



## **REVIEW REPORT 156-2019, 006-2020**

### **Rural Municipality of Enniskillen #3**

**February 21, 2020**

#### **Summary:**

The Applicant made an access to information request to the Rural Municipality of Enniskillen #3 (the R.M.) for certain information. The R.M. withheld information pursuant to subsection 18(1)(a), (b) and (c)(iii) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner found that the R.M.'s response was not in compliance with section 7 of LA FOIP and that the R.M. did not meet the duty to assist. The Commissioner also found that subsections 18(1)(a), (b) and (c)(iii) of LA FOIP did not apply to the records, in part because the Third Party consented to their release. The Commissioner recommended that the R.M. release the responsive records, develop a written policy for responding to access to information requests and ask the Applicant to see if they are interested in other records.

#### **I BACKGROUND**

- [1] On April 17, 2019, the Applicant made the following access to information request to the Rural Municipality of Enniskillen #3 (the R.M.):

Official survey plans for Vermillion Oil Padsite [specific coordinates of section of land #1] submitted to council at Feb 7, 2019 monthly council meeting (now approved minutes)

Also same for special Jan 27/2019 meeting, survey plans for [specific coordinates of section of land #2]

- [2] In response, the R.M. sent the Applicant an undated response indicating that the responsive records could not be released because they were subject to changes and would not be released until available on the Integrated Resource Information System. On May 17, 2019, the R.M. provided the Applicant with an invoice for the \$20 application fee. The R.M. later decided to waive the application fee.
- [3] On May 21, 2019, the Applicant requested a review by my office of the denial of access and late reply of the response. As a result of early resolution efforts by my office, on May 27, 2019, the R.M. provided the Applicant with a second response which indicated that the responsive records were being withheld pursuant to subsections 13(1)(b), 18(1)(b) and 18(1)(c)(iii) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).
- [4] On June 3, 2019, my office notified the Applicant, the R.M. and a Third Party of my intention to undertake a review under file 156-2019.
- [5] In its submission to my office, the R.M. indicated that records related to the second land location did not exist. It also indicated that it also applied subsection 18(1)(a) of LA FOIP to the record in question. My office let the Applicant know about these developments. On January 14, 2020, the Applicant indicated they would like my office to review these additional issues. On January 14, 2020, my office notified the R.M. that my office would review its application of subsection 18(1)(a) of LA FOIP and the R.M.'s search for records under file 006-2020.

## **II RECORDS AT ISSUE**

- [6] The record consists of two documents that are five pages each and relate to the first land location mentioned in the Applicant's access to information request. The R.M. indicated in its response to the Applicant that it is withholding the information pursuant to subsections 13(1), 18(1)(b) and (c)(iii) of LA FOIP. The R.M. later indicated that it is relying on subsections 18(1)(a), (b) and (c)(iii) of LA FOIP to withhold the records in their entirety.

[7] I also note that I have received a submission from the Third Party identified by the R.M. The Third Party has consented to the release of the responsive records. However, the R.M. continues to withhold the records pursuant to subsections 18(1)(a), (b) and (c)(iii) of LA FOIP.

### **III DISCUSSION OF THE ISSUES**

#### **1. Does LA FOIP apply in these circumstances?**

[8] The R.M. qualifies as a local authority pursuant to subsection 2(f)(i) of LA FOIP. Therefore, LA FOIP applies and I have jurisdiction to undertake this review.

#### **2. Did the R.M. comply with section 7 of LA FOIP?**

[9] In his request for review, the Applicant asked that my office review the responses provided by the R.M., particularly the timelines.

[10] The Applicant made the access to information request to the R.M. on April 17, 2019. The access to information request was made on the form prescribed in *The Local Authority Freedom of Information and Protection of Privacy Regulations* (the Regulations). On the form, the Applicant checked boxes that indicated that they were seeking both general information and their own personal information. The Applicant also checked a box that indicated that a waiver of fees was requested.

[11] Section 7 of LA FOIP instructs a local authority on what to do if it receives an access to information request. Relevant portions are as follows:

7(1) Where an application is made pursuant to this Act for access to a record, the head of the local authority to which the application is made shall:

(a) consider the application and give written notice to the applicant of the head's decision with respect to the application in accordance with subsection (2); or

...

(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;

...

(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;

...

(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.

[12] Within 30 days of receiving the access to information request, the R.M. indicated that it provided the Applicant with a written, undated response. The R.M.'s response indicated that access to the responsive records were denied and provided written reasons why the records could not be provided. This response appears to have been provided within the 30-day timeline as described in subsection 7(2) of LA FOIP. However, it did not identify the specific provisions of LA FOIP on which the refusal is based, indicate that certain records did not exist or state that the Applicant may request a review by my office as required by subsections 7(2)(d), (e) and 7(3) of LA FOIP.

[13] On May 21, 2019, the Applicant requested a review from my office. On May 23, 2019, the R.M. sent the Applicant a letter confirming that the application fee had been waived. The R.M. provided the Applicant with a second response on May 27, 2019, which complied with subsections 7(2)(d) and 7(3) of LA FOIP. However, the R.M.'s second response was not provided to the Applicant within 30 days of receiving the access to information request pursuant to subsection 7(2) of LA FOIP.

[14] In its submission, the R.M. indicated that the Applicant's access request made on April 17, 2019 was deficient; therefore, there was no need for the R.M. to reply within 30 days pursuant to subsection 7 of LA FOIP. It indicated that the access request was deficient for two reasons. First, the R.M. indicated that the Applicant did not pay the \$20 application

fee. Secondly, the R.M. pointed out that the Applicant checked a box on the request form that indicated that they were seeking their own personal information. The R.M. pointed out that the request does not reasonably contemplate the Applicant's personal information.

[15] Because the R.M. went forward and provided the undated response to the Applicant, it appears that it waived the fee.

[16] Further, I do not accept the R.M.'s claim that the request for general information was made invalid when the Applicant checked a box on the form requesting personal information. If the R.M. was unclear about what the Applicant was requesting, it should have contacted the Applicant to clarify. This is part of meeting the duty to assist pursuant to subsection 5.1(1) of LA FOIP, which provides:

**5.1(1)** Subject to this Act and the regulations, a local authority shall respond to a written request for access openly, accurately and completely.

[17] In meeting the duty to assist, local authorities should respond to applicants in a timely manner indicating if it has received an access request and if it requires more information in order to begin process the request.

[18] Finally, the R.M. communicated late in this review that records responsive to the second part of the request did not exist. This should have also been communicated to the Applicant as part of its original response to the Applicant pursuant to subsection 7(2)(e) of LA FOIP. Having identified this issue at a late date caused further delays in this review.

[19] I recommend that the R.M. create written procedures for responding to access requests that comply with Part II of LA FOIP, which specifically address circumstances where the application fee has not been received, a fee waiver is requested and the request is unclear.

**3. Do responsive records exist?**

[20] Section 5 of LA FOIP provides:

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 of LA FOIP is clear that access to records must be granted if they are in the possession or under the control of the local authority subject to any applicable exemptions under LA FOIP.

[22] When a local authority indicates that responsive records do not exist, my office usually asks the local authority to describe its search for records. 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. LA FOIP does not require the local authority to prove with absolute certainty that records do not exist. However, it must demonstrate that it has conducted a reasonable search to locate them.

[23] In this case, the R.M. explained why records responsive to the Applicant’s request were never in the possession or control of the local authority.

[24] The Applicant’s request was, partially, for survey plans for a padsite on the south-west quarter of a specific section of land, which were discussed at a special council meeting on January 27, 2019.

[25] The R.M. provided my office with a copy of the minutes from the January 27, 2019 council meeting that indicates that plans for a padsite on the same section of land were discussed, but, the padsite was on the south-east quarter of the land, not the south-west as requested by the Applicant.

[26] I am satisfied that official survey plans for a padsite on the south-west quarter of the section of land in question were not discussed at a council meeting of the R.M. on January 27, 2019. Therefore, I am satisfied that records responsive to that part of the Applicant's access request do not exist.

[27] However, it is obvious to me what information that the Applicant was seeking. There appears to be an error on the Applicant's access to information request form. As discussed above, the R.M. has a duty to assist the Applicant pursuant to subsection 5.1(1) of LA FOIP. In this case, the R.M. has not demonstrated that it contacted the Applicant to ask if they wanted the records related to the south east quarter instead of the south-west quarter. Further, the R.M. did not identify that responsive records did not exist, indicating that an error might have been made, in its undated interim response to the Applicant or its section 7 response dated May 27, 2019. The R.M. only identified this issue to my office when it provided its submission to my office.

[28] The R.M. has indicated that it has possession of records responsive to the Applicant's access request for the south-east quarter of the section of land in question. I recommend that the R.M. contact the Applicant and ask if they are interested in these records. If so, I recommend that the R.M. treat it like an access request and provide a section 7 response to the Applicant.

#### **4. Does subsection 18(1)(a) of LA FOIP apply to the record?**

[29] Subsection 18(1)(a) of LA FOIP provides:

**18(1)** Subject to Part V and this section, a head shall refuse to give access to a record that contains:

(a) trade secrets of a third party;

[30] In determining if subsection 18(1)(a) of LA FOIP applies to a record, the following test can be used:

Does the record contain trade secrets of a third party?

[31] Trade secret is defined as information, including a plan or process, tool, mechanism or compound, which possesses each of the four following characteristics:

- i) the information must be secret in an absolute or relative sense (is known only by one or a relatively small number of people);
- ii) the possessor of the information must demonstrate he/she has acted with the intention to treat the information as secret;
- iii) the information must be capable of industrial or commercial application; and
- iv) the possessor must have an interest (e.g. an economic interest) worthy of legal protection

[32] In its submission, the R.M. indicated that, at the time of the Applicant's request, the Third Party clearly indicated that the record was submitted to the R.M. on the basis that they were private and would not be disclosed. However, the Third Party has since consented to the release of the record, which does not demonstrate that the Third Party is acting with the intention of treating the information as a secret. As such, it does not qualify as a trade secret.

[33] Subsection 18(1)(a) of LA FOIP does not apply to the record.

**5. Does subsection 18(1)(b) of LA FOIP apply to the record?**

[34] Subsection 18(1)(b) of LA FOIP provides:

**18(1)** Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

- (b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to the local authority by a third party;

[35] This exemption permits refusal of access in situations where a record contains financial, commercial, scientific, technical or labour relations information that was supplied in confidence to a local authority by a third party.



[36] The following three-part test can be applied:

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?
2. Was the information supplied by the third party to a local authority?
3. Was the information supplied in confidence implicitly or explicitly?

[37] In its submission, the R.M. stated that the records in question were supplied in confidence but did not explain how this was communicated between the R.M. and the Third Party. Again, I note that the Third Party has indicated that it consents to the release of the record. Thus, I am not persuaded that the third part of the test has been met.

[38] Further, the R.M. noted that at the time of the access request, both parties treated the plans as documents to be held in confidence. As such, the RM submitted it should not matter if the views of the Third Party change at the time of the access request or during a review.

[39] As the R.M. has not demonstrated how the information was supplied in confidence, I am not persuaded by the R.M.'s claim that the Third Party is precluded from waiving any confidentiality. Nonetheless, I direct the R.M.'s attention to Part V of LA FOIP which provides a mechanism for local authorities to check with third parties to see if third party information can be released. Specifically, subsections 18(2) and 34(2) of LA FOIP provide:

**18(2)** A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

**34(2)** A third party who consents to the giving of access to a record containing information described in subsection 33(1) is deemed to have waived the requirement for notice.

[40] I find that subsection 18(1)(b) of LA FOIP does not apply.

**6. Does subsection 18(1)(c)(iii) of LA FOIP apply to the record?**

[41] Subsection 18(1)(c)(iii) of LA FOIP provides:

**18(1)** Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(c) information, the disclosure of which could reasonably be expected to:

...

(iii) interfere with the contractual or other negotiations of;

a third party;

[42] The R.M. applied subsection 18(1)(c)(iii) of LA FOIP to the entire record.

[43] As the Third Party consented to release of the records, it did not indicate that it anticipated any interference with contractual or other negotiations.

[44] However, the R.M. indicated that release of the record might harm the Third Party's negotiations with the R.M.. It noted that it is the R.M.'s decision whether or not to approve the Third Party's development permit.

[45] My office's *Guide to FOIP – Chapter 4 Exemptions from the Right of Access* (the Guide to FOIP) (updated December 17, 2019) considers subsection 19(1)(c)(iii) of *The Freedom of Information and Protection of Privacy Act* (FOIP), which is similar to subsection 18(1)(c)(iii) of LA FOIP. It defines a negotiation as a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings conducted between two or more parties for the purpose of reaching an understanding. It connotes a more robust relationship than "consultation". It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion. It is unclear how the R.M.'s approval process would qualify as a negotiation.

- [46] Further, the R.M. did not elaborate on how the release of the information in question would interfere with the Third Party's negotiations in this case.
- [47] I am not persuaded that release of the record would interfere with a negotiation of the Third Party. Subsection 18(1)(c)(iii) of LA FOIP does not apply to the record.
- [48] I note that the R.M. had acknowledged that the Third Party consented to release of the record but further commented that the Applicant could ask the Third Party for the records. The R.M. also noted that it did not want to set a precedent for releasing all records of this type.
- [49] I am unaware of any legislation that gives an individual the right to access a private business' records. However, LA FOIP does grant individuals the right to access information in a local authority's possession or control if exemptions do not apply. In this case, I have found that none of the exemptions raised by the R.M. apply to the record. Therefore, the Applicant is entitled to the record.
- [50] With respect to the R.M.'s concern that providing the record to the Applicant would set a precedent for all requests for information of the same type, I note that LA FOIP provides the mechanism for local authorities to consider any exemptions that might apply to records responsive to each new access request received. In other words, a local authority has the opportunity to apply exemptions on a case-by-case basis when responding to new access requests.

#### **IV FINDINGS**

- [51] I find that the R.M. did not comply with section 7 of LA FOIP when responding to the Applicant's access to information request.
- [52] I find that records responsive to the second part of the Applicant's access request do not exist.

[53] I find that subsections 18(1)(a), (b) and (c)(iii) of LA FOIP do not apply to the record.

## **V RECOMMENDATIONS**

[54] I recommend that the R.M. create written procedures for responding to access requests that comply with Part II of LA FOIP, which specifically address circumstances where the application fee has not been received, a fee waiver is requested and the request is unclear.

[55] I recommend that the R.M. contact the Applicant and ask if they are interested in these records. If so, I recommend that the R.M. treat it like an access request and provide a section 7 response to the Applicant.

[56] I recommend that the R.M. provide the responsive records to the Applicant in their entirety.

Dated at Regina, in the Province of Saskatchewan, this 21st day of February, 2020.

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