



## **REVIEW REPORT 026-2016**

### **City of Regina**

**July 19, 2016**

#### **Summary:**

The Applicant submitted an access to information request to the City of Regina (the City). The City advised that a redacted version of the requested record was available on its website and that it would continue to withhold the redacted portions pursuant to subsection 17(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). In an earlier review by this office, the Commissioner had found that the redacted portions of the record had been withheld appropriately. The Applicant felt that as an adequate amount of time had passed and a contract had been signed that the report should be released in full. It was found that the City was in continued negotiations and therefore subsection 17(1)(d) of LA FOIP had been applied appropriately. It was recommended that the City review the redacted information as different phases of the project are completed to determine if any redacted information can be unmasked on the redacted document available on its website.

#### **I BACKGROUND**

[1] On January 29, 2016, the City of Regina (the City) received an access to information request from the Applicant for the following:

A copy of the full unredacted version of the City of Regina Wastewater Treatment Plan and Expansion and Upgrade Project, Delivery Model Assessment report, prepared by Deloitte, dated January 22, 2013, which was the subject of investigation by the OIPC, Review Report 087/2013.

[2] The City sent a letter to the Applicant on February 1, 2016 advising that the \$20 application fee would need to be submitted before processing the request.

- [3] The City received the \$20 application fee from the Applicant on February 11, 2016 and provided a response to the Applicant's access to information request on the same day. The response provided as follows:

In 2014 the City made available a redacted version of the requested Deloitte report on its website... The redacted version of this report is acceptable to and consistent with the recommendations of the IPC in Review Report 087/2013.

Access to the full unredacted version of the Deloitte report remains refused pursuant to sections 16(1)(a) and 17(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act*. The information has been severed because it is information relating to contractual and other negotiations and because release of the information at this time would be prejudicial to the City's economic and other interests. Contract obligations are not complete and the factors in 2014 remain applicable at this time...

- [4] On February 19, 2016, the Applicant submitted a request for my office to review the City's decision to deny access to portions of the requested record pursuant to subsections 16(1)(a) and 17(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).
- [5] On March 1, 2016, the City sent a letter to the Applicant revising the exemptions it was relying on to refuse portions of the requested record. In the letter, the City advised it was only relying on subsection 17(1)(d) of LA FOIP for the refusal.
- [6] On March 2, 2016, my office provided notification to the Applicant and the City of our intention to review this matter. In that notification, my office requested the City provide a copy of the redacted portions of the record, an index of records and a submission supporting the exemption claimed. The Applicant was also invited to provide a submission for my office's consideration in the review.

## **II RECORD AT ISSUE**

- [7] The record at issue consists of three pages which the City has redacted the portions of the pages that contain dollar amounts.

### III DISCUSSION OF THE ISSUE

[8] The City is a local authority pursuant to subsection 2(f)(i) of LA FOIP.

#### 1. Did the City properly apply subsection 17(1)(d) of LA FOIP to the withheld portions of the record?

[9] Subsection 17(1)(d) of LA FOIP provides as follows:

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;

[10] The test for determining if subsection 17(1)(d) of LA FOIP applies to information in a record is as follows:

1. Identify and provide details about the contractual or other negotiations and the parties involved; and
2. Details how release of the record could reasonably be expected to interfere with the contractual or other negotiation(s).

[11] As noted in the access to information request, the information that the Applicant was requesting was considered in Review Report 087/2013. The information in document #1 in the 2013 Report is the same information that is at issue in this Report.

[12] In Review Report 087/2013, it was found that subsection 17(1)(d) of LA FOIP applied to the withheld information and therefore could continue to be withheld. The Applicant provided the following arguments to support his position that subsection 17(1)(d) of LA FOIP should no longer apply to the requested record:

The City claims the continued need to redact the requested information under section 17(1)(d). Since the contract has been signed, there should be no remaining “contractual and other negotiations” outstanding and therefore no reason to withhold

the information. Unless the City means to restrict this information for the life of the contract (almost 30 years), but that seems very, very, odd. If there is a legitimate basis for the continued redaction of this information I would like to get a clearer justification for it (the contract with EPCOR has been signed so that is not it) and at the very least a time line on when, if ever, the information would be available. This would be of public interest and would save your office from continually responding to review requests.

...Your office made its original decision (Review Report 087/2013) based on submissions received by March 28, 2013. The contract was awarded 3 months later and roughly 15 months ago.

The supplemental points I want to make are three.

1. The City of Regina ultimately withdrew its appeal to Section 16(1)(a) as a reason to deny access to the material in question. In my earlier submission, I made arguments against section 16(1)(a). I ask that you consider those arguments as the basis for a public interest argument...
2. ...for section 17(1)(d), that states, "Once a contract has been executed, negotiation is concluded. This exemption would generally not apply." The contract was signed July 3, 2014. That was over a year and a half ago.
3. Finally, if for some reason your office finds that section 17(1)(d) still applies, please offer in your decision enough of an explanation as to let outsiders understand how this section could still apply given the signed contracts (i.e. what other contracts are still being negotiated?) and sometime estimate as to when this section would no longer apply.

[13] While the Applicant is in part relying on a public interest argument, there is not a public interest consideration in section 17 of LA FOIP. Therefore, the only consideration would be whether or not the exemption was applied appropriately by the City.

[14] The City provided the following in its submission to my office to support its position that subsection 17(1)(d) of LA FOIP applied to the withheld portions of the record:

As a result of the Deloitte Report, the City chose to proceed with a P3 delivery model for the Project. Following a competitive public procurement process, the City awarded the Project to EPCOR... The partnership between the City and EPCOR is expected to last 30 years.

Construction on the upgrades to the plant has commenced but work has not reached the milestone of substantial completion. Substantial completion is expected later in 2016, after the expected conclusion of this review.

While EPCOR will build, operate and maintain the Plant, the City remains the owner of the Plant...

...With construction of the facility still underway and a 30 year future partnership for operation and maintenance of the Plant within physical and regulatory environments that are subject to change, both parties accept that the Project Agreement will not remain static. There will be ongoing negotiations regarding the relationship, including allocations of costs and risks, potentially throughout the life of the relationship.

The future negotiations will be required is not just reasonably foreseeable; the need for further negotiations of the Project Agreement have already manifested. As of the date of this review, three change orders are outstanding for negotiations between the parties. These change orders relate to new work caused by events that were not foreseen at the time the Project Agreement was signed...

The severed portions of the responsive record is information prepared for the City, by Deloitte, using Deloitte's expertise in this area, of how the City should perceive and value certain risks for the purpose of concluding the Project Agreement and negotiating the ongoing relationship with EPCOR. That analysis will be relied on by the City in the foreseeable future for any negotiations with EPCOR resulting from scope changes in the Project Agreement, changes in the physical or regulatory environments or to apportion responsibility and risk for events that have not yet materialized and were not contemplated when the Project Agreement was signed.

...While the Project is at a different stage now than it was when Report 087/2013 was released, the sensitivity of this information and its value to the City within the Project and its relationship with EPCOR remains unchanged.

While EPCOR and the City are partners in the Project, each party still has independent interests that they will seek to protect and advance in negotiations during the relationship...

If the severed information were to come into EPCOR's possession, EPCOR would gain an unfair advantage over the City in future negotiations of the relationship and changes to the Project Agreement. It is likely that some of the risks analyzed in association with the severed information will arise in the course of the partnership. Some of those risks have already materialized (risk nos. [numbers identified]), resulting in the three open change orders. Recent communications between the City and Water Security Agency suggests that risk nos. [numbers identified] may also materialized in the near future.

There is a clear cause an effect relationship between release of the severed information and prejudice to the City in the management of the existing Project Agreement and current and future negotiations that are reasonably expected to result in changes to the Project Agreement. The City does not have access to EPCOR's valuation of project risks or other EPCOR information similar to the severed information. As such, release of the information would result in EPCOR gaining an unfair advantage over the City in current and future negotiations.

While the [name of delivery model] has been chosen from the four delivery models analyzed in the chart, disclosure of the values in any of the columns would inform EPCOR of the City's risk perceptions, which would give EPCOR an unfair advantage over the City in future negotiations relating to this contract. EPCOR having an unfair advantage over the City would prejudice the City's future negotiations relating to this contract.

[15] While the City has signed a contract with EPCOR, the City has shown that it continues to be in negotiations with EPCOR and the release of the withheld information could reasonably be expected to interfere with those negotiations, I find that subsection 17(1)(d) of LA FOIP continues to apply to the redacted portions of the record and therefore could continue to be withheld.

[16] While it has been found that the exemption applies, the City should consider reviewing the redacted information after certain phases of the project are completed (such as the construction phase) to determine if any of redacted information can be unmasked on the document available on its website.

[17] After receiving my office's Draft Report, the City advised it intended to comply with the recommendation by reviewing the redactions at the end of each year to determine if any severed information can be revealed.

#### **IV FINDING**

[18] I find that subsection 17(1)(d) of LA FOIP was appropriately applied to the record at issue.

#### **V RECOMMENDATION**

[19] I recommend the City review the redacted information as phases of the project are completed (such as the construction phase) to determine if any of the redacted information can be unmasked on the document available on its website.

Dated at Regina, in the Province of Saskatchewan, this 19th day of July, 2016.

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