



## **REVIEW REPORT 038-2018**

### **University of Regina**

**November 28, 2018**

**Summary:**

The Applicant submitted an access to information request to the University of Regina (U of R). The U of R refused the Applicant some of the information requested by citing subsection 17(3) of *The Local Authority Freedom of Information and Protection of Privacy* (LA FOIP). It also issued a fee estimate to the Applicant. The Applicant appealed to the Information and Privacy Commissioner (IPC). The IPC found that the U of R did not demonstrate how subsection 17(3) of LA FOIP applied to the record. He also found that the U of R should not have issued a fee estimate. He made a number of recommendations to the U of R including rescinding its fee estimate as well as releasing the record to the Applicant.

### **I BACKGROUND**

[1] On November 7, 2017, the University of Regina (U of R) received the following access to information request:

All external research funding (both private and public) to the University of Regina including but not limited to grants and contracts. I would like the dollar amount of the funding, the funding agency/company awarding the money, the title of the research project, and the unit (faculty or department or school) that received the funding. A spreadsheet would be a sufficient format.

[2] The Applicant specified that the time period for the records she is requesting is 2006 to 2017.

[3] Based on the wording of the request, the Applicant is requesting four types of information: 1) the amount of funding, 2) the funding agency/company awarding the money, 3) the title

of the research project, and 4) the unit (faculty/department/school) that received the funding, for the time period 2006 to 2017.

[4] The U of R ran a query on a database that contained information about research grants and contracts, and it was able to generate a spreadsheet (herein referred to as the original spreadsheet). The spreadsheet included the four types of information that the Applicant sought for the time period 2006 to 2017. There were 1776 projects listed on this spreadsheet. For the purposes of this review, the U of R provided my office with a copy of this original spreadsheet. It should be noted that the 1776 projects listed on the spreadsheet was filtered to 250 projects (herein referred to as the filtered spreadsheet), as described below.

[5] The U of R contacted the Applicant by telephone to discuss the access request and to possibly narrow the request. In a letter dated December 6, 2017, the U of R summarized its understanding of a narrowed access request. Its letter stated the following:

- 1) that due to subsections 17(3) and 17(4) of LA FOIP, the U of R will not be providing two of the four types of information requested by the Applicant, which are the funding agency/company awarding the money and the unit that received the funding,
- 2) that due to the costs associated the effort of processing a great number of records, the U of R had reached out to the Applicant to narrow the scope of the access request,
- 3) that in conversation with the Applicant, it has learned that the Applicant is interested in the influence of the fossil fuel industry on education, specifically oil, gas, coal, carbon capture, climate change and alternative energy. It has used these words in its search for responsive records and it was able to narrow the number of responsive records from 1776 to 243,
- 4) that the Applicant contact the U of R to confirm she is agreeable to the approach the U of R is taking to processing the access request,
- 5) that if the Applicant is agreeable to the U of R's approach, then the U of R would proceed to issuing a fee estimate,
- 6) that the U of R is extending the 30 day response period by an additional 30 days pursuant to subsections 12(1)(a)(i) and 12(1)(b) of LA FOIP.

[6] In an email dated December 12, 2017, the Applicant responded to the U of R by stating she would like the U of R to add one more search term, “petroleum”, and that the U of R could go ahead with issuing a fee estimate.

[7] In a letter dated December 18, 2017, the U of R responded by stating the following:

- 1) that the U of R has added the search term “petroleum” so the number of responsive records has increased from 243 to 250,
- 2) that due to subsections 17(3) and 17(4) of LA FOIP, the U of R can only disclose 1) the project title and 2) the amount of funding that was received, which the U of R will refer to as the “the Particulars”. It said “only the Particulars will be provided in respect of your Request [sic],...”.

[8] Its letter also said the following regarding the fee estimate for providing access to “the Particulars”:

In order to provide access to the Particulars, we will need to undertake a number of steps. We anticipate that this work will include:

- (a) reviewing the list of 250 records for potentially non-responsive records;
- (b) determining if any granting agencies currently make the information publicly available (in which case, we can release this information to you without further analysis);
- (c) removing any records that may be exempt from disclosure under one or more provisions of LAFOIP (including, but not limited to, sections 18(1) "Economic or other interests", 19(1) "Third party information", and 20 "Testing procedures, tests and audits").

Therefore, the fee to process your Request is \$1,020.00, calculated as follows:

| Type of Fee  | Calculation of Fees                       | Total Amount of Fees |
|--|---|----------------------|
| Time required to search for records  | 33 hours x \$15.00/half hour <sup>1</sup> | \$ 990.00            |
| Time required to prepare records for disclosure (the listing of Particulars) | 2 hours x \$15.00/half hour               | 60.00                |
| Less: one hour free  | 1 hour x \$15.00/half hour                | 30.00                |
| Total fees required to process access request                                |   | \$1,020.00           |

<sup>1</sup>Comprised of 4 hours to investigate whether information is publicly available, 4 hours to locate the paper files, and approximately 10 minutes per file to review the provisions of the funding / grant agreement and to assess applicable exemptions to disclosure (multiplied by an estimated 150 remaining files)

- [9] In an email dated January 3, 2018, the Applicant asked if she could also get the name of the funding agencies. She said the following:

I am wondering, since the letter doesn't make mention of it, would we also get the name of the funder along with the title of the research and amount of funding.

- [10] In an email dated January 9, 2018, the U of R responded by stating that only the project title and the amount of funding would be provided:

As indicated in my letter of December 6, 2017, you would not be provided information regarding the funding agency/company awarding the funds. Only the project title and amount of funding received would be provided.

- [11] In an email dated January 31, 2018, the Applicant indicated that the information would be of no use without the funding agency. She said the following:

The information is of no use to us without the funding agency, and furthermore, we have no sense of how many records will be further eliminated because of further provisions under the act.

- [12] In an email dated February 6, 2018, the U of R responded as follows:

Subsection 17(4) of LAFOIP requires the University to disclose only (i) the title of, and (ii) the amount of funding being received with respect to, such academic research. This is true for all cases, regardless of the funding source.

Subsection 7(2)(b) states that in response to an access request, if the record requested is published, then the Head should refer the applicant to the publication.

Therefore, if (as you stated in your email of January 31) the information is of no use without the funding agency, and you're planning to narrow your request to only public sources of funding, I think that your best course of action would be to either search their funding information directly (utilizing websites or other publications of public funding bodies) or make the access requests to those funding bodies directly and obtain your desired information in that fashion.

- [13] On March 1, 2018, the Applicant requested a review by my office.

- [14] On March 9, 2018, my office notified both the Applicant and the U of R that it would be undertaking a review.

[15] In its submission to my office, the U of R raised two concerns. The first concern is that it asserts that the Applicant is requesting information and not records. The second concern is that it asserts that the Applicant is prematurely requesting my office to review its refusal of access to records. I will analyze these issues below.

## **II RECORD AT ISSUE**

[16] The record at issue is the information in the database. This information is captured on the filtered spreadsheet.

## **III DISCUSSION OF THE ISSUES**

### **1. Does my office have jurisdiction to review this matter?**

[17] The U of R is a local authority as defined by subsection 2(f)(xii) of LA FOIP. Therefore, I find that my office has jurisdiction to review this matter.

### **2. To what record is the Applicant entitled?**

[18] Section 5 of LA FOIP provides individuals with the right of access to records that are in the possession or under the control of a local authority. It says:

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.

[19] Subsection 2(j) of LA FOIP defines “record” as follows:

2 In this Act:

...

(j) “record” means a record of information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include computer programs or other mechanisms that produce records;

[20] In its submission, the U of R asserts that the Applicant has requested information and not records. It says:

[The Applicant] has asserted, in her request for Review, that she has been refused access to all or a part of the records requested. To be clear, [the Applicant] has not requested access to any records. She has asked the University review its records and generate a spreadsheet containing certain information.

[21] In the past, my office has said that public bodies are not obligated to create records which do not exist. For example, in Review Report 313-2016, I said that a public body's duty to assist does not include an obligation to create records which do not currently exist. However, if the public body has records containing the raw information that is sought by the Applicant that can be produced, then those records would be responsive to the Applicant's access request.

[22] In the course of my office's review, the U of R informed my office that the filtered spreadsheet is not the record sought by the Applicant because:

- 1) Some of the projects listed on the spreadsheet will not be responsive to the Applicant's access request because some of the projects may not be focused on the fossil fuel industry.
- 2) The funding amount on the spreadsheet is not necessarily straightforward. For example, the funding amount on the spreadsheet could be the amount of funding spread over a few years or the funding amount could be double-counted on the spreadsheet.

[23] The U of R informed my office that it intends to use the filtered spreadsheet as a starting point for its search for responsive records. It said that if it were to proceed with processing the access request, it would create a record by doing the following:

- 1) Narrow the filtered spreadsheet by review the project titles. Based on the project titles, the U of R would be able to deem some of the projects to be non-responsive to the Applicant's access request because they would be clearly not related to the Applicant's interest in the fossil fuel industry, including oil, gas, coal, carbon capture, climate change, petroleum, climate change and alternative energy.
- 2) Based on the narrowed spreadsheet, pull the paper file located in the Research Office of each research project listed.
- 3) Review the paper file and determine if the project is responsive to the Applicant's access request.

- 4) If the project is responsive, then create a new record (a table, list, or spreadsheet) that contains the information the Applicant is seeking. To create this new record, it would use the information from the paper file.
- 5) Apply exemptions to the information in the record that the U of R is not willing to release.

[24] Further, the U of R said that as it pulled the paper files, if it came across relevant information responsive to the Applicant's access request, it would include such information in the newly created record. It said that since that the time period specified by the Applicant goes back more than ten years, it is possible that not all potentially responsive information was recorded in the database. Therefore, it would pay attention to any responsive information that it might discover in its search efforts.

[25] As already noted, LA FOIP does not require local authorities to create records which do not exist to respond to access requests. Therefore, I find that LA FOIP does not require the U of R to undertake the above steps to respond to the Applicant's access request.

[26] The filtered spreadsheet, however, is a record containing the raw information that is responsive to the Applicant's access request. I recommend that the U of R regard the filtered spreadsheet as a record responsive to the Applicant's access request. If it determines a project listed on the spreadsheet is non-responsive to the access request, then it can sever that project from the record and mark it as "non-responsive". Further, if information in the spreadsheet is not straightforward, such as the funding amount, then it could consider including an explanation as a part of its duty to assist. Subsection 5.1(2) of LA FOIP provides the duty to assist as follows:

- 5.1(2) On the request of an applicant, the local authority shall:
  - (a) provide an explanation of any term, code or abbreviation used in the information; or
  - (b) if the local authority is unable to provide an explanation in accordance with clause (a), endeavour to refer the applicant to a person who is able to provide an explanation.

[27] If the Applicant receives a copy of the filtered spreadsheet and determines she requires additional records, she can submit another access request under LA FOIP.

**3. Did the Applicant prematurely request a review for the U of R's application of subsection 17(3) of LA FOIP?**

[28] Subsection 38(1) of LA FOIP provides that an Applicant can request a review by my office when a local authority makes a decision pursuant to section 7 of LA FOIP. Subsection 38(1) of LA FOIP reads as follows:

38(1) Where:

(a) an applicant is not satisfied with the decision of a head pursuant to section 7, 12 or 36;

[29] As mentioned earlier, the Applicant asserts that the U of R refused her access to records. Subsection 7(2)(d) of LA FOIP provides as follows:

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

...

(d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;

[30] However, in its submission, the U of R asserts it has not refused her access to records yet. It says it intends to apply subsection 17(3) of LA FOIP but it has not actually reviewed the record to apply the exemption.

[31] As noted in the background, the U of R communicated to the Applicant in its letters dated December 6, 2017 and December 18, 2017 that due to subsections 17(3) and 17(4) of LA FOIP, it would only be disclosing the project title and the amount of funding received. **It would not be releasing information about the funding agency/company nor the unit that received the funding.** Therefore, the U of R is refusing the Applicant access to two of the four types of information she is requesting.

[32] I find that the Applicant is not prematurely requesting the review of the U of R's reliance on subsection 17(3) of LA FOIP to refuse her access to the information about the funding

agency/company awarding the money and the unit (faculty or department or school) that received the funding.

**4. Did the U of R properly apply subsection 17(3) of LA FOIP?**

[33] Subsection 17(3) of LA FOIP provides as follows:

17(3) The head of the University of Saskatchewan, the University of Regina or a facility designated as a hospital or a health centre pursuant to *The Provincial Health Authority Act* may refuse to disclose details of the academic research being conducted by an employee of the university, hospital or health centre, as the case may be, in the course of the employee's employment.

[34] In order for subsection 17(3) of LA FOIP to apply, the local authority must demonstrate that the release of records would disclose details of the academic research being conducted by an employee of the university in the course of the employee's employment. In this case, the U of R must demonstrate how releasing the funding agency/company awarding the money and the unit (faculty or department or school) that received the funding would disclose details of academic research being conducted by an employee of the university in the course of the employee's employment.

[35] In its submission, the U of R describes subsection 17(3) of LA FOIP as discretionary but a blanket exemption that applies to all academic research. It says:

Subsection 17(3) of the Act is a discretionary, but blanket, exemption that applies to all academic research. It recognizes, in statutory fashion, (i) the unique, often sensitive, and potentially competitive nature of such research, (ii) the academic freedom of the faculty members conducting such research and (iii) the conditions that may be imposed by funding or granting agencies or entities when faculty members are engaged (through the University) to conduct research.

[36] The U of R's position that subsection 17(3) is a blanket exemption contrasts with section 8 of LA FOIP, which requires local authorities to apply severing where appropriate but provide the Applicant the remainder of the record. Section 8 of LA FOIP provides:

8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

[37] The U of R has not conducted a line-by-line review of the record pursuant to section 8 of LA FOIP in order to apply subsection 17(3) of LA FOIP. It applied subsection 17(3) of LA FOIP in the abstract. I find that it did not meet its obligations under section 8 of LA FOIP.

[38] Further, the U of R argues that disclosing any information beyond what subsection 17(4) of LA FOIP requires would have a chilling effect on academic freedom, competitiveness and research at the University. It said the following:

The University submits that disclosure of anything other than the Prescribed Information would be inconsistent with the purposes of the Act and would have a chilling effect on academic freedom, competitiveness and research at the University.

[39] Subsection 17(4) of LA FOIP requires that the U of R disclose the title of and the amount of funding being received with respect to academic research. It provides:

17(4) Notwithstanding subsection (3), where possible, the head of the University of Saskatchewan, the University of Regina or a facility designated as a hospital or a health centre pursuant to *The Provincial Health Authority Act* shall disclose:

- (a) the title of; and
- (b) the amount of funding being received with respect to;

the academic research mentioned in subsection (3).

[40] Therefore, the U of R's position in its submission is that it will not disclose anything beyond what subsection 17(4) of LA FOIP requires of it. In contrast, in its December 18, 2017 letter, the U of R said it would release information if the funding/granting agencies already make the information publicly available. These contrasting positions are confusing.

[41] By stating it will disclose information if the funding/granting agencies have already made the information publicly available, the U of R has undermined its argument that the

disclosure of anything beyond what subsection 17(4) of LA FOIP requires of it would impinge upon academic freedom, competitiveness and research at the U of R.

[42] Nevertheless, the U of R did not provide arguments specific to the record at issue and how subsection 17(3) of LA FOIP applies to it. I note that the U of R cited paragraphs [27] to [29] of Ontario (ON) IPC's Order PO-3084 regarding the importance of academic freedom. I agree that academic freedom is important. However, I note that in that same order, the public body provided arguments as to how the records at issue in that review are indeed records "respecting or associated with" research which are summarized in paragraphs [37] to [47] to persuade the ON IPC that the records at issue in that case, were excluded from ON's *Freedom of Information and Protection of Privacy Act*. The U of R did not do the same in this case. It did not demonstrate how releasing the funding agency/company and the unit (faculty or department or school) that received the funding would disclose details of the academic research being conducted by its employees. In a review, the U of R has the obligation to establish how an exemption applies to a record. Section 51 of LA FOIP provides:

51 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[43] I find that the U of R has not demonstrated how subsection 17(3) of LA FOIP applies to the record at issue.

[44] Since it has not demonstrated that subsection 17(3) of LA FOIP applies, then I recommend that the U of R release the project title, the funding amount, the funding agency and the unit receiving the funding to the Applicant.

[45] Also, as noted already, subsection 17(4) of LA FOIP requires the disclosure of the project title and the funding amount. Therefore, I recommend that the U of R comply with subsection 17(4) of LA FOIP.

**5. Should the U of R have issued a fee estimate?**

[46] Subsection 9(2) of LA FOIP requires a local authority to provide a fee estimate where the cost for providing access exceeds \$100. Subsection 9(2) provides as follows:

9(2) Where the amount of fees to be paid by an applicant for access to records is greater than a prescribed amount, the head shall give the applicant a reasonable estimate of the amount, and the applicant shall not be required to pay an amount greater than the estimated amount.

[47] According to my office's *IPC Guide to Exemptions*, there are three kinds of fees that can be included in a fee estimate: 1) fees for searching for a responsive record, 2) fees for preparing the record for disclosure, and 3) fees for the reproduction of records. As described in the background, the U of R's fee estimate only contemplates the first two types of fees and not the third so I will only analyze the first two types of fees.

[48] First, fees for searching for a responsive record include the time required to locate and identify responsive records. However, in this case, the U of R already completed this work created the filtered spreadsheet, which is a responsive record. A fee estimate cannot be issued for work already completed.

[49] As already discussed earlier, the U of R indicated that it regarded the filtered spreadsheet as its starting point for its search for records and not the record responsive to the access request. It had said that through its search through paper files located in the Research Office, it would create a new record containing the information sought by the Applicant. Its fee estimate is meant to reflect this search through paper files located in the research office in order to create a new record. However, as I have already concluded, the filtered spreadsheet is the record at issue. LA FOIP does not require the U of R to create records to respond to access requests.

[50] Second, fees for preparing the record for disclosure means the time anticipated to be spent physically severing exempt information from the responsive record. It does **not** include the time deciding whether or not to claim an exemption. This means that if the U of R wanted to review the funding or grant agreements as a part of its assessment of whether exemptions applied or not, it can do so but it cannot charge the Applicant for this time.

[51] I find that the U of R's fee estimate contemplates fees for things it cannot charge. I find that the U of R should not have issued a fee estimate.

#### **IV FINDINGS**

[52] I find that my office has jurisdiction to review this matter.

[53] I find that the filtered spreadsheet is responsive to the Applicant's access request.

[54] I find that LA FOIP does not require the U of R to undertake the steps described at paragraphs [23] and [24] to respond to the Applicant's access request.

[55] I find that the U of R did not meet its obligations under section 8 of LA FOIP when applying subsection 17(3) of LA FOIP.

[56] I find that the Applicant is not prematurely requesting the review of the U of R's reliance on subsection 17(3) of LA FOIP to refuse her access to the information about the funding agency/company awarding the money and the unit (faculty or department or school) that received the funding.

[57] I find that the U of R has not demonstrated how subsection 17(3) of LA FOIP applies to the record at issue.

[58] I find that the U of R's fee estimate contemplates fees for things it cannot charge.

[59] I find that the U of R should not have issued a fee estimate.

#### **V RECOMMENDATIONS**

[60] I recommend that the U of R regard the filtered spreadsheet as the record responsive to the Applicant's access request.

[61] I recommend that the U of R release the project title, the funding amount, the funding agency, and the unit receiving the funding to the Applicant.

[62] I recommend that the U of R comply with subsection 17(4) of LA FOIP.

[63] I recommend that the U of R rescind its fee estimate.

Dated at Regina, in the Province of Saskatchewan, this 28th day of November, 2018.

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