SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER

REVIEW REPORT 035/2015

Rural Municipality of Shellbrook #493

Summary:	The Applicant requested records from the Rural Municipality of Shellbrook (RM). The RM provided some records to the Applicant in full but refused to confirm or deny the existence of other records pursuant to subsection 7(4) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Upon review, the Commissioner found that the RM did not appropriately apply subsection 7(4) of LA FOIP and recommended that if responsive records existed they should be released to the Applicant. The RM complied with this recommendation and released two emails to the Applicant.

I   BACKGROUND

[1]   On January 2, 2015, the Rural Municipality of Shellbrook (RM) received an access to information request from the Applicant for:

> Any records emails other documents involving the installation of the culvert on NE 9-49-3-w3 as well as all communication from [name of individual] or the [individual's family] May of 2013 to Nov 1 2014 also [name of individual] Division Two Councillor.

[2]   Legal counsel representing the RM responded to the Applicant by a letter dated February 2, 2015. The letter indicated that access was granted in full to a number of emails. Those emails were attached. Further, the RM indicated that confirmation or denial of the existence of other records was refused pursuant to subsection 7(4) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[3]   On February 18, 2015, my office received a Request for Review from the Applicant.

[4]   My office notified the RM and the Applicant of our intention to undertake a review on March 1, 2015. A submission was received from legal counsel representing the RM on March 27, 2015. However, my office requested additional details on April 2, 2015. A supplementary submission was received on April 14, 2015.   A submission was received from the Applicant on March 13, 2015.

II   RECORDS AT ISSUE

[5]   The RM has elected not to disclose whether some records responsive to the Applicant's access request exist or not.

III   DISCUSSION OF THE ISSUES

[6]   The RM is a "local authority" pursuant to subsection 2(f)(i) of LA FOIP.

1.   Did the RM properly apply section 7(4) of LA FOIP to the records requested?

[7]   Subsection 7(4) of LA FOIP provides that a local authority can refuse to confirm or deny the existence of records as follows:

> **7**(4) Where an application is made with respect to a record that is exempt from access pursuant to this Act, the head may refuse to confirm or deny that the record exists or ever did exist.

[8]   By invoking subsection 7(4) of LA FOIP, the local authority is denying the Applicant the right to know whether a record exists, even if one does not. This subsection provides local authorities with a significant discretionary power that should be exercised only in rare cases. It creates an aura of secrecy around what may be a significant expenditure of public moneys. In our opinion, this provision, and its identical provision in *The Freedom of Information and Protection of Privacy Act* (FOIP), are meant to protect highly sensitive situations where confirming or denying the mere existence of a record would itself pose significant risk. The types of risks could include risks to national security, an individual causing physical harm to others or risk to others by revealing a law

enforcement investigation is underway. Although there are exemptions to protect records that fall into these categories, this provision enables the local authority to address risks that could occur just by revealing a record exists. It is not meant to protect a local authority from a pending lawsuit, embarrassment or negative public scrutiny.

[9]   A jurisdictional scan indicates that British Columbia and Ontario have a similar provision but it can only be invoked where there would be an unjustified invasion of privacy or interference with law enforcement. Alberta, Prince Edward Island and Manitoba are similar but in addition to the above, the provision can be invoked where disclosure would threaten health or safety. The federal *Access to Information Act* (ATIA) has a provision most similar to Saskatchewan's. It is broad and the federal Information Commissioner has recommended that it be more narrowly defined as it is in other provinces. Saskatchewan's subsection 7(4) of LA FOIP and FOIP should also be amended to narrow the scope of this discretionary power in order to bring it into line with other provinces.

[10]   In order for subsection 7(4) of LA FOIP to be found to apply, there must be specific exemption(s) that could be relied upon to withhold the records if they existed. Given that subsection 7(4) of LA FOIP has been invoked, I will be careful and avoid confirming or denying the existence of any responsive records. Further, I will lay out the reasons for my findings in very general terms only.

[11]   In this circumstance, the RM indicated that if the records existed it could rely on sections 21 and 13 of LA FOIP to withhold them. I will address section 21 of LA FOIP first.

[12]   Section 21 of LA FOIP is a discretionary exemption which allows local authorities to withhold information that is subject to solicitor-client privilege or relates to the provision of legal services or advice. Section 21 of LA FOIP provides:

> **21** A head may refuse to give access to a record that:
> (a) contains information that is subject to solicitor-client privilege;
> (b) was prepared by or for legal counsel for the local authority in relation to a matter involving the provision of advice or other services by legal counsel; or

(c) contains correspondence between legal counsel for the local authority and any other person in relation to a matter involving the provision of advice or other services by legal counsel.

[13] In its submission to my office, the RM did not clarify which subsection of section 21 it would rely on. Each subsection has a different set of criteria that must be met in order for my office to find it applies. I will address each one.

[14] For subsection 21(a) of LA FOIP to be found to apply, all three parts of the following test must be met:

1. The record must be a communication between solicitor and client;

2. The communication must entail the seeking or giving of legal advice or legal assistance; and

3. The communication must be intended to be confidential.

[15] The rule of solicitor-client privilege is considered a fundamental civil and legal right that guarantees clients a right to privacy in their communications with their lawyers. As such, it is necessary that the communication be one between solicitor and client.

[16] Based on the submission from the RM, I find that subsection 21(a) of LA FOIP would not apply if the records existed.

[17] For subsection 21(b) of LA FOIP to be found to apply, both parts of the following test must be met:

1. The records must be "prepared by or for" an agent or legal counsel for the local authority; and

2. The records were prepared in relation to a matter involving the provision of advice or other services by the agent or legal counsel.

[18]   This provision is broader than subsection 21(a) of LA FOIP and is meant to capture records prepared by or for legal counsel for a local authority in the course of providing legal advice and services.

[19]   Based on the submission received from the RM, I find that subsection 21(b) of LA FOIP would not apply if the records existed.

[20]   For subsection 21(c) of LA FOIP to be found to apply, both parts of the following test must be met:

1. The record must be correspondence between the local authority's legal counsel and any other person; and

2. The correspondence must be in relation to a matter involving the provision of advice or other services by legal counsel.

[21]   This provision is also broader than subsection 21(a) of LA FOIP and is meant to capture records that contain correspondence between legal counsel for the local authority and others.

[22]   Based on the submission received from the RM, I find that subsection 21(c) of LA FOIP would not apply if the records existed.

[23]   I will now address the application of section 13 of LA FOIP. Section 13 is a mandatory exemption which means that the head of the local authority is obligated to enforce the exemption where it thinks it may apply. Section 13 allows local authorities to withhold information that it obtained in confidence from other governments which are listed in its subsections. Section 13 provides as follows:

> **13**(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:
>
> (a) the Government of Canada or its agencies, Crown corporations or other institutions;
>
> (b) the Government of Saskatchewan or a government institution;

(c) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;

(d) the government of a foreign jurisdiction or its institutions; or

(e) an international organization of states or its institutions;

unless the government or institution from which the information was obtained consents to the disclosure or makes the information public.

(2) A head may refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from another local authority or a similar body in another province or territory of Canada.

[24] Based on the submission from the RM, it is not necessary to consider subsections 13(1)(a),(c), (d), (e) or 13(2). I will only need to consider subsections 13(1)(b) of LA FOIP.

[25] For subsection 13(1)(b) of LA FOIP to be found to apply, both parts of the following test must be met:

1. Was the information obtained from the government of Saskatchewan or a government institution?

2. Was the information obtained implicitly or explicitly in confidence?

[26] Section 13 uses the term "information contained in a record" rather than "a record" like other exemptions in LA FOIP. Therefore, what is at issue must constitute 'information'. *Information* is defined as facts or knowledge provided or learned as a result of research or study.

[27] For information to be found to have been obtained in confidence, the supplier of the information has generally stipulated how the information can be disseminated. The information must have been obtained in circumstances that clearly place an obligation on the local authority to maintain confidentiality. *In confidence* usually describes a situation of mutual trust in which private matters are relayed or reported.

[28] Based on the submission provided by the RM, I find that subsection 13(1)(b) of LA FOIP would not apply if the records existed.

[29]   As section 21 and subsection 13(1)(b) of LA FOIP have been found not to apply, I find that there is no reasonable basis for the RM to invoke subsection 7(4) of LA FOIP in this circumstance.

[30]   On July 2, 2015, my office shared the above analysis and findings with the RM. My office recommended that the RM release the record if it did indeed exist. On July 14, 2015 the RM responded to my office indicating that it would comply with the recommendation and proceeded to release two emails to the Applicant.

IV   FINDINGS

[31]   I find that section 21 and subsection 13(1)(b) of LA FOIP would not apply in this circumstance.

[32]   I find that there is no reasonable basis for the RM to invoke subsection 7(4) of LA FOIP.

V   RECOMMENDATIONS

[33]   As the Rural Municipality of Shellbrook released the record to the Applicant, there are no further recommendations.

[34]   I recommend that the Legislative Assembly amendment subsections 7(4) of *The Local Authority Freedom of Information and Protection of Privacy Act* and *The Freedom of Information and Protection of Privacy Act* to narrow the scope of these provisions to bring them in line with other provinces.

Dated at Regina, in the Province of Saskatchewan, this 7th day of August, 2015.

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