

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 122/2014

Village of Lebret

Summary: The Applicant submitted an access to information request to the Village of Lebret (Village) but the Village denied access to the requested record cited subsections 18(1)(c)(ii) and (iii) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner found that the subsections did not apply and recommended that the Village release the record.

I BACKGROUND

[1] On July 28, 2014, the Village of Lebret (Village) received an access to information request from the Applicant requesting the following:

1. Agreement between Village and [third party]...
2. Proposal for development
3. Any and all related correspondence between Developer and Village

[2] The Village advised the Applicant by a letter dated July 29, 2014, that access to the records were denied but did not provide any authority for withholding as required pursuant to section 7 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[3] On September 30, 2014, my office received a Request for Review from the Applicant.

[4] In an email dated November 26, 2014, my office notified both parties of its intention to conduct a review. My office received a copy of the record, Index of Records and

submission from the Village on December 29, 2014. In the Village's submission it cited subsections 18(1)(c)(ii) and (iii) of LA FOIP. The Applicant provided a submission to my office on December 9th and 21st, 2014. No submission was received from the third party despite being invited to provide one by my office on November 26, 2014.

II RECORDS AT ISSUE

[5] The Village provided the following responsive records to my office:

1. An Agreement between the Village and a Developer (third party);
2. A letter dated July 13, 2012 from the Village to the Developer; and
3. An email dated October 22, 2014 from a surveying company to the Village

[6] During the course of the review, the Village agreed to release record #2 to the Applicant and the Applicant indicated he was not interested in record #3. Therefore, the only record remaining at issue is record #1.

III DISCUSSION OF THE ISSUES

[7] The Village is a "local authority" pursuant to subsection 2(f)(i) of LA FOIP.

[8] The third party, in this case, is a third party pursuant to subsection 2(k) of LA FOIP

1. Did the Village meet its obligations under section 7 of LA FOIP?

[9] In a letter to the Applicant dated July 29, 2014, the Village advised the Applicant that access was denied. Subsection 7(2) and 7(3) of LA FOIP outline how a local authority is supposed to respond to access to information requests. Subsection 7(2) and 7(3) provide:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

- (a) stating that access to the record or part of it will be given on payment of the prescribed fee and setting out the place where, or manner in which, access will be available;

(b) if the record requested is published, referring the applicant to the publication;

(c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;

(d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;

(e) stating that access is refused for the reason that the record does not exist;
or

(f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4).

(3) A notice given pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

[10] In the July 29, 2014 letter to the Applicant, the Village indicated that access was refused but did not give the reasons or identify any specific provisions under LA FOIP for withholding the information requested. In addition, it did not advise the Applicant of the right to request a review by my office within one year.

[11] Therefore, I find that the Village did not meet its obligations under section 7 of LA FOIP. I recommend that the Village take steps to ensure that all future section 7 responses to applicants are in compliance with the requirements outlined in section 7 of LA FOIP. My office can assist the Village in this regard if needed.

2. Does the Village have any authority to withhold the record from the Applicant?

[12] In its submission to my office, the Village argued that subsections 18(1)(c)(ii) and (iii) of LA FOIP applied to all of the information in record #1. Record #1 is an agreement or contract between the Village and the third party signed and dated October 20, 2012.

[13] On December 20, 2014 the Village Council held a public meeting to discuss the agreement. It was decided that the public could attend the Village office at any time and view the agreement but the public could not make copies of it. On November 27, 2014

the Applicant attended the Village office and was permitted to view the agreement but was not permitted a copy of it.

[14] In its submission, the Village asserted that by making the agreement available for public viewing, but not copying, did not make the agreement a public record within the meaning of section 3 of LA FOIP. Further, public records are held to be something the Village would be required to keep by law and which are generally open to the public. Examples include court and tribunal hearings, and the written decisions attached to them. Other definitions require that the document or information be intended to be used by the public. Finally, the Village argued that the information was not produced by the Village or other government for public use. The Village is not required by law to display or make available the information requested.

[15] The Applicant asserted that the Village had maintained over the past two years that it would release the agreement and it has now done so. Further, the Village and third party answered questions concerning the agreement at a recent public meeting. Further, the issue of proper application of the release of public documents by the Village is important.

[16] The Village is subject to *The Municipalities Act*. Subsection 117(1)(a) of *The Municipalities Act* provides:

117(1) Any person is entitled at any time during regular business hours to inspect and obtain copies of:

(a) any contract approved by the council, any bylaw or resolution and any account paid by the council relating to the municipality;

[17] The record in question is a contract, approved by Council, for third party development services. Section 117(1)(a) of *The Municipalities Act* requires the Village to make any contract available to the public and to provide copies.

[18] Section 3(1) of LA FOIP provides:

3(1) This Act does not apply to:

(a) published material or material that is available for purchase by the public;

(b) material that is a matter of public record; or

(c) material that is placed in the custody of a local authority by or on behalf of persons or organizations other than the local authority for archival purposes.

[19] Virtually all documents in the possession or control of a local authority could be said to be public records. A *matter of public record* for purposes of subsection 3(1)(b) of LA FOIP relates to documents that members of the public have ready access to. There is a statutory provision assuring public access to contracts once approved by council pursuant to subsection 117(1)(a) of *The Municipalities Act*. The Village has also already approved having the contract available to the public for viewing.

[20] Further, subsections 4(a) and (b) of LA FOIP provide:

4 This Act:

(a) complements and does not replace existing procedures for access to information or records in the possession or under the control of a local authority;

(b) does not in any way limit access to the type of information or records that is normally available to the public;

[21] If subsections 18(1)(c)(ii) or (iii) could be relied on by the Village than it would be preventing access to information in records that are normally available to the public pursuant to subsection 117(1)(a) of *The Municipalities Act* which would be contrary to subsection 4(b) of LA FOIP.

[22] In the context of contracts entered into by local authorities, it should be requiring contractual wording that acknowledges that any agreement entered into by the local authority is subject to LA FOIP. My office fully expects that local authorities recognize that there is no enforceable contractual language that allows a Saskatchewan local authority to contract outside of the scope of LA FOIP. When a third party decides to conduct business with a local authority, such as the Village, it must recognize the need for public accountability in the expenditure of public funds.

[23] In conclusion, I find that the Village cannot rely on subsections 18(1)(c)(ii) and (iii) of LA FOIP to withhold the record as this information is already made available to the public pursuant to subsection 117(1)(a) of *The Municipalities Act*.

[24] In my office's draft review report, provided to the Village on January 22, 2015, my office recommended that the Village release the record and address deficiencies in its section 7 responses. On February 24, 2015, the Village responded indicating that it did not intend to comply and would continue to withhold the record. The Village did not address the recommendation regarding section 7 responses.

IV FINDINGS

[25] I find that the Village did not meet its obligations under section 7 of LA FOIP.

[26] I find that the Village cannot withhold the record pursuant to subsections 18(1)(c)(ii) and (iii) of LA FOIP.

V RECOMMENDATIONS

[27] I recommend that the Village address the deficiencies in its section 7 responses and ensure that all future section 7 responses to applicants are in compliance with the requirements outlined in section 7 of LA FOIP. My office would be available to assist the Village in this regard if needed.

[28] I recommend the Village release record #1.

Dated at Regina, in the Province of Saskatchewan, this 3rd day of March, 2015.

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