



## **REVIEW REPORT 011-2018**

### **City of Prince Albert**

**June 29, 2018**

**Summary:** The Applicant submitted an access to information request to the City of Prince Albert (the City). The City provided the Applicant with some but not all of the records. It cited subsections 18(1)(b) and 16(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) as its reasons for withholding records. The Information and Privacy Commissioner found that the City had applied the exemptions correctly in some instances but not in others.

### **I BACKGROUND**

[1] On December 15, 2017, the City of Prince Albert (the City) received the following access to information request:

Original Tender submissions for Wireless Communication Equipment Tender from 2017 for Communication Tower located at MSC. Email String to [name of City employee] and [name of City employee] from [name of City employee] on Wednesday September 6, 2017 at 8:24 am in Regards to Tender

[2] In a letter dated January 12, 2018, the City responded to the Applicant. It granted the Applicant access to portions of some records but denied the Applicant access to other records pursuant to subsections 18(1)(b) and 16(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[3] On January 30, 2018, my office notified the City, the Applicant, and the third parties that it would be undertaking a review.

## II RECORDS AT ISSUE

[4] The records at issue are described below:

- Summary of results – one page containing a table containing the unit prices of the bidders. The total of the unit prices is also included in this table. I refer to this record as the “Summary of results”.
  - The City cited subsection 18(1)(b) of LA FOIP as its reason to withhold the unit prices in the table.
- Tender Bid of Flyer Electric (third party 1). The City cited subsection 18(1)(b) of LA FOIP as its reason to withhold this record in full.
- Tender Bid of GL Mobile Communications (third party 2). The City cited subsection 18(1)(b) of LA FOIP as its reason to withhold this record in full.
- Tender Bid of KMS Holding Corp (third party 3). The City cited subsection 18(1)(b) of LA FOIP as its reason to withhold this record in full.
- Email string featuring the following three emails:
  - Email between a third party and a City employee – dated September 5, 2017 and timestamped 4:40pm. The City cited subsections 16(1)(b) and 18(1)(b) of LA FOIP as its reason to withhold this record in full.
  - Email between two City employees – dated September 5, 2017 and timestamped 4:42 p.m. The City cited subsections 16(1)(b) and 18(1)(b) of LA FOIP as its reason to withhold this record in full.
  - Email between three City employees – dated September 6, 2017 and timestamped 8:24 a.m. The City cited subsections 16(1)(b) and 18(1)(b) of LA FOIP as its reason to withhold this record in full.

[5] It should be noted that the City consulted with a fourth third party and that particular third party did not object to the City releasing its tender bid to the Applicant. The City released this particular tender bid to the Applicant. Therefore, the tender bid for the fourth third party is not a record at issue in this review.

### **III DISCUSSION OF THE ISSUES**

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

[6] The City is a local authority as defined by subsection 2(f)(i) of LA FOIP. Therefore, I have jurisdiction to review this matter.

#### **2. Did the City properly apply subsection 18(1)(b) of LA FOIP to the withheld record in question?**

[7] Subsection 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;

[8] In order for subsection 18(1)(b) of LA FOIP to apply, the following three-part test must be met:

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 public body?
3. Was the information supplied in confidence implicitly or explicitly?

[9] The City applied subsection 18(1)(b) of LA FOIP to the following:

- the unit prices that appears in the summary of results,
- to the entire tender bids,
- the email dated September 5, 2017 and timestamped 4:40pm,
- the email dated September 5, 2017 and timestamped 4:42pm,
- the email dated September 6, 2017 and timestamped 8:24am.

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

**a. Summary of results**

[10] As described in the “Records at Issue” section, the City withheld the unit prices of each bidder pursuant to subsection 18(1)(b) of LA FOIP. In its submission, it cited my office’s Review Report 229-2015. In that report, I defined commercial information as information related to the buying, selling or exchange of merchandise or services. Therefore, I found that information related to unit price for goods or merchandise offered by the third party qualified as commercial information. In *Canadian Bank Note Limited v. Saskatchewan Government Insurance, 2016 SKQB 362*, Justice Zarzeczny agreed that the unit price qualified as commercial information. In *Seon v. Board of Education of the Regina Roman Catholic School Division No. 81, 2018 SKQB*, Justice McCreary made the same finding. The case in this review is the same. I find that the unit price in the summary of results qualify as commercial information.

**b. Tender bids**

[11] In its submission, the City asserted that the tender bid forms submitted by the third parties qualify as commercial information. It cited my office’s Review Report 031-2015 to support its position. In that particular report, I said that commercial information related to a commercial enterprise need not be proprietary in nature or have an independent market or monetary value. It is sufficient if the information is associated with the buying, selling or exchange of the entity’s goods or services. The information in the tender forms relates to the buying and selling of goods and services. Therefore, I find that the information in the tender bid forms qualify as commercial information.

**c. The email dated September 5, 2017 and timestamped 4:40pm**

[12] As described above, this email is from a third party to the City’s Purchasing Manager. The email offers the unit prices for two types of services. I find that this particular type of

information qualifies as commercial information. However, the remainder of the information in the email does not qualify as financial, commercial, scientific, technical or labour relations information.

**d. The email dated September 5, 2017 and timestamped 4:42pm**

[13] This is an email by the City's Purchasing Manager. He is forwarding the third party's email to the City's IT & Innovation Manager. In an email dated June 21, 2018 to my office, the City argued that this email is an extension of the third party's tender bid. Based on a review of the contents of this email, I find that the contents within this particular email (not the third party's email) does not contain financial, commercial, scientific, technical or labour relations information of the third party.

**e. The email dated September 6, 2017 and time stamped 8:24am.**

[14] This is an email by the City's IT and Innovation Manager to two of his employees. He is forwarding the third party's email and the City's Purchasing Manager's email. As noted above, the City argued that this email is an extension of the third party's tender bid. Based on a review of the contents of this email, I find that the contents within this particular email (not the third party's email) does not contain financial, commercial, scientific, technical or labour relations information of the third party.

**2. Was the information supplied by the third party to a public body?**

[15] Information may qualify as "supplied" if it was directly supplied to the local authority by a third party.

[16] In its submission, the City asserted that the commercial information in the tender bid forms were supplied by each third party in response to the City's tender request. Based on a review of the tender bid forms, it is apparent that each tender bid form was filled out by a third party and then submitted to the City. I find that the unit prices in the "Summary of

results” record and the information in the tender bid forms were supplied by third parties to the City.

**3. Was the information supplied in confidence implicitly or explicitly?**

[17] In confidence usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained in confidence means that the supplier of the information has stipulated how the information can be disseminated. In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the local authority and the third party providing information.

[18] In this case, the City asserts that the information was supplied to it by the third parties implicitly in confidence. Two of the three third parties also indicated to my office that the information was submitted in confidence.

[19] Implicitly means that confidentiality is understood even though there is no actual statement of confidentiality, agreement or other physical evidence of the understanding that the information will be kept confidential. Based on the nature of the information, the circumstances, and the submissions received by my office, I find that the information was supplied in confidence.

[20] So that public bodies, third parties as bidders and my office do not have to determine whether bids are made implicitly in confidence, I recommend that the City and other public bodies make it clear, in a bidding process, whether all bids will be received explicitly in confidence. This can be done in the tender form, an RFP or on the City’s or a public bodies’ website. Once a successful bidder is selected and a contract is negotiated, then the City and other public bodies should be clear as to whether the contract will be treated as a public document. I lean to the position that contracts with public bodies should be disclosed, and not confidential, but of course, one always has to consider section 18 of LA FOIP.

[21] In summary, I find that the City properly applied subsection 18(1)(b) of LA FOIP to the following:

- the unit prices in the summary of results,
- the entire tender bid forms,
- the unit prices in the email dated September 5, 2017 and timestamped 4:40pm.

[22] I find that the City did not properly apply subsection 18(1)(b) of LA FOIP to the header, salutation, and description of the two services in the email dated September 5, 2017 and timestamped 4:40pm, and the two sentences after the description of the two services, and the email signature. I also find that the City did not properly apply subsection 18(1)(b) of LA FOIP to the email dated September 5, 2017 (timestamped 4:42pm), and the email dated September 6, 2017 (timestamped 8:24am).

**3. Did the City properly apply subsection 16(1)(b) of LA FOIP to the withheld record in question?**

[23] Subsection 16(1)(b) 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:

...

(b) consultations or deliberations involving officers or employees of the local authority;

[24] A consultation occurs when the views of one or more officers or employees of local authorities are sought as to the appropriateness of a particular proposal or suggested action.

[25] A deliberation is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

[26] In order for subsection 16(1)(b) of LA FOIP to apply, the opinions solicited during a consultation or deliberation must:

- i. be either sought, expected, or be part of the responsibility of the person who prepared the record; and

- ii. be prepared for the purpose of doing something, such as taking an action, making a decision or a choice.

[27] It should be noted that subsection 16(1)(b) of LA FOIP is meant to permit local authorities to consider options and act without constant public scrutiny. However, it is not meant to protect the bare recitation of facts nor does it generally apply to records or parts of records that in themselves reveal only the following:

- that a consultation or deliberation took place at a particular time;
- that a particular person was involved; or
- that a particular topic was involved.

[28] The City applied subsection 16(1)(b) of LA FOIP to the three emails, which are as follows:

- Email from third party to the City's Purchasing Manager – dated September 5, 2017 and timestamped 4:40pm.
- Email between two City employees – dated September 5, 2017 and timestamped 4:42 p.m.
- Email between three City employees – dated September 6, 2017 and timestamped 8:24 a.m.

[29] In the first email (dated September 5, 2017 and timestamped 4:40pm), the third party sends an email with the unit prices for two types of services. The contents of the email does not constitute as a consultation or a deliberation between officers or employees of the City. I find that subsection 16(1)(b) of LA FOIP does not apply to this email.

[30] In the next email (dated September 5, 2017 and timestamped 4:42pm), the City's Purchasing Manager forwards an email from the third party to the City's IT and Innovation Manager. The contents of the email does not constitute a consultation or a deliberation. It is merely forwarding information from the third party. I find that subsection 16(1)(b) of LA FOIP does not apply to this email.

[31] In the last email (dated September 6 and timestamped 8:24am), the City's IT and Innovation Manager forwards the email to two of his employees. The body of the email contains two sentences. In my office's draft report, my office interpreted the first sentence



as factual because the City's IT and Innovation Manager is summarizing what has happened. Therefore, my office found that subsection 16(1)(b) of LA FOIP does not apply. However, in its response to my office's draft report, the City indicated the IT and Innovation Manager misused a word in the first sentence. Therefore, it alleges that the sentence is not factual but an opinion and should be caught by subsection 16(1)(b) of LA FOIP. As noted earlier, subsection 16(1)(b) of LA FOIP is not meant to cover the recitation of facts. It is also not meant to cover the misuse of words. Misusing a word does not change a fact to an opinion. It also does not change a fact to a consultation or deliberation as defined above. I find that subsection 16(1)(b) of LA FOIP does not apply to this first sentence.

[32] However, the second sentence is the City's IT and Innovation Manager's opinion on the third party's tender. In its submission, the City indicates that the IT & Innovation Manager was in charge of reviewing and analyzing the tender submissions and approving the awarding of the tender. When I consider the context, this opinion appears to be a deliberation. In other words, it is a consideration of a reason for or against selecting a particular bidder. I find that subsection 16(1)(b) of LA FOIP applies to this second sentence.

#### **IV FINDINGS**

[33] I find that the City properly applied subsection 18(1)(b) of LA FOIP to the following:

- the unit prices in the summary of results,
- the entire tender bid forms,
- the unit prices in the email dated September 5, 2017 and timestamped 4:40pm,
- the email dated September 5, 2017 and timestamped 4:42pm,
- the email dated September 6, 2017 and timestamped 8:24am.

[34] I find that the City did not properly apply subsection 18(1)(b) of LA FOIP to the header, salutation, and description of the two services in the email dated September 5, 2017 and timestamped 4:40pm, and the two sentences after the description of the two services, and the email signature.

- [35] I find that the City did not properly apply subsection 18(1)(b) of LA FOIP to the email dated September 5, 2017 (timestamped 4:42pm), and the email dated September 6, 2017 (timestamped 8:24am).
- [36] I find that subsection 16(1)(b) of LA FOIP does not apply to the email dated September 5, 2017 and timestamped 4:40pm.
- [37] I find that subsection 16(1)(b) of LA FOIP does not apply to the email dated September 5, 2017 and timestamped 4:42pm.
- [38] I find that subsection 16(1)(b) of LA FOIP applies to the second sentence in the email dated September 6, 2017 and timestamped 8:24am.

## **V RECOMMENDATIONS**

- [39] I recommend that the City sever the unit prices from the email dated September 5, 2017 and timestamped 4:40pm and release the remainder of the email to the Applicant.
- [40] I recommend that the City release the email dated September 5, 2017 and timestamped 4:42pm to the Applicant.
- [41] I recommend that the City sever the second sentence from the email dated September 6, 2017 and timestamped 8:24am and then release the remainder of the email to the Applicant.
- [42] I recommend that the City and other public bodies make it clear, in a bidding process, whether all bids will be received explicitly in confidence.

Dated at Regina, in the Province of Saskatchewan, this 29<sup>th</sup> day of June, 2018.

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