



REVIEW REPORT 276-2019, 277-2019

Prince Albert Police Service

November 16, 2020

Summary:

The Prince Albert Police Service (PAPS) received an access to information request for legal and police costs regarding a particular investigation. PAPS denied the Applicant access to legal invoices pursuant to subsections 21(a), (b) and (c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). PAPS further stated that records responsive to other parts of the Applicant's access to information request do not exist. The Commissioner found that PAPS properly applied subsection 21(a) of LA FOIP to the legal records and could continue to withhold them in full from the Applicant pursuant to subsection 21(a) of LA FOIP, but recommended PAPS consider providing the totals of the legal invoices to the Applicant. The Commissioner also found that PAPS did not conduct an adequate search for records and recommended that PAPS undertake further search efforts.

I BACKGROUND

- [1] On June 20, 2019, the Prince Albert Police Services (PAPS) received the following access to information request dated June 11, 2019. The request was for:

Legal cost details relating to [name of Applicant] paid by the City of Prince Albert/Prince Albert Police Commission. [Timeframe June of 2016 to May of 2019].

- [2] On June 20, 2019, PAPS received a second access to information request transferred from the City of Prince Albert. The request was from the same Applicant. The request was for:

What were the total Police hours and total expenses incurred investigating [name of Applicant] in regards to all of the SPCA allegations made against [name of Applicant]. This includes the allegations involving the incident with the dog [name of dog] on

[date]. The expenses should also include all legal costs associated with the investigation and police act hearing. I would like a detailed list showing the dates, hours, expenses and reasons for the expenses... [Timeframe June 2, 2016 to June 18, 2019].

[3] In correspondence dated July 15, 2019, PAPS responded to the Applicant’s first access to information request that it was withholding the information pursuant to subsections 21(a), (b) and (c) of LA FOIP. Also on this date, PAPS responded to the Applicant’s second response indicating it was withholding the records pursuant to subsections 7(2)(e) and 21(a), (b) and (c) of LA FOIP.

[4] On August 23, 2019, the Applicant asked my office for a review of PAPS’ responses to both access to information requests.

[5] On September 16, 2019, my office notified PAPS and the Applicant of my office’s intent to undertake a review.

II RECORDS AT ISSUE

[6] At issue are 33 pages of invoices concerning legal costs that the City withheld pursuant to subsections 21(a), (b) and (c) of LA FOIP. PAPS provided an index of records, which I have modified for ease of reference as follows:

Type of Invoice	Dates
Legal accounts re: investigation/notice of investigation	<ul style="list-style-type: none"> • December 21, 2015
Legal accounts re: post investigation/notice of discipline charges	<ul style="list-style-type: none"> • March 31, 2016 • September 29, 2017
Legal accounts re: discussions with Applicant’s lawyer	<ul style="list-style-type: none"> • October 31, 2017 • December 27, 2017 • January 31, 2018 • February 27, 2018
Legal accounts re: preliminary meetings	<ul style="list-style-type: none"> • May 31, 2018 • July 31, 2018
Legal accounts re: preparation and conduct of discipline hearing	<ul style="list-style-type: none"> • September 29, 2018 • October 31, 2018

Legal accounts re: Applicant's application for leave to appeal	<ul style="list-style-type: none">• January 30, 2019• February 28, 2019• April 30, 2019
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[7] For the portion of the Applicant's request concerning total police hours and expenses incurred regarding an investigation, there are no records at issue since PAPS has taken the position that records do not exist for this part of the Applicant's access to information request. As such, my review will be on the efforts undertaken by PAPS to search for these records.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[8] PAPS is a local authority pursuant to subsection 2(f)(viii.1) of LA FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did PAPS properly apply subsection 21(a) of LA FOIP?

[9] Subsection 21(a) of LA FOIP provides the following:

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;

[10] The three-part test for subsection 21(a) of LA FOIP, which can be found in the *Guide to The Freedom of Information and Protection of Privacy Act* (Guide to FOIP), (February 4, 2020) at page 247, is as follows:

1. Is the record a communication between a solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Did the parties intend for the communication to be treated confidentially?

- [11] When applying subsection 21(a) of LA FOIP to a record, a local authority has three options when claiming privilege: 1) provide the documents to my office with a cover letter stating the public body is not waiving the privilege; 2) provide the documents to my office with the portions severed where solicitor-client privilege is claimed; or 3) provide my office with an affidavit and schedule of records. If the Commissioner has a reasonable basis for questioning the content of an affidavit, he may, exercising his formal powers and only as necessary, request additional background information by affidavit or otherwise. My office's *The Rules of Procedure* (August 12, 2020), provides further guidance to local authorities on this.
- [12] PAPS applied subsection 21(a) of LA FOIP to 33 pages of legal invoices as part of the Applicant's second request for, "[l]egal costs associated with the investigation and police act hearing...". PAPS provided my office with copies of the records in question. I appreciate that PAPS has provided these records for my review.
- [13] PAPS has not stated directly if it intended for the communication to be treated confidentially. In Review Report 052-2013, at paragraph [11], I discussed the Supreme Court of Canada (SCC) decision *Maranda v. Richer* [2003] 3 S.C.R. 193, 2003 SCC67 (*Maranda*), in which the SCC asserted that there was a presumption of privilege for lawyers' bills of account as a whole in order to ensure that solicitor-client privilege is honored, and would be intended to be confidential. I further discussed that the presumption of privilege can be rebutted if the applicant can provide a persuasive argument that the disclosure of information will not result in the Applicant learning of information that is subject to solicitor-client privilege. In this case, the Applicant did not provide such a rebuttal. As I have noted in my Review Report 003-2017, applicants are at a serious disadvantage when having to make arguments for why privilege does not apply to information they cannot see in their efforts to rebut the presumption.
- [14] As the presumption of privilege has not been rebutted, I find that PAPS properly applied subsection 21(a) of LA FOIP to the legal invoices. As subsection 21(a) of LA FOIP has been found to apply, I do not need to consider subsections 21(b) and (c) of LA FOIP.

[15] I wish to add, however, that the Applicant stated the following, to my office, in an email dated September 10, 2019, when clarifying their request:

I just want to know what the tax payers of Prince Albert had to pay in regards to the investigation, the police act hearing and all legal bills to date. I don't require any communications between the board, the city police and their lawyer. I only want the total expenses.

[16] In Review Report 003-2017, I considered that certain portions of a legal invoice may be subject to solicitor-client privilege, because they would reveal the nature of the communications between solicitor and client. If, however, some portions of the invoices such as the amount of fees paid (or in this case, the totals) would not reasonably reveal the communication protected by privilege, then the local authority should consider releasing those portions. While PAPS may continue to withhold the legal invoices in their entirety pursuant to subsection 21(a) of LA FOIP, I recommend that it provide the *totals* of the invoice expenses to the Applicant.

3. Did PAPS conduct an adequate search?

[17] Section 5 of LA FOIP provides as follows:

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.

[18] Section 5 of LA FOIP is clear that access to records must be granted if they are in the possession or under the control of the local authority subject to any exemptions that may apply pursuant to LA FOIP. A local authority, however, may claim that records do not exist. Subsection 7(2)(e) of LA FOIP, which provides as follows, contemplates such situations:

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

...

(e) stating that access is refused for the reason that the record does not exist;

[19] If a local authority takes the position that records do not exist, my office will still ask the local authority to describe its search efforts in support of its assertion, which my office will then review. LA FOIP does not require a local authority to prove with absolute certainty that records do not exist, but it must demonstrate that it has conducted a reasonable search to locate the records.

[20] A reasonable search is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records related to the access to information request. A reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances. Examples of information that can be provided to my office to support a local authority's search efforts include the following:

- If personal information is involved, explain how the individual is involved with the local authority (e.g. current or former employee), and why certain branches or departments were searched;
- For general requests, tie the subject matter of the request to the department, branch, etc., involved. In other words, explain why certain areas were searched and not others;
- Identify the employees involved in the search and how they are experienced in the subject matter;
- Explain how the paper and/or records management systems are organized in the departments, branches, etc., involved in the search. Explain how records are classified, for example, if they are organized by alphabet, year, function or subject. Consider providing a copy of your organization's record schedule and/or destruction certificates. Consider how you have considered off-site records, records in possession of a third party but in the local authority's control, and mobile devices (e.g. laptops, smartphones and tablets);
- Explain the folders searched and how the folders link back to the subject matter requested; and
- Include on what dates employees searched and how long it took for each to search. Include the results of the search. Consider having employees provide affidavits to support a position that a record searched for does not exist, or to support the details provided.

[21] The preceding list is intended to be a guide. Each case will require different search strategies and details depending on the records requested.

[22] In this matter, the Applicant is seeking, “[a] detailed list showing the dates, hours, expenses and reasons for the expenses...” These appear to be in relation to the part of their request that states, “[w]hat were the total Police hours and total expenses incurred investigating [name of Applicant] in regards to all of the [organization name] allegations made against [name of Applicant]...”.

[23] With respect to the type of records the Applicant sought and its own search efforts, PAPS stated the following:

The records we referenced to not exist would be the total exact hours incurred during the course of the investigation as this is not something specifically we track. All investigations can be lengthy and occur ongoing throughout different times of the day, week, month etc. and often by multiple investigators. As a result, the record does not exist as we do not record a detailed list of exact dates and hours.

...

In contrast, the “Legal Costs expenses”, represented in legal counsel’s invoiced statements of account do certainly exist.

[24] I first note that the Applicant stated they would accept a “rough estimate of hours” and a “detailed list showing the dates, hours, expenses and reasons for the expenses”. If such records do not exist, then LA FOIP does not obligate PAPS to create them.

[25] With respect to its search efforts, PAPS appears to have conducted a search for legal invoices because it has denied the Applicant access to these records pursuant to section 21 of LA FOIP. These legal invoices would address the part of the Applicant’s access to information request seeking legal costs associated with the investigation.

[26] It does not appear, however, that PAPS conducted a search for records that would address the part of the Applicant’s access to information request for “total police hours and total expenses”. PAPS’ rationale is that it does not keep or create records related to tracking police hours incurred during an investigation. PAPS did not state, however, if it undertook search efforts to locate such records, which, for example, can include records created by an

external party. There is a difference between records a local authority creates, and those in its possession or control created by an external party, which may be located by undertaking search efforts.

[27] As noted previously, PAPS appears to only have conducted a search for records that would address part of the Applicant's access to information request. As PAPS has not provided information on its overall search efforts to locate records, I am unable to conclude that it conducted an adequate search for records. I recommend that PAPS undertake further search efforts in relation to the Applicant's request for access to information except as I have noted at paragraph [24] of this Report.

IV FINDINGS

[28] I find that PAPS properly applied subsection 21(a) of LA FOIP to the legal invoices.

[29] I am unable to conclude that PAPS conducted an adequate search for records.

V RECOMMENDATIONS

[30] I recommend that PAPS continue to withhold the legal invoices pursuant to subsection 21(a) of LA FOIP, but that it consider providing the *totals* of the legal invoice expenses to the Applicant.

[31] I recommend that PAPS undertake further search efforts in relation to the Applicant's request for access to information as I have noted at paragraph [2] of this Review Report.

Dated at Regina, in the Province of Saskatchewan, this 16th day of November, 2020.

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