



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **REVIEW REPORT 205-2019, 255-2019**

### **Rural Municipality of Sherwood No. 159**

**March 31, 2021**

#### **Summary:**

The Applicant submitted an access to information request to the Rural Municipality of Sherwood No. 159 (RM). The RM withheld records pursuant to subsections 28(1), 14(1)(c), 15(1)(b), 16(1)(a), (b), (c), 17(1)(d), (g), 18(1)(a), (b), (c), 21(a), (b) and (c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) or as being outside of the scope or not responsive to the Applicant's request. The Applicant requested a review of the reasons why the RM was withholding records. In addition, the Applicant requested a review of the RM's delayed response and the fee estimate issued by the RM. The Commissioner found that the RM was late in responding to the Applicant's request and that the fee estimate was not provided within the timeframe required under subsections 7(2)(a) and 9(1) of LA FOIP. The Commissioner recommended the RM review its procedures to ensure it is meeting its legislated timelines. The Commissioner also recommended that the RM keep the \$20 application fee and refund the Applicant any remaining fees they paid. The Commissioner found that several documents were outside the scope or not responsive to the request, but that one was responsive to the request and recommended the RM release that document. The Commissioner also recommended the RM release the non-responsive documents. The Commissioner found that the RM did not meet its obligations under section 8 of LA FOIP and recommended the RM develop a procedure for conducting line-by-line reviews and properly severing records for release. The Commissioner also found the subsections 28(1), 18(1)(a), 18(1)(c)(i), (ii) and (iii) of LA FOIP do not apply to the record. However, the Commissioner did find that subsection 18(1)(b) of LA FOIP applies to the specific dollar amounts that the Third Party has invested in the properties, but does not apply to the remainder of information being withheld under this subsection. The Commissioner recommended the RM continue to withhold the specific dollar amounts the Third Party has invested in the properties. The Commissioner found that the RM did not meet its burden of proof pursuant to subsection 51 of LA FOIP for subsections 14(1)(c), 15(1)(b), 16(1)(a), (b), (c), 17(1)(d), (g), 21(a), (b) and (c) of LA FOIP and recommended

release of that information. Finally, the Commissioner recommended that the RM develop policy and procedures for processing access to information requests and implements training for its staff involved in processing requests.

## **I BACKGROUND**

[1] The Commissioner has identified a potential conflict with the subject material of the records in review. The Commissioner has taken no part in this review and has delegated the Executive Director of Compliance to make all decisions related to this review. The only thing that will occur is that the final Report will go out under the Commissioner's name after being reviewed and approved by the Executive Director of Compliance.

[2] The Applicant submitted the following access to information request to the Rural Municipality of Sherwood No. 159 (RM) on March 19, 2019:

Please provide all correspondence between the administrator/CEO/CAO of the RM of Sherwood and/or the Reeve of the RM and anyone representing any [Third Party] company ... from January 1, 2014 to present related to:

1. Developments/improvements done without permits.
2. Buildings erected or demolished without permits.
3. Threatened or actual stop-work-orders.
4. Municipal servicing agreements.
5. Potential or actual court action.
6. Requests by [Third Party] for tax abatement and/or being admitted to the RMs tax incentive program.

[3] By letter dated May 1, 2019, the RM sent the Applicant an extension of time letter pursuant to section 12 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). In that letter, the RM advised that it will conclude its search and respond on or before May 30, 2019.

[4] By letter dated June 6, 2019, the RM sent the Applicant an estimate of costs in the amount of \$1,368.25. In the letter, the RM required a 50% deposit in the amount of \$684.13 in order to proceed with the Applicant's request.

[5] On June 27, 2019, the Applicant requested a review by my office. The reason for the review was:

I have not received a reply to the application, which I submitted 100 days ago.

[6] Through email communications with my office on July 17, 2019, the Applicant advised that they wanted, "...to proceed with a review of the late response, the exorbitant fees, and all of the exemptions applied..."

[7] On July 24, 2019, my office notified the Applicant and the RM of our intention to undertake a review and invited each to provide my office with a submission. The reasons for the review were:

- how parts of the record qualifies for exemption under subsections 14(1)(c), 15(1)(b), 16(1)(a), 16(1)(b), 16(1)(c), 17(1)(d), 17(1)(g), 18(1)(a), 18(1)(b), 18(1)(c), 21(a), 21(b) and 21(c) of LA FOIP;
- why parts of the record were deemed non-responsive;
- why the RM did not respond to the Applicant's access request within the legislated timeline pursuant to section 7 of LA FOIP; and
- how the fee estimate was calculated and demonstrating the fee is reasonable.

[8] As there were third party exemptions involved in this request, my office also notified the Third Party of its right to make a submission surrounding the RM's application of subsection 18(1)(a), (b) and (c) of LA FOIP.

## **II RECORDS AT ISSUE**

[9] The record at issue totals 697 pages. The Applicant was provided 55 pages where the RM withheld a portion of each page pursuant to subsection 28(1) of LA FOIP. The RM has fully withheld 642 pages pursuant to subsections 14(1)(c), 15(1)(b), 16(1)(a), (b), (c), 17(1)(d), (g), 18(1)(a), (b), (c), 21(a), (b) and (c) of LA FOIP or as being withheld as they are outside of the scope or not responsive to the Applicant's request.

[10] My office will be reviewing the delay in responding to the Applicant, the fee estimate the RM provided to the Applicant, the exemptions that have been applied and why parts of the record were withheld as they were deemed outside of the scope or not responsive to the request.

[11] I would like to note that when it provided my office with its submission, the Third Party provided arguments in regards to the application of section 18 of LA FOIP, and additional sections. The Third Party only has the right to make representations as to the potential application of section 18 of LA FOIP. Therefore, in this review, I will not consider the other representations made by the Third Party not related to section 18 of LA FOIP.

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

#### **1. Do I have jurisdiction?**

[12] The RM qualifies as a “local authority” pursuant to subsection 2(f)(i) of LA FOIP. The Third Party qualifies as a “third party” pursuant to subsection 2(k) of LA FOIP. Therefore, I have jurisdiction to review this matter.

#### **2. Did the RM meet the legislated timelines?**

[13] As noted above, the Applicant submitted their access to information request to the RM on March 19, 2019. The RM sent the Applicant an extension of time letter dated May 1, 2019 – 43 days after the RM received the request.

[14] Subsection 7(2) of LA FOIP provides:

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

[15] Section 12 of LA FOIP provides that where a limited and prescribed circumstance exists, a local authority can extend the response time up to an additional 30 days. Section 12 of LA FOIP provides:

**12(1)** The head of a local authority may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

(a) where:

(i) the application is for access to a large number of records or necessitates a search through a large number of records; or

(ii) there is a large number of requests;

and completing the work within the original period would unreasonably interfere with the operations of the local authority;

(b) where consultations that are necessary to comply with the application cannot reasonably be completed within the original period; or

(c) where a third party notice is required to be given pursuant to subsection 34(1).

(2) A head who extends a period pursuant to subsection (1) shall give notice of the extension to the applicant within 30 days after the application is made.

(3) Within the period of extension, the head shall give written notice to the applicant in accordance with section 7.

[16] Subsection 12(2) of LA FOIP requires that the extension of time be provided to an applicant, in writing, within the 30 days of receiving the request. In this case, the extension of time was sent 43 days after the RM received the request. At day 43, the RM no longer had the ability to extend the response time.

[17] I find that the RM was late in responding to the Applicant's request. I recommend the RM review its procedures when responding to access requests to ensure it is meeting the legislated timelines.

### **3. Did the RM miss the opportunity to issue a fee estimate?**

[18] As noted above, the RM received the request on March 19, 2019, and issued an estimate of costs on June 6, 2019 – 69 days after receiving the Applicant's request. The total estimate of costs was \$1,378.25 and the RM requested a 50% deposit of \$684.13 to proceed with processing the request.

[19] Subsection 9(1) of LA FOIP provides:

9(1) An applicant who is given notice pursuant to clause 7(2)(a) is entitled to obtain access to the record on payment of the prescribed fee.

[20] Further, subsection 7(2)(a) of LA FOIP provides in part:

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....

[21] I recently commented on when a fee estimate should be issued in Review Report 160-2020 as follows:

[28] ...Government Relations received the Applicant's access to information request on April 29, 2020. It provided its fee estimate to the Applicant 61 days after receiving the access to information request.

[29] If Government Relations' intention was to provide a fee estimate, then it should have done so within 30 days of receiving the access to information request pursuant to subsection 7(2)(a) of FOIP. **After the 30 days have elapsed, there is no other mechanism within FOIP that allows for the government institution to issue a fee estimate.** Without a fee estimate, a government institution would be unable to charge fees for search, preparation and reproduction of records.

[30] I find that Government Relations did not issue a fee estimate within the legislated 30 days of receiving the access to information request pursuant to subsection 7(2)(a) of FOIP. I recommend that Government Relations rescind the fee estimate it issued to the Applicant and issue a response to the Applicant that is compliant with section 7 of FOIP within 30 days of issuance of this Report....

[Emphasis added]

[22] Consistent with Review Report 160-2020, I find that the RM, in this instance, has also lost the ability to issue a fee estimate as it was issued 69 days after receiving the request.

[23] Included in the June 16, 2019 estimate of costs was a line item titled “Application Fee” in the amount of \$20.00. Subsection 5(1) of *The Local Authority Freedom of Information and Protection of Privacy Regulations* (LA FOIP Regulations) provides:

5(1) An application fee of \$20 is payable at the time and application for access to a record is made.

[24] The \$20 application fee is a fee paid by an applicant to a local authority for submitting an access to information request. Pursuant to subsection 8(1)(a) of the LA FOIP Regulations, the application fee can be waived if it is a request for personal information of an applicant. In this case, it was not a personal information request, it was a general information request.

[25] I understand that the Applicant paid the deposit amount of \$684.13 and that deposit included the \$20 application fee. Therefore, with the exception of the \$20 application fee, the RM should refund the Applicant any fees they have paid for this request.

[26] I find that the RM’s fee estimate was not issued within the timeframe required under subsections 7(2)(a) and 9(1) of LA FOIP. I recommend that within 30 days of issuance of this Report, the RM keep the \$20 application fee but refund the remainder of the fees paid by the Applicant.

**4. Is there information in the record that is outside the scope of the access to information request or non-responsive?**

[27] In the index of records the RM provided to the Applicant, there are 36 documents totalling 132 pages that the RM withheld as being outside the scope or not responsive to the Applicant’s request. Each of these 36 documents are separate and are not co-mingled with the other records the RM has identified as inside the scope of the request.

[28] The Guide to LA FOIP discusses records that are not responsive to the request starting on page 12. Responsive means relevant. The term describes anything that is reasonably related to the request. It follows that any information or records that do not reasonably

relate to an applicant's request will be considered non-responsive. When determining what information is responsive, consider the following:

- The request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive.
- A local authority can remove information as not responsive only if the applicant has requested specific information, such as the applicant's own personal information.
- The local authority may treat portions of a record as not responsive if they are clearly separate and distinct and entirely unrelated to the access request. However, use it sparingly and only where necessary.
- If it is just as easy to release the information as it is to claim not responsive, the information should be released (i.e. releasing the information will not involve time consuming consultations nor considerable time weighing discretionary exemptions).
- The purpose of LA FOIP is best served when a local authority adopts a liberal interpretation of a request. If it is unclear what the applicant wants, a local authority should contact the applicant for clarification. Generally, ambiguity in the request should be resolved in the applicant's favour.

[29] My office views outside the scope of the request as being outside of the date range specified by an applicant. For example, if an applicant specifies they would like access to records on a specific topic from January 1, 2021 to March 1, 2021, and there is an email on the specified topic that is dated September 1, 2020, that email would be considered outside the scope of the request.

[30] There may be instances of duplicate records when a local authority is responding to a request. I commented on how duplicate records should be treated in Review Report 086-2018 at paragraph [154]:

[154] ...If a public body is going to leave duplicate attachments out of the record, or re-order the record, it is best practice to provide an explanation to the Applicant at the same time it provides the record. This would be part of the duty to assist.

[31] I will now take a look at the pages the RM has withheld as outside the scope or not responsive to the request.



- [32] The RM has identified that document number 149 as a duplicate record. Upon review of the record, I can confirm that document 149 is an identical duplicate of document 147. Document 147 has been identified as responsive to this request. In cases where there are duplicate records, the RM going forward should either include the duplicate record or identify to applicants what pages have not been included as they are duplicate and include the specific page numbers that are duplicated. I find document number 149 is a duplicate record to document 147. I recommend the RM release document 149 to the Applicant.
- [33] The Applicant has set out a specific date range in their access to information request – January 1, 2014 to present. From a review of the record, I can confirm that documents 76, 79, 80, 84, 93, 95, 96, 105, 106, 107, 108, 113, 114, 115, 116, 120, 121, 123, 124, 129, 130, 131, 132, 133, 140, 141, 144 and 152 have date ranges that start and end prior to January 1, 2014. Therefore, these documents are outside the scope of the request.
- [34] The RM has withheld documents 85, 91, 100, 102, 103, 104 based upon the wording of the request. For example, in its submission the RM asserts that documents 85 and 104 relate to fire response call out and is has been withheld as not responsive to the request. Further, it asserts that some of the documents relate to the RM’s capital improvements and the City of Regina development plans. From a review of the documents, I agree that 85, 91, 100, 102, 103 and 104 are non-responsive to the request. However, in cases where I determine that a records is non-responsive, I recommend release of those records subject to exemptions, if they apply.
- [35] I will now take a look at document 92. First, the email falls within the Applicant’s specified date range. The email is dated November 4, 2014. Further, from a review of the record, it is an email and some photos of some work the Third Party is allegedly conducting without a permit. Item #1 of the Applicant’s request is for, “Developments/improvements done without permits.” Therefore, document 92 is responsive to the request.
- [36] I find that documents 76, 79, 80, 84, 93, 95, 96, 105, 106, 107, 108, 113, 114, 115, 116, 120, 121, 123, 124, 129, 130, 131, 132, 133, 140, 141, 144 and 152 are outside the scope of the request. I recommend that the RM not release these documents.

[37] I find that document 85, 91, 100, 102, 103 and 104 are not responsive to the request. However, I recommend the RM release this pages to the Applicant, subject to exemptions in any apply.

[38] I find document 92 is responsive to the request. I recommend the RM release document 92 to the Applicant.

[39] To eliminate confusion for applicants, going forward the RM should not include documents in the index of records if they clearly fall outside the scope of a request.

**5. Is there personal information pursuant to subsection 28(1) of LA FOIP?**

[40] The RM has severed portions of information found in documents 20, 22, 23, 29, 30, 33, 35, 41, 49, 51, 52, 53, 54, 64, 71, 78, 82, 94, 97, 112, 128, 134, 145 and 154 pursuant to subsection 28(1) of LA FOIP. Subsection 28(1) of LA FOIP provides:

**28(1)** No local authority shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 29.

[41] Subsection 23(1) of LA FOIP provides a list of types of information that may qualify as personal information, however, the list is not exhausted. In order to qualify as personal information, the information must relate to an identifiable individual and the information must be personal in nature.

[42] On these pages, the RM has released the name, but withheld some contact information such as business email addresses, business mailing addresses, and business telephone numbers for the following:

- Current and former RM employees;
- Employees of the Third Party, a private business;
- Employees of another local authority; and
- Employees of other private businesses.

[43] This type of information is commonly referred to as “business card information”. I have looked at the issue of business card information not qualifying as personal information in several reports in the past. Recently, I noted the following in Review Report 186-2019 at paragraph [26]:

[26] Business card information is the type of information found on a business card (name, job, title, work address, work phone numbers and work email address). This type of information is generally not personal in nature and therefore would not be considered personal information....

[44] From a review of the record, the individuals whose contact information has been included in the records are in their capacity as employees of the organization in which they represent and are not in their personal capacity. Therefore, the contact information that has been severed is business card information and not personal information.

[45] Therefore, I find the information that has been severed in documents 20, 22, 23, 29, 30, 33, 35, 41, 49, 51, 52, 53, 54, 64, 71, 78, 82, 94, 97, 112, 128, 134, 145 and 154 does not qualify as personal information pursuant to subsection 23(1) of LA FOIP. As such, the RM cannot rely on subsection 28(1) of LA FOIP to withhold it. I recommend the RM release the withheld information in documents 20, 22, 23, 29, 30, 33, 35, 41, 49, 51, 52, 53, 54, 64, 71, 78, 82, 94, 97, 112, 128, 134, 145 and 154 to the Applicant.

## **6. Did the RM meet its obligations under section 8 of LA FOIP?**

[46] The RM fully withheld 105 documents totalling 550 pages from the Applicant, which it applied various exemptions.

[47] Section 8 of LA FOIP provides:

**8** Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

[48] The Guide to LA FOIP speaks to severing a record starting at page 44. *Severability* is the principle described in section 8 of LA FOIP requiring that information be disclosed if it

does not contain, or if it can be reasonably severed from, other information that the head of a local authority is authorized or obligated to refuse to disclose under LA FOIP. *Severing* is the actual exercise by which portions of a document are blacked or greyed out before the document is provided to the applicant.

[49] Section 8 of LA FOIP uses the phrase, “*can be reasonably severed.*” LA FOP does not elaborate on what constitutes reasonable severability. However, one principle that has emerged from decisions of other Commissioners and courts is that information that would comprise of only disconnected or meaningless snippets is not reasonably severable and such snippets need not be released.

[50] A line-by-line review is essential to comply with the principle of severability set out in section 8 of LA FOIP. This provision grants an applicant a right of access to any record from which exempted material can be reasonably severed. When severing, each severed item should have a notation indicating which exemption(s) applies in each instance.

[51] The RM has not done this. First, as 550 pages were fully withheld from the Applicant, it does not appear the RM undertook a line-by-line review of the record. The only information that the RM did sever was what it considered personal information that appeared in the pages released to the Applicant.

[52] Secondly, the RM took a blanket approach and applied exemptions to full documents. For example, the RM fully applied five exemptions to document 31, totalling 93 pages. These exemptions include subsections 16(1)(a), 17(1)(g), 18(1)(a), (b) and (c) of LA FOIP. For five exemptions to fully apply to 93 pages would be, in short, highly unlikely.

[53] I looked at this issue in Review Report 171-2019 as follows:

[33] [Saskatchewan Human Rights Commission] indicated that Bundle A contains 78 pages of records and it is withholding all 78 pages in their entirety pursuant to eight exemptions. This implies that all eight exemptions apply equally to all 78 pages. In other words, SHRC took a blanket approach in applying exemptions instead of a line-by-line analysis that is required by section 8 of FOIP....

[54] My office's notification email asked the RM, in part, to address in its submission how the RM met its severing obligations under section 8 of LA FOIP. The RM provided my office with a submission and additional supporting arguments. In its submission, the RM did not address how it met its obligations under section 8 of LA FOIP.

[55] Therefore, I find the RM has not met its obligations under section 8 of LA FOIP. I recommend the RM develop a procedure for conducting line-by-line reviews and properly severing records for release.

[56] My office has developed several tools and resources that can assist the RM in this recommendation, including the webinar *Modern Day Severing - Made A Lot Easier*, which can be found on my office's website ([www.oipc.sk.ca](http://www.oipc.sk.ca)).

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

[57] I will first review the mandatory exemptions pursuant to section 18 of LA FOIP. In my office's *Guide to FOIP, Chapter 4: Exemptions to the Right of Access*, updated February 4, 2020 (Guide to FOIP) at pages 9 and 10 describes mandatory exemptions. A mandatory exemption is one where the local authority has no, or a more limited, discretion regarding whether or not to apply the exemption.

[58] Regardless of whether an exemption is mandatory or not, section 51 of LA FOIP establishes that the burden of establishing that access to the records may or must be refused or granted is on the head concerned.

[59] The RM applied subsection 18(1)(a) of LA FOIP in full to documents 12, 13, 14, 15, 31, 32, 61, 67, 77, 135 and 150 totalling 222 pages. 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;

[60] Subsection 19(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP) is the same provision as subsection 18(1)(a) of LA FOIP. As such, the Guide to FOIP provides guidance. Page 188 of the Guide to FOIP outlines that this subsection is a mandatory exemption that permits refusal of access in situations where a record contains the trade secrets of a third party. When making this assessment, the public body can apply the following test - does the record contain trade secrets of a third party?

[61] *Trade secret* is defined as information, including a plan or process, tool, mechanism or compound. In order to be considered a *trade secret* the information must meet all of the above criteria:

- 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 they have 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.

[62] The types of information that could potentially fall in this class include the chemical composition of a product and the manufacturing processes used. However, not every process or test would fall into this class, particularly when the process or test is common in a particular industry.

[63] My office received a submission from the Third Party. The Third Party provided a high level argument related to trade secrets:

...

A large number of these documents contain [Third Party] trade secrets including but not limited to [Third Party] processes, [Third Party] drawings, land testing processing as well as financial information relating to [Third Party] and its owned property. Disclosure of such confidential information severely prejudices [Third Party]'s competitive position by providing access to otherwise confidential information to competitors, prospective purchasers and other third parties.

...

- [64] The Third Party has also provided some general arguments by each record, however, none of the arguments apply specifically to trade secrets of a Third Party, which is required in order for subsection 18(1)(a) of LA FOIP to apply.
- [65] Documents 12, 13, 14 and 15 are each Council Decision Items related to the Third Party's application for a tax incentive from the RM. From a review of these pages, there is no information that would meet the criteria outlined above to qualify as a trade secret.
- [66] Documents 31 and 32 are foundation permit applications of the Third Party. These documents include information such as building permit checklists, permit information forms and a geotechnical investigation of the property. From a review of these two documents, none of this information would qualify as a trade secret of the Third Party.
- [67] Document 61 is an email facilitating a meeting between the RM, the Third Party and another local authority related to some concerns the neighboring local authority has regarding the expansion. Document 67 is essentially a "to do" list of where particular items are at by the Third Party with the expansion. Some of the items on this list are as simple as asking if the furniture has been ordered. Document 77 is a covering email with site plans for the expansion project. Finally, document 150 is an email chain between the Third Party and RM regarding building requirements and concerns the Third Party has related to some of the RM's application requirements. Nothing within these documents would constitute trade secrets.
- [68] The only document in which the RM provided arguments or comments on for subsection 18(1)(a) of LA FOIP was document 135. In it, the RM asserts:

... [document 135] was also withheld under section [sic] 18(1)(a) of LA FOIP, containing trade secrets of a third party. The processor of the information clearly intended to keep the information confidential as the language in the email states "confidential".

It also is important to note that under section 33 of [LA FOIP] the RM had reason to believe the documents may contain information that affects the interest of the third part [sic] and requested their consent to release the information. The RM received written correspondence from the Third Party denying release of these documents.

[69] First, I would like to discuss the term “confidential”. Simply marking correspondence as confidential does not mean the document must be kept confidential. The test laid out for the particular exemption must be met. I commented on this in Review Report 326-2019 as follows:

[17] After receiving a draft of this Report, the [RM of Maple Creek No. 111] indicated that the word “confidential” was stamped on the envelope in which the letter was sent. My office’s Guide to FOIP, Chapter 4 (updated February 4, 2020) at page 21 indicates that simply labelling documents as “confidential” does not, on its own, make the documents confidential (i.e. confidentiality stamps or standard automatic confidentiality statements at the end of emails)....

[70] From a review of document 135, there is nothing contained that would constitute a trade secret.

[71] Therefore, I find subsection 18(1)(a) of LA FOIP does not apply to documents 12, 13, 14, 15, 31, 32, 61, 67, 77, 135 and 150.

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

[72] The RM applied subsection 18(1)(b) of LA FOIP in full to documents 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 21, 24, 25, 26, 27, 28, 31, 32, 36, 48, 61, 67, 72, 77 and 150, totalling 290 pages. 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;

[73] The Guide to FOIP provides guidance on this section starting at page 191. Subsection 18(1)(b) of LA FOIP permits refusal of access in situations where a record contains financial, commercial, scientific, technical or other information that was supplied in confidence to a local authority by a third party. To determine if the information qualifies under this exemption, 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?

[74] I will now consider each part of the test.

***1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?***

[75] In its submission, the Third Party has provided the following high-level arguments as it relates to subsection 18(1)(b) of LA FOIP:

...where the documents do not, in our opinion, meet the threshold of containing trade secrets, it is [Third Party]'s submission that they do contain financial and commercial information of [Third Party] that was supplied to the RM impliedly [sic] or expressly on an expected confidential basis. These records contain specific commercial details regarding [Third Party] specific property that [Third Party] did not intend to be made public. They were disclosed to the RM for the strict purposes of dealings between the RM and [Third Party], and no other person.

A variety of the records contain specific financial information relating to [Third Party] owned property and its business. Again, [Third Party] does not make this information public, and it was provided to the RM with the intention that it remained confidential.

[76] The RM has raised subsection 18(1)(b) of LA FOIP, however, has only provided arguments for document 16, which I will look at later. Both the RM and the Third Party have raised limited arguments related to financial and commercial information and not technical or labour relations information.

[77] The Guide to FOIP describes financial and commercial information at page 192. *Financial information* is information regarding monetary resources, such as financial capabilities, assets and liabilities, past or present. Common examples are financial forecasts, investment strategies, budgets and profit and loss statements. The financial information must be specific to a third party.

[78] *Commercial information* is information relating to the buying, selling or exchange of merchandise or services. This can include third party associations, past history, references and insurance policies and pricing structures, market research, business plans and computer records. Types of information included in the definition of commercial information can include:

- Offers of products and services a third-party business proposes to supply or perform;
- A third-party business' experiences in commercial activities where this information has commercial value;
- Terms and conditions for providing services and products by a third-party;
- Lists of customers, suppliers or sub-contractors compiled by a third party business for its use in its commercial activities or enterprises - such lists may take time and effort to compile, if not skill;
- Methods a third-party business proposes to use to supply food and services; and
- Number of hours a third-party business proposes to take to complete contracted work or tasks.

[79] Documents 6, 7, and 8 are stop work orders issued by the RM to the Third Party. Document 9 is a road allowance maintenance agreement between the RM and the Third party. The maintenance agreement is also included as an attachment in document 10. The first portion of document 10 is a council decision item related to the stop work orders and the maintenance agreement. Documents 12, 13, 14 and 15 are council decision items regarding the Third Party's application for a tax incentive. Several of the withheld documents are the Third Party's tax incentive application form. Document 72 is a one sentence email where the Third Party is simply asking the RM a question, while document 61 is a list of concerns and questions that the Third Party's property neighbour (that is also a different local authority) has raised and the local authority has answered the concerns.

[80] Neither the Third Party nor the RM has provided my office with specific arguments as to why the contents of each of these documents would qualify under subsection 18(1)(b) of

LA FOIP. However, from a review of these records, I find it confusing how the RM could view much of this as qualifying under this exemption.

[81] Document 16 is the Proposal for Tax Incentive Support prepared by the Third Party for the RM. As noted above, the RM provided high level, limited arguments for this 14 page document:

...The document does include information to their [Third Party] business that financial investments and strategies. This information is internal intelligence to the producer of the document, it is information that could not be collected by a general observation by the public of government organization.

The producer of the document did clearly indicate that the document was being provided in confidence to the public/government organization and further indicated the document as confidential.

It is also important to note that under section 33 of [LA FOIP] the RM had reason to believe the documents may contain information that affects the interest of the third part and requested their consent to release the information. The RM received written correspondence from the Third Party denying release of these documents.

[82] Again, although the RM did specifically speak to this record, its arguments are high level and do not get into the specifics required to show this exemption applies. I would note that some of the information included in document 16 is even publicly available as it was taken directly from the Third Party's website.

[83] From a review of the information the RM has withheld under subsection 18(1)(b) of LA FOIP, lacking specific arguments from the Third Party to support its case, the only information I see that meets the first part of the test would be the specific dollar amount that the Third Party has invested in the properties, such as the construction/improvement upgrade dollar amounts. For example, specific third party construction dollar amounts can be found in documents 18, 19, 25, 26 and 27 (Tax Incentive Applications).

[84] The burden of proof under section 51 of LA FOIP has not been met for the remainder of the information being withheld under this exemption. Therefore, I will move onto the next

part of the test only for the specific dollar amounts that the Third Party has invested in the properties.

**2. Was the information supplied by the third party to a local authority?**

[85] The Guide to FOIP, starting a page 193, speaks to this part of the test. *Supplied* means provided or furnished. Information may qualify as “supplied” if it was directly supplied to a local authority by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.

[86] From a review of the record, it is easy to determine that the Third Party has supplied the specific dollar amounts that the Third Party has invested in the properties, as it has done so by completing the application for a tax incentive. Therefore, this part of the test has been met. I will now look at the third part of the test for this information.

**3. Was the information supplied in confidence implicitly or explicitly?**

[87] The Guide to FOIP speaks to this part of the test starting at page 195. As noted above, *supplied* means provided or furnished. *In confidence* usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained in confidence means that the supplier of the information has stipulated how the information can be disseminated.

[88] In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the local authority and the Third Party providing the information.

[89] *Implicitly* means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential. *Explicitly* means that the request for confidentiality has been clearly expressed, distinctly stated or made definite. There may

be documentary evidence that shows that the information was supplied on the understanding that it would be kept confidential.

[90] In order for subsection 18(1)(b) of LA FOIP to apply, a local authority must show that both parties intended the information to be held in confidence at the time the information was supplied. The expectation of confidentiality must be reasonable and must have an objective basis. Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated.

[91] Factors considered when determining whether a document was supplied in confidence implicitly include (not exhaustive):

- What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the third party or the local authority?
- Was the information treated consistently in a manner that indicated a concern for its protection by the third party and the local authority from the point at which it was supplied until the present time?
- Is the information available from sources to which the public has access?
- Does the local authority have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially?
- Was there a mutual understanding that the information would be held in confidence?

[92] *Mutual understanding* means that the local authority and the third party both had the same understanding regarding the confidentiality of the information at the time it was supplied. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been supplied in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.

[93] The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments. The bare assertion that the information was supplied implicitly in confidence would not be sufficient.

[94] Factors to consider when determining if a document was supplied in confidence explicitly include (not exhaustive):

- the existence of an express condition of confidentiality between the local authority and the third party;
- the fact that the local authority requested the information be supplied in a sealed envelope and/or outlined its confidentiality intentions to the third party prior to the information being supplied.

[95] As noted above, simply labelling documents as “confidential” does not, on its own, make the documents confidential. Local authorities cannot be relieved of their responsibilities under LA FOIP merely by agreeing via a confidentiality clause in a contract/agreement to keep matters confidential.

[96] The RM has provided limited arguments on this. The arguments relate specifically to document 16. It has asserted:

The producer of the document did clearly indicate that the document was being provided in confidence to the public/government organization and further indicated that the document as [sic] as confidential.

[97] The Third Party provided the following arguments related to confidentiality. It has stated that these records contain confidential financial and commercial information of the Third Party. In addition, the Third Party states:

...it is [Third Party]’s position that they do contain financial and commercial information of [Third Party] that was supplied to the RM impliedly [sic] or expressly on an expected confidential basis....

A variety of records contain specific financial information relating to [Third Party] owned property and its business. Again, [Third Party] does not make this information public, and it was provided to the RM with the intention that it remain confidential.

[98] I would like to reiterate that simply marking something confidential does not make it confidential. I would also like to remind the RM that it should be indicating to businesses that they cannot automatically assume the expectation of confidentiality through business

dealings with the RM. The RM is a local authority, and as such, is subject to and must comply with LA FOIP.

[99] However, as it relates to the specific dollar amounts that the Third Party has invested in the properties, the Third Party arguments have demonstrated the expectation of confidentiality. Therefore, I find that subsection 18(1)(b) of LA FOIP applies to the specific dollar amounts that the Third Party has invested in the properties, but does not apply to the remainder of the information being withheld pursuant to subsection 18(1)(b) of LA FOIP. I recommend the RM continue to withhold the specific dollar amounts that the Third Party has invested in the properties pursuant to subsection 18(1)(b) of LA FOIP.

[100] Further, I recommend the RM release document 16 as there are no further exemptions applied to this document.

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

[101] The RM applied subsection 18(1)(c) of LA FOIP in full to documents 6, 7, 8, 9, 10, 12, 13, 14, 15, 17, 18, 19, 21, 24, 25, 26, 27, 28, 31, 32, 36, 42, 48, 61, 67, 72, 77, 83, 99, 101, 117, 122, 125, 126, 146, 147, 148 and 150 totalling 316 pages. Subsection 18(1)(c) 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:

(i) result in the financial loss or gain to;

(ii) prejudice the competitive position of; or

(iii) interfere with the contractual negotiations of;

a third party;

[102] I would like to note that subsection 18(1)(c) of LA FOIP is not a single exemption, it is in fact three exemptions – 18(1)(c)(i), 18(1)(c)(ii) and 18(1)(c)(iii). However, the RM has not differentiated which part of subsection 18(1)(c) of LA FOIP it has applied to the record. Therefore, I must assume the RM has applied all three.

[103] The Guide to FOIP at page 204 outlines the 2-part test for subsection 18(1)(c)(i) of LA FOIP:

1. What is the financial loss or gain being claimed?
2. Could release of the record reasonably be expected to result in financial loss or gain to a third party?

[104] I will now assess each part of the test.

***1. What is the financial loss or gain being claimed?***

[105] As outlined in the Guide to FOIP at page 204, *financial loss or gain* must have a monetary equivalent, or value.

[106] The Third Party argues:

...This financial information, if released, harms current and potential negotiations with third parties, such as competitors, [Third Party] suppliers, or purchasers.

Lastly, [Third Party] relies on the confidentiality of a variety of the financial and commercial information contained in these records to maintain a competitive advantage over its competitors. The disclosure of this information to a third party creates a significant risk it will be released to [third party] competitors and will adversely affect [Third Party]'s position [Third Party]'s competitive position. Such a result would financially harm [Third Party]'s competitive position.

[107] However, the Third Party has not outlined what the monetary equivalent, or value is being claimed, as is required by this exemption.

[108] The RM has not provided my office with any arguments related to this exemption.



[109] In order to be successful, each part of each test for each exemption being claimed must be argued specifically to each piece of information that is being withheld under the exemption. The high level, blanket approach by the RM and the Third Party simply will not suffice in meeting the threshold to establish the exemption applies.

[110] Therefore, the RM has not met its burden of proof pursuant to section 51 of LA FOIP and the Third Party has not demonstrated what the actual financial loss or gain would be if this information was released. Since the first part of the test has not been met, I find subsection 18(1)(c)(i) of LA FOIP does not apply to the record.

[111] The Guide to FOIP starting at page 208 outlines the 2-part test for subsection 18(1)(c)(ii) of LA FOIP:

1. What is the prejudice to a third party's competitive position that is being claimed?
2. Could the release of the record reasonably be expected to result in the prejudice?

[112] I will now consider each part of the test.

***1. What is the prejudice to a third party's competitive position that is being claimed?***

[113] The Guide to FOIP starting at page 208 outlines the requirements for this part of the test. *Prejudice* in this context refers to detriment to the competitive position of a third party. *Competitive position* means the information must be capable of use by an existing or potential business competitor, whether or not that competitor currently competes for the same market share.

[114] The RM has provided me no arguments for subsection 18(1)(c)(ii) of LA FOIP.

[115] The Third Party has simply argued that it will affect its competitive position. It has not told my office what that prejudice would be or how it would affect its competitive position.

Furthermore, the Third Party's arguments are high level and not specific to each piece of information in each of the 316 pages being withheld under this exemption.

[116] Therefore, the RM has not met its burden of proof pursuant to section 51 of LA FOIP and the Third Party has not demonstrated how it would affect its competitive position if this information was released. Since the first part of the test has not been met, I find subsection 18(1)(c)(ii) of LA FOIP does not apply to the record.

[117] The Guide to FOIP starting at page 213 outlines the 2-part test for subsection 18(1)(c)(iii) of LA FOIP:

1. Are there contractual or other negotiations occurring involving a third party?
2. Could release of the records reasonably be expected to interfere with the contractual or other negotiations of a third party?

[118] I will now consider each part of the test.

***1. What is the prejudice to a third party's competitive position that is being claimed?***

[119] The Guide to FOIP starting at page 213 outlines the requirements for this part of the test. A *negotiation* is a consensual bargaining process in which the parties attempt to reach an 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.

[120] Prospective or future negotiations could be included within this exemption, as long as they are foreseeable. It may be applied even though negotiations have not yet started at the time of the access to information request, including when there has not been any direct contact with the other party or their agent. However, a vague possibility of future negotiations is not sufficient. There must be a reasonable fact-based expectation that the future negotiations will take place.

[121] Once a contract is executed, negotiation is concluded. The exemption would generally not apply unless, for instance, the same strategy will be used again and it has not been publicly disclosed.

[122] The RM has provided me no arguments for subsection 18(1)(c)(iii) of LA FOIP.

[123] The Third Party has simply argued that the information if released will harm current and potential negotiations with third parties, such as competitors, suppliers or purchasers. It has not told my office how it would affect current or future negotiations. Again, the Third Party's arguments are high level and not specific to each piece of information being withheld under this exemption.

[124] Therefore, the RM has not met its burden of proof pursuant to section 51 of LA FOIP and the Third Party has not demonstrated what current or potential negotiations would be harmed if this information was released. Since the first part of the test has not been met, I find subsection 18(1)(c)(iii) of LA FOIP does not apply to the record.

[125] I recommend the RM release documents 12, 13, 14, 15, 18, 19, 21, 61, 67, 77, 99 and 150 as there are no further exemptions applied to these documents.

**10. Did the RM meet its burden of proof pursuant to section 51 of LA FOIP for subsections 14(1)(c), 15(1)(b), 16(1)(a), (b), (c), 17(1)(d), (g), 21(a), (b) and (c) of LA FOIP?**

[126] The remaining exemptions that have been applied to this record are discretionary exemptions. The Guide to FOIP starting at page 10, describes this category of exemptions. Discretionary exemptions offer discretion for a local authority. In other words, disclosure can still occur even where a discretionary exemption is found to apply. Discretionary exemptions begin with the phrase "A head may refuse...".

[127] If a local authority does not meet its burden of proof pursuant to section 51 of LA FOIP for a discretionary exemption, my office will recommend release of the record. Subsection 51 of LA FOIP provides:

**51** In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[128] Chapter 2 of the Guide to LA FOIP speaks to the burden of proof requirement of a local authority starting at page 38. The burden is not on the applicant to establish that an exemption does not apply. Burden of proof is the obligation of one of the parties in a review to persuade the Commissioner to decide an issue in its favour.

[129] When it is said that a party has the “burden of proof”, what is meant is that one party has a duty in law first to bring forward evidence that a particular fact or situation exists, and then to persuade the Commissioner that the evidence meets the necessary standard of proof.

[130] Evidence is the material that parties must submit in reviews/investigations to establish the facts on which they are relying. Arguments are the reasons why a party thinks that the evidence shows certain facts to be true, or why the Commissioner should interpret the law in a particular way, so as to make the decision that the party wants the Commissioner to make.

[131] Parties may not succeed in a review if they do not provide evidence to support their arguments. If the success of an argument depends on underlying facts, providing the argument alone is not sufficient. Examples of evidence include affidavits, expert reports, news articles, meeting minutes, policy documents or contracts. In a review, the records at issue are treated as evidence. Although news articles are not generally thought of as reliable evidence, they may be relevant in cases such as where a party is trying to demonstrate that something is publicly available, or where personal information has been disclosed without authority.

[132] It would not be sufficient to provide my office with records and leave it up to my office to draw from the records the facts on which the decisions will be based. In addition, it would

not be sufficient to simply state “access is denied because of section 18.” It is up to the local authority to ‘make the case’ that a particular exemption applies. That means presenting reasons why the exemption is appropriate for the part of the record that has been withheld. This is usually done in the form of written representations, commonly called a submission.

[133] When my office provided notification to the RM regarding the review, my office, in part, asked the RM to provide our office with a submission and to explain how the record qualifies for each of the exemptions the RM had claimed. In addition, my office provided the RM with links to several documents to assist in preparing its submission. This included a link to our former resource the *IPC Guide to Exemptions* (replaced with the Guide to FOIP and the Guide to LA FOIP) which included the specific page numbers to the tests for each of the exemptions the RM had denied access.

[134] My office also provided the RM with a link to *What to Expect During a Review with the IPC: A Resource for Public Bodies and Trustees*, updated January 2018. Pages 6 and 7 of this resource discusses how to prepare a submission.

[135] Upon initial analysis, my office recognized that the RM provided an insufficient submission. It appeared that this may have been the first review the RM had with my office, therefore, my office reached out to the RM to get some additional details on May 8, 2020. In part this request read:

In regards to your submission, you have provided me with the spreadsheet that outlines what exemption(s) apply to the particular record, however, you have not provided arguments outlining how the exemptions apply. Page 6 and 7 (Preparing the Submission) in our resource *What to Expect During a Review with the IPC* [link included] describes what our office looks for in a submission. Therefore, can you prepare a submission and forward it to me. I have included the tests for the exemptions you have claimed (below) which you can refer to when preparing your submission. Our office is currently working on the IPC Guide to FOIP and then will be working on the IPC Guide to LA FOIP. Therefore, for the exemptions you have claimed, here are the tests:

- 14(1)(c): attached
- 15(1)(b): attached

- 16(1)(a), (b), (c): attached
- 17(1)(d): use the test for 18(1)(d) of FOIP found in chapter 4 the IPC Guide to FOIP [link included] starting at page 167
- 17(1)(g): use the test for 18(1)(h) of FOIP found in chapter 4 of the above starting at page 181
- 18(1)(a), (b), (c): attached
- 21(a): use the test for 22(a) of FOIP found in chapter 4 of the above starting at page 245 (for 22(a), (b), (c) tests, the Attorney general references would not be relevant to the RM – that’s government institution specific)
- 21(b): use the test for 22(b) of FOIP found in chapter 4 of the above starting at page 261
- 21(c): use the test for 22(c) of FOIP found in chapter 4 of the above starting at page 262
- Personal information (section 28): attached
- Records not responsive: attached

In addition, I have the following questions/clarification regarding the record itself:

...

- For several of your records you have claimed multiple exemptions. Are you applying each of these exemptions to the individual record fully or an exemption to a part of the record and an exemption to another part of the record? For example, for record 1 you are applying subsections 15(1)(b), 16(1)(a) and 16(1)(b) to 6 pages. Are these exemptions being applied to the full content of the 6 pages or does 15(1)(b) apply to a portion, 16(1)(a) apply to a portion and perhaps 16(1)(a) and (b) apply to another portion. Can you identify which records you are applying the exemption(s) to in full and which you are applying in part. In cases of the latter, please forward me another copy of the record marked where you are applying each exemption.

[136] In the remaining 81 documents in this review, the RM provided my office with limited arguments for 54 of the documents. In addition, the RM applied several exemptions to many of the remaining documents, however it only addressed one exemption per document in most cases.

[137] The RM also did not address the last bullet above where my office has asked what exemptions apply to what portions of the record. By not specifying, this shows that the RM intended to apply each exemption to the entire document. For the RM to reach this conclusion is highly unlikely for a record this size and given the variety of documents.

[138] From the additional arguments, the RM has provided my office, I will now assess if it is sufficient.

***Subsection 14(1)(c) of LA FOIP***

[139] Subsection 14(1)(c) of LA FOIP provides:

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

...

(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;

[140] The following two part test can be applied:

1. Does the local authority's activity qualify as a "lawful investigation"? and
2. Does one of the following exist?
  - Could the release of the information interfere with a lawful investigation?  
or
  - Could release disclose information with respect to a lawful investigation?

(Guide to FOIP, pp. 51 to 53)

[141] The RM has provided arguments for part one of the test. It did not address part two of the test. For this exemption to be found to apply, the RM must successfully argue both parts of the test. Therefore, the RM has not met the burden of proof for subsection 14(1)(c) of LA FOIP.

***Subsections 15(1)(b) and 16(1)(a) and (b) of LA FOIP***

[142] Subsection 15(1)(b) of LA FOIP provides:

**15(1)** A head may refuse to give access to a record that:

(a) contains a draft of a resolution or bylaw;

[143] My office provided the RM with the test for subsection 15(1)(b) of LA FOIP as an attachment to the May 8, 2020 request for additional details. Subsection 15(1)(b) is actually two exemptions – 15(1)(b)(i) and 15(1)(b)(ii). In its response, the RM provided arguments based upon the latter. In order for subsection 15(1)(b)(i) to be found to apply, all three parts of the following test must be met:

1. Has a meeting of a council, board, commission or other body or a committee of one of them taken place?
2. Does the statute authorize the holding of a meeting in the absence of public?
3. Would disclosure of the record reveal the agenda or substance of the deliberations of the meeting?

[144] The RM provided my office with limited arguments for the first two parts of the test but did not address the third part of the test. Therefore, the RM has not met the burden of proof for subsection 15(1)(b) of LA FOIP.

[145] In its arguments for subsection 15(1)(b)(i), the RM also stated:

...The document was further exempted, and withheld from the public from 16(1)(a) and 16(1)(b) [of LA FOIP] as the document contains consultations and/or deliberations from the employees of the local authority and proposals and advice from employees to Council.

[146] Subsections 16(1)(a) and (b) of LA FOIP provide:

**16(1)** Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority;

(b) consultations or deliberations involving officers or employees of the local authority;

[147] For these exemptions to be found to apply, both parts of the test for subsection 16(1)(a) of LA FOIP and both parts of the test for subsection 16(1)(b) of LA FOIP must be met. What the RM has done above is essentially restate what subsection 16(1)(b) of LA FOIP provides



in the Act and has not argued the exemption. In addition, the RM has not provided any arguments for subsection 16(1)(a) of LA FOIP. Therefore, the RM has not met the burden of proof for subsections 16(1)(a) and (b) of LA FOIP.

***Subsection 17(1)(a) of LA FOIP***

[148] Subsection 17(1)(a) of LA FOIP provides:

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

(a) trade secrets;

[149] In reference to subsection 17(1)(a) of LA FOIP, the RM stated:

As the document also pertains to [other local authority] negotiations this information is Third Party [sic] to the RM of Sherwood and was also withheld under section 18(1)(a) of LA FOIP containing trade secrets of the Third Party.

[150] These are very limited arguments. The RM has not pointed directly to what information of the Third Party would be considered a trade secret. I have found above that subsection 18(1)(a) of LA FOIP (third party trade secrets) does not apply to the record. Further, the RM has not argued any portion of the test for subsection 17(1)(a) of LA FOIP. Therefore, the RM has not met the burden of proof for subsection 17(1)(a) of LA FOIP.

***Subsection 21(a) of LA FOIP***

[151] Subsection 21(a) of LA FOIP provides:

**21** A head may refuse to give access to a record that:

(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

[152] I appreciate that the RM provided my office with a copy of the record where they claimed subsection 21(a) of LA FOIP. In addition, the RM provided me the following arguments related to subsection 21(a) of LA FOIP related to documents 24, 40, 60, and 98:

Is a document which included a third party lawyer and the RM's legal representative; the [sic] was intended to be within a zone of privacy as the two parties were acting on instructions given and investigating the potential contravention of a municipal bylaw and provincial legislation which may result in an offence or summary conviction. These documents align with the [Guide to FOIP – Chapter 4] page 246, common interest principle. A privilege does exist when records are provided among parties where several parties have a common interest in anticipated litigation.

[153] In Review Report 298-2019, I established the following two part test for common interest privilege at paragraph [53]:

1. The record contains information that is subject to any privilege that is available at law; and
2. The parties who share that information must have a “common interest”, but not necessarily an identical interest, in the information.

[154] The RM has first argued that there is a potential contravention of a municipal bylaw and provincial legislation that may result in an offence. If there is an offence, then the RM's interest is adverse to that of the Third Party. The RM would be prosecuting the Third Party for committing an offence and the Third Party would be defending itself. This means their interests are opposites, not common.

[155] The RM then argues that several parties have a common interest in anticipated litigation, which is a civil matter and not an offence. The RM has not made me aware of any civil litigation or potential civil litigation. If there was civil litigation, the RM would have to show that their interest was common to that of this Third Party. It is more likely that the RM interest and the Third Party's interest would be very different. Therefore, the RM has not met the burden of proof for subsection 21(a) of LA FOIP.

***Subsection 21(b) of LA FOIP***

[156] Subsection 21(b) of LA FOIP provides:

**21** A head may refuse to give access to a record that:

...

(b) was prepared by or for legal counsel for the local authority in relation to a matter involving the provision of advice or other services by legal counsel;

[157] The RM provided my office with the following arguments related to subsection 21(b) of LA FOIP for documents 37, 38, 39, 56 and 59:

The RM's lawyer was providing client solicitor privileged advice with a recommended course of action. The lawyer was providing a legal opinion and/or advice on matters of bylaw contravention....

[158] Further, the RM provided the following arguments related to subsection 21(b) of LA FOIP for document 81:

This document is solicitor-client privileged as it was prepared by RM legal counsel, contains draft letter only.

[159] The Guide to FOIP provides the test for subsection 21(b) of LA FOIP starting at page 261:

1. Were the records "prepared by or for" legal counsel for a local authority?
2. Were the records prepared in relation to a matter involving the provision of advice or other services by legal counsel?

[160] I note that subsection 21(b) of LA FOIP does not deal with solicitor-client privilege. The RM has raised solicitor-client privilege in its arguments for this exemption. Solicitor-client privilege is captured under subsection 21(a) of LA FOIP.

[161] The RM has provided very high level arguments for these six documents. In order to meet the burden of proof, the RM must be more specific and address each piece of the test. From

a review of the record, some of the communications do not even involve lawyers. Therefore, the RM has not met the burden of proof for subsection 21(b) of LA FOIP.

***Subsection 21(c) of LA FOIP***

[162] Subsection 21(c) of LA FOIP provides:

**21** A head may refuse to give access to a record that:

...

(c) contains correspondence between legal counsel for the local authority and any other person in relation to a matter involving the provision of advice or other services by legal counsel.

[163] The RM provided my office with the following arguments related to subsection 21(c) of LA FOIP for documents 43, 44, 45, 46, 47, 55, 69, 70, 73, 74, 75, 87, 93, 109 and 110:

The purpose of the agreement and email in questions was to settle/resolve a dispute in that was contemplated for litigation.

[164] Further, the RM provided my office with the following arguments related to subsection 21(c) of LA FOIP for documents 55, 56, 59, 66, 68, 86, 88, 89, 90, 111, 118, 119, 124, 127, 133, 136, 137, 138, 139, 142, 143 and 151:

Client solicitor privileged discussion in a recommended course of action.

[165] Again, solicitor client privilege is captured under subsection 21(a) of LA FOIP and not 21(c) of LA FOIP.

[166] The test that can be applied for subsection 21(c) of LA FOIP is as follows:

1. Is the record a correspondence between the local authority's legal counsel and any other person?
2. Does the correspondence relate to a matter that involves the provision of advice or other services by legal counsel?

(Guide to FOIP, p. 263)

[167] The RM has provided my office with two sentences arguing its case for 37 documents. There is absolutely no way that the RM can argue the tests in these two sentences for 37 documents.

[168] Therefore, the RM has not met its burden of proof for subsection 21(c) of LA FOIP.

[169] I find the RM has not met its burden of proof pursuant to section 51 of LA FOIP for subsections 14(1)(c), 15(1)(b), 16(1)(a), (b), (c), 17(1)(d), (g), 21(a), (b) and (c) of LA FOIP.

[170] From this review, it is apparent that the RM needs to take steps to be more prepared in meeting its obligations under LA FOIP, including training related to processing access to information requests for staff that process requests. My office has several resources on our website that can assist the RM in meeting its obligations under LA FOIP. In addition, the Access and Privacy Branch of the Ministry of Justice has many tools and resources available that may assist the RM.

[171] I hope the RM takes this opportunity to grow and take the steps necessary to meet its obligations under LA FOIP. Therefore, I recommend that the RM develop policy and procedures for processing access to information requests. Further, I recommend the RM implement access to information training for its staff involved in processing access to information requests.

#### **IV FINDINGS**

[172] I find that the RM was late in responding to the Applicant's request.

[173] I find that the RM's fee estimate was not issued within the timeframe required under subsections 7(2)(a) and 9(1) of LA FOIP.

[174] I find document number 149 is a duplicate record to document 147.

[175] I find that documents 76, 79, 80, 84, 93, 95, 96, 105, 106, 107, 108, 113, 114, 115, 116, 120, 121, 123, 124, 129, 130, 131, 132, 133, 140, 141, 144 and 152 are outside the scope of the request.

[176] I find that document 85, 91, 100, 102, 103 and 104 are not responsive to the request.

[177] I find document 92 is responsive to the request.

[178] I find the information that has been severed in documents 20, 22, 23, 29, 30, 33, 35, 41, 49, 51, 52, 53, 54, 64, 71, 78, 82, 94, 97, 112, 128, 134, 145 and 154 does not qualify as personal information.

[179] I find the RM has not met its obligations under section 8 of LA FOIP.

[180] I find subsection 18(1)(a) of LA FOIP does not apply to the record.

[181] I find that subsection 18(1)(b) of LA FOIP applies to the specific dollar amounts that the Third Party has invested in the properties, but does not apply to the remainder of the information being withheld pursuant to subsection 18(1)(b) of LA FOIP.

[182] I find subsection 18(1)(c)(i), (ii) and (iii) of LA FOIP do not apply to the record.

[183] I find the RM has not met its burden of proof pursuant to subsection 51 of LA FOIP for subsections 14(1)(c), 15(1)(b), 16(1)(a), (b), (c), 17(1)(d), (g), 21(a), (b) and (c) of LA FOIP.

## **V RECOMMENDATIONS**

[184] I recommend the RM review its procedures when responding to access requests to ensure it is meeting the legislated timelines.

- [185] I recommend that within 30 days of issuance of this Report, the RM keep the \$20 application fee but refund the Applicant any fees they have paid to the RM for this request.
- [186] I recommend the RM release document 149 to the Applicant.
- [187] I recommend that the RM not release documents 76, 79, 80, 84, 93, 95, 96, 105, 106, 107, 108, 113, 114, 115, 116, 120, 121, 123, 124, 129, 130, 131, 132, 133, 140, 141, 144 and 152.
- [188] I recommend the RM release documents 85, 91, 100, 102, 103 and 104 to the Applicant, subject to exemptions if any apply.
- [189] I recommend the RM release document 92 to the Applicant.
- [190] I recommend the RM release the severed information in documents 20, 22, 23, 29, 30, 33, 35, 41, 49, 51, 52, 53, 54, 64, 71, 78, 82, 94, 97, 112, 128, 134, 145 and 154 to the Applicant.
- [191] I recommend the RM develop a procedure for conducting line-by-line reviews and properly severing records for release.
- [192] I recommend the RM continue to withhold the specific dollar amounts that the Third Party has invested in the properties pursuant to subsection 18(1)(b) of LA FOIP.
- [193] I recommend that within 30 days of issuance of this Report, the RM release the remainder of the record that has not been addressed in the above recommendations to the Applicant as the exemptions do not apply to the record or the RM has not met its burden of proof pursuant to section 51 of LA FOIP.
- [194] I recommend that the RM develop policy and procedures for processing access to information requests.

[195] I recommend the RM implement access to information training for its staff involved in processing access to information requests.

Dated at Regina, in the Province of Saskatchewan, this 31st day of March, 2021.

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