

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT LA-2014-003

City of Regina

Summary:

In February 2013, an Applicant submitted an access to information request to the City of Regina (City). The City advised the Applicant that it was withholding the records pursuant to subsections 14(1)(d), 17(1)(d), (e), 18(1)(b), (c), 21(a) and (b) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). However, the City later dropped reliance on subsection 21(a) of LA FOIP. The Applicant proceeded to request a review by the Office of the Information and Privacy Commissioner (OIPC). Upon review, the Commissioner found that the City appropriately applied subsection 21(b) of LA FOIP to a portion of the record. As a result, the Commissioner did not have to consider subsection 18(1)(b) of LA FOIP. Further, the Commissioner found that the City did not establish that subsections 14(1)(d), 17(1)(d), (e), 18(1)(c) and 21(b) of LA FOIP applied to the remaining portions of the record. The Commissioner recommended the City continue to withhold the portion of the record found to qualify for exemption under subsection 21(b) of LA FOIP and release the remainder.

I BACKGROUND

[1] On February 7, 2013, the City of Regina (City) received an access to information request from the Applicant.

In respect to the Soil Sampling that took place, during the latter part of 2011 and into 2012, on publicly owned land areas in, around and north of the City Transit Centre located along [name of street], that was formally part of the [third party's] site, please provide the following information:

- All communications, written or electronic, between representatives of the City of Regina and representatives of the [name of ministry] regarding the soil

sampling procedure, test parameters, test results and any proposals, recommendations or directions before and after soil sampling and test results were known.

- Provide the scope of the soil testing in respect to the depths of soil sampling and the substances tested for.

- Provide all test results for all samples taken regarding soil and water.

- Provide the name of the company commissioned to take the samples, the name of the soil test laboratory, the cost of these two separate activities and how this work was paid for.

- [2] The City responded to the Applicant by a letter dated February 28, 2013, that third party notification would be required for some of the information requested pursuant to subsection 33(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Further, that the City was extending the 30 day response period by an additional 30 days, pursuant to subsection 12(1)(c) of LA FOIP to allow time to contact the Third Party.
- [3] The City contacted the Third Party by a letter dated March 6, 2013, and advised it of the access to information request.
- [4] The Third Party responded to the City by a letter dated March 26, 2013, indicating it did not consent to the release of third party information. The Third Party's submission to the City proceeded to outline its arguments in support of the record not being released pursuant to subsections 18(1)(b), (c), 21(a) and (b) of LA FOIP.
- [5] The City provided a letter to the Applicant dated April 8, 2013, indicating that it was withholding the record pursuant to subsections 14(1)(d), 17(1)(d) and (e), 18(1)(b) and (c) and 21(a) and (b) of LA FOIP.
- [6] On April 15, 2013, my office received a Request for Review from the Applicant dated April 9, 2013.

[7] My office notified the City and Applicant of its intention to undertake a review via letter dated May 17, 2013. At that time, my office requested the City provide a copy of the record and submission to my office supporting its reliance on the subsections noted in its response to the Applicant.

[8] On September 24, 2013, my office received a copy of the record from the City and its submission. On October 24, 2013 my office received a submission from the third party and one from the Applicant on October 31, 2013.

II RECORDS AT ISSUE

[9] As indicated by the City in its letter to my office received June 6, 2013, the record appears to consist of the following three records:

- 1) Access and Cost Sharing Agreement between [the Third Party] and the City;
- 2) Environmental Site Assessment; and
- 3) Correspondence between a government Ministry and the City.

III DISCUSSION OF THE ISSUES

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

[11] The Third Party, in this case, would qualify as a third party pursuant to subsection 2(k) of LA FOIP.

1. Does subsection 21(b) of LA FOIP apply?

[12] Subsection 21(b) of LA FOIP is a discretionary exemption and provides:

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

...

(b) was prepared by or for legal counsel for the local authority in relation to a matter involving the provision of advice or other services by legal counsel; or

[13] The City applied subsection 21(b) of LA FOIP to all of the information on all three records.

[14] The office has not previously considered subsection 21(b) of LA FOIP. However, the following two part test for the equivalent section in *The Freedom of Information and Protection of Privacy Act* (FOIP) has previously been established. That test is as follows:

- i. Were the records “prepared by or for” an agent or legal counsel for a government institution?
- ii. Were the records provided in relation to a matter involving the provision of advice or other services by the agent or legal counsel?

(Review Report F-2014-003 at [19])

[15] I will now consider these two questions. However, I have adjusted the language of the questions to correspond with the language observed in LA FOIP.

i. Were the records “prepared by or for” legal counsel for the local authority?

[16] For record #1, the City confirmed for my office that the agreement was prepared by the City’s legal counsel. Therefore, record #1 qualifies for the first part of the test.

[17] In the *Introduction* section of record #2, it states that the record was prepared for legal counsel for the City. In order to qualify, the person preparing the record must be either the person providing the legal advice or legal service or a person who is preparing the record in question on behalf of, or, for the use of, the provider of legal advice or legal related services (Alberta IPC Order F2013-13 at [para 242]). Therefore, record #2 meets the first part of the test.

[18] For record #3, the City’s legal counsel is not sending the emails nor does it appear the emails are being prepared for the City’s legal counsel. Simply copying legal counsel on

emails does not qualify the emails themselves and their content as having been sent by or for legal counsel for the City. Therefore, I find that the City has not shown that record #3 qualifies for the first part of the test.

ii. Were the records provided in relation to a matter involving the provision of advice or other services by legal counsel?

[19] The City's submission, received September 24, 2013, asserts that both records relate to the lawsuit the City is currently involved in with the Applicant and Third Party. On July 23, 2014, the City provided further details regarding how the records relate to the ongoing lawsuit. According to the City, records #1 and #2 were created after the lawsuit commenced and were in response to the lawsuit and allegations in the Statement of Claim. Legal counsel for the City is providing legal services pertaining to the lawsuit which involve these records.

[20] Therefore, I find that records #1 and #2 meet the second part of the test. Therefore, records #1 and #2 qualify for exemption pursuant to subsection 21(b) of LA FOIP. As records #1 and #2 are addressed, there is no need to consider subsection 18(1)(b) of LA FOIP.

2. Does subsection 14(1)(d) of LA FOIP apply?

[21] Subsection 14(1)(d) of LA FOIP is a discretionary exemption and provides:

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

...

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

[22] Record #3 is the only record remaining under consideration for subsection 14(1)(d) of LA FOIP.

[23] The two distinct questions that must be answered in this circumstance are:

a) Do the proceedings qualify as legal proceedings for the purposes of LA FOIP?

b) Could disclosure of withheld records be injurious to [the City] in the conduct of existing or anticipated legal proceedings?

(Review Report LA-2013-001 at [22])

a) Do the proceedings qualify as legal proceedings for the purposes of LA FOIP?

[24] The office has previously defined “legal proceedings” as follows:

Proceedings governed by rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgment of a court or a ruling by a tribunal. Legal proceedings include all proceedings authorized or sanctioned by law, and brought or instituted in a court or legal tribunal, for the acquiring of a right or the enforcement of a remedy.

(Review Report LA-2013-001 at [25])

[25] On March 19, 2014, my office contacted the City via email and requested a status update on the proceeding that commenced September 9, 2010. My office was advised by the City that the proceedings had not concluded.

[26] Given that at the material time, the proceeding was before the Court of Queen’s Bench, I find that the above matters would qualify as legal proceedings for the purposes of subsection 14(1)(d) of LA FOIP.

b) Could disclosure of withheld records be injurious to the City in the conduct of existing or anticipated legal proceedings?

[27] The City provided a copy of the Statement of Claim to my office. It appears to confirm the City’s position that the records relate to the issues identified in the Statement of Claim. With regards to the injury that release of the records could cause, the City’s submission did not focus on presenting such a case. Rather, the City’s submission focused on how the Commissioner should interpret the section of LA FOIP.

[28] The City has not shown what injury could occur if record #3 were released. Therefore, I find that the City has not established that subsection 14(1)(d) of LA FOIP applies to record #3.

3. Does subsection 17(1)(d) of LA FOIP apply?

[29] Subsection 17(1)(d) of LA FOIP is also a discretionary exemption and provides:

17(1) Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the local authority;

[30] Record #3 is the only records remaining under consideration for subsection 17(1)(d) of LA FOIP.

[31] The following are criteria which must be met:

- Identify and provide details about the contractual or other negotiation;
- Identify and provide details about the parties involved with the contractual or other negotiation; and
- Detail how release of the record would interfere with the contractual or other negotiation.

(Review Report F-2012-003 at [16])

I. Identify and provide details about the contractual or other negotiation

[32] In its submission, the City asserted that there was a contract and negotiations involved in this case. Record #3, appears to be 14 pages consisting of email exchanges between various parties including the City. Which contains details of the contract and negotiations.

[33] Therefore, I find that the first part of the test has been met.

II. Identify and provide details about the parties involved with the contractual or other negotiation

[34] In its submission, the City detailed the parties involved in the negotiations which included the City and the Third Party.

[35] Therefore, I find that the City has met the second part of the test.

III. Detail how release of the record would interfere with the contractual or other negotiation

[36] With regards to how release of the record would interfere with the contract or other negotiations, the City suggests that if released, the City would be in breach of the confidentiality provision of the agreement (record #1). Further, it appears the City is arguing that if released, the City may not have the cooperation of the Third Party for any future negotiations or contracts.

[37] However, the City has not tied the interference that is expected with specific information in record #3. It appears instead to have taken a “blanket approach” in applying the exemption. In addition, the City appears to be arguing that because the City agreed to include a confidentiality clause in the agreement (record #1) (to avoid an access request by this Applicant) that it is now obligated by that clause and cannot release any related records (i.e. record #3).

[38] In the agreement (record #1), the City agreed not to “divulge any information” respecting the agreement without the prior “written approval” of the Third Party. This office has consistently advised Saskatchewan public bodies, in the context of contracts entered into by public bodies, that the public body should ensure contractual wording that acknowledges that any agreement entered into by the public body is subject to FOIP or LA FOIP.

[39] The suggestion that disclosure may affect future cooperation of the Third Party does not satisfy the test of interference. Such a general assertion cannot be tested in any way. Further, it is not clear what specific information in record #3 would interfere with any future negotiations.

[40] As the City has not shown what interference could occur if information in the record #3 were released, I find that the City has not established that subsection 17(1)(d) of LA FOIP applies to record #3.

4. Does subsection 17(1)(e) of LA FOIP apply?

[41] Subsection 17(1)(e) of LA FOIP is also a discretionary exemption and provides:

17(1) Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(e) 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;

[42] The City applied subsection 17(1)(e) of LA FOIP to all of the information in record #3.

[43] From a review of how other jurisdictions approach similar sections, I find the following criteria would have to be met in order for subsection 17(1)(e) of LA FOIP to apply:

- 1) the record contains positions, plans, procedures, criteria, instructions or considerations;
- 2) the positions, plans, procedures, criteria, instructions or considerations are developed for the purpose of contractual or other negotiations; and
- 3) the positions, plans, procedures, criteria, instructions or considerations are developed by or on behalf of the local authority.

1) Does the record contain positions, plans, procedures, criteria, instructions or considerations?

[44] The City has indicated that record #3, contains “criteria”, “plans”, “instructions” and “considerations”. However, the City has not shown what information in the record constitutes such.

[45] Therefore, I find that the City has failed to establish that subsection 17(1)(e) of LA FOIP applies to the information in record #3.

5. Did the City appropriately apply subsection 18(1)(c) of LA FOIP?

[46] Subsection 18(1)(c) of LA FOIP is a mandatory exemption and provides:

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

[47] Record #3 is the only record remaining under consideration for subsection 18(1)(c) of LA FOIP.

[48] In determining whether the information in record #3 qualifies for exemption under subsection 18(1)(c) of LA FOIP the following test must be applied:

(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.

(Review Report F-2005-003 at [36])

[49] From a review of the Third Party and City's submissions, the expectation of harm appears speculative and hypothetical. It is unclear what the prejudice is. The Third Party and the City failed to connect specific portions of record #3 to the harm it is asserting would occur. It also appears that the Third Party is speculating that, where the information may not be flattering, harm will automatically result. The Third Party provided no specific details to persuade my office in this regard.

[50] I find, based on the submission from the Third Party and the City that it has not shown that the disclosure of the information in record #3 could reasonably be expected to result in financial loss, prejudice the competitive position or interfere with negotiations involving the Third Party.

[51] As such, the City and Third Party has not established that subsection 18(1)(c) of LA FOIP applies to record #3.

IV FINDINGS

[52] I find that the City appropriately applied subsection 21(b) of LA FOIP to records #1 and #2.

[53] I find that the City did not establish that subsections 14(1)(d), 17(1)(d), (e), 18(1)(c) and 21(b) of LA FOIP applied to record #3.

V RECOMMENDATIONS

[54] I recommend that the City of Regina continue to withhold records #1 and #2.

[55] I recommend that the City of Regina release record #3.

Dated at Regina, in the Province of Saskatchewan, this 6th day of August, 2014.

RONALD J. KRUZENISKI, Q.C.
Saskatchewan Information and Privacy
Commissioner