



REVIEW REPORT 229-2017, 031-2017 - PART II

Rural Municipality of Rosthern No. 403

December 7, 2018

Summary:

The Commissioner considered whether subsection 21(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) applied to records, including legal invoices. The Rural Municipality of Rosthern No. 403 (the RM) described the records using affidavits. The Commissioner considered how subsection 117(1)(a) of *The Municipalities Act* applied and was satisfied that the RM had made a prima facie case that subsection 21(a) of LA FOIP applied to eight records. He found that one additional record that, was provided to his office, was responsive to the applicant's request. He found that subsection 21(a) of LA FOIP did not apply to that record. He recommended the RM release the one record to the applicant and provide him with other records in accordance with subsection 117(1)(a) of *The Municipalities Act*.

I BACKGROUND

[1] On December 1, 2016, the Applicant made an access to information request to the Rural Municipality of Rosthern No. 403 (the RM) that included six different items. Part of the request was for all records of invoices (contracts) from legal counsel for "legal advice" pertaining to the Applicant from June 1, 2015 until December 1, 2016.

[2] The RM provided the Applicant with a fee estimate. The Applicant paid the fee. On January 30, 2017, the RM responded to the Applicant's access request. It provided some records. The RM also informed the Applicant that it was withholding records pursuant to

section 21 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

- [3] On February 7, 2017, my office received a request for review from the Applicant. He requested that my office review the RM's application of fees, the RM's search for records and the RM's application of section 21 of LA FOIP.
- [4] My office dealt with the issues of fees and search in Review Report 031-2017 – PART I.
- [5] On May 16, 2018, the Court of Appeal for Saskatchewan determined whether my office had authority to require local authorities to produce records that may be subject to solicitor-client privilege. *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 concluded that my office should follow the "absolutely necessary" principle. As a result, it suggested that my office follow a process to gather information about records and consider whether a prima facie case for solicitor-client privilege has been made before requiring a record.
- [6] My office has established a process to consider a claim of solicitor-client privilege which is detailed in the *Rules of Procedure* available on my office's website. My office will request an affidavit of records over which the solicitor-client privilege is claimed including a form that describes the records and a submission providing further information as to why solicitor-client privilege is claimed. The *Rules of Procedure* also includes a sample schedule that should be included with the affidavit. If sufficient information is not provided for me to conclude that the use of subsection 21(a) of LA FOIP is justified, I will request further particulars which can be provided to my office by affidavit.
- [7] The RM provided my office with an affidavit signed by the Reeve of the RM on August 27, 2018. My office requested further particulars on September 6, 2018. The RM provided further particulars by affidavit about some of the records dated September 28, 2018.

[8] During the course of the review, I confirmed that the RM was relying only on subsection 21(a) of LA FOIP. The RM also indicated that one of the records it was withholding pursuant to subsection 21(a) of LA FOIP, was unresponsive to the Applicant's request. I will now review the RM's application of subsection 21(a) of LA FOIP to eight records and I will consider if an additional record is responsive to the Applicant's request.

II RECORDS AT ISSUE

[9] The RM applied subsection 21(a) of LA FOIP to eight records totalling 13 pages. It also indicated that an additional record that it was withholding pursuant to subsection 21(a) of LA FOIP is unresponsive to the Applicant's request. The RM has provided me with a copy of that record.

III DISCUSSION OF THE ISSUES

1. Does my office have jurisdiction in this matter?

[10] The RM qualifies as a local authority pursuant to subsection 2(f)(i) of LA FOIP. Therefore my office has jurisdiction in this matter.

2. Are all of the records responsive to the Applicant's access request?

[11] The RM is withholding a one page email from a legal assistant for the RM's legal counsel to the RM. The RM had previously identified that it was responsive to the Applicant's request and applied subsection 21(a) of LA FOIP to it. However, the RM now indicates it is not responsive to the Applicant's request.

[12] The email conveys two attachments, an invoice and a letter. Both are records responsive to this review and the RM asserts that they should be withheld pursuant to subsection 21(a) of LA FOIP. I must consider whether the email itself is responsive to the Applicant's request.

- [13] When a public body receives an access to information request, it must determine what information is responsive to the access request.
- [14] Responsive means relevant. The term describes anything that is reasonably related to the request. The Applicant's access request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive.
- [15] The purpose of LA FOIP is best served when a government institution adopts a liberal interpretation of a request. If a local authority has any doubts about its interpretation, it has a duty to assist the Applicant by clarifying or reformulating it.
- [16] As noted, the Applicant requested all records of invoices (contracts) from legal counsel for "legal advice" pertaining to the Applicant from June 1, 2015 until December 1, 2016.
- [17] The RM submitted that the Applicant's name does not appear in this email, but noted the attachments are related to the Applicant.
- [18] Even though the email does not mention his name, it is still a record relating to an invoice from the RM's legal counsel for legal advice pertaining to the Applicant.
- [19] The record is responsive to the Applicant's request.

3. Does subsection 21(a) of LA FOIP apply to the record?

- [20] Subsection 21(a) of LA FOIP provides:

21 A head may refuse to give access to a record that:

- (a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

[21] My office has established the following test for subsection 21(a) of LA FOIP:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Was the communication intended to be confidential?

Legal Invoices

[22] The RM has withheld three two-page documents that it has described as invoices between the RM and its legal counsel.

[23] I am satisfied that the invoices meet the first part of the test as they are communications between a solicitor and a client.

[24] Federal Court of Appeal decision *Stevens v. Canada (Prime Minister)*, [1998] 4 FC 89 CanLII 9075 (FCA) recognizes that invoices of lawyers constitute communications for the purpose of obtaining advice and solicitor-client privilege applies. I am satisfied that the second part of the test is met.

[25] Finally, as I discussed in my office's Review Report 052-2013, in the Supreme Court of Canada (SCC) decision *Maranda v. Richer*, 2003 SCC 67 (CanLII), [2003] 3 S.C.R. 193, 2003 SCC67 (Maranda), the court asserted that there is a presumption of privilege for lawyers' bills of account as a whole in order to ensure that solicitor-client privilege is honoured. The decision stated:

In law, when authorization is sought for a search of a lawyer's office, the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege. While that presumption does not create a new category of privileged information, it will provide necessary guidance concerning the methods by which effect is given to solicitor-client privilege, which, it will be recalled, is a class privilege. Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved.

[26] I am satisfied that the invoices were intended to be confidential. However, I also note that the decision stated that it “is in the interests of the administration of justice and of society in general for there to be greater transparency in respect of the amount of the fees that lawyers charge their clients”. In addition, it stated that “certain information will be available from other sources, such as the client’s bank where it retains the cheques or documents showing payment of the bills of account.”

[27] In Review Report 052-2013, I also discussed that the presumption of privilege for lawyer’s invoices can be rebutted if the Applicant can provide persuasive arguments that the disclosure of information, namely the fees detailed in the invoice, will not result in the Applicant learning of information that is subject to solicitor-client privilege.

[28] The Applicant questions the ability of the RM to withhold such invoices. He submitted that section 117 of *The Municipalities Act* allows individuals to inspect such invoices.

[29] Subsection 117(1)(a) of *The Municipalities Act* provides:

117(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 municipality;

...

[30] I am also mindful of subsection 4(b) of LA FOIP which provides:

4 This Act:

...

(b) does not in any way limit access to the type of information or records that is normally available to the public;

[31] I must determine if there is a conflict between subsection 21(a) of LA FOIP and subsections 117(1)(a) of *The Municipalities Act* and 4(b) of LA FOIP.

- [32] Subsection 117(1)(a) of *The Municipalities Act* does not explicitly state that any person is entitled to inspect invoices. It states, instead, that any person is entitled to inspect “any account paid”. *The Municipalities Act* does not define the term “account paid”. My office had difficulty finding a definition of “account paid” for this context. Instead, I have focused on the definition of account. There are many varied and broad definitions of “account”. The *Concise Oxford English Dictionary* (Tenth Edition) provides the following definition of account: “A record of financial expenditure and receipts.”
- [33] My view is that “account paid” is a concept and is not meant to reflect only one type of record. Naturally, an invoice is what comes to mind when referring to an “account paid”. However, as explained above, information on invoices between a lawyer and a client is subject to solicitor-client privilege.
- [34] In Review Report 003-2017, I found that the details of payment for legal services in a public body’s accounts payable invoice history report was not subject to solicitor-client privilege. In other words, some of the information from the lawyer’s bill was entered into the public body’s accounting system, which was the record subject of the review. Some of the data items in that record, such as purchase order number, voucher number and bank information, was information that the public body assigned to the lawyer’s bill once it was received and the exemption did not apply to these items. The lawyer’s firm’s invoice number and the due date did not reveal the nature of the advice that was sought. Finally, there was not a reasonable possibility that disclosure of the amount of the fees paid would reveal any communication protected by privilege.
- [35] There are many types of records that a person can inspect that reflect “any account paid”. I find that subsection 21(a) of LA FOIP applies to the invoices. I recommend that the RM work with the Applicant and provide other records that reflect the “account paid” to the RM’s lawyer.
- [36] I have not examined the invoices. However, I am satisfied that the RM has made a *prima facie* case that subsection 21(a) of LA FOIP applies to these three records.

Communications between the RM and legal counsel

- [37] The RM withheld five records that qualify as communications between the RM and legal counsel. In its affidavit, the RM identified the legal counsel. I am satisfied that these communications are between the RM and its solicitor. The first test is met.
- [38] In the original affidavit requested by my office, the RM did not indicate specifically if each of the communications involved the seeking or giving of legal advice. My office requested further particulars from the RM. It confirmed in a second affidavit, dated September 28, 2018, that the remaining records contain legal advice. The second test is met. I am also satisfied that the communication was intended to be confidential.
- [39] I have not examined these records. However, I am satisfied that the RM has made a *prima facie* case that subsection 21(a) of LA FOIP applies to these five records.

Email that the RM provided to my office

- [40] As noted, the RM provided one email to my office to which it claims is not responsive to the Applicant's access request. Although the RM claims it is not responsive to the Applicant's request, it indicated that privilege attaches to the record. As such I will consider whether subsection 21(a) of LA FOIP applies to the email.
- [41] Upon review of the record, the first test is met because it is a communication between a solicitor and a client. However, the information in the record does not entail the seeking or giving of legal advice. As noted, the RM has made a *prima facie* case that the attachments do contain legal advice, however, the email at issue only appears to convey the attachments. The second test is not met.
- [42] Subsection 21(a) of LA FOIP does not apply to this record.
- [43] Further, as discussed earlier in this report, subsection 117(1)(a) of *The Municipalities Act* provides that any person is entitled to inspect "any account paid" and that there are many

types of records that a person can inspect that can reflect “any account paid”. I recommended that the RM work with the Applicant and provide other records that reflect the “account paid” to the RM’s lawyer. This is one of such records that could achieve this goal.

[44] I recommend that the RM release this remaining record to the Applicant.

IV FINDINGS

[45] Although I have not examined the record, I find that the RM has made a *prima facie* case that subsection 21(a) of LA FOIP applies to the eight records.

[46] I find that the remaining record is responsive to the Applicant’s request.

[47] I find that subsection 21(a) of LA FOIP does not apply to the remaining record.

V RECOMMENDATIONS

[48] I recommend that the RM work with the Applicant and provide other records that reflect the “account paid” to the RM’s lawyer.

[49] I recommend that the RM continue to withhold the eight records to which I have found that the RM has made a *prima facie* case that subsection 21(a) of LA FOIP applies.

[50] I recommend that the RM release the remaining record to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 7th day of December, 2018.

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