



REVIEW REPORT 063-2019

Saskatoon Broadway Business Improvement District

October 29, 2019

Summary: The Applicant submitted an access to information request to the Saskatoon Broadway Business Improvement District (SBBID). SBBID responded by indicating that no records exist. The Applicant appealed to the Information and Privacy Commissioner. The Commissioner found that SBBID did not conduct an adequate search for records. The Commissioner made a number of recommendations, including that SBBID conduct another search for records.

I BACKGROUND

[1] In a letter dated November 22, 2018, the Applicant submitted the following access request to Saskatoon Broadway Business Improvement District (SBBID):

Please send to the address above all information retained by your organization relating to me or relating to alleged violations of the Poster Bylaw 7565 in 2017 and 2018.

Also send all manuals, policies, guidelines or procedures relating to posters or maintenance of poster boards. By “posters” I mean any material intended for posting in accordance with the Poster Bylaw by citizens, BID employees or any other person or organization.

[2] In a letter dated February 7, 2019, SBBID responded to the Applicant. It advised the Applicant that the records that they wished to access do not exist pursuant to subsection 7(2)(e) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[3] In an email dated February 21, 2019 to my office, the Applicant requested a review by my office. Within the email, the Applicant specified what records they believe to exist:

- Tweets by SBBID’s Executive Director from their personal Twitter account “with knowledge of and about [the Applicant] that were quoted and published in the Star Phoenix.”
- Record of a verbally stated policy to remove all poster on the third Wednesday every month.
- Records relating to correspondence with police requesting enforcement against the Applicant.
- Records relating to the poster bylaw enforcement against the Applicant.

[4] On March 5, 2019, my office notified both the Applicant and SBBID that it would be undertaking a review.

II RECORDS AT ISSUE

[5] At issue is SBBID’s efforts to search for records. Therefore, there are no records at issue.

III DISCUSSION OF THE ISSUES

1. Does LA FOIP apply and do I have jurisdiction to review this matter?

[6] Subsection 2(f)(v) of LA FOIP provides as follows:

2 In this Act:

...
(f) “local authority” means:

...
(v) any board, commission or other body that:

(A) is appointed pursuant to *The Cities Act*, *The Municipalities Act* or *The Northern Municipalities Act, 2010*; and

(B) is prescribed;

[7] Subsection 3(1) of the *The Local Authority Freedom of Information and Protection of Privacy Regulations* (LA FOIP Regulations) provides:

3(1) For the purposes of subclause 2(f)(v) of the Act, the bodies set out in Part I of the Appendix are prescribed as local authorities.

[8] Part I of the Appendix of the LA FOIP Regulations provides as follows:

1. A board, commission or other body established pursuant to *The Cities Act*

[9] Subsection 25(1) of *The Cities Act* provides as follows:

25(1) A council may, by bylaw, establish a business improvement district.

[10] Bylaw No. 6731 of the City of Saskatoon is the bylaw that establishes SBBID as a business improvement district.

[11] I find that SBBID qualifies as a local authority pursuant to subsection 2(f)(v) of LA FOIP. I find that LA FOIP applies. Therefore, I have jurisdiction to conduct this review.

2. **Did the SBBID conduct an adequate search for records?**

[12] Section 5 of LA FOIP provides every person a right of access to records in the possession or control of a local authority:

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.

[13] 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 applicable exemptions under LA FOIP.

[14] LA FOIP does not require a local authority to prove with absolute certainty that records responsive to an access to information request do not exist. However, it must demonstrate that it has conducted a reasonable search to locate them.

[15] A reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the 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.

[16] When conducting a review of a local authority's search efforts, details are requested that help my office understand the level of effort made to locate the records. The submission to my office should outline the search strategy, which can include:

- For personal information requests – explain how the individual is involved with the public body (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 organizations 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 public body's control have been searched such as a contractor or information service provider.

- Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Which folders within the records management system were searched and explain how these folders link back to the subject matter requested?
 - For electronic folders – indicate what key terms were used to search if applicable.
- On what dates did each employee search?
- How long did the search take for each employee?
- What were the results of 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 the IPC resource, Using Affidavits in a Review with the IPC available on our website.

[17] As stated in the background at paragraph [3], the Applicant specified which record they believed to exist. I have categorized these records into the following three categories:

- Records related to the Applicant, including correspondence with police requesting enforcement against the Applicant and records related to the poster bylaw enforcement against the Applicant,
- Tweets, and
- Records about poster removal policy.

Records related to the Applicant

[18] In its email dated March 6, 2019, SBBID indicated that it uses DropBox to store all of its electronic documents. It advised that it searched through its electronic documents using the Applicant’s name, but the search did not return any records.

[19] SBBID then searched its emails. It uses Gmail for all of its electronic correspondence. It searched through its email using the Applicant’s name. The only results were correspondence regarding the process of the Applicant’s access to information request. I

find such correspondence is not within the scope of the Applicant's access to information request.

[20] As for paper records, SBBID explained it rarely keeps paper files. It only located the one letter of correspondence from the Applicant where the Applicant was requesting information under LA FOIP. I find that such correspondence is not within the scope of the Applicant's access to information request.

[21] SBBID's explanation of its search appears reasonable. However, in my office's review 020-2019 with another local authority and the Applicant, my office received emails that were sent by Saskatoon Riversdale Business Improvement District (SRBID). SRBID had carbon copied SBBID's Executive Director on these emails. Some of the emails includes the Applicant's name. It is unclear as to why these emails from SRBID did not turn up in SBBID's search through its emails. The existence of these emails suggests that SBBID did not conduct an adequate search for records. The issue of whether these emails should be released will be dealt with in my office's Review Report 020-2019, 098-2019.

[22] I find that SBBID did not conduct an adequate search through its electronic and paper records about the Applicant.

[23] I recommend that SBBID conduct another search for responsive records. Then, I recommend that SBBID send a letter to both my office and to the Applicant that includes the details of its search efforts and the result of its search for records within 30 days of receiving the final version of this report. If additional records are located, SBBID should indicate whether it will be releasing the records to the Applicant or if it would be withholding the records in accordance with a particular exemption in Parts III or IV of LA FOIP.

Tweets

[24] SBBID indicated it searched its Twitter account @broadwayxe using the Applicant's name. The search did not return any records.

[25] SBBID indicated that its position is that the tweets from the Executive Director's personal Twitter account are "separate and distinct and entirely unrelated to the access request". In other words, tweets by the Executive Director's personal account is not in the possession or control of the SBBID. The Applicant disagreed and argued the following:

The "entirely unrelated" tweets are responsive to me and they were also quoted by a now deceased Star Phoenix reporter in a published article [the Executive Director] knows is about me.

[26] I must determine if tweets by SBBID's Executive Director's personal account can be considered to be in the possession or under the control of SBBID. If so, then tweets could be subject to access requests under LA FOIP.

[27] It should be noted that my office has dealt with situations where government-related activities have been conducted using non-governmental email accounts in Investigation Report 101-2017, Review Report 051-2017, Review Report 184-2016, and Review Report 216-2017. In those reports, my office recommended that employees and board members use government email accounts to conduct government-related activities, including emailing about government-related business and activities. However, my office still considered the emails in the non-governmental email accounts to be in the custody or control of the public body. Similarly, then, even though tweets may appear on a personal Twitter account and not on the official SBBID Twitter account, the tweets could still be in the possession or control of SBBID and therefore subject to LA FOIP.

[28] The Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306 determined if records were under the control of the public body by adopting the following two-part test:

- 1) Do the contents of the document relate to a departmental matter?
- 2) Could the government institution reasonably expect to obtain a copy of the document upon request?

[29] If both parts of the test can be answered in the affirmative, then the records would be under the control of the public body.

[30] In this case, if tweets by the SBBID's Executive Director on their personal twitter account is about a BID matter, then the first part of the test is met. If SBBID's Executive Director sent out the tweet in their professional capacity and not in a personal capacity, then the second part of the test is met.

[31] Before I apply the two-part test to this case, I should note that the Applicant confirmed that the *StarPhoenix* article they were referring to in their submission was an article dated August 3, 2018 entitled: "What a rip-off: Broadway Ave. stripped of posters overnight". The article says the following:

...

On Wednesday and Thursday night, someone ripped down every poster on each of the 12 barrel display posts on the street.

...

It's been happening occasionally all summer, said Broadway Business Improvement District (BID) executive director [name of SBBID's Executive Director] — and downtown and Riversdale as well. It's not necessarily an anti-Fringe gesture.

"We think it's a guy who's mad I asked for a review of the poster bylaw last year. My office door is locked," [name of SBBID's Executive Director] wrote on Twitter.

[emphasis added]

[32] The article does not specify from which Twitter account the *StarPhoenix* was quoting — whether it be SBBID's official Twitter account or SBBID's Executive Director's personal Twitter account. However, the contents of the article and the quoted tweet relates to a SBBID matter. Therefore, the first part of the two-part test is met. Further, if the SBBID Executive Director did in fact post the quoted tweet to Twitter, the content appears to have been derived from their knowledge of being a BID employee. Accordingly, it would be reasonable for the BID to obtain a copy of the tweet from the Executive Director if the

tweet was posted to their personal Twitter account. I find that the second part of the two-part test is met.

[33] Since the two-part test is met, I find that the tweet is under the control of SBBID. I recommend that SBBID request that the Executive Director search through their personal Twitter account to determine if there are any tweets about the Applicant. If there are, then the tweets should be released to the Applicant, subject to limited and specific exemptions set out in Parts III and IV of LA FOIP.

[34] I also recommend that SBBID direct its employees to refrain from using personal Twitter accounts to tweet about SBBID matters. I recommend that SBBID establish a records management policy that outlines the types of content that citizens can expect to be tweeted from its official twitter account @broadwayxe, how long the SBBID will retain its tweets, and when tweets will be deleted. Further, this policy should establish guidelines for employees on how to participate in social media in a personal capacity. This includes employees taking steps to ensure that their tweets do not imply in any way that they are speaking on behalf of the SBBID.

Records about poster removal policy.

[35] In its submission, SBBID asserted it does not have a formal written policy on poster removal. I accept this explanation because “the poster bylaw” or Bylaw No. 7565 is a bylaw enacted by the City of Saskatoon and not by SBBID. Therefore, if there were any “manuals, policies, guidelines or procedures relating to the posters or maintenance of poster boards”, they would be by the City and not by SBBID.

IV FINDINGS

[36] I find that SBBID qualifies as a local authority pursuant to subsection 2(f)(v) of LA FOIP.

[37] I find that LA FOIP applies.

[38] I find that SBBID did not conduct an adequate search through its electronic and paper records about the Applicant.

[39] I find that the tweet quoted in the *StarPhoenix* article described at paragraph [31] is under the control of SBBID.

[40] I find that SBBID's explanation for not having a formal written policy on poster removal to be acceptable.

V RECOMMENDATIONS

[41] I recommend that SBBID conduct another search for responsive records. Then, I recommend that SBBID send a letter to both my office and to the Applicant that includes the details of its search efforts and the result of its search for records within 30 days of receiving the final version of this report. If additional records are located, SBBID should indicate whether it will be releasing the records to the Applicant or if it would be withholding the records in accordance with a particular exemption in Parts III or IV of LA FOIP.

[42] I recommend that SBBID request that the Executive Director search through their personal Twitter account to determine if there are any tweets about the Applicant. If there are, then the tweets should be released to the Applicant, subject to limited and specific exemptions set out in Parts III and IV of LA FOIP.

[43] I recommend that SBBID establish a records management policy that outlines the types of content that citizens can expect to be tweeted from its official twitter account @broadwayyxe, how long the SBBID will retain its tweets, and when tweets will be deleted. Further, this policy should establish guidelines for employees on how to participate in social media in a personal capacity. This includes employees taking steps to ensure that their tweets do not imply in any way that they are speaking on behalf of the SBBID.

Dated at Regina, in the Province of Saskatchewan, this 29th day of October, 2019.

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