

**SASKATCHEWAN**  
**OFFICE OF THE**  
**INFORMATION AND PRIVACY COMMISSIONER**

**REPORT LA-2011-003**

**City of Saskatoon**

**Summary:** The Applicant applied to the City of Saskatoon (City) for certain documents. The City released some responsive records but withheld others citing section 15(1)(b)(i) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) as its authority. The City asserted that it had a right to withhold the records in question as the content had been dealt by its Executive Committee during *in camera* sessions. The Commissioner found that the City did not meet the burden of proof and recommended release of all withheld records.

**Statutes Cited:** *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1, ss. 15(1)(b)(i), 51; *The Cities Act*, S.S. 2002, c. C-11.1, ss. 91(1)(a), 93(1), 93(2), 94(1), 94(2), 94(4), 94(5); *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 6(1)(b).

**Authorities Cited:** Saskatchewan OIPC Reports F-2004-007, F-2005-006, F-2006-004, LA-2007-002, LA-2010-001, LA-2011-001 and 2003/018 and Investigation Reports LA-2005-003 and LA-2010-001; Ontario IPC Orders MO-1714 and MO-1215.

**Other Sources Cited:** Saskatchewan OIPC: *FOIP FOLIO* (September 2004 and November 2005), *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review*; Saskatchewan Ministry of Municipal Affairs: *Municipal Council Meeting Guide*.

## I BACKGROUND

[1] The Applicant submitted an undated access to information request to the City of Saskatoon (City) for the following:

- Copy of July 14, 2004 letter and enclosures by [the Manager, Special Projects] to [the Communications Specialist] of Infrastructure Canada re: South Downtown Project
- Copy of October 7, 2004 letter by [the City Manager] to [the Communications Specialist] re: CSIF Program and A.L. Cole Site
- Copies of all City Administrative Documents and Records between December 1, 2004 and June 20, 2005, inclusive, regarding Western Economic Diversification and the Federal Centennial Funding Issue

[2] On or about June 20, 2005, the City acknowledged receipt of the Applicant's request but did not state the date on which it was received.

[3] By way of letter dated July 21, 2005, the City advised the Applicant that it was releasing certain documents to him, but withholding the following:

In accordance with subsection 15(1)(b)(i) of *The Local Authority Freedom of Information and Protection of Privacy Act*, I am withholding additional material that relates to matters that were dealt with during in camera portions of the Executive Committee.

[4] In the Applicant's letter to us dated July 25, 2005 he requested a review of the matter as follows:

The City is also withholding material that was dealt with by its Executive Committee.

...

As for the material dealt with by the Executive Committee the City did not say under which part of the Act the information was being withheld.

[5] My office provided notice to the parties on or about August 3, 2005 that my office intended to undertake a review.

## **II RECORDS AT ISSUE**

[6] The City provided us with copies of those documents not released to the Applicant along with a cover letter dated October 19, 2005. Included was a copy of the *South Downtown Federal Interim Due Diligence Report* (later released to the Applicant in full; see City's letter to our office dated June 20, 2006) and a "Package of information relating to In Camera meetings of City Council's Executive Committee."

[7] The responsive record consists of a variety of different types of documents such as memorandums (memos), letters, emails, excerpts from minutes, concept plans, news items totaling 84 pages. Some documents are marked in camera financial matter or land issue, others "(In Camera)", but not all have one or the other marking. The record also consists of many documents containing excerpts from various meetings of the Executive Committee held on a number of different occasions and letters with attachments provided by various parties to the Executive Committee for their information. Some of the documents are duplicates (i.e. pages 9-11 appear to be copies of pages 12-14).

## **III ISSUES**

- 1. Is the City able to rely on discretionary exemptions raised for the first time at the review stage?**
- 2. Did the City properly apply section 15(1)(b)(i) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the withheld record in question?**

#### IV DISCUSSION OF THE ISSUES

##### 1. Is the City able to rely on discretionary exemptions raised for the first time at the review stage?

[8] I have found previously that the City is a local authority for purposes of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).<sup>1</sup>

[9] In its first submission to our office dated October 19, 2005, the City introduced new discretionary exemptions as follows:

Package of information relating to In Camera meetings of City Council's Executive Committee. Not released in accordance with section 15(1)(b)(i) of the *LAFOIPPA Act*. The meetings of the Executive Committee were held in camera in accordance with *The Cities Act*, and the reasons for doing so fall under sections 16(a), (b), (c) and (e) of the *AFOIPP Act* [sic].

[10] As the only section of LA FOIP referenced in the City's section 7 response to the Applicant was section 15(1)(b)(i) of LA FOIP, we responded as follows to the City:

We note in your above noted submission, that you raise new discretionary exemptions not raised at the time you originally responded to the Applicant's request on July 21, 2005. Our practice is not to consider new discretionary exemptions once the review has begun unless there is no prejudice to the Applicant. In this regard we refer you to page 3 of our September 2004 e-newsletter, the FOIP Folio available on our website: [www.oipc.sk.ca](http://www.oipc.sk.ca). We also addressed this issue in one of our past Reports. Enclosed is the relevant paragraph of that Report for your review. We invite your submissions on that question.<sup>2</sup>

[11] By way of letter dated April 7, 2006 the City provided the following response:

You indicate in your letter that I have raised new discretionary exemptions not raised in my response to the applicant on July 21, 2005. I disagree. ... The information relating to meetings of City Council's Executive Committee were not released because the meetings were held in camera in accordance with the Act, and I advised him of this as well.

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<sup>1</sup>Office of the Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Report LA-2010-001 at [18], and Investigation Reports LA-2010-001 at [11] and LA-2005-003 at [11], available at [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

<sup>2</sup>Letter from SK OIPC to the City of Saskatoon (City) City Clerk dated March 8, 2006.

[12] On or about May 26, 2006, my office provided this response to the City:

In response, we enclose a copy of the City's July 21, 2005 letter to the Applicant. We note that the only exemption that is referenced is "*subsection 15(1)(b)(i) of The Local Authority Freedom of Information and Protection of Privacy Act.*" If in fact the City provided the Applicant with another written response within the 30 day response deadline with additional exemptions cited, we would appreciate a copy. In absence of this, we are unclear as to how you are able to draw this conclusion as ... *The Local Authority Freedom of Information and Protection of Privacy Act* ("the Act") requires that "*the head shall give written notice to the applicant within 30 days after the application is made: (d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based.*" (emphasis in original)

[13] The City responded in turn as follows:

There is no other letter to the applicant, apart from the one dated July 21, 2005. This letter did explain the reasons for the refusal but did not refer to a specific provision in the *Act*. I recognize that the *Act* requires both a reason for a refusal and a reference to the specific provision of the *Act*, and that this was not done in this case. The point of my letter to you on April 7, 2006, was merely that I had not raised any new arguments, because I had articulated them to the applicant.<sup>3</sup>

[14] Those sections of LA FOIP raised by the City after the review was initiated are 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;
- (b) consultations or deliberations involving officers or employees of the local authority;
- (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;

...

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<sup>3</sup>Letter from the City to SK OIPC dated June 20, 2006.

(e) information, including the proposed plans, policies or projects of the local authority, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.<sup>4</sup>

[15] Even if a paraphrase of the statutory provision would be sufficient for purposes of a section 7 response, and I find it would not be, the description proffered by the City at [3] does not accurately reflect section 16.

[16] In the November 2005 issue of the *FOIP FOLIO*, we provided the following advice to our readers:

Just a reminder that if you are a FOIP Coordinator for a Saskatchewan public body, it is important when you first respond to someone seeking access to records you should claim all of the discretionary exemptions that you believe should apply. In a Federal Court of Appeal decision, the court stated

“I recognize that the case law suggests that a government institution ought to claim the relevant exemptions at the initial stage; at least insofar as nonmandatory exemptions are concerned (see *Davidson v. Canada* [1989] 2 F.C. 341 and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [1999] F.C.J. No. 522 (Q.L.))”<sup>5</sup>

[17] In my Reports F-2004-007, F-2005-006, F-2006-004 and LA-2007-002 as well as in my office’s publication *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review*, I reiterated the above noted position.<sup>6</sup>

[18] For all the above noted reasons, I will not consider the late introduction of new discretionary exemptions raised by the City during the review process (i.e. sections 16(1)(a), (b), (c) and (e) of LA FOIP). The only exemption therefore applied by the City that is under consideration in this Report is section 15(1)(b)(i) of LA FOIP.

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<sup>4</sup>*The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-1991, c. L-27.1 (hereinafter LA FOIP), s. 16(1)(a),(b),(c) and (e).

<sup>5</sup>SK OIPC FOIP FOLIO (November 2005), p. 2, available at [www.oipc.sk.ca/newsletters.htm](http://www.oipc.sk.ca/newsletters.htm).

<sup>6</sup>SK OIPC Reports F-2004-007 at [16], F-2005-006 at [6], F-2006-004 at [18], and LA-2007-002 at [16] and [22]. *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* states at p. 8 “Our practice is that we will not normally consider a new discretionary exemption once we commence our review unless the public body/trustee can demonstrate that this will not prejudice the applicant.” All available at [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

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

[19] The applicable section of LA FOIP is 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; ...

[20] I am mindful of former Commissioner Rendek's Report 2003/018. His decision turns however on a different combination of statutory provisions. He considered section 15(1)(b)(ii) and sections 16(1)(a) and (b) of LA FOIP.

[21] The City did not make reference to any applicable section(s) of *The Cities Act*<sup>7</sup> or any other law that would authorize it to hold the *in camera* meetings in question. Further, the City provided no evidence as to the make-up, delegated authority or the mandate of the Executive Committee.

[22] The closest provision I found in another jurisdiction to that of our section 15(1)(b)(i) for the sake of comparison is section 6(1)(b) from Ontario's *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA).

6(1) A head may refuse to disclose a record,

...

(b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.<sup>8</sup>

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<sup>7</sup>*The Cities Act*, S.S. 2002, c. C-11.1.

<sup>8</sup>*Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 6(1)(b).

[23] The Ontario exemption was considered in Order MO-1714 by Adjudicator Frank De Vries and by Ontario Assistant Commissioner Tom Mitchinson in Order MO-1215.<sup>9</sup> Those Orders describe a three part test to qualify for exemption under section 6(1)(b) of MFIPPA:

In order to qualify for exemption under section 6(1)(b), the institution 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.

[24] The burden of proof in Ontario is on the municipality to provide sufficient evidence to establish that the municipality's meeting in question was a properly constituted *in camera* meeting of the municipality or one of its committees.

[25] The Ontario Orders established that a municipality seeking to rely on this exemption must provide information concerning when any *in camera* meetings were held, or whether any such meetings were properly constituted *in camera* meetings and details of the subject matter or substance of the deliberations of such meeting.

[26] I choose to adopt the above described three part test in applying section 15(1)(b)(i) of LA FOIP and I accept the approach followed by the Office of the Ontario Information and Privacy Commissioner.<sup>10</sup>

[27] In its section 7 response to the Applicant, the City noted: "...I am withholding additional material that relates to matters that were dealt with during in camera portions of Executive Committee."

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<sup>9</sup>Information and Privacy Commissioner of Ontario Orders MO-1714 at p. 11 and MO-1215 at pp. 11-12, available at [www.ipc.on.ca](http://www.ipc.on.ca).

<sup>10</sup>Also see SK OIPC Report LA-2011-001 at [120] to [123], available at [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).



[28] When our office advised the City that “[y]ou have not offered much in the way of an argument in order to meet that burden”<sup>11</sup>, instead of providing a fuller submission, the City opted only to restate its previously noted position that “[t]he information relating to meetings of City Council’s Executive Committee were not released because the meetings were held in camera in accordance with the Act, and I advised him [the Applicant] of this as well.”<sup>12</sup>

[29] On May 26, 2006, my office advised the City as follows: “Additionally by letter dated March 8, 2006, we requested the following: ‘You have not offered much in the way of an argument in order to meet that burden. If you are planning on offering further arguments, let us know at your earliest convenience.’” By way of letter June 20, 2006, the City responded: “I have no further arguments to make...”.

[30] I noted in *The Cities Act* those sections that speak to the circumstances in which meetings may be held in public or *in camera* are as follows:

**Inspection of municipal documents**

**91(1) Any person is entitled at any time during regular business hours to inspect and obtain copies of:**

(a) any contract approved by the council, any bylaw or **resolution** and any account paid by the council relating to the city;

...

**Actions in public**

**93(1)** An act or proceeding of a council is not effective unless it is authorized or adopted by a bylaw or a resolution at a duly constituted public meeting of the council.

**(2) An act or proceeding of a council committee is not effective unless it is authorized or adopted by a resolution at a duly constituted public meeting of the committee or council.**

...

**Meetings to be in public, exceptions**

**94(1) Subject to subsections (2), (3) and (4), councils and council committees are required to conduct their meetings in public.**

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<sup>11</sup>*Supra* note 2 at [10].

<sup>12</sup>Letter from the City to SK OIPC dated April 7, 2006.

(2) Councils and **council committees may close all or part of their meetings to the public if the matter to be discussed is within one of the exemptions in Part III of *The Local Authority Freedom of Information and Protection of Privacy Act*.**

...

(4) **Every council may meet in meetings closed to the public for the purpose of long-range or strategic planning, but no business may be transacted at that meeting.**

(5) When a meeting is closed to the public, no bylaws may be passed at the meeting.<sup>13</sup>

[emphasis added]

[31] For more on council procedures, I considered resources produced by the Saskatchewan Ministry of Municipal Affairs. This particular resource speaks to acts of committees of council as follows:

**Any act of a committee is not effective until the recommendation is decided by council, unless council has provided the committee with operational authority.**

Certain powers of a council are discretionary which means council has the option of whether or not to carry out that particular function. Other duties are mandatory requiring council to perform the function.

...

#### *Closed Sessions*

The exemptions listed in Part III of LAFOIP include items such as:

- legal matters, including enforcement of bylaws or other laws
- personnel issues
- matters which reasonably impact economic interests of the municipality or other parties.

...

**When members conclude discussion of the topic in the closed session, they adopt an informal motion to rise from the closed session. Legislation requires councils and committees to act in a public forum, and therefore the members must publicly deal with the recommendation from the closed session.** A member puts forward the recommendation as a motion. Further discussion on the matter may occur; however, as there was discussion in private, public discussion will likely be minimal. Following debate, members vote on the question.

...

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<sup>13</sup>Supra note 7 at [21].

Council committees are required to exercise their duties and powers in the same manner as council – at a duly convened meeting. This includes recording minutes approved by the committee, and signed by the presiding officer and the administrator. **Actions of council committees are not effective unless council has delegated authority to the committee or council adopts the committee’s recommendation or decision at a council meeting.**<sup>14</sup>

[emphasis added]

[32] Nothing in the record itself helps me to understand with any certainty what authority the City relied on to hold any of the meetings noted *in camera*. What I can glean from the record is that certain meetings of a City Committee did appear to take place. What is also not evident is if *all* parts of the record were discussed at these meetings. If I cannot establish that the information in question was considered by Committee with proper authority *in camera* I also cannot find that releasing such information to the Applicant would reveal agendas or the actual substance of the deliberations of this committee.

[33] The City must demonstrate that access to the record may or must be refused as the City bears the burden of proof pursuant to section 51 of LA FOIP. However, at no time did the City offer representation as to how it arrived at the conclusion that the withheld information in question constitutes “the substance of deliberations,” nor did it clarify what specific portions of *The Cities Act* or other law authorized it to hold one or all of the meetings in question in the absence of the public. The City must have the requisite authority to hold meetings *in camera*, yet offered nothing to demonstrate that it could and that the records in question were considered during *in camera* deliberations. I therefore find that the City has not met the burden of proof in the circumstances.

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<sup>14</sup>Saskatchewan Ministry of Municipal Affairs, *Municipal Council Meeting Guide* (July 2010); pp. 6-7 and 42, available at [www.municipal.gov.sk.ca/Elections/Training/Council-Meeting-Guide-pdf](http://www.municipal.gov.sk.ca/Elections/Training/Council-Meeting-Guide-pdf).

**V RECOMMENDATION**

[34] In the circumstances, I find that the City has not met the burden of proof and I recommend release of the record in question.

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

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