

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 150/2014

City of Saskatoon

Summary: In December 2014, the City of Saskatoon (City) received an access to information request. In response, the City advised it was denying access in full pursuant to subsection 14(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Upon review, the Commissioner found that the City had not established that subsection 14(1)(d) of LA FOIP applied to the record and recommended that it be released.

I BACKGROUND

[1] On December 4, 2014, the City of Saskatoon (City) received an access to information request from the Applicant requesting the following:

1. Report on water main break and subsequent repair;
2. Report on sewer back up & subsequent report;
3. Record of service – sewer cleaning service report

Dates of incidents Nov 18, Nov 29, Dec 3, all occurring at or in front of [address removed]. Need detailed reports indicating City's findings & actions.

[2] The City advised the Applicant by a letter dated December 9, 2014, that access to the records was denied in full pursuant to subsection 14(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[3] On December 11, 2014, my office received a request for review from the Applicant.

[4] On December 17, 2014, my office notified both parties of its intention to conduct a review. My office received a copy of the record and submission from the City on December 22, 2014. No submission was received from the Applicant although the Applicant was invited to provide one in my office's notification letter.

II RECORDS AT ISSUE

[5] The record consists of six reports that are one page each.

III DISCUSSION OF THE ISSUES

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

1. Does subsection 14(1)(d) of LA FOIP apply?

[7] Subsection 14(1)(d) of LA FOIP is a discretionary exemption and provides:

14(1) A head may refuse to give access to a record, the release of which could:

...

(d) be injurious to the local authority in the conduct of existing or anticipated legal proceedings;

[8] The City applied subsection 14(1)(d) of LA FOIP to all of the information in the six page record.

[9] The following criteria must be met in order for subsection 14(1)(d) of LA FOIP to be found to apply:

- i. Do the proceedings qualify as legal proceedings for the purposes of LA FOIP?
- ii. Could disclosure of the withheld records be injurious to the local authority in the conduct of existing or anticipated legal proceedings?

i. Do the proceedings qualify as legal proceedings for the purposes of LA FOIP?

[10] *Legal proceedings* are proceedings governed by rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgment of a court or a ruling by a tribunal. Legal proceedings include all proceedings authorized or sanctioned by law, and brought or instituted in a court or legal tribunal, for the acquiring of a right or the enforcement of a remedy.

[11] In the City's submission, it asserted that the Applicant had initiated two claims for recovery of damages with the City respecting damages claimed to be as a result of a sewer backup and a water main break. The records being requested relate to the City's response to the property in question on the dates referenced in the applicant's access to information request. The City's initial response to the applicant is anticipated to be completed in January of 2015. The City asserts that there is real potential that these matters will go forward to litigation after that. Citizens, or their lawyer or insurance company, can submit a claim to the City for alleged damages to property. The City Solicitor's Office gathers and reviews the records relating to the claim. The City Solicitor's Office will then submit a letter to the individual, lawyer or insurance company who submitted the claim, either accepting or denying the claim. Denial of a claim frequently results in a statement of claim being issued with the court, particularly where damages are not inconsequential. For these reasons, the City has asserted that the "anticipated legal proceedings" portion of the test is met.

[12] I agree with the City. A proceeding before a court would qualify as a legal proceeding for purposes of subsection 14(1)(d) of LA FOIP. Further, the City has clarified to my satisfaction why the legal proceeding is anticipated. Therefore, I find that the first part of the test is met.

ii. Could disclosure of the withheld records be injurious to the local authority in the conduct of existing or anticipated legal proceedings?

[13] To be *injurious* or to cause harm implies damage or detriment. This requires a harms test to be met. A harms test is a set of criteria used to determine whether disclosure of records or information could reasonably be expected to cause harm to a particular interest. The harms test is as follows:

1. there must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
2. the harm caused by the disclosure must be more than trivial or inconsequential; and
3. the likelihood of harm must be genuine and conceivable.

[14] Further, this subsection uses the term *could* as opposed to *could reasonably be expected to* result in the harms anticipated. The requirement for “could” is simply that the release of information “could” have the specified result. The threshold test is somewhat lower than a reasonable expectation. Nonetheless, there would still have to be some kind of basis. If it is fanciful or exceedingly remote, it will not be found to apply.

[15] In the City’s submission, it asserted that while the records are factual records, it would be harmful to the claims process to release these records prior to the conclusion of the claims process and any resulting further court proceedings. The records could be misunderstood or misleading to an individual that does not understand the records. As there is the real potential for claims to move forward to litigation, the City believes it would be injurious to it to release the records at this time. In addition, it argues that there are processes through the court to gain access to the records should this matter proceed to court.

[16] I find that the arguments presented by the City are not persuasive. It is not clear what injury the City is asserting would occur other than the possible risk that the Applicant might misinterpret the factual information in the records. However, any such misinterpretation presented by the Applicant at a court proceeding could be addressed by

the City at that time. Further, the City is correct that there are processes through the court to gain access to records however this matter has not proceeded to court yet. This process is independent of LA FOIP. Subsection 4(a) of LA FOIP provides that the Act complements and does not replace existing procedures for obtaining access to information.

[17] Therefore, I find that the City has not established that subsection 14(1)(d) of LA FOIP applies to the records.

[18] My office shared its preliminary analysis with the City on January 15, 2015 which included the above finding and a recommendation to release the records. The City responded to my office on January 29, 2015 indicating that it would comply with my recommendation.

IV FINDINGS

[19] I find that the City has not established that subsection 14(1)(d) of LA FOIP applies to the records.

V RECOMMENDATIONS

[20] I recommend the City of Saskatoon release the records.

Dated at Regina, in the Province of Saskatchewan, this 6th day of February, 2015.

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