



## **REVIEW REPORT 053-2018**

### **Town of Radisson**

**June 7, 2019**

**Summary:**

The Applicant submitted an access to information request to the Town of Radisson (the Town). The Town responded to the Applicant denying access to records pursuant to subsections 16(1)(a) and 18(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner found that the Town had appropriately applied subsection 16(1)(a) of LA FOIP to portions of the withheld records. The Commissioner recommended the Town continue to withhold those sections of the records where subsection 16(1)(a) of LA FOIP applied and release the remaining portions of the records to the Applicant. The Commissioner also recommended the Town develop and implement a policy or procedure for processing access to information requests under LA FOIP.

### **I BACKGROUND**

- [1] On January 4, 2018, the Applicant submitted an access to information request to the Town of Radisson (the Town) requesting “any and all documents showing the Town of Radisson is in arrears of their school transfer payments to the Living Sky School District” between the years 2010 and 2017.
- [2] On February 14, 2018, the Town responded to the Applicant by email stating, “Thank you for your request below. There is some information in a Municipal office that is not public even with a LAFOIP request; the information you are seeking is one of those items...”
- [3] On March 9, 2018, the Applicant submitted a request for review to my office indicating that part of the responsive records were withheld. Specifically, the Applicant noted that

letters sent to the Town by a third party accounting firm between 2015 and 2017 had been withheld.

[4] On March 13, 2018, my office emailed the Town requesting a proper section 7 response be issued to the Applicant. My office requested that the response state what part of the responsive records were being withheld and setting out the reason for refusal and identifying the exemptions being applied, as required by subsection 7(2)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[5] On March 14, 2018, the Town issued a revised response to the Applicant advising that it was withholding letters from the third party accounting firm, that were responsive to the access to information request, pursuant to subsections 16(1)(a) and 18(1)(b) of LA FOIP.

[6] On March 15, 2018, the Applicant indicated that they did not agree with the exemptions raised by the Town and wished to proceed with a review of the application of these exemptions to the responsive record. The Applicant also provided a revised Request for Review form that included the revised response from the Town of Radisson.

[7] On March 19, 2018, my office sent notification emails to the Town, the Applicant and the third party accounting firm that my office would be undertaking a review of this matter. In the notification email, my office requested the Town provide its submission, index of records and a copy of the withheld records. The Applicant and the third party were also invited to provide submissions for consideration in this review.

## **II RECORDS AT ISSUE**

[8] The records at issue are three letters from the third party accounting firm to the Town totalling six pages.

## **III DISCUSSION OF THE ISSUES**

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

[9] The Town is a “local authority” pursuant to subsection 2(f)(i) of LA FOIP. Thus, I have jurisdiction to conduct this review.

[10] The Town has identified the accounting firm as a third party in this matter. The accounting firm would qualify as a “third party” pursuant to subsection 2(k) of LA FOIP.

**2. Did the Town properly apply subsection 18(1)(b) of LA FOIP to the withheld records?**

[11] Subsection 18(1)(b) of LA FOIP is a mandatory exemptions and provides:

**18(1)** Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to the local authority by a third party;

[12] Section 18 of LA FOIP is intended to protect the business interests of third parties and to ensure that public bodies are able to maintain the confidentiality necessary to effectively carry on business with the private sector. Although public bodies need to be open and accountable, they also need to conduct business and enter into business relationships and in doing so they must be able to assure their private sector partners that their trade secrets and commercial and financial secrets will not be readily disclosed to competitors and the general public. However, this is balanced against the need for public accountability in the expenditure of public funds. Third parties must understand that certain information regarding how the public body meets its financial obligations will be made public.

[13] In order for subsection 18(1)(b) of LA FOIP to be found to apply, all three parts of the following test must be met:

i. Is the information financial, commercial, scientific, technical or labour relations information of a third party?

ii. Was the information supplied by the third party to the local authority?

iii. Was the information supplied in confidence implicitly or explicitly?

*i. Is the information financial, commercial, scientific, technical or labour relations information of a third party?*

[14] The letters from the accounting firm to the Town are related to year-end audits conducted by the accounting firm on behalf of the Town. The information is not about the third party accounting firm, therefore the information would not qualify as third party information. (In Review Reports: LA-2011-002, 180-2015 and 231-2015, my office reached the same conclusion about records related to an audit conducted by a third party). As such, third party exemptions would not apply to these records.

[15] I find that subsection 18(1)(b) of LA FOIP does not apply to the responsive records.

**3. Did the Town properly apply subsection 16(1)(a) of LA FOIP to the withheld records?**

[16] Subsection 16(1)(a) of LA FOIP is a discretionary exemption and 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;

[17] When my office started conducting the analysis on this file, an inspection of the records provided showed that the withheld letters were not provided to my office in the Town's submission package. My office followed up with the Town requesting the records, however, a recently hired Administrator struggled to find information related to this matter. In the Administrator's search of the Town's records, there did not appear to be a file with information related to this file. The Administrator conducted a search and found three letters in emails between the Town and the third party accounting firm that appears to relate to this file. The Administrator provided these document to my office for the purpose of this review.

- [18] In telephone discussions with the new Administrator, we discussed obligations under LA FOIP, processing of requests and records management practices. In discussions, my office mentioned that it would be helpful not only for the new Administrator for any future requests, but others coming into the role to know where things were left off. Based on my office's discussions with the new Administrator, it sounded as though these were issues they planned to address.
- [19] My office provided the new Administrator with many resources available on our website, [www.oipc.sk.ca](http://www.oipc.sk.ca) and recommends the Administrator refer to these resources, as well as any other resources available on our website under the *Resources* tab. These documents contain best practices to enhance access rights of individuals and efficiencies in the process. I also encourage the new Administrator to consult my office's *Rules of Procedure*, available at: [www.oipc.sk.ca/resources/rules-of-procedure/](http://www.oipc.sk.ca/resources/rules-of-procedure/), which clarifies the processes used by my office in a review or investigation.
- [20] The Town's submission, which was provided by the previous Administrator, did not provide a lot of detail to support the Town's position that the exemptions would apply, aside from the assertion that because the letters were addressed to Council and marked confidential they should be withheld. As I have not been provided adequate arguments from the Town to complete my analysis, I will consider the application of the exemption based on my review of the face of the record.
- [21] The responsive record consists of three letters, one of which is marked draft for discussion purposes only. All three letters are from the third party accounting firm to the Town, to the attention of Council. All three letters are in regards to a year-end audit, which identified two matters that Council may want to address. The letter identified the implications related to the two matters and the recommendations from the third party accounting firm.
- [22] The Town applied subsection 16(1)(a) of LA FOIP to the letters in full. In the future, when responding to an access to information request, the Town should consider whether or not responsive records should be withheld in full, or if they are able to sever the portions where it believes an exemption applies, as provided by section 8 of LA FOIP:

**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.

[23] 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 applied 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. The advice, recommendations, proposals, analyses and/or policy options must:
  - i) be either sought, 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.
3. Was the advice, recommendations, analyses and/or policy options developed by or for the local authority?

[24] In consideration of two recent court decisions, my office has modified its test to better reflect the language and considerations of subsections 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?

(see *Britto v University of Saskatchewan*, 2018 SKQB 92 and *Hande v University of Saskatchewan*, QBG 1222 of 2018 May 21, 2019)

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

[25] *Advice* includes 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 has a broader meaning than recommendations. 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.

[26] *Recommendations* relate to a suggested course of action as well as the rationale for a suggested course of action. Recommendations are generally more explicit and pointed than advice.

[27] *Proposals, analyses and policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action. Therefore, advice is the course of action put forward, while analyses refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals, and policy options as to a course of action.

[28] To add to this further, advice is the course of action put forward, while analyses refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals, and policy options as to a course of action.

[29] Further, in *Britto v University of Saskatchewan*, 2018 SKQB 92, Justice Danyliuk broadened the definitions for “advice” and “recommendations” as follows:

22 The Court of Appeal also found that “[a]dvice may be construed more broadly than “recommendation” (para. 29). However, it distinguished these terms by finding that “recommendation” may be understood to “relate to a suggested course of action’ more explicitly and pointedly than “advice”, while “[a]dvice” ... encompass[es] material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation” (ibid.). In oral argument in this Court, the Information and Privacy Commissioner of British Columbia and the Canadian Civil Liberties Association made a similar distinction: that while “recommendation” is an express suggestion, “advice” is simply an implied recommendation (transcript, at pp. 52 and 57).

23 In this case, the IPC Adjudicator applied MOT. She found that to qualify as “advice” and “recommendations” under s. 13(1), “the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised” (p. 4). I accept that material that relates to a suggested course of action that

will ultimately be accepted or rejected by the person being advised falls into the category of “recommendations” in s. 13(1).

24 However, it appears to me that the approach taken in MOT and by the Adjudicator left no room for “advice” to have a distinct meaning from “recommendation”. A recommendation, whether express or inferable, is still a recommendation. “[A]dvice” must have a distinct meaning. I agree with Evans J.A. in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C. 421 (“Telezone”), that in exempting “advice or recommendations” from disclosure, the legislative intention must be that the term “advice” has a broader meaning than the term “recommendations” (para. 50 (emphasis deleted)). Otherwise, it would be redundant. By leaving no room for “advice” to have a distinct meaning from “recommendation”, the Adjudicator’s decision was unreasonable.

[30] From a review of the information in the responsive letters, portions of the information, namely the portions below the headings *implications* and *recommendations*, clearly qualify as advice and recommendations. There is an opinion and a suggested course of action. Therefore, I find that the first part of the test has been met.

[31] The remaining portions of these letters appear to be the presentation of facts and as such would not fit the definitions in the first part of the test. As the remaining portions of the letters have not met the first part of the test, I find that subsection 16(1)(a) of LA FOIP does not apply to these portions of the record.

[32] As only the portions of the letters pertaining to implications and recommendations fit the first part of the test for subsection 16(1)(a) of LA FOIP, I will only consider those portions for the remaining parts of the test.

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

[33] For information to be developed by or for the local authority, the person developing the information should be an official, officer or employee of the local authority, 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] The information in the letters were prepared for the Town by the third party accounting firm as part of its audit. As such, the second part of the test is met.

[35] I find that the Town has appropriately applied subsection 16(1)(a) of LA FOIP to the portions of the record below the headings *implications* and *recommendations*.

[36] I recommend the Town continue to withhold these portions of the record and release the remaining portions where subsection 16(1)(a) of LA FOIP has been found not to apply.

#### **IV FINDINGS**

[37] I find that subsection 18(1)(b) of LA FOIP does not apply to the record.

[38] I find that subsection 16(1)(a) of LA FOIP applies to some portions of the record.

[39] I find that subsection 16(1)(a) of LA FOIP does not apply to some portions of the record.

#### **V RECOMMENDATIONS**

[40] I recommend the Town continue to withhold the portions of the record that subsection 16(1)(a) of LA FOIP has been found to apply, namely the portions below the headings *implications* and *recommendations*.

[41] I recommend the Town release portions of the record that subsection 16(1)(a) of LA FOIP has been found not to apply.

[42] I recommend the Town develop and implement a policy or procedure for the processing of access to information requests under LA FOIP, including records management practices for these requests.

Dated at Regina, in the Province of Saskatchewan, this 7th day of June, 2019.

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