SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT LA-2011–001

City of Saskatoon

Summary: The Applicant filed two access to information requests with the City of Saskatoon (City) pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act*. The responsive record for the first request is subsumed in the record of the broader, but similar, second request. Over 500 documents were withheld or severed by the City on the basis of section 21; sections 16(1)(a), (b) and (c); sections 18(1)(a), (b) and (c); and sections 15(1)(a) and (b). The City provided very little explanation or details to support the application of the exemptions to the responsive documents. The Commissioner reviewed the record to determine if on the face of the record any of the exemptions might apply. Only in the "clearest of circumstances" did the Commissioner find that some documents qualified for the exemption. This was the case for almost all of the documents on which solicitor-client privilege (section 21) was claimed, and some of the documents relative to advice from officials (section 16). The third party exemptions (section 18) and documents of a local authority exemption (section 15) were not found to apply to any of the documents. The exercise of discretion was also not apparent on the face of the record. The Commissioner provided guidance for applying each exemption and recommended that the City reconsider their decision to withhold or sever the documents at issue. The Commissioner will provide any assistance the City needs in order to reconsider each exemption and each document.

Statutes Cited: *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1, ss. 7, 8, 15(1)(a)(b), 16(a)(b)(c), 18(1)(a)(b)(c), 18(2), 21, 23(1), 28(1), 51; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F-22.01. ss. 17(1)(a), 17(1)(b)(i); Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 1(s).

Authorities Cited: Saskatchewan Office of the Information and Privacy Commissioner Reports: 2004-001, 2004-002, 2004-006, 2004-007, 2005-002, 2005-003, F-2006-001, F-2006-002, F-2006-004, F-2006-005, F- 2007-002, F-2010-001, LA-2007-001, LA-2009-001, LA-2009-002, LA-2010-001, LA-2010-002; Newfoundland and Labrador Information and Privacy Commissioner Report A-2010-008; Information and Privacy Commissioner of Ontario Orders M-755 Appeal M_9500679, MO-2396-F Appeal MA-060119-2, MO-1714 Appeal MA-020290-1; *Ontario (Ministry of Northern Development and Mines)* v. *Ontario (Assistant Information and Privacy Commissioner)* [2004] O.J. No. 163; *Ontario (Ministry of Transportation)* v. *Ontario (Information and Privacy Commissioner)* [2005] O.J. No. 4047; *Société Gamma Inc.* v. *Canada (Secretary of State)* [1994] 79 F.T.R. 42 (Fed. T.D.); *Canada* v. *Solosky* [1980] 1 S.C.R. 821.

Other Sources Cited: McNairn and Woodbury, *Government Information: Access and Privacy* (2005, Thomson Carswell, Toronto); *Black's Law Dictionary*, 9th Ed., USA: Thomson West, 2009; Saskatchewan OIPC's *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review;* Saskatchewan *OIPC's Reviews & Investigations* PowerPoint Presentation; Access and Privacy Branch, Service Alberta, *FOIP Guidelines and Practices* (2009).

I BACKGROUND

[1] Two request for review files, OIPC File 011/2005–LA FOI/AI and OIPC File 044/2006–LA FOI/AI, are being addressed in this Report. My office has dealt with these two files in a consolidated manner because they involve the same parties and because the responsive record for File 011/2005–LA FOI/AI is essentially subsumed within the responsive record for File 044/2006–LA FOI/AI. This is addressed further below.

File 011/2005–LA FOI/AI (City File 416-1/05)

[2] An access to information request pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP)[1] was submitted to the City of Saskatoon (City) on February 25, 2005. The Applicant requested the following:

[1] *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990 1991, c.L-27.1 (as amended) (hereinafter LA FOIP).

> I would like to obtain one complete copy of each of the four (4) Expression of Interest (EOI) Submissions for Parcel Y of the River Landing Redevelopment Area that were received by the City of Saskatoon by the February 11, 2005 4:00 P.M. C.S.T. deadline.

[3] By letter dated February 28, 2005 the City responded to the access request indicating that:

> … the actual proposals are not released, since they contain proprietary information provided by a third party. This is in accordance with Subsections 18(a), (b) and (c)(i) and (ii) of [LA FOIP] … Our position is that the information was provided in confidence, explicitly, because prospective bidders were told that their Expressions of Interest, including the names of the unsuccessful bidders, would be kept confidential.

[4] By letter dated March 9, 2005 the Applicant requested my office review the decision of the City.

[5] On April 1, 2005 we provided notification to the City and the Applicant that we had opened Review File 011/2005–LA FOI/AI.

[6] On June 15, 2005 we received from the City some very brief arguments and documentation to support its position. On August 18, 2005 we received copies of the responsive record.

[7] By email on January 23, 2007, my office contacted the City regarding the third parties involved in the documents. We asked whether the City had contacted those third parties to determine if they might consent to the release of the documents. The City responded by email on the same day:

> No … I felt that it would be redundant to do so, since the City had been clear in all its discussions with prospective bidders, and written material in the information package, that the Expressions of Interest, including the names of the unsuccessful bidders, would be kept confidential. It didn't make sense to me to assure people that we would keep their information confidential, and then write to them to ask them if we could release it.

[8] We subsequently emailed the City on May 8, 2007 to confirm whether pursuant to section 41(1) of LA FOIP the City had contacted the third parties to inform them of the request

for review filed with this office. The City responded on May 9, 2007 stating that this requirement had been "overlooked" but that:

> Since the EOI submissions are from over two years' ago, and the successful bidder has recently abandoned their proposal, it may be that the bidders would have no problem in having their submissions released. I will write to them all to advise them of the appeal and to ask whether they would give their consent to the material being released now. I'll let you know the outcome.

[9] We followed up with the City on June 5, 2007. The City's response indicated that it wrote to the third parties on May 9, 2007, that one party refused to give consent, and that the others had not yet been heard back from.

[10] By letter dated August 17, 2010 we requested the contact information for the third parties involved so that we could write to them regarding their right under section 42(2) of LA FOIP to make representations to the Commissioner for the purposes of a review.

[11] The City provided my office with the contact information for four third parties by letter dated August 23, 2010.

[12] We then wrote to each of the third parties on September 13, 2010 and provided the following information:

- description of the document at issue,
- summary of the City's position,
- quote of section 18 of LA FOIP,
- that they may choose to make a submission and guidance as to making reference to previous decisions of Commissioners across Canada in interpreting the third party exemptions, and
- that a public report may be issued to address this matter if we are not able to reach a resolution with the City.

[13] Having received no response to our letters, we then contacted each third party by phone. Third party A and third party B stated that the document was for the City's use only, includes financial information and that they do not want anything released, while third

party C indicated that it has no objection to the release of its Expression of Interest (EOI) submission.

[14] Third party D provided a submission by email stating as follows:

> We would like to restrict any information contained in the RFP and associated documents from being released that relates to financial data, financial projections, and market appraisals / valuations.
>
> We would also want to limit / restrict any detailed drawings that were developed as part of this RFP or any previous submissions that we made to the City of Saskatoon. We consider the detailed drawings to be proprietary and considering the money expended to produce them, we would like to retain control of them. As well, considering we are continuing to own, operate and develop hotel properties in the Saskatoon market, we would want to ensure this information would not be made available to the general public, including potential competitors to our properties. We consent to release any conceptual or non-detailed drawings.
>
> Following your review and development of what you think is acceptable to be released, we would like an opportunity to review the package before it is sent to the individual requesting the information.

[15] I will address the EOI proposals for each third party in the analysis and recommendations that follow, recognizing the consent we have received.

File 044/2006–LA FOI/AI (City File 416-6/06)

[16] On May 1, 2006 the Applicant wrote to the City making a similar, but broader access to information request. The Applicant sought documents dated between June 1, 2004 and December 12, 2005 regarding the Spa Hotel and Parcel Y Site within River Landing Phase I (except those tabled at public meetings of City Council).

[17] On May 8, 2006 the City provided a fee estimate of $105 and then on June 6, 2006 the City released some documents in full, severed some and withheld some. The City cited several different exemptions under LA FOIP:

- sections 21(a)(b)(c) – solicitor-client privilege
- sections 16(1)(a)(b)(c) – advice from officials

- sections 18(1)(a)(b)(c) – third party information
- sections 15(1)(a)(b) – documents of a local authority

[18] The City also noted that it had on file the EOI submissions relating to the call for a realtor[2], that those third party bidders had been contacted to request their consent, and that the City would advise the Applicant in due course.

[19] My office received a request for review from the Applicant on June 14, 2006. The Applicant alleged that the City appeared to be applying blanket policies to refuse access to records. He also asserted that the City did not appear to exercise its discretion to determine if the documents should be withheld or if perhaps some portions of the documents could be released.

[20] By letters dated June 15, 2006 my office notified the City and the Applicant of the opening of File 044/2006–LA FOI/AI.

[21] On June 29, 2006 the City wrote to the Applicant, with a copy of the letter to my office, and indicated that "three of the bidders have given their approval for the release of the information, and accordingly I am enclosing copies." However, the City indicated that it did not receive consent from third party E and stated as follows:

> As I indicated to you in my June 6th letter, the Call for Expressions of Interest [for the Call for Realtor] indicated that "The names of those submitting proposals will be made public; however, details of submissions which are not recommended to Council will not be made public except to the extent required by *The Local Authority Freedom of Information and Protection of Privacy Act*.

[22] Also by letter dated June 29, 2006 the City provided to my office copies of the portions of the record on which severing occurred.

[2] This is different from the EOI Submissions discussed above which involve proposals for the development of the hotel/spa (for which there are four third parties involved). These EOI Submissions appear to relate to proposals for a realtor to manage the development process. The City refers to the third parties involved in these EOI submissions as "bidders".

[23] On January 19, 2007 we wrote to the City thanking them for providing a copy of the responsive record and indicating that "we have not received any submission from you with respect to the matter."

[24] The City responded on February 20, 2007 providing copies of the record that was withheld from the Applicant. The City also stated "I believe that the reasons given in the chart are self explanatory, and do not have anything further to add."

[25] We wrote to the City on August 10, 2010 requesting contact information for each of the third parties that are involved for File 044/2006–LA FOI/AI. By way of example, we identified third party E and asked whether the address the City had used when corresponding with that company was the current address on file for them.

[26] The City responded on August 31, 2010 stating that the address we listed for third party E, an address in Toronto, "is the only one that I have on file" and that "[third party E] is the only party to which a third party exemption has been applied."

[27] However, upon my office reviewing the record, we noted that the City's statements in the August 31, 2010 letter were not completely accurate. First, the City stated that the Toronto address was the only address on file, and indeed the correspondence the City sent to third party E about this review was sent to that Toronto address. However, the document in question was submitted to the City by the Saskatoon office of third party E, an address for which was clearly marked on the record.

[28] We contacted the individual whose name appears on the document, the "President of [third party E] Saskatoon Ltd.", and received his consent to release their document to the Applicant.

[29] Secondly, while the City asserted that third party E was the only entity to which a third party exemption had been applied, that is clearly not the case. In fact, all four documents on which some severing occurred involve third party exemptions being cited and none of which appear to involve third party E. Indeed, upon our review of those documents it is

difficult, if not impossible in some cases, to determine who the third party entity is that may have an interest in the information contained in the document.

[30] Also within the record are the same four EOI submissions which are the subject of File 011/2005–LA FOI/AI. As stated above, this second access to information request was a similar but more expansive request, and thus resulted in the documents that are the subject of File 011/2005–LA FOI/AI also being included as part of the responsive record for File 044/2006–LA FOI/AI (with the same exemptions applied). As can be seen from the discussion above for File 011/2005–LA FOI/AI, four distinct third parties submitted the EOI proposals to the City, none of which are third party E.

[31] On December 30, 2010 we advised the City that a report will soon be issued and highlighted the recommendations to be made.

II RECORDS AT ISSUE

[32] The record has been organized into three groups to reflect the fact that my office received different portions of the record from the City at different times.

[33] Record 1 involves 81 withheld documents totalling 510 pages. Within this group are the four documents that are also the subject of File 011/2005–LA FOI/AI. An Index of Records (Index) was provided by the City, which included page numbering, a description of each document, and reference to the wording and section number of the exemption that was claimed for each.

[34] Record 2 encompasses one withheld document totalling eight pages. This record is the document that involves third party E, for which we received consent to release.[3] As such, Record 2 is not addressed in the analysis in this Report, but is addressed in our Recommendations.

[3] See [28] above which speaks to the consent received from third party E.

[35] Record 3 involves four severed documents totalling eight pages. No Index was provided with these documents, but instead the City provided a short summary (four lines or less) for each of the four documents setting out a description of the document and, like the Index for Record 1, refers to the wording and section number of each exemption claimed.

III ISSUES

1. Did the City properly apply section 21 of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?

2. Did the City properly apply section 16(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld or severed records in question?

3. Did the City properly apply section 16(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?

4. Did the City properly apply section 16(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?

5. Did the City properly apply section 18(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?

6. Did the City properly apply section 18(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld or severed records in question?

7. Did the City properly apply section 18(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld or severed records in question?

8. Did the City properly apply section 15(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?

9. Did the City properly apply section 15(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?

IV DISCUSSION OF THE ISSUES

Commentary on the City's Submissions

[36] The City provided very little in the way of argument or explanation to justify or support its reliance on the various exemptions cited. As discussed above, when we requested additional representations from the City we were told that "the reasons given in the chart are self explanatory". The chart it was referring to is only the Index supplied with Record 1. This comprises a description of each document, and reference to the wording and section number of the exemption that was claimed for each.

[37] In my view this skeletal information cannot be characterized as "reasons", since it provides no more guidance than quoting the exemption section.

[38] Section 51 of LA FOIP places the onus on the local authority to prove that access to the requested record may or must be refused. That provision reads as follows:

> **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.

[39] This means that the burden is on the City to establish, on a balance of probabilities, that the content of the documents falls within the parameters of the exemption cited. This would typically include some argument and evidence that interprets the scope and application of the exemption provision while considering the context within which the record was created. This can include reference to court decisions or reports from oversight offices interpreting and applying a particular exemption in the same or similar legislation.

[40] I have addressed burden of proof in several reports as well as in *Helpful Tips* and other resources available on my office's website.[4] In my Report F-2006-005, I concluded as follows:

> A statement of the decision made by the government institution and paraphrasing the statutory provision is insufficient for me to assess the appropriateness of that decision. I find that asserting an opinion … without particularizing the reasons for such an opinion fails to discharge the burden of proof.[5]

[41] In this Report I have set out any submissions we have received from the City or from the third parties involved. However, because those submissions were so limited it became necessary to review the record page by page and line by line to determine if on the face of the record each of the exemptions would apply.

[42] The need to do such a review has been well explored by the Newfoundland and Labrador Information and Privacy Commissioner, and in the recent Report A-2010-008 this approach was summarized:

> I have discussed in previous reports the consequences when a public body fails to present any argument or evidence to meet the burden imposed on it by section 64 of the *ATIPPA*, which requires the public body to prove that an applicant has no right of access to a record or part of a record. In Report A-2009-007, I stated at paragraph 18:
>
> > *I will note here that the Department has not provided a written submission in this matter and, therefore, there is an "absence of evidence to discharge the burden of proof." As a result, I have been put in the position that I can only find that section 20(1)(a)* ***is applicable in the "clearest circumstances"*** *where it is* ***clear to me on its face*** *that the information reveals advice or recommendations. In those circumstances where the application of section 20(1)(a) is not clear, absent any submission or explanation from the Department, I will have to find that it is not applicable.*
>
> As a result, I have to review the information for which section 20 has been claimed and decide **whether this is one of the "clearest circumstances" in which it is clear**

[4] See Saskatchewan Information and Privacy Commissioner [hereinafter SK OIPC] Reports F-2004-006 at [24], F-2004-007 at [19], F-2007-002 at [5-9], LA-2010-001 at [20], and LA-2010-002 at [119-122]; *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* at p. 8-11; and *OIPC Reviews & Investigations* PowerPoint Presentation at p. 43-49, available at: www.oipc.sk.ca.

[5] SK OIPC Report F-2006-005 at [77].

> **to me on its face** that disclosure of the information would reveal advice or recommendations developed by or for the College.[6]

[43] This approach is not to be taken lightly or be relied on by a public body to avoid having to meet its burden of proof. In some cases where it might be plausible that a certain situation exists or criteria are met, I did not find that the exemption applied because it was not the "clearest of circumstances". Indeed, in some cases a simple explanation from the City may have sufficed to establish the exemption, but I could not conclude as such in the absence of such an explanation.

[44] Having reviewed the records on that basis, I found that for some documents the exemption cited by the City was apparent on the face of the record, while for many other documents it was not apparent. Further, I found that for almost all of the documents for which the solicitor-client exemption under section 21 of LA FOIP was cited, it was indeed apparent on the face of the record that the exemption applied. As such, I will first address that exemption and only where that exemption does not apply to a particular document do I then go on to consider other exemptions that were cited for each document. For those other exemptions I also considered whether the document presents a "clear circumstance" for the application of the exemption.

[45] I also wish to make a note about the exercise of discretion. The exemptions applied in this case are primarily discretionary exemptions. That is, the language in the legislation is that the record "may" be withheld, as contrasted to "must" be withheld. Whenever a public body invokes a discretionary exemption, my office looks for evidence that the public body has properly exercised its discretion. A good discussion of discretion can be found in Alberta's *FOIP Guidelines and Practices*:

> The exercise of discretion is not a mere formality. The public body must be able to show that the records were reviewed, that all relevant factors were considered and, if the decision is to withhold the information, that there are sound reasons to support the decision.
> …

[6] Newfoundland and Labrador Information and Privacy Commissioner Report A-2010-008 at [36-37], available at: www.oipc.nl.ca/accessreports.htm.

> Discretion amounts to the power to choose a particular course of action for good reasons and in good faith, after the decision-maker has considered the relevant facts and circumstances; the applicable law, including the objects of the Act; and the proper application of the law to the relevant facts and circumstances.
> …
> The Commissioner can, however, require the head to reconsider a decision if it appears that the obligation to exercise discretion has been disregarded, or where discretion has been exercised without due care and diligence or for an improper or irrelevant purpose (see *IPC Order 96-017*).[7]

[46] As we received minimal submissions from the City, it is unclear whether the City has exercised its discretion. However, based on the fact that of the over 500 pages of responsive records only eight pages were subject to any severing,[8] while the rest were withheld in their entirety, it seems that the City did likely apply the exemptions in a blanket manner without regard for whether there are actual reasons or a need to withhold the specific document, or to sever portions and release the remainder of the document. I have addressed this below.

1. Did the City properly apply section 21 of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?

[47] The City claimed section 21 of LA FOIP to support its contention that many of the documents that are part of Record 1 should be withheld in their entirety. Section 21 reads as follows:

> **21** A head may refuse to give access to a record that:
>
> (a) contains information that is subject to solicitor-client privilege;
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> (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.

[7] Access and Privacy Branch, Service Alberta, *FOIP Guidelines and Practices* (2009) at p. 97-98, available at: http://foip.alberta.ca/resources/guidelinespractices.

[8] Section 8 of LA FOIP states: "Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access."

[48] In all cases for which this exemption was cited, the City's Index uses the wording "solicitor-client privilege" and references all three subsections of section 21.

[49] My Report F-2005-002 focused largely on legal fees, but the reference in that Report to the principles set out in Former Commissioner Rendek's Report 2003/004 is relevant:

> a) all communications, verbal or written, of a confidential character, between a client and a legal advisor **directly related to the seeking, formulating or giving of** legal advice or legal assistance … are privileged; and
>
> b) all papers and materials created or obtained specifically for the lawyer's 'brief' for litigation, whether existing or contemplated are privileged.[9]
>
> [emphasis added]

[50] Also in my Report F-2005-002, the court decision of Descoteaux v. Mierzwinski was discussed: "Mr. Justice Lamer advocated a very liberal approach to the scope of privilege by extending it to include **all communications made 'within the framework of the solicitor-client relationship'**."[10] [emphasis added]

[51] I referenced Alberta Adjudication Order #3 dated March 13, 2003 in my Report F-2005-002. Mr. Justice McMahon stated that "Where legal advice of any kind is sought … the communications relating to the purpose, made in confidence by the client, are at his instance permanently protected from disclosure …".[11]

[52] The primary court case on solicitor-client privilege is Canada v. Solosky, which established the following three part test:

> i) a communication between solicitor and client;
> ii) which entails the seeking or giving of legal advice; and
> iii) which is intended to be confidential by the parties.[12]

[9] SK OIPC Report F-2005-002 at [29].
[10] *Ibid*. at [29].
[11] *Ibid*. at [34].
[12] *Canada* v. *Solosky* (1980), 1 S.C.R. 821 at p.11.

[53] However, I recognize that subsections b) and c) of LA FOIP are broader than the basic solicitor-client privilege set out in subsection a). The following, from *Government Information: Access and Privacy* by Woodbury and McNairn, provides some guidance:

> The expanded exemption in the Saskatchewan Act covers information prepared by or for an agent of the Attorney General or legal counsel for an institution in relation to any matter involving the provision of advice or services – not necessarily of a legal nature – by the agent or counsel. This information includes correspondence between any such agent or counsel and a third party.[13]

[54] This excerpt from Woodbury and McNairn was again cited in my recent Report F-2010-001, with the following comments:

> As the records to which section 22 of FOIP is applied involve one government institution sharing with a second, the following also from McNairn is germane:
>
> > A client institution may waive solicitor-client privilege, either explicitly or by such conduct as would indicate an intention to abandon the privilege. In that event, the protection of the disclosure exemption will be lost. The release of privileged information by one institution to another would not normally constitute a waiver as this action is internal to the government, the ultimate beneficiary of the privilege. The Federal Court has held, however, that the voluntary disclosure, by an institution, of a privileged report to the Auditor General, with full knowledge that the report will be used in carrying out the Auditor General's statutory mandate, amounts to a waiver of privilege.
>
> Further *Stevens* v. *Canada (Prime Minister)* offers the following advice in terms of what does and does not constitute a waiver of privilege:
>
> > In essence, where the client authorizes the solicitor to reveal a solicitor-client communication, either it was never made with the intention of confidentiality or the client has waived the right to confidentiality. In either case, there is no intention of confidentiality and no privilege attaches. For example, it has been held that documents prepared with the intention that they would be communicated to a third party, or where on their face they are addressed to a third party, are not privileged.
> >
> > …
> >
> > The respondent claims that the Privy Council Office is not a third party on the basis that the Parker Commission and the Privy Council Office are both government departments, and such disclosure between them is not disclosure to a third party.
> >
> > …

[13] McNairn and Woodbury, *Government Information: Access and Privacy* (2005, Thomson Carswell, Toronto) at p. 3-47.

> In general, with respect to solicitor-client privilege as between government institutions, "[t]he release of privileged information by one institution to another would not normally constitute a waiver as this action is internal to the government, the ultimate beneficiary of the privilege" see: McNairn and Woodbury, *Government Information: Access and Privacy* (Scarborough, Ont.: Carswell, 1992) at page 3-36.[14]

[55] Upon my review of the documents and based on the above research, I determined that almost all of the documents for which section 21 was claimed qualify for the solicitor-client exemption. In the case of one document the content is limited to a statement that the Solicitor reviewed her report and answered questions; there are no details of what the Solicitor's report contained.

2. Did the City properly apply section 16(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld or severed records in question?

[56] The City applied section 16(1)(a) to several documents within Records 1 and 3, stating either that the document involves "analyses developed for the local authority" or "advice, proposals and recommendations developed for the City". There was no explanation provided by the City beyond these references in the Index.

[57] This exemption reads as follows:

> **16**(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:
>
> (a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority;

[58] In my Report LA-2007-001, I considered this section. I quoted the following from *The Report of the Commission on Freedom of Information and Individual Privacy /1980*:

> There are very few records maintained by governmental institution that cannot be said to pertain in some way to a policy formulation or decision making process.

[14] SK OIPC Report F-2010-001 at [111].

> ...there is a general agreement that documents or parts of documents **containing essentially factual material should be made available** to the public. If a freedom of information law is to have the effect of increasing the accountability of public institutions to the electorate, **it is essential that the information underlying decisions taken … must be accessible to the public**.[15]
>
> [emphasis added]

[59] Also in Report LA-2007-001, I considered a number of decisions from across Canada and discovered that there had not been a consistent approach to interpreting the "advice" exemptions. I concluded that:

> I further find that, at this time, to best achieve the objectives of the Act and to ensure that the right of access is not unduly diminished by assigning an extremely broad meaning to the word "advice", I should construe "advice" in a way that is consistent with the Ontario Court of Appeal decisions noted above.[16]

[60] Those Ontario Court of Appeal decisions are Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner) and Ministry of Transportation v. Cropley (Cropley).[17] In Cropley, the Court accepted the Commissioner's conclusion that "to qualify as 'advice' or 'recommendations', the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process".[18] The Court concluded that "the Commissioner's interpretation complies with the legislative text, promotes the legislative purpose and is reasonable."[19]

[61] Also, I note that on April 3, 2006 the Supreme Court of Canada refused leave to appeal from the decision in Cropley.[20]

[62] The Ontario Court of Appeal also made brief reference to another case where the Court upheld the Commissioner's interpretation:

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[15] SK OPIC Report LA-2007-001 at [16].
[16] *Ibid.* at [90].
[17] Both of these Court of Appeal decisions were referenced in LA-2007-001 at [79-88].
[18] *Ibid.* at [83].
[19] *Ibid.* at [85].
[20] *Ibid.* at [86].

> … a memorandum from an investigating human rights officer to her supervisor seeking direction as to how an investigation should be handled and the response of the supervisor did not qualify … because neither set out any suggested course of action which could be accepted or rejected during the deliberative process.[21]

[63] Applying this interpretation, in my Report LA-2009-002, I concluded that "internal communications which are simply summaries of the situation or requests as to who will be responding [do not qualify for this exemption]... the communications are logistical as opposed to substantive in nature."[22]

[64] In addressing the fact that the other words (proposals, recommendations, analyses or policy options) found in section 16(1)(a) of LA FOIP had not been considered, I stated in Report LA-2007-001 as follows:

> I take the view that each of these words also require more than mere information. To qualify … the information in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.[23]

[65] The Saskatchewan Queen's Bench decision of Weidlich v. SaskPower considered the equivalent provision in *The Freedom of Information and Protection of Privacy Act*[24] (FOIP), section 17(1)(a).[25] Two primary principles that are helpful to this analysis came out of that decision: first, that advice involves the expression of counsel or opinion, favorable or unfavorable, as to action; and second, that underlying facts and opinions might be highly intertwined within one document. I have considered both principles as fundamental guidance in interpreting LA FOIP's section 16(1)(a).

[66] In my recent Report F-2010-001, I relied on a decision from the Alberta Information and Privacy Commissioner which considered their equivalent provision, as it specifically relates to the wording "by or for". The following paragraphs out of that Alberta decision summarize the resulting principle:

[21] *Ibid.* at [82].
[22] SK OIPC Report LA-2009-002 at [148].
[23] SK OIPC Report LA-2007-001 at [91].
[24] *Ibid.* at [60-64].
[25] *The Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F-22.01.

> [para 42] In my view, for information to be developed by or on behalf of a public body under section 24(1)(a) of the Act, **the person developing the information should be an official, officer or employee of the public body, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the public body**. I do not believe that general feedback or input from stakeholders or members of the public normally meets the first requirement of the test under section 24(1)(a), as the stakeholders or **members of the public do not provide the information by virtue of any advisory "position**". This is even if the public body has sought or expected the information from them.
>
> [para 43] To put the point another way, the position of the party providing information under section 24(1)(a) – or the relationship between that party and the public body – **should be such that the public body has specifically sought or expected, or it is the responsibility of the informing party to provide, more than merely thoughts, views, comments or opinions on a topic**. General stakeholders and members of the public responding to a survey or poll are not engaged by the public body in a sufficient advisory role. They have simply been asked to provide their own comments, and have developed nothing on behalf of the public body.[26]
>
> [emphasis added]

[67] In the subject case, I examined the entirety of the record and the submissions from the City to help us establish which outside entities could be characterized to have done work *for* the City. As just discussed, this would normally be companies or individuals under contract with the City to provide professional services to the City, which in the context of this exemption would be in an advisory role. The City indicated in the Index if an outside entity was a "contractor" but only in some cases was there any other supporting documentation or proof that such entities had been engaged by the City for an advisory role. That is, in some cases it was not clear whether the outside entity had provided its advice *for* the City, or perhaps on another basis.

[68] Having considered all of the above principles I have found that for most documents in respect to which this section was cited (and which were not already found to be exempt under section 21), it was clear that the exemption applied. However, there are a few instances that did not qualify for the exemption because the City did not meet its burden of proof to establish that the information contained in the document was developed "by or

[26] SK OIPC Report F-2010-001 at [81].

for the local authority", as just discussed. For the other documents, this requirement was apparent on the face of the record.

3. Did the City properly apply section 16(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?

[69] Section 16(1)(b) of LA FOIP was cited by the City for many documents in Record 1. The wording primarily used in the City's Index is "consultations involving employees of the C+ity", but in some instances "officers" or "deliberations" are also referenced. The City provided no further explanation or details.

[70] The exemption reads as follows:

> **16**(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:
>
> …
>
> (b) consultations or deliberations involving officers or employees of the local authority;

[71] The equivalent section from FOIP, 17(1)(b)(i), has been considered in several of my reports. The following points are noteworthy from my Report F-2004-001, and have been reiterated in subsequent reports, including F-2006-004:

> A "consultation" occurs when the views of one or more officers or employees are sought as to the appropriateness of a particular proposal or suggested action … A "deliberation" is a discussion of the reasons for and against an action …
>
> In order to justify withholding a record [under either of these] the opinions solicited during a "consultation" or "deliberation" must:
>
> a) either be sought or expected, or be part of the responsibility of the person from whom they are sought;
> b) be sought for the purpose of doing something, such as taking an action or making a decision; and
> c) involve someone who can take or implement the action.[27]

[27] SK OIPC Report F-2004-001 at [12-13].

[72] In my Report F-2004-002, I considered these criteria and concluded that the exemption does not apply to: a document reporting factual information regarding communications with an agent of an Applicant, a document which makes non-substantive reference to other documents, and e-mail reporting certain matters of fact relating to the Applicant.[28]

[73] In addition, in my Report F-2006-004[29], the following conclusions were made:

- **E-mail heading information**, such as subject lines, to and from, are **not** caught by the exemption.
- The exemption not only captures substantive parts regarding proposals, but also **parts that reveal the individual's reliance on other facts.**
- The exemption does **not** capture **records of interaction between parties** or records of action taken by staff or **instructions to staff** on how to proceed.

[74] For this exemption, I again reviewed the record page by page to determine, if on the face of the record, the criteria set out above exist. In several cases the document involved communication from outside entities and thus does not meet the requirement clearly set out in the section that officers or employees of the local authority must be involved. In addition, in some cases purely factual information is being conveyed or there is communication of a decision made or the forwarding of a final draft of a document. In such cases, there are no consultations or deliberations and the exemption does not apply. However, many documents do demonstrate the "clearest of circumstances" for the application of this exemption.

4. Did the City properly apply section 16(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?

[75] This provision was cited by the City for several documents within Record 1. In all instances the Index uses the following wording: "considerations that deal with negotiations on behalf of local authority". No further explanation was provided by the City.

[28] SK OIPC Report F-2004-002 at [7-12].
[29] SK OIPC Report F-2006-004 at [34-36].

[76] The exemption reads as follows:

> **16**(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:
>
> …
>
> (c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the local authority, or considerations that relate to those negotiations;

[77] In my Report LA-2010-001[30] I briefly considered this provision, although the analysis is very minimal due to the lack of any details from the public body to justify the application of this provision. I have not otherwise analyzed this provision, and as such I have taken guidance from the following two decisions from the Ontario Information & Privacy Commissioner (IPC) when considering their equivalent provision.

[78] From the Ontario IPC Order M-755, I found the following comments helpful:

> Previous orders of the Commissioner's office have defined "plan" as "... a **formulated and especially detailed method** by which a thing is to be done; a design or scheme" (Order P-229).
>
> In my opinion, the other terms in section 11(e), that is, "positions", "procedures", "criteria" and "instructions", are **similarly referable to pre-determined courses of action or ways of proceeding.**[31]
>
> [emphasis added]

[79] From Ontario IPC Order MO-2396-F, I took direction from the following:

> In order for section 11(e) to apply, the City must show that:
> 1. the record contains positions, plans, procedures, criteria or instructions
> 2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations
> 3. the negotiations are being carried on currently, or will be carried on in the future, and
> 4. the negotiations are being conducted by or on behalf of an institution.
>
> [Order PO-2064]

[30] SK OIPC Report LA-2010-001 at [48-51].
[31] Information and Privacy Commissioner of Ontario (hereinafter IPC Ontario) Order M-755 Appeal M_9500679 at p.1-3, available at: www.ipc.on.ca.

> The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Order PO-2034]. Background information that may have formed the basis for positions taken during negotiations are distinguishable from the positions themselves, and such background information is not exempt under section 11(e) [Order M-862].[32]

[80] Upon my review of the documents on which section 16(1)(c) was claimed, I determined that in some cases the City had not met its burden of proof to establish that the information contained in the document was developed "by or on behalf of the local authority".[33] Further, whether or not I could conclude that the document fits within this exemption depended on whether it was clear on the face of the record that the information was "developed for the purpose of contractual or other negotiations". In some cases I could make such a determination, on others I could not.

5. Did the City properly apply section 18(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?

[81] Section 18 of LA FOIP provides an exemption for third party information. The full section reads as follows:

> **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;
>
> (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;
>
> (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; or

[32] IPC Ontario Order MO-2396-F Appeal MA-060119-2 at p.11.

[33] See [64-65] above for a discussion on the issue of determining whether an outside entity was acting for the City. Although the wording is a bit different ("by or for" versus "by or on behalf of") the same analysis and considerations would apply to this exemption. In another case, with detailed submissions from the public body there may be cause to consider if "by or on behalf of" in section 16(1)(c) has a different meaning than "by or for" in section 16(1)(a), but in this case such an analysis is not necessary.

> (d) a statement of a financial account relating to a third party with respect to the provision of routine services from a local authority.
>
> (2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.
>
> (3) Subject to Part V, a head may give access to a record that contains information described in clauses (1)(b) to (d) if:
>
> (a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and
>
> (b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:
>
> (i) financial loss or gain to;
>
> (ii) prejudice to the competitive position of; or
>
> (iii) interference with contractual or other negotiations of;
>
> a third party.

[82] The primary documents on which the third party exemption was cited by the City are the EOI submissions, for which the City stated as follows in the Index:

> Subject of previous FOI request and appeal to the Saskatchewan Information and Privacy Commissioner. Information relating to third party that contains trade secrets, financial and commercial information supplied in explicit confidence, and if disclosed could be expected to result in financial loss or gain or prejudice the competitive position of the third party.

[83] In addition, in the section 7 response[34] to the Applicant for File 044/2006–LA FOI/AI when referring to the "list of EOI submissions received for the hotel/spa development" the City stated that:

> The information severed is the names of two applicants that were not chosen to proceed to the next level. In the [REOI], it was stated that only the names of those chosen to proceed to the next level would be made public.

[84] The section 7 response to the Applicant for File 011/2005 – LA FOI/AI and any other correspondence received from the City also made reference to essentially the same statement as above. No other explanation was provided at any time by the City.

[34] Section 7 of LA FOIP instructs public bodies on how to respond to access requests.

[85] Before turning to subsection 18(1)(a) as the first provision of section 18 that the City relied on, I must consider subsection 18(2).

[86] As discussed in [13] and [28] above, upon my office contacting the third parties involved in these files, third party C and third party E gave their consent to have the documents containing their information released to the Applicant. However, based on the wording of section 18(2) it is still up to the City whether or not to release the documents. As we indicated to the third parties, it is not within our authority to release those documents to the Applicant. Nevertheless, since consents have been given by the third parties and since the third party exemptions were the only exemptions applied by the City to those documents, it would only seem reasonable that the City should follow those consents and release the documents to the Applicant.

[87] I will now address the first subsection of the section 18 third party information exemption.

[88] The only documents for which the City invoked subsection 18(1)(a) were the EOI submissions which make up a portion of Record 1 and which are the entire records at issue for File 011/2005–LA FOI/AI. This provision reads as follows:

> **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;

[89] As I have not had occasion to consider this exemption, I took guidance from the following resources.

[90] In **Société** Gamma Inc. v. Canada (Secretary of State) Strayer J. held:

> In the absence of authoritative jurisprudence on what is a "trade secret" for the purposes of s. 20(1), the Court held that "trade secrets" must have a reasonably narrow interpretation, since one would assume that they do not overlap the other categories: in particular, they can be contrasted to "commercial … confidential information supplied to a government institution … treated consistently in a confidential manner …" which is protected under s. 20(1)(b). In respect of neither (a)

> nor (b) is there a need for any harm to be demonstrated from disclosure for it to be protected. There must be some difference between a trade secret and something which is merely "confidential" and supplied to a government institution. **A trade secret must be something, probably of a technical nature, which is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure**.[35]
>
> [emphasis added]

[91] *Black's Law Dictionary* defines 'trade secret' as follows:

> A formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors; information – including a formula, pattern, compilation, program, device, method, technique, or process – that (1) derives independent economic value, actual or potential, from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use, and (2) is the subject of reasonable efforts, under the circumstances, to maintain its secrecy.[36]

[92] Alberta's *Freedom of Information and Protection of Privacy Act*, section 1(s) defines "trade secret" as:

> "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process
>
> (i) that is used, or may be used, in business or for any commercial purpose,
>
> (ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use,
>
> (iii) that is the subject of reasonable efforts to prevent it from becoming generally known, and
>
> (iv) the disclosure of which would result in significant harm or undue financial loss or gain.[37]

[93] In turn, the following guidance comes from Alberta's *FOIP Guidelines and Practices*:

> Information **must meet all of these criteria** [in the definition] to be considered a trade secret. The fact that others may benefit from the disclosure of the information

[35] *Société Gamma Inc.* v. *Canada (Secretary of State)* (1994), 79 F.T.R. 42 (Fed. T.D.) at [45].
[36] *Black's Law Dictionary*, 9th Ed., USA: Thomson West, 2009, at p. 1633.
[37] See section 1 of Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25.

> does not mean that there is independent economic value in the secrecy of the information (*IPC Order F2004-006).*
>
> Information that is generally available through public sources (e.g. corporate annual reports) would not usually qualify as a trade secret under the Act. A third party **must be able to prove ownership or a proprietary interest** in a trade secret or must be able to prove a claim of legal right to the information (e.g. a licence agreement) in order for that information to qualify for the exception.[38]
>
> [emphasis added]

[94] Because we received nothing from the third parties or from the City as to how the information in the record might qualify as a "trade secret" I was unable to conclude that this exemption applies to any of the documents at issue.

6. Did the City properly apply section 18(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld or severed records in question?

[95] This section of LA FOIP states as follows:

> **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;

[96] In addition to the EOI submissions, the City also applied this exemption to one other document in Record 1 as well as all four of the documents that make up Record 3.

[97] One of the criteria for this provision is that the information in question be supplied by the third party to the local authority. This was considered in my Reports F-2005-003[39] and F-2006-002[40], with the following principle resulting: an agreement where the public body contributed significantly to its terms would not qualify under this exemption because it is

[38] Supra note 7 at p.102.
[39] SK OIPC Report F-2005-003 at [12-21].
[40] SK OIPC Report F-2006-002 at [34-73].

the result of negotiation between the parties and was also largely based on the criteria set out by the public body in its request for proposals.

[98] The one document of Record 1 on which this exemption was cited does not survive this initial test. The information contained in that document is reference check information provided by other public bodies, either other local authorities or government institutions. As concluded in my Report F-2010-001, LA FOIP and FOIP must be read together in order to achieve a reasonable and consistent result.[41] Thus the definitions of third party in each statute result in neither a local authority nor a government institution being a third party. This then concludes the inquiry for that document of Record 1.

[99] One other basic criterion is that there must be an expectation of confidentiality. In my Reports F-2006-002 and F-2006-001 I fully considered this component, including the issue of implicit versus explicit confidentiality.[42]

[100] As briefly discussed above in [29], for the severed documents that make up Record 3 it is not clear on the face of the record or in the limited submissions we received from the City who the third parties are, let alone whether the information at issue was supplied in confidence. Thus, I need not go any further as regards section 18(1)(b) for those documents.

[101] Only the EOI submissions remain for consideration under section 18(1)(b).

[102] Having considered the principles and guidelines on the issue of an expectation of confidentiality, I concluded in my Report F-2006-002 that there was indeed an implicit expectation of confidentiality:

> Even though [the public body] failed to provide explicit evidence of an expectation of confidentiality from the third parties, I find that burden of proof has been met by [the public body]. I have come to this conclusion after a careful review of all of the circumstances before me. I was impressed with the consistent and specific

[41] SK OIPC Report F-2010-001 at [91-95].
[42] SK OIPC Reports F-2006-002 at [50-72] and F-2006-001 at [73-77].

> representations by [the public body] in its literature, forms and documents that information supplied by third parties or obtained by [the public body] from third parties would be kept confidential. I also have given considerable weight to the nature of the business of [the public body] and the importance of confidentiality in that business when it comes to receiving, testing and reporting on soil or water samples for commercial clients, whether private or public.[43]

[103] In my Report F-2005-003, I referenced a decision from one of my predecessors, Report 96/002:

> Insofar as the clause in the Contract dealing with non-disclosure is concerned, in my opinion such a clause, to the extent that it is contrary to the provisions of the Act, can be of no effect. **It is not competent for a government institution, in my view, to enter into a contract of non-disclosure with respect to records or information which it would otherwise be required to disclose** pursuant to the provisions of the Act. Indeed, the wording of the non disclosure clause seems to recognize this.[44]
>
> [emphasis added]

[104] In this case, we have a similar situation. In the City's Request for Expressions of Interest (REOI), the following statement is made:

> It is the intent that the content of the submissions and names of the unsuccessful proponents will be confidential. Proponents should be aware however that the City is subject to the *Local Authority Freedom of Information and Protection of Privacy Act*.

[105] The REOI also indicates that the submissions should be provided to the City in a sealed envelope and that certain portions of the submission should be marked as "confidential". However, upon review of the EOI submissions very few pages are actually marked as confidential.

[106] The issue of a third party supplying documents in confidence to a public body is discussed in my office's pamphlet, *A Contractor's Guide to Access and Privacy in Saskatchewan*:

> Records you create or submit to a public body, even though you may have intended it to be confidential, may be disclosed under the Acts if it is requested by a member of

[43] SK OIPC Report F-2006-002 at [71].
[44] SK OIPC Report F-2005-003 at [32].

> the public. This may include information in proposals, as well as contracts with the public body, unless the information falls within one of the exemptions to disclosure permitted by the Acts.
> …
> It is your responsibility to demonstrate that disclosing the requested record could harm your business interests. You should undertake a line-by-line review of the documents in question and provide a detailed explanation to prove that releasing all or part of these documents could be harmful to you. You may wish to seek legal counsel in doing so.

[107] Having considered all of the above, I am unable to determine that the EOI submissions were submitted to the City in confidence. The only evidence I received from either the third parties or the City was that contained in the City's REOI, as just discussed. This does not provide sufficient evidence to establish that the information was supplied in confidence. As such, having made this determination, it is not necessary to go on to consider the other criteria of section 18(1)(b).

[108] Thus, the burden of proof was not met for any of the documents withheld on the basis of this exemption and the documents should be released.

7. Did the City properly apply section 18(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld or severed records in question?

[109] Section 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; or

[110] This exemption was cited for the EOI submissions as well as two of the documents that make up Record 3.

[111] This provision has a harms test component. In my Report F-2005-003, after considering a test developed in Alberta and modifying it to reflect the wording of our FOIP, I set out the following test:

> The three part test that should be applied in Saskatchewan consists of the following elements: (a) there must be a **clear cause and effect relationship** between the disclosure and the harm which is alleged; (b) the harm caused by the disclosure **must be more than trivial or inconsequential**; and (c) the **likelihood** of harm **must be genuine and conceivable.**[45]
>
> [emphasis added]

[112] In my Report LA-2009-001, after considering the above three part test, I made the following conclusion:

> In terms of applying the above noted three part test, I am of the view that the **likelihood of harm is conceivable as any grant process is in itself a competitive process**. What is likely is that if one grant applicant had access to another's, he/she could use it to his/her advantage supplementing or making revisions to his/her own application which could in turn alter the outcome. Therefore, I find that the cause and effect relationship is clear, the harm that may result would be more than trivial or inconsequential, and the likelihood of the harm resulting is plausible.[46]
>
> [emphasis added]

[113] I also addressed section 18(1)(c) of LA FOIP in my Report LA-2007-001:

> In Report 2001/047 section 18(1)(c) of the Act was considered by this office. A former Commissioner found that the disclosure of the information exempted by the University of Saskatchewan in that case could reasonably be expected to result in financial loss to, prejudice the competitive position of, or interfere with the contractual or other negotiations of a third party. He noted that in view of differences in the Act from other provinces' access legislation it is **not necessary to find that these expected results be "significant" or "undue"**. ... He further concluded that disclosing portions of the Coca Cola agreement with the University could reasonably be expected to interfere with future negotiations involving the third party and to

[45] *Ibid.* at [35].
[46] SK OIPC Report LA-2009-001 at [78].

> impact upon the third party's financial well-being if the information was released to a direct competitor.[47]
>
> [emphasis added]

[114] Ultimately, reliance on section 18(1)(c)(i) as authority for exemption requires that the party citing that exemption must demonstrate that a "reasonable expectation of harm" exists if the information at issue is disclosed. I have considered the reasonable expectation of harm in my Report F-2004-007.[48]

[115] In all cases for which this exemption was cited, I received no evidence that would satisfy the harms test of this exemption. Thus, the burden of proof was not met for any of the documents withheld on the basis of this exemption and those documents should be released.

[116] However, I note that there are portions of the EOI submissions which contain what may be the personal information of individuals, as defined in section 23(1) of LA FOIP.[49] As such, pursuant to section 28(1) of LA FOIP below, that personal information should be severed.

> **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.

8. Did the City properly apply section 15(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?

[117] This exemption states as follows:

> **15**(1) A head may refuse to give access to a record that:
>
> (a) contains a draft of a resolution or bylaw;

[47] SK OIPC Report LA-2007-001 at [147].
[48] SK OIPC Report F-2004-007at [26-38].
[49] Subsection 23(1)(b) states that the following is included in the definition of personal information: "(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved".

[118] In the City's Index the only comments made in relation to this exemption was that the document is a "draft resolution or bylaw".

[119] Of the documents for which this exemption was cited, only three documents of Record 1 have not already been found to be exempt under other provisions. Of those three documents, it is clear on the face of the record and the simple wording of the provision that the exemption does not apply. Section 15(1)(a) clearly only applies to draft resolutions or bylaws. The three documents in question all relate to resolutions that were passed; thus the exemption cannot apply.

9. Did the City properly apply section 15(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld records in question?

[120] Section 15(1)(b) states as follows:

> **15**(1) A head may refuse to give access to a record that:
>
> …
>
> (b) discloses agendas or the substance of deliberations of meetings of a local authority if:
>
> (i) an Act authorizes holding the meetings in the absence of the public; or
>
> (ii) the matters discussed at the meetings are of such a nature that access to the records could be refused pursuant to this Part or Part IV.

[121] Many documents of Record 1 were withheld on the basis of this exemption. The Index from the City states that the documents were either "submitted to" or are "from" an "in camera meeting". That was the totality of the City's submissions for this exemption.

[122] I have not previously considered this exemption, but I take some guidance from a decision from the Ontario IPC which set out the following three criteria:

> In order to qualify for exemption under section 6(1)(b), the Township must establish that:
>
> 1. a **meeting** of a council, board, commission or other body or a committee of one of them **took place**; and

> 2. that a **statute authorizes** the holding of this meeting in the absence of the public; and
>
> 3. that disclosure of the record at issue **would reveal the actual substance of the deliberations** of this meeting.
> [Orders M-64, M-98, M-102, M-219 and MO-1248][50]
>
> [emphasis added]

[123] The conclusion on this exemption is similar to the last one in that the plain wording of the exemption requires evidence that the information in the record involves a meeting of the local authority that was authorized to be held in camera. I received no evidence from the City to establish that the meetings in question were authorized to be held in camera. Thus, the burden of proof was not met for any of the documents withheld on the basis of this exemption.

V FINDINGS

[124] I find that sections 18(1)(a), 18(1)(b), 18(1)(c), 15(1)(a) and 15(1)(b) of LA FOIP do not apply to any of the withheld records or portions therein.

[125] I find that the City properly applied sections 16(1)(a), 16(1)(b), 16(1)(c), and 21 of LA FOIP to some of the withheld records.

[126] I find that certain portions of the EOI submissions contain the personal information of third parties and should be severed pursuant to section 28(1) of LA FOIP.

[127] I find that in many cases the City did not meet its burden of proof under section 51 of LA FOIP to establish that access to the requested records should be denied.

[50] IPC Ontario Order MO-1714 Appeal MA-020290-1 at p.11.

VI RECOMMENDATIONS

[128] I recommend that the City review the analysis and guidance contained within this Report and determine which documents, or portions of, do not qualify for the cited exemptions and release those documents to the Applicant.

[129] I recommend that the City consider exercising its discretion and decide whether there are indeed actual reasons or a need to withhold or sever any of the documents.

[130] I recommend that the City release to the Applicant the third party documents for which consent to release was given: the document that makes up Record 2 (that being the third party E document), as well as the EOI submission of third party C.

[131] If upon implementation of these recommendations the City requires guidance in applying the exemptions to each document, my office would provide such assistance.

Dated at Regina, in the Province of Saskatchewan, this 2nd day of February, 2011.

R. GARY DICKSON, Q.C.
Saskatchewan Information and Privacy Commissioner