



REVIEW REPORT 339-2017

City of Regina

April 17, 2018

Summary: The Applicant requested records from the City of Regina (City). The City provided partial access to records citing subsections 14(1)(c), 17(1)(b), 18(1)(c) and 21(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). In addition, the City refused to confirm or deny the existence of other records pursuant to subsection 7(2)(f) and 7(4) of LA FOIP. Upon review, the Commissioner found that the City could not rely on subsection 7(4) of LA FOIP. The Commissioner recommended the City reconsider its application of subsection 7(4) of LA FOIP. Further, the Commissioner recommended that the City release any remaining records referred to in its initial fee estimate of 320 pages if those records existed.

I BACKGROUND

[1] On November 8, 2017, the City of Regina (City) received an access to information request from the Applicant for:

Any and all correspondence, emails, notes, FOIP correspondence, draft reports or records in the possession of the City pertaining to the Fire Report of [name] (including investigation notes) of Regina Fire and Protective Services completed for the GM building (located at 1250 Winnipeg Street) and including all records surrounding the FOIP request file #2017-79 (City of Regina file number).

[2] The City followed up with the Applicant seeking clarification of the access request. By way of letter dated November 10, 2017, the Applicant clarified the access request as follows:

...Specifically we are looking for any correspondence between your office and the Regina Fire Protective Services related to the completion or provision of the referenced

Fire Report, [name] notes and correspondence in relation to the preparation and completion of the said Fire Report and any correspondence between City staff (including FAST) regarding the production, completion or provision of the Fire Report...

- [3] On November 16, 2017, the City responded to the access request by issuing a fee estimate of \$426.50. The City’s initial fee estimate was as follows:

Fee Type	# of Staff	Fee Calculations	Fees
Paper records – time required to search	1	0.25 hr(s) \$30 /hr	\$7.50
Electronic records – Time to search for and review search results	3	3.33 hr(s) \$30 /hr	\$99.90
Paper and Electronic records – Time to locate relevant info		0.5 hr(s) \$30 /hr	\$15.00
*Time required to prepare records for disclosure	1	10.6 hr(s) \$30 /hr	\$320.10
USB Drive		1 USB \$14 /ea	\$14.00
Photocopies of Records		0 pg(s) 0.25 /pg	\$0.00
Other Fees Required per section 5 LAFOIPP Regulations		0 Copies x fees per unit	\$0.00
Subtotal:			\$456.50
Less: 1st Hour Free		1 hour -\$30	-\$30.00
Total Fees:			\$426.50
Deposit Required – 50% of Total Fees:			\$213.25

*Based on 320 pages at 2min/page

- [4] The Applicant paid the required 50% deposit of \$231.25 to proceed with the processing of the access request.

- [5] On December 18, 2017, the City provided a response to the Applicant indicating that access to the records was partially granted. In addition, the City indicated that some of the information had been redacted pursuant to subsections 14(1)(c), 17(1)(b), 18(1)(c) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). It also advised the Applicant that “pursuant to sections 7(2)(f) and 7(4) of the LA FOIP, confirmation or denial of the existence of further records is refused.” Finally, it also amended the initial fee estimate indicating the initial fee was higher than actual costs. The new fee was \$86.40. The City reimbursed the Applicant \$126.76.

[6] On December 20, 2017, my office received a Request for Review from the Applicant. The Applicant requested a review of the City's application of subsection 7(4) of LA FOIP. The Applicant did not request a review of the other exemptions applied by the City.

[7] My office notified the City and the Applicant of our intent to undertake a review on December 22, 2017, and invited all parties to provide submissions.

[8] On December 27, 2017, the Applicant provided a submission. On January 16, 2018, the City provided its submission.

II RECORDS AT ISSUE

[9] The City has elected not to disclose whether certain records exist or not pursuant to subsection 7(4) of LA FOIP. The issue in this review is whether or not the City may refuse to confirm or deny the existence of responsive records.

III DISCUSSION OF THE ISSUES

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

1. Can the City rely on subsection 7(4) of LA FOIP?

[11] I note that on January 1, 2018, new amendments to LA FOIP came into effect which limited the application of subsection 7(4) of LA FOIP to only those records that would be exempt from disclosure pursuant to subsections 14, 20, 21 or 28(1) of LA FOIP.

[12] However, as the access request and the review by my office were initiated prior to the amendments coming into effect, my office will address these issues based on the provisions existing in 2017 under LA FOIP. The former subsection 7(4) of LA FOIP provided:

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.

- [13] Given that subsection 7(4) of LA FOIP has been invoked, pursuant to subsection 46(4) of *The Freedom of Information and Protection of Privacy Act* (FOIP), I will be careful and avoid confirming or denying the existence of any responsive records. I will lay out the reasons for my findings in very general terms only. I find that when a public body invokes subsection 7(4) of LA FOIP it makes our analysis much more difficult, the writing of the report more awkward and sometimes it makes the exercise appear to be stupid or silly.
- [14] In response to my office's preliminary analysis, the City asserted that if I identify what exemptions it is relying on to invoke subsection 7(4) of LA FOIP then I would be in breach of section 42 of LA FOIP. Further, it suggested I consider not issuing a Review Report. These suggestions are tantamount to suggesting total secrecy. To do so would be contrary to all that LA FOIP stands for.
- [15] Section 48 of LA FOIP provides that "subsections 43(1), sections 45 to 47 and subsection 66(3) of *The Freedom of Information and Protection of Privacy Act* are adopted, with any necessary modification, for the purposes of this Act".
- [16] Subsection 46(3) of FOIP provides me with the discretion to disclose what I consider necessary to disclose, to establish grounds for my findings and recommendations. Further, subsection 46(4)(b) of FOIP requires that in making a disclosure, I take reasonable precautions to avoid confirming or denying the existence of records. Subsections 46(3) and (4)(b) of FOIP provide:

46(3) Notwithstanding subsection (1), the commissioner may disclose:

(a) in the course of a review pursuant to section 49, any matter that the commissioner considers necessary to disclose to facilitate the review; and

(b) in a report prepared pursuant to this Act, any matter that the commissioner considers necessary to disclose to establish grounds for the findings and recommendations in the report.

(4) When making a disclosure pursuant to subsection (3), the commissioner shall take every reasonable precaution to avoid disclosure, and shall not disclose:

...

(b) any information as to whether a record exists if the head, in refusing to give access, does not indicate whether the record exists.

[17] During a review, I will identify what exemptions a local authority is relying on when it invokes subsection 7(4) of LA FOIP. As noted above, subsections 46(3) and 46(4)(b) of FOIP provide me with discretion to disclose what I deem necessary during a Review to establish my findings and recommendations while avoiding disclosing whether records exist or not. This Review Report has struck the balance between transparency in a review process and the secrecy the City wishes to have when invoking subsection 7(4) of LA FOIP. I remind the City that subsection 7(4) of LA FOIP requires a local authority to demonstrate that an exemption exists. Further, section 51 of LA FOIP provides:

51 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[18] 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 FOIP, are meant to protect **highly sensitive** records where confirming or denying the mere existence of a record would in itself impose significant risk. For example, the risk of harm to witnesses as a result of revealing a law enforcement investigation was underway. Although section 14 of LA FOIP could protect records from being disclosed that fall into that category, 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 possible embarrassment or negative public scrutiny. I would ask all government institutions and local authorities to consider carefully before invoking subsection 7(4) of LA FOIP.

[19] In order for a local authority to be able to show it properly refused to confirm or deny the existence of a record pursuant to subsection 7(4) of LA FOIP, the local authority must be able to:

1. Demonstrate that the records (if they existed) would qualify for exemption under the particular exemption it is citing; and
2. Explain how disclosing the existence of records (if they existed) could reasonably compromise what it is protecting.

1. Has the City demonstrated that the records (if they existed) would qualify for exemption?

[20] The City has indicated that if the records existed it could rely on subsections 14(1)(c), (d), 21(a), (b) and (c) of LA FOIP to deny access.

[21] Subsections 14(1)(c) and (d) of LA FOIP provide:

14(1) A head may refuse to give access to a record, the release of which could:

...

(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;

(d) be injurious to the local authority in the conduct of existing or anticipated legal proceedings;

[22] In order for subsection 14(1)(c) of LA FOIP to be found to apply, the following two part test must be met:

1. Does the public body's activity qualify as a "lawful investigation"?
2. Does one of the following exist?
 - a. The release of information would interfere with a lawful investigation, **or**
 - b. The release of information would disclose information with respect to a lawful investigation.

[23] In order for subsection 14(1)(d) of LA FOIP to be found to apply, the following two part test must be met:

1. Do the proceedings qualify as existing or anticipated legal proceedings?
2. Could disclosure of the records be injurious to the public body in the conduct of the legal proceedings?

- [24] For subsections 14(1)(c) and (d) of LA FOIP, the City asserted that if the records existed they would disclose information about the City's lawful investigations into the fire and would disclose information injurious to the City in the conduct of an anticipated legal proceeding. The City also indicated that further arguments were unnecessary, as section 21 would apply.
- [25] With such limited argument from the City, I am not persuaded that subsections 14(1)(c) and (d) of LA FOIP would apply.
- [26] The City also asserted that if the records existed, subsections 21(a), (b) and (c) of LA FOIP would apply.
- [27] I note that on January 1, 2018, new amendments to LA FOIP came into effect which broadened the scope of privilege covered by subsection 21(a) of LA FOIP to include any privilege available at law. No changes were made to subsections 21(b) and (c) of LA FOIP.
- [28] However, as the access request and the review by my office were initiated prior to the amendments coming into effect, my office will address these issues based on the provisions existing in 2017 under LA FOIP. The former section 21 of LA FOIP provided:

21 A head may refuse to give access to a record that:

- (a) contains information that is subject to solicitor-client privilege;
- (b) was prepared by or for legal counsel for the local authority in relation to a matter involving the provision of advice or other services by legal counsel; or
- (c) contains correspondence between legal counsel for the local authority and any other person in relation to a matter involving the provision of advice or other services by legal counsel.

- [29] In order for subsection 21(a) of LA FOIP to be found to apply, the following three part test must be met:
1. Is the record a communication between solicitor and client?
 2. Does the communication entail the seeking or giving of legal advice?
 3. Was the communication intended to be confidential?

[30] In order for subsection 21(b) of LA FOIP to be found to apply, the following two part test must be met:

1. Were the records “prepared by or for” an agent or legal counsel for a public body?
2. Were the records prepared in relation to a matter involving the provision of advice or other services by the agent or legal counsel?

[31] In order for subsection 21(c) of LA FOIP to be found to apply, the following two part test must be met:

1. Is the record a correspondence between the public body’s legal counsel (or an agent of the Attorney General for Saskatchewan) and any other person?
2. Does the correspondence relate to a matter that involves the provision of advice or other services by the agent or legal counsel?

[32] Based on what has been provided to my office, it is not possible to determine whether subsections 21(a), (b) or (c) of LA FOIP would apply.

[33] In conclusion, I am not persuaded that subsections 14(1)(c), (d), 21(a), (b) or (c) would apply to the records if they existed. As the City has not met the first part of the test, there is no need to proceed further. Therefore, I find that subsection 7(4) of LA FOIP cannot be relied on by the City in this case.

IV FINDING

[34] I find that subsection 7(4) of LA FOIP can not be relied on by the City.

V RECOMMENDATIONS

[35] I recommend that the City reconsider its application of subsection 7(4) of LA FOIP.

[36] I recommend that the City release any remaining records referred to in its initial fee estimate of 320 pages if those records exist. No further fees should be charged.

Dated at Regina, in the Province of Saskatchewan, this 17th day of April, 2018.

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