



REVIEW REPORT 223-2015 and 224-2015

City of Regina

April 13, 2016

Summary: The Applicant requested records from the City of Regina (City). The City provided a portion of one record to the Applicant citing subsection 14(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) to the information withheld. Further, the City refused to confirm or deny the existence of other records pursuant to subsection 7(4) of LA FOIP. Upon review, the Commissioner found that the City could rely on subsection 7(4) of LA FOIP. In addition, the Commissioner found that the City appropriately applied subsection 14(1)(d) of LA FOIP to the portions of the record identified and withheld from the Applicant. The Commissioner recommended the City continue to withhold the records, if they existed, along with the portions of the record identified and withheld. Further, the Commissioner recommended that the City reconsider its application of subsection 7(4) of LA FOIP at the conclusion of the trial and contact the Applicant to inquire if he is interested in access to the records if records exist. If so, the City should process a new access to information request and issue a response to the Applicant under section 7 of LA FOIP. Finally, the Commissioner recommended that the Legislative Assembly amend subsection 7(4) of LA FOIP and *The Freedom of Information and Protection of Privacy Act* (FOIP) to narrow the scope of these provisions to bring them in line with other provinces.

I BACKGROUND

[1] On December 3, 2015, the City of Regina (City) received two similar access to information requests from the Applicant for:

- 1) "...a copy of the complete audit that was recommended by the coroner's report into the death of [name of individual] – including all appendices and any attachments."

- 2) "...a copy of all internal correspondence discussing or related to the coroner's requirement for an independent audit related to the death of [name of individual] from November 15, 2013 until November 30, 2015. Please include any internal formal response to the report."

[2] These access requests were processed by the City as file numbers 2015-076 and 2015-077 respectively. On December 3, 2015, the City responded to each request. Each letter indicated that the City was refusing to confirm or deny the existence of any records pursuant to subsection 7(4) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Further, the City indicated that if the records existed they would be exempt from disclosure pursuant to subsections 14(1)(d) and 21 of LA FOIP.

[3] On December 8, 2015, my office received two Requests for Review from the Applicant. My office notified the City and the Applicant of our intention to undertake a review on December 10, 2015. My office received a submission from the City on January 7, 2016 and an additional submission on February 16, 2016. The Applicant's submission was included with the December 8, 2015 Requests for Review and a supplemental submission was provided on February 2, 2016.

[4] After commencement of this review, the City identified a record and determined it was responsive to the Applicant's request (file number 2015-077). By letter dated February 5, 2016, the City released this record to the Applicant with two portions severed pursuant to subsection 14(1)(d) of LA FOIP. By email received March 4, 2016, the Applicant requested that my office review the City's application of subsection 14(1)(d) of LA FOIP to this record.

II RECORDS AT ISSUE

[5] The City has elected not to disclose whether the records responsive to the Applicant's two access to information requests exist or not pursuant to subsection 7(4) of LA FOIP.

[6] The City has provided a record to the Applicant with portions severed pursuant to subsection 14(1)(d) of LA FOIP. The record is a six page briefing note.

III DISCUSSION OF THE ISSUES

[7] The City is a “local authority” pursuant to subsection 2(f)(i) of LA FOIP.

1. Did the City properly apply subsection 7(4) of LA FOIP to the records requested?

[8] Subsection 7(4) of LA FOIP provides:

7(4) Where an application is made with respect to a record that is exempt from access pursuant to this Act, the head may refuse to confirm or deny that the record exists or ever did exist.

[9] In order for subsection 7(4) of LA FOIP to be found to apply, there must be specific exemption(s) that could be relied upon to withhold the records if they existed. Given that subsection 7(4) of LA FOIP has been invoked, I will be careful and avoid confirming or denying the existence of any responsive records. Further, I will lay out the reasons for my findings in very general terms only.

[10] By invoking subsection 7(4) of LA FOIP, the City is denying the Applicant the right to know whether a record exists. This subsection provides local authorities with a significant discretionary power that should be exercised only in rare cases. In my opinion, this provision, and its identical provision in *The Freedom of Information and Protection of Privacy Act* (FOIP), are meant to protect highly sensitive records where confirming or denying the mere existence of a record would in itself impose significant risk. The types of risks could include risks to national security, an individual causing physical harm to others or risks to others by revealing a law enforcement investigation is underway. Although there are exemptions to protect records that fall into these categories, this provision enables the local authority to address risks that could occur just by revealing a record exists. It is not meant to protect a local authority from a possible lawsuit, embarrassment or negative public scrutiny.

[11] A jurisdictional scan indicated that British Columbia and Ontario have a similar provision but it can only be invoked where there would be an unjustified invasion of privacy or

interference with law enforcement. Alberta, Prince Edward Island and Manitoba are similar but in addition to the above, the provision can be invoked where disclosure would threaten health or safety. The federal *Access to Information Act* (ATIA) has a provision most similar to Saskatchewan's. It is broad and the federal Information Commissioner has recommended that it be more narrowly defined as it is in other provinces. I believe Saskatchewan's subsection 7(4) of LA FOIP and FOIP should also be amended to narrow the scope of this discretionary power in order to bring it into line with other provinces. I previously recommended this in my Review Report 035-2015.

[12] The City has indicated that if the records existed it could rely on subsection 14(1)(d) of LA FOIP to deny access. 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;

[13] Although subsection 7(4) of LA FOIP has not been applied to the severed briefing note, the City's arguments surrounding subsection 14(1)(d) of LA FOIP also apply to this record. Therefore, I will be including this record in my analysis as I consider if that subsection applies.

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

- i. The proceeding(s) must be existing or anticipated legal proceedings; and
- ii. Disclosure of the records could be injurious to the local authority in the conduct of the existing or anticipated legal proceeding(s).

i. Does the proceeding(s) qualify as an existing or anticipated legal proceeding(s)?

[15] *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”.

[16] The City’s submission indicates that a lawsuit has commenced against the City. As of the date of this report, my office confirmed with the City that this matter has not yet gone to trial and therefore has not concluded. Therefore, I find that the first part of the test is met.

ii. Could disclosure of any records be injurious to the local authority in the conduct of the existing or anticipated legal proceedings?

[17] To be *injurious* or to cause harm implies damage or detriment. The exemption is designed to protect the local authority from harm in its existing or anticipated legal proceedings. The criteria used to determine whether the City has met the threshold in demonstrating injury is:

- There must be a clear cause and effect relationship between the disclosure and the injury which is alleged;
- The injury caused by the disclosure must be more than trivial or inconsequential; and
- The likelihood of injury must be genuine and conceivable.

[18] Further, this subsection uses the term *could*. The requirement for *could* is simply that the release of information *could* have the specified result. The threshold for this test is somewhat lower than a reasonable expectation. Nonetheless, there would still have to be some kind of basis. If it is fanciful or exceedingly remote, it will not be found to apply.

[19] Discovery and disclosure provisions of the *Rules of the Court of Queen’s Bench* of Saskatchewan operate independent of any process under LA FOIP. Subsection 4(c) of LA FOIP establishes that the Act does not limit access to information otherwise available by law to parties to litigation. Therefore, 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 lawsuit. Further, in this case, the City has confirmed that the Applicant is not a party to the litigation.

[20] In his submissions, the Applicant argues that the records he requests should be released, if they exist, because they would be in the public interest. Further, the audit report, if it exists, was recommended by the Coroner. The Applicant asserted that:

...The fact that the City of Regina feels that this document is relevant to a lawsuit it is involved in seems quite irrelevant to the purpose of that report in the first place. The coroner did not ask the City to commission the report so it could function as evidence in a trial. It's clear that the coroner recommended the audit in order to ensure that the city was operating a safe bus service. In other words, this audit first and foremost serves the public interest....

[21] Certain sections of LA FOIP do allow for the release of records in the public interest even where an exemption is found to apply. For example, subsection 18(3) of LA FOIP provides for a public interest override regarding the release of third party information in certain circumstances.

[22] For subsection 14(1)(d) of LA FOIP to be found to apply, the City must demonstrate that the release of records could injure the City in its legal proceeding. So, although I agree with the Applicant on his point that such an audit report would be in the public interest, it is not a determining factor for whether subsection 14(1)(d) of LA FOIP applies.

[23] The City described the expected injury in its submission to my office. The City argued that the Applicant requested the type of records that, if they existed, would relate to the lawsuit and could cause injury to the City in the conduct of that lawsuit if released.

[24] It is important in the judicial system that legal proceedings do proceed in a fair and impartial manner without external influences that could potentially impact the outcome. The accident and pending lawsuit has been a high profile case, garnering media attention. Subsection 9-1(1) of the *Rules of the Court of Queen's Bench* of Saskatchewan allow either party to demand a jury trial any time before the local registrar has scheduled a date

for trial. At the time of this review report being issued, a trial date has not been set. Therefore, injury could result from potential swaying of jury members prior to trial.

[25] Based on what has been provided, I find the second part of the test has been met. Therefore, I find that subsection 14(1)(d) of LA FOIP would apply, if the records exist. Further, I find that subsection 14(1)(d) of LA FOIP applies to the severed portions of the briefing note. It should be noted that the City has advised our office that when the lawsuit concludes it may reconsider its position on this matter.

[26] Given this finding, there is no need to consider section 21 of LA FOIP.

[27] Therefore, as I have found that subsection 14(1)(d) of LA FOIP applies, I also find that subsection 7(4) of LA FOIP can be relied on by the City in this case.

[28] On March 17, 2016, my office shared the findings and recommendations below with the City. It responded indicating that it would comply with these recommendations.

IV FINDINGS

[29] I find that subsection 14(1)(d) of LA FOIP would apply if the records exist.

[30] I find that as subsection 14(1)(d) of LA FOIP would apply if the records exist that subsection 7(4) can be relied upon.

[31] I find that subsection 14(1)(d) of LA FOIP applies to the severed portions of the briefing note.

V RECOMMENDATIONS

[32] I recommend that the City continue to withhold the records, if they exist.

[33] I recommend the City continue to withhold the severed portions of the briefing note.

[34] I recommend that once this trial has concluded, the City reconsider its application of subsection 7(4) of LA FOIP.

[35] I recommend that once this trial has concluded, the City inquire if the Applicant is still interested in access to the records, if they exist. If so, I recommend the City process a new access to information request and issue a response to the Applicant under section 7 of LA FOIP.

[36] I recommend that the Legislative Assembly amend subsection 7(4) of LA FOIP and subsection 7(4) of FOIP to narrow the scope of these provisions to bring them in line with other provinces.

Dated at Regina, in the Province of Saskatchewan, this 13th day of April, 2016.

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