SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REVIEW REPORT LA-2013-002

City of Regina

Summary: The Applicant made two requests under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) for access to records in the possession of the City of Regina (City) that potentially contained third party business information. The City provided notification to the third party under section 33(1) of LA FOIP and invited the third party to provide its consent to release the records or arguments to support withholding the records in question. The third party did not provide its consent but instead argued that section 18(1)(b) and 18(1)(c) of LA FOIP applied to the records and they should therefore be withheld. Despite section 18(1), the City concluded that release of the records was in the public interest pursuant to section 18(3) and advised the third party and the Applicant of its intention to release the records. The third party proceeded to submit a request for review to the Office of Saskatchewan Information and Privacy Commissioner (OIPC) of the decision of the City in regards to both access requests. The Applicant also requested a review of the same as the City withheld other portions of the record under section 28(1) of LA FOIP. The Commissioner found that neither sections 18(1)(b) or 18(1)(c) applied to the records in question for both access requests. The Commissioner also found that section 28(1) did not apply to any of the information severed by the City with respect to the first access request. The Commissioner recommended the City release everything withheld in full or in part for both access requests 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. 2(f)(i), 2(k), 18(1)(b), 18(1)(c), 18(3), 23(1)(b), 23(1)(e), 23(1)(k), 28(1), 33, 35, 38; *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01; Alberta's *Personal Information Protection Act*, S.A. 2003, c. P-6.5.

Authorities Cited: Saskatchewan OIPC Review Reports F-2005-003, F-2006-002, F-2008-001, LA-2009-001, F-2010-001, LA-2011-001, LA-2011-002, F-2012-001/LA-2012-001, F-2012-003; British Columbia IPC Order F11-08; Ontario IPC Orders PO-2558.

Other Sources Cited: Office of the Information Commissioner of Canada, *Investigator's Guide to Interpreting ATIA*; Co-published by Elizabeth Wilcox and Alberta Queen's Printer, *Annotated Alberta Freedom of Information and Protection of Privacy Act*, January 2005 update.

I BACKGROUND

[1] This Report addresses three review files involving two separate access requests made by the Applicant (#2010G-09 and #2010G-15). Both access requests involve the same parties, similar records and the application of sections 18(1)(b), 18(1)(c) and 18(3) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).[1] However, one access request also involved the application of section 28(1) of LA FOIP.

Access Request #1: (#2010G-09)

[2] The Applicant submitted an access to information request (#2010G-09) to the City of Regina (City) requesting a number of records on or about May 17, 2010. The records requested appear to be largely environmental studies containing results of groundwater and/or soil testing related to specific sites in the City.

[3] The City identified that the responsive records involved a third party and proceeded to provide notice on or about June 10, 2010 to it pursuant to section 33 of LA FOIP. The third party was given 20 days in keeping with section 35 to make representation to the City regarding the release of the records in question.

[4] Sections 33 and 35 of LA FOIP provide as follows:

> **33**(1) Where a head intends to give access to a record that the head has reason to believe may contain:

[1] *The Local Authority Freedom of Information and Protection of Privacy Act,* S.S. 1990-91, c. L-27.1.

(a) information described in subsection 18(1) that affects the interest of a third party; or

(b) personal information that may be disclosed pursuant to clause 28(2)(n) and that relates to a third party;

and, in the opinion of the head, the third party can reasonably be located, the head shall give written notice to the third party in accordance with subsection (2).

(2) The notice mentioned in subsection (1):

(a) is to include:

(i) a statement that:

(A) an application for access to a record described in subsection (1) has been made; and

(B) the head intends to give access to the record or to part of it;

(ii) a description of the record that the head has reason to believe may contain:

(A) information described in subsection 18(1) that affects the interest of the third party; or

(B) personal information that may be disclosed pursuant to clause 28(2)(n) and that relates to the third party; and

(iii) a statement that the third party may, within 20 days after the notice is given, make representations to the head as to why access to the record or part of the record should not be given; and

(b) subject to subsection (3), is to be given within 30 days after the application is made.

(3) Section 12 applies, with any necessary modification, to the extension of the period set out in clause (2)(b).

(4) Where, in the opinion of the head, it is not reasonable to provide a notice to a third party pursuant to subsection (1), the head may dispense with the giving of notice.
…

35(1) A third party who is given notice pursuant to subsection 33(1):

(a) is entitled to make representations to the head as to why access to the record or part of the record should not be given; and

> (b) within 20 days after the notice is given, shall be given the opportunity to make those representations.
>
> (2) Representations made by a third party pursuant to clause (1)(b) shall be made in writing unless the head waives that requirement, in which case they may be made orally.[2]

[5] On June 23, 2010, the third party made representation to the City opposing the release of the records citing section 18(1)(b) and 18(1)(c) of LA FOIP.

[6] On July 6, 2010, the City advised the third party that after considering the third party's arguments it found that those arguments were not persuasive. The City indicated that it intended to release the records pursuant to section 18(3) as the records could "reasonably be expected to be in the public interest as it relates to public health, safety and protection of the environment and would outweigh any harm as presented" by the third party. The City advised the third party that pursuant to subsections 38(3) and 38(4) it had the right to request a review by my office within 20 days of receipt of the City's letter. Section 38 of LA FOIP provides as follows:

> **38**(1) Where:
>
> (a) an applicant is not satisfied with the decision of a head pursuant to section 7, 12 or 36;
>
> (b) a head fails to respond to an application for access to a record within the required time; or
>
> (c) an applicant requests a correction of personal information pursuant to clause 31(1)(a) and the correction is not made;
>
> the applicant may apply in the prescribed form and manner to the commissioner for a review of the matter.
>
> (2) An applicant may make an application pursuant to subsection (1) within one year after being given written notice of the decision of the head or of the expiration of the time mentioned in clause (1)(b).

[2] *Ibid.*

> (3) A third party may apply in the prescribed form and manner to the commissioner for a review of a decision pursuant to section 36 to give access to a record that affects the interest of the third party.
>
> (4) A third party may make an application pursuant to subsection (3) within 20 days after being given notice of the decision.[3]

[7] The City provided a response to the Applicant on or about July 8, 2010 indicating it intended to release some records not in dispute. However, the City also indicated it would withhold some of the record as it constituted third party personal information as defined by LA FOIP. In terms of the third party business information, the City advised the Applicant that it had taken the third party's representation into consideration and had decided to release the information in question "as it is expected to be in the public interest as it relates to public health, safety and protection of the environment." The Applicant was further advised that the records however could not be released until the 20 day notification period had lapsed giving the third party opportunity to request a review.

[8] On July 21, 2010, the third party requested that my office review the matter. Given that the third party requested a review within 20 days, the City was unable to release the record until my office had completed its review.

[9] On January 4, 2011, the Applicant also submitted a request for review to my office.

Access Request #2: (#2010G-15)

[10] The Applicant submitted another access to information request (#2010G-15) to the City requesting access to certain records on July 28, 2010. The records requested are documents containing results of and recommendations pertaining to environmental testing relating to a specific site in the City involving the third party. The City characterized the records as relating to the protection of the environment and public health and safety.

[3] *Ibid.*

[11] The City identified that the responsive records involved the same third party as access request #1 and proceeded to provide it notice on September 17, 2010.

[12] On October 6, 2010, the third party made representation to the City opposing release of the records citing sections 18(1)(b) and 18(1)(c) of LA FOIP.

[13] The City considered the submission provided by the third party and on October 14, 2010 sent a letter to the third party stating the following:

> We have carefully reviewed your representations. While we believe it could be established that these are scientific and technical documents provided implicitly in confidence to the City, we also believe that the arguments you have presented under section 18(1) of The LAFOIPP Act may not be persuasive enough to the OIPC to satisfy the City's burden to prove that the harms were likely to manifest and that the harms outweighed the individual's right to know when the information deals with the condition of the environment, public health and safety.

[14] The City further advised in the letter that pursuant to section 18(3) of LA FOIP "disclosure of the information could reasonably be expected to be in the public interest as it relates to public health, safety and protection of the environment and would likely outweigh any harm as presented" by the third party. The City informed the third party of its intent to release the record and the third party's right to request a review of the matter within 20 days of the City's decision.

[15] On October 20, 2010, the third party requested that my office review this matter.

II RECORDS AT ISSUE

Access Request #1: (#2010G-09)

[16] The records requested in access request #1 include records numbered one to sixty-one by the Applicant.

[17] The City provided its response to the Applicant on July 8, 2010 indicating it was relying on section 23(1)(k) of LA FOIP and stating:

> …
>
> 2. The following records have been granted; however, some of the information has been deleted pursuant to section 8 of *The Local Authority Freedom of Information and Protection of Privacy Act* (The LAFOIPP Act) because it is personal information as defined by The LAFOIPP Act. Access to this information is denied pursuant to section 23(1)(k).
>
> …
>
> 3. Further to my letters of June 4 and June 14, 2010, we have received representations from the third party in regards to the records in question. We have taken the representations into consideration and have decided to release the information as it is expected to be in the public interest as it relates to public health, safety and protection of the environment.
>
> …

[18] As noted above, the City cited section 23(1) of LA FOIP to justify withholding portions of the record from the Applicant.

[19] On January 28, 2011 the City provided a copy of the record, an Index of Records and its submission for our consideration. On its Index of Records, sections 23(1)(b), 23(1)(e) and 23(1)(k) were used by the City to describe what it found to constitute third party personal information. The Index of Records notes that section 28(1) of LA FOIP was applied to portions of the following documents grouped by page numbers as follows: 2; 3-7; 8-9; 11-15; 16-39; 40-44; 48-49; 50-52 and 53. The City indicated that the above noted records were provided to the Applicant with personal information severed.

[20] In terms of any third party business information, the City indicated it intended to release to the Applicant pursuant to section 18(3). On a separate Index of Records, the City listed the third party records one to thirteen consisting of 289 pages. The third party resisted the release of these records pursuant to sections 18(1)(b) and 18(1)(c) of LA FOIP.

[21] The review conducted by my office only involved those line items and pages that the City and/or the third party indicated sections 18(1) and/or 28(1) of LA FOIP may apply.

Access Request #2: (#2010G-15)

[22] The Index of Records provided to my office by the City on November 23, 2010 noted the applicable sections as 18(3)(a) and 18(3)(b) of LA FOIP. At the bottom of the Index of Records, the City noted the following: "The documents have been withheld from the applicant in their entirety pending OIPC review." The responsive record is grouped by document type. The page numbers associated with each document is as follows: 25 to 40; 41 to 73; 74 to 76; 77 to 78; 79 to 82; 83; 84; 85; 86; 88; and 89 to 91. In total, the responsive record appears to consist of 65 pages. However, in regards to pages 88 to 91, the City advised that these pages were "[n]ot to be released pending outcome of OIPC review of **2010G-09** Third Party Request for Review". [emphasis added]

[23] The review conducted by my office regarding this access request only addresses those pages noted above that the third party is resisting release under section 18(1) of LA FOIP.

III ISSUES

1. Does section 18(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* apply to the records in question?

2. Does section 18(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* apply to the records in question?

3. Can the City of Regina rely on section 18(3) of *The Local Authority Freedom of Information and Protection of Privacy Act* to release the records in this case?

4. Did the City of Regina appropriately apply section 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record in question?

IV DISCUSSION OF THE ISSUES

1. Does section 18(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* apply to the records in question?

[24] Normally my office undertakes a review to deal with a denial of access. In these cases, the City wishes to release the third party material in question. In the first case, both the third party and the Applicant requested a review. In the second, it was only the third party. The third party is involved because the City identified the records as potentially containing third party information and provided notice to the third party pursuant to section 33(1) of LA FOIP.

[25] Even though the City did not formally raise section 18(1)(b) of LA FOIP, I must consider it nonetheless as the City relies on section 18(3) to release the records. If the City did not believe that any part of section 18(1) may apply to the records in question then it would have released the records without providing third party notice. In order for the City to rely on section 18(3) to release the record involved in access request #1 and #2, section 18(1) must first be found to apply. Based on the submissions of both the City and the third party, I must consider the application of section 18(1)(b) of LA FOIP.

[26] Section 2(f)(i) of LA FOIP defines a local authority as follows:

> **2** In this Act:
> …
> (f) "**local authority**" means:

(i) a municipality;[4]

[27] Therefore, the City of Regina, a municipality, is a local authority for purposes of LA FOIP.

[28] Section 2(k) of LA FOIP defines a "third party" as follows:

> **2** In this Act:
> …
>
> (k) **"third party"** means a person, including an unincorporated entity, other than an applicant or a local authority.[5]

[29] The third party in this case is a private business and would qualify as a third party under section 2(k) of LA FOIP.

[30] Section 18(1)(b) of LA FOIP states that:

> **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;[6]

[31] I have approached third party information under section 18(1)(b) of LA FOIP and section 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP)[7] in a consistent manner.[8] To determine if section 18(1)(b) of LA FOIP applies, analysis is required of three distinct questions:

1. **Is the information in question financial, commercial, scientific, technical or labour relations information?**

[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*
[7] *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01.
[8] Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Review Reports F-2005-003, F-2006-002, F-2010-001, F-2012-001/LA-2012-001, F-2012-003, LA-2009-001, LA-2011-001, LA-2011-002. Available at www.oipc.sk.ca/reviews.htm.

2. Was the information supplied by the third party to the public body?

3. Was the information supplied <u>in confidence</u> implicitly or explicitly?

[32] Although section 18(1) of LA FOIP is a mandatory exemption, there is an important and often ignored discretionary element that also needs to be a part of a public body's analysis. That being, if section 18(1) applies, is there an appropriate basis for the public body to exercise its discretion under section 18(3) of LA FOIP? Section 18(3) of LA FOIP reads as follows:

> **18**(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.[9]

[33] In the case before me, the City appropriately considered this discretionary element. Nonetheless, I must address the three distinct questions to the matter before me.

1. Is the information in question financial, commercial, scientific, technical or labour relations information?

[34] The City clarified in both its submissions of October 20, 2010 and November 23, 2010 for both access requests #1 and #2 that the information is "scientific" and "technical" information. Both the City's submissions state the following:

[9] *Supra* note 1.

> 7. The **City agrees** with [the third party] that the records in issue **contain scientific and technical information**. The documents are reports of the results of environmental testing related to the former [third party] site and reports and recommendations on the results of those tests results and therefore are the type of records contemplated by subsection 18(1)(b) of the Act…
>
> [emphasis added]

[35] The third party also stated that the information was "scientific" or "technical" information in both its submissions to our office dated July 21, 2010 and October 20, 2010 for both access requests #1 and #2. Both submissions state the following:

> **The Records contain scientific environmental testing assessment information for the Site and as such contains "technical" or "scientific" information.**
> …
>
> [emphasis added]

[36] The first consideration then will be whether the information in the responsive records for both access requests #1 and #2 qualifies as technical and/or scientific information.

[37] In my Review Report F-2005-003 I referred to the Ontario Information and Privacy Commissioner's (IPC) Order PO-1806-F for assistance in defining what type of information would need to be involved to qualify as technical information:

> [26] Ontario/IPC Final Order PO-1806-F defines "technical information" as follows:
>
> > "Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it **will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information** which also appears in section 17(1)(a) of the Act. [Order P-454]"[10]
>
> [emphasis added]

[10]SK OIPC Review Report F-2005-003, available at www.oipc.sk.ca/Reports/2005-003.pdf.

[38] In my Review Report F-2006-002 I referred to the *Annotated Alberta Freedom of Information and Protection of Privacy Act*[11] and IPC Orders from both Alberta and Ontario to assist in defining the terms scientific and technical. I adopt for purposes of this Review Report those definitions of scientific and technical information outlined in my previously issued Review Reports.[12]

[39] For the responsive record related to access request #1, I find that the records contain technical information. The reason is that the records contain data and/or information directly related to testing and analysis conducted by engineering consultants and/or engineers employed with the third party and who appear from their title to be qualified to conduct such testing and analysis. This conclusion is consistent with the finding in Ontario IPC Order PO-2558 as follows: "Specifically, I find that the records contain explanations and descriptions **related to the monitoring and testing of the soil and groundwater** of the specified property that **fit within the definition of technical information**."[13] [emphasis added]

[40] For the responsive record related to access request #2, I find that all of the records qualify as technical information **except** for pages 83 to 86. These pages appear to be letters between the third party and the City. They do not contain any results of a technical study but rather make indirect reference to the studies done.

[41] These pages also do not qualify as scientific information because they do not contain any test data, conclusions or outline any sort of scientific methodology.

[42] Therefore, I find pages 83 to 86 do not qualify for exemption under section 18(1)(b). However, these pages will still be considered under section 18(1)(c) later in this Report.

[43] I will now proceed to the rest of my analysis for the remaining pages of the record.

[11]Co-published by Elizabeth Wilcox and Alberta Queen's Printer, *Annotated Alberta Freedom of Information and Protection of Privacy Act*, January 2005 update.
[12]SK OIPC Review Reports F-2005-003 at [85] to [89], F-2006-002 [82] to [88] and LA-2009-001 at [55], available at www.oipc.sk.ca/reviews.
[13]Ontario Information and Privacy Commissioner (ON IPC) Order PO-2558 at p. 5, available at www.ipc.on.ca/images/Findings/up-1po_2558.pdf.

2. Was the information supplied by the third party to the public body?

[44] The second part of the test requires determining if the information was supplied by the third party to the City.

[45] The issue of "supplied" was considered in my Review Reports F-2005-003 and F-2006-002 and set out the following principles:

- an agreement where the public body contributed significantly to its terms would **not** qualify under this exemption because it is the result of negotiation between the parties and was also largely based on the criteria set out by the public body in their request for proposals; and

- samples given to the public body for testing and the test results generated by the public body can still qualify as information that was supplied to the public body since the "test result information was embedded in the samples."[14]

[46] Upon review of the remaining responsive record for both access request #1 and #2, it appears that the records were created by the third party, completed by environmental consulting firms commissioned to complete the actual testing on behalf of the third party or contain third party information but were prepared by public bodies. These records were provided to the City and/or contain third party information.

[47] I find that all of the above could be considered to contain information supplied to the City.

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

[48] Once it has been determined that the information in question has been supplied by the third party to the City, the final part of the test is determining whether the information was supplied in confidence to the City either implicitly or explicitly.

[14]Summarized from SK OIPC Reports F-2005-003 at [12] to [21] and F-2006-002 at [34] to [73], available at www.oipc.sk.ca/reviews.htm.

[49] In my Review Report F-2012-001/LA-2012-001 I laid out the tests to determine if a document was obtained in confidence implicitly or explicitly:

> [29] The tests I rely upon to determine if a document was obtained in confidence explicitly or implicitly are found in my Report F-2006-002 as follows:
>
> > [56] The *Annotated Alberta Freedom of Information and Protection of Privacy Act* (Alberta's Annotated FOIP Act) publication offers definitions of the above-noted terms as listed below:
> >
> > Page 5-16-5, discusses "provided in confidence, implicitly or explicitly".
> >
> > > In the past, factors that have been cited to support a finding that information has been supplied to a public body by a third party in confidence include:
> > >
> > > a. the existence of an express condition of confidentiality in an agreement between a public body and the third party (Orders 97-013 [23-27], 2001-008 [54], 2001-019 [15]);
> > >
> > > b. the fact that the public body requested the information be supplied in a sealed envelope (Order 97-013 [23-27]);
> > >
> > > c. the third party's evidence that it considered the information to have been supplied in confidence (Order 97-013 [23-27]);
> > > …
> >
> > [57] Also, the same tool defines "implicitly" as meaning,
> >
> > > that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential. In such cases, all relevant facts and circumstances need to be examined to determine whether or not there is an understanding of confidentiality including whether the information was:
> > >
> > > a. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
> > >
> > > b. treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body;
> > >
> > > c. not otherwise disclosed or available from sources to which the public has access; or

> d. prepared for a purpose which would not entail disclosure.
>
> …
>
> [32] I first note Ontario Information and Privacy Commissioner (IPC) Order PO-2180 which addresses what is reasonable in terms of expectations of the supplier of the information.
>
> > With respect to whether the information was supplied "in confidence", part 2 of the test requires a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the affected party expects that the information would be treated confidentially; this expectation **must be reasonable**, and must have an **objective basis.** The expectation of confidentiality can arise implicitly or explicitly [Order M-169].
>
> [33] I then note the following comment in *Government Information: The Right to Information and the Protection of Privacy in Canada*:
>
> > Marking Information as Confidential
> >
> > The designation of information submitted to the government as confidential can be overplayed, at some risk to the third party. A blanket claim of confidentiality is often made by a person providing information to an institution for a broad range of material some of which is plainly not confidential. Such a claim, when considered in the context of an access request, is likely to lack credibility. It may, therefore, be ignored by the government institution in receipt of the request, defeating the very purpose of the confidential designation. Accordingly, a supplier of information to a government institution would be wise to develop a systematic and considered plan for the use of any "confidential" marking, having regard to the nature of the information being so classified.
> >
> > There is a like danger if a third party exaggerates or overextends the portrayal of harm that would come from disclosure of information submitted to a government institution.
> >
> > A page-by-page analysis of information to determine what is confidential, or potentially harmful, and what is not will usually be impractical. Some general classifications of the types of information to be marked as confidential are therefore, necessary and likely to be acceptable. But a counsel of caution that would have a third party allege that material of all kinds supplied to the government consists of protected third party information is likely to be ineffective and potentially counterproductive.[15]

[15]SK OIPC Review Report F-2012-001/LA-2012-001, available at www.oipc.sk.ca/Reports/Report%20F-2012-001-LA-2012-001.pdf.

[50] The Information Commissioner of Canada's resource, *Investigator's Guide to Interpreting the ATIA*, provides some guidance as follows:

> …the Federal Court in *Cyanamid Canada v. Minister of National Health and Welfare* (February 21, 1992) No.T-1970-89, T-2235-89, T-868-90 (F.C.T.D.) confirmed by F.C.A. (October 23, 1992), A-456-91, A-457-91, A-458-91, A-296-92, A-297-92 held that it is not sufficient that the applicant consider the information to be confidential, it must also be kept confidential by both parties and must not have been otherwise disclosed or available from sources to which the public has access. **In other words, the parties must be able to say that, the information was confidential when it was supplied to the institution and has remained confidential from the date of supply to the government up to the time of the decision not to disclose.**[16]
>
> [emphasis added]

[51] For access request #1 and #2, the third party stated in its submission to our office dated July 21, 2010 and November 28, 2011, the following with regards to this point:

> 2. The Records were expressly or implicitly supplied in confidence to the City by [the third party] as required by s. 18(1)(b) of the Act:
>
> The Records were provided by [the third party] to the City on the understanding that the Records are the property of [the third party], are treated as confidential by [the third party] and were supplied to the City explicitly in confidence.

[52] The City appeared to support the third party's contention in its submission dated October 20, 2010 for access request #1 and November 23, 2010 for access request #2:

> The City also confirms that the records were supplied explicitly or implicitly in confidence to the City. The records were produced when the City and [the third party] were working cooperatively to address a concern that had been raised about the environmental condition of the site. The documents were treated as confidential documents by the City.

[53] There was nothing further provided by either party to support the assertions.

[54] There is also nothing on the face of the records to suggest the records were explicitly supplied in confidence. There is simply the bare assertion by the third party and the City.

[16]Office of the Information Commissioner of Canada, *Investigator's Guide to Interpreting the ATIA*, available at www.oic-ci.gc.ca/eng/inv_inv-gui-ati_gui-inv-ati_section_20%281%29%28b%29.aspx.

[55] In applying the implicitly in confidence test set out earlier, I find the following for both the responsive record for access request #1 and #2:

> ***a. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;***
>
> No evidence has been provided by either party indicating that there was a communication between the parties referring to the information as confidential.
>
> ***b. treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body;***
>
> No evidence has been provided to support a claim that the information was consistently treated in a manner indicating a concern for its protection from disclosure.
>
> ***c. not otherwise disclosed or available from sources to which the public has access;***
>
> It appears that the information is not otherwise disclosed or available from other sources to which the public has access.
>
> ***d. prepared for a purpose which would not entail disclosure.***
>
> No evidence was provided by either party to indicate that the information was prepared for a purpose that would not entail disclosure.

[56] In this case, both the City and the third party agree that the information was confidential. I considered how this may factor into the test.

[57] In my Review Report F-2006-002 I considered an Ontario IPC Order MO-1896. That Order refers to a requirement termed "mutuality":

> [52] Also useful on this point is Ontario IPC Order MO-1896 that reads, in part, as follows:
>
> > Previous orders issued by this office have stated that for information to "have been received in confidence" there must be an expectation of confidentiality on the part of the supplier and the receiver of the information. [Orders 210, P-278, P-480, and M-871]. I agree with this analysis. **For a matter to be "in confidence", there must be a mutual intention, or at least a mutual expectation, of secrecy**. **If one party intends that the information be kept confidential but the other party does not, the information generally cannot be considered "in**

> **confidence"... The requirement for mutuality is illustrated by the Oxford Concise Dictionary, 1990 edition, definition of "confidence" as "the telling of private matters with mutual trust".**
>
> **In determining what evidence will satisfy the onus to establish that information has been supplied in confidence under section 10, this office has made the following observations:**
>
> **To satisfy the "in confidence" component of the section, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided.** This expectation must have an objective basis [Order PO-2020].
> …

[53] The Treasury Board of Canada Secretariat's website offers advice on what the phrase "information obtained in confidence" means and how to prove it applies. The relevant excerpts from that site include the following:

> This is a mandatory class exemption. **The term "in confidence" means that the supplier of the information has stipulated that the information is not available for dissemination beyond the government institutions** which have a need to know this information.
> …
>
> This exemption protects the information provided "in confidence" both formally and informally, by officials of other governments or international organizations and their institutions. **In order to ensure that a claim for exemption in this area can be adequately proved, institutions should obtain in writing at the time of receipt of the record concerned notification or a statement from the supplier of the information indicating that it is being supplied "in confidence". Wherever feasible, it is advisable that government institutions have agreements with other governments, international organizations or their institutions stipulating those types of information which are exchanged "in confidence".**[17]

[emphasis added]

[58] In British Columbia IPC Order F11-08 the following is helpful when there is a situation where both parties assert that the information was supplied in confidence:

> [32] VIHA's s. 24 letter to Compass indicates that **there was no "mutuality of understanding" with respect to the confidentiality of the information, which Commissioner Loukidelis has identified as being necessary to establish the application of s. 21(1)(b).** In Order F11-05,21 where confidentiality was also at

[17] SK OIPC Review Report F-2006-002, available at www.oipc.sk.ca/Reports/F-2006-002.pdf.

> issue, Senior Adjudicator Francis noted that **VIHA did not provide any policies or procedures or anything else to support its argument that it had received the information in dispute in confidence. In this case, neither Compass nor VIHA provided any policies or procedures or any other objective evidence. In the end, Compass has only its own assertion to rely on. This is not a sufficient basis on which to conclude that the information was supplied "implicitly in confidence" as past orders have interpreted this term.** Therefore, I find that Compass did not supply the information "implicitly" in confidence.[18]
>
> [emphasis added]

[59] When there is sufficient evidence of a "mutuality of understanding" with respect to the confidentiality of the information the test for section 18(1)(b) of LA FOIP is met.

[60] Simply the assertion that the information was supplied implicitly or explicitly in confidence would not be sufficient. The third party in this case is resisting release of the information and needed to have provided more persuasive evidence to support its assertion. Evidence could consist of internal practices regarding such types of information, a provision for confidentiality in an agreement between the City and the third party prior to negotiations, notes of a discussion about confidentiality with the City, etc. Neither the City nor the third party provided any evidence to support the assertions that the information was supplied implicitly or explicitly in confidence.

[61] Therefore, I find the records for both access request #1 and #2 do not qualify for exemption under section 18(1)(b) of LA FOIP.

[62] The third party has also asserted that section 18(1)(c) of LA FOIP applies to the records in question for both access request #1 and #2. Therefore, I will now consider that section.

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

[63] As noted earlier, in these particular cases, the City is looking to release what potentially may constitute third party information. The third party is involved because the City

[18] British Columbia IPC Order F11-08, available at www.oipc.bc.ca/rulings/orders.aspx.

identified the records as potentially containing third party business information and provided notice to the third party pursuant to section 33(1) of LA FOIP. In order for the City to rely on section 18(3) of LA FOIP to release the record involved in access request #1 and #2, section 18(1) of LA FOIP must first be found to apply to both records. I have already determined that section 18(1)(b) of LA FOIP does not. I will now consider the application of section 18(1)(c) of LA FOIP.

[64] Section 18(1)(c) of LA FOIP states that:

> **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[19]

[65] In determining whether records qualify for exemption under section 18(1)(c) of LA FOIP, a test must be applied. That test was outlined in my Review Report F-2005-003 for section 18(1)(c) of LA FOIP's equivalent in FOIP, section 19(1)(c):

> [36] Since section 19(1)(c)(ii) of Saskatchewan's Act does not expressly require the disclosure to "*harm significantly the competitive position*", a modification of the 3 part test is required. **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**.
>
> …
>
> [39] The Applicant's submission is supported by decisions in other jurisdictions. For instance, Ontario/IPC Order PO-2195 provides the following:

[19] *Supra* note 1.

> *"*Under part 3, the Ministry and/or OPG **must demonstrate that disclosing the information "could reasonably be expected to "lead to a specified result. To meet this test, the parties resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.** [see Order P-373, two court decisions on judicial review of that order in Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.)]."[20]
>
> [emphasis added]

[66] The following are the harms outlined in the submission from the third party dated July 21, 2010:

> 3. The following harms set out in s. 18(1)(c) of the Act will result if the Records are released:
>
> The disclosure of the Records by the City to the Applicant could reasonably be expected to result in undue financial loss to [the third party] and could harm significantly the competitive position or interfere significantly with the negotiating position of [the third party] within the meaning of section 18(1)(c) of the Act, for the following reasons:
>
> [The third party] is discussing with the City assessment of the Site and potential involvement of other parties. If the Applicant is one of those other parties, [the third party's] position could be severely prejudiced as the information could result in undue financial loss for [the third party] or, conversely, an undue gain in favour of other parties.
>
> If the public or competitors of [the third party] became aware of existing or potential contamination on the Site, such disclosure could reasonably be expected to result in undue financial loss to [the third party] due to a loss of reputation. The public could reasonably be expected to react negatively to unfavourable environmental information resulting in a loss in [product] sales or even a potential boycott of [the third party's] operations.

[67] In its submission to our office dated October 27, 2010 for access request #2, the third party added the following additional potential harm in addition to the ones noted above:

- Litigation has been commenced with respect to the site therefore the disclosure of the Records could reasonably be expected to prejudice the position of [the third party], particularly if the Applicant is a party to the litigation.

[20] *Supra* note 10.

[68] Nothing further was provided by the third party to support its assertions. In any event, it is hard to imagine that any relevant documents, including the record at issue, would not be required to be part of routine disclosure by any party to such litigation. It is unclear what the prejudice is that is claimed by the third party.

[69] In its submission to our office dated October 20, 2010 and November 23, 2010 for both access request #1 and #2, the City stated the following with regards to the third party's arguments:

> 10. The City was not satisfied that release of the requested records would clearly cause the harms identified by [the third party], despite anticipated commencement of a lawsuit. Even had the City accepted [the third party's] submission that the three part test [harms test] was met, the City was not convinced that the harms alleged by [the third party] would outweigh the public interest in release…

[70] I agree with the City. The expectation of harm in this instance appears to be purely hypothetical, as no evidence has been presented on the likelihood of harm occurring if in fact the record was disclosed.

[71] Therefore, I find on the submissions from the third party that it has failed to provide sufficient evidence demonstrating that the disclosure of the records in question could reasonably be expected to result in financial loss, prejudice the competitive position or interfere with negotiations involving the third party. As such, the records for both access request #1 and #2 do not meet the test for exemption under section 18(1)(c) of LA FOIP.

3. Can the City of Regina rely on section 18(3) of *The Local Authority Freedom of Information and Protection of Privacy Act* to release the records in this case?

[72] As the records for access request #1 and #2 do not meet the criteria established for sections 18(1)(b) and 18(1)(c) there is no need to review the application of section 18(3) of LA FOIP as the records must constitute third party information first and they fail in this regard.

[73] The responsive record for access request #2 has been fully dealt with. However, the City also applied section 28(1) of LA FOIP to some limited portions of the record for access request #1.

4. Did the City appropriately apply section 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record in question?

[74] The City applied sections 23(1)(b), 23(1)(e) and 23(1)(k) of LA FOIP to portions of the record for access request #1 (pages 2, 3-7, 8-9, 11-15, 16-39, 40-44, 48-49, 50-53). This section defines what constitutes personal information under LA FOIP as follows:

> **23**(1) Subject to subsections (1.1) and (2), **"personal information"** means personal information about an identifiable individual that is recorded in any form, and includes:
>
> …
>
> (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;
>
> …
>
> (e) the home or business address, home or business telephone number, fingerprints or blood type of the individual;
>
> …
>
> (k) the name of the individual where:
>
> (i) it appears with other personal information that relates to the individual; or
>
> (ii) the disclosure of the name itself would reveal personal information about the individual.[21]

[75] When a local authority believes it is dealing with third party personal information, it must consider the application of section 28(1) of LA FOIP which states:

> **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.[22]

[21] *Supra* note 1.
[22] *Ibid.*

[76] On the Index of Records provided January 28, 2011, the City appropriately noted the following with respect to the above:

> 23(1)(k), 28(1) Please note that when redacting and quoting sections of the Act, 23(1)(k) was cited but the actual reference to why the information could not be disclosed is section 28(1).

[77] The City stated in its submission to our office dated January 28, 2011 the following:

> Therefore, the names of individuals have been removed from these pages of the document as they are associated with business name and address and where they are employed.
> …
>
> As well, some information was removed as personal information as the name is used in conjunction with an opinion and is personal information within the meaning of 23(1)(k).

[78] I will first address the severing of the names of individuals that are associated with the business name and address of where the individuals work.

[79] In my Review Report F-2008-001 I concluded that the names of employees of a government institution and their respective work phone numbers are not personal information:

> [87] In my Report F-2005-001, I determined that the following does not constitute the personal information of employees under the Act:
>
> > (a) Is the severed information (phone numbers, worker's names, employee numbers, and SIN) personal information as defined by section 24 of FOIP?
> > …
> >
> > [13] Section 24 was considered by a previous Saskatchewan Commissioner in Report No. 2003/014. Page 10 of that Report reads, "…Pursuant to section 24(1)(k), the name by itself is not personal information."
> > …
> >
> > [15] In the case of this review, the names of employees are severed from some of the responsive records, but only when linked with other data elements.

> (b) The name of an individual employee may not constitute personal information on its own, but would it if linked to other data elements that constitute personal information under the Act?
>
> [16] Labour argues that section 24(1)(k) [the name of the individual where: (i) it appears with other personal information that relates to the individual; or (ii) the disclosure of the name itself would reveal personal information about the individual] applies to the severed items as described in paragraph [12]. Not all the severed data elements are linked directly to an individual worker's name.
>
> …
>
> [25] The final data element to consider is whether the severed phone numbers are personal information as defined under the Act.
>
> [26] Labours [sic] contention is as follows:
>
> > "We also withheld by blocking out the direct phone number of an individual worker pursuant to section 29(1) and 24(1)(e) of FOIP."
>
> …
>
> [29] We adopt the same conclusion that the names of employees of a government institution and their respective work phone numbers are not personal information under the Act.[23]

[80] In order to qualify as personal information under LA FOIP, the information in question must be of a **personal nature**. This distinction was discussed in my Review Report F-2010-001:

> [126] Further on this question, I found Ontario IPC Order PO-2420 of assistance in this regard:
>
> > **To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual** [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225]
>
> …

[23] SK OIPC Review Report F-2008-001, available at www.oipc.sk.ca/Reports/F-2008-001.pdf.

> [128] **For these reasons, the names of individuals and views represented do not constitute his/her personal information because it is not information *about* him/her. Therefore, I recommend release of all business card information regardless of the type of agency the individual represents.** The exception is in respect to submissions of private citizens to which Health has properly withheld email addresses and names of said. Though the personal opinions of the authors, Health should nonetheless release the content of the emails as without names and email address, no individuals are identifiable.[24]
>
> [emphasis added]

[81] On several pages, the City appears to have severed the names of employees who worked for a government institution and private businesses. The severed names include employees of at least three private businesses which include a Saskatchewan environmental consulting company, an Alberta laboratory and a construction company.

[82] In my recent Review Report F-2012-006, I stated the following:

> [143] Further, the *Personal Information Protection and Electronic Documents Act* (PIPEDA) applies to every organization that collects, uses or discloses personal information in the course of "commercial activities". However, the federal government may exempt organizations and/or activities in provinces that are deemed to have adopted substantially similar privacy legislation. This is not the case in Saskatchewan. The presence of commercial activity is the most important consideration in determining whether or not an organization is subject to PIPEDA. PIPEDA defines "commercial activity" as:
>
> > **2.** (1) The definitions in this subsection apply in this Part.
> > …
> >
> > "commercial activity" means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.
>
> [144] PIPEDA has similarly carved out such information as it pertains to employees of private businesses subject to section 2 as follows:
>
> > "personal information" means information about an identifiable individual, **but does not include the name, title or business address or telephone number of an employee of an organization.**

[24] SK OIPC Review Report F-2010-001, available at www.oipc.sk.ca/Reports/Report%20F-2010-001,%20March%209,%202010.pdf.

> [145] PIPEDA has a similar purpose as Part IV of FOIP. The name of an employee is not personal information under PIPEDA. It would then be an absurd result to ignore that treatment under PIPEDA by considering it personal information under FOIP. Section 29(2)(i)(ii) of FOIP effectively incorporates by reference provisions in federal statutes. Surely in a nation with a federal system of government, and both federal and provincial laws dealing with similar areas and rights of citizens for similar purposes, there must be a genuine effort made to harmonize the interpretation of the rules to minimize inconvenience and confusion for citizens.[25]
>
> [emphasis added]

[83] An alternate analysis of work product and business card contact information of employees would lead to the same conclusion. Even in the case that the Alberta laboratory may be subject to Alberta's private sector privacy law, *Personal Information Protection Act* (PIPA),[26] I would conclude the same.

[84] Therefore, the information severed by the City does not constitute personal information and should be released to the Applicant.

V FINDINGS

[85] I find that the records for both access request #1 and #2 do not qualify for exemption under section 18(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act.*

[86] I find that the records for both access request #1 and #2 do not qualify for exemption under section 18(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act.*

[87] I find that the records responsive to access request #1 which were severed by the City of Regina do not qualify for exemption under section 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act.*

[25]SK OIPC Review Report F-2012-006, available at www.oipc.sk.ca/What's%20New/Report%20F-2012-006/Review%20Report%20F-2012-006.pdf.
[26]Alberta's, *Personal Information Protection Act*, S.A. 2003, c. P-6.5.

VI RECOMMENDATIONS

[88] I recommend that the City of Regina release all previously withheld line items and records in full to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 28th day of February, 2013.

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