

SASKATCHEWAN
OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER

REPORT LA-2011-002

City of Saskatoon

- Summary:** The Applicant filed an access to information request with the City of Saskatoon (City) pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The request was for the draft audit report on the City's snow and ice program. Although the City cited certain exemptions in its response to the Applicant's request, during the review process all exemptions were withdrawn except for sections 18(1)(b) and (c) of LA FOIP. The Commissioner determined that the information in the draft audit report was not supplied by the Auditor as a third party, but rather the information is the City's own information on its programs and services. Further, with regards to section 18(1)(c), the Commissioner received insufficient evidence from the City and from the Auditor to satisfy the harms test of this exemption. The Commissioner recommended that the draft audit report be released to the Applicant.
- Statutes Cited:** *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1, ss. 16(1)(a), 16(1)(b), 18(1)(b), 18(1)(c), 21(a), and 42(2)(b).
- Authorities Cited:** Saskatchewan OIPC Reports F-2004-007, F-2005-003, F-2006-002, F-2007-007, F-2010-001, LA-2007-001, LA-2009-001 and LA-2011-001.
- Other Sources Cited:** Institute of Internal Auditors: *Contract between the Auditor and the City of Saskatoon Council Policy C02-032, Internal Audit Charter, International Standards for the Professional Practice of Internal Auditing (Standards), Code of Ethics and Practice Advisories.*

I BACKGROUND

- [1] 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 December 21, 2006. The Applicant requested the following:

I would like a complete copy of the terms of reference, including any addendums, for the snow and ice program audit that was undertaken by [the Auditor], as well as a copy of the first draft of their audit report that the City received on or about May 3, 2006.

- [2] The City released a copy of the terms of reference but denied access to the draft audit report. By letter dated January 8, 2007 the City stated as follows:

The process for audits is that only the final version is submitted to the Audit Committee. The Audit Committee does not see any of the draft reports – they are seen only by the affected department manager, during his or her discussions with the Auditor. I have been advised by [the Auditor], the City’s auditor, that it is established industry practice that no one has access to any auditor’s working papers or drafts except by Court Order.

Accordingly, I am denying your request for this record, in accordance with Section 16(1)(a) and (b) of [LA FOIP], in that the record contains advice, proposals, recommendations, analyses and policy options developed by the Auditor for the City, and the record would also disclose consultations and deliberations involving officers and employees of the City.

- [3] By letter dated January 17, 2007 the Applicant requested that my office review the decision of the City.
- [4] On January 23, 2007 my office provided notification to the City and to the Applicant that this Review file had been opened. We requested that the City provide my office with a copy of the record that would be responsive to the subject access request, as well as the City’s submission on the exemptions cited.

¹*The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c.L-27.1 (hereinafter LA FOIP).

[5] By letter dated January 29, 2007 the City provided a copy of the first draft of the audit report to my office. The submissions made at that time were as follows:

We are not disclosing this audit report in accordance with the following provisions of [LA FOIP]:

- Subsection 16(1)(b) – The draft audit report is part of a consultation process that takes place between the auditor and management. There is a lot of back-and-forth that occurs, and there are several draft audits that are prepared based on these consultations. Only the final audit report is formally submitted to the City (i.e. City Council’s Audit Committee.)
- Subsection 21(a) – The draft audit report contains information that was in the process of being reviewed by and discussed with the City’s Solicitor and subject to solicitor-client privilege.
- Subsection 16(1)(a) – The draft audit report contains analyses, recommendations and policy options developed for the City by the auditor.

[6] On October 6, 2008 my office provided the City with our preliminary analysis on the above three exemptions. We indicated that based on our research and analysis thus far that the portions of the draft audit report titled ‘Conclusions and Recommendations’ would qualify as advice and recommendations pursuant to section 16(1)(a) of LA FOIP. In relation to section 16(1)(b) of LA FOIP we stated that it was unclear whether the Auditor would qualify as an “officer” of the local authority, which is part of the exemption under section 16(1)(b). As such we would require additional submissions from the City to provide an appropriate response to this question. Lastly, we indicated that it appeared no portions of the draft audit report would qualify under section 21(a), solicitor-client privilege. We stated that the City could file further submissions to support the cited exemptions, or bring to our attention other portions of the record that might qualify as advice and recommendations.

[7] The City responded on October 16, 2008 stating "...I was wrong in viewing the internal auditor² as an officer of the [City] ... Section 16(1)(b) does not apply in this case". The City then raised section 18(1)(b) as a new exemption, and continued to refuse to release the record.

The auditor, as a third party, submitted the draft audit in confidence to the City. Section 18(1)(b) therefore applies, since this document contains financial, technical and labour relations information that was supplied in confidence to the local authority by a third party. I have contacted the auditor and he has refused to allow the City to release any portion of the document.

Accordingly, our position is that we will not release any portion of the draft document. This is very important to us as we would likely not have any auditing firms bid on providing audit services if we could not assure them that their draft documents would be kept confidential.

[emphasis added]

[8] We wrote to the City on November 19, 2009. We stated that although section 18(1)(b) was being raised for the first time at this late stage of the Review process, because it is a mandatory exemption we would consider it. However, we noted that since the City's submission on this exemption consisted only of the remarks quoted above, we would need more from the City to meet its burden of proof.

[9] The City responded by way of letter dated December 17, 2009 to our November 19, 2009 correspondence as follows:

I recognize that I have not done a good job in explaining our position, so I will try again. I do not have the resources, however, to search decisions of the Saskatchewan Commissioner or those from other jurisdictions. I can only advise as to our requirements and to the professional advice provided to me by our Internal Auditor.

²The name "Internal Auditor" refers to the fact that the audit relates to internal activities and programs, not that the Auditor is internal. Internal Auditing is defined on the web-site of The Institute of Internal Auditors as: "Internal Auditing is an independent, objective assurance and consulting activity designed to add value and improve an organization's operations. It helps an organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes." Available at <http://www.theiia.org/theiia/about-the-profession/internal-audit-faqs/?i=1077>.

- [10] In addition to some submissions to support its position, the City also provided a copy of the contract with the Auditor and the City of Saskatoon Council Policy C02-032, *Internal Audit Charter*. In this December 17, 2009 letter from the City a further mandatory exemption, 18(1)(c), was raised although not earlier raised in its section 7 response to the Applicant.
- [11] By letter dated February 26, 2010 my office wrote to the City. We noted that the City had not responded to our preliminary analysis on sections 16(1)(a) and 21(a) that was provided on October 6, 2008.
- [12] The City responded on March 11, 2010 indicating that: “...**I am refusing to release the report solely in accordance with section 18(1)(b) and (c)**. I therefore have no comments regarding the applicability of section 16(1)(a) and 21(a).” [emphasis added]
- [13] By letter dated March 17, 2010 my office provided the Applicant with a copy of the City’s submissions. We drew to the Applicant’s attention that the City had indicated that it was relying solely on sections 18(1)(b) and (c) as the basis for its decision to withhold the draft audit report. We also indicated: “Therefore, the exemptions previously relied on, sections 16(1)(a), (b) and 21(a), appear to no longer be at issue.”
- [14] In response to a request from my office the City provided a copy of the final version of the audit report on August 9, 2010. The City stated that the final report of the Auditor was submitted to City Council on December 18, 2006, at which time it became a public document.
- [15] We then contacted the Auditor, as the third party identified by the City as having an interest in the draft audit report. By letter dated August 10, 2010 we summarized the City’s position on this access request, cited the applicable legislation, provided some guidance in how to research the exemptions, and requested his submission. This was done in accordance with section 42(2)(b) of LA FOIP, which allows a third party to make representations to my office during the course of a review.

[16] On August 25, 2010 my office received a submission from the Auditor, which included arguments to support withholding the draft audit report. In addition, the Auditor provided copies of various materials from his professional association, the Institute of Internal Auditors (IIA).

II RECORD AT ISSUE

[17] As previously noted, the record at issue is a draft audit report prepared by the Auditor, in relation to the City's snow and ice program. The draft audit report totals 50 pages and consists of a preface, ten chapters, and various tables and charts. Within seven of the chapters there are sections titled "Conclusion" and "Recommendations". Throughout the draft audit report there are comments in the right hand margin which include remarks instructing the need for follow-up, or of details to be added later.

III ISSUES

- 1. Did the City properly apply section 18(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld record in question?**
- 2. Did the City properly apply section 18(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld record in question?**

IV DISCUSSION OF THE ISSUES

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

[18] The City relied on section 18(1)(b) of LA FOIP in support of its decision to withhold the draft audit report. That 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:

...

(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] This exemption was recently discussed in my Report LA-2011-001 from [95] to [108].³

[20] As discussed in the aforementioned report, one of the fundamental criteria of this exemption is that the information must have been supplied by a third party. I have followed the principle in other reports that where the public body has contributed significantly to the content of the record at issue, the information was not supplied by the third party.

[21] The draft audit report is an audit of the City's programs and services related to snow and ice management. The factual information contained within the draft audit report is the City's information. The draft audit report's introduction states that relevant information and documents are provided by the City, include Auditor interviews of management and staff of the City, and reviews of current service levels by the Auditor. All of these steps involve acquiring data from the City.

[22] Another step identified in the introduction involves internet research and surveying other cities as to common practices. Again, this would not be information supplied by the third party, the Auditor, but rather would either come from publicly available sources or be supplied by other municipalities.⁴ This information then formed the basis of the Auditor's review, including his conclusions and recommendations.

[23] Included in the materials provided by the Auditor were excerpts from the IIA's *International Standards for the Professional Practice of Internal Auditing (Standards)*,

³See Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Report LA-2009-001 and for a look at its equivalent provision, 19(1)(b), in *The Freedom of Information and Protection of Privacy Act* (hereinafter FOIP) also see Reports F-2005-003, F-2006-002 and F-2010-001, available at www.oipc.sk.ca/reviews.htm.

⁴In my Report F-2010-001, I determined that a 'local authority' could not constitute a 'third party' for purposes of FOIP or LA FOIP. See [87] to [94] of that Report for a full discussion of this issue, available at www.oipc.sk.ca/reviews.htm.

Code of Ethics and *Practice Advisories*. The Auditor also made general reference to access to information legislation from other jurisdictions which exempt incomplete audit reports or final audits that relate to the performance or efficiency of a public body or any of its programs or policies. The Auditor suggested that other jurisdictions treat the same kind of material as exempt but such a claim is unsupported by focused argument tied to any specific statutory provisions in those other jurisdictions.

[24] It is noteworthy that the provisions in the IIA's *International Standards for the Professional Practice of Internal Auditing (Standards)*, *Code of Ethics* and *Practice Advisories* (collectively referred to as the IIA Guidelines)⁵ make reference to the confidentiality of the information in relation to the organization for which the audit is being completed. For example, in section 2330.A1 of the *International Standards for the Professional Practice of Internal Auditing (Standards)*⁶, reference is made to the Auditor obtaining approval from the organization for any disclosure of records. There is also reference in the *Practice Advisories* to the "organization's records" and that the "engagement records or working papers are the property of the organization." [emphasis added] Furthermore, the IIA's policies regarding access to records varies "depending on the nature of the organization, practices followed in the industry and access privileges established by law." [emphasis added] References are consistently made to the organization's role in maintaining control over the audit records, and having the responsibility to give approval for any release of records. Overall, the IIA Guidelines only address confidentiality as it relates to the responsibilities of the Auditor in keeping the organization's information confidential.

[25] I conclude that the information in the draft audit report was not supplied by a third party. As this criterion is not met, there is no need to consider the other criteria in section 18(1)(b) of LA FOIP. This includes the question of whether the draft audit report was

⁵Institute of Internal Auditors, *International Standards for the Professional Practice of Internal Auditing (Standards)*, *Code of Ethics* and *Practice Advisories*, available at www.theiia.org/.

⁶Institute of Internal Auditors, *International Standards for the Professional Practice of Internal Auditing (Standards)*, section 2330.A1, available at <http://www.theiia.org/guidance/standards-and-guidance/ippf/standards/?search=standards>.

provided to the City in confidence. Therefore, although the City argued that the draft audit report is a confidential working paper file of the Auditor, it is not necessary to consider the “in confidence” criterion of the exemption.

[26] Therefore, the draft audit report does not qualify for the exemption under section 18(1)(b).

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

[27] The City also relied on section 18(1)(c) of LA FOIP to justify withholding the draft audit report. That 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:

...

(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;

[28] This exemption was also discussed in my recent Report LA-2011-001 from [109] to [116].⁷

[29] In order for this exemption to apply to the draft audit report, it needs to be established that there is a reasonable expectation that one of the harms set out in the subsection may occur if the record is released. Arguably, this exemption also can only apply if we are dealing with third party information, which as addressed above is not the case with the subject record. However, as the wording in section 18(1)(c) does not strictly have the ‘supplied

⁷See also SK OIPC Reports LA-2007-001 and LA-2009-001, and for the equivalent provision in FOIP, 19(1)(c), look at F-2004-007 and F-2005-003, available at www.oipc.sk.ca/reviews.htm.

by a third party' criterion, I will now consider the arguments we received on this exemption.

[30] The City argued that to release the draft audit report would likely prejudice the competitive position of the Auditor, in that the Auditor could face disciplinary action from his professional body for not following the IIA's Guidelines. No further explanation beyond this was provided.

[31] The Auditor argued that the nature of an audit involves a significant amount of back and forth communication with management. The Auditor stated that because there would be inaccurate information in drafts corrected for the final report, it would not be in the public good for a document with errors, incomplete information, and misrepresentations to be publicly released.

[32] The Auditor also argued that: "[i]f released, I could face disciplinary action from the Institute of Internal Auditors for not following the IIA Professional Standards, Code of Ethics, and Practice Advisories." Further, the Auditor stated that such action would undermine his reputation and competitive position as he could lose his professional designation. He stated that if the draft audit report were released he could not guarantee clients' confidentiality in the audit process.

[33] The Auditor identified the various provisions of the IIA Guidelines that relate to confidentiality and to the use and disclosure of audit documents. However, he did not specify exactly how these provisions support the argument that there would be an effect on his competitive position or result in financial harm if the draft audit report were released.

[34] I reviewed all of the provisions of the IIA Guidelines that were supplied to my office. In addition to the comments above regarding the focus of the IIA Guidelines being on the confidentiality of the organization's information, it is also noted that the IIA Guidelines are general in referring to confidentiality issues and reference is made to "legal obligations" and "access privileges established by law". I did not see anything in the IIA

Guidelines that would indicate that the Auditor would face disciplinary action if the draft audit report were released to the public.

[35] Indeed, as concluded above, since the information that formed the basis of the draft audit report is City information as opposed to information of the Auditor, it is not open to the Auditor to consent to the release of the document. In this case, it is not the Auditor who is making the decision to release or not to release, rather it is the City.

[36] I now turn to the Auditor's argument that he could not guarantee clients' confidentiality in the audit process if this draft was released, and thus he could not get new clients. Indeed, it is the City's status as a local authority subject to LA FOIP that creates a situation whereby the draft audit report may be accessible under LA FOIP. When an Auditor takes on as a client a public body that is subject to LA FOIP or *The Freedom of Information and Protection of Privacy Act*, the Auditor must realize that the work done for that public body may be open to possible public scrutiny. Further, based on the limited argument and evidence presented, I do not see how the possible release of this draft audit report would negatively affect his work with other potential clients.

[37] I received insufficient evidence to satisfy the harms test of this exemption. As such, the burden of proof has not been met for this exemption. Therefore, the draft audit report does not qualify for the exemption under section 18(1)(c).

V FINDINGS

[38] I find that sections 18(1)(b) and 18(1)(c) of LA FOIP do not apply to the draft audit report.

VI RECOMMENDATIONS

[39] I recommend that the City release to the Applicant the draft audit report.

[40] I recommend that the City Clerk become familiar with the Review Reports from this office available at www.oipc.sk.ca/reviews.htm.

Dated at Regina, in the Province of Saskatchewan, this 21st day of November, 2011.

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