



REVIEW REPORT 119-2016

Town of Kindersley

September 26, 2016

Summary: The Applicant submitted a freedom of information request to the Town of Kindersley (the Town). The Town responded by stating that no records exist for one part of her request, and issued a fee estimate for the second part of her request. The Applicant requested a review by the Information and Privacy Commissioner (IPC). The IPC found that it is reasonable to believe that no records exist to the one part of the Applicant's request. However, the IPC found that the Town did not demonstrate that its fee estimate was reasonable.

I BACKGROUND

[1] On April 6, 2016, the Town of Kindersley (the Town) received the following access to information request:

Agreement referred to on March 14, 2016 in town council meeting, agenda 5.3.5 West Central Abilities. All documentation regarding Kinsmen Park.

[2] On April 19, 2016, the Town responded by stating that "there is no agreement in place with the West Central Abilities" and explained that what was being referenced was the intent to develop a draft agreement in the council meeting. Also, the Town provided a fee estimate of \$1,244.95 for all documentation related to Kinsmen Park.

[3] On May 30, 2016, my office received a Request for Review from the Applicant.

[4] On June 15, 2016, my office notified both the Applicant and the Town that it would be undertaking a review.

II RECORDS AT ISSUE

[5] Since this review is focused on search efforts by the Town and the fee estimate, there are no records at issue in this review.

III DISCUSSION OF THE ISSUES

[6] The Town qualifies as a “local authority” as defined by subsection 2(f)(i) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

1. Did the Town provide sufficient evidence that no records exist?

[7] Section 5 of LA FOIP provides the right of access as follows:

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.

[8] 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, or otherwise show records do not exist.

[9] On July 11, 2016, to support its assertion that records do not exist, the Town provided my office with the following:

- **Agenda No. 5.3.5, Resolution No. 83-16, Dated March 14, 2016** Council directing Administration to proceed with a 40 year lease option with West Central Abilities Inc.
- **Agenda 5.3.1, Resolution No. 110-16, Dated April 11, 2016** Council rescinds Resolution No. 83-16.
- **Agenda 5.3.1a, Resolution No. 111-16 Dated April 11, 2016** Council supports relocation efforts by West Central Abilities.

- **Letter dated April 18, 2016 by West Central Abilities to Town Council**
West Central Abilities withdraws request for a lease of Kinsmen Park.

[10] Based on the above, I find it reasonable that an agreement between the Town and West Central Abilities does not exist.

2. Are the fees estimated by the Town reasonable?

[11] Section 9 of LA FOIP provides the Town with the ability to issue a fee estimate to the Applicant where the amount will exceed the prescribed fee of \$50.

[12] Fee estimates are generally judged on the basis of whether they are reasonable. The local authority bears the burden of establishing the reasonableness of the fee.

[13] There are three kinds of fees that a public body can include in its fee estimate:

1. fees for searching for a responsive record;
2. fees for preparing the record for disclosure; and
3. fees for the reproduction of records.

[14] Below, the analysis is broken down into these three kinds of fees to determine if the Town's fee estimate is reasonable.

1. Fees for searching for a responsive record

[15] Subsections 5(3) and 5(4) of LA FOIP Regulations provide a local authority with the ability to recover costs associated with searching for responsive records.

[16] Fees encourage responsible use of the right of access by applicants. However, fees should not present an unreasonable barrier to access. Therefore, fees should be reasonable, fair and at a level that does not discourage any individual from exercising their access rights.

[17] Where the search for responsive records exceeds one hour, the Town can charge \$15.00 for every half hour after that.

- [18] My office has previously stated that search time consists of every 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/or reading through files to determine whether records are responsive. However, 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.
- [19] Further, my office has previously established that it should take an experienced employee approximately one minute to examine 12 pages to determine if they are responsive or not. Also, generally it should take an experienced employee five minutes to search one regular file drawer for responsive file folders.
- [20] In instances where these tests do not accurately reflect the circumstances, the public body should design a search strategy and test a representative sample of records for time. The time can then be applied to the responsive records as a whole.
- [21] In its submission dated August 3, 2016, the Town stated that its fee estimate was arrived at due to the age of the Kinsmen Park and that there would be many hours involved in combing through long archived documents as well as archived emails. It stated that the wording of the request was broad because the Applicant requested “all documentation regarding Kinsmen Park”.
- [22] I agree with the Town that the wording of the original request was broad. Broad requests can easily result in large fee estimates. However, based on the information provided to my office, I cannot decipher the Town’s search strategy and how it calculated \$1244.95.
- [23] I find that the Town has not demonstrated that its fee estimate for search is reasonable.

2. Fees for preparing the record for disclosure

- [24] My office had established that an estimate of two minutes per page to prepare the records requiring severance is reasonable. Subsection 5(3) of the LA FOIP Regulations allows the

local authority to charge a fee of \$15 for each half-hour for preparing of the records, if the time is in excess of one hour.

[25] The Town's fee estimate did not include fees for preparing records for disclosure. Therefore, I will not consider this type of fee.

3. Fees for the reproduction of records

[26] Subsection 5(2)(a) of the LA FOIP Regulations allows for \$0.25 to be charged for each page that is photocopied.

[27] The Town's fee estimate does not provide an estimated number of pages to be responsive to the request. Therefore, it is difficult to determine if its fee estimate of \$1244.95 included photocopying costs.

[28] Overall, I find that the Town did not demonstrate to my office how it calculated its fee estimate.

[29] The Town stated that the Applicant submitted another request in which she narrowed her request to agreements related to Kinsmen Park in the last 10 years that may still be in effect (this request is discussed in Review Report 149-2016). In a discussion with the Applicant on July 26, 2016, I confirmed with the Applicant that she had submitted a separate but related narrowed request to help avoid such a big fee estimate. However, she stated she never rescinded her original request and that she wished to proceed with this review because she felt that fee estimate could have been used as a barrier to access records.

[30] I recommend that, in the future, the Town devise a search strategy as described in paragraphs [18] and [19], and base the search fee estimate on the search strategy. The search strategy should also help the Town estimate an approximate number of pages of responsive records. The fee estimate for preparation and photocopying can be based on this approximate number of pages of responsive records.

[31] Further, within its fee estimate letters in the future, I recommend the Town invite the Applicant to contact it to determine if there's any opportunity to narrow the request. A narrowed request could result in a win-win situation because the Town would have less work in processing a narrowed request and the Applicant would have a smaller fee to pay.

[32] In a letter dated September 16, 2016, the Town's legal counsel expressed his disagreement with my office's method of analyzing 1) fees for search and 2) fees for reproduction of records. First, the Town's Counsel took issue with the estimate as described in paragraphs [18] and [19]. He stated it is not supported by legislation and that it is a "subjective estimation that is not prescribed in legislation." My office must establish tests to analyze issues in reviews. To develop these tests, my office considers tests set out by other Information and Privacy Commissioners and by courts from across Canada. My office's tests are transparent and published in public reports as well as in my office's resource, *IPC Guide to Exemptions* (available on www.oipc.sk.ca). I note, though, that for reviews where the search for records is an issue, my office has stated that if my office's established tests do not reflect the circumstances of the public body, then the public body should design a search strategy and test a representative sample. This was clearly stated in paragraph [20] of my office's Draft Review Report.

[33] Second, the Town's legal counsel took issue with my office's method for analyzing fees for reproduction of records. He described my office's recommendation of devising a search strategy and using the search strategy to estimate an approximate number of pages of responsive records to be "impractical and impossible". He stated:

The Town sees the recommendation as akin to asking it to estimate many words are contained in a book without firstly looking through the book. Not all books are the same and each is different, and each page contains a different number of words because each word has a varying amount of letters.

[34] In the past, public bodies have been able to estimate an approximate number of pages and demonstrate how it arrived at such an estimate in reviews with my office. For example, in Review Report 114-2013, the Saskatoon Public Library provided my office with a digital image of a drawer of the responsive records. It used a pack of paper (500 sheets) to show how it estimated the drawer contained 7200 pages of responsive records. The Town can

read this Review Report on my office's website www.oipc.sk.ca. Therefore, I encourage the Town to reconsider its position that my office's recommendation is impractical and impossible.

[35] Finally, the Town's legal counsel stated that my office's recommendation that for fee estimate letters in the future, the Town invite the Applicant to contact it to determine if there's any opportunity to narrow the request is not necessary. He states that the narrowing is not necessary because the Applicant had submitted a narrowed second request (as discussed in Review Report 149-2016).

[36] The Applicant submitted a narrowed second request by her own initiative instead of the Town inviting the Applicant to contact it to narrow her original request. To submit a narrowed second request, the Applicant had to pay a second application fee of \$20 pursuant to subsection 5(1) of the LA FOIP Regulations. Further, the Town did not respond to the Applicant's narrowed second request within the legislated timelines (as described in Review Report 149-2016) because it thought its fee estimate for the first original request applied to the narrowed second request. In fact, the Town did not respond to the Applicant's narrowed second request until the Applicant appealed to my office. Based on the Town's failure to respond to the Applicant's narrowed second request within legislated timelines, I disagree with the Town's legal counsel that my office's recommendation was unnecessary.

IV FINDINGS

[37] I find it reasonable that an agreement between the Town and West Central Abilities does not exist.

[38] I find that the Town has not demonstrated that the fee estimate is reasonable.

V RECOMMENDATIONS

[39] I recommend that the Town release to the Applicant the records referred to in paragraph [9] so that the Applicant can be reasonably assured that no agreement between the Town and West Central Abilities does not exist.

[40] I recommend that, in the future, the Town devise a search strategy as described in paragraphs [18], [19], and [20] and base the search fee estimate on the search strategy. The search strategy should also help the Town estimate an approximate number of pages of responsive records. The fee estimate for preparation and photocopying can be based on this approximate number of pages of responsive records.

[41] I recommend that, in its fee estimate letters in the future, the Town invite the Applicant to contact it to determine if there's any opportunity to narrow the request.

Dated at Regina, in the Province of Saskatchewan, this 26th day of September, 2016.

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