



REVIEW REPORT 020-2018

City of Swift Current

August 15, 2018

Summary:

The Applicant submitted an access to information request to the City of Swift Current (the City). The City refused the Applicant access pursuant to subsections 17(1)(d) and 18(1)(c)(iii) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). It also indicated that the Applicant gave up any rights or claims to chickens when she turned them loose. It also said that a record is in the possession or control of another organization. The Information and Privacy Commissioner (IPC) found that subsections 17(1)(d) and 18(1)(c)(iii) of LA FOIP did not apply to the records. He also found that the City did not conduct a reasonable search for records about the location of the chickens. Finally, he found that a record requested by the Applicant would not be in the possession or under the control of the City. The IPC made a number of recommendations including releasing the records to the Applicant and conducting another search for records.

I BACKGROUND

[1] On December 5, 2017, the City of Swift Current (the City) received the following access to information request:

1. An audio copy of my appeal hearing held July 13th, 2017.
2. The work order given to Speedy Creek Maintenance regarding my property and the date it was given. As well as a list of tasks they were asked to perform.
3. Location of my chickens.

[2] In a letter dated January 3, 2018, the City responded as follows:

1. **An audio copy of my appeal hearing held July 13th, 2017.**

This is a record of the Appeal Board and you will have to contact the Chair and/or the Secretary of the Board with this request.

2. The Work [sic] order given to Speedy Creek Maintenance regarding my property and the date it was given. As well as a list of tasks they were asked to perform.

This is information which can reasonably be expected to interfere with contractual or other negotiations of the City and contractual or other negotiations of a third party and therefore is refused pursuant to sections 17(d) [sic] and 18(c)(iii) [sic] of the [sic] *Local Authority Freedom of Information and Protection of Privacy Act*.

3. Location of my chickens.

You gave up any rights or claims to chickens when you turned them loose and chased them out of your yard.

[3] On January 15, 2018, my office received a request from the Applicant to review the City's response.

[4] On January 24, 2018, my office notified the Applicant and the City that it would be undertaking a review.

[5] Then, after receiving the third party's contact information from the City, my office notified the third party of the review on February 22, 2018.

II RECORDS AT ISSUE

[6] At issue are five pages of records. Page 1 is a memorandum. Pages 2 and 3 are a property clean-up schedule. Pages 4 and 5 are reproductions of an Act. According to its Index of Records, the City is withholding all five pages in their entirety. It cites subsections 17(1)(d) and 18(1)(c)(iii) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) as its reasons for withholding these five pages.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction to review this matter?

[7] 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. Does subsection 17(1)(d) of LA FOIP apply?

[8] Subsection 17(1)(d) of LA FOIP provides:

17(1) Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the local authority;

[9] In order for subsection 17(1)(d) of LA FOIP to apply, the following test must be met:

1. Are there contractual or other negotiations occurring?
2. Could release of the record reasonably be expected to interfere with the contractual or other negotiation(s)?

[10] The City had engaged a third party contractor to conduct work on the Applicant's property. In its submission, the City alleges that the Applicant has assaulted a bylaw enforcement officer and repeatedly harassed City employees as they carried out their daily duties. It believes the disclosure of the work order, or even the contact information of the third party, would make it next to impossible for the City to engage the third party in the future. Further, it states that Swift Current is a small community and contractors who do similar work are in short supply. Therefore, it believes that the disclosure of the work order or the third party's contact information could reasonably be expected to interfere with the contractual or other negotiations of the City.

[11] Pages 1 to 3 of the records describe the work order and the tasks scheduled by the City to be completed. I do not find that the disclosure of this type of information would make it difficult for the City to engage the third party in the future. I do not find that it would interfere with the contractual or other negotiations of the City.

[12] I note these three pages do not identify the third party or employees of the third party.

[13] Finally, pages 4 and 5 are reproductions of an Act. I do not find that disclosing such information would interfere with the contractual or other negotiations of the City.

[14] I find that subsection 17(1)(d) of LA FOIP does not apply to any of the records at issue.

2. Does subsection 18(1)(c)(iii) of LA FOIP apply?

[15] Subsection 18(1) 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:

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

a third party;

[16] To interfere with contractual or other negotiations means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement involving a third party.

[17] The City offered the same arguments it did for subsection 17(1)(d) of LA FOIP for why subsection 18(1)(c)(iii) of LA FOIP would also apply to the records. It said the following:

...Therefore the disclosure of the work order, or even the contact information of the contractor, “could reasonably be expected to interfere with the contractual or other negotiations” of the City as set out in section 17(1)(d) of the Act. Likewise, the disclosure of the work order and/or contact information “could reasonably be expected to interfere with the contractual or other negotiations” of the 3rd party as set out in section 18(1)(c)(iii) of the Act.

[18] As noted earlier, the records at issue do not identify the third party or employees of the third party. Pages 1 to 3 merely describe the work order and the tasks the City requested the third party to perform. Pages 4 and 5 are reproductions of an Act. I find that subsection 18(1)(c)(iii) of LA FOIP does not apply to the records.

[19] I note that subsection 91(1) of *The Cities Act* also provides as follows:

91(1) Any person is entitled at any time during regular business hours to inspect and obtain copies of:

(a) any contract approved by the council, any bylaw or resolution and any account paid by the council relating to the city;

[20] Prior to engaging third parties by contract, the City should inform third parties of subsection 91(1) of *The Cities Act*. When third parties conduct business with a local authority, they must recognize that the contract will be made available to the public pursuant to *The Cities Act*.

3. Does the City have possession or control over the audio copy of the appeal hearing?

a. Audio copy of appeal hearing

[21] The Applicant requested an audio copy of her appeal hearing but the City did not provide her with such a record.

[22] The Applicant's basis for believing that an audio copy of the appeal hearing exists is because the secretary for the development appeals board (DAB) used the audio copy of the hearing to compile notes. The Applicant says that the secretary of the DAB is also a City employee.

[23] A DAB is independent from the City because the City is required to act through its council pursuant to section 5 of *The Cities Act* but the DAB does not. The DAB's powers and duties are established through *The Planning and Development Act, 2007* (PDA). While subsection 215(1) of the PDA provides that a member of the DAB cannot be an employee of the City, the PDA does not say that the secretary cannot be a City employee. Therefore, it is possible that the secretary of the DAB is also a City employee. If this is the case, though, that does not mean that the records created by the secretary of the DAB during an appeal hearing are in the possession or control of the City.

[24] In its submission, the City asserted that the DAB is a completely independent administrative board. Therefore, if an audio copy of the hearing is in existence, then the DAB would have a copy of the appeal hearing.

[25] My office was informed by the DAB that audio recordings are made at the discretion of the DAB secretary for verifying written minutes of hearings depending on the complexities of the appeal. It also indicated that it does not forward a copy of the audio recordings to the City. The DAB indicated that if individuals wished to access the DAB's records, they may submit a written request to the DAB's secretary. Subsections 224(4) and 224(5) of the PDA provide that the DAB must make and keep a written record of its proceedings and this written record is a public record:

224(4) The board shall make and keep a written record of its proceedings, which may be in the form of a summary of the evidence presented to it at the hearing.

(5) The written record mentioned in subsection (4) is a public record.

[26] Therefore, if an audio copy of the appeal hearing exists, then I find that it would be a public record. Subsection 5(2) of *The Electronic Information and Documents Act, 2000* provides written records include records in electronic form:

5(2) For the purpose of subsection (1), the use of "in writing" and "signature" and other similar words and expressions does not by itself prohibit the use of information or documents in an electronic form.

[27] I find that if an audio recording of the appeal hearing is in existence, then it would be in the possession or control of the DAB, not the City. I recommend that the Applicant submit a written request to the DAB's secretary requesting access to the audio copy of the hearing, pursuant to subsections 224(4) and 224(5) of the PDA.

b. Is the DAB a local authority subject to LA FOIP?

[28] Subsection 2(f)(v) of LA FOIP provides the definition of the term "local authority". This definition provides that any board, commission or other body that is appointed pursuant to

The Cities Act, The Municipalities Act or The Northern Municipalities Act, 2010 and is prescribed. It provides:

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;

[29] As noted earlier, the DAB is appointed pursuant to the PDA. Therefore, I find that the DAB does not qualify as a local authority pursuant to subsection 2(f)(v) of LA FOIP. It also does not qualify as a local authority pursuant to subsection 3(1) or Part I of the Appendix in the LA FOIP Regulations.

[30] I recommend that the Minister of Justice amend the LA FOIP Regulations to include the DAB as a local authority.

4. Did the City conduct an adequate search for records on the location of the Applicant’s chickens?

[31] The Applicant requested the location of the Applicant’s chickens.

[32] When a local authority has not provided the Applicant with records, my office’s focus will be on the local authority’s search efforts and whether the local authority conducted a reasonable search.

[33] In its submission, the City indicated that there are no records about the location of the Applicant’s chickens. Its position is that the Applicant gave up any rights or claims to the chickens when the Applicant turned them loose and chased them away to run free.

[34] Since my office did not receive any details of its search for records, I find that the City did not conduct a reasonable search for records about the location of the chickens.

[35] I must address the City's assertion that the Applicant gave up any rights or claims to the chickens when the Applicant turned them loose and chased them away to run free. The Applicant's right of access to records existing on the topic pursuant to section 5 of LA FOIP is not dependent on conduct.

[36] I recommend that the City:

- Conduct a search for records regarding the location of the chickens within 20 days of receiving this draft report.
 - The search should include correspondence, including emails, email attachments, letters, photographs, and any other record, between the Planning & Growth Development and the third party regarding the location of the chickens.
- Document its search strategy, which employees it asked to search for records, where they searched for records, and the results of each of their search efforts.
- Provide my office with the results of its search within 20 days of receiving this draft report.

IV FINDINGS

[37] I find that subsection 17(1)(d) of LA FOIP does not apply to any of the records at issue.

[38] I find that subsection 18(1)(c)(iii) of LA FOIP does not apply to the records at issue.

[39] I find that if an audio recording of the appeal hearing is in existence, then it would be in the possession or control of the DAB, not the City.

[40] I find that the DAB does not qualify as a local authority pursuant to subsection 2(f)(v) of LA FOIP nor subsection 3(1) or Part I of the Appendix in the LA FOIP Regulations.

[41] I find that the City did not conduct a reasonable search for records about the location of the chickens.

V RECOMMENDATIONS

[42] I recommend that the City release the records it was withholding pursuant to subsections 17(1)(d) and 18(1)(c)(iii) of LA FOIP to the Applicant.

[43] I recommend that the City should inform third parties of subsection 91(1) of *The Cities Act*. When third parties conduct business with a local authority, they must recognize that the contract will be made available to the public pursuant to *The Cities Act*.

[44] I recommend that the City:

- Conduct a search for records regarding the location of the chickens within 20 days of receiving this report.
 - The search should include correspondence, including emails, email attachments, letters, photographs, and any other record, between the Planning & Growth Development and the third party regarding the chickens.
- Document its search strategy, which employees it asked to search for records, where they searched for records, and the results of each of their search efforts.
- Provide my office with the results of its search within 20 days of receiving this report.

[45] I recommend that if the Applicant has not already done so, that the Applicant contact the DAB and request a copy of the written record of the appeal hearing.

[46] I recommend that the Minister of Justice amend the LA FOIP Regulations to include the DAB as a local authority.

Dated at Regina, in the Province of Saskatchewan, this 15th day of August, 2018.

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