



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **REVIEW REPORT 210-2017**

### **City of Saskatoon**

**January 2, 2018**

#### **Summary:**

The City of Saskatoon (the City) received an access to information request related to a Statement of Claim filed with the Court of Queen's Bench. The City applied subsections 18(1)(b), (c)(i), (ii) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) to portions of the record. The Commissioner found that subsections 14(1)(d), 18(1)(b), (c)(i) and (ii) of LA FOIP did not apply to the record. However, he did find that portions of the record qualified as personal information and recommended they be withheld pursuant to subsection 28(1) of LA FOIP.

#### **I BACKGROUND**

[1] On July 20, 2017, the City of Saskatoon (the City) received an access to information request for:

Copies of all reports, service records and/or correspondence relating to storm sewer system inspections and repairs on [a certain road] in Saskatoon, Saskatchewan. Records relating to the residence located at [a certain address] are specifically requested.

[2] The City responded to the Applicant on August 16, 2017 indicating that access to the record was denied pursuant to subsection 14(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[3] The Applicant was dissatisfied with the response of the City and requested a review by my office on August 18, 2017. On August 21, 2017, my office sent notification to both the City and the Applicant of my intention to undertake a review.

[4] When the City provided its submission to my office on September 19, 2017, it also indicated that subsections 18(1)(b), (c)(i), (ii) and 28(1) of LA FOIP applied to the record. On November 17, 2017 I notified, the third party, of this review.

**II RECORDS AT ISSUE**

[5] The City has withheld 143 pages in full pursuant to subsection 14(1)(d) of LA FOIP. When it provided it’s submission to my office, it also indicated that subsections 18(1)(b), (c)(i), (ii) and 28(1) of LA FOIP applied to the record.

<b>Pages</b>	<b>Title</b>	<b>Exemptions</b>
1	Service Connection Report dated July 18, 2011	<b>14(1)(d)</b> – entire record
2-6	Statement of Claim dated July 20, 2017 from applicants	Publicly available
7-8	Sanitary Sewer Connection Repair – Location in question	<b>14(1)(d)</b> – entire record
9-10	Search Result – Water and Sewer Assets Database Program – [location in question] (None relating to storm water system. There were no sanitary sewer service cleaning records for the connection that serves [location in question] in the City of Saskatoon Water and Sewer Assets database.)	<b>14(1)(d)</b> – entire record
11-16	Saskatoon Fire Department Incident Report 16-07871 dated August 9, 2016.	<b>14(1)(d)</b> – entire record
17-150	Contract No. 16-0030 – City of Saskatoon Transportation and Utilities Department – 2016 Sewer Cured-In-Place (CIPP) Lining	<b>14(1)(d)</b> – entire record  <b>18(1)(b), (c)(i), (ii)</b> - pages 11, 14, 15 and 26 of the Successful Bidder’s Submission section  <b>28(1)</b> – pages 16-25 of the Successful Bidder’s Submission section

### III DISCUSSION OF THE ISSUES

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

#### 1. Does subsection 14(1)(d) of LA FOIP apply to the record?

[7] Subsection 14(1)(d) of LA FOIP provides:

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

...

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

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

1. Do the proceedings qualify as existing or anticipated legal proceedings? and
2. Could disclosure of the records be injurious to the public body in the conduct of the legal proceedings?

[9] The City has applied subsection 14(1)(d) of LA FOIP to 143 pages of the record in their entirety.

#### *Do the proceedings qualify as existing or anticipated legal proceedings?*

[10] Legal proceedings are proceedings governed by rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgement of a court or a ruling by a tribunal. Legal proceedings include all proceedings authorized or sanctioned by law, and brought or instituted in a court or legal tribunal, for the acquiring of a right or enforcement remedy. To qualify for this exemption, the legal proceedings must be “existing or anticipated”.

[11] The City provided my office with a copy of a Statement of Claim against the City and a Third Party seeking damages stemming from an accident that occurred. The Statement of Claim was filed with the Court of Queen’s Bench of Saskatchewan on July 20, 2017 and the City indicated the matter was on going.

[12] I am satisfied that this qualifies as an existing legal proceeding for the purpose of this exemption.

***Could disclosure of the records be injurious to the public body in the conduct of the legal proceedings?***

[13] In its submission, the City indicated that the disclosure of the records would circumvent the usual course of disclosure in a legal action. The harm could be premature admission of facts/documents which may otherwise not have been admitted or discovered by the plaintiff in the legal action. There are legal rules and processes in place to address disclosure of information and these should be followed after commencement of a legal action.

[14] In Review Reports 104-2016 and 153-2015 Part 1, I have stated that the injury should be above and beyond any prejudice that relates to the production of a relevant non-privileged document in the usual course of a legal proceeding. The Applicant receiving the records before he receives the records through the arbitration process is not injurious at all.

[15] Access to information under LA FOIP is independent of any discovery or disclosure provisions in a legal proceeding. The Applicant's right to access to information under LA FOIP is not muted because there is an upcoming arbitration hearing. The right of access under LA FOIP remains.

[16] I am not persuaded that subsection 14(1)(d) of LA FOIP applies to the record.

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

[17] 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;

[18] The following test has been established for this exemption:

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

[19] The City noted that subsection 18(1)(b) of LA FOIP applied to the following information:

- Page 11 of the “Successful Bidder’s Submission” of the contract which is a subcontractor/supplier list;
- Page 14 and 15 of the “Successful Bidder’s Submission” of the contract which is past work references;
- Page 26 of the “Successful Bidder’s Submission” of the contract which is an equipment list of the third party.

[20] The Third Party is Insituform Technologies Limited (Insituform). It did not provide a submission.

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

[21] My office has defined commercial information as follows:

Commercial information is information relating to the buying, selling or exchange of merchandise or services. Types of information included in the definition of commercial information:

- 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 goods and services; and
- number of hours a third-party business proposes to take to complete contracted work or tasks.

[22] I am satisfied that the portions of the record in question qualifies as commercial information as lists of customers, suppliers or sub-contractors compiled by a third-party. Further, a list

of equipment would qualify as commercial information because it is part of the methods the third-party business proposes to use to supply goods and services.

[23] The first part of the test is met.

**2. Was the information supplied by the third party to a public body?**

[24] The information in question was supplied to the City when Insituform made its submission to bid for the contract through public tender process.

[25] The second part of the test is met.

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

[26] The City indicated that the information in question was supplied implicitly in confidence.

[27] Implicitly means 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.

[28] The *IPC Guide to Exemptions* provides that the following factors are to be considered when determining whether a document was supplied in confidence implicitly (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 public body?
- Was the information treated consistently in a manner that indicated a concern for its protection by the third party and the public body 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 public body 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? Mutual understanding means that the public body 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.

[29] The City provided a copy of its council policy C02-030 *Purchase of Goods, Services and Work* to my office. The policy provides:

8.1 The City will provide pricing information, including the total contract amounts and the unit pricing of the successful bidder. Unit pricing of the unsuccessful bidders will only be released if permission of the bidders is obtained in accordance with *The Local Authority Freedom of Information and Protection of Privacy Act*.

8.2 Purchasing will not divulge the names or numbers of bidders prior to the closing of tenders or bids, except when it is deemed to be in the best interest of the City to do so.

8.3 Requests for Proposals received will not be opened publicly. However, upon opening, the Requests for Proposals will be witnessed and dated. At the time of the contract award, the evaluation results and factors that determined the successful proposal will be disclosed. Details of the Requests for Proposals will only be released if permission of the bidder is obtained in accordance with *The Local Authority Freedom of Information and Protection of Privacy Act*.

[30] The City indicated that the information was supplied in response to a public tender. It is not clear that the information in question is covered by the confidentiality provisions in the City's policy as the type of information described in the policy does not match what is in the record.

[31] I also note that subsection 91(a) of *The Cities Act* provides:

91(1) Any person is entitled at any time during regular business hours to inspect and obtain copies of:

(a) any contract approved by the council, any bylaw or resolution and any account paid by the council relating to the city;

[32] By including Insituform's proposal in the contract, the City has entitled any person to inspect it. As such, I am not persuaded that there was a mutual understanding that the information would be kept confidential when Insituform supplied it to the City.

[33] The third part of the test is not met. Subsection 18(1)(b) of LA FOIP does not apply to the record.

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

[34] Subsection 18(1)(c)(i) 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 financial loss or gain to;

(ii) prejudice the competitive position of; or

...

[35] For this provision to apply there must be objective grounds for believing that disclosing the information could result in the harm alleged. The parties do not have to prove that a harm is probable, but need to show that there is a “reasonable expectation of harm” if any of the information were to be released. All three parts of the following test must be met:

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

[36] In support of this exemption, the City stated that, in its opinion, the disclosure of the third party information in question, supplied by Insituform as part of their bid submission, could reasonably be expected to result in financial loss or gain to the third party and prejudice the competitive position of the third party. It did not elaborate or address any of the questions above.

[37] I am not persuaded that subsection 18(1)(c) of LA FOIP applies to the information in question.



**4. Did the City properly apply subsection 28(1) of LA FOIP to the record?**

[38] Subsection 28(1) of 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.

[39] In order for subsection 28(1) of LA FOIP to apply, the information in the record must first be found to qualify as “personal information” pursuant to subsection 23(1) of LA FOIP. Some relevant subsections include:

23(1) Subject to subsections (1.1) and (2), “personal information” means personal information about an identifiable individual that is recorded in any form, and includes:

...

(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

[40] In its submission, the City indicated that subsection 28(1)(b) of LA FOIP would apply to the portion of the contract that outlines the vendor’s team experience. This portion lists resume information of team members. The City submitted that this would qualify as employment history of the individuals.

[41] My office has defined employment history as the type of information normally found in a personnel file such as performance reviews, evaluations, disciplinary actions taken, reasons for leaving a job or leave transactions. It does not include work product. Employment history is considered personal information pursuant to subsection 23(1)(b) of LA FOIP.

[42] I am persuaded that the information found on pages 19-25 of the “Successful Bidder’s Submission” section of the record qualifies as personal information pursuant to subsection 23(1)(b) of LA FOIP. The City should withhold these pages pursuant to subsection 28(1) of LA FOIP.

[43] However, pages 16-18 of the “Successful Bidder’s Submission” section of the record describes both the credentials of the individuals as well as the roles each individual will

perform for the project it will do for the City. While the paragraphs describing each individual's credentials would qualify as personal information, their names, titles and roles in the project would qualify as work product. Work product is information generated by or otherwise associated with an individual in the normal course of performing his or her professional or employment responsibilities, whether in a public or private setting. This is not considered personal information.

[44] Section 8 of LA FOIP provides:

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.

[45] The paragraphs describing each individual's credentials would qualify as personal information pursuant to subsection 23(1)(b) of LA FOIP. The City should withhold these paragraphs pursuant to subsection 28(1) of LA FOIP. I recommend that the City sever these paragraphs pursuant to section 8 of LA FOIP and provide the rest to the Applicant.

#### **IV FINDINGS**

[46] I find that subsections 14(1)(d), 18(1)(b), (c)(i) and (ii) of LA FOIP do not apply to the record.

[47] I find that portions of the record qualify as personal information pursuant to subsection 23(1) of LA FOIP and should be withheld pursuant to subsection 28(1) of LA FOIP.

**V RECOMMENDATIONS**

[48] I recommend that the City sever personal information from pages 16 to 25 of the “Successful Bidder’s Submission” section of the contract and withhold it from the Applicant pursuant to subsection 28(1) of LA FOIP. The City should disclose the information on pages 16-18 that describes the roles each individual will perform for the project to the Applicant.

[49] I recommend the City disclose the rest of the record to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 2nd day of January, 2018.

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