

#### REVIEW REPORT 109-2015

## City of Moose Jaw

#### September 4, 2015

**Summary:** 

In March 2015, an Applicant submitted an access to information request to the City of Moose Jaw (City). The City responded providing partial access to the records requested. It withheld other information pursuant to subsections 18(1)(b), (c), 16(1)(a), (b), (c), 17(1)(b), (d), (e), (f) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Upon review, the Commissioner found that the City appropriately applied subsections 16(1)(b), 18(1)(b) and 28(1) of LA FOIP. The Commissioner recommended the City continue to withhold the information.

#### I BACKGROUND

[1] On March 9, 2015, the City of Moose Jaw (City) received an access to information request from the Applicant for:

Any and all documentation related to the City of Moose Jaw 'Request for Proposal' 2015 Curbside Recycling Collection and Processing Service including, but not limited to the written criteria used to determine the successful proposal, the scoring results on the evaluation criteria for submissions by Emterra Group and Loraas Disposal, and the information upon which the City of Moose Jaw denied Emterra Group's proposal and accepted Loraas Disposal's proposal.

[2] The City responded to the request by a letter dated March 27, 2015 indicating that access was partially granted. Some records were released to the Applicant at this time. The City did not indicate what authority it was relying on to withhold the remainder of the records requested. In a letter dated April 27, 2015, the City provided additional records to the Applicant but severed portions pursuant to subsections 18(1), 16(1)(a), (b), (c), 17(1)(b),

- (d), (e) and (f) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). In a letter dated May 7, 2015, the City provided additional records to the Applicant but severed portions pursuant to subsections 16(1)(a), (b), (c), 17(1)(b), (d), (e), (f), 18(1)(b), (c) and 28(1) of LA FOIP.
- [3] On May 26, 2015, my office received a Request for Review from the Applicant.
- [4] On June 3, 2015, my office notified the City, Applicant and third party of our intention to undertake a review. A submission was received from the City on June 30, 2015 along with the records in question. A submission was received from the third party on June 17, 2015. We received a submission from the Applicant on July 3, 2015.

#### II RECORDS AT ISSUE

[5] The records at issue consist of the third party's proposal to the City, various City memos, handwritten notes, evaluation documents and emails. In total, there are 263 pages.

#### III DISCUSSION OF THE ISSUES

- [6] The City is a "local authority" pursuant to subsection 2(f)(i) of LA FOIP.
- [7] Loraas Disposal Services Ltd. is a "third party" pursuant to subsection 2(k) of LA FOIP.
- 1. Did the City properly apply subsection 16(1)(b) of LA FOIP to the withheld record in question?
- [8] Subsection 16(1)(b) 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:
    - (b) consultations or deliberations involving officers or employees of the local authority;

- [9] The City applied subsection 16(1)(b) of LA FOIP to a number of pages in the record. However, I will only address pages 237, 238, 239, 336, 338, 339, 341, 342, 368, 369 and 371 in this section.
- [10] A *consultation* occurs when the views of one or more officers or employees of the public body are sought as to the appropriateness of a particular proposal or suggested action.
- [11] A *deliberation* is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.
- [12] In order to qualify, the opinions solicited during a consultation or deliberation must:
  - i) must 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, such as taking an action, making a decision or a choice.
- [13] In its Index of Records, the City asserted that the information severed on these pages constituted consultations and deliberations of various issues relating to the curbside recycling RFP, including cost estimates, funding, and general advantages and disadvantages involving the City's engineering department and the City's executive committee. The consultations and deliberations were for the purpose of assessing and implementing residential curbside recycling collection and recycling processing services in the City.
- [14] Pages 237, 238 and 239 qualify as consultation. The information is contained within a memorandum meant to present options to the Executive Committee. Similar information is found on pages 368 and 369.
- [15] Pages 336, 338, 339, 341, 342 and 371 are emails between different City employees and consultants. Subsection 16(1)(b) of LA FOIP requires that the consultations and deliberations involve officers or employees of the local authority. These pages contain

consultations and deliberations. For example, on page 338, a City Manager provides his feedback on work provided to him by another employee.

[16] In conclusion, I find that the City has appropriately applied subsection 16(1)(b) of LA FOIP to pages 237, 238, 239, 336, 338, 339, 341, 342, 368, 369 and 371. The City applied several other exemptions to these pages however there is no need to consider these given my finding.

# 2. Did the City properly apply subsection 18(1)(b) of LA FOIP to the withheld record in question?

- [17] Subsection 18(1)(b) of LA FOIP is a mandatory exemption 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;
- [18] Subsection 18(1)(b) of LA FOIP is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to local authorities. Although one of the central purposes of the Act is to shed light on the operations of local authorities, subsection 18(1)(b) of LA FOIP serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.
- [19] All three parts of the following test must be met in order for subsection 18(1)(b) of LA FOIP to be found to apply:
  - i. The information in question must qualify as financial, commercial, scientific, technical or labour relations information:
  - ii. The information must have been supplied by the third party; and
  - iii. The information must have been supplied in confidence either implicitly or explicitly.

- [20] The City applied subsection 18(1)(b) of LA FOIP to several pages of the record. Some pages were severed and others were withheld in full.
  - i. Is the information in question financial, commercial, scientific, technical or labour relations information?
- [21] In its Index of Records, the City asserted that the information withheld in the record was "financial", "commercial", "scientific", "technical" and "labour relations" information. I will address the financial and commercial information first.
- [22] *Financial information* relates to money and its use or distribution and must contain or refer to specific data. Examples of financial information include cost accounting methods, pricing practices, profit and loss data and overhead and operating costs.
- [23] *Commercial information* is information relating to the buying, selling or exchange of merchandise or services. In British Columbia IPC Order F05-09, identified a number of types of information which its jurisdiction considered to be included in the definition of commercial information are as follows:
  - Offers of products and services a third-party business proposes to supply or perform;
  - A third-party business's experiences in commercial activities where this information has commercial value;
  - Terms and conditions for providing services and products by a third party;
  - Lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises; such lists may take time and effort to compile, if not skill;
  - Methods a third-party business proposes to use to supply goods and services; and
  - Number of hours a third-party business proposes to take to complete contracted work or tasks.
- [24] The City applied subsection 18(1)(b) of LA FOIP to all of the information in the first 234 pages of the record which constitutes the third party's complete proposal to the City in

response to a request for proposals for the provision of residential curbside recycling collection and recycling processing services.

- It is clear that the entire proposal was created by the third party with the aim of winning a contract with the City. Commercial information relates to a commercial enterprise, but it need not be proprietary in nature or have an independent market or monetary value. It is sufficient if the information is associated with the buying, selling or exchange of the entity's goods or services. The information in the proposal relates to the buying or selling of goods and services. Therefore, I find that the entire proposal package submitted by the third party to the City constitutes the third party's commercial information. This approach is consistent with other jurisdictions (e.g. BC IPC Order F09-22, Ontario IPC Order MO-3179).
- The City also severed information on pages 242, 260, 261, 290, 291, 292, 293, 294, 295 and 296 citing subsection 18(1)(b) of LA FOIP. The City indicated that the information was financial and commercial information. In its Index of Records, the City indicated that some of the severed information was financial information because the information included specific proposed operational costs, and pricing terms and options. For example, on page 237 of the record, the City severed the estimated cost proposed for diverting recycling from the landfill. The City indicated that this information was taken from and calculated based on the third party's proposal. Pages 291 to 295 constitute a document containing the evaluation scores of the third party's proposal and pricing information taken from the third party's proposal.
- [27] I find that the information severed is financial and commercial information of the third party.

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

[28] Information may qualify as "supplied" if it was directly supplied to a local authority by a third party.

- [29] Pages 1 to 234 were clearly supplied by the third party to the City as it is the third party's proposal package in response to the RFP. Pages 242, 260, 261, 290, 291, 292, 293, 294, 295 and 296 contain information drawn from the third party's proposal.
- [30] Records can still be considered to have been supplied by a third party even when the records originate with the public body, for example when the record contains or repeats information extracted from documents supplied by the third party. In this case, that is what has occurred. Therefore, I find that the information in pages 242, 260, 261, 290, 291, 292, 293, 294, 295 and 296 was supplied by the third parties to the City.

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

- [31] Both the City and third party assert that the information was supplied by the third party to the City implicitly in confidence. In this instance, there was no explicit expression of confidentiality in the City's RFP documents.
- [32] If a public body, in its RFP process, explicitly indicates that RFP proposals will be held in confidence (subject to any legal requirements) the situation is clear. In recent reports issued by my office, where public bodies have had explicit confidentiality clauses, I have concluded that RFP proposals were supplied explicitly in confidence. I recommend that public bodies seriously consider incorporating into their RFP process a clause that indicates RFP proposals are submitted in confidence. This advice is consistent with other jurisdictions. For example, in British Columbia IPC Order 03-02, former Commissioner Loukidelis provided similar advice:
  - ...a confidentiality clause can greatly assist the determination of whether the parties to a contract intend information related to it to be confidential...Public bodies should also address their confidentiality intentions in records that govern tenders, request for proposals and other procurement processes. Similarly, where third parties voluntarily supply information to a public body, they ideally should do so knowing the public body's confidentiality practices.
- [33] Such a confidentiality clause does not exist here, therefore, I must analyze whether it was provided implicitly in confidence.

- [34] *Implicitly* means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential. Some factors considered when determining whether a document was supplied implicitly in confidence include:
  - What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the third party or public body?
  - Was the information treated consistently in a manner that indicated a concern for its protection by the third party and the public body?
  - Is the information available from sources to which the public has access?
  - Does the public body have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially?
  - Was there a mutual understanding that the information would be held in confidence? *Mutual understanding* means that the public body and the third party both had the same understanding regarding the confidentiality of the information at the time it was supplied. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been supplied in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.
- In its submission, the City provided arguments to support that the information was supplied implicitly in confidence by the third party including the fact that both the third party and the City agree that the information was supplied in confidence. Accordingly, there is a mutual understanding between the parties. Secondly, the information has been treated consistently by both parties in a manner that indicates a concern for its protection and has remained confidential since it was supplied to the City. The third party's submission also indicated that it supplied the information to the City in confidence.
- [36] The information at issue is the third parties proposal in response to an RFP, scoring and evaluation notes created by the City. I find that the nature of the information is such that a reasonable person would regard it as confidential. In addition, there is a mutual understanding between the City and the third party that there would be confidentiality. Therefore, I find that the information meets the third part of the test.

[37] In conclusion, the City appropriately applied subsection 18(1)(b) of LA FOIP to the third party's proposal (pages 1 to 234) and pages 242, 260, 261, 290, 291, 292, 293, 294, 295 and 296.

# 2. Did the City properly apply subsection 28(1) of LA FOIP to the withheld record in question?

- [38] Only page 316 remains to be addressed. Page 316 is an email and the City severed a portion of information citing subsection 28(1) of LA FOIP. Subsection 28(1) of LA FOIP provides:
  - **28**(1) No local authority shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 29.
- [39] In order for subsection 28(1) to apply, the information severed in the record must first be found to qualify as "personal information" pursuant to subsection 23(1) of LA FOIP. In its Index of Records, the City asserted that the information severed on page 316 related to the family status of an identifiable individual. Subsection 23(1)(a) of LA FOIP provides:
  - **23**(1) Subject to subsections (1.1) and (2), "personal information" means personal information about an identifiable individual that is recorded in any form, and includes:
    - (a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;
- [40] Family status is not defined in LA FOIP. However, The Saskatchewan Human Rights

  Code defines family status as the status of being in a parent and child relationship. Child

  is defined as a son, daughter, stepson, stepdaughter, adopted child and person to whom

  another person stands in place of a parent. Parent is defined as a father, mother,

  stepfather, stepmother, adoptive parent and person who stands in place of a parent to
  another person.

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[41] For the information on page 316 there is an identifiable individual and the information is

about the family status of the individual. As the information qualifies as personal

information pursuant to subsection 23(1)(a) of LA FOIP, I find that the City appropriately

applied subsection 28(1) of LA FOIP.

[42] As all records have been addressed, there is no need to address the remaining seven

exemptions applied by the City to the record.

IV FINDINGS

[43] I find that the City appropriately applied subsections 16(1)(b), 18(1)(b) and 28(1) of LA

FOIP.

**V** RECOMMENDATIONS

[44] I recommend the City continue to withhold the information in the record.

Dated at Regina, in the Province of Saskatchewan, this 4<sup>th</sup> day of September, 2015.

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

Commissioner

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