



REVIEW REPORT 151-2016

Town of Kindersley

September 26, 2016

Summary:

The Applicant submitted an access to information request to the Town of Kindersley (the Town). The Applicant appealed to the Office of the Information and Privacy Commissioner (IPC) when she did not receive a response within legislated timelines. The IPC found that the Town did not process the access to information request within legislated timelines. Further, the IPC found that subsection 117(1)(a) of *The Municipalities Act* entitles any person to inspect and obtain copies of the type of record the Applicant is seeking. The IPC recommended that the Town establish written policies and/or procedures so that it processes access to information requests within legislated timelines. The IPC also recommended that the Town make contracts approved by council available to citizens pursuant to subsection 117(1)(a) of *The Municipalities Act*.

I BACKGROUND

[1] On May 5, 2016, the Town of Kindersley (the Town) received the following access to information request:

Agreements with Hollands backfill reservoir and the town.

[2] On June 15, 2016, the Town wrote a letter to the Applicant advising her that it notified a Third Party about the request.

[3] Also on June 15, 2016, the Applicant requested reviews by my office into her freedom of information requests, including the request at issue in this Review Report. My office

attempted to find an early resolution to the issues. Unfortunately, the efforts were unsuccessful.

[4] On July 14, 2016, the Town sent a letter to the Applicant stating it would not be releasing the agreement. It stated:

As per your request regarding the agreement signed between Holland's Fill reservoir and the Town of Kindersley, our partner has been contacted and does not wish to disclose the contract due to 2 reasons:

- 1) They feel that any business agreements should be kept between the two parties dealing
- 2) With recent information requests being posted on social media, they feel their contract would open to predatory competitors using their information

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

[6] Then, in a letter dated July 21, 2016 to the Town, the Third Party's solicitor stated it objected to the release of the record in its entirety. However, it stated that if the Town decided it would still release the requested record, that it redact certain information.

[7] In its submission to my office dated August 3, 2016, the Town stated that it was now in a position to provide notice of its decision in accordance with section 36 of LA FOIP. It stated that its decision was to release a redacted version of the agreement. It stated that it was now providing the Third Party an opportunity "to provide representations as to why access to the Agreement ought not to be provided to the Applicant" in accordance with section 33 of LA FOIP.

[8] On August 19, 2016, my office notified the Third Party of the review and invited it to provide a submission. On August 29, 2016, my office received a submission from the Third Party's solicitor.

II RECORDS AT ISSUE

[9] The record at issue is the agreement between the Town and Holland's Hot Oiling Ltd.

III DISCUSSION OF THE ISSUES

[10] 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 issue a fee estimate properly?

[11] The issue of the fee estimate is discussed in my office's Review Reports 150-2016 and 155-2016. Please refer to those Review Reports for my office's analysis on the Town's fee estimate that was issued to the Applicant.

2. Did the Town properly process the access to information request?

a. Did the Town process the request in accordance within legislated timelines?

i. Notification to Third Party

[12] When a local authority intends to provide access to a record that contains information described in subsection 18(1) of LA FOIP, it is to provide notice to the Third Party within 30 days of receiving the access to information request. This timeline is set out in subsection 33(2)(b) of LA FOIP, which provides:

33(2)

...

(b) subject to subsection (3), is to be given within 30 days after the application is made.

[13] The Town received the Applicant's access to information request on May 5, 2016. Then, it wrote a letter dated June 15, 2016 to the Applicant advising her that it has notified the Third Party of the request. The letter provided as follows:

As per Part III, Section 18(1) of the LAFOIP Act, we have reached out to the third party involved to seek authorization to release this information.

[14] Based on the above, I find that the Town did not provide notice to the Third Party within 30 days of receiving the access to information request.

ii. Decision pursuant to section 36 of LA FOIP

[15] After providing notice to a third party pursuant to section 33 of LA FOIP, the third party has the opportunity to make written representations to the head of the local authority as to why access to the records (or part of the record) should not be given. These representations by the third party must be made within 20 days of the notice being given to the third party, pursuant to subsection 35(1)(b) of LA FOIP.

[16] Then, within 30 days of the notice being given to the third party, the local authority must make a decision as to whether or not it will give access to the record or a part of the record and give written notice of that decision to the third Party and the Applicant. This timeline is set out in subsection 36(1) of LA FOIP, which provides:

36(1) After a third party has been given an opportunity to make representations pursuant to clause 35(1)(b), the head shall, within 30 days after the notice is given:

- (a) decide whether or not to give access to the record or part of the record; and
- (b) give written notice of the decision to the third party and the applicant.

[17] The Town provided my office with a letter dated August 3, 2016 stating it was in a position to provide notice of its decision pursuant to section 36 of LA FOIP. I find that the Town's decision pursuant to section 36 of LA FOIP came after the timeline set out in subsection 36(1) of LA FOIP.

[18] Since the Town's decision came after the timeline set out in subsection 36(1) of LA FOIP, then it is deemed that the Town has refused to give access to the record. Subsection 36(4) of LA FOIP provides:

36(4) A head who fails to give notice pursuant to clause (1)(b) is deemed to have given notice, on the last day of the period set out in subsection (1), of a decision to refuse to give access to the record.

iii. Section 7 response

[19] Subsection 7(2) of LA FOIP provides that a local authority is to give written notice to the Applicant within 30 days of receiving an access to information request. In this case, and as stated earlier, the Town received the access to information request on May 4, 2016. Then, the Town provided a response dated July 14, 2016 stating it was refusing access because the Third Party did not wish for the agreement to be disclosed.

[20] Based on the above, it appears that the Town did not give written notice to the Applicant within the timeline set in subsection 7(2) of LA FOIP. As such, it is deemed that the Town is refusing to give access to the record pursuant to subsection 7(5) of LA FOIP. Subsection 7(5) of LA FOIP provides:

7(5) A head who fails to give notice pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record.

[21] I must note that it is confusing how the Town refused the Applicant access on July 14, 2016 but then issued a notice detailing its decision pursuant to section 36 of LA FOIP on August 3, 2016. In the course of this review, my office recommended that the Town establish written policies and/or procedures on how to process access to information requests so that it can meet legislated timelines. In a letter dated September 23, 2016, the Town's legal counsel advised my office that the Town is working to establish written policies.

[22] I will discuss whether or not the Town's response dated July 14, 2016 contained the elements required by section 7 of LA FOIP below.

b. Did the Town issue a proper section 7 response to the Applicant?

[23] As already described in the background section of this Review Report, the Town issued a letter dated July 14, 2016 to the Applicant. The Town provided reasons as to why it was refusing access to the record, background information about the Request for Proposals (RFP) process, and information about the project undertaken by the Third Party and the Town. The letter also said it would refund the \$20 application fee to the Applicant.

[24] While this letter was very thoughtful and attempted to provide information that might have been related to the Applicant's request, it did not meet the requirements of section 7 of LA FOIP.

[25] When refusing an Applicant access to a record, or to part of a record, the local authority must identify the specific provisions within LA FOIP on which the refusal is based pursuant to subsection 7(2)(d) of LA FOIP:

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

...

(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;

[26] Further, the Town is to inform the Applicant that she may request a review by the Commissioner pursuant to subsection 7(3) of LA FOIP:

7(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.

[27] The Town's letter dated July 14, 2016 did not identify the specific provisions within LA FOIP on which the refusal is based. Further, it did not inform the Applicant that she may request a review by the Commissioner.

[28] I find that the Town's letter dated July 14, 2016 did not meet the requirements of section 7 of LA FOIP.

[29] In a letter dated September 23, 2016, the Town's legal counsel asserted that the Town's denial of access in its July 14, 2016 letter was not a permanent denial. It said:

The Applicant was only refused access to the record in question on July 14, 2016 until such time as the rights of the third party had been addressed. The July 14, 2016 denial of access was not a permanent denial. This is clearly contemplated in the legislation. The determination as to whether access to the record would finally be denied could only be considered after the third party was notified and afforded an opportunity to respond.

[30] As mentioned earlier, the Town had already notified the Third Party of the request, according to its June 15, 2016 letter to the Applicant. By July 14, 2016, nearly a month later, the Third Party would have had the opportunity to make representations to the Town, and the Town would have been in a position to make a decision pursuant to subsection 36(1) of LA FOIP. However, if the Town's letter dated July 14, 2016 was not to refuse the Applicant access to the record, then it is unclear what responsibility under LA FOIP the Town was attempting to fulfill.

[31] Nevertheless, as I have already found, the Town's decision pursuant to section 36 of LA FOIP and its response pursuant to section 7 were not given within the legislated timelines. Failure to meet the legislated timelines is a deemed refusal, as described in paragraphs [18] and [20].

2. Did the Town properly withhold the record in question?

[32] The Town did not identify a specific provision within LA FOIP for withholding the requested records. Presumably, it was withholding the records pursuant to subsection 18(1) of LA FOIP. Normally, I would set out the tests to withhold records pursuant to subsection 18(1) of LA FOIP to determine if the records qualify to be exempted from access. I would also consider the arguments for objecting to the release of the record to the Applicant submitted by the Third Party's solicitor.

[33] However, I note that the Applicant is requesting access to an agreement between the Town and the Third Party. Subsection 117(1)(a) of *The Municipalities Act* provides that

any person is entitled to inspect and obtain copies of any contract approved by the council. 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

[34] Therefore, based on subsection 117(1)(a) of *The Municipalities Act*, the Applicant could have gained access to the requested records outside of LA FOIP.

[35] Also, I note that subsections 4(a) and 4(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;

[36] If the Town relies upon subsection 18(1) of LA FOIP to refuse the Applicant access to a copy of the agreement between the Town and the Third Party, in whole or in part, 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*. Such a refusal would be contrary to subsection 4(b) of LA FOIP.

[37] In a letter dated September 23, 2016, the Town's legal counsel asserted that the Town does not accept my offices' interpretation of section 117 of *The Municipalities Act*. He stated that subsection 117(1)(a) of *The Municipalities Act* is subject to the provisions of LA FOIP. He suggested that before a contract is made available pursuant to subsection 117(1)(a) of *The Municipalities Act*, the provisions of subsection 18(1) of LA FOIP should be considered. He asserted that his interpretation was consistent with decisions previously made in my office's Review Reports 084-2015, 148-2015, and LA-2011-003. In Review Report 084-2015, my office found that the local authority did not demonstrate that section 18(1) of LA FOIP applied to the contract. I stated that the local authority take into consideration subsection 91(1)(a) of *The Cities Act*, which is the equivalent of

subsection 117(1)(a) of *The Municipalities Act*. I recommended that the local authority release the contract to the Applicant. Neither Review Reports 148-2015 nor LA-2011-003 contemplates contracts with third parties as an issue.

[38] I finding it surprising in 2016, when section 117 of *The Municipalities Act* has been enforced for many years that towns and third parties continue to resist contracts approved by council. I believe all towns, councils and administrators should inform every third party they contract with that the contract may be disclosed to a citizen if requested. In 2016, I believe every Third Party should know before they bid or tender, or sign a contract that the contract they sign may become public. We should no longer have to use tax payer dollars to recommend to towns that they release a contract.

IV FINDINGS

[39] I find that the Town did not provide notice to the Third Party within the 30 days of receiving the access to information request pursuant to subsection 33(2)(b) of LA FOIP.

[40] I find that the Town did not provide notice of its decision within the timeline set out in subsection 36(1) of LA FOIP.

[41] I find that the Town did not give written notice within the timeline set out in subsection 7(2) of LA FOIP.

[42] I find that the Town's letter dated July 14, 2016 did not contain all the required elements outlined in section 7 of LA FOIP.

[43] I find that the Applicant is entitled to inspect and obtain a copy of the contract between the Town and the Third Party, pursuant to subsection 117(1)(a) of *The Municipalities Act*.

V RECOMMENDATIONS

- [44] I recommend that the Town follow through with its commitment to establish written policies and/or procedures on how to process access to information requests so that it can meet legislated timelines as described in paragraph [21].
- [45] I recommend the Town make contracts approved by council available to citizens pursuant to subsection 117(1)(a) of *The Municipalities Act*. This may include making the contracts available on its website.
- [46] I recommend that the Town inform third parties that when they enter into a contract approved by council with the Town, that any person is entitled to inspect and obtain copies of these contracts.

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

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