

The following is a copy of **Clause 1, Report No. 9-2010** of the **Executive Committee**, which was **ADOPTED** by City Council at its meeting held on **June 28, 2010**:

**1. Investigation Report –
Saskatchewan Information and Privacy Commissioner
Disclosure of Personal Information – City of Saskatoon
(File No. CK 416-1)**

- RECOMMENDATION:**
- 1) that the Province be requested to amend the *Local Authority Freedom of Information and Protection of Privacy Act* as follows:
 - a) that there be a time limit for the Information and Privacy Commissioner to respond to privacy complaints; and
 - b) that reports and recommendations not be publicized or posted publicly until after a response has been received from the local authority or until the statutory period for response from the local authority has expired, and that any response submitted be posted with the report; and
 - 2) that a copy of this report together with the report of the Saskatchewan Information and Privacy Commissioner be posted on the City's website.

Your Committee has considered and supports the following report of the City Clerk, which is in response to Investigation Report LA-2010-001 of the Saskatchewan Information and Privacy Commissioner, a copy of which is attached for Council's information (Attachment A). The City Clerk's report has been submitted to the Information and Privacy Commissioner as the City's formal response to his Investigation Report.

“BACKGROUND

On October 21, 2005 the City Clerk received a letter from the Saskatchewan Information and Privacy Commissioner advising that an individual had alleged that a breach of privacy had occurred by the City of Saskatoon, in that the City had disclosed her personal information to Canada Customs and Revenue Agency (now Canada Revenue Agency and hereafter referred to as CRA for ease of reference) in contravention of Part IV (the protection of privacy section) of *The Local Authority Freedom of Information and Protection of Privacy Act (LAFOIP)*.

The Commissioner advised that the complainant's allegations were that on or about June 7, 2005, CRA requested that the City provide the name and address of the individual that paid utilities at a specific address during the years 2002-2004. Shortly thereafter the City forwarded some of her personal information in response to CRA's request via facsimile. The complainant was concerned that the City disclosed more of her personal information than requested by CRA.

Upon investigation it was determined that the City Treasurer had had a longstanding arrangement (over 27 years) with CRA whereby it provided utility information when requested. For ease of administering requests, the practice had been that a printout of the utility history was made and faxed to CRA, and CRA was charged \$25.00 for each year of information requested. This is what happened in this instance – CRA asked only for the name and address of the individual that paid utilities at the address during those years, and was provided with the complete billing history, which included balances, payment dates and late payment charges.

The complainant, who happened to be an employee of the City Treasurer's Branch, discovered the disclosure of the billing history and questioned the City Treasurer as to whether the Treasurer's Office had the authority to disclose this type of information to CRA. The City Treasurer was in the process of reviewing the matter when the formal complaint was launched with the Saskatchewan Information and Privacy Commissioner, and upon discussion with the City Clerk the City Treasurer immediately changed the practice so that CRA would be provided only the information requested, and nothing more. The complainant was verbally advised of this change in practice.

CURRENT PRACTICE

This issue arose five years' ago. It has only been in the last decade that people and organizations have given the issue of privacy the attention it warrants. In the last five years, since this complaint, the City's attention to privacy issues has continued to evolve.

LAFOIP allows municipalities to disclose personal information to other levels of government and their agencies, Crown Corporations or government institutions, for the purpose of administering or enforcing any law or carrying out a lawful investigation. In order to ensure that we release information appropriately, in 2009 we implemented a disclosure form for other levels of government. The City will only release personal information to another level of government upon receipt of a completed form, signed by an authorized official of the body requesting the information. The form requires a description of the purpose for which the information is required and the legislative authority for its collection. A copy of the form is attached (Attachment B).

RESPONSE TO COMMISSIONER'S RECOMMENDATIONS

[72] *I recommend that the City communicate to its employees its authority under section 28(2) of LA FOIP to disclose personal information to CRA. In doing so, the City should identify exactly which provisions in which tax or other laws give CRA authority to collect personal information of its clients. The City should also clarify specifically which types of personal information will be shared with CRA in what circumstances.*

The City's goal is to protect the personal information of all individuals, not just those of employees. We will immediately include a statement on the Privacy page of the City's website, advising of the provisions of Section 28 of *LAFOIP* under which their personal information might be disclosed.

We believe that the Disclosure Form identified above satisfactorily addresses the issue of determining whether CRA or any other body has authority to collect the personal information of its clients and do not feel it is necessary or practical to identify the provisions in each the various pieces of legislation that authorize the collection of personal information that might be applicable to the City of Saskatoon.

[73] *I recommend the City strengthen its policies to ensure that, each time a request is received from CRA, discretion is used on a case by case basis when disclosing personal information without consent pursuant to section 28(2) of LA FOIP.*

We feel that the Disclosure Form mentioned above addresses this issue. Discretion is exercised on a case-by-case basis because each request must be accompanied by a form outlining the purpose to which the information will be used and the legislative authority, and all concerns or questions are referred to the City Clerk.

[74] *I recommend the City ensure that employees responding to these requests understand and comply with the data minimization principle.*

This has been done and will continue to be reinforced.

[75] *I recommend the City make every reasonable effort to retrieve from CRA the Complainant's personal information that was provided without authority.*

After all this time it is extremely unlikely that we will be able to retrieve the information, but an attempt will be made.

[76] *I recommend the City inform the Complainant about its intentions regarding these recommendations as well as any outcomes.*

A copy of this report will be forwarded to the Complainant.

[77] *I recommend the City offer an apology to the Complainant.*

A written apology will be provided to the Complainant.

RECOMMENDED AMENDMENTS TO LEGISLATION

As noted above, the complaint was made to the Saskatchewan Information and Privacy Commissioner in October, 2005. Our last correspondence with the Commissioner was in April, 2006. On April 30, 2010 we received an email saying that a report was imminent. On Friday, May 21, 2010, four and a half years after the complaint was filed, the City received the report of the Commissioner, and five days later, on Wednesday, May 26 (after a long weekend) the Commissioner posted the report on his website.

This report, issued in 2010 and containing recommendations that respond to actions that occurred in 2005, leaves the impression with citizens that the situation described still exists, and that is not the case and it is not fair to the City of Saskatoon to be portrayed that way.

It is recommended that the Province be requested to amend the *Local Authority Freedom of Information and Protection of Privacy Act* by implementing a time limit for the Information and Privacy Commissioner to respond to privacy complaints and clarifying that posting or publicizing of reports and recommendations will not occur until after a response has been received from the local authority or until the statutory period for response from the local authority has expired, and that any response submitted be posted with the report.”

Date: May 19, 2010

File No.: 2005/057

SASKATCHEWAN

OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER

INVESTIGATION REPORT LA-2010-001

City of Saskatoon

Summary: The Complainant, an employee of the City of Saskatoon (City) discovered that the City had disclosed her personal information to the Canada Revenue Agency (CRA), formerly Canada Customs and Revenue Agency. The Complainant asked the City what authority it had to disclose her personal information to CRA. When she did not receive a satisfactory answer, she raised her concerns with the Saskatchewan Information and Privacy Commissioner (the Commissioner). The Commissioner found that the City did not meet the burden of proof in showing that it had authority to disclose the Complainant's personal information pursuant to section 28(2)(h) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Furthermore, it did not show how utility information was required by the CRA for the purpose of administering or enforcing a tax law. The Commissioner also found that the City failed to exercise its discretion and disclosed more of the Complainant's personal information than necessary. The Commissioner also found that the City did not respond adequately to the formal complaint. Finally, the Commissioner made several recommendations to the City for dealing with future requests for personal information from CRA.

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), 4(a), (b), 23(1)(d), (e), (i), (j), (k)(i), 28(2)(h) and 51; *The Local Authority Freedom of Information and Protection of Privacy Regulations*, (c. L-27.1, Reg. 1), ss. 10; *Personal Information Protection and Electronic Documents Act* (S.C. 2000, c.5 as amended) s. 13(2)(b).

Authorities Cited: Saskatchewan Information and Privacy Commissioner Investigation Reports F-2007-001, F-2009-001 and LA-2005-003; Saskatchewan

Information and Privacy Commissioner Reports F-2004-003, F-2004-006, F-2006-001, H-2006-001 and LA-2007-002; Privacy Commissioner of Canada *PIPEDA* Case Summary #2003-206;

Other Sources Cited: Saskatchewan Information and Privacy Commissioner, *Helpful Tips*; Saskatchewan Information and Privacy Commissioner, *Privacy Breach Guidelines*; Canada Customs and Revenue Agency webpage; Canadian Standards Association *Model Code for the Protection of Personal Information* (Q830); City of Saskatoon webpage.

I. BACKGROUND

[1] On September 23, 2005, the Office of the Information and Privacy Commissioner (OIPC) received a letter dated September 20, 2005 from the Complainant who was concerned about a practice in which her employer, the City of Saskatoon, was engaged. The Complainant worked in the Treasurer's Branch of the City.

[2] The City of Saskatoon's website advises that:

The Treasurer's Branch is responsible for the collection, control, disbursement, and investment of all corporate funds. In addition, Treasurer's is responsible for property tax and utility billing, parking ticket administration, regulation and enforcement of various civic bylaws, and the administration of the Animal Services Program.¹

[3] The Complainant advised us that Canada Revenue Agency (CRA), formerly Canada Customs and Revenue Agency (CCRA), often sent, via facsimile, requests for personal information of the City's clients. Her letter of September 20, 2005 stated:

The Treasurer's Branch often receives faxes from Revenue Canada, requesting information. These requests can be very vague, in that a customer is not even named in that request for information.

[4] The Complainant reported that CRA requested her own information from the City. She indicated that, in response, the City disclosed her personal information to CRA. She also

¹ City of Saskatoon website
<http://www.saskatoon.ca/DEPARTMENTS/Corporate%20Services/City%20Treasurer%20-%20Services%20and%20Payments/Pages/default.aspx>

reports the City disclosed more personal information to CRA than was requested. The Complainant's letter states:

...it was my own personal home address, which I had recently moved out of, which CCRA had an interest in... Not only do I have a problem with the vague wording of these requests, I am also very upset [about] the amount of personal information which was released. The City of Saskatoon not only sent them my name and address, but also sent my forwarding address and a copy of an A/R [utility] Statement (which shows my bills and payments for the past number of years). I feel that my payment history is private and I did not give any type of release of information to CCRA or to the City of Saskatoon.

- [5] The Complainant also reported that she approached several officials within the City to ask about its authority to disclose her personal information to CRA. She began by approaching her branch manager. Then she sent a letter to the City Solicitor, copied to the Mayor and members of the City Council. The letter, dated August 29, 2005, specifically asked:

I would like to know which government agencies are able to obtain information on me, with respect to my utility account.

What type of information are they able to obtain, without my permission.

Does this government agency have to ask specifically about me or give a reason for their request or can they just give a "blanket request" such as "who pays for the utilities" at a specific address?

What Act (provincial or federal) and what specific sections if this act(s) are applicable?

- [6] The City's response to this letter referred her back to her branch manager. She reported that her manager told her that its authority to disclose this information was section 28(2)(h) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Complainant also stated:

[My branch manager] told me, as well, that the Solicitor's Department would not answer legal questions coming from civic staff.

- [7] As a result, we undertook an investigation under Part IV of LA FOIP.

[8] One of the City's submissions, dated November 23, 2005, stated:

On June 7, 2005 the City Treasurer's Office received a fax, a copy of which is attached, requesting "the name(s) and addresses for the person(s) or entity who requested and paid for utilities at the following address for the years 2002, 2003 and 2004: [Complainant's former address]." Pursuant to the City's practice, the enclosed information was faxed to [CRA], along with an invoice in the amount of \$75.00.

[9] With this letter, the City enclosed a copy of the facsimile request from CRA. The request is written on a "Canada Customs and Revenue Agency - Facsimile Cover Sheet" that is dated June 7, 2005. The request had a CRA account reference number. The request stated:

Please provide the name(s) and addresses for the person(s) or entity who requested and paid for utilities at the following address for the years 2002, 2003 and 2004:

1) [Complainant's former address]

[10] The City also supplied us with a 4 page document entitled "City of Saskatoon CIS A/R Statement, Jan 01 – Dec 31, 2004". The document appears to have been generated on June 8, 2005 at 14:41. The document included the Complainant's name, current and former address, account number and information that described the Complainant's financial activities and credit worthiness.

II. ISSUES

1. Does the Saskatchewan Information and Privacy Commissioner have jurisdiction to investigate this breach of privacy complaint?
2. Are the data elements disclosed by the City of Saskatoon to Canada Revenue Agency the Complainant's personal information?
3. Did the City of Saskatoon have the authority to disclose the Complainant's personal information to Canada Revenue Agency?

4. Did the City of Saskatoon exercise its discretion when disclosing this information?
5. Did the City of Saskatoon attempt to limit the amount of the Complainant's personal information it disclosed to Canada Revenue Agency?
6. Did the City of Saskatoon respond appropriately to the complaint?

III. DISCUSSION OF THE ISSUES

1. Does the Saskatchewan Information and Privacy Commissioner have jurisdiction to investigate this breach of privacy complaint?

[11] The City of Saskatoon is a local authority pursuant to section 2(f)(i) of LA FOIP which states:

2 In this Act:

...

(f) "local authority" means:

(i) a municipality;

[12] My authority for undertaking this investigation is founded in section 32(d) of LA FOIP which states:

32 The commissioner may:

...

(d) from time to time, carry out investigations with respect to personal information in the possession or under the control of local authorities to ensure compliance with this Part.

[13] I find that I have jurisdiction to investigate this complaint.

2. Are the data elements disclosed by the City of Saskatoon to Canada Revenue Agency the Complainant's personal information?

[14] Personal information is defined in section 23 of LA FOIP. The relevant sections of the definition are 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:

...

(d) any identifying number, symbol or other particular assigned to the individual;
(e) the home or business address, home or business telephone number, fingerprints or blood type of the individual;

...

(i) information that was obtained on a tax return or gathered for the purpose of collecting a tax;

(j) information that describes an individual's finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness; or

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual

[15] The following data elements relating to the Complainant were disclosed to CRA: her account number with the City, her current and former address and her name. These data elements qualify as personal information pursuant to sections 23(1)(d), 23(1)(e) and 23(1)(k)(i) of LA FOIP respectively.

[16] I determined a list of her bill and payment history was disclosed to CRA. This information includes late payment charges. I find that information about indebtedness and repayment behaviour would qualify as information that describes an individual's credit worthiness. In arriving at that conclusion, I am guided by the Privacy Commissioner of Canada's *PIPEDA* Case Summary #2003-206. Therefore, the Complainant's bill and payment history would qualify as personal information pursuant to section 23(1)(j) because I view it to be information about her credit worthiness.

3. Did the City of Saskatoon have the authority to disclose the Complainant's personal information to Canada Revenue Agency?

[17] On October 21, 2005, my office notified the City of our intention to undertake an investigation. We invited the City to make representations regarding the Complainant's allegations and its authority to disclose her personal information to CRA. We received a submission from the City Clerk dated November 23, 2005 which stated:

The City, through the Office of the City Treasurer, has had a longstanding arrangement with Canada Customs and Revenue Agency... whereby it provides utility information when requested. The information is disclosed in accordance with Section 28(1)(h) of *The Local Authority Freedom of Information and Protection of Privacy Act*. **We do not enquire of [CRA] the purpose for which the information is required.**

For ease of administrating the requests, the practice until recently was that a printout of the utility history was made and faxed to [CRA], and [CRA] charged \$25.00 for each year of information requested. [emphasis added]

[18] Section "28(1)(h)" of LA FOIP does not exist. In a letter dated March 13, 2006 to the City, my office sought to clarify with the City which section of LA FOIP it intended to rely upon as follows:

In your submission, you cite section 28(1)(h) as your authority for the disclosure. However, as this provision does not exist, we assume you are referring to section 28(2)(h).

[19] In its letter of April 7, 2006, the City clarified that it was actually relying on section 28(2)(h) of LA FOIP as its authority for releasing the Complainant's personal information to CRA.

[20] Section 28(2)(h) of LA FOIP reads as follows:

(2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:

...

(h) pursuant to an agreement or arrangement between the local authority and:

- (i) the Government of Canada or its agencies, Crown corporations or other institutions;
- (ii) the Government of Saskatchewan or a government institution;
- (iii) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;
- (iv) the government of a foreign jurisdiction or its institutions;
- (v) an international organization of states or its institutions; or
- (vi) another local authority;

for the purpose of administering or enforcing any law or carrying out a lawful investigation

- [21] Also, in our letter of March 13, 2006, we asked the City to expand on its argument regarding its reliance on section 28(2)(h) of LA FOIP. Our request read as follows:

Please provide further representation as to how the City has determined that it is authorized under section 28(2)(h) of the Act to disclose any of the complainant's personal information to CCRA "*for the purpose of administering or enforcing any law or carrying out a lawful investigation.*" We have included portions of a Report issued by this office [wherein] we defined what constitutes a "lawful investigation." I trust you will find it of interest if you are relying upon that part of the provision above.

- [22] The City responded to this request in its letter to my office dated April 7, 2006. It stated:

Finally, you requested "further representation as to how the City has determined that it is authorized under section 28(2)(h) of the Act to disclose any of the complainant's personal information to CCRA '*for the purpose of administering or enforcing any law or carrying out a lawful investigation.*'" The CCRA administers tax laws for Saskatchewan. The requests come from the Verification and Enforcement Section of the Saskatoon Tax Services Office. We have had a long-standing (more than 27 years) arrangement with CCRA to release the information to assist them in administering the tax laws, which in our opinion is permissible in accordance with section 28(2)(h)(i) of the Act.

- [23] I take note of the City's comment that it has had a long-standing agreement with CRA to disclose personal information. In my Investigation Report LA-2005-003², the City stated that it had been releasing personal information related to building permits before July 1, 1993 when LA FOIP came in to force. In that instance, it argued that section 4(a) and

² Saskatchewan Information and Privacy Commissioner, Investigation Report LA-2005-003 at [17].

4(b) of LA FOIP would apply because it was a practice that existed prior to LA FOIP. Section 4(a) and 4(b) read as follows:

4 This Act:

- (a) complements and does not replace existing procedures for access to information or records in the possession or under the control of a local authority;
- (b) does not in any way limit access to the type of information or records that is normally available to the public;

[24] However, I note the City did not rely upon section 4 of LA FOIP in this case.

[25] It is important to note that, during a review of an access decision, section 51 of LA FOIP places the burden of proof on the local authority. In other words, it is up to the local authority to establish that an exemption would apply. Section 51 reads as follows:

51 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[26] The statute does not define burden of proof in a breach of privacy investigation in the context of an impugned disclosure. In these circumstances, I find that the burden must be borne by the local authority as only the local authority would have intimate knowledge of the circumstances surrounding the disclosure. That burden of proof is assessed on the basis of a balance of probabilities.³

[27] The City has not supplied this office with a copy of any agreement that it may have with CRA. As such, I am not aware of what type of personal information is outlined in the agreement and under what circumstances the personal information may be shared. On its face, the personal information provided by the City has nothing to do with a federal tax. The liability to pay federal tax is different than the liability to pay utilities. In absence of evidence that the payment or non-payment of utilities effects the payment of federal taxes, we are left with nothing more than speculation and conjecture as to the connection.

³ Our office's *Helpful Tips* resource available on our website, I have stated that: "The standard of proof is "on a balance of probabilities" or "on a preponderance of evidence." A party will have proven its case on a "balance of probabilities" if the Commissioner is able to say: "I think it more likely, or more probable, than not.""

- [28] Additionally, section 28(2) of LA FOIP states that local authorities may, pursuant to an agreement, disclose personal information to the Government of Canada “for the purpose of administering or enforcing any law or carrying out a lawful investigation”. We have only the City’s bare assertion that CRA was seeking to collect the Complainant’s personal information for the purpose of administering or enforcing a tax law. We would have expected the City to exercise more rigour in making such a determination before disclosing personal information. Additionally, the City states that CRA administers tax laws for the province. However, it is not specific as to which tax laws it is referring.
- [29] To meet the burden of proof in this case, the City would likely have had to provide a copy of its agreement with the CRA and/or identify which laws, and its specific sections, the CRA was seeking to administer or enforce. It did not provide me with such details.
- [30] I find the City’s representations surrounding section 28(2)(h) of LA FOIP to be vague and lacking in detail. As such, the City has not persuaded me that it had authority to disclose the Complainant’s personal information to CRA.

4. Did the City of Saskatoon exercise its discretion when disclosing this information?

- [31] Although the City has not met the burden of proof in demonstrating that it had the requisite authority to disclose the Complainant’s personal information to CRA, it is conceivable that an agreement may exist between the City and CRA. CRA does have the mandate to “investigate suspected cases of tax evasion, fraud and other serious violations of tax laws.”⁴ As such, I will address other issues related to disclosure of personal information in these circumstances. First, I will examine the City’s application of discretion in this case.

⁴ Canada Revenue Agency, *Criminal Investigations Program* available online at <http://www.cra-arc.gc.ca/ency/lrt/crmnl-eng.html>

[32] Section 28(2) of LA FOIP outlines the circumstances in which a local authority may disclose personal information without consent. Prior to enumerating all the circumstances in which personal information may be disclosed, the section states:

(2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority **may be disclosed**... [emphasis added]

[33] This indicates that even if a local authority has authority under this section to disclose personal information, it must use its discretion and consider the underlying privacy principles of LA FOIP before doing so. I have commented on the discretion of government institutions in Saskatchewan OIPC Report 2004-006:

Even if this section applies, the government institution may still decide to disclose the information. To exercise its discretion properly, the government institution **must show that it considered the objects and purposes of the Act...and did not exercise its discretion for an improper or irrelevant purpose.**⁵ [emphasis added]

[34] I have also stated in a previous Report that our office does not normally substitute our discretion for that of a public body. "However, we will make recommendations in cases where there is some basis to believe that discretionary power has been exercised for an improper purpose, or not exercised at all."⁶

[35] The City has not shown that it has exercised its discretion in this case. In fact there is evidence to the contrary. The City states in its letter of November 23, 2005 states:

We do not enquire of [CRA] the purpose for which the information is required.

For the ease of administrating the requests, the practice until recently was that a print out of the utility history was made and faxed to [CRA], and [CRA] charged \$25.00 for each year of information requested.

...

In summary, we agree that more information was disclosed than was requested, and we have changed our procedures accordingly. **However, should [CRA] ask for complete utility payment information, it will be provided in accordance with Section 28(1)(h) of *The Local Authority Freedom of Information and Protection of Privacy Act*.** [emphasis added]

⁵ Saskatchewan Information and Privacy Commissioner, Report F-2004-006 at [24].

⁶ Saskatchewan Information and Privacy Commissioner, Report H-2006-001 at [24].

[36] These statements are concerning because the City has effectively affirmed that it has a blanket policy when it applies this supposed discretionary authority vis-à-vis CRA. I cautioned public bodies against such blanket policies in my Report F-2006-001. Although the comment was in the context of reviews and discretionary exemptions for withholding information, it is also applicable in the context of the exercise of discretion when disclosing personal information. The comment is as follows:

In Ontario IPC Order M-285, the Inquiry Officer considers blanket approaches when applying discretionary exemptions. The relevant portions of the Order are offered below:

“Section 12 of the Act is a discretionary exemption. It provides the head with the discretion to disclose the record even if the record meets the test for exemption.

In response to a specific request for representations on the exercise of discretion, the City’s Freedom of Information Coordinator states:

The City Solicitor has advised that he relies on solicitor/client privilege in all instances where a claim against the City is involved or where there is an allegation of responsibility for damages.

The Co-ordinator confirms that it was the City Solicitor who reviewed the records and made the decision with respect to access and that the head of the City merely adopted the City Solicitor’s decision.

Where access to disclosure is denied pursuant to a discretionary exemption, the head is required to decide whether the record falls within the exemption claimed. Having established that it does, the head must then decide whether the exemption should be applied.

Guidance as to the general principles that apply to the exercise of discretion is found in “de Smith’s Judicial Review of Administrative Action” (4th ed., Toronto: Carswell, 1980) at page 285:

In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case.

Further guidance is provided in Orders P-262 and P-344, in which former Assistant Commissioner Tom Mitchinson stated at page 7 of each order:

In this appeal, the head's representations regarding the exercise of discretion do not refer to the particular circumstances of the appellant's situation. At most, they set out general concerns about the type of record at issue. The head has not explained why, in this case, the appellant's rights and interests are outweighed by these general concerns.

[Order P-262]

In my view, taking a "blanket" approach to the application of section 14(3) in all cases involving a particular type of record would represent an improper exercise of discretion. Although it may be proper for a decision maker to adopt a policy under which decisions are made, it is not proper to apply this policy inflexibly to all cases. In order to preserve the discretionary aspect of a decision under sections 14(3) and 49(a), the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the Act.

[Order P-344]

I adopt the reasoning applied in both these orders and find that, in this case, the head acted under the dictation of the City Solicitor. Further, I find that the City applied a blanket approach in deciding whether section 12 of the Act applies.

There is no indication in any of the correspondence from the City that it considered the merits of this particular appellant's case or that it considered whether, in this appeal, a departure from their general policy, as stated in their representations, would be warranted. Accordingly, in my view, the head has not properly exercised his discretion, and I order him to reconsider the question of discretion, in accordance with the requirements outlined above."

We view application of discretionary exemptions in the same fashion and caution government institutions to reconsider any ongoing use of policy for this purpose.⁷
[emphasis added]

[37] I adopt that reasoning in considering the discretionary provision in question in this investigation.

[38] Furthermore, the City has not demonstrated that it has considered the objects and purpose of LA FOIP. I have commented on the purposes of Saskatchewan legislation such as LA FOIP in my Report F-2004-003:

⁷ Saskatchewan Information and Privacy Commissioner, Report F-2006-001 at [69] and [70].

Over the twenty two years since the *Access to Information Act* came into force, provincial and territorial governments have enacted their own access to information and protection of privacy legislation. Many of those more recent provincial instruments have included a more comprehensive purpose clause. Those purpose clauses tend to reflect and reinforce the approach taken by the federal Information Commissioner and numerous decisions of superior courts in Canada. A good example is section 2 of the British Columbia *Freedom of Information and Protection of Privacy Act*:

“2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

- (a) giving the public a right of access to records
- (b) giving individuals a right of access to, and a right to request corrections of, personal information about themselves
- (c) specifying limited exceptions to the rights of access
- (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and**
- (e) providing for an independent review of decisions made under this Act”

I find that this neatly summarizes and clearly identifies the purpose of legislation such as the Saskatchewan Act. Our office will deal with the subject request for review and future requests for review by reference to those same five purposes.⁸ [emphasis added]

[39] In its letter of April 7, 2006, the City states that the agreement it has with CRA was entered into 27 years prior. It has, however, provided no documentary evidence of this agreement, its terms and limitations and, as LA FOIP was enacted in 1993, the alleged agreement would have been entered into long before LA FOIP came into force. As I have discussed earlier in this Report, the City has not chosen to rely on section 4 of LA FOIP that permit a practice of disclosure of personal information that existed before LA FOIP took effect to continue. Therefore, unless the City has revisited the alleged agreement between 1990 and 2006, it could not have considered the objects and purposes of LA FOIP when entering into it. Again, the City has not informed us of any such reconsideration.

[40] In our letter to the City dated March 13, 2006, our office gave the City opportunity to make representation that it exercised its discretion when releasing the Complainant’s personal information to CRA as follows:

⁸ Saskatchewan Information and Privacy Commissioner, Report F-2004-003at [10]-[11].

It is our responsibility to determine whether the City has exercised its discretion appropriately when disclosing the individual's personal information to another body under this part of the Act. The authority for disclosure must come from section 28(2) of the Act or section 10 of the Regulations. The City's authority for making the disclosure to CCRA may have been legitimate. However, based on the representation provided to us up to this point, the City has not demonstrated that this is in fact the case.

- [41] The City's supplementary submission did not address the issue of exercise of discretion.
- [42] The City has not provided any representation regarding the exercise of discretion in this instance. Significantly, the City has also provided representation that it would apparently indiscriminately disclose personal information to the federal government in the future upon request. Therefore, I find that the City did not exercise its discretion when releasing the Complainant's information to CRA.

5. Did the City of Saskatoon attempt to limit the amount of the Complainant's personal information it disclosed to Canada Revenue Agency?

- [43] Again, I have stated that the City has not demonstrated it had authority under section 28(2)(h) of LA FOIP to disclose the Complainant's personal information. However, as previously acknowledged, it is conceivable that an agreement exists although I do not know the elements of such an agreement. Therefore, I will comment on the amount of the Complainant's personal information the City disclosed to the CRA.
- [44] CRA's request for the Complainant's information dated June 7, 2005 asked for only the name and addresses of the Complainant. However, the City provided CRA with more personal information than asked, including: the Complainant's account number with the City and information that describes her financial activities and credit worthiness.
- [45] In its letter dated November 23, 2005, the City conceded that it sent more personal information about the Complainant than was asked for by CRA. It "agree[s] that more information was disclosed than was requested."

[46] I have stated in past Reports that public bodies should disclose the least amount of personal information possible.⁹ In my Investigation Report F-2007-001, I stated:

Disclosure, on the other hand, is occasionally mandatory, but most often is a discretion for the government institution to exercise dependent on the particular circumstances. It is subject to the requirement to disclose the **least amount of identifying information necessary for the purpose**.¹⁰ [emphasis added]

[47] The practice of disclosing the least amount of information when required is called the 'data minimization principle'. This is one of the 10 Fair Information Principles that have been codified in the Canadian Standards Association *Model Code for the Protection of Personal Information* (Q830)¹¹. I commented on the data minimization principles in my Investigation Report F-2009-001 as follows:

I also considered the important 'data minimization' rule and the 'need-to-know' rule that underlie Part IV of FOIP. Data minimization means that an organization should always collect, use and disclose the least amount of personal information necessary for the purpose.¹²

[48] The data minimization principle would also underlie Part IV of LA FOIP.

[49] The City disclosed more personal information than was necessary. This clearly constitutes a breach of the Complainant's privacy.

[50] I acknowledge that the City has asserted that it has changed its practices regarding disclosing the least amount of personal information possible. On April 30, 2010, it sent us a *Government Institution Disclosure Request Form* (the Form) that was circulated to what appears to be all City employees on June 1, 2009. The Form is specifically for disclosures of personal information under sections 28(2)(h), 28(2)(i) and 28(2)(o) of LA FOIP. Employees are asked to fill out this form which requires approval of an

⁹ Saskatchewan Information and Privacy Commissioner Investigation Reports F-2007-001, F-2009-001 and Report LA-2007-002

¹⁰ Saskatchewan Information and Privacy Commissioner, Investigation Report 2007-001 at [82].

¹¹ Canadian Standards Association, *Model Code for the Protection of Personal Information* (Q830) <http://www.csa.ca/cm/ca/en/privacy-code>. In Canada, the key elements of the Privacy Code are now incorporated into the *Personal Information Protection and Electronic Documents Act*.

¹² Saskatchewan Information and Privacy Commissioner Investigation Report F-2009-001 at [92]

“authorized official”. It asks for the following: name of government institution requesting the personal information, name of the subject individual, what data elements are being requested and purpose.

6. Did the City of Saskatoon respond appropriately to the complaint?

- [51] As mentioned previously, the Complainant brought her concerns to the City before coming to my office. When a local authority receives such a complaint, I expect that it would take measures to investigate and take any remedial action as warranted in a timely fashion. The City provided no detail of any steps or process it took to evaluate the Complainant’s concerns. As such, I must consider if the City has responded appropriately to this complaint.
- [52] My office has promoted adoption of privacy best practises since 2003. These privacy best practises in respect of a breach were codified in a document entitled *Privacy Breach Guidelines*¹³ on February 3, 2009. This document outlines five steps for responding to a privacy breach: contain the breach, investigate the breach, assess and analyze the breach, notification and prevention. It also offers tips and advice to public bodies when dealing with such circumstances.
- [53] In terms of containing the breach, the best practice would be for a local authority to stop the practice that led to the breach until it can be properly analyzed and preventative measures put into place. The local authority should also try and recover the personal information that was disclosed improperly.
- [54] We would then expect the local authority to fully investigate the breach on a systematic basis. Following the investigation, the local authority should perform a detailed analysis and assessment of the practices that led to the breach. This type of analysis would include an evaluation of the authority of the local authority to disclose personal information. It would also include a review of the exercise of discretion.

¹³ Saskatchewan Information and Privacy Commissioner, *Privacy Breach Guidelines* available online at www.oipc.sk.ca.

[55] The next step would be to advise those affected by the breach about the incident. In this case, it was the Complainant who originally discovered the breach. However, public bodies should go further than simply providing notification that the breach occurred. The *Privacy Breach Guidelines* suggest that the public body include the following when notifying affected individuals:

- Recognize the impacts of the breach on affected individuals and consider **offering an apology**;
- Date of the breach;
- Description of the breach (a general description of what happened);
- Description of the breached PI/PHI (e.g. name, credit card numbers, SINs, medical records, financial information, etc.);
- **The steps taken to mitigate the harm to date**;
- **Next steps planned and any long term plans to prevent future breaches**;
- Steps the individual can take to further mitigate the risk of harm. Provide information about how individuals can protect themselves e.g. how to contact credit reporting agencies (to set up a credit watch), how to change a health services number or driver's license number;
- Contact information of an individual within the Organization who can answer questions and provide further information; and
- That individuals have a right to complain to the OIPC. Provide contact information. [emphasis added]¹⁴

[56] When an individual comes to my office with a privacy complaint, we encourage them to first raise the issue and their concerns with the public body before we consider commencing an investigation. In her letter of September 20, 2005, the Complainant detailed many attempts she made to have her concerns resolved, including writing a formal letter of complaint. She went through several channels within the City to find satisfaction; and clearly did not find it. She then approached our office. This investigation may have been avoided had the City responded in a more timely and appropriate manner.

[57] After my office received the City's first submission on the matter, we asked if it had informed the Complainant that it shared too much personal information with CRA. It

¹⁴ Ibid, p. 7.

was our hope that the City would take further action to resolve the Complainant's concerns. It responded in its letter of April 7, 2006 by stating:

You asked whether "the City has informed the complainant of its finding", and the answer is yes. This had been done prior to the complainant contacting your office.

[58] My office also wrote to the Complainant on July 26, 2006 to ask:

...we would like to find out from your perspective if the City has addressed your concerns. For example, we are interested in whether the City offered you an apology or not. We would appreciate any further information that you are willing to provide.

[59] The Complainant responded in a letter dated August 25, 2006. She was clear that in her view the City had not adequately addressed her concerns. She also informed us that it had not afforded her an apology.

[60] Finally, the last step is prevention. The City stated in its letter of November 23, 2005 that:

Upon review of the matter, the City Treasurer agreed that [the Complainant's] concerns were valid, and the practice has now been changed so that [CRA] is provided only the information that has been requested, and nothing more.

In summary, we agree that more information was disclosed than was requested, and we have changed our procedures accordingly. However, should [CRA] ask for complete utility payment information, it will be provided in accordance with Section 28(1)(h) of *The Local Authority Freedom of Information and Protection of Privacy Act*.

[61] As previously noted, the City circulated the aforementioned form to its employees and has directed them to fill out the form before disclosing personal information to third parties such as CRA, but not until June 1, 2009. I applaud the City for taking this initiative, albeit late. Still, the form fails to require City employees to identify exactly for which agreement, act or audit program the personal information is required.

[62] Furthermore, the City has not demonstrated that it had the requisite authority to disclose personal information to CRA. It also has not shown that it used discretion in deciding to

make this disclosure. Therefore, I am not convinced it has put into place the appropriate safeguards and policies to prevent future improper disclosures of personal information to CRA.

[63] In summary, I find the City did not adequately respond to this complaint.

IV. FINDINGS

[64] I find that my office has jurisdiction to investigate this privacy complaint.

[65] I find that information relating to an individual's indebtedness or repayment behaviour describes creditworthiness and is personal information pursuant to section 23(1)(j) of LA FOIP.

[66] I find that the City did not meet the burden of proof in demonstrating that it had authority to disclose the Complainant's personal information to CRA pursuant to section 28(2)(h) of LA FOIP.

[67] I find that, at all material times, the City followed a blanket or indiscriminate policy regarding disclosure of personal information of the Complainant to CRA.

[68] I find the City did not exercise its statutory discretion when it disclosed the Complainant's personal information to CRA.

[69] I find that the City disclosed more personal information than was requested. As such the City violated the data minimization principle.

[70] I find the City breached Part IV of LA FOIP.

[71] I find that the City did not respond adequately to this breach.

V. RECOMMENDATIONS

- [72] I recommend that the City communicate to its employees its authority under section 28(2) of LA FOIP to disclose personal information to CRA. In doing so, the City should identify exactly which provisions in which tax or other laws give CRA authority to collect personal information of its clients. The City should also clarify specifically which types of personal information will be shared with CRA in what circumstances.
- [73] I recommend the City strengthen its policies to ensure that, each time a request is received from CRA, discretion is used on a case by case basis when disclosing personal information without consent pursuant to section 28(2) of LA FOIP.
- [74] I recommend the City ensure that employees responding to these requests understand and comply with the data minimization principle.
- [75] I recommend the City make every reasonable effort to retrieve from CRA the Complainant's personal information that was provided without authority.
- [76] I recommend that the City inform the Complainant about its intentions regarding these recommendations as well as any outcomes.
- [77] I recommend the City offer an apology to the Complainant.

Dated at Regina, in the Province of Saskatchewan, this 19th day of May, 2010.

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



GOVERNMENT INSTITUTION DISCLOSURE REQUEST
CITY OF SASKATOON

Date _____

The City of Saskatoon is authorized to disclose personal information to other levels of government in accordance with Sections 28(2)(h), (i) and (o) of *The Local Authority Freedom of Information and Protection of Privacy Act*. (Please see reverse for details.)

(Name of Government Institution) _____

requests disclosure of personal information pertaining to: (name of individual or other identifier) _____

which may be generally described as: (general description of information requested)

This information is required by the requesting government institution for the following purpose: (description of purpose and legislative authority for collection)

Printed Name & Title of Authorized Government Institution Official:

Phone Number _____ Signature _____

TO BE COMPLETED BY CITY OF SASKATOON

I hereby _____ consent or _____ refuse this disclosure of personal information to the requesting government institution.

Printed Name & Title of Authorized Official _____

Phone Number _____ Signature _____

Excerpt from *Local Authority Freedom of Information and Protection of Privacy Act*

28 (2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:

(h) pursuant to an agreement or arrangement between the local authority and:

- (i) the Government of Canada or its agencies, Crown corporations or other institutions;
- (ii) the Government of Saskatchewan or a government institution;
- (iii) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;
- (iv) the government of a foreign jurisdiction or its institutions;
- (v) an international organization of states or its institutions; or
- (vi) another local authority;

for the purpose of administering or enforcing any law or carrying out a lawful investigation;

(i) for the purpose of complying with:

- (i) an Act or a regulation;
- (ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada; or
- (iii) a treaty, agreement or arrangement made pursuant to an Act or an Act of the Parliament of Canada;

(o) to the Government of Canada or the Government of Saskatchewan to facilitate the auditing of shared cost programs.

