



## **REVIEW REPORT 123-2020**

### **Saskatchewan Health Authority**

**November 24, 2021**

**Summary:** The Saskatchewan Health Authority (SHA) received an access to information request from the Applicant for a Schedule to a Master Services Agreement between two third parties. SHA identified the responsive record and withheld it pursuant to section 18(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act*. In this review, the Commissioner found that the exemption does not apply and recommended that the record be released to the Applicant.

#### **I BACKGROUND**

- [1] On February 4, 2020, the Applicant made an access to information request by email to the Saskatchewan Health Authority (SHA) seeking access to, “Appendix G and Attachments G-1 through G-7” to a Master Services Agreement (MSA) dated December 13, 2013, under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).
- [2] The SHA Privacy Officer who received the email was away from the office at the time of the request and their out of office email replies advised the Applicant that they would be returning on March 3, 2020.
- [3] On March 3, 2020, the SHA’s Privacy Officer wrote to the Applicant advising that they did not have possession of the requested records, and undertook to look for them and respond to the request later.

- [4] The SHA subsequently found the records, consulted with two third parties and issued a section 7 response on April 1, 2020 by letter denying the request claiming that the information was subject to the mandatory exemption in section 18(1)(b) of LA FOIP.
- [5] On May 11, 2020, my office received a request for review of the decision from the Applicant, disputing the application of section 18(1)(b) of LA FOIP.
- [6] On May 20, 2020, my office notified the Applicant and the SHA of my intention to conduct a review and invited both parties to provide submissions on the possible application of section 18(1)(b) of LA FOIP. That same day, pursuant to section 41(1) of LA FOIP, the SHA notified two parties to the MSA, namely, K-Bro Linen Systems (K-Bro) and 3sHealth.
- [7] K-Bro is the provider of the laundry services under the MSA. 3sHealth is a corporation created by statute under *An Act to Incorporate Saskatchewan Health-Care Association*. Its mandate is to enhance shared services among Regional Health Authorities and in this capacity, it entered into and managed the contract for laundry services with K-Bro.
- [8] When the Regional Health Authorities were amalgamated in 2017, the SHA took over responsibilities for the management of the contract for laundry services with K-Bro. The MSA is a long-term service contract, which will expire in 2023.
- [9] On May 20, 2020, my office also notified K-Bro and 3sHealth of my intention to conduct a review and invited both third parties to provide submissions on the matters at issue.
- [10] 3sHealth responded to this notice advising that it would not be providing submissions. K-Bro and the Applicant did not provide submissions. The SHA provided submissions by email dated June 25, 2020.

## **II RECORD AT ISSUE**

[11] The record at issue is Schedule G, and its seven attachments, to a MSA dated December 13, 2013 for laundry services to which K-Bro and 3sHealth are parties. The record is 40 pages long and includes information about K-Bro's pricing, terms, rates and price adjustments.

[12] All of the information in the record has been withheld pursuant to section 18(1)(b) of LA FOIP.

## **III DISCUSSION OF THE ISSUES**

### **1. Do I have jurisdiction to conduct this review?**

[13] The SHA qualifies as a local authority pursuant to section 2(f)(xiii) of LA FOIP. Therefore, LA FOIP applies and I have jurisdiction to conduct this review.

[14] Further, SHA identified K-Bro and 3sHealth as third parties. Each of these parties qualifies as a "third party" pursuant to section 2(k) of LA FOIP.

### **2. Did SHA properly apply section 18(1)(b) of LA FOIP?**

[15] Section 18(1)(b) of LA FOIP is designed to protect the confidential "information assets" of businesses or other organizations that provide information to local authorities. It is a mandatory exemption, which requires a local authority to deny access to a record that contains information supplied in confidence to it by a third party if certain conditions are met.

[16] Section 18(1)(b) of LA FOIP provides:

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

...

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

[17] My office uses the following three-part test to determine if section 18(1)(b) of LA FOIP applies:

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

(IPC *Guide to LA FOIP*, Chapter 4: “Exemptions from the Right of Access”, updated April 29, 2021, at pp. 170-174 (*Guide to LA FOIP*, Ch. 4))

[18] Following is my analysis of the application of each part of this three-part test.

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

[19] “Commercial information” is information relating to the buying, selling or exchange of merchandise or services. Types of information included in the definition of commercial information can include:

- offers of products and services a third-party business proposes to supply or perform;
- a third-party business’ experiences in commercial activities where this information has commercial value;
- terms and conditions for providing services and products by a third party;
- lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises -such lists may take time and effort to compile, if not skill;
- methods a third-party business proposes to use to supply goods and services; and

- number of hours a third-party business proposes to take to complete contracted work or tasks.

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

- [20] The information at issue in this review relates to the buying and selling of laundry services. In particular, it includes information about the costs of services over specific time periods, rebates for volume or bulk services and adjustments to the costs to account for changes in circumstances.
- [21] The SHA submits that this information is commercial information. Based on my review of the record, I agree with this position and find that all of the information in the record qualifies as commercial information as defined above.

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

- [22] The second part of the test requires that the information be “supplied” by a third party to a local authority. “Supplied” means provided or furnished. Information may qualify as “supplied” if it was directly supplied to a local authority by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party *(Guide to LA FOIP, Ch. 4, p. 172)*.
- [23] The contents of a contract involving a local authority and a third party will not normally qualify as having been supplied by a third party. The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied.” Previous reports of my office have applied this approach even where the contract is preceded by little or no negotiation, or where the final agreement reflects information that originated from a single party, such as through a Request for Proposals (RFP) process.
- [24] There are two exceptions to the general rule of “mutually generated” information in contracts. If one of these exceptions apply, the information in a contract could be found to have been supplied by the third party:

- i) Inferred disclosure – where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the local authority; and
- ii) Immutability – information the third party provided that is immutable or not open or susceptible to change and was incorporated into the contract without change, such as the operating philosophy of a business, or a sample of its products.

[25] In the discussion that follows, I will first consider whether the information in Schedule G was supplied, and then I will turn to address the inferred disclosure and immutability exceptions.

[26] The SHA claims that Schedule G includes K-Bro's RFP's "confidential proposal for its detailed pricing for services and by unit" which it claims was supplied and not negotiated. It further explains that the information in the Schedule describes the commercial terms on which K-Bro was prepared to provide laundry and linen services to the relevant local authorities that was included as part of its response to the RFP. It states that these were the terms and conditions for the services to be supplied that culminated in reaching a contract.

[27] As noted by the SHA in its submissions to my office, in [Review Report 082-2015](#), I had occasion to consider a request for access to the MSA to which Schedule G is attached. In that review, 3sHealth's arguments focused on whether it had control over the records at issue. It did not provide any submissions on the possible application of section 18(1)(b) of LA FOIP. K-Bro claimed that sections 18(1)(a), (b) and (c) of LA FOIP applied to the entire MSA, including information about pricing which had been provided as part of the RFP process.

[28] Among the documentation provided to support its argument on the control issue, my office received a confidential copy of a letter to the Regional Health Authorities dated December 13, 2013 from the Chief Executive Officer of 3sHealth. While I cannot reveal the contents of that letter, it included information confirming:

- 3sHealth had been mandated to negotiate, execute and administer a linen services contract on behalf of the Saskatchewan Health System.
- Several months had been spent negotiating the contract.

- Negotiating goals included reducing costs and achieve savings.

[29] I applied my office’s long-standing approach to contracts in that review and found that the information at issue in the MSA was not supplied, it was mutually generated. Therefore, the second part of the three part test for the application of section 18(1)(b) of LA FOIP was not met. I recommended that the entire MSA be disclosed.

[30] I followed the same approach to contracts in [Review Report 229-2015](#), where I found the unit price information in a contract between the Canadian Bank Note Limited and Saskatchewan Government Insurance was “negotiated” and not “supplied.” Addressing the potential application of section 19(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP) (which is the equivalent to section 18(1)(b) of LA FOIP) to unit prices, I stated:

The unit prices and lump sum prices form part of the terms of the contract that has been agreed to. SGI was not bound to accept them. If SGI judged the prices to be unacceptable, it had the option of not entering into the contract with the third party. In my view, having accepted the pricing was part of the negotiation process. Even if SGI did not feel it could negotiate the price, by accepting it, the price is agreed upon as mutual agreement is required for the term to become binding on the parties.

There is a distinction that needs to be made here between the initial procurement phase, when proposals may be submitted on a confidential basis and the final stage when the contract is issued and public accountability considerations come to the forefront.

[31] On appeal to the Court of Queen’s Bench of Saskatchewan, Justice Zarzeczny upheld my finding that the unit prices qualified as commercial information, but did not uphold my finding on the question of whether that information was supplied (*Canadian Bank Note Limited v. Saskatchewan Government Insurance* 2016 SKQB 362).

[32] With respect to the supplied issue, and relying on the Supreme Court of Canada’s decision in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2021 SCC 3, Justice Zarzeczny stated:

**The question is not whether or not the RFP provided that the Contract between SGI and Veridos could involve negotiation of the Unit Price but rather whether it did. The facts establish clearly that it did not.** I therefore conclude that this

commercial information (i.e. the Unit Price) was “supplied ... by a third party” namely Veridos within the meaning of ss. 19(1)(b) of the [FOIP].

[Emphasis added]

[33] More recent reports of my office have followed the Court’s approach in *Canadian Bank Note Limited*, and have treated the question of supply as a question of fact requiring a consideration of the facts surrounding the provision of the information (see for example, [Review Reports 336-2017](#) and [086-2019](#)).

[34] Considering the submissions of the SHA, including the claim that the information in Schedule G was provided in response to an RFP, the record at issue, and the facts surrounding the generation of the MSA, I am satisfied that the evidence reveals that the terms of the contract were mutually generated or negotiated, and not supplied. The correspondence from the Chief Executive of 3sHealth is particularly persuasive here. It supports a finding that the information in the contract, including information about the pricing, was mutually generated or negotiated. Therefore, I find that the pricing information contained in Schedule G was not supplied by K-Bro and part two of the test for the application of section 18(1)(b) has not been met.

[35] Turning to the inferred disclosure and immutability exceptions, the SHA suggests that the inferred disclosure exception applies. It states that the disclosure of the entire Schedule G would permit precise conclusions to be made with respect to the non-negotiated confidential information supplied by K-Bro. However, it did not provide any information about the nature of the non-negotiated information that might be inferred from the disclosure of the record and no further explanations were offered to support this claim.

[36] Considering Schedule G with the attachments, I am satisfied that the information it contains includes information about the prices to be paid for services rendered under the MSA, and disclosure would not reveal or permit the drawing of precise conclusions about non-negotiated information. Information about products and services and the price is the kind of information that is found in most, if not all, contracts – it negotiated. There is not enough



evidence or information before me to establish that the inferred disclosure exception would apply here.

[37] In summary, I find that the record at issue is not exempt under section 18(1)(b) of LA FOIP because the second part of the test for the application of that section has not been met. Therefore, it is not necessary for me to consider whether the third part of the test has been met.

[38] In arriving at this finding, I note that in similar circumstances, the Information and Privacy Commissioners of British Columbia and Ontario have found pricing information in contracts involving the same third party not to be exempt under provisions equivalent to section 18(1)(b) of LA FOIP. See for example, Order F10-28 ([2010 BCIPC 40 \(CanLII\)](#)) which involved a laundry services contract between K-Bro and the Vancouver Coastal Health Authority, and Ontario Orders PO-4031 and PO-4053 ([2020 CanLII 28076](#) and [2020 CanLII 53026](#)) which involved laundry services contracts with Ontario hospitals.

#### **IV FINDING**

[39] I find that SHA has not shown that section 18(1)(b) of LA FOIP applies to Schedule G and its attachments.

#### **V RECOMMENDATION**

[40] I recommend that the SHA release Schedule G and its attachments in full to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 24th day of November, 2021.

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