



REVIEW REPORT 102-2017

City of Saskatoon

September 26, 2017

Summary:

The Applicant made one access to information request to the City of Saskatoon (the City) with five items. The City provided the Applicant with a fee estimate. Not wanting to delay access, the Applicant paid the fees. The City provided him with access to some records and withheld others pursuant to subsections 16(1)(a) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Applicant requested a review of the fees, the search and the City's application of subsection 16(1)(a) of LA FOIP. The Commissioner found the fees were reasonable, but recommended that the City develop a procedure to review the fees once search, preparation and reproduction is complete. He found the City's search was reasonable. He found that subsection 16(1)(a) of LA FOIP applied to only portions of the record and recommended release of the rest.

I BACKGROUND

[1] On April 4, 2017, the City of Saskatoon (the City) received an access to information request for records related to a river access study. The Applicant's request included:

- a. A copy of any draft of the study;
- b. A copy of the contract between the City and the Meewasin Valley Authority (MVA) related to the study;
- c. Minutes / records of all meetings held by the City administration staff at which decisions were considered or made regarding the scope, cost or potential outcome(s) and or preferred outcomes of this River Access Study;

- d. Minutes/records of all meetings held by the City administration staff at which decisions were considered or made regarding the public communication or public relation strategy surrounding (a) the River Access Study and (b) any other work the City administration is conducting or has conducted since January 1, 2016, on the subject of plans to design and/or build a public-use, permanent launch site for motorized watercraft to access the South Saskatchewan River in Saskatoon; and
- e. Records of all communication held between Transport Canada and the City administration staff since January 1, 2016, in which the Vessel Operation Restriction Regulations under the *Canada Shipping Act, 2001*, or the requirements thereof, were discussed as they pertain to the River Access Study and/or a public use boat launch site in Saskatoon.

[2] The City provided the Applicant with a fee estimate dated April 19, 2017 by mail. However, the Applicant did not receive the fee estimate. On May 4, 2017, he telephoned the City looking for a response. The City sent him a copy of the fee estimate by e-mail on that day. The Applicant paid fifty percent of the estimate as a deposit. On May 17, 2017, he paid the remaining fees and received records responsive to his request.

[3] The City also notified the Applicant that information has been withheld pursuant to subsection “28 and 16(1)(a)” of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[4] On May 18, 2017, the Applicant requested a review by my office. He requested that we review the reasonableness of the fees applied, the City’s search efforts, the application of subsection 16(1)(a) of LA FOIP and the potential application of subsection 16(2)(d) of LA FOIP.

[5] On May 23, 2017, my office notified both the Applicant and the City of my intention to undertake a review.

II RECORDS AT ISSUE

[6] The City identified 91 pages of responsive records. It withheld a 39 page draft *River Access Study* report (river access report) almost in its entirety pursuant to subsection 16(1)(a) of LA FOIP. The City also withheld one e-mail address pursuant to subsection 28(1) of LA FOIP, which is not a subject of this review. It released the rest of the responsive records to the Applicant.

III DISCUSSION OF THE ISSUES

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

1. Were the fee estimate and the fees applied by the City reasonable?

[8] Subsection 9(1) of LA FOIP states:

9(1) An applicant who is given notice pursuant to clause 7(2)(a) is entitled to obtain access to the record on payment of the prescribed fee.

[9] Subsections 5(2) and 5(3) of *The Local Authority Freedom of Information and Protection of Privacy Regulations* (the Regulations) provide a local authority the ability to recover costs associated with searching for responsive records.

[10] Subsection 9(2) of FOIP requires that a local authority provide the Applicant with an estimate of the fees:

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.

[11] A reasonable fee is one that is proportionate to the work required on the part of the public body to respond efficiently and effectively to an applicant's request. The public body should be able to detail how it arrived at its fee estimate amounts for each of the

types of fees that can be charged. In past reports, my office has established that there are three kinds of fees that a public body can include in its fee estimate:

- fees for searching for a responsive record;
- fees for preparing the record for disclosure; and
- fees for the reproduction of records.

[12] The City provided the following estimate to the Applicant:

	Type of Fee	Calculation of Fees	Total Amount of Fees
1	Time required to search for records	4 hours x \$15.00/half hour	\$120.00
2	Time required to prepare records for disclosure	3 hours x \$15.00/half hour	\$90.00
3	Photocopies of Records	0 x \$0.25/page	nil
4	Applicant will supply USB stick	nil	nil
5	LESS:	1 hour free x \$15.00/half hour	(\$30.00)
Total amount of fees required to process access request			\$180.00 divided by 50% = \$90.00

[13] Consistent with the Regulations, the City broke the fees down into three categories: search fees, preparation fees and reproduction fees.

[14] The Applicant notes that after receiving the fee estimate, he called the City to ask for additional details regarding the fee estimate. He reported that the City did not break down the costs with more detail than the fee estimate he received, but he paid the 50 per cent deposit to not delay access.

[15] In its submission, the City indicated that the leadership team was notified of the access request. It provided direction in terms of search. The Manager of Special Use Facilities/Capital Planning and the Manager of Open Space Programing and Development conducted a search of their areas. Further, the Records Information and Bylaw Supervisor conducted a search of Documentum, the City's electronic filing system and paper files in the City Clerk's Office.

[16] The City indicated that the Managers and the Supervisor each provided an estimate of their search to the Access and Privacy Officer, which collectively totaled four hours. The Access and Privacy Officer estimated it would take her three hours to prepare the record.

[17] My office asked the City for details of how it reached this conclusion. The City replied that the two Managers and the Supervisor advised her that there would be both electronic and physical records and estimated that there would be 90 pages. The Access and Privacy Officer indicated that she based her preparation estimate on my office's guideline of two minutes per page.

[18] My office advises that public bodies should take the following steps when charging a fee:

1. Contact the applicant:
 - a. advise that fees will be necessary;
 - b. attempt to clarify or offer ways to narrow the request to reduce or eliminate fees;
 - c. follow up in writing with applicant when narrowing occurs;
2. Make a search strategy;
3. Based on the search strategy, prepare a fee estimate (do not complete search);
4. Decide whether to charge a fee (refer to your public body's policy);
5. Send out fee estimate and suspend work;
6. If applicant initiates, clarify or narrow request with applicant;
7. When applicant pays 50% deposit; start search.

[19] Although the City could have made a greater effort to keep the Applicant informed, and potentially narrow the scope of his request, it took appropriate steps to prepare a fee estimate, as recommended by my office.

[20] On May 17, 2017, the Applicant paid the remainder of the fees and received the responsive records. The Applicant then requested a review of the fees by my office.

[21] On May 30, 2017, after my office provided notification to the City of my intention to conduct a review, the City provided details of the actual fees associated with the request and refunded the Applicant \$105. The details were as follows:

	Type of Fee	Calculation of Fees	Total Amount of Fees
1	Time required to search for records	2.5 hours x \$15.00/half hour	\$75.00
2	Time required to prepare records for disclosure	1 hour 18 minutes x \$15.00/half hour	Rounded off to \$30.00
3	Photocopies of Records	0 x \$0.25/page	nil
4	Applicant will supply USB stick	nil	nil
5	LESS:	1 hour free x \$15.00/half hour	(\$30.00)
Total amount of fees required to process access request			\$75.00
Total amount paid			\$180.00
Refund			\$105.00

[22] Again, the details were broken down into search time, preparation time and reproduction costs. As there were no reproduction costs, I will review the other categories.

[23] Search time consists of every half hour of manual search time required to locate and identify responsive records. For example:

- staff time involved with searching for records;
- examining file indices, file plans or listings of records either on paper or electronic;
- pulling paper files/specific paper records out of files; and
- reading through files to determine whether records are responsive.

[24] Search time does not include:

- time spent to copy the records;
- time spent going from office to office or off-site storage to look for records; or
- having someone review the results of the search.

[25] The tests related to a reasonable search are:

- Generally, it should take an experienced employee 1 minute to visually scan 12 pages of paper or electronic records to determine responsiveness;
- Generally, it should take an experienced employee 5 minutes to search 1 regular file drawer for responsive file folders; and
- Generally, it should take 3 minutes to search an e-mail account and copy into a folder.

[26] The City’s original submission contained a detailed account of the Records Information and Bylaw Supervisor’s search. She searched Documentum with three keywords. The

search resulted in approximately 381 records. They were further filtered by date and removal of public emails which narrowed the search to approximately 281 documents. A review of the remaining documents was conducted to seek responsive records. The Supervisor also reviewed one paper file containing approximately 100 pages located in the vault. It reported that the supervisor's search and review for responsive records was 80 minutes. The City has given me enough information to persuade me that it likely took the supervisor 80 minutes to search for records.

[27] In its submission, the City indicated that the search performed by the Manager of Special Use Facilities/Capital Planning took 30 minutes and the search of the Manager of Open Space Programing and Development took 90 minutes. Each Manager conducted a search of their e-mail accounts. The Manager of Special Use Facilities/Capital Planning reported that the search returned approximately 50 e-mails and the search of the Manager of Open Space Programing and Development resulted in approximately 60 e-mails. Both Managers also reported searching a paper file related to the project. The City did not indicate approximately how many pages were in each paper file. It appears that the two Managers did the same amount of work, yet, it did not account for the hour discrepancy between the time it took each Manager to search.

[28] I am not persuaded that sufficient information regarding the search was provided to my office. Based on the limited information provided to me, the search time of the two Managers should have resulted in approximately 60 minutes, not 120 minutes. The search of the Supervisor took 80 minutes. The Applicant should have been charged for 140 minutes of search time.

[29] However, although the City's description of the search time in its submission totaled 200 minutes; the fee details sent to the Applicant on May 30, 2017 only charged him for 150 minutes. My office asked the City about this. It replied that the Access and Privacy Officer reduced the time to 150 minutes as she thought the estimate was high and provided the Applicant with a "break".

[30] I find the fee applied to search time was reasonable. However, I remind public bodies and access and privacy officers to take detailed notes when searching for records. Additionally, if those who are not familiar with access and privacy legislation are asked to search, they should also be instructed how to take detailed notes of the search. This is imperative when the public body is charging fees.

[31] With respect to preparation fees, the City's Access and Privacy Officer indicated it took her two minutes per page to prepare the 39 pages of withheld material. This is in line with our office's guidelines. This took one hour and 18 minutes and the Applicant was charged for two hours of preparation time. I note that subsection 5(3) of the Regulations provides:

5(3) Where time in excess of one hour is spent in searching for a record requested by an applicant or in preparing it for disclosure, a fee of \$15 for each half-hour or portion of a half-hour of that excess time is payable at the time when access is given.

[32] It was appropriate for the City to round the preparation fee for that portion of the half hour. The preparation fee was reasonable.

[33] Finally, I note that subsection 6(2) of the Regulations provides:

6(2) Where the amount of an estimate exceeds the actual amount of fees determined pursuant to this Act, the actual amount of fees is the amount payable by the applicant.

[34] The City should have corrected the estimate to reflect the actual cost of the search before the Applicant paid the remainder of what was owed and given the records. Instead, the City waited until the Applicant requested a review by my office. If he had not done that, it is unclear whether the City would have corrected the over charge. I recommend the City put in place a procedure to confirm fees are appropriate before the final payment is made by an applicant.

2. Did the City conduct a reasonable search?

[35] Section 5 of LA FOIP provides:

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.

[36] Section 5 is clear that access can be granted provided the records are in the possession or under the control of the local authority. LA FOIP does not require a local authority to prove with absolute certainty that records do not exist. It must however, demonstrate that it has made a reasonable effort to identify and locate responsive records.

[37] A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request. The threshold that must be met is one of “reasonableness”. In other words, it is not a standard of perfection, but rather what a fair and rational person would expect to be done or consider acceptable.

[38] The level of detail that can be provided to my office is outlined in my office’s resource, *IPC Guide to Exemptions*. Each case requires different search strategies and details depending on the nature of the records and the way an organization manages them.

[39] The first two items of the Applicant’s request were for specific documents: a draft of a study and an agreement between the City and MVA. They have been provided to the Applicant either in full or in part as exemptions have been applied. I am satisfied with the City’s search for these items.

[40] The third item was for minutes or records of all meetings held by the City administration staff at which decisions were considered or made regarding the scope, cost or potential outcomes and or preferred outcomes of the river access study. The City noted that MVA was the project leader and held meetings and kept the minutes of those meetings. These minutes were retrieved from MVA and provided in full to the Applicant. Further, two Managers and the Supervisor, as discussed above, searched paper files related to the project and e-mail accounts for additional minutes. The Supervisor searched

Documentum and a paper file relating to the project in the Clerk's office. I am satisfied with the search for this item.

[41] The fourth item the Applicant requested is minutes or records of all meetings held by the City administration staff that related to a public communication or public relation strategy surrounding the river access study and related issues. When the Applicant made his request for a review to my office, he specifically noted that there were no documents related to a news release dated November 23, 2016 about the river access study. The City's submission did not provide details of a search of its communications branch. My office asked the City about the search for these records.

[42] The City replied that there were e-mails regarding advertisements for an open house and online survey related to the river access study, but the City did not believe they were responsive to the Applicant's request because they were not minutes or records of meetings. On September 7, 2017, the City released these e-mails to the Applicant as a result of a suggestion from my office.

[43] The City also confirmed that there were no meetings involving Communications regarding the river access study. I am satisfied with the City's search for item four.

[44] Finally, the Applicant requested records of communication held between Transport Canada and the City administration staff since January 1, 2016, relating to river access. In addition to the search described thus far in this report, the City stated that MVA is leading the process of the study and would be responsible for contacting Transport Canada for research purposes. It also noted again that the study is in draft form and has not been presented to Council. Further, the City Council has not chosen a plan of action and it would be premature for the City to contact Transport Canada regarding amendments to regulations. I am satisfied with the City's explanation and search for these records.

[45] I find the City's search for records was reasonable.

3. Does subsection 16(1)(a) of LA FOIP apply to the record?

[46] Subsection 16(1)(a) of LA FOIP 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;

[47] My office has considered this exemption many times in the past. It is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice. All three parts of the following test must be met:

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 public body?

[48] The City applied subsection 16(1)(a) of LA FOIP to the majority of a 39 page draft river access report. The City released only the cover page to the Applicant.

First part of the test

[49] I first must consider whether the information in the river access report qualifies as advice, proposals, recommendations, analyses or policy options.

- [50] 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.
- [51] 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.
- [52] 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.
- [53] The first page (not paginated) is an acknowledgement page and lists members of different committees. The next 3 pages of the river access report (pages i, ii and iii) is the table of contents for the report. This information does not qualify as advice, proposals, recommendations, analyses or policy options. Therefore, subsection 16(1)(a) of LA FOIP does not apply to these pages.
- [54] The next four pages (pages iv to vii) is the executive summary portion of the river access report. The first page of the executive summary, and most of the second (pages iv and v), discuss the reason for the river access report, factual information about the community, feedback from the community, current river access and usage. This type of information does not qualify as advice, proposals, recommendations, analyses or policy options. Subsection 16(1)(a) of LA FOIP does not apply.
- [55] The last three paragraphs of the second page of the executive summary (page v) begins a summary of the recommendations of the river access report. This continues to the end of the executive summary (pages vi and vii). I find that this information qualifies as recommendations in the context of subsection 16(1)(a) of LA FOIP.
- [56] On page v of the executive summary, there is a paragraph that refers to recommendations of past studies of this nature. I will deal with this later in my analysis.

- [57] With respect to the main body of the river access report, the majority qualifies as factual or background information. This includes: an introduction, scope of the study, background of river use and users, existing facilities, data collection, survey results, survey of other cities, technical considerations, a zoning map, description of committees and stakeholder engagement and references. These sections do not contain analysis of the data or information that is associated with a particular course of action. This does not qualify as advice, proposals, recommendations, analyses or policy options and subsection 16(1)(a) of LA FOIP does not apply.
- [58] Although the majority of the record qualifies as factual or background information, there are areas that qualify as advice, analysis, recommendations or policy options. Section 6.3 of the river access report and the last sentence of section 6.3.2 recommend a course of action if certain decisions are made. Further, the Legal and Regulatory Considerations section of the river access report detail actions that should be taken if certain decisions are made. Finally, the findings, options and recommendations sections of the river access report contain analyses, recommendations and policy options. This information would qualify as analyses, recommendations and policy options for the purposes of subsection 16(1)(a) of LA FOIP.
- [59] Additionally, section 3 of the river access report (pages 5 to 10) discusses past studies that have examined the same issue. These studies were created in 1983, 1988, 1990 and 1993 as well as a parks and recreation plan in 2015. The river access report summarizes each study's scope and factors considered. These descriptions are purely factual and no new analysis is offered. This information would not qualify as advice, proposals, recommendations, analyses or policy options. Further, the 2015 plan is currently publically available on the City's website and the river access report notes that this plan did not include relevant recommendations.
- [60] However, the river access report does summarize the findings and recommendations for the 1983, 1988 and 1993 studies. Further, there is a sentence in the executive summary, as mentioned earlier, that summarizes these recommendations. This information would

qualify as analyses or recommendations in the context of subsection 16(1)(a) of LA FOIP.

Second part of the test

[61] Next, I must determine if the advice, recommendations, analyses or policy options in the record meet the second part of the test.

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.

[62] The City's indicated that it partnered with the MVA to hire a consultant to do the study and create the river access report. The agreement between the City and MVA is a responsive record and has been provided to both the Applicant and my office. Once the river access report is finalized, it is to be presented to City Council for consideration.

[63] The information was sought from the consultant. It was prepared for the purpose of City Council making a decision with respect to the river access. Finally, it was intended for City Council who can take the action. I note that the City has indicated that Council has not yet been presented with a copy of the river access report. My office has found in the past that the information does not have to have arrived at the person who can take or implement the action in order to qualify. Also, my office has found that draft advice, recommendations, proposals, analyses and/or policy options are protected by this exemption. I am satisfied that, with respect to the advice, recommendations, analyses and policy options I have identified in the river access report, the second part of the test has been met.

[64] The only exception is the descriptions of the policy options and recommendations included in the river access report from the 1983, 1988 and 1993 studies. These reports were created by or for MVA. The City has not indicated that these recommendations

were intended for anyone in the City. It does not meet the second part of the test and subsection 16(1)(a) of LA FOIP does not apply.

Third part of the test

[65] In order to meet this part of the test, the information must have been developed by or for the local authority. The agreement between the City and MVA clearly indicates that the City is pursuing the study to determine river access requirements of its residents. I am satisfied that the City has a sufficient advisory role and that this part of the test has been met.

[66] Subsection 16(1)(a) of LA FOIP applies to the advice, recommendations, analyses and policy options I have identified in the river access report.

4. Does subsection 16(2)(d) of LA FOIP apply to the record?

[67] The Applicant also asked that my office review whether subsection 16(2)(d) of LA FOIP applies to the material to which the City applied subsection 16(1)(a) of LA FOIP. Subsection 16(2)(d) of LA FOIP provides:

16(2) This section does not apply to a record that:

...

(d) is a statistical survey;

[68] My office's resource *IPC Guide to Exemptions* defines statistical surveys as general views or considerations of subjects using numerical data. While the river access report does contain the results of a statistical survey, I have found that subsection 16(1)(a) of LA FOIP only applies to the advice, recommendations, analyses and policy options I have identified in the river access report. These portions would not qualify as a statistical survey. Subsection 16(2)(d) is not applicable to these portions of the record.

IV FINDINGS

[69] I find that the fees were reasonable.

[70] I find that the search performed by the City was reasonable.

[71] I find that subsection 16(1)(a) of LA FOIP only applies to portions of the river access report.

[72] I find that subsection 16(2)(d) of LA FOIP does not apply to portions of the river access report where I have found subsection 16(1)(a) of LA FOIP applies.

V RECOMMENDATIONS

[73] I recommend the City create a procedure to confirm that fees are appropriate before the final payment is made by an applicant.

[74] I recommend that the City release the entire river access report to the Applicant with the exception of:

- the recommendations in the executive summary that begins with the last three paragraphs of the second page of the executive summary (page v) and continues to the end of the executive summary (pages vi and vii);
- section 6.3 (Long Term Considerations);
- the last sentence of section 6.3.2 (Weir);
- section 7 (Legal and Regulatory Considerations);
- section 9 (Finding);
- section 10 (Options); and
- section 11 (Recommendations).

Dated at Regina, in the Province of Saskatchewan, this 26th day of September, 2017.

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