



REVIEW REPORT 037-2017

City of Saskatoon

September 11, 2017

Summary: The Applicant submitted an access to information request to the City of Saskatoon (the City). The City responded to the Applicant by refusing to confirm or deny the existence of records. The Applicant appealed to the Information and Privacy Commissioner (IPC). In the course of the review, the City changed its position by indicating it was no longer refusing to confirm or deny the existence of records. The IPC recommended that the City contact the Applicant to clarify and possibly narrow his access to information request within three days of the issuance of this Final Report. Then, it should provide responsive records to the Applicant (without charging fees) within 30 days of receiving this Final Report.

I BACKGROUND

[1] On January 24, 2017, the City of Saskatoon (the City) received the following access to information request:

An explanation of all cost increases in construction of Remai Modern Art Gallery including: emails, official correspondence, briefing notes, handwritten notes and text messages. As well, I would like correspondence between [name of City Manager] and EllisDon Construction and Architecture 49 (SMITH CARTER) between 2013 – Present.

[2] In a letter dated February 14, 2017, the City responded by providing the Applicant with reports submitted to public meetings of City Council and City Council Standing Policy Committees. In that letter, the City refused to confirm or deny the existence of any further records responsive to the Applicant's request, pursuant to subsections 7(2)(f) and 7(4) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), which provides:

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.

- [3] On February 28, 2017, the Applicant requested a review by my office.
- [4] The City sent a revised letter dated March 10, 2017 to the Applicant. It cited sections 13 to 21, 23 and 28 of LA FOIP as the exemptions it would rely on if the records did exist. It did not specify which particular subsections of each exemption it was relying upon. In that letter it continued to neither confirm nor deny the existence of the record.
- [5] On March 13, 2017, my office notified both the Applicant and the City that it would be undertaking a review. My office requested that the City provide a submission outlining its position to my office by March 27, 2017.
- [6] My office did not receive a submission until June 6, 2017. Within its submission, the City provided arguments as to why records, if they existed, would qualify for exemption pursuant to subsections 14(1)(d), 15(1)(b), 16(1)(a), 16(1)(b), 16(1)(c), 17(1)(d), 17(1)(e), 17(1)(f), 18(1)(b), 21(a), and 28(1) of LA FOIP. Within its submission, the City also indicated it did not clarify with the Applicant his access to information request because that would imply that records did exist.
- [7] On August 1, 2017, my office provided the City with a draft review report. This draft review report included an analysis of the City's response to the Applicant pursuant to subsection 7(4) of LA FOIP and the 11 exemptions that the City provided arguments for.
- [8] On August 2, 2017, the City notified my office that it would be no longer relying on subsection 7(4) of LA FOIP. In other words, it would no longer be refusing to confirm or deny that records exist.
- [9] On August 9, 2017, 2017, my office recommended to the City that it contact the Applicant within three days of the issuance of my office's Final Report on the matter to clarify and possibly narrow the Applicant's request. The reason for my office's recommendation was because 1) the City had indicated it did not do so when it first

received the Applicant's request in January 2017, and 2) the City had indicated there are 284,901 electronic files in its central project folder, comprising 702 gigabytes worth of data. It also said its central e-mail server contains tens of thousands of emails related to the project the Applicant is seeking records about. Clarifying the access to information request with the Applicant would increase the likelihood the Applicant receives the records he is seeking.

[10] On August 31, 2017, the City responded by stating that it intends on complying with my office's recommendation to clarify and possibly narrow the Applicant's request. It also indicated that it will consider a cost estimate based on the clarified request, if it was necessary.

II RECORDS AT ISSUE

[11] At issue is whether the City can issue a fee estimate to the Applicant. Therefore, there are no records at issue in this report.

III DISCUSSION OF THE ISSUES

[12] The City qualifies as a local authority pursuant to subsection 2(f)(i) of LA FOIP.

1. Has the City followed the best practice of assisting the Applicant?

[13] There is an implied duty on the part of local authorities to take reasonable steps to ensure they respond to access to information requests openly, accurately and completely. This includes contacting an applicant soon after it receives an access to information request to clarify and possibly narrowing the request. This increases the likelihood that the applicant will receive the records he or she is seeking while reducing the amount of work that goes into processing an access request.

[14] In this case, the City did not contact the Applicant to clarify his access to information request because it was refusing to confirm or deny that records exist or ever did exist. It

believed that by clarifying the request with the Applicant would imply records exist. I disagree with the City's reasoning that clarify the Applicant's request would imply records exist. Clarification could also imply records do not exist.

[15] Since the City did not clarify the request with the Applicant, my office recommended that the City contact the Applicant within three days after I issue this Final Report. While the City has indicated to my office that it intends on complying with the recommendation, it would have been far better if the City had followed the best practice of assisting the Applicant when it first received the request. By not doing so, it has delayed the Applicant receiving the records he is seeking.

[16] I find that the City has not met the best practice of assisting the Applicant.

2. Has the City's opportunity to issue a fee estimate expired?

[17] The City has said that once it has contacted the Applicant to clarify his access to information request, it may also issue a fee estimate to the Applicant.

[18] Subsection 7(2) of LA FOIP requires that local authorities respond to access to information requests within 30 days. Subsection 7(2) of LA FOIP provides:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

...

[19] LA FOIP allows for local authorities to charge prescribed fees. Where the amount of fees is greater than the prescribed amount of \$50, subsection 9(2) of LA FOIP requires that local authorities provide a fee estimate to the applicant. The fee estimate should be issued to the applicant before the written notice required by subsection 7(2) of LA FOIP is provided to the Applicant. Subsection 9(3) of LA FOIP provides:

9(3) Where an estimate is provided pursuant to subsection (2), the time within which the head is required to give written notice to the applicant pursuant to subsection 7(2) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application.

[20] My office encourages public bodies to issue a fee estimate within the first three to 10 days of receiving an access to information request. That way, there is time remaining in the 30 day response period once an applicant indicates to the local authority that he or she wishes to proceed with his/her access to information request.

[21] In this case, the City received the Applicant's access to information request on January 24, 2017. If the City had intended on issuing a fee estimate, it should have done so prior to issuing its written notice within the legislated timeline in subsection 7(2) of LA FOIP. In other words, I find that LA FOIP does not allow for the City to issue a fee estimate 9 months after it receives an access to information request.

[22] I recommend that the City contact the Applicant within three days of this Final Report being issued to clarify his request. I suggest that the City no longer create further delay in providing the Applicant the records he seeks by issuing a fee estimate. The opportunity for the City to issue a fee estimate has expired.

IV FINDING

[23] I find that the City has not met the best practice of assisting the Applicant.

[24] I find that LA FOIP does not allow for the City to issue a fee estimate 9 months after it receives an access to information request.

V RECOMMENDATION

[25] I recommend that the City contact the Applicant within three days of this Final Report being issued to clarify and possibly narrow his request. Then, I suggest it provide responsive records, without charging fees, to the Applicant within 30 days of receiving my office's Final Report.

Dated at Regina, in the Province of Saskatchewan, this 11th day of September, 2017.

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