



## REVIEW REPORT 104-2019

### City of Prince Albert

May 12, 2020

#### Summary:

The City of Prince Albert (City) received an access to information request regarding a particular address. In its section 7 response, the City denied the Applicant access to portions of the responsive records pursuant to section 21 of *The Local Authority Freedom of Information and Access to Privacy Act* (LA FOIP). The Commissioner found that the City appropriately applied subsection 21(a) of LA FOIP, it met its obligations pursuant to section 8 of LA FOIP, it conducted a reasonable search for records, and there are no inspector notes responsive to the Applicant's request. The Commissioner recommended the City continue to withhold the records in question.

#### I BACKGROUND

[1] On January 31, 2019, the City of Prince Albert (City) received the following access to information request:

All records regarding the applicant and [address location], including from the City Solicitor and the Planning Dept. and Building Inspectors and Fire Inspectors for the dates March 1, 2015 to May 1, 2018.

[2] On March 1, 2019, the City provided the Applicant with a fee estimate for partial disclosure of records in response to the Applicant's request, and also advised the Applicant that it was withholding records, in full, pursuant to section 21 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[3] On March 18, 2019, the Applicant requested that my office review the City's decision.

[4] On May 1, 2019, my office provided notification to the City and the Applicant of my intent to undertake a review of the City's search efforts as well as its application of section 21 of LA FOIP to the record. The City provided its response to my office on July 19, 2019.

## **II RECORDS AT ISSUE**

[5] The records at issue includes 952 pages of records to which the City has applied section 21 of LA FOIP. In the course of the review, the City indicated it had released records to the Applicant, or indicated where the records could be obtained as a matter of public record. I will analyze the application section 21 of LA FOIP on the pages of the record the City has not released to the Applicant.

## **III DISCUSSION OF THE ISSUES**

### **1. Do I have jurisdiction to conduct this review?**

[6] The City qualifies as a local authority pursuant to subsection 2(f)(i) of LA FOIP; therefore, I have jurisdiction to conduct this review.

### **2. Did the City properly apply subsections 21(a), (b) and (c) of LA FOIP to the record?**

[7] With respect to the application of section 21 of LA FOIP, public bodies have three options when claiming privilege, which include: 1) providing the documents to my office with a cover letter stating that the public body is not waving the privilege; 2) providing the documents to my office with the portions severed where solicitor-client privilege is claimed; or 3) providing my office with an affidavit with a schedule of records. If the Commissioner has a reasonable basis for questioning the content of an affidavit, the Commissioner may, exercising his formal powers, and only as necessary, request additional background information by affidavit or otherwise. My office's *The Rules of Procedure* (June 10, 2019), provides further guidance to public bodies on this.

[8] In the matter before me, the City has provided my office with a copy of the records stating that it is not waiving the privilege. The City has included an index of records indicating the pages of the records it has released to the Applicant or where the records could be found as a matter of public record. My office appreciates when public bodies provide a copy of the records as it allows my office to undertake a more thorough review.

[9] The City has applied subsections 21(a), (b) and (c) to the record, which provides the following:

**21** A head may refuse to give access to a record that:

(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

(b) was prepared by or for legal counsel for the local authority in relation to a matter involving the provision of advice or other services by legal counsel; or

(c) contains any correspondence between legal counsel for the local authority and any other person in relation to a matter involving the provision of advice or other services by legal counsel.

[10] When applying an exemption, my office suggests that public bodies use the relevant tests outlined in my office's *Guide to FOIP, Chapter 4* (updated February 4, 2020). Using the relevant tests can assist a local authority with making its case as to whether or not an exemption applies, and can help my office come to a conclusion with whether or not the exemptions were properly applied.

[11] It was initially not clear from the City's submission if it was applying only subsection 21(b) of LA FOIP to all of the records. My office asked the City to provide clarification, and the City responded that it was applying all parts of section 21 of LA FOIP to the records. I will consider all of section 21 of FOIP, as part of my analysis.

***Subsection 21(a) of LA FOIP***

[12] The City has *not* released the following pages of the records to the Applicant, which I will consider pursuant to subsection 21(a) of LA FOIP: 1, 2, 4, 20-26, 33-36, 39, 55-59, 66-69,

72, 75-77, 79, 81, 82, 87-93, 95-102, 119-135, 137-141, 144-147, 149-155, 157, 159, 160, 163, 181-187, 191-201, 203, 205, 207, 209-217, 221-224, 229, 236, 237, 240, 243-265, 268, 269, 273, 274, 278, 282, 289, 294-301, 305-311, 316, 324, 325, 332-356, 359-362, 372-379, 384, 388, 393-397, 400-402, 407-431, 440, 444-446, 449-473, 476-484, 489-497, 505-528, 536-562, 567-570, 582-641, 644-651, 653, 654, 689, 725-734, 762-767, 773-844, 847-862, 864-867, 872-875, 879-885, 891-898, 914-930, 934-938, 941-946 and 952.

[13] I note the City stated that records that were attached to emails or correspondence were released to the Applicant along with the rest of the documents it released to the Applicant. The City indicated to the Applicant that, “[a]ll Court documents for the property requested are accessible by the public on the Court records as action number [removed]”. The City stated its purpose for doing so was because the City, “did not want the Applicant to have to pay for something [they] could get through the Court records, which may be free...” I also note that some portions of the pages are partially redacted to account for information the City has withheld pursuant to section 21 of LA FOIP.

[14] To determine if subsection 21(a) of LA FOIP applies to a record, my office suggests the following three-part test from the *Guide to FOIP, Chapter 4* (updated February 4, 2020) at page 247:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice? and
3. Did the parties intend for the communication to be treated differently?

[15] For the purposes of the test, a client includes an individual or entity who consults with a lawyer or enters into an agreement to receive legal services. In the matter before me, the City stated that it retains outside legal counsel, who upon review of the Law Society of Saskatchewan’s website, is listed as an active member. Communication between a client and lawyer must be for the purpose of seeking or giving legal advice, where legal advice means a legal opinion about a legal issue, and a recommended course of action that is based on legal considerations regarding a matter with legal implications. The privilege not only applies to records that give legal advice, but also to those that seek it or provide factual

information with respect to the advice sought. Finally, confidentiality may be explicit or implicit.

[16] On the face of the remaining records, it appears that all three parts of the test for subsection 21(a) of LA FOIP have been met as they include correspondence between City employees and the City's legal counsel for the purposes of seeking or giving legal advice, and the records would be intended to be treated differently as confidential. I find, therefore, that the City has properly applied subsection 21(a) of LA FOIP to the records I have identified at paragraph [12] and recommend the City continue to withhold them. Because I find that subsection 21(a) of LA FOIP applies to these records, I do not need to consider whether subsections 21(b) and (c) of LA FOIP apply to them as well.

**3. Did the City meet its obligation pursuant to section 8 of LA FOIP?**

[17] Section 8 of LA FOIP provides the following:

**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.

[18] When a local authority receives an access to information request, it must complete a line-by-line analysis of the responsive records to comply with section 8 of LA FOIP. Through this analysis, the local authority is required to determine where mandatory or discretionary exemptions apply and sever those specific portions. Once it does this, it is to release the remainder of the record to the Applicant.

[19] I note that section 21 of LA FOIP is a discretionary exemption. The City appears to have gone through all responsive records and released what it could to the Applicant. This included portions of pages where subsection 21(a) of LA FOIP was otherwise applied. This approach would comply with section 8; therefore, I find the City met its obligation pursuant to section 8 of LA FOIP.

**4. Did the City conduct a reasonable search?**

- [20] The focus of a search review is whether or not the local authority conducted a reasonable search. A reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the request. The threshold is “reasonableness”, and not a standard of perfection. LA FOIP does not require a local authority to prove with absolute certainty that records do not exist.
- [21] The City provided my office with a description of the steps it undertook in order to fulfill the Applicant’s request. The City forwarded the Applicant’s access request to the City’s legal counsel and department heads to determine who would have responsive records. The following responded with information: Secretary of Planning and Development Services, Building Inspector Planning and Development Services, Chief Building Official, Acting Deputy Fire Chief and the City’s legal counsel. According to the City’s submission, each department head reviewed property and building permit files, electronic folders and emails; the City’s solicitor provided their entire file to the City clerk for review of responsive documents. The efforts resulted in two sets of records: 1) a set of records, which are not part of this review, provided to the Applicant along with an index citing where they are able to obtain the documents that are part of the public record; and 2) the second set of records which the City has withheld from the Applicant pursuant to section 21 of LA FOIP.
- [22] The Applicant’s concern in their request for review to my office, however, centered specifically on the following:
- Nothing has been provided that was directly generated by the building inspector. It was all prepared by legal counsel.
- I am requesting the notes of the inspectors [building and fire] after inspections, and nothing has been provided in this regard.
- [23] Because it was not initially clear from the City’s submission why there were no records directly generated by the building inspector, but instead all appeared to be prepared by legal counsel, the City provided the following explanation to my office:

The Original Order issued by the Chief Building Official was prior to the date range of this particular request and was not reviewed or provided. With that Original Order, it indicated that a number of deficiencies were required to be completed and that a re-inspection would take place on a specific date. When the Building Inspector attended to the building for re-inspection [pursuant to the Original Order], he attended with a copy of the Building Plans and a device to take pictures.

As outlined in the Affidavit of Michael Nelson [Building Inspector] sworn on March 4, 2016, which is... Michael completed the inspection on October 15, 2015, and clearly documented that inspection by viewing the Building Plans that he brought and taking pictures of the deficiencies that existed at the building. He did not take any handwritten notes at that inspection. Therefore, in regards to the inspection on October 15, 2015, all documentation that was utilized to produce the Affidavit (Inspection findings) are actually attached to the Affidavit, which are the Building Plans and Pictures. This document was released prior to this request within the Court process and is a matter of public record.

Following the October 15, 2015 Inspection, all subsequent inspections were ordered by the Court and only the deficiencies noted in the Court Orders were visually observed by the Building Inspector. All inspection findings were required to be provided directly back to the Court through the filing of an Affidavit by Legal Counsel. All of these Affidavits were released prior to this request within the Court process and are a matter of public records.

Following each Court Ordered inspection, Michael either emailed or called Nicole to advise what he visually observed at the inspection in regards to the deficiencies he was required to review by the Court. In some cases he actually drafted the Affidavit and emailed Nicole [City's legal counsel] for review and filing...

[24] Based on the City's explanation, it seems reasonable that the findings of the inspectors, based on the original court order and after their inspections occurred, could be provided through an affidavit, drafted by the inspectors or by the City's legal counsel, and include attached photographs (or exhibits). As noted at paragraph [20] of this Report, LA FOIP does not require a local authority to prove with absolute certainty that records do not exist. I am satisfied that the City has provided enough clarification regarding the inspector's notes to conclude there are no inspector's notes responsive to this request, and therefore, that the City has conducted a reasonable search for records.

#### **IV FINDINGS**

[25] I find that subsection 21(a) of LA FOIP applies to the records I have identified at paragraph [12].

[26] I find that the City met its obligation pursuant to section 8 of LA FOIP.

[27] I find that the City has conducted a reasonable search for records and that there are no inspector's notes responsive to the request.

## **V RECOMMENDATION**

[28] I recommend that the City continue to withhold the records I have identified at paragraph [12] pursuant to subsection 21(a) of LA FOIP.

Dated at Regina, in the Province of Saskatchewan, this 12th day of May, 2020.

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