



REVIEW REPORT 084-2019

Regina Police Service

February 19, 2020

Summary: The Applicant made an access to information request to the Regina Police Service (RPS) for an email about a complaint against the Applicant. RPS refused to confirm or deny that the record exists even though the RPS had discussed the complaint with the Applicant. The Applicant requested a review of the RPS's reliance of subsection 7(4) of *The Local Authority Freedom of Information and Protection of Privacy Act*. The Commissioner found that there was no reasonable basis for the RPS to invoke subsection 7(4) of LA FOIP and recommended, if the record exists, that it be release to the Applicant.

I BACKGROUND

[1] On March 23, 2018, the Applicant made a request for information to the Regina Police Service (RPS) for the period between February 21, 2018 to March 21, 2018 as follows:

A work email from an employee who made a complaint about me.

[2] On May 1, 2018, the RPS responded indicating that it was unable to confirm or deny the existence of any records as per subsection 7(4) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) and that if such information did exist, it would be withheld from disclosure under section 20 of LA FOIP.

[3] On March 6, 2019, my office received a request for review from the Applicant.

[4] On March 19, 2019, my office provided notification to both the Applicant and the RPS of my intent to undertake a review.

II RECORDS AT ISSUE

[5] There are no records at issue as the RPS has taken the position that it was unable to confirm or deny the existence of any records. The issue is whether or not the RPS may refuse to confirm or deny the existence of any responsive records.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[6] The RPS is a “local authority” pursuant to subsection 2(f)(viii.1) of LA FOIP. Therefore, I have jurisdiction to conduct this review.

2. Can the RPS rely on subsection 7(4) of LA FOIP?

[7] Pursuant to subsection 7(4) of LA FOIP, if the local authority is refusing access to the record and the reason for the refusal is an exemption described in section 14, 20, or 21 or subsection 28(1), the local authority may also refuse to confirm or deny that the records exist or ever did exist. Subsection 7(4) of LA FOIP provides:

7(4) If an application is made with respect to a record that is exempt from access pursuant to section 14, 20 or 21 or subsection 28(1), the head may refuse to confirm or deny that the record exists or ever did exist.

[8] 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.

[9] By invoking subsection 7(4) of LA FOIP, RPS is denying the Applicant the right to know whether a record exists. This subsection provides local authorities with a significant discretionary power that should be exercised only in rare cases. In my opinion, this provision is meant to protect highly sensitive records where confirming or denying the mere existence of a record would in itself impose significant risk. The types of risks could include risks to national security, an individual causing physical harm to others or risks to others or 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 possible lawsuit, embarrassment or negative public scrutiny.

[10] In order for a local authority to be able to show it properly refused to confirm or deny the existence of a record pursuant to subsection 7(4) of LA FOIP, the local authority must be able to:

1. Demonstrate that the records (if they existed) would qualify for exemption under the particular exemption it is citing; and
2. Explain how disclosing the existence of records (if they existed) could reasonably compromise what it is protecting.

1. Has the RPS demonstrated that the records (if they existed) would qualify for exemption?

[11] In its submission, the RPS indicated that, if responsive information existed, it may be withheld under section 20 of LA FOIP. Section 20 of LA FOIP provides:

20 A head may refuse to give access to a record if the disclosure could threaten the safety or the physical or mental health of an individual.

[12] Section 20 of LA FOIP is a discretionary, harm-based exemption. It permits refusal of access in situations where disclosure of a record could threaten the safety or the physical or mental health of an individual.

[13] Section 20 of LA FOIP uses the word **could** versus “*could reasonably be expected to*” as seen in other provisions of LA FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for asserting the harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked. For this provision to apply, there must be objective grounds for believing that disclosing the information *could* result in the harm alleged.

[14] Recently, my office published Chapter 4 of *IPC Guide to FOIP* (the Guide) (December 10, 2019). In the Guide, my office revised its test for the equivalent provision of *The Freedom of Information and Protection of Privacy Act* (FOIP), as follows:

1. What is the harm identified?
2. Does the harm constitute damage or detriment and not mere inconvenience?
3. Is there a connection between disclosure and the anticipated harm?

[15] It is not enough to assert that there is a possibility. My office still requires evidence that the harm might occur in order to determine that section 20 of LA FOIP applies. The harm should be not fanciful or exceedingly remote.

[16] The local authority should be able to detail what the harm is and to whom the harm threatens if the information existed and if it were released.

[17] The exemption can apply where the nature of the applicant is the reason harm may occur.

[18] It is fair then to look at the probable effect of disclosure from the perspective of the applicant. For example:

- What use might this specific applicant make of the requested information?
- What, in view of what is known about the applicant, might the applicant do to themselves or someone else if the information is disclosed?

[19] More specifically, could the mental or physical health of a person be threatened if information were disclosed to an applicant because it could cause severe stress such as suicidal ideation or that it could result in verbal or physical harassment or stalking. Individual safety could be threatened if information were released that allowed someone who had threatened to kill or injure the individual to locate them. Examples of individuals whose safety might be threatened would include an individual fleeing from a violent spouse, a victim of harassment or a witness to harassment, or an employee who has been threatened.

[20] RPS has indicated, if they existed, the release of records may threaten the mental health of individuals involved. The risk that RPS has identified does not fit into the risks contemplated by subsection 7(4) of LA FOIP. Further, I note that the RPS also indicated that the Applicant is aware that a complaint was made against them but is unaware of who made the complaint.

[21] I am not persuaded that section 20 of LA FOIP would apply to responsive records, if they exist, and I find that there is no reasonable basis for the RPS to invoke subsection 7(4) of LA FOIP.

IV FINDING

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

V RECOMMENDATION

[23] If records exist, I recommend that the RPS release them to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 19th day of February, 2020.

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