



REVIEW REPORT 237-2021

Saskatoon Police Service

August 12, 2022

Summary: The Saskatoon Police Service (SPS) received an access to information request from the Applicant. The SPS responded to the Applicant it was neither confirming nor denying the existence of the records pursuant to sections 7(2)(f) and 7(4) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner found SPS could rely on section 7(4) of LA FOIP and recommended SPS take no further action.

I BACKGROUND

[1] On June 14, 2021, the Saskatoon Police Service (SPS) received an access to information request from the Applicant as follows:

I was informed today that my [redacted] made some reports about me. I will [sic] like to know the details

[2] In correspondence dated June 18, 2021, SPS responded to the Applicant that it “refuses to confirm or deny that these records exist or ever existed” pursuant to sections 7(2) and 7(4) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[3] On September 22, 2021, the Applicant asked my office to review SPS’ decision.

[4] On September 29, 2021, my office notified the Applicant and SPS of my office’s intention to undertake a review of SPS’ reliance on section 7(4) of LA FOIP.

[5] SPS provided my office with its formal submission on October 14, 2021; the Applicant did not provide a formal submission.

II RECORDS AT ISSUE

[6] Based on its response to the Applicant dated June 18, 2021, SPS is neither confirming nor denying the existence of a record pursuant to section 7(4) of LA FOIP.

[7] I note that SPS has invoked section 7(4) of LA FOIP. Section 48 of LA FOIP adopts section 46 of *The Freedom of Information and Protection of Privacy Act* (FOIP) with any necessary modifications. Section 46(4)(b) of FOIP requires that I take reasonable precautions to avoid not disclosing any information that will confirm if a record exists if a local authority has invoked section 7(4) of LA FOIP. Throughout this review, then, I will take care and avoid confirming or denying the existence of any responsive records. I will lay out the reasons for my findings in very general terms only. I caution that when a public body invokes section 7(4) of LA FOIP it makes our analysis much more difficult, the writing of the report more awkward and sometimes it makes the exercise appear to be stupid or silly.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[8] SPS is a “local authority” pursuant to section 2(f)(viii.1) of LA FOIP. Therefore, I have jurisdiction to conduct this review.

2. Can the SPS rely on section 7(4) of LA FOIP?

[9] Section 7(2)(f) of LA FOIP provides that in certain cases, a local authority may refuse to confirm or deny the existence of a record. If a local authority intends to invoke this provision, it must do so in compliance with section 7(4) of LA FOIP (*Guide to LA FOIP*, Chapter 3, “Access to Records”, updated June 29, 2021 [*Guide to LA FOIP*, Ch. 3], p. 37).

[10] Section 7(4) of LA FOIP provides as follows:

7(4) If an application is made with respect to a record that is exempt from access pursuant to section 14, 20 or 21 or subsection 28(1), the head may refuse to confirm or deny that the record exists or ever did exist.

[11] Section 7(4) of LA FOIP provides that where a local authority intends to respond to an applicant citing section 7(2)(f) of LA FOIP, it can only do so for records that would be exempt from disclosure pursuant to sections 14, 20 or 21 or section 28(1) of LA FOIP (*Guide to LA FOIP*, Ch. 3, p. 39).

[12] By invoking section 7(4) of LA FOIP, a local authority is denying an applicant the right to know whether a record exists. This section provides local authorities with a significant discretionary power that should be exercised only in rare cases. It is my view that this provision is meant to protect highly sensitive records where confirming or denying the mere existence of a record would impose significant risk. For example, the risk of harm to witnesses because of revealing a law enforcement investigation is underway. Although section 14 of LA FOIP could protect records from being disclosed that fall into the category of law enforcement and investigations, this provision enables the local authority to address risks that could occur just by revealing records exist. It is not meant to protect a local authority from possible embarrassment or negative public scrutiny (*Guide to LA FOIP*, Ch. 3, p. 39).

[13] By invoking section 7(4) of LA FOIP, a local authority must be able to:

1. demonstrate that records, if they existed, would qualify for the particular exemption provided for at section 7(4); and
2. explain how disclosing the existence of records, if they existed, could reasonably compromise what it is protecting.

[14] SPS submitted that if records did exist in this matter, they would be exempt pursuant to sections 14(1)(c), 14(1)(j), 20 and 28(1) of LA FOIP.

Would Section 20 apply?

[15] Section 20 of LA FOIP provides as follows:

20 A head may refuse to give access to a record if the disclosure could threaten the safety or the physical or mental health of an individual.

[16] Section 20 of LA FOIP is a discretionary, harm-based exemption. It permits refusal of access in situations where disclosure of a record could threaten the safety or the physical or mental health of an individual (*Guide to LA FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated April 29, 2021 [*Guide to LA FOIP*, Ch. 4], p. 214).

[17] The following test can be applied:

- Could disclosure of the record threaten the safety or the physical or mental health of an individual?

(*Guide to LA FOIP*, Ch. 4, p. 215)

[18] For section 20 of LA FOIP, the question that must be answered is if disclosure of the record could threaten the safety or the physical or mental health of an individual. The threshold for “could” is somewhat lower than a reasonable expectation. On the threshold, speculation is at one end, and probable (or “could reasonably be expected”) is at the other. The middle ground for “could” therefore, is “that which is possible” (*Guide to LA FOIP*, Ch. 4, p. 215).

[19] In this context, “possible” means capable or existing, happening, or being achieved; that which is not certain or probable. This is opposed to “probable”, meaning likely to happen or to be the case, or “speculative”, meaning based on conjecture rather than knowledge (*Guide to LA FOIP*, Ch. 4, p. 215).

[20] If the possibility is fanciful or exceedingly remote, the exemption should not be invoked. For this provision to apply there must be objective grounds for believing that disclosing the information could result in the harm alleged. Generally, this means the local authority must assess the risk and determine if there are reasonable grounds for concluding

there is a threat to the safety or the physical or mental health of any person. That assessment must be specific to the circumstances of the case under consideration. The inconvenience, upset or unpleasantness of dealing with difficult or unreasonable people is not sufficient to trigger the exemption. The threshold cannot be achieved based on unfounded, unsubstantiated allegations. The local authority should be able to detail what the harm is and to whom the harm threatens if the information were released (*Guide to LA FOIP*, Ch. 4, p. 215).

[21] To “threaten” means to be likely to injure; be a source of harm or danger to. It means to create the possibility or risk of harm or jeopardize an individual’s safety or mental or physical wellbeing (*Guide to LA FOIP*, Ch. 4, p. 216).

[22] “Safety” means the state of being protected from or guarded against hurt or injury; freedom from danger (*Guide to LA FOIP*, Ch. 4, p. 216).

[23] “Physical health” refers to the well-being of an individual’s physical body. Determination of the effect of a release of information on an individual’s physical health must consider the current or normal state of health of persons who may be affected by the release of information, as well as the decline in health that is expected to occur if the information is disclosed to an applicant. It may be helpful for the head to obtain the assistance of an expert (e.g. a physician) when making this determination (*Guide to LA FOIP*, Ch. 4, p. 216).

[24] “Mental health” means the condition of a person in respect of the functioning of the mind. It means the ability of a person’s mind to function in its normal state. Determination of the effect of a release of information on a person’s mental health must, where practicable, be based on a subjective evaluation made on a case-by-case basis.

Mental health: where the applicant has a history of mental or emotional difficulties and disclosure of the information could worsen or aggravate his/her condition to the point that he/she could harm someone.

[25] As I previously stated, I will take care to not indicate if a record exists given the nature of section 7(4) of LA FOIP. I will also not quote anything from SPS’ submission. Based on

the submission SPS has provided my office, I am satisfied that if records responsive to the Applicant's access to information request existed, they would all be exempt from release pursuant to section 20 of LA FOIP, given the nature of this exemption, and would compromise the safety or the physical or mental health of an individual.

[26] I find that SPS can rely on section 7(4) of LA FOIP. I recommend SPS take no further action.

IV FINDING

[27] I find that I have jurisdiction to conduct this review.

[28] I find SPS can rely on section 7(4) of LA FOIP.

V RECOMMENDATION

[29] I recommend SPS take no further action.

Dated at Regina, in the Province of Saskatchewan, this 12th day of August, 2022.

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