



REVIEW REPORT 336-2017

Chinook School Division No. 211

October 4, 2018

Summary:

The Applicant made a request to the Chinook School Division No. 211 (the School Division) for records related to an Invitation to Tender. The School Division refused access to responsive records pursuant to subsection 18(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). In response to the office's notice of the review, the School Division questioned if the Canadian Free Trade Agreement (CFTA) applied to the request. In its submission, the School Division also raised the application of subsections 7(2)(b), 7(2)(e), 17(g), 18(1)(b) and 18(1)(c) of LA FOIP to the responsive record, if it was found that CFTA did not apply. My office found that LA FOIP did apply to the Applicant's request and that the School Division had appropriately applied subsection 18(1)(b) of LA FOIP to a portion of the responsive records. The Commissioner recommended that the School Division release the portions of the record that contained the names of the vendors, information submitted by the Applicant, and information that the School Division has already published pursuant to the CFTA. The Commissioner also found that the School Division did not meet the duty to assist the Applicant and recommended the School Division develop a policy for processing access to information requests and implement mandatory annual access and privacy training.

I BACKGROUND

[1] On December 14, 2017, the Applicant submitted a request to the Chinook School Division No. 211 (the School Division) requesting records related to a December 8, 2017 Invitation to Tender for the purchase of 500 or more Chromebooks as follows:

...copies of the original report of the standings of each firm who submitted a bid to Chinook School Division. I am seeking to know details regarding the selected products including associated price, before and after the application of taxes, the type of tax and

- any associated shipping costs. I am also seeking a list of names of the disqualified vendors [sic], their bid pricing and reasons for disqualification.
- [2] On December 15, 2017, the School Division responded to the Applicant refusing access to the responsive records. The School Division mistakenly referred to subsection 19(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). As the School Division is subject to *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), the School Division indicated in its response to my office that the subsection it had intended to rely on was subsection 18(1) of LA FOIP.
- [3] On December 18, 2017, the Applicant contacted my office to request a review of the School Division's decision to deny access to the requested records.
- [4] On December 20, 2017, my office notified the School Division, the Applicant and the third parties of my office's review.
- [5] The School Division's solicitor provided a response on the School Division's behalf. The response questioned if the Canadian Free Trade Agreement (CFTA) had any application to this matter. In its response, the School Division also raised a number of exemptions that may apply to the responsive record, if my office found that the CFTA had no application. My office requested the School Division provide its submissions on the exemptions raised in its response. The School Division's submission provided arguments for the application of subsections 7(2)(b), 7(2)(e), 17(g), 18(1)(b) and 18(1)(c) of LA FOIP to the responsive record.

II RECORDS AT ISSUE

- [6] The record, which the School Division has identified as being responsive to the Applicant's access to information request, is a single page table identifying the vendors and bid information submitted by each of the vendors in response to the Invitation to Tender.

III DISCUSSION OF THE ISSUES

1. Does my office have jurisdiction in this matter?

[7] The School Division qualifies as a local authority pursuant to subsection 2(f)(viii) of LA FOIP. As such, I have jurisdiction to conduct this review.

[8] The third parties identified by the School Division, with the exception of the Applicant, qualify as third parties pursuant to subsection 2(k) of LA FOIP.

2. Does CFTA have any application in this matter?

[9] As noted earlier, the response provided by the School Division raised an argument that it believed that LA FOIP would not apply to the Applicant's access to information request, due to the application of CFTA. In its submission, the School Division provided the following arguments:

The Canadian Free Trade Agreement (CFTA) came into effect on July 1, 2017 and is a national intergovernmental agreement including the federal government, the provincial governments, and the territorial governments...

...

The Province of Saskatchewan has committed the municipal, publicly-funded academic, school boards and health sectors ("MASH sector") to... CFTA... Chinook is obliged to comply with CFTA...and cannot opt out...

...Article 516 of CFTA describes the national agreement on exact standards to be applied to the information to be provided to suppliers and the necessity of the procuring entity (Chinook) to publish the award information. Article 516(2) specifically grants the procuring entity "no later than 72 days after the award of each contract" to publish a notice on SaskTenders' website that includes at least the following:

- A description of the goods/services procured
- The name and address of the procuring entity (Chinook)
- The name and address of the successful supplier
- The Value of the successful tender and
- The date of the award

CFTA's Article 517(1) specifically states that "a procuring entity shall not provide to any particular supplier information that might prejudice fair competition between suppliers." In addition the relevant portions of CFTA's Article 517(2) states that this chapter shall not be construed to require the disclosure of information if disclosure:

- (b) might prejudice fair competition between suppliers;
- (c) would prejudice the legitimate commercial interests of third persons, including the protection of intellectual property;
- (d) would be contrary to the public interest; or
- (e) would be exempt from disclosure under, or its disclosure would contravene applicable law.

CFTA's Article 518 describes the bid protest provisions that may be utilized by supplier(s) should the procuring entity breach the supplier's rights. Article 518 does not contain any specific time restrictions on the supplier to launch bid protests.

...

[10] The School Division's position is that it is obligated to comply with CFTA and cannot opt out. While this may be true, the School Division is also obligated to comply with LA FOIP and cannot opt out.

[11] *Chapter Five – Government Procurement* of the CFTA, provides the following purpose statement:

The purpose of this Chapter is to establish a transparent and efficient framework to ensure fair and open access to government procurement opportunities for all Canadian suppliers.

[12] The purpose of this agreement is to regulate procurement activities, whereas, LA FOIP is "an Act respecting a right of access to documents of local authorities and a right of privacy with respect to personal information held by local authorities."

[13] While the CFTA appears to provide that portions of information related to the winning bidder needs to be published within 75 days, this does not relate to records of the local authority. As LA FOIP provides individual with the right to access records pursuant to section 5 of LA FOIP, just because some information is available does not mean individuals no longer have the ability to exercise their access rights to request records related to procurement matters.

[14] Additionally, subsection 7(2)(c) of LA FOIP provides that if the record responsive to the Applicant's request will be published within 90 days, the local authority can inform the Applicant of this fact and advise of the approximate date of publication. As noted above the CFTA provides that a notice with certain data elements be posted within 75 days. As such, if an Applicant was to request the notice that would be posted by the local authority pursuant to the CFTA, there does not appear to be anything preventing the School Division from complying with both LA FOIP and the CFTA.

[15] Finally, subsection 22(1) of LA FOIP provides the following regarding the potential conflicts between LA FOIP and other acts, regulations, resolutions, or bylaws:

22(1) Where a provision of:

(a) any other Act;

(b) a regulations made pursuant to any other Act; or

(c) a resolution or bylaw;

that restricts or prohibits access by any person to a record or information in the possession or under the control of a local authority conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant to it shall prevail.

[16] Therefore, even if a clause of CFTA was to be in conflict with LA FOIP, LA FOIP would prevail.

[17] I find that LA FOIP applies to the records responsive to the Applicant's request.

3. Did the School Division properly apply subsection 18(1)(b) of LA FOIP?

[18] Subsection 18(1)(b) of LA FOIP is a mandatory exemption and 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;

[19] Section 18 of LA FOIP is designed to protect the confidential “informational assets” of private businesses, not local authorities, or other organizations that provide information to local authorities. Although one of the central purposes of the Act is to shed light on the operations of local authorities, section 18 of LA FOIP serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace. There must, therefore, be a balance between granting access to information and protecting the interests of third parties in relation to some types of third party information.

[20] 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:

- i. Is the information financial, commercial, scientific, technical or labour relations information of a third party?
- ii. Was the information supplied by the third party to the local authority?
- iii. Was the information supplied in confidence implicitly or explicitly?

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

[21] In its submission, the School Division asserted that the information withheld contained bid information submitted by the third party vendors in response to the Invitation to Tender. The submission also asserted that the bid information submitted to the School Division was supplied in confidence by the third party vendors.

[22] *Financial information* is 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.

- [23] *Commercial information* is information relating to the buying, selling or exchange of merchandise or services.
- [24] In Review Report 031-2015, the Commissioner found that a third party's entire proposal package in response to a public body's Request for Proposal constituted third party information.
- [25] In *Canadian Bank Note Limited v. Saskatchewan Government Insurance*, 2016 SKQB 362, Justice Zarzeczny determined that unit prices qualified as commercial information. In *Seon v. Board of Education of the Regina Roman Catholic School Division No. 81*, 2018 SKQB, Justice McCreary made the same finding.
- [26] The information recorded in the table that the School Division identified as responsive to the Applicant's request is data provided by the third party vendors in the bids submitted. The information submitted by the vendors in response to the Invitation to Tender qualifies as financial and commercial information.
- [27] While the bid information submitted by the vendors would meet the first part of this test, the names of the vendors, by themselves, do not fit the definition of financial, commercial, scientific, technical or labour relations information. The names of the vendors do not meet the first part of the test.

ii. Was the information supplied by the third parties to the School Division in confidence?

- [28] Information may qualify as "supplied" if it was directly supplied to the local authority by a third party.
- [29] In the submission, the School Division's position is that the third parties supplied the pricing information in response to a tender process.

[30] In *Canadian Bank Note Limited v. Saskatchewan Government Insurance*, 2016 SKQB 362, Justice Zarzecsny stated at paragraph [39]:

The Unit Price in Schedule “A” to the contract is precisely the information that the applicant now seeks. The question is not whether or not the RFP provided that the Contract between SGI and Veridos could involve negotiation of the Unit Price but rather whether it did. The facts establish clearly that it did not. I therefore conclude that this commercial information (i.e. the Unit Price) was “supplied...by a third party” namely Veridos within the meaning of ss. 19(1)(b) of the Act.

[31] I note that Justice Zarzecsny treated the question of supplying of commercial information as a question of fact. Thus, in each case, the facts surrounding the supplying of commercial information have to be considered.

[32] The School Division’s submission provided that the prices submitted by the third parties were accepted without negotiation.

[33] Consistent with *Canadian Bank Note Limited v. Saskatchewan Government Insurance*, I find that the third parties supplied the pricing information found in the responsive record. The second part of the test is met.

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

[34] *In confidence* usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained in confidence means that the supplier of the information has stipulated how the information can be disseminated. In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the local authority and the third party providing the information.

[35] The School Division submitted that the information was supplied in confidence implicitly.

- [36] *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.
- [37] To support its position that the information was supplied in confidence implicitly, it submitted that the “Terms and Conditions” in the Invitation for Tender provided that the bids would be reviewed in a closed session. Additionally, it indicated that some of the vendors’ responses to the Invitation for Tender reference confidentiality and request the information not be shared without consent.
- [38] Based on the submissions from the third parties that chose to respond to my office’s notification of the review, the vendors were of the opinion that the information was being supplied to the School Division in confidence.
- [39] Additionally, the School Division’s Purchasing and Records Administrator provided an affidavit of the School Division’s procurement practices. The affidavit stated that the School Division has always treated bid information from vendors as confidential and that there is no public opening of the bids.
- [40] In order for subsection 18(1)(b) of LA FOIP to apply, the third party and/or local authority must show that both parties intended the information to be held in confidence at the time the information was supplied (Review Report 158-2016 and 203-2016).
- [41] In *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23, at paragraph 150, the court stated: “Once the relevant legal principles are established, whether or not a record is confidential is primarily a question of fact.”
- [42] Based on the facts in this case, it appears the information was supplied implicitly in confidence. Therefore, the third part of the test is met.

[43] I find that subsection 18(1)(b) of LA FOIP applies to the withheld information, with the exception of the vendor names.

[44] However, some of the information withheld by the School Division is information submitted by the Applicant in response to the Invitation to Tender. As the Applicant would already have knowledge of the information submitted by itself, the School Division should release this portion of the record to the Applicant.

[45] Additionally, if any portions of information in the responsive record were published in the notice pursuant to CFTA, the School Division should release those portions of the record to the Applicant.

[46] I recommend the School Division release portions of the record that relate to the information submitted by the Applicant and portions of the record where the information was published in its notice pursuant to the CFTA.

4. Did the School Division properly apply subsections 17(1)(g) and 18(1)(c) of LA FOIP?

[47] The School Division also raised the application of subsection 17(1)(g) and 18(1)(c) of LA FOIP to the responsive record. Those subsections provide as follows:

17(1) Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(g) information, the disclosure of which could reasonably be expected to result in an undue benefit or loss to a person.

...

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;

[48] The arguments provided by the School Division for the application of these exemptions appear to relate to the bid information submitted by the third party vendors, not how these exemptions would apply to the release of the vendor names alone. As such, I do not find subsections 17(1)(g) or 18(1)(c) of LA FOIP apply to the vendor names alone.

[49] I recommend the School Division release the names of the third party vendors.

5. Did the School Division meet their duty to assist the Applicant?

[50] In the submission provided to my office by the School Division, it raised the application of subsection 7(2)(b) and 7(2)(e) of LA FOIP. The submission provided that there were no disqualified vendors, therefore no records responsive to that portion of the request existed and certain details regarding the winning bidder were since published pursuant to the CFTA. Subsection 7(2)(b) and 7(2)(e) of LA FOIP provide as follows:

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

...

(b) if the record requested is published, referring the applicant to the publication;

...

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

[51] When the School Division responded to the Applicant's request, it responded pursuant to subsection 7(2)(d) of LA FOIP, advising that access to the requested records was refused pursuant to specified provisions of the Act. Based on the section 7 response provided to the Applicant, it does not appear the School Division ever referenced subsection 7(2)(b) of LA FOIP and referred the Applicant to the publication; nor did the School Division

reference subsection 7(2)(e) of LA FOIP and advise the Applicant that information they were seeking did not exist.

[52] Subsection 5.1(1) of LA FOIP provides:

5.1(1) Subject to this Act and the regulations, a local authority shall respond to a written request for access openly, accurately and completely.

[53] I note that this provision is an amendment to LA FOIP and came into effect on January 1, 2018, after the Applicant made their access to information requests. Nevertheless, my office has been informing public bodies for many years that there was an implied duty to assist.

[54] The School Division did not provide a complete response to the Applicant as it did not inform the Applicant of the application of subsections 7(2)(b) or 7(2)(e) of LA FOIP. Additionally, the School Division's submission, appears to question what records the Applicant was seeking based on some of the descriptions provided by the Applicant. If the School Division was not clear on exactly what the Applicant was seeking, it should be following up with the Applicant to ensure they have accurately interpreted the request.

[55] I find that the School Division did not meet the duty to assist the Applicant.

[56] Although not addressed in its submission, the School Division's affidavit raised concerns that the Applicant did not use the prescribed form or provide the application fee with their request. My office has long been of the opinion that it is not mandatory for Applicants to use the prescribed form, provided the request is in writing and contains the information that pertains to the elements on the form. If the School Division required any additional information, it should have advised the Applicant at the time the request was received. Additionally, when the School Division is processing access to information requests and an application fee is not provided, it can request the Applicant provide the application fee before processing the request. In this case, the School Division did not choose to request the application fee and instead proceeded to process the request.

[57] I recommend the School Division develop and implement a policy or procedure for the processing of access to information requests, including determining what its practice will be for collecting fees.

[58] I recommend that the School Division implement mandatory annual access and privacy training for its staff.

IV FINDINGS

[59] I find that LA FOIP applies.

[60] I find that subsection 18(1)(b) of LA FOIP applies to the record, with the exception of the names of the vendors.

[61] I find that subsection 17(g) of LA FOIP does not apply to the responsive record.

[62] I find that subsection 18(1)(c) of LA FOIP does not apply to the responsive record.

[63] I find that the School Division did not meet the duty to assist the Applicant.

V RECOMMENDATIONS

[64] I recommend the School Division release the names of the third party vendors.

[65] I recommend the School Division release portions of the record that relate to the information submitted by the Applicant and portions of the record where the information was published in its notice pursuant to the CFTA.

[66] I recommend the School Division develop and implement a policy or procedure for the processing of access to information requests, including determining what its practice will be for collecting fees.

[67] I recommend that the School Division implement mandatory annual access and privacy training for its staff.

Dated at Regina, in the Province of Saskatchewan, this 4th day of October, 2018.

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