

**SASKATCHEWAN  
INFORMATION AND PRIVACY COMMISSIONER**

**REVIEW REPORT 084-2015**

**City of Lloydminster**

**Summary:** The Applicant requested records from the City of Lloydminster (the City). The City responded that some of the requested records did not exist and denied access to the other records requested pursuant to subsection 18(1)(a), (b) and (c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner found that the City provided reasonable documentation to conclude that some of the records did not exist and recommended the City take no further action regarding these records. The Commissioner found that the City did not provide sufficient evidence to support the exemptions applied to the records the Applicant was denied access to and recommended the City release the record to the Applicant.

**I BACKGROUND**

[1] On February 23, 2015, the City of Lloydminster (the City) received an access to information request for “tender documents, bid evaluation reports and the contract between the City of Lloydminster and [the Third Party]. Please include a summary of all payments made to [the Third Party] under this contract.”

[2] The City replied to the Applicant in a letter dated March 2, 2015 advising that tender documents and bid evaluation reports for consulting services with the Third Party did not exist. Further, they advised that the contract and summary of payments with the Third Party contained third party information. Pursuant to section 33 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), the City sent

notification of the request to the Third Party. The City advised the Applicant that they would consider representations from the Third Party and respond by March 23, 2015.

[3] In a letter dated March 17, 2015, the City advised that the Applicant's request for the contract with the Third Party was being denied pursuant to subsections 18(1)(a), (b) and (c)(i), (ii) and (iii) of LA FOIP. They also provided the Applicant with copies of the summary of payments made to the Third Party under this contract as this information was public information.

[4] My office received a request for review and corresponding documentation from the Applicant on April 16, 2015 requesting my office review the City's position that tender documents and bid evaluation reports did not exist and the City's decision to deny access to the contract with the Third Party pursuant to subsection 18(1)(a), (b) and (c)(i), (ii) and (iii) of LA FOIP.

[5] In emails dated April 21, 2015, my office notified the City, the Third Party and the Applicant of its intention to conduct a review. My office requested the City provide a copy of the record, index of record and submission that the tender documents and bid evaluation reports requested did not exist and outline their search efforts and support its position that subsections 18(1)(a), (b) and (c)(i), (ii) and (iii) of LA FOIP apply to the requested contract. My office also invited the Third Party and the Applicant the opportunity to provide submissions.

## **II RECORDS AT ISSUE**

[6] The records at issue are a contract with the Third Party that the City has withheld from release, as well as tender documents and bid evaluation reports related to the contract with the Third Party that the City has indicated does not exist.

## **III DISCUSSION OF THE ISSUE**

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

[8] The Third Party qualifies as a “third party” pursuant to subsection 2(k) of LA FOIP.

**1. Does subsection 18(1)(a) of LA FOIP apply?**

[9] Subsection 18(1)(a) of LA FOIP provides as follows:

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

(a) trade secrets of a third party;

[10] My office’s *IPC Guide to Exemptions: For FOIP and LA FOIP* (Guide to Exemptions) defines a trade secret as follows:

*Trade Secret* is defined as information, including a formula, pattern, compilation, program, device, product, method, technique or process:

i) that is used, or may be used, in business or for any commercial purpose;

ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use;

iii) that is the subject of reasonable efforts to prevent it from becoming generally known; and

iv) the disclosure of which would result in significant harm or undue financial loss or gain.

The information must meet all of the above criteria to be considered a trade secret. Further, the third party must also be able to prove ownership or a proprietary interest in the trade secret or prove a claim of legal right to the information (i.e. license agreement)

[11] While the City relied on subsection 18(1)(a) of LA FOIP to deny the Applicant’s request for this contract, the City’s submission only indicated that the contract referenced material to be utilized by the Third Party that it considered to be proprietary material, but it did not provide any further arguments to support the application of this subsection.

[12] The information found in the contract between the Third Party and the City does not appear to contain information that would qualify as a trade secret pursuant to subsection 18(1)(a) of LA FOIP, therefore this exemption has not been properly applied.

**2. Does subsection 18(1)(b) of LA FOIP apply?**

[13] Subsection 18(1)(b) of LA FOIP provides as follows:

**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;

[14] The City provided in their submission the following regarding the support of their submission for this exemption regarding the information found in the contract:

The Agreement outlines the consulting fees that were agreed to by the Client and [the Third Party]. The fees outlined in the agreement were negotiated for the provision of specific services to the City of Lloydminster by [the Third Party] at a rate that may or may not be provided by [the Third Party] to any other client. These negotiated rates were implicitly considered confidential.

[15] The three part test for subsection 18(1)(b) of LA FOIP is as follows:

- i. Is the information financial, commercial, scientific, technical or labour relations information?
- 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?*

[16] *Financial information* relates to money and its use or distribution and must contain or refer to specific data.

[17] *Commercial information* is information relating to the buying, selling or exchange of merchandise or services.

[18] I agree that the contract for consulting services between the Third Party and the City contains information that qualify as financial information and commercial information.

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

[19] Information may qualify as “supplied” if it was directly supplied to the local authority by the Third Party, or where disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by the Third Party.

[20] The Guide to Exemptions provides the following regarding contracts:

The contents of a contract involving the public body and a third party will not normally qualify as having been supplied by a third party. The provisions on a contract, in general, have been treated as mutually generated, rather than supplied by the third party, even where the contract is preceded by little or no negotiations or where the final agreement reflects information that originated from a single party.

[21] Further, as quoted earlier in this Report, the City’s submission indicated that the provisions of specific services were negotiated between it and the Third Party.

[22] The Guide to Exemptions provided two exceptions to this rule, *inferred disclosure* and *immutability*. However, neither the submission from the City or the Third Party provided support for either of these exceptions.

[23] As the City and Third Party have not provided sufficient support for the position that the information was supplied to the City by the Third Party, this part of the test is not met.

[24] As all three parts of the test must be met in order for the information to qualify for exemption under subsection 18(1)(b) of LA FOIP, this exemption has not been properly applied.

**3. Does subsection 18(1)(c) of LA FOIP apply?**

[25] Subsection 18(1)(c) of LA FOIP provides as follows:

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

...

(c) information, the disclosure of which could reasonably be expected to:

(i) result in financial loss or gain to;

(ii) prejudice the competitive position of; or

(iii) interfere with the contractual or other negotiations of;

a third party; or

[26] The Guide to Exemptions provides the following regarding this exemption:

The phrase, could reasonably be expected to result in loss or gain, prejudice or interfere with, requires the harms test to be applied... Could reasonably be expected to provides a middle ground between that which is probable and that which is merely possible. The public body must provide evidence well beyond or considerably above a mere possibility of harm in order to reach that middle ground.

[27] The Third Party provided in their submission that the release of the contract could disadvantage them in current negotiations and agreements in which they are currently engaged. As well, the Third Party's submission indicated that releasing the contract could disadvantage their position in future negotiations or when responding to competitive bids.

[28] This subsection of LA FOIP requires a harms test to be applied as follows:

1. There must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
2. The harm caused by the disclosure must be more than trivial or inconsequential; and
3. The likelihood of harm must be genuine and conceivable.

[29] In a past Report by my office, we referenced Order F14-37 from the Office of the Information and Privacy Commissioner for British Columbia and agreed with their position. This Order stated:

...the City says that releasing the reports reveals cost estimates and recommendations for future work, which would provide potential bidders with pricing estimates and preclude unbiased and fair bids in any RFP, ultimately harming the City. I do not accept this argument. First, any RFP process is inherently a competitive process, so cost estimate information does not preclude bidders from submitting a bid that gives them the best chance of being the successful proponent. As noted above, many factors influence proponents' bids and the overall competitiveness of an RFP process. Arguably, the informed bidders is the best way to assure the competitiveness of the RFP bid process. The competitiveness of the bid process for the City will certainly not be assisted by having one or more bidders who have greater knowledge than all other bidders.

[30] In that Report, "it was my understanding that the winning contractor would have access to the internal cost estimates in question, as it is part of the current contract. In my opinion, keeping these figures from the public, including other future bidders, would jeopardize a competitive bidding process."

[31] The Third Party's submission also referenced current negotiations, Ontario Information and Privacy Commissioner Order MO-3129 provided the following regarding current and ongoing negotiations:

In some past decisions, the application of section 11(c) has been established because the institution was able to point to current or ongoing negotiations that could be prejudiced by disclosure... In those orders, therefore, the institutions had tendered sufficient evidence related to current or ongoing processes to satisfy the decision maker that the institution's competitive position or financial interests were susceptible to interference upon disclosure of the particular information at issue...

[32] Neither party has provided me with sufficient information to show that the release of this information is likely to result in a harm that is genuine and conceivable. Therefore, the harms test has not been met and this exemption has not been properly applied to the contract.

[33] Finally, the City may want to take into consideration subsection 91(1)(a) of *The Cities Act* which provides individuals with the ability to obtain copies of contracts:

**91(1)** Any person is entitled at any time during regular business hours to inspect and obtain copies of:

(a) any contract approved by the council, any bylaw or resolution and any account paid by the council relating to the city;

#### **4. Did the City conduct a reasonable search for the records?**

[34] The City had advised that the tender documents and bid evaluation forms that the Applicant requested did not exist. In their submission, it indicated that the Director of Legislative Services and City Clerk for the City conducted the search for records responsive to the Applicant's and found the contract in the Third Party's folder.

[35] Further, the City indicated in their submission that "there was no tender process and no bid evaluation completed, as the service provider possessed a unique skill set that was required to accomplish the tasks identified in the Agreement."

[36] My office requested the City provide further documentation to support their position that the tender documents and bid evaluation forms did not exist.

[37] The City provided my office with an affidavit that the tender documents did not exist nor were there any records addressing the absence of the tender process. My office followed up with the City as the affidavit did not address the bid evaluation forms. The City advised that if there was no tender process then there would not be any bids to evaluate. Based on this, I find it reasonable to conclude that the tender documents and bid evaluation forms do not exist.

#### **IV FINDINGS**

[38] I find that the City has not shown that subsections 18(1)(a), (b) and (c) of LA FOIP applies to the contract in the responsive record.



[39] I find that the City had shown that it is reasonable to conclude that the tender documents and bid evaluation forms do not exist.

## **V RECOMMENDATIONS**

[40] I recommend that the City release the contract between the Third Party and the City to the Applicant.

[41] I recommend that the City take no further action regarding the request for tender documents and bid evaluation forms.

Dated at Regina, in the Province of Saskatchewan, this 9th day of July, 2015.

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