



REVIEW REPORT 283-2018

Town of Kindersley

November 13, 2019

Summary: The Applicant requested all information pertaining to any communications on the Guppy's carwash/water issues from the Town of Kindersley (the Town). The Town provided the Applicant access to some of the records, but withheld one record in full pursuant subsections 18(1)(a)(b)(c) and (d) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Applicant appealed to the Commissioner. The Commissioner recommended the release of some of the withheld portions of the record and that with future requests, the Town fully follow section 7 of LA FOIP when providing notification to applicants

I BACKGROUND

[1] On November 8, 2018, the Applicant made the following access to information request to the Town of Kindersley (the Town):

I know we have received the information up to the last FOIP we did. Is it possible for you to provide me the more recent activity from August until current from administration and council for email and any communications on the Guppy's carwash/water issues.

[2] On November 9, 2018, the Town provided the responsive records to the Applicant. It also indicated that some of the information was withheld pursuant to section 18 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

[3] On November 27, 2018, the Applicant requested that my office review the application of the exemptions applied to one of the records by the Town.

[4] On December 18, 2018, my office notified both the Applicant, the Town and the Third Party that I would be undertaking a review of the exemptions applied to the one record.

II RECORDS AT ISSUE

[5] The record consists of a one page document received by the Town from the Third Party which has been withheld in full under subsections 18(1)(a)(b)(c) and (d) of LA FOIP. In its submission, the Town indicated that it applied subsection 18(1)(d) of LA FOIP to the record in error and therefore my office will not review the application of this exemption.

[6] The document consists of nine bullets of information authored by the Third Party, and the business name, address and phone number of the Third Party.

[7] The Town also indicated to my office that none of the exemptions applied to the business name and address of the Third Party and that it should have been released to the Applicant. I will therefore not be reviewing this portion of the record.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[8] The Town is considered a “local authority” pursuant to subsection 2(f)(i) of LA FOIP. Also, the Third Party is a “third party” pursuant to subsection 2(k) of LA FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did the Town appropriately apply subsection 18(1)(b) of LA FOIP?

[9] 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;

[10] The three part test that must be met is as follows:

1. Is the information financial, commercial, scientific, technical or labour relations information?
2. Was the information supplied by the third party to a public body?
3. Was the information supplied in confidence implicitly or explicitly?

[11] All three parts for the test must be met in order for subsection 18(1)(b) of LA FOIP to apply.

1. Is the information financial, commercial, scientific, technical or labour relations information?

[12] My office defines financial information as 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 that must demonstrate a proprietary interest or right of use of the financial information. Upon review of the record, the majority of the information contained in the proposal is information relating to revenue of the Third Party and would qualify as financial information.

[13] The record contains the business header with the name, address and phone number of the Third Party, which would indicate that it was prepared by the Third Party. The Town indicated in its submission that it should have released this information to the Applicant; therefore, I recommend that the Town release this information.

[14] Bullets 1, 3, 8 and 9 contains financial information of the Third Party and therefore meets the first part of the test.

[15] Bullet 2 contains factual market information and is not financial information of the Third Party.

[16] Bullet 7 contains financial information of an expenditure of the Third Party in the first sentence only and meets the first part of the test. The remaining three sentences in this bullet, however, do not contain financial information and therefore do not meet the first part of the test.

[17] Bullets 4 - 6 contain opinions of the Third Party about other businesses and do not contain financial information of the Third Party. These bullets do not meet the first part of the test.

[18] I will now assess the second and third parts of the test for bullets 1, 3, 8, 9 and the first sentence of bullet 7.

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

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

[19] 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 obtained with the understanding that it would be kept confidential.

[20] A factor to consider when determining if information was obtained explicitly includes:

- The existence of an express condition of confidentiality between the public body and the party that provided the information.

[21] In the Town's submission, it indicated that, "The record was voluntarily provided to the municipality in confidence and as a show of good faith in response to the review...for the express use of the CAO or Mayor".

[22] In the submission from the Third Party, it indicated that, "When the document was provided to Mayor [name removed] and CAO [name removed], I explicitly told them that it was to go no farther than their eyes...." Further, in consideration of the type of information contained in the record and the purpose for which it was provided, I am persuaded that it was supplied in confidence.

[23] I find that the second and third parts of the test have been met and that subsection 18(1)(b) of LA FOIP applies to bullets 1, 3, 8, 9 and the first sentence of bullet 7.

3. Did the Town appropriately apply subsection 18(1)(a) of LA FOIP?

[24] Subsection 18(1)(a) of LA FOIP states:

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;

[25] As I have found that subsection 18(1)(b) of LA FOIP applies to bullets 1, 3, 8, 9 and the first sentence of bullet 7, I will review the remaining portions under subsection 18(1)(a) of LA FOIP.

[26] The following two-part test must be met:

1. Does the information constitute a trade secret?
2. Could release reasonably be expected to disclose the trade secret?

[27] I will now analyze the first part.

1. Does the information constitute a trade secret?

[28] My office has defined trade secrets as information, including a plan or process, tool, mechanism or compound which possesses the following characteristics:

- 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 he/she has 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.

[29] The information must meet all of the above criteria to be considered a trade secret.

[30] In its submission, the Third Party explained what it believes would qualify as a trade secret within the record. The information described is information which has previously been relayed to the Third Party's customers and staff members and has not been treated as secret. It is a product which is publically available for purchase and therefore would not qualify as a trade secret of the Third Party. The other information withheld under this exemption is factual information on industry prices which does not qualify as a trade secret of the Third Party.

[31] I find that the first part of the test has not been met and that subsection 18(1)(a) of LA FOIP does not apply to the remainder of the record. I do not need to consider the second part of the test.

[32] As I have found that subsection 18(1)(b) of LA FOIP applies to bullets 1, 3, 8, 9 and the first sentence of bullet 7, I will review the remaining portions under subsection 18(1)(c) of LA FOIP.

4. Did the Town appropriately apply subsection 18(1)(c) of LA FOIP to the record?

[33] Subsection 18(1)(c) of LA FOIP states:

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;

[34] This provision is a harms-based provision. For it 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.

[35] The second bullet discusses industry costs and is factual information which is publically available. The last three sentences of bullet 7 are information on policies and procedures of business. The record provides that these policies and procedures have been communicated to customers and staff of the Third Party.

[36] In its submission, the Third Party indicated that, “It is important that my business be viewed favorably in my community”. It did not indicate, however, how releasing this information would result in financial loss or gain, prejudice their competitive position, or interfere with negotiations. I find that the Third Party has not provided sufficient evidence of a reasonable expectation of this harm and that subsection 18(1)(c) of LA FOIP does not apply to the remainder of the record.

5. Did the Town appropriately apply subsection 28(1) of LA FOIP?

[37] The Town did not consider subsection 23(1) of LA FOIP when applying exemptions to this record. Subsection 23(1)(f) of LA FOIP provides:

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:

...

(f) the personal opinions or views of the individual except where they are about another individual;

[38] Further, 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.

[39] As subsection 28(1) of LA FOIP is a mandatory exemption, the Town should have considered whether this exemption applied. I find that the information contained in bullets 4 – 6 is the personal opinion of the Third Party and therefore is personal information to which the Town should have applied subsection 28(1) of LA FOIP. I recommend the Town withhold the personal opinions of the Third Party.

6. Did the Town comply with section 7 of LA FOIP?

[40] Section 7 of LA FOIP instructs a local authority on what to do if it receives an access to information request:

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

...

(d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;

(3) A notice given pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

[41] In its submission provided to our office, it included correspondence where the Town discusses that all records have been provided to the Applicant with the exception of correspondence they were withholding, but did not advise the Applicant of the reasons for withholding the records. The Town submitted these records to my office for review. After reviewing these records, I find that the records in question were responsive to the access to information request and should have been provided to the Applicant with any applicable exemptions applied.

[42] In what appears to be its section 7 response to the Applicant, the Town did not advise the Applicant that it was refusing access to all responsive records and the reason for doing so. It also did not advise the Applicant of their right to request a review by my office within one year.

[43] After consultation with my office, the Town has since provided these records to the Applicant on October 8, 2019.

[44] I find that the Town did not meet its obligations for proper notification under subsections 7(2)(d) and 7(3) of LA FOIP. I recommend that with future requests, the Town fully follow section 7 of LA FOIP when providing notification to applicants.

IV FINDINGS

- [45] I find that subsection 18(1)(b) of LA FOIP applies to bullets 1, 3, 8, 9 and the first sentence of bullet 7.
- [46] I find that subsection 28(1) of LA FOIP applies to bullets 4, 5 and 6.
- [47] I find that subsections 18(1)(a) and (c) of LA FOIP do not apply to the remainder of the record.
- [48] I find that the Town did not fully comply with section 7 of LA FOIP.

V RECOMMENDATIONS

- [49] I recommend the Town release bullet 2 and the last three sentences of bullet 7 of the record to the Applicant.
- [50] I recommend the Town release the name and business address of the Third Party to the Applicant.
- [51] I recommend the Town continue to withhold bullets 1, 3, 4, 5, 6, 8, 9 as well as the first sentence of bullet 7.
- [52] I recommend that with future requests, the Town fully follow section 7 of LA FOIP when providing notification to applicants.

Dated at Regina, in the Province of Saskatchewan, this 13th day of November, 2019.

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