



REVIEW REPORT 134-2015

City of Saskatoon

October 2, 2015

Summary:

In December 2014, an Applicant submitted an access to information request to the City of Saskatoon (City) for records related to the City and a Labour Arbitrator/Mediator. The City responded indicating that access was denied as no records existed pursuant to subsection 7(2)(e) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Additional records were obtained by the City after the access to information request and the City notified the Applicant that these records were being withheld in full pursuant to subsection 17(1)(d) of LA FOIP. The Applicant requested a review by the Commissioner. During the review, the City identified additional records responsive to the access to information request. The Commissioner found that the City had not conducted a reasonable search for responsive records and recommended the City conduct a new search and provide details and any responsive records to the Applicant. The Commissioner also found that the City appropriately applied subsection 17(1)(d) of LA FOIP to the located records and recommended they continue to be withheld.

I BACKGROUND

[1] On December 16, 2014, the City of Saskatoon (City) received an access to information request from the Applicant for:

Communication between city management and [name of Labour Arbitrator/Mediator]
Invoices and contracts between City of Saskatoon and [name of Labour Arbitrator/Mediator]
Timeframe: Sept-Nov 2014

- [2] The City responded to the requests by a letter dated January 7, 2015 indicating that it required an extension of 30 days in order to fully respond to the access to information request pursuant to subsection 12(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).
- [3] In a letter dated January 28, 2015, the City advised the Applicant that access to the requested records was denied because no records existed pursuant to subsection 7(2)(e) of LA FOIP. Following this letter, further communications occurred between the City and the Applicant between February 3, 2015 and June 23, 2015.
- [4] In a further letter to the Applicant dated June 29, 2015, the City indicated that since the original access to information request, a record had been received by the City. The record was an invoice between the City and the Labour Arbitrator/Mediator. The City advised the Applicant that it was withholding the invoice in full pursuant to subsection 17(1)(d) of LA FOIP.
- [5] On July 2, 2015, my office received a Request for Review from the Applicant.
- [6] In a further letter to the Applicant dated July 9, 2015, the City indicated that in addition to its letter dated June 29, 2015, it was adding that subsection 7(2)(e) of LA FOIP still applied and that no further records existed that would be responsive to the access to information request.
- [7] On July 10, 2015, my office contacted the Applicant to see if the Applicant wanted a review of the invoice withheld pursuant to subsection 17(1)(d) of LA FOIP and/or the issue of no records existing pursuant to subsection 7(2)(e) of LA FOIP. The Applicant requested that both issues be reviewed.
- [8] My office notified the City and the Applicant of our intention to undertake a review on July 10, 2015. My office requested the City provide a copy of the record and a submission that addressed subsection 17(1)(d) of LA FOIP and details of its search efforts. A submission was received from the Applicant on July 20, 2015. A preliminary

submission was received from the City on July 27, 2015 which included a copy of the record at that point (a one page invoice). A full submission and additional records were received from the City on September 16, 2015.

II RECORDS AT ISSUE

[9] The records that have been located and identified as responsive by the City at the time of this report are five pages consisting of emails and an invoice. The records have been withheld in full.

[10] The City has also asserted that no further responsive records exist within its possession and/or control. Therefore, this review will also focus on the search efforts conducted by the City.

III DISCUSSION OF THE ISSUES

[11] The City is a “local authority” pursuant to subsection 2(f)(i) of LA FOIP.

1. Did the City properly apply subsection 17(1)(d) of LA FOIP to the withheld record in question?

[12] Subsection 17(1)(d) of LA FOIP is a discretionary exemption and provides:

17(1) Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the local authority;

[13] In order to qualify for the exemption, the following criteria must be met:

- i. Identify and provide details about the contractual or other negotiations and the parties involved; and

- ii. Detail how release of the record could reasonably be expected to interfere with the contractual or other negotiation(s).

[14] *To interfere with contractual or other negotiations* means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement involving the public body. Prospective or future negotiations could be included within this exemption, as long as they are foreseeable. Once a contract is executed, negotiation is concluded. The exemption would generally not apply.

[15] The public body does not have to prove that interference is probable, but needs to show that there is a “reasonable expectation of interference” if any of the information or records were to be released.

[16] The City withheld all five pages of the record citing subsection 17(1)(d) of LA FOIP. One record is two pages and is an invoice from the Labour Arbitrator/Mediator to the City. The other three pages are emails dated October 7, 2014, October 9, 2014 and April 29, 2015.

[17] In its submission, the City indicated that negotiations were ongoing between the Amalgamated Transit Union, 615 (ATU) and the City for a collective agreement. There were further scheduled meetings in September. The City explained how both the City and ATU have maintained a high level of confidentiality around the negotiations and information being released publicly on the status of bargaining could be harmful to the success of those negotiations. In particular, if the media were to begin reporting publicly about the progress.

[18] In the Applicant’s submission, the Applicant argued that payment of third party contractors is public information and should be made available for transparency and accountability in government. The Applicant indicated that both the ATU and City had agreed to share the costs of the Labour Arbitrator/Mediator.

[19] It is clear that the information in the invoice is directly related to the negotiations in terms of the costs of a Labour Arbitrator/Mediator. The emails contain correspondence between the City and the Labour Arbitrator/Mediator related to the negotiations. Further, the negotiations are actively ongoing and releasing information to the public before they have been concluded could negatively impact them or make them more difficult. However, I do agree with the Applicant that the information in the invoice should be made public but only after the negotiations have concluded. Therefore, I find that the City appropriately applied subsection 17(1)(d) of LA FOIP to the five pages.

2. Did the City conduct an adequate search?

[20] 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.

[21] 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.

[22] 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.

[23] When providing details of search efforts to my office, generally, the details can include (non-exhaustive):

- Outline the search strategy conducted:
 - For personal information requests – explain how the individual is involved with the public body (i.e. client, employee, former employee

etc.) and why certain departments/divisions/branches were included in the search;

- For general requests – tie the subject matter of the request to the departments/divisions/branches included in the search. In other words, explain why certain areas were searched and not others;
- Identify the employee(s) involved in the search and explain how the employee(s) is “experienced in the subject matter”;
- Explain how the records management system is organized (both paper & electronic) in the departments/divisions/branches included in the search:
 - Describe how records are classified within the records management system. For example, are the records classified by:
 - alphabet
 - year
 - function
 - subject

Consider providing a copy of your organizations record schedule and screen shots of the electronic directory (folders & subfolders).

If the record has been destroyed, provide copies of record schedules and/or destruction certificates;

- Explain how you have considered records stored off-site.
- Explain how records that may be in the possession of a third party but in the public body’s control have been searched such as a contractor or information service provider. For more on this, see the OIPC resource, *A Contractor’s Guide to Access and Privacy in Saskatchewan* available on our website.
- Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Which folders within the records management system were searched and explain how these folders link back to the subject matter requested?

- For electronic folders – indicate what key terms were used to search if applicable;
- On what dates did each employee search?
- How long did the search take for each employee?
- What were the results of each employee’s search?
 - Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided. For more on this, see the OIPC resource, *Using Affidavits in a Review with the IPC* available on our website.

[24] The above list is a guide. Each case will require different search strategies and details depending on the records requested.

[25] In its preliminary submission of July 27, 2015, the City indicated that it had located an invoice (one page) and clarified why it was not located at the time of the access to information request. The City explained that it had not received the invoice from the Labour Arbitrator/Mediator until April 29, 2015 via email. There had been problems with transmission and the City did not receive it. The invoice is dated January 27, 2015. The City provided some details regarding the search conducted. It indicated that its search involved various City employees. It was determined that all communication with the Labour Arbitrator/Mediator had been through the Director of Human Resources. There were no further details regarding the City’s search in the preliminary submission.

[26] In the City’s full submission of September 16, 2015, the City included four additional pages that had now been located (emails dated October 7, 2014, October 9, 2014 and April 29, 2015 and a cover page for the invoice). The Director of Human Resources indicated that he had searched his outlook folders. This search resulted in the additional records being located. No further details regarding the City’s search were provided in the submission.

[27] For clarification, a public body is only required to provide access to records that exist at the time of the access to information request. In this case, the access to information request was received by the City on December 16, 2014. Therefore, the records currently identified that would be captured are the emails dated October 7th and October 9th, 2014. Details of the City's search efforts should satisfy my office that all records have been found that existed as of December 16, 2014. Very few details were provided by the City regarding the search conducted. Clearly, a thorough search was not done at the time the City provided its section 7 response to the Applicant on January 28, 2015 because, if it had, it would have located the emails from October 2014. Therefore, I am not confident that the City has identified all responsive records.

[28] In conclusion, I find that the City has not conducted an adequate search for responsive records.

[29] The findings and recommendations outlined in this report were shared with the City on September 24, 2015. On October 1, 2015, the City responded indicating that it would comply with the recommendations outlined below. If any further records are located as a result of the search, the City indicated it would release the records in accordance with LA FOIP. In addition, the City indicated that it would release the records presently withheld under subsection 17(1)(d) of LA FOIP upon completion of the negotiations and report to council.

IV FINDINGS

[30] I find that the City appropriately applied subsection 17(1)(d) of LA FOIP to the records in question.

[31] I find that the City did not conduct an adequate search for responsive records.

V RECOMMENDATIONS

[32] I recommend the City complete another search for records and provide a full response to the Applicant which includes details of its search and a copy of any records located.

[33] I recommend that the City provide training to its employees in key positions such as the Director of Human Resources, on LA FOIP, in particular what is required with regards to search efforts.

Dated at Regina, in the Province of Saskatchewan, this October 2nd day of October, 2015.

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