



## **REVIEW REPORT 219-2018**

### **City of Moose Jaw**

**June 17, 2019**

**Summary:**

The City of Moose Jaw (the City) withheld responsive records from the Applicant pursuant to subsections 18(1)(b), 18(1)(c) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner found that the exemptions did not apply and recommended release of the records. He also reviewed the search efforts of the City and recommended that additional records be released. Finally, the Commissioner recommended that the City develop and implement a policy to discourage the use of personal email accounts for official business, to ensure information is appropriately safeguarded and records are retained.

### **I BACKGROUND**

[1] On August 29, 2018, the City of Moose Jaw (the City) received an access to information request for the following information:

1. All documents related to an in camera briefing about the cultural centre as mentioned in an April 2 2018 email from Councillor A to Councillor B at 4:51 pm.
2. All discussion on the cultural centre from e-mail account belonging to Councillor A. The Applicant specifically asks for responsive records from Councillor A's personal email account.
3. Records demonstrating contact between the City Solicitor and a specific individual on a specific topic referred to in an email.

[2] The City responded to the request on September 26, 2018. It provided the Applicant with some responsive records. It also indicated that it withheld some information pursuant to subsections 18(1)(a) and (c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[3] On October 4, 2018, the Applicant requested a review of the City's decision by my office. The Applicant asked that I review the City's search for records and the exemptions applied.

[4] On October 17, 2018, my office provided notification to the City, the Applicant and a third party of my intention to undertake a review.

## **II RECORDS AT ISSUE**

[5] The City withheld two pages of *in camera* meeting minutes in full pursuant to subsections 18(1)(a) and (c) of LA FOIP. The City also redacted names and email addresses from another page of the record pursuant to subsection 28(1) of LA FOIP.

[6] After sharing a draft version of this Report with the City, it indicated on May 15, 2019, that it did not intend to apply subsection 18(1)(a) of LA FOIP to the record, but instead it believed that subsection 18(1)(b) of LA FOIP applied to the record. As subsection 18(1)(b) of LA FOIP is a mandatory exemption, I will still consider if it applies at this late date. I will not consider if subsection 18(1)(a) of LA FOIP applies to the record. The City provided a second submission on May 23, 2019.

## **III DISCUSSION OF THE ISSUES**

### **1. Does my office have jurisdiction in this matter?**

[7] The City qualifies as a local authority pursuant to subsection 2(f)(i) of LA FOIP. Therefore, my office has jurisdiction in this matter.

**2. Did the City perform a reasonable search for records?**

[8] Section 5 of LA FOIP provides:

5 Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the possession or under the control of a local authority.

[9] The threshold that must be met is one of “reasonableness”. In other words, it is not a standard of perfection, but rather what a fair and rational person would expect to be done or consider acceptable. LA FOIP does not require the public body to prove with absolute certainty that records do not exist. Public bodies can provide information in describing its search efforts. Examples of the type of information that can be provided can be found in my office’s resource *IPC Guide to Exemptions for FOIP and LA FOIP*.

[10] The first part of the Applicant’s request was seeking documents related to a specific *in camera* briefing about the cultural centre.

[11] The City indicated that it provided the Applicant with the May 15, 2018 Agenda documents. This included: the agenda page; an email thread between the City Clerk/Solicitor and the General Manager of the Moose Jaw Cultural Centre; and the public minutes of the Executive Committee meeting held May 15, 2018. It is withholding the minutes of the related *in camera* meeting.

[12] With respect to the search for other documents related to the meeting, the City noted that physical copies of the confidential minutes of the Personnel Committee and Board of Police Commissioners are stored in a locked cabinet in the Assistant City Clerk's office. Further, it reported that, due to the sensitive nature of subject matter discussed by this committee, only the Assistant Clerk has access to these physical documents as this position also acts as the recording secretary. No other employees have access. Confidential electronic minutes are stored in a secure folder to which only staff of the Clerk's Department have access. The Assistant Clerk confirmed that both electronic and physical files were searched.

- [13] Further, in its second submission, the City indicated that the Moose Jaw Cultural Centre did not provide any written attachments with their request to meet and that there were no written documents circulated at the meeting. However, it noted that the third party's financial information was discussed at the *in camera* meeting even though no financial documents were circulated with the agenda or were attached to the agenda or minutes.
- [14] My office asked the City to explain how financial information was discussed if the relevant documents were not provided for the purposes of the meeting. It reported that the third party's financial documents were provided to the City and were circulated to City Council members in the May 14, 2018 City Council general meeting agenda package as an information item only. The City noted that no discussion takes place during a City Council meeting with respect to information only items. The third party's financial statements are provided to City Council as a courtesy since the Board manages a City-owned facility. The City also reported that the third party is legally obligated to file their financial statements as a public document with the Information Services Corporation (ISC).
- [15] I am persuaded that the financial information of the third party was not attached to the agenda or minutes of the *in camera* Council meeting. However, the Applicant requested "all documents related" to the meeting. It is my view that the financial documents of the third party are responsive to the Applicant's request. Since the City indicated that these documents are publicly available from ISC, I recommend that the City provide a copy to the Applicant.
- [16] I am satisfied that the City performed a reasonable search for records related to the agenda.
- [17] Next, the Applicant requested copies of any discussions on the cultural centre from email account belonging to a specific Councillor. The Applicant specifically asks for responsive records from this Councillor's personal email account.
- [18] On September 18, 2018, the Assistant City Clerk sent the Councillor an email requesting confirmation that the Councillor had searched relevant email accounts. The Councillor

indicated that the keywords were “Cultural Centre” and “AGM”. All relevant emails were provided.

[19] My office spoke to the Applicant on May 6, 2019. The Applicant believed that the Councillor should have more responsive emails in her personal account because the fact that there were some emails there is a sign there should be more. The Applicant, however, did not have further evidence that there would be more responsive records.

[20] I am satisfied that the City verified with the Councillor that the personal email account was searched for responsive records.

[21] In his request for review, the Applicant specifically notes that there could be more messages or conversations because the author of one of the emails uses the greeting “Hello all” and the email shows that there is only one recipient. My understanding is that the Applicant implied that part of the email thread had been deleted. However, this is the page where the City redacted names and email addresses. The City appropriately marked the redaction with “Section 23 LA FOIP exemption”. The City provided me with an unsevered copy of the email. I am not persuaded that there is evidence of other messages or conversations as the Applicant has alluded to.

[22] Finally, the Applicant requested records demonstrating contact between the City Solicitor and a specific individual on a specific topic referred to in an email.

[23] The City Solicitor provided my office with an affidavit addressing this matter. The City Solicitor indicated they reviewed his electronic and paper files and found no records. The solicitor also indicated that they recalled that the conversation referred to in the email was verbal and indicated that they did not take notes.

[24] I am satisfied that the City performed a reasonable search for records.

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

[25] 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;

[26] In order for subsection 18(1)(b) of LA FOIP to be found to apply, all three parts of the following test must be met:

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

[27] Upon review of the record, the majority of the information withheld is standard information one would expect to find in minutes of an executive committee meeting of the City of Moose Jaw. There is one sentence that describes the subject matter of the entire meeting. It refers to a third party and does not provide much detail about what was discussed. There is also a subject line and names of individuals associated with the third party that were in attendance.

[28] In its second submission, the City indicated that third party financial information was discussed at the meeting in question, but no decisions were made. My office has defined financial information as information regarding monetary resources, such as financial capabilities, assets and liabilities, past or present. Common examples are financial forecasts, investments strategies, budgets, and profit and loss statements. The financial information must be specific to a third party that must demonstrate a proprietary interest or right of use of the financial information.

[29] The City submitted that financial information was verbally discussed, however, no related materials were distributed to Council and no recording was made of the proceeding. It indicated that it objects to releasing any information, including the reference in the confidential minutes, as this would effectively disclose the specific contract involved. A search of the internet has found news articles related to this topic.

[30] Although financial information of a third party may have been discussed at the meeting, I am not persuaded that the *in camera* minutes of the City of Moose Jaw qualifies as financial information. The first part of the test is not met.

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

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

[32] 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 financial loss or gain to;

(ii) prejudice the competitive position of; or

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

a third party;

[33] In its submission, the City indicated that disclosure of the minutes could reasonably be expected to result in financial loss to the third party and interfere with the contractual negotiations between the two third parties. It appears that the City is applying subsections 18(1)(c)(i) and (iii) of LA FOIP. It provided nothing further to support the application of these exemptions.

[34] For subsection 18(1)(c)(i) of LA FOIP to apply, there must be objective grounds for believing that disclosing the information could result in loss or gain measured in monetary terms (e.g. loss of revenue). To interfere with contractual or other negotiations for the purposes of subsection 18(1)(c)(iii) of LA FOIP means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement involving a third party.

[35] In order to demonstrate that these exemptions apply, the local authority should provide some relevant information such as:

- What kind of harm is expected from disclosure?
- How will the loss or gain specifically occur?
- What negotiations would be affected by disclosure?
- Are these negotiations ongoing?
- Have the negotiations been concluded?

[36] As noted, the third party did not make a submission. Further, the City's submission only indicated that the exemptions would apply, but did not elaborate.

[37] Given that the majority of the information withheld is standard information one would expect to find in minutes of an executive committee meeting of the City of Moose Jaw and there is one sentence that describes the subject matter of the entire meeting. I am not persuaded that disclosure could reasonably be expected to result in financial loss or interfere with contractual negotiations.

[38] Subsections 18(1)(c)(i) and (iii) of LA FOIP do not apply to the record.

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

[39] 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.



[40] The City severed the carbon copy recipient list from an email. This includes six names (in lieu of email addresses) and one email address. In its submission, the City did not explain its rationale for concluding that this information qualifies as personal information.

[41] In order for subsection 28(1) of LA FOIP to apply, the information in the record must first qualify as “personal information” as defined by subsection 23(1) of LA FOIP; however, it is not an exhaustive list. Some relevant provisions 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:

...

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual; or

(ii) the disclosure of the name itself would reveal personal information about the individual.

[42] The list provided in subsection 23(1) of LA FOIP is not meant to be exhaustive. There can be other types of information that would qualify as personal information that are not listed. Part of that consideration involves assessing if the information has both of the following:

1. Is there an identifiable individual?
2. Is the information personal in nature?

Personal in nature means that the information reveals something personal about the individual. Information that relates to an individual in a professional, official or business capacity could only qualify if the information revealed something personal about the individual for example, information that fits the definition of employment history.

[43] The rest of the email has been released to the Applicant, including the body of the email. It discusses a response by the City to an issue surrounding the annual general meeting of a third party. The text of the email does not qualify as personal information. I am not persuaded that the names of the recipients qualify as personal information pursuant to subsection 23(1)(k) of LA FOIP.

[44] It appears that the email was sent and received for business purposes. As such, it would qualify as work product. Work product is information generated by or otherwise associated with an individual in the normal course of performing professional or employment responsibilities, whether in a public or private setting. This is not considered personal information.

[45] The names on the record do not qualify as personal information and should be released to the Applicant.

[46] With respect to the email address, it appears to be the email of a musical band and it is available online. Therefore, it does not qualify as personal information. It should also be released to the Applicant.

**6. Should City Councillors use personal email accounts to conduct City business?**

[47] As noted during my review of the City's search, it appears that at least one City Councillor is using a personal email account to conduct City business. I have addressed this issue in past reports such as Investigation Report 101-2017, Investigation Report 350-2017 and Investigation Report 262-2017.

[48] The practice of using personal email for activities related to local authorities threatens the proper functioning of LA FOIP which requires that local authorities respond to written access to information requests openly, accurately and completely. The use of personal email accounts by public officials makes this duty difficult to comply with because the local authority may not be aware of the existence of emails on personal email accounts that are responsive to an access request.

[49] Further, personal email accounts pose information security risks for public records. For example, personal email providers might not have adequate protections for personal information. Section 23.1 of LA FOIP requires local authorities to ensure personal information is protected. The email system should be secure and meet current industry

standards. I have discussed other significant privacy issues regarding the use of personal email accounts in Investigation Report 101-2017.

- [50] I recommend that the City set up email accounts for its Councillors to use when conducting business for the City to ensure the security and retention of these records. I also recommend that the City develop and implement a policy to discourage the use of personal email accounts for official business, to ensure information is appropriately safeguarded and records are retained.

#### **IV FINDINGS**

- [51] I find that the City performed a reasonable search for records.

- [52] I find that subsections 18(1)(b), 18(1)(c)(i), (iii) and 28(1) of LA FOIP do not apply to the record.

**V RECOMMENDATIONS**

- [53] I recommend that the City release all withheld responsive records to the Applicant, including the financial statements of the third party.
- [54] I recommend that the City set up email accounts for its Councillors to use when conducting business for the City to ensure the security and retention of these records.
- [55] I recommend that the City develop and implement a policy to discourage the use of personal email accounts for official business to ensure information is appropriately safeguarded and records are retained.

Dated at Regina, in the Province of Saskatchewan, this 17th day of June, 2019.

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