



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 031-2019, 069-2019

City of Saskatoon

July 25, 2019

Summary: The City of Saskatoon (the City) withheld portions of records responsive to the Applicant's access to information request pursuant to subsections 16(1)(a), 20 and 21(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Applicant requested that the Commissioner review the application of the exemptions and the City's search for records. The Commissioner found that the City performed a reasonable search for records. He also found that the exemptions applied, except in one instance, and recommended the City release one portion of the record to the Applicant.

I BACKGROUND

[1] On December 11, 2018, the Applicant made the following access to information request to the City of Saskatoon (the City):

...a copy of the email(s) sent by City Hall Security Manager to City Hall staff regarding posters on or near August 23rd, 2018.

...all manuals, policies and procedures regarding community standards content-based grounds for removal of street posters that are or were in the possession of the Office of the City Solicitor or City Hall Security.

[2] On January 10, 2019, the City responded to the Applicant. It provided some responsive records to the Applicant. It also indicated that some information was withheld pursuant to section 20 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

- [3] On January 16, 2019, the Applicant requested a review of the City's search for records. On January 23, 2019, my office notified both the City and the Applicant of my intention to undertake a review of the City's search for records.
- [4] On February 6, 2019, the City sent a second response to the Applicant. It had found two additional responsive records. It provided the Applicant with portions of the record, but withheld other portions pursuant to subsections 16(1)(a), 20 and 21(a) of LA FOIP.
- [5] On February 8, 2019, the Applicant requested that my office review the application of the exemptions. On March 12, 2019, my office notified both the Applicant and the City that I would also be undertaking a review of all exemptions applied, in addition to the search.

II RECORDS AT ISSUE

- [6] The City redacted information from three emails, which each are two pages in length. Information is withheld from five of these pages pursuant to subsections 16(1)(a), 20 and 21(a) of LA FOIP. See Appendix A for details.

III DISCUSSION OF THE ISSUES

1. Does LA FOIP apply in these circumstances?

- [7] The City qualifies as a local authority pursuant to subsection 2(f)(i) of LA FOIP. Therefore, I have the authority to conduct this review.

2. Did the City perform a reasonable search for records?

- [8] Section 5 of LA FOIP provides:

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.

[9] Section 5 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.

[10] The Applicant requested:

...a copy of the email(s) sent by City Hall Security Manager to City Hall staff regarding posters on or near August 23rd, 2018.

...all manuals, policies and procedures regarding community standards content-based grounds for removal of street posters that are or were in the possession of the Office of the City Solicitor or City Hall Security.

[11] The Applicant requested a search because the Applicant believed that there is a policy respecting the removal of posters in the City based on content. The Applicant indicated that an employee of the City informed the Applicant that such a policy existed; however, the Applicant did not provide details about who told the Applicant about the policy or when. The City acknowledged a conversation that the Corporate Security Manager had with the Applicant where the situations as to when a poster might be removed was discussed. However, the City has indicated that a policy that addresses the removal of posters did not exist.

[12] In the notification, my office requested that the City describe its search efforts for the records in its possession or control that are responsive to the Applicant's request.

[13] The threshold that must be met is one of "reasonableness". In other words, it is not a standard of perfection, but rather what a fair and rational person would expect to be done or consider acceptable. LA FOIP does not require the local authority to prove with absolute certainty that records do not exist. However, it must demonstrate that it has conducted a reasonable search to locate them.

[14] 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.

- [15] 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. Examples of the type of information that can be provided can be found in my office's resource *IPC Guide to Exemptions for FOIP and LA FOIP*.
- [16] The City reported that, on December 13, 2018, its Access and Privacy Officer requested that the Corporate Security Manager search for emails the Manager sent "to City Hall staff regarding posters on or near August 23rd, 2018", which corresponds with the Applicants request.
- [17] The Access and Privacy Officer also asked the Corporate Security Manager to let her know of any "manuals, policies and procedures regarding community standards content-based grounds for removal of street posters that are or were in the possession of the Office or the City Solicitor or City Hall Security" as per the Applicant's request.
- [18] The Corporate Security Manager identified an email that the Manager sent on August 23, 2018 to City Hall and Civic Square East Staff. The City indicated that these were sent by distribution email groups. The Corporate Security Manager also identified *Bylaw No. 7565, The Poster Bylaw, 1996*.
- [19] The Access and Privacy Officer also described the search of the City's website and Documentum (an electronic filing system) for responsive records. The Access and Privacy Officer used the search terms of "posters" and "poster removal."
- [20] The use of the term "posters" resulted in over 350 records. They were reviewed and the City determined that none were responsive to the Applicant's access request. The City also reported that search using the term "poster removal" produced no records in Documentum. *Bylaw No. 7565, The Poster Bylaw, 1996* was identified during a search of the City's website.

[21] After my office notified the City of our review of the search on January 23, 2019, and for the purpose of preparing the submission for this review, the Access and Privacy Officer consulted again with the Corporate Security Manager about the Manager's search for records. The Corporate Security Manager provided the Access and Privacy Officer with two additional emails. The Access and Privacy Officer discussed the scope of the Applicant's request and determined that the term "City Hall staff" should be interpreted broadly. As such, they agreed that the two additional emails were responsive to the Applicant's request. The City provided the Applicant with severed copies of these emails on February 6, 2019.

[22] I am satisfied that the City has performed a reasonable search for responsive emails that the Corporate Security Manager has sent and for responsive manuals, policies and procedures.

3. Does subsection 16(1)(a) of LA FOIP apply to the record?

[23] Subsection 16(1)(a) of LA FOIP provides:

16(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority;

[24] Subsection 16(1)(a) of LA FOIP is an exemption that is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice. My office has recently adopted the following test for subsection 16(1)(a) of LA FOIP:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. Was the advice, recommendations, analyses and/or policy options developed by or for the local authority?

[25] The City applied subsection 16(1)(a) of LA FOIP to two redactions on the first page of the record and one redaction on the fifth page.

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?

[26] In its submission, the City submitted that the redactions qualify as advice or analyses.

[27] Advice is guidance offered by one person to another. It can include the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice encompasses material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It can be an implied recommendation. The “pros and cons” of various options also qualify as advice. It should not be given a restricted meaning. Rather, it should be interpreted to include an opinion that involves exercising judgement and skill in weighing the significance of fact. It includes expert opinion on matters of fact on which a government institution must make a decision for future action.

[28] Advice includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.

[29] With respect to the last redaction on the first page and the redaction on the fifth page, I agree that the severed information qualifies as advice. Both redactions provide guidance to City staff.

[30] Analyses is a detailed examination of the elements or structure of something; the process of separating something into its constituent elements.

[31] The City indicated that the other information redacted on the first page pursuant to subsection 16(1)(a) of LA FOIP qualifies as analysis. The information does not provide details of elements of something. It is an opinion and a prediction made about the

Applicant. The information does not provide the analysis about how the opinion and prediction was formed. I am not persuaded that the information qualifies as advice, proposals, recommendations, analyses or policy options. Therefore, subsection 16(1)(a) of LA FOIP does not apply to the first redaction on the first page. I suggest that the City consider whether this redaction qualifies as the Applicant's personal information.

2. Was the advice, recommendations, analyses and/or policy options developed by or for the local authority?

[32] "Developed by or for" means the advice, proposals, recommendations, analyses and/or policy options must have been created either 1) within the local authority, or 2) outside the local authority but for the local authority (for example, by a service provider or stakeholder).

[33] For information to be developed by or for a local authority, the person developing the information should be an official, officer or employee of the government institution, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the local authority.

[34] To put it another way, in order to be engaged in an advisory role or have a sufficient connection to the local authority, the advice, proposals, recommendations, analyses and/or policy options should:

- i) be either sought, be expected, or be part of the responsibility of the person who prepared the record; and
- ii) be prepared for the purpose of doing something, for example, taking an action or making a decision; and
- iii) involve or be intended for someone who can take or implement the action.

[35] The City submitted that the Corporate Security Manager wrote the advice found in the record. It was the Manager's responsibilities to inform and direct the security services for the City. The advice was prepared to keep those with the need to know within the City

abreast of the recent activity regarding posters placed around City Hall that did not comply with the bylaws. Finally, the City indicated that the advice involved employees that will be following the advice with respect to posters around City Hall.

[36] I am satisfied that the advice was developed by and for the City. Subsection 16(1)(a) of LA FOIP applies to portions of the record. See Appendix A for details.

4. Does section 20 of LA FOIP apply to the record?

[37] Section 20 of LA FOIP provides:

20 A head may refuse to give access to a record if the disclosure could threaten the safety or the physical or mental health of an individual.

[38] This provision is meant to provide the ability to refuse access to information if its disclosure could threaten the safety, physical or mental health of an individual.

[39] Threaten means to expose to risk or harm. Safety implies relative freedom from danger or risks. Physical health refers to the well-being of an individual's physical body. Mental health refers to the functioning of a person's mind in a normal state.

[40] In order to determine whether a threat to the safety, physical or mental health of any person exists, all three parts of the following test should be met:

1. Is there a reasonable expectation of probable harm?
2. Does the harm constitute damage or detriment and not mere inconvenience?
3. Is there a causal connection between disclosure and the anticipated harm?

[41] Generally, this means the public body must make an assessment of the risk and determine whether there are reasonable grounds for concluding there is a danger to the health or safety of any person. That assessment must be specific to the circumstances of the case under consideration. The inconvenience, upset or unpleasantness of dealing with difficult or

unreasonable people is not sufficient to trigger this section. The threshold cannot be achieved on the basis of unfounded, unsubstantiated allegations.

[42] The City has severed and applied section 20 of LA FOIP to names, work telephone numbers and email addresses of City employees who have sent or received the emails that make up the records. This type of information was severed from five pages of the record.

1. Is there a reasonable expectation of probable harm?

[43] In its submission, the City has detailed recent behaviour of the Applicant including threatening employees (threatening to attend City Hall with a knife) and providing correspondence to the City's solicitor with "blood spots". A "no contact" order is in place for the Applicant not to contact City employees. The Applicant received a court imposed condition not to attend or communicate with City Hall. The City indicated that it relied on section 20 of LAFOIP as it is its assessment that release of the record could assist the Applicant to further threaten the safety, physical and mental health of its employees.

[44] The City also indicated that it did provide the first letter of each of the first and last name of City employees and security service provider's email address and area code of the Manager of Corporate Security Service's telephone number to the Applicant. This was provided as a way to balance between providing the Applicant with as much access to the record without disclosing the information to which section 20 of LA FOIP is applied.

[45] I agree there is a reasonable expectation of probable harm.

2. Does the harm constitute damage or detriment and not mere inconvenience?

[46] The City indicated that the behaviour of the Applicant has caused stress among City employees who are aware of threats and other activities of the Applicant. I am satisfied that the threatening behaviour of the Applicant could constitute damage or detriment and not mere inconvenience. Further, in its submission, the City noted that it has a

responsibility under subsections 3-8(a) and (d) of *The Saskatchewan Employment Act* section to ensure the health, safety, and welfare of all employees while at work.

3. Is there a causal connection between disclosure and the anticipated harm?

[47] The City's submission indicated that the Applicant's behaviour was enough for a "no contact" order to be put in place. It noted that the threatening, posturing behaviour the Applicant has demonstrated does not provide a safe work environment at City Hall. It submitted that by releasing the names and contact information for specific City staff, the Applicant would have new means to conduct harassing activity and physically threatening behaviour towards City employees.

[48] I am satisfied that the City has demonstrated that section 20 of LA FOIP applies to the record. See Appendix A for details.

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

[49] 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;

[50] The City applied subsection 21(a) of LA FOIP to a portion of page 2 and a portion of page 5 of the record.

[51] 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.

[52] My office has established a process to consider a claim of solicitor-client privilege. When considering claiming solicitor-client privilege, public bodies have three options when preparing records for review with the Information and Privacy Commissioner (IPC):

1. Provide the documents to the IPC with a cover letter stating the public body is not waiving the privilege;
2. Provide the documents to the IPC with the portions severed where solicitor-client privilege is claimed;
3. Provide the IPC with an affidavit with a schedule of records (see sample in the Rules of Procedure).

[53] In this case, the City provided my office with a copy of the records.

[54] 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?

[55] As noted, the first part of the test for subsection 21(a) of LA FOIP requires that a communication be between a solicitor and a client. However, past decisions of Commissioners from across the country have considered records in the “continuum” of giving legal advice.

[56] A resource from Alberta’s Office of the Information and Privacy Commissioner (Alberta OIPC) entitled *The Basics of Solicitor-client Privilege* provides the following:

Documents that are not actually passed between the solicitor and client may be part of the continuum of legal advice, or reveal information subject to solicitor-client privilege. More examples of records found to be part of the continuum of legal advice:

...

- written communications between officials or employees of a public body, in which they quote or discuss the legal advice given by the public body's solicitor (Order 99-013 at paras. 62-63; Order 2001-025 at para. 67) ...

[57] Upon review of the record it appears that the Corporate Security Manager was sharing advice provided by the City's Solicitor. The City's submission confirms that the advice was provided by the City Solicitor. I am satisfied that the records are within the continuum of solicitor-client privilege.

[58] The City's submission also indicated that the record contains legal advice about a bylaw. It also indicated that the records were intended to be confidential as they were created for internal use only. Upon review of the record, I agree with the City's submission.

[59] Subsection 21(a) of LA FOIP applies to the record. See Appendix A for details.

IV FINDINGS

[60] I find the City performed a reasonable search for records.

[61] I find that subsections 16(1)(a), 20 and 21(a) of LA FOIP apply to portions of the record as described in Appendix A.

V RECOMMENDATION

[62] I recommend that the City release and withhold information as described in Appendix A.

Dated at Regina, in the Province of Saskatchewan, this 25th day of July, 2019.

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

Appendix A

PAGE OF THE RECORD	SECTION(S) APPLIED BY THE MINISTRY	DOES IT APPLY?	RELEASE OR WITHHOLD
1 (Redaction 1)	20	Yes	Withhold
1 (Redaction 2)	20	Yes	Withhold
1 (Redaction 3)	16(1)(a)	No	Release
1 (Redaction 4)	16(1)(a)	Yes	Withhold
2	20	Yes	Withhold
2	21(a)	Yes	Withhold
3	20	Yes	Withhold
4	No redactions		Released
5	16(1)(a)	Yes	Withhold
5	20	Yes	Withhold
5	21(a)	Yes	Withhold
6	20	Yes	Withhold