Glamping Resorts to the RM since January 2020 are exempted under Part III of the Local Authority Freedom of Information and Protection of Privacy Act.
3. No written quotes were received by the RM since January 2020 for Livestreaming.
4. Report to Council on hiring an RM Solicitor is exempted under Part III of the Local Authority Freedom of Information and Protection of Privacy Act.

[3] On May 3, 2021, the Applicant asked my office to review the RM's decision.

[4] On May 4, 2021, my office asked the RM to clearly state, pursuant to section 7 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), on which provisions of LA FOIP it was denying the Applicant access to the records.

[5] On May 10, 2021, the RM clarified with my office and the Applicant it was denying access, in full, to some items in the Applicant's access to information request pursuant to sections 22(1)(c) (item 1), 18(1)(c) (item 2) and 16(1)(a) and (c) (item 4) of LA FOIP. For item 3, the RM stated that no records existed.

[6] On June 30, 2021, my office provided notification to the RM, the third party (identified as Glamping Resorts Ltd. by the RM) and to the Applicant of my office’s intent to undertake a review of the RM’s decision to deny access to the records, in full, pursuant to sections 16(1)(a), (c), 18(1)(c) and 22(1)(c) of LA FOIP. My office’s notification also asked the RM to demonstrate how it concluded part of the record did not exist, and how the RM determined it was compliant with section 7 of LA FOIP.

II RECORDS AT ISSUE

[7] At issue are the following records for each of items 1, 2 and 4 from the Applicant’s access to information request, which I have placed into a table for ease of reference as follows:

Item Number	Description	LA FOIP Exemption Applied
1	Ethics complaints dated “since January 2018”: <ul style="list-style-type: none"> • Complaint 1 – 34 pages • Complaint 2 – 7 pages • Complaint 3 – 8 pages • Complaint 4 – 4 pages • Complaint 5 – 13 pages • Complaint 6 – 3 pages • Complaint 7 – 3 pages • Complaint 8 – 3 pages 	22(1)(c)
2	Development Application #1 document (5 pages) plus attachments as follows: <ul style="list-style-type: none"> • Attachment 1 – 4 pages • Attachment 2 – 1 • Attachment 3 – 5 • Attachment 4 – 12 Development Application #2 document (5 pages) plus attachments as follows: <ul style="list-style-type: none"> • Attachment 1 – 4 pages • Attachment 2 – 1 • Attachment 3 – 5 • Attachment 4 – 12 	18(1)(c)

4	Report to council for legal services – 1 page	16(1)(a), (c)
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III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

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

[9] Glamping Resorts Ltd. qualifies as a third party pursuant to section 2(k) of LA FOIP.

2. Did the RM properly apply section 22(1)(c) of LA FOIP?

[10] Section 22(1)(c) of LA FOIP provides as follows:

22(1) Where a provision of:

...
 (c) a resolution or bylaw;

that restricts or prohibits access by any person to a record or information in the possession or under the control of a local authority conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant to it shall prevail.

[11] Section 22(1) of LA FOIP provides that where there is a conflict between LA FOIP and any other Act or regulation, LA FOIP will prevail. LA FOIP prevails even where another Act or regulation restricts or prohibits access (*IPC Guide to LA FOIP*, Chapter 1, “Purposes and Scope of LA FOIP”, updated July 28, 2020 [*Guide to LA FOIP*, Ch. 1], p. 19).

[12] “Prevail” means a provision of one Act having priority over a conflicting provision in another Act. The ordinary meaning of the word means to be superior in strength or influence (*Guide to LA FOIP*, Ch. 1, p. 19).

[13] Section 22 of LA FOIP ensures that the fundamental rights enshrined in LA FOIP are given proper deference when interpreting legislative intent as to its application in conjunction with other statutes. This primacy clause is a strong expression of legislative intent and a tool for ensuring public policy objectives are met. In the event of a contest between two statutes, the legislature is presumed to not intend conflict between the statutes. Therefore, if an interpretation allows concurrent application, then that interpretation should be adopted (*Guide to LA FOIP*, Ch. 1, p. 20).

[14] The RM applied section 22(1)(c) of LA FOIP to the ethics complaints, which I have numbered as 1 to 8.

[15] In terms of its reliance on section 22(1)(c) of LA FOIP, the RM stated as follows:

Code of Ethic Complaints are considered private information because of the way they are handled. Decisions are public and are available in the meeting minutes. Meeting minutes are published on our website. Pursuant to Section 22(1)(c) of LAFOIP.

...

I [RM's chief administrative officer] used Section 22(1)(c) of LAFOIP as our Code of Ethics Bylaw discusses that the complaint is handled in camera. As far as the decisions are public and are available in the meeting minutes this is the same for all decisions of Council and are recorded in the meeting minutes. Meeting minutes, once they are approved, are open to public inspection in accordance with Section 117(1)(d) of the Municipalities Act.

[16] It appears the RM's argument is that its code of ethics bylaws state complaints are handled in private. The RM provided a copy of its bylaws titled, "Council Member Code of Ethics Bylaw... BYLAW NO. 326/2017". The RM has not expressly stated which section of its bylaws apply, but I note section 4.1.3 of its bylaws states as follows:

4.1.3. All discussions surrounding alleged and substantiated contraventions of this policy shall be conducted in an in-camera session at a meeting of Council.

[17] The above noted requirement of the bylaw may be consistent with what is required by section 120(2) of *The Municipalities Act*, which provides as follows:

120(2) Councils and council committees may close all or part of their meetings to the public if the matter to be discussed:

(a) is within one of the exemptions in Part III of *The Local Authority Freedom of Information and Protection of Privacy Act*; or

(b) concerns long-range or strategic planning.

[18] However, I do not see the bylaw as having any application as the records withheld by the RM in this case are letters of complaint, not any records that were generated in the course of discussions during *in-camera* sessions of Council.

[19] Further, if the RM was asserting its bylaws supersede access rights in LA FOIP, it should not have applied section 21(1)(c) of LA FOIP, but rather section 22(3) of LA FOIP, which provides as follows:

22(3) Subsection (1) does not apply to:

(a) *The Health Information Protection Act*;

(a.01) Part VIII of *The Vital Statistics Act, 2009*;

(a.1) any prescribed Act or prescribed provisions of an Act; or

(b) any prescribed regulation or prescribed provisions of a regulation;

and the provisions mentioned in clauses (a), (a.01), (a.1) and (b) shall prevail.

[20] Section 22(3) of LA FOIP though does not mention any provision of *The Municipalities Act* or bylaws, and neither does section 8.1(c) of *The Local Authority Freedom of Information and Protection of Privacy Regulations* (Regulations), which provides as follows:

8.1 For the purposes of clause 22(3)(a.1) of the Act, the following are prescribed as provisions to which subsection 22(1) of the Act does not apply:

...

(c) subsections 201(5) and (6) and sections 231 and 232 of *The Municipalities Act*;

[21] Sections 201, 231 and 232 of *The Municipalities Act*, do not appear to deal with the confidentiality of ethics complaints, nor has the RM argued that any of these sections apply in the given circumstances.

[22] Therefore, I do not find that sections 22(1) or 22(3) of LA FOIP and section 8.1 of the LA FOIP Regulations have any application to the ethics complaints. Ethics complaints, however, may contain personal information. Although the RM has not raised section 28(1) of LA FOIP, I will review if it has any application on the ethics complaints in the next section of this Report.

3. Does section 28(1) of LA FOIP apply to the ethics complaints?

[23] Even if a public body has not raised section 28(1) of LA FOIP, my office will still consider it because it is a mandatory exemption. Section 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.

[24] Section 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) requires a local authority to have the consent of the individual whose personal information is in the record prior to disclosing it (*IPC Guide to LA FOIP*, Chapter 4, “Exemptions to the Right of Access”, updated April 29, 2021 [*Guide to LA FOIP*, Ch. 4], p. 240).

[25] 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 (*Guide to LA FOIP*, Ch. 4, p. 240).

[26] I previously found that section 22(1) of LA FOIP, as well as section 22(3) of LA FOIP, and section 8.1 of the LA FOIP Regulations, do not have any application to the ethics complaints. Ethics complaints, however, may contain personal information as defined by

section 23(1) of LA FOIP. Section 23(1) of LA FOIP provides a list of examples of information that would qualify as personal information; however, the list is not exhaustive as other types of information may qualify as personal information. To determine if personal information is involved, local authorities should also consider the following:

1. Is there an identifiable individual? This means it must be reasonable to expect that an individual may be identified if the information were disclosed. The information must reasonably be capable of identifying particular individuals because it either directly identifies a person or enables an accurate inference to be made to their identity when combined with other available sources of information (data linking) or due to the context of the information in the record.
2. Is the information personal in nature? This that the information reveals something personal about the individual. Information that relates to an individual in a professional, official or business capacity could only qualify if the information revealed something personal about the individual for example, information that fits the definition of employment history.

[27] I note the following regarding the ethics complaints:

- They all appear to be completed on, or include as an attachment to an email, a “Schedule A Formal Complaint Form” and have what appears to be a file number assigned by the RM;
- They all appear to include the name and signature of the individual(s) who submitted each complaint as well as other information such as their addresses, phone numbers and email addresses;
- They contain details about why the complaint was made and other factors, such as which bylaw the complainant feels was violated; and
- Invariably, complaints 1, 3 and 5, have other attachments that appear were supplied by the complainants with their complaint form, including copies of public notices or RM meeting minutes, copies of councillors’ expenses, RM policies, affidavits provided by RM councillors to the Court of Queen’s Bench, and other information that appears otherwise publicly available (e.g. copy of fundraising information retrieved from the Internet). Conceivably, the complainants received some of this documentation through their own access to information requests to the RM, although I do not have proof of this.

[28] Based on this, it appears the following types of information are involved as defined by sections 23(1) (d), (e), and (h) of LA FOIP:

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:

...

(d) any identifying number, symbol or other particular assigned to the individual;

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

...

(h) the views or opinions of another individual with respect to the individual; or

[29] With respect to the identify of an individual who makes an ethics complaint, in [Investigation Report 350-2017](#), I stated at paragraph [19] that my office has long taken the position that the identity of an individual who sends access to information requests or breach of privacy complaints to a local authority is their personal information. Similarly, the identity of an individual who submits an ethics complaint would be their personal information. I find, therefore, the names and signatures of the individuals who submitted the ethics complaints are their personal information and recommend the RM continue to withhold this type of information as it appears throughout the ethics complaints.

[30] Further to the preceding paragraph, I find that the complainants’ file numbers and contact information (home addresses, email addresses and phone numbers) would be their personal information as defined by sections 23(1)(d) and (e) of LA FOIP as this information was not used in a business context, but rather in a personal one. I recommend the RM also continue to withhold this information as it appears throughout the ethics complaints pursuant to section 28(1) of LA FOIP.

[31] With respect to the bodies of the ethics complaints, I note there is personal information as defined by sections 23(1)(h) of LA FOIP as follows that I recommend the RM continue to withhold:

Complaint Number	Description
#1 (34 pages) received by email January 29, 2021	<ul style="list-style-type: none"> Page 1 to 24 contains correspondences and rationale containing an opinion the complainant has about two councillors, which is the personal information of the councillors as defined by section 23(1)(h) of LA FOIP
#2 (7 pages) date stamped received on October 1, 2020	<ul style="list-style-type: none"> Pages 1 to 7 (all of the complaint) contain correspondences containing an opinion the complainant has about a councillor and responses from the RM, which is the personal information of the councillors as defined by section 23(1)(h) of LA FOIP
#3 (8 pages) date stamped received on February 25, 2020	<ul style="list-style-type: none"> Pages 1, 2 and 7 contain correspondence containing an opinion the complainant had about a councillor and other information which is the personal information of the councillor as defined by section 23(1)(h) of LA FOIP
#4 (4 pages) date stamped received on February 7, 2020	<ul style="list-style-type: none"> Pages 1 to 4 (all of the complaint) contain correspondence containing an opinion the complainant had about a councillor, which is the personal information of the councillor as defined by section 23(1)(h) of LA FOIP
#5 (13 pages) signed by complainants April 5, 2019	<ul style="list-style-type: none"> Pages 1 to 3 contain correspondence containing an opinion the complainants had about a councillor, which is the personal information of the councillor as defined by section 23(1)(h) of LA FOIP
#6 (3 pages) signed by complainant May 29, 2019	<ul style="list-style-type: none"> Pages 1 to 3 (all of the complaint) contain correspondence containing an opinion the complainants had about a councillor, which is the personal information of the councillor as defined by section 23(1)(h) of LA FOIP
#7 (3 pages) signed by complainant May 29, 2019	<ul style="list-style-type: none"> Pages 1 to 3 contain (all of the complaint) correspondence containing an opinion the complainants had about a councillor, which is the personal information of the councillor as defined by section 23(1)(h) of LA FOIP
#7 (3 pages) signed by complainant May 29, 2019	<ul style="list-style-type: none"> Pages 1 to 3 (all of the complaint) contain correspondence containing an opinion the complainants had about a councillor, which is the personal information of the councillor as defined by section 23(1)(h) of LA FOIP

[32] As I previously stated, complaints 1, 3 and 5 invariably contain attachments that appear were supplied by the complainants with their complaint form, including copies of public notices or RM meeting minutes, copies of councillors' expenses, RM policies, affidavits provided by RM councillors to the Court of Queen's Bench, and other information that appears otherwise publicly available (e.g. copy of fundraising information retrieved from the Internet). Some of this information may personally identify RM councillors, but it would not be personal in nature to them. This information would also not personally

identify the complainants, nor is it personal to them. Further, it does not appear that the attachments would reveal the contents of the portions of the ethics complaints that have been found to contain personal information. As such, I do not find the attachments in complaints 1 to 3 and 5, as I have described above, contain personal information pursuant to section 28(1) of LA FOIP and recommend the RM release them.

4. Did the RM properly apply section 18(1)(c) of LA FOIP?

[33] In this matter, there is a third party, Glamping Resorts Ltd.

[34] Section 18(1)(c) of LA FOIP provides as follows:

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

...
(c) information, the disclosure of which could reasonably be expected to:

(i) result in financial loss or gain to;

(ii) prejudice the competitive position of; or

(iii) interfere with the contractual or other negotiations of;

a third party; or

[35] Section 18(1)(c) of LA FOIP is a mandatory, harm-based provision. It permits refusal of access in situations where disclosure could reasonably be expected to result in the harms outlined at subclauses (i), (ii) and (iii). Local authorities and third parties should not assume the harms are self-evident. The harm must be described in a precise and specific way in order to support the application of the provision (*IPC Guide to LA FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated April 29, 2021 [*Guide to LA FOIP*, Ch. 4], p. 180).

[36] “Harm-based exemptions” are based on a determination by the local authority that it is reasonable to expect that some injury, harm or prejudice will occur if the information is released. For harm-based exemptions to apply there must be objective grounds for

believing that disclosing the information could result in the harm alleged. The local authority (or third party) does not have to prove that the harm is probable, but needs to show there is a likelihood the harm will occur if any of the information or records were released (*Guide to LA FOIP*, Ch. 4, p. 8).

[37] The RM has not stated which subclause of section 18(1)(c) of LA FOIP it is relying on, so I will assess each one separately. The RM has applied section 18(1)(c) of LA FOIP to two development applications, with each having four attachments.

Section 18(1)(c)(i) of LA FOIP

[38] Section 18(1)(c)(i) of LA FOIP is a mandatory, harm-based exemption. It permits refusal of access in situations where disclosure of information could reasonably be expected to result in financial loss or gain to a third party (*Guide to LA FOIP*, Ch. 4, p. 181).

[39] The following two-part test can be applied:

1. What is the financial loss or gain being claimed?
2. Could release of the record reasonably be expected to result in financial loss or gain to a third party?

(*Guide to LA FOIP*, Ch. 4, p. 181)

1. What is the financial loss or gain being claimed?

[40] “Financial loss or gain” must be monetary, have a monetary equivalent, or value (e.g. loss of revenue or loss of corporate reputation) (*Guide to LA FOIP*, Ch. 4, p. 181).

[41] The RM did not provide any information with respect to the expected financial loss or gain to the third party as a result of disclosure of both development applications and attachments.

[42] The third party, cited section 18(1)(c)(i) of LA FOIP applied, and stated as follows:

We currently have an extremely competitive parcel of land secured, with a closing date in the future, which release of information to a journalist – looking for a story – would negatively impact. The information would be utilized in the local paper which would directly negatively impact my ability to efficiently negotiate the close of this acquisition and thus significantly impact my organization financially.

[43] As this is a harms-based provision, the local authority needs to establish a basis for believing financial loss or gain could come to the third party by disclosing the record. This can be done, for example, by verifying through evidence or supporting documentation, which the RM and third party have not done. As such, the first part of the test is not met. As both parts of the test must be met, there is no need to consider the second part. Therefore, I find the RM did not properly apply section 18(1)(c)(i) of LA FOIP. I will now consider if section 18(1)(c)(ii) of LA FOIP applies.

Section 18(1)(c)(ii) of LA FOIP

[44] Section 18(1)(c)(ii) of LA FOIP is a mandatory, harm-based exemption. It permits refusal of access in situations where disclosure of information could reasonably be expected to prejudice the competitive position of a third party (*Guide to LA FOIP*, Ch. 4, p. 186).

[45] The following two-part test can be applied:

1. What is the prejudice to a third party's competitive position that is being claimed?
2. Could release of the record reasonably be expected to result in the prejudice?

(*Guide to LA FOIP*, Ch. 4, p. 186)

1. What is the prejudice to a third party's competitive position that is being claimed?

[46] "Prejudice" in this context refers to detriment to the competitive position of a third party (*Guide to LA FOIP*, Ch. 4, p. 186).

[47] “Competitive position” means the information must be capable of use by an existing or potential business competitor, whether or not that competitor currently competes for the same market share (*Guide to LA FOIP*, Ch. 4, p. 186).

[48] The RM did not provide any information or details regarding what prejudice could occur as a result of disclosing the records, and the third party did not cite section 18(1)(c)(ii) of LA FOIP. Again, the local authority needed to provide my office with some detail and supporting evidence regarding the resulting harm in order to make its case, but did not do so. As such, the first part of the test is not met. As both parts of the test must be met, there is no need to consider the second part. Therefore, I find the RM did not properly apply section 18(1)(c)(ii) of LA FOIP. I will now consider if section 18(1)(c)(iii) of LA FOIP applies.

Section 18(1)(c)(iii) of LA FOIP

[49] Section 18(1)(c)(iii) of LA FOIP is a mandatory, harm-based exemption. It permits refusal of access in situations where disclosure of information could reasonably be expected to interfere with the contractual or other negotiations of a third party (*Guide to LA FOIP*, Ch. 4, p. 191).

[50] The following two-part test can be applied:

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

(*Guide to LA FOIP*, Ch. 4, pp. 191-192)

1. Are there contractual or other negotiations occurring involving a third party?

[51] 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 (*Guide to LA FOIP*, Ch. 4, pp. 191-192).

[52] If there are contractual or other negotiations occurring that involve the third party, the RM did not state so, or provide any such details. Although the third party stated they were in contractual negotiations with the RM, they did not provide information or supporting evidence to support their assertion. As such, the first part of the test is not met. As both parts of the test must be met, there is no need to consider the second part. Therefore, I find the RM did not properly apply section 18(1)(c)(iii) of LA FOIP.

[53] In conclusion, I find the RM did not properly apply section 18(1)(c) of LA FOIP to the development application 1 and its four attachments, and to development application 2 and its four attachments (item 2 in the Applicant’s access to information request). I recommend the RM release these records to the Applicant.

5. Did the RM properly apply section 16(1)(a) of LA FOIP?

[54] Section 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;

[55] Section 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 a local authority (*Guide to LA FOIP*, Ch. 4, p. 105).

[56] The following two-part test can be applied:

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 the local authority?

(Guide to LA FOIP, Ch. 4, pp. 105-106)

[57] The RM applied section 16(1)(a) of LA FOIP to a one-page report to council concerning legal services.

[58] The RM did not provide any arguments to support its position that section 16(1)(a) of LA FOIP applies to the record. Section 51 of LA FOIP establishes a local authority's requirement to meet the burden of proof that an exemption applies 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.

[59] Without any arguments, I find the RM has not met the burden of proof in establishing that section 16(1)(a) of LA FOIP applies to the one-page report to council concerning legal services. Because the RM also applied section 16(1)(c) of LA FOIP to the record in question, I will consider it under section 16(1)(c) of LA FOIP.

6. Did the RM properly apply section 16(1)(c) of LA FOIP?

[60] Section 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;

[61] Section 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 (*Guide to LA FOIP*, Ch. 4, p. 117).

[62] The following two-part test can be applied:

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?

(*Guide to LA FOIP*, Ch. 4, pp. 117-118)

[63] The RM applied section 16(1)(c) of LA FOIP to a one-page report to council concerning legal services.

[64] The RM has not provided my office with arguments supporting its assertion that section 16(1)(c) of LA FOIP applies to the record at question. Again, without any arguments, I find the RM has not met the burden of proof pursuant to section 51 of LA FOIP in establishing that section 16(1)(a) of LA FOIP applies to the one-page report to council concerning legal services (item 4 in the Applicant's access to information request). Further, I note that section 117(1)(c) of *The Municipalities Act* states as follows:

117(1) Any person is entitled at any time during regular business hours to inspect and obtain copies of:

...

(c) any report of any consultant engaged by or of any employee of the municipality, or of any committee or other body established by a council pursuant to clause 81(a), after the report has been submitted to the council, except any opinion or report of a lawyer; and

[65] The record in question is a report, and once it is submitted to council, it is available for inspection. Based on this, I recommend the RM release the one-page report to council concerning legal services to the Applicant.

7. Did the RM conduct a reasonable search for records?

[66] 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.

[67] Section 5 of LA FOIP establishes a right of access by any person to records in the possession or control of a local authority, subject to limited and specific exemptions, which are set out in LA FOIP (*IPC Guide to LA FOIP*, Chapter 3, “Access to Records”, updated June 29, 2021 [*Guide to LA FOIP*, Ch. 3], p. 4).

[68] The threshold that must be met is one of reasonableness. In terms of a local authority’s search efforts, 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 a local authority can provide to my office that may support its search efforts 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.

(*Guide to LA FOIP*, Ch. 3 pp. 8-9)

[69] The preceding list is intended to be a guide. Each case will require different search strategies and details depending on the records requested (*Guide to LA FOIP*, Ch. 3, p. 9).

[70] In their access to information request, the Applicant asked for, “quotes received by the RM since January 2020 for Livestreaming” (item 3 in their access to information request). The RM’s response was, “there are no written quotes”. The RM did not provide any further information regarding how it came to this conclusion, including if it undertook any search efforts that could at least support its assertion that written quotes do not exist. As such, I find the RM did not undertake a reasonable search for records. I recommend that within 30 days of receiving this Report, the RM undertake a search for the record in question and provide the Applicant and my office with the details of its search efforts in a new section 7 response to the Applicant.

8. Was the RM’s response compliant with section 7 of LA FOIP?

[71] As per my office’s notification of June 30, 2021, I am reviewing if the RM’s response to the Applicant of May 3, 2021, was compliant with section 7 of LA FOIP.

[72] Section 7 of LA FOIP provides that an applicant must receive a response from the local authority. The response must be within 30 days and must contain certain elements, which are enumerated at sections 7(2) and (3) of LA FOIP (*Guide to LA FOIP*, Ch. 3, p. 26).

[73] The RM’s initial section 7 response stated it was denying access to the records because: 1) code of ethics complaints are confidential and able to be withheld, along with other records, pursuant to Part III of LA FOIP; 2) the quote for livestreaming did not exist; and, 3) meeting minutes are published on the RM’s website. Based on the RM’s response, sections 7(2)(b), (d), (e) and 7(3) of LA FOIP are relevant in this case. These sections provide:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

...

(b) if the record requested is published, referring the applicant to the publication;

...

(d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;

(e) stating that access is refused for the reason that the record does not exist;

- [74] With respect to the 30 days in which a local authority must respond, I note the RM received the Applicant's access to information request on April 8, 2021, and responded on May 3, 2021. This was within the 30-day time limit to respond.
- [75] With respect to the RM's response directing the Applicant to the RM's website for copies of RM meeting minutes, section 7(2)(b) of LA FOIP requires a local authority to provide such direction. As such, I find the RM was compliant with section 7(2)(b) of LA FOIP.
- [76] With respect to the RM's response that ethics complaints were confidential and could be, along with other records, withheld pursuant to Part III of LA FOIP, section 7(2)(d) of LA FOIP required the RM to explicitly state on which provisions of LA FOIP it was relying to withhold these records. With prompting from my office, the RM later indicated to the Applicant it was denying access pursuant to section 22(1)(c) of LA FOIP. However, I find the RM's response of May 3, 2021, did not meet the requirements set out by section 7(2)(d) of LA FOIP.
- [77] With respect to the RM's response that records related to quotes for livestreaming did not exist, the RM was required to explicitly cite section 7(2)(e) of LA FOIP, but did not do so. In the future, it is good practice that the RM do so.
- [78] Finally, section 7(3) of LA FOIP requires a local authority to state an applicant may request a review by my office within one year of receiving the local authority's response. Again, with prompting from my office, the RM did include this in its new response to the Applicant. However, I find the RM's section 7 response of May 3, 2021, did not meet the requirements set out by section 7(3) of LA FOIP.
- [79] In conclusion, I find the RM's section 7 response of May 3, 2021, complied with section 7(2)(b) of LA FOIP, and did not comply with sections 7(2)(d) and 7(3) of LA FOIP. I recommend the RM ensure its future section 7 responses to applicants are in compliance with section 7 of LA FOIP.

[80] With respect to the RM's compliance with section 7 of LA FOIP, I wish to add that the RM stated the following about the Applicant and their access to information requests:

The applicant is not a ratepayer in the municipality. The applicant is a reporter for the local newspaper who has done [their] best to report on the happenings of the RM of McKillop No. 220 reporting misleading information. Multiple requests for different information on one Access to Information Request form make it difficult to complete these submissions.

[81] I remind the RM that anyone has a right of access to records in the possession or control of a local authority pursuant to section 5 of LA FOIP. It does not matter who the applicant is, or their motive. Every local authority that receives an access to information request has a duty pursuant to section 5.1 of LA FOIP to respond to that applicant openly, accurately and completely. I recommend the RM ensure its policies and procedures include best practices for meeting its duty to assist and responding openly, accurately and completely. The RM can find information on doing so in my office's resource, [Best Practices When Responding to Access Requests](#).

IV FINDINGS

[82] I find the RM did not properly apply sections 22(1)(c) and 18(1)(c) of LA FOIP.

[83] I find section 28(1) of LA FOIP applies to the ethics complaints as I have outlined at paragraphs [29] to [32] of this Report.

[84] I find the RM did not meet the burden of proof pursuant to section 51 of LA FOIP in demonstrating that sections 16(1)(a) and (c) of LA FOIP apply.

[85] I find the RM did not conduct a reasonable search for records.

[86] I find the RM's section 7 response of May 3, 2021, complied with section 7(2)(b) of LA FOIP, and did not comply with sections 7(2)(d) and 7(3) of LA FOIP.

V RECOMMENDATIONS

- [87] I recommend the RM continue to withhold or release information in the ethics complaints (Item 1) as I have outlined at paragraphs [29] to [32] of this Report, and that it release records related to items 2 and 4.
- [88] I recommend that within 30 days of receiving this Report, the RM undertake a search for the record related to item 3 in the Applicant's access to information request and provide the Applicant and my office with the details of its search efforts in a new section 7 response.
- [89] I recommend the RM ensure its future section 7 responses to applicants are in compliance with section 7 of LA FOIP, and that it ensure its policies and procedures include best practices for meeting its duty to assist and responding openly, accurately and completely.

Dated at Regina, in the Province of Saskatchewan, this 13th day of January, 2022.

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