

CITY OF SASKATOON

DECISION OF THE HEAD REGARDING REPORT LA-2011-004 OF THE SASKATCHEWAN INFORMATION AND PRIVACY COMMISSIONER

The Saskatchewan Information and Privacy Commissioner has issued a report dated November 21, 2011 in response to a Request for Review filed by a person who disagreed with the City of Saskatoon's refusal to release records, including copies of two sets of minutes from the Destination Centre Steering Committee .

Section 45 of *The Local Authority Freedom of Information and Protection of Privacy Act* states as follows:

- 45 Within 30 days after receiving a report of the commissioner pursuant to subsection 44(1), a head shall:
- (a) make a decision to follow the recommendation of the commissioner or any other decision that the head considers appropriate; and
 - (b) give written notice of the decision to the commissioner and the persons mentioned in clause 44(1)(b).

The duties of head have been delegated by City Council to the City Clerk. The purpose of this report is to provide the head's decision regarding the recommendations of the Information and Privacy Commissioner. This report will be submitted to the Commissioner. However it has come to the City's attention that the applicant is deceased; accordingly the City is unable to fully meet the requirement of Section 45(b) above.

Janice Mann, City Clerk
November 24, 2011

City of Saskatoon File 416-09-21
OIPC File 2010/005

BACKGROUND

1. On December 1, 2009 the applicant submitted an access to information request for five types of records relating to the development of the City's South Downtown.
2. On December 14, 2009 the applicant was provided with a copy of all of the records responsive to his request. Portions of the records were severed in accordance with Section 16(1)(a) and (b) of *The Local Authority Freedom of Information and Protection of Privacy Act* in that they would disclose advice, proposals, recommendations, analyses or policy options developed for the city, and consultations or deliberations involving officers or employees of the City.

REVIEW BY OIPC

On January 6, 2010 the City was advised by the OIPC that the applicant had submitted a formal Request for Review. On January 22, 2010 the OIPC was provided with copies of the responsive records, together with an index outlining the reasons for withholding certain information.

In mid 2010 most of the documents were released to the applicant, with the exception of the minutes of the Destination Centre Steering Committee meetings held on April 29, 2009 and April 1, 2009, and portions of several emails involving civic staff. The City reviewed the issue of whether to release these records on July 27, 2010 and again on September 30, 2011, and it was determined that they should not be released at this time, but that they would be released fairly soon, likely in early 2012. The OIPC was advised on September 30, 2011 that the documents would be released to the applicant in early 2012.

The report of the OIPC was received on November 21, 2011.

RESPONSE TO COMMISSIONER'S STATEMENTS

- [52] I find that the e-mails and meeting minutes do not meet the criteria established. The main reason for this is that the e-mail exchanges and the meeting minutes involve multiple stakeholders and do not qualify under this exemption. To qualify, the e-mails and documents **must** be between internal officers or employees of the local authority exclusively **and** contain information that would constitute consultations and deliberations.

We believe that the Commissioner's interpretation is wrong in law. Section 16(1) states that "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; or*

- (b) consultations or deliberations **involving** officers or employees of the local authority.”

Section 16(1)(b) does not require that consultations or deliberations be “among” or “between” officers or employees of the local authority exclusively. The plain wording is that they must be “involved” in the consultations or deliberations. Therefore, the exemption still applies when consultations or deliberations involve both City officers and employees and members of other organizations or the public.

The Steering Committee was established in order to assist civic administration in reaching a recommendation to take to City Council for the preferred concept for the Destination Centre at River Landing. The Committee was comprised of two members of the public as well as representatives from a range of organizations and bodies in the city. The minutes contain advice, proposals and analyses developed for the City. Moreover the meetings were for the purpose of consultations and deliberations involving employees of the City, and the minutes reflect those consultations and deliberations.

DECISION OF HEAD RELATING TO COMMISSIONER’S RECOMMENDATIONS

[53] In the circumstances, I find the City has not met the burden of proof and I recommend release of the record in question subject to severing any personal information that may exist.

Head’s Decision:

As outlined in my response to the Commissioner’s Report LA-2011-003, we disagree with the Commissioner’s interpretation of “burden of proof”.

We believe that the Commissioner’s interpretation of Sections 16(1)(a) and (b) is wrong in law. We are satisfied that the City is authorized under Sections 16(1)(a) and (b) to withhold the records and maintain our position, as previously supplied to the OIPC, that we would be willing to release the records in due course, likely in early 2012. As indicated on the cover page of this report, the applicant is deceased; thus the records cannot be released to the applicant.

The Commissioner has appended a Postscript to the Review Report in which he sets out concerns about “systemic issues”. A meeting was held with the Commissioner in which these issues, and the City’s issues, were discussed. Attached is a letter dated September 21, 2010 from the City Solicitor to the Commissioner, setting out the City’s position on the matters raised in the Commissioner’s Postscript.



City of
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Office of the City
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SEP 21 2010

CITY CLERK'S OFFICE
SASKATOON

September 21, 2010

Saskatchewan Information and Privacy Commissioner
503, 1801 Hamilton Street
Regina SK S4P 4B4

Via Fax

Attention: R. Gary Dickson, Q.C.
Saskatchewan Information and Privacy Commissioner

Dear Mr. Dickson:

Re: Meeting of September 8, 2010

Thank you for your letter of September 13, 2010. Unfortunately, your letter does not address our concerns, and does not, from our point of view, set out our position at the meeting. Following are the concerns which we raised at the meeting.

There are thirteen outstanding Saskatoon-related appeals in your Office. Twelve appeals are from the same individual. Six of these appeals are from 2006 or earlier. The oldest is from April of 2004.

In our view, this state of affairs does not meet the intent or purpose of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The City is prejudiced in dealing with these delayed appeals. For example, in the appeal regarding police records (from 2004) on which you are hoping to report, many of the key people on the file are no longer available. In addition, the individuals appealing have been denied their right to a Decision from the Head, and potentially from the Court of Queen's Bench, as they cannot proceed to these steps, unless and until they receive a Report from you.

When we reviewed the files, it appeared to us that a significant factor in this delay was the adoption by your Office of a very technical, legalistic, resource-heavy process for the appeals. To us, this process might be suitable for a Privacy Commissioner who makes final decisions on access to documents. It

is not necessary, or suitable, for the Privacy Commissioner in Saskatchewan who provides recommendations only.

Our point is that the obvious alternative is to adopt a different process which meets all of the goals of the *Act*, but also results in timely, quality Reports. We outlined an example of a practical, high-quality efficient review process which we believe would also be more in keeping with the spirit and intent of Saskatchewan's legislation. Our understanding is that the process which we proposed is similar to processes used by Saskatchewan Privacy Commissioners before you.

We emphasized that the last two National Freedom of Information Audits of the Canadian Newspaper Association scored Saskatoon as an A, ahead of or equal to all other large Canadian cities. Regina's score was very similar, and the Province of Saskatchewan itself scored higher than all other Provinces. We are ideally situated to proceed with an efficient, cost-effective but high-result review process. We believe that this will address the serious backlog problem outlined above, without requiring additional resources.

Another issue that we raised was the treatment by your Office of the City Clerk who is the delegated Head for Saskatoon. When we review, *in toto*, the correspondence of your Office to the City Clerk, the overall impression is that she is under attack. We have characterized this as almost amounting to harassment, so as to bring to your attention how concerned we are. The City deals with other oversight Provincial agencies, such as the Human Rights Commission, and their correspondence is not comparable to what is on the Privacy Commissioner files.

Our point is that the City Clerk is not doing something "wrong" or "bad". As the Supreme Court of Canada recently explained in *Ontario (Public Safety and Security) v. Criminal Lawyers Assoc.*, access to information involves the balancing of the need for openness and transparency in government with the need for those governments to be able to withhold some information in order to do their job. In other words, there are no right or wrong answers, but rather a series of good faith judgment calls on where that balance lies in specific fact situations.

Under the Saskatchewan system, the City Clerk as the delegated Head is required to make the first good faith judgment call as to where the balance lies on a specific request. She does this. If an applicant is not satisfied with her decision, they may apply to you for a review. Your job, under our legislation, is

to take the same facts as the City Clerk had, and provide a second expert opinion on where the balance should be drawn. The City Clerk then agrees, agrees in part or disagrees with your recommendation and makes her final decision. If the applicant is still not satisfied, they may apply to the Court of Queen's Bench. The Court does its own balancing of the competing interests involved, and makes a final decision. This underlying understanding of the roles of the parties and the assumption that everyone is acting in good faith, should form the basis of all of our correspondence.

In our discussions, we also made it clear that we believe that the City Clerk is complying with the spirit and intent of the *Act*. She does not have the resources to comply with all of the requirements of "Helpful Tips". As well, our advice to her is that she is not legally required to comply with every aspect of "Helpful Tips", especially where to do so would provide nothing substantive to the end result.

We also discussed the timing of the release of your Report. (We understand that you plan to issue one from 2004 in the near future.) We have asked that your Report be released to the public at the same time as the Head's decision (in which she agrees or disagrees with the recommendations in your Report and gives her reasons). We explained that, in our view, this is the only way that the public can see the full picture, and make their own decisions on where the balance between the public's right to transparency and the right to conduct government business should be drawn. Publishing your Report on its own, so that the Press reports only your recommendations, with no possibility of reference to the Head's decision, robs the public of their right to decide whether they agree with you or with the Head or with neither. We consider this public "review" a key part of open and transparent government.

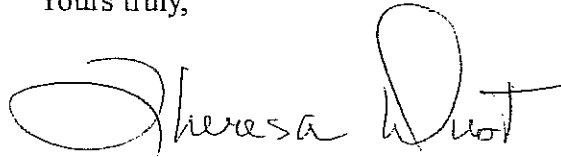
We also raised the outstanding appeal regarding police records. Our point here is that there are some issues which are more properly decided by the Legislature than through a LA FOIP process. We believe that the police-records case is a classic example. The issue is very simple. Police records are currently exempt from the LA FOIP. The issue is whether those records, if generated by City staff as agents of the police, become subject to the LA FOIP. We suggested exploring ways for issues such as this being referred to the Province, as they are really questions of legislative intent.

Finally, please note that we specially deny the allegation which you make in the first full paragraph of page 5 of your letter of September 13, 2010, which reads "You made it clear that the City takes the view that those requests for

access from certain named individuals did not warrant the effort we expect from local authorities.” We specifically deny that we said or implied any such thing, and nothing that the City has done, at any time, on any file would justify such an allegation.

This letter is being copied to Minister Don Morgan, Q.C. as Minister of Justice and Attorney General, so that he is aware of Saskatoon’s concerns. We are not providing the Minister with a copy of your letter of September 13, 2010 as it was your letter to us, and should be yours to release or not to the Minister, as you consider appropriate.

Yours truly,

A handwritten signature in black ink that reads "Theresa Dust". The signature is written in a cursive style with a large, looped initial "T".

Theresa Dust, Q.C.
City Solicitor

TD:cac

- cc:
- Honourable Don Morgan, Q.C.
Minister of Justice and Attorney General
 - His Worship Mayor Don Atchison
 - Janice Mann, City Clerk