



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 001-2021 PART I

Rural Municipality of Lumsden No. 189

September 9, 2021

Summary:

The Applicant made an access to information request for records, to which the Rural Municipality of Lumsden No. 189 (RM) provided some records, but stated it was denying access to other records pursuant to subsections 16(1), 18(1) and 21 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The RM further responded to the Applicant that some records did not exist. The Applicant was dissatisfied with the RM's response, and asked my office to review the RM's decision to deny access pursuant to subsections 16(1), 18(1) and 21 of LA FOIP, as well as how the RM met its duty to assist and its search efforts. The RM asked my office to consider discontinuing the review pursuant to subsections 39(2)(a), (b) and (c) of LA FOIP, and the Commissioner found the circumstances to discontinue a review pursuant to these subsections did not exist. As the RM did not provide records or proper arguments, the Commissioner further found the RM failed to: meet its duty to assist; and, conduct a reasonable search for records. The Commissioner recommended that within 30 days of issuance of this Report, the RM do all of the following: 1) contact the Applicant to clarify their request, undertake and complete a search for responsive records; 2) issue a new section 7 response to the Applicant and provide them with a severed copy of any records the Applicant may be entitled to receive pursuant to section 8 of LA FOIP; and 3) provide his office with a copy of the non-severed and severed records, as well as arguments for any exemptions upon which it is relying to deny access, including an affidavit of records if it is making a *prima facie* case that subsection 21(a) of LA FOIP applies.

I BACKGROUND

- [1] On December 4, 2020, the Rural Municipality of Lumsden No. 189 (RM) received an access to information request for the following from the Applicant:

We seek all information, notes, recordings and everything related to the R.M. of Lumsden #189 Resolution # 2020-439 and all related following correspondence, letters and emails not limited in any way to just to the Reeve, Councillors, Administrators, MPE Engineering and R.M. staff.

We also seek all information and names of persons responsible for a change of review and comment on the Clifton Remediation Plan related to the Resolution to who and why the resolution was changed to disregarding the Clifton Remediation Report to ordering a complete new Report from MPE Engineering without consulting the R.M. Councilor passing a new resolution.

We seek all copies and dates related to the R.M. of Lumsden contacting MPE Engineering to hire said work. We also seek why, when and who decided and advised the R.M. lawyer to advise the writer, [Applicant] he should not contact MPE and he would be responsible for payment.

As the subject property is rented, [the Applicant] need to coordinate MPE staff timing and entrance to the property to carry out similar study, drone flights, testing and measuring as done by Clifton and associates.

- [2] In a letter dated December 31, 2020, the RM responded to the Applicant, in part, with the following:

Your request is governed by the *Local Authority Freedom of Information and Protection of Privacy Act*. There are exceptions to which records must be released to you. I am providing you with the Agenda, Minutes and Resolution from the October 15th, 2020 meeting. I am refusing access to any further documentation. As you have requested a broad array of documents without much specificity, I will reply to these requests generally.

- [3] In its response of December 31, 2020, to the Applicant, the RM added that, “[f]urther information regarding following correspondence, letters, and emails related to Resolution #2020-439” are covered by subsections 16(1) and 18(1), and section 21 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

- [4] On December 31, 2020, the Applicant asked my office to review the RM’s denial of access as they had not received a response. However, as the RM ended up providing its section 7

response to the Applicant on the same date, the Applicant instead asked my office to review the RM's decision to deny access to portions of the records.

[5] On January 5, 2021, my office emailed the RM to ask it to provide clarification on its section 7 response to the Applicant.

[6] In a letter dated, January 15, 2021, the RM responded to my office to explain why some of the records the Applicant sought did not exist, and to also ask my office to consider discontinuing the review pursuant to subsection 39(2)(a) of LA FOIP, as it felt the Applicant's actions were a "vexatious use of the Act". The RM also reiterated its reliance on sections 16, 18 and 21 of LA FOIP to deny access to portions of the records, and that certain records could not be provided as they did not exist.

[7] In an email dated January 18, 2021, my office advised the RM that my office could not make a determination to discontinue the review pursuant to subsection 39(2)(a) of LA FOIP "at this stage" [of the review process], but that it could provide arguments in support of subsection 39(2)(a) of LA FOIP in its submission. My office also advised the RM that its section 7 response to the Applicant did not inform them that records did not exist, and so asked it to provide the Applicant with an updated section 7 response.

[8] In a letter dated February 2, 2021, the RM provided an additional response to the Applicant in an effort to answer some of the questions they asked in their access to information request, and also to advise as follows:

There are no notes or recordings related to Resolution #2020-439. The Resolution exists because it is an obvious next step following to the Court Order where you were instructed to prepare a site remediation plan.

[9] On February 4, 2021, my office sent notification to both the Applicant and the RM of my office's intent to undertake a review of the RM's decision to deny access to portions of the records pursuant to subsections 16(1), 18(1) and section 21 of LA FOIP, as well as a review of how the RM met its duty to assist and its search efforts.

II RECORDS AT ISSUE

[10] The RM refused to provide my office with a copy of the records in question or an index of records. It appears to have also indicated it did not conduct a search for records. The RM apparently based its decision on its request for my office to discontinue its review pursuant to subsection 39(2)(a) of LA FOIP because, “[t]he RM’s position is that the Request is so flawed that it would be meaningless to attempt to collect the requested documentation (which is either non-existent or clearly privileged)”.

[11] This is Part I of a Report that will address the above issues, but also look to determine if the RM met its duty to assist the Applicant. Part II of this Report will deal with the potential application of any exemptions including solicitor-client privilege as well as search efforts.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[12] The RM qualifies as a “local authority” pursuant to subsection 2(f)(i) of LA FOIP. Therefore, I have jurisdiction to undertake this review.

2. Did the Applicant request this review on grounds that are frivolous, vexatious, not in good faith, or concern a trivial matter?

[13] In its submission, the RM asked my office to consider discontinuing this review pursuant to subsections 39(2)(a), (b) and (c) of LA FOIP. As this is a preliminary consideration, I must review it prior to reviewing the other matters identified as part of this review.

Subsection 39(2)(a) of LA FOIP – Frivolous and vexatious

[14] Subsection 39(2)(a) of LA FOIP provides that the Commissioner can refuse to conduct a review or discontinue one, where the Commissioner is of the opinion the request for review is frivolous or vexatious (*Guide to LA FOIP, Chapter 3: Access to Records*, Updated: June

29, 2021, at page 110 (Guide to LA FOIP). Subsection 39(2)(a) of LA FOIP provides as follows:

39(2) The commissioner may refuse to conduct a review or may discontinue a review if, in the opinion of the commissioner, the application for review:

(a) is frivolous or vexatious;

[15] *Frivolous* is typically associated with matters that are trivial or without merit, lacking a legal or factual basis or legal or factual merit; not serious; not reasonably purposeful; of little weight or importance (Guide to LA FOIP, Chapter 3, p. 110).

[16] *Vexatious* means without reasonable or probable cause or excuse. A request is vexatious when the primary purpose of the request is not to gain access to information, but to continually or repeatedly harass a public body in order to obstruct or grind a public body to a standstill. It is usually taken to mean with intent to annoy, harass, embarrass, or cause discomfort. A request is not vexatious simply because a government institution is annoyed or irked because the request is for information the release of which may be uncomfortable for the government institution (Guide to LA FOIP, Chapter 3, p. 110).

[17] LA FOIP must not become a weapon for disgruntled individuals to use against a local authority for reasons that have nothing to do with the Act. In court proceedings, a vexatious proceeding means "...that the litigant's mental state goes beyond simple animus against the other side, and rises to a situation where the litigant is attempting to abuse or misuse the legal process" (*Jamieson v Denman*, 2004 ABQB 593 (CanLII), para 127. 176). In *Chutskoff v Bonora*, 2014 ABQB 389 (CanLII), Michalyshyn J identified a "catalogue" of features of vexatious litigation:

1. collateral attack;
2. hopeless proceedings;
3. escalating proceedings;
4. bringing proceedings for improper purposes;
5. initiating "busybody" lawsuits to enforce alleged rights of third parties;
6. failure to honour court-ordered obligations;
7. persistently taking unsuccessful appeals from judicial decisions;
8. persistently engaging in inappropriate courtroom behavior;
9. unsubstantiated allegations of conspiracy, fraud, and misconduct;

10. scandalous or inflammatory language in pleadings or before the court; and
11. advancing “Organized Pseudolegal Commercial Argument.

Any of these indicia are a basis to classify a legal action as vexatious.

(Guide to LA FOIP, Chapter 3, pp. 110 – 111)

[18] When considering if a request for review was made on grounds that are frivolous or vexatious, I am determining if there is a pattern or type of conduct that amounts to an abuse of the right of access. Depending on the nature of the case, one factor alone or multiple factors in concert with each other can lead to a finding that a request is an abuse of the right of access. The following are the factors considered when determining if there is a pattern or type of conduct that amounts to an abuse of the right of access:

- **Number of requests:** is the number excessive? Where the volume of requests interferes with the operations of a government institution it can be argued the requests are excessive. In order to interfere with operations, the volume of requests must obstruct or hinder the range of effectiveness of the government institution’s activities.
- **Nature and scope of the requests:** are they excessively broad and varied in scope or unusually detailed? Are they identical to or similar to previous requests?
- **Purpose of the requests:** are the requests intended to accomplish some objective other than to gain access? For example, are they made for “nuisance” value, or is the applicant’s aim to harass the government institution or to break or burden the system?
- **Timing of the requests:** is the timing of the requests connected to the occurrence of some other related event, such as a court or tribunal proceeding?
- **Wording of the request:** are the requests or subsequent communications in their nature offensive, vulgar, derogatory or contain unfounded allegations? Offensive or intimidating conduct or comments by applicants is unwarranted and harmful. They can also suggest that an applicant’s objectives are not legitimately about access to records. Requiring employees to be subjected to and to respond to offensive, intimidating, threatening, insulting conduct or comments can have a detrimental effect on wellbeing.

(Guide to LA FOIP, Chapter 3, pp. 111 – 112)

[19] To support its position that the Applicant's request was frivolous and vexatious, the RM stated as follows:

41. The Request is hopeless. The Applicant has failed to honour their court-ordered obligations and the factual underpinnings related to the Request are a direct result of this failure. The applicant persistently took unsuccessful appeals which are the direct precedent to the underlying fact scenario. The Applicant uses scandalous and inflammatory language in their applications & makes unsubstantiated allegations of conspiracy, fraud, and misconduct.

42. The Applicant was to meet certain obligations on December 5th, 2013, through a Zoning Compliance Order, including submission of a site remediation plan. The Applicant unsuccessfully appealed this decision to the Saskatchewan Municipal Board. After the Applicant's continued failure to meet his obligations, including the submission of the remediation plan, the RM brought the matter to the Court of Queen's Bench. On December 17th, 2019, the Honourable Court made an Order requiring the Applicant to, among other things, complete a remediation plan. The Applicant again failed to complete the remediation plan and was declared in Contempt of Court on September 17th, 2020.

43. In finally attempting to do what he ought to have done, the Applicant contracted with [third party] to create the Report. The RM, as part of the litigation, needed to review the Report and ensure it met the obligations that had been imposed on [Applicant]. The information that the Applicant requests is directly related to his refusal to live up to court-ordered obligations, and his unsuccessful appeals.

44. In 2021-LAFOIP 001 the Applicant states that a 'false Affidavit' was submitted to the Queen's Bench Court. This language is inflammatory and scandalous. It accuses the RM of knowingly misleading the Court. Further, it states that the Affidavit instead refers to an unsanctioned gravel operation belonging to an R.M. of Lumsden Councillor. This information is extraneous to the request but insinuates that there is an aspect of conspiracy to the 'false Affidavit'.

45. In 2021-LAFOIP 006 the Applicant requests information of overtime records for November 23rd, 2019. This is based on the Applicant's review of a May 23rd, 2019, report submitted by the Director of Planning and Development to the RM's council. Part of the report indicated that the Applicant did not attend a meeting with RM staff. The Applicant states that "[the Applicant] has no recollection of written items and very much doubts an employee of the RM would try to same day schedule and expect attendance on a Saturday. If so there would be a record of overtime." This again insinuates fraud or misconduct on behalf of the RM, claiming that a report tendered relied on fabricated information.

46. In 2021-LAFOIP 009, the Applicant ends the request by stating "Does the R.M. of Lumsden administer the permission and I.L.O. setbacks in an atmosphere of Fairness and Equality?" (sic) This is scandalous language. Regardless of the question mark

appending the sentence, the Applicant is clearly communicating that the RM has somehow conspired to administer the permission and I.L.O. setbacks in a way that is unfair.

47. While the 2021-LAFOIP requests were all made after the Request, the Commissioner is empowered to review subsequent communications when determining if requests are an abuse of the right of access. The language and tone that the Applicant uses in communication with the RM demonstrates that at least part of the objective is not to obtain information but instead to delay and denigrate the RM. The accusations and allegations made by the Applicant are unfounded and have no place in the LAFOIP process.

48. The Request is vexatious because it is categorically hopeless and hopeless in a way that cannot be remedied. The Request asks specifically for communication between the RM and their solicitor relating to decisions made in an ongoing legal dispute, which is by definition protected by solicitor-client privilege. More widely, the Request asks for communication regarding decisions being made which are related to ongoing litigation that is clearly covered by litigation privilege.

49. Litigation privilege is a class-based privilege. Documents must meet two criteria to be considered part of the class. It must be created for the dominant purpose of litigation, and the litigation must be ongoing or anticipated.

50. Resolution 2020-439 was a decision of the RM relating directly to litigation. QBG 1157 of 2019 is directly mentioned in the motion. The commentary that was expected from [third party] was solely and exclusively to be used in ongoing litigation and to advise litigation strategy. Specifically, the Applicant was attempting to purge their contempt by Filing the Report. Purging the contempt requires a Remediation Plan that complies with various requirements. The acceptance or rejection of the Report by the RM is likely to determine whether the contempt would be purged by consent or whether there would be ongoing legal battle to determine if the Report met the threshold required by the Order. The dominant, and only, purpose of engaging with [third party] was litigation.

51. Even in the situation where the factual underpinnings of the second request regarding ‘disregarding the [third party] Report’ and ordering a new report were accurate—which they are not—no documentation would be disclosable. The decision to request a new report is a decision to guide litigation. Any discussion about the change would be covered by litigation privilege. There is no permutation of the question asked which would lead to any disclosure because the Report is a litigation document. All review, analysis, discussion, and commentary on the Report by the RM or [third party] is created for the dominant purpose of litigation and that litigation continues.

52. Further, ‘copies and dates’ related to the R.M. of Lumsden contacting [third party] to hire ‘said work’ are documents that are in the litigation privileged class. The following non-exhaustive list of litigation privileged documents is instructive: a.

correspondence between counsel and the client(s); b. documents relevant to the issues pleaded in the lawsuit that were produced by the parties; 12 c. witness statements; d. letters retaining experts or commenting on their reports; e. research memoranda and legal authorities; f. annotations on records written by the litigator; and g. miscellaneous public documents such as newspaper clippings, press releases and investigator's reports

[20] For their part, the Applicant stated as follows:

We respect the principal of Solicitor Client privilege and seek only information that does not directly involve the solicitor for the R.M. of Lumsden.

Our LA FOIP request and our Request for Review are not frivolous or vexation [sic] and does not contain a trivial matter.

For almost 10 years we have watched the R.M. of Lumsden do subdivision on land adjacent to ours with the same access issues, but they have not responded to our many written requests.

[21] In Review Report 053-2015, I stated at paragraph [25] that when considering if a request for review is frivolous or vexatious, it is important to consider the nature and scope of the records sought by an applicant. I further stated that, “[a] review of the requests may indicate a theme, pattern or type of conduct that indicates that access to records is not the intent of the Applicant. In many cases, ascertaining the Applicant’s purpose requires the drawing of inferences from behavior as Applicants seldom admit to a purpose other than access”.

[22] In Review Report 053-2015, I also stated at paragraph [32] as follows:

[32] A request is made for the purpose other than to gain access if the Applicant is motivated not by a desire to obtain access, but by some other objective. Access to information legislation exists to ensure government accountability and to facilitate democracy. Therefore, where an Applicant’s motivation is fact finding or to obtain proof of wrong-doing these purposes cannot be considered unreasonable or illegitimate. Applicants may seek information to assist them in a dispute with a public body, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by public bodies. On the contrary, if the Applicant is rolling forward grounds and issues into subsequent actions for the purpose of harassment, nuisance or to raise an issue already determined than the motivation may not be reasonable or legitimate.

- [23] With respect to the number of access to information requests, the RM stated, “[s]ubsequent to filing the Request [initial access to information request], the Applicant has made no fewer than 11 further LA FOIP requests, including”, and then provided a list of numbered access to information requests, the dates received and the time period covering the request.
- [24] Upon review of the list of access requests, I note three were made the same date (January 4, 2021), and the rest were made between January 20, 2021 and May 3, 2021 (two requests were made May 3, 2021). Of the 11 requests, five were made after the RM provided the Applicant with clarification of its section 7 response on February 12, 2021. I note the timeframes covered by each request are different, but the RM has not provided copies of the requests for me to determine if the details or contents of each request are distinctly different. I can determine the Applicant made multiple access to information requests, sometimes on the same date, but that is all I am really able to determine. That is, if making multiple requests suggests the Applicant was making them for nuisance value rather than to obtain access to records, I require more information and evidence, such as the contents of the requests, to make that inference.
- [25] Because the RM has not provided copies of the Applicant’s subsequent access to information requests or its section 7 responses for me to review, I am also not able to determine how broad they were in scope or their purpose, or if it appeared the Applicant made them to burden the RM.
- [26] As for the timing of the access requests, it appears the Applicant made them while in litigation with the RM and that they were asking for records or information relating to that litigation. Having other proceedings like litigation occurring does not, in and of itself, suggest a request for review to my office is vexatious or frivolous. Applicants can have other proceedings occurring with a public body when they utilize their access to information rights under LA FOIP.
- [27] With respect to wording, the RM asserts the Applicant’s language and accusations are “inflammatory and scandalous”. For example, the RM stated the Applicant submitted a “false affidavit” to the Queen’s Bench Court, which accused the RM of knowingly

misleading the Court. The RM also attached, as evidence, an email from the Applicant to the RM's law firm, dated December 21, 2019, wherein the Applicant asks, "[m]aybe we can make you some more RM money in a year", and "[w]hat is the penalty for ignoring the Order?" The RM advised the latter was in relation to a court-ordered remediation plan the Applicant was to follow. In my view, asking the RM's lawyer what the penalty is for ignoring the Order could be construed as being provocative; however, it may also point to the Applicant being frustrated by outcomes or processes. If the Applicant used offensive or foul language in any of their correspondence with the RM, the RM did not provide evidence to support this.

[28] The RM cites further examples of where the Applicant made accusations, some of which I quoted at paragraph [19] of this Report. The RM, however, did not provide evidence to support its claims, such as a copy of the affidavit it mentioned. Because I do not have copies of the access to information requests, I am also not able to determine if the Applicant displayed a pattern of abusive language or accusations that supports a pattern of behaviour suggesting their motive was other than to receive access to records.

[29] Given the lack of evidence provided by the RM to support its request, I find the Applicant's request for review was not frivolous or vexatious.

Subsection 39(2)(b) of LA FOIP – Not made in good faith

[30] Subsection 39(2)(b) of LA FOIP provides that the Commissioner can dismiss or discontinue a review where the request for review has not been made in good faith (Guide to LA FOIP, Chapter 3, p. 116). Subsection 39(2)(b) of LA FOIP provides as follows:

39(2) The commissioner may refuse to conduct a review or may discontinue a review if, in the opinion of the commissioner, the application for review:

...

(b) is not made in good faith; or

[31] *Good faith* means the state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. Good

faith is an intangible quality encompassing honest belief, the absence of malice and the absence of design to defraud or take advantage of something (Guide to LA FOIP, Chapter 3, p. 116).

[32] *Not in good faith* means the opposite of “good faith”, generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or other contractual obligation, not prompted by an honest mistake as to one’s rights, but by some interested or sinister motive. When an applicant refuses to cooperate with a local authority in the process of accessing information or if a party misrepresents events to my office, this could suggest the party is not acting in good faith. Bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will (Guide to LA FOIP, Chapter 3, p. 116).

[33] When reviewing whether a request for review was made in bad faith, I consider the same factors I outlined at paragraph [18] of this Report. In its submission to my office, the RM asserted:

53. The Request is hopeless. It has been hopeless from the moment it was filed. The Applicant wilfully [sic] or recklessly misunderstood what was happening in his ongoing litigation.

54. The Applicant has a duty to act in good faith when making a LAFOIP request:

An application to disregard is a serious matter as it could have the effect of removing an applicant’s express right to seek access to information. However, FOIP recognizes that not all access to information requests are appropriate. Section 45.1 of FOIP exists to preserve the proper intent and functioning of the Act. Former British Columbia Information and Privacy Commissioner (BC IPC), David Loukidelis, said the following about the role of the equivalent provision in British Columbia’s Act:

...Access to information legislation confers on individuals such as the respondent a significant statutory right, i.e., the right of access to information (including one’s own personal information). All rights come with responsibilities. The right of access should only be used in good faith. It must not be abused. By overburdening a public body, misuse by one person of the

right of access can threaten or diminish a legitimate exercise of that same right by others, including as regards their own personal information. Such abuse also harms the public interest, since it unnecessarily adds to public bodies' costs of complying with the Act. Section 43 exists, of course, to guard against abuse of the right of access...

(BC IPC Order 99-01 at p. 7)

55. Requesting information that the Applicant knows does not exist burdens the RM and diminishes others' ability to request information. Failing to formulate a request perfectly is not necessarily a demonstration that a party is not acting in good faith. However, the factual matrix surrounding the request must be considered. An individual with no access to information can be forgiven for asking a question that has no answer. An individual who has full access to information, particularly through counsel, should not be given the same grace.

56. The Request was made after the discussion between counsel for the Applicant and counsel for the RM. The Applicant knew, or how to have known, that what he was requesting could not be provided. Regardless of the Request's hopelessness, the request necessitated expense on behalf of the RM and that expense was likely part of the Applicant's goal. The RM draws the Commissioner's attention to the email sent by the Applicant in December of 2019 where he states that he may be able to make the RM's legal counsel more money by ignoring a Court Order at Tab D. This behaviour should [not] be encouraged. An applicant who knowingly makes a faulty request is not complying with the responsibilities associated with the right of access to information and is not acting in good faith.

[34] For their part, the Applicant stated they sought records that fell outside those the RM claims are covered by solicitor-client or litigation privilege.

[35] The RM states such information was shared between its counsel and counsel for the Applicant, so the Applicant knew or ought to have known, it could not be requested. The RM, however, did not provide evidence to support its claims. Such evidence could have included, besides the record itself, evidence such as notes or copies of conversations between solicitors, or a description of what those conversations entailed and when they occurred.

[36] It also appears the RM acknowledged it did not conduct a search or gather the records the Applicant sought, so it is unclear how it knows which records are at issue and whether they exist or not. In addition, it is not on applicants to "know" records requested are subject to

solicitor-client privilege under LA FOIP. The burden of demonstrating that an exemption to the right of access applies is on the RM pursuant to section 51 of LA FOIP. As such, it appears the RM has not properly processed the Applicant's access to information request. Further, it has refused to provide my office with any records, so that my office may conduct a fulsome review of several discretionary exemptions it has applied to the unknown records at issue.

- [37] Given the lack of evidence provided by the RM to support its request, I find the Applicant's request for review was not made in bad faith.

Subsection 39(2)(c) of LA FOIP – Concerns a trivial matter

- [38] Subsection 39(2)(c) of LA FOIP provides that the Commissioner can dismiss or discontinue a review where the request for review concerns a trivial matter (Guide to LA FOIP, Chapter 3, p. 118). Subsection 39(2)(c) of LA FOIP provides as follows:

39(2) The commissioner may refuse to conduct a review or may discontinue a review if, in the opinion of the commissioner, the application for review:

...
(c) concerns a trivial matter.

- [39] A *trivial matter* is something insignificant, unimportant or without merit. It is similar to frivolous. However, what is trivial to one person may not be trivial to another (Guide to LA FOIP, Chapter 3, p. 118).

- [40] In support of its request to discontinue my review as it concerns a trivial matter, the RM stated as follows:

Frivolous matters and matters that are trivial are closely related. They often lack a legal or factual basis, legal or factual merit, or are not reasonable purpose.

- [41] The RM did not provide a direct argument or evidence to support its position that the Applicant's request for review concerned a trivial matter. The RM suggests that trivial and

frivolous are closely related. I have already found earlier in this Report that the request for review was not frivolous. Further, as noted earlier, the Applicant indicated that:

For almost 10 years we have watched the R.M. of Lumsden do subdivision on land adjacent to ours with the same access issues, but they have not responded to our many written requests.

[42] Based on this, it appears this is an important matter and has merit. I find the Applicant's request for review does not contain a trivial matter.

[43] As I have found the Applicant's request for review was not frivolous and vexatious, made in bad faith, or does not concern a trivial matter, I will proceed with my review.

3. Did the RM conduct a reasonable search for records?

[44] Section 5 of LA FOIP provides as follows:

5 Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the possession or under the control of a local authority.

[45] Section 5 of LA FOIP is clear that access to records must be granted if they are in the possession or under the control of the local authority subject to any exemptions that may apply pursuant to LA FOIP (Guide to LA FOIP, Chapter 3, p. 3).

[46] The threshold that must be met is one of reasonableness. In terms of a local authority's search efforts, a *reasonable search* is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records reasonably related to the access to information request. A reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances. Examples of information a local authority can provide to my office that may support its search efforts include the following:

- For personal information requests – explain how the individual is involved with the local authority (i.e. client, employee, former employee etc.) and why certain departments/divisions/branches were included in the search.
- For general requests – tie the subject matter of the request to the departments/divisions/branches included in the search. In other words, explain why certain areas were searched and not others.
- Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
- Explain how the records management system is organized (both paper & electronic) in the departments/divisions/branches included in the search.
- Describe how records are classified within the records management system. For example, are the records classified by:
 - alphabet
 - year
 - function
 - subject
- Consider providing a copy of your organization’s record schedule and screen shots of the electronic directory (folders & subfolders).
- If the record has been destroyed, provide copies of record schedules and/or destruction certificates.
- Explain how you have considered records stored off-site.
- Explain how records that may be in the possession of a third party but in the local authority’s control have been searched such as a contractor or information management service provider.
- Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Explain which folders within the records management system were searched and how these folders link back to the subject matter requested. For electronic folders – indicate what key terms were used to search if applicable.
- Indicate the calendar dates each employee searched.
- Indicate how long the search took for each employee.

- Indicate what the results were for each employee's search.
- Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided. For more on this, see my office's resource, *Using Affidavits in a Review with the IPC*, available on my office's website.

(Guide to LA FOIP, Chapter, 3 pp. 7 - 10)

[47] The preceding list is intended to be a guide. Each case will require different search strategies and details depending on the records requested. (Guide to LA FOIP, Chapter 3, p. 10)

[48] The RM did not directly address its search efforts in its submission, and it appears to have acknowledged it did not search for responsive records, stating in correspondence dated July 15, 2021, "it would be meaningless to attempt to collect the requested documentation (which is either non-existent or clearly privileged)". This was after my office advised the RM on June 30, 2021, it would need to provide my office with records and arguments for where it wanted to claim subsections 16(1) and 18(1) of LA FOIP, and that it had the option of either providing the records or an affidavit of records to make a *prima facie* case that subsection 21(a) of LA FOIP applies to records to which it is claiming solicitor-client privilege.

[49] Based on its statement in the preceding paragraph and lack of information on its search efforts, I find the RM did not conduct a reasonable search for records. As the RM has not identified the records responsive to this access to information request, it is premature for it or my office to consider the possible application of any exemptions at this time. Once the RM provides my office with the records and submission, including any exemptions it wants to apply, I will in Part II of this Report further examine its search for records and the exemptions it has applied.

4. Did the RM meet its duty to assist?

[50] Subsection 5.1(1) of LA FOIP provides as follows:

5.1(1) Subject to this Act and the regulations, a local authority shall respond to a written request for access openly, accurately and completely.

[51] Subsection 5.1(1) of LA FOIP requires a local authority to respond to an applicant's written access to information request openly, accurately and completely. This means that local authorities should make reasonable efforts to not only identify and seek out records responsive to an applicant's access to information request, but to explain the steps in the process and seek any necessary clarification on the nature or scope of the request within the legislated timeframe (Guide to LA FOIP, Chapter 3, p. 15).

[52] Though LA FOIP requires the local authority to respond openly, accurately and completely, the duty to assist also involves making every reasonable effort to assist without delay. This should occur pre and post receipt of any access to information request. *Reasonable effort* is what a fair and rational person would expect to be done or would find acceptable and helpful in the circumstances (Guide to LA FOIP, Chapter 3, p. 16).

[53] *Open* means to be honest, forthcoming and transparent. Where a decision is made to not provide an applicant with all or part of a record, a local authority should provide reasons for the refusal in an upfront and informative manner. Being open would also include explaining to an applicant other things such as: how and why a decision was made, how responsive records were searched for, any additional information necessary to explain something found in the record that is believed to be confusing; how a fee is calculated; and creating a record when appropriate (Guide to LA FOIP, Chapter 3, p. 16).

[54] *Accurate* means careful; precise; lacking errors. Further, it means the local authority must provide the applicant with sufficient and correct information about the access process and how decisions are made. This includes understanding what the applicant is actually looking for including: clarifying the nature of the access to information request; understanding the nature of the records; searching for the record to make sure that all possible responsive documents have been located; preparing an Index of Records if this would make the local authority's response more accurate; and, reviewing the records line-by-line before a

decision is made with respect to what, if any, exemptions apply (Guide to LA FOIP, Chapter 3, pp. 16 – 17).

[55] *Complete* means having all its parts; entire; finished; including every item or element; without omissions or deficiencies; not lacking in any element or particular. Further, it means the information from a local authority must be comprehensive and not leave any gaps in its response to an applicant’s access to information request. A local authority should provide all the necessary details to enable an applicant to understand how a decision was reached (Guide to LA FOIP, Chapter 3, p. 17).

[56] The RM did not directly address how it met its duty to assist in its submission. I note in its section 7 response to the Applicant on December 31, 2020, the RM stated, “[a]s you have requested a broad array of documents without much specificity, I will reply to these requests generally”. In its February 2, 2021 letter to the Applicant, the RM explained that records in relation to “Resolution #2020-430” do not exist because it involves, “an obvious next step following the Court Order where you were instructed to prepare a site remediation plan”. The RM’s letter went on to further explain matters for the Applicant in relation to their access to information request, but added it could not provide information to the extent that it would jeopardize the RM’s legal case with the Applicant. As such, it was still relying on records being exempt subject to subsections 16(1), 18(1) and 21(a) of LA FOIP.

[57] In neither correspondence did the RM state the reasons why it was relying on subsections 16(1) or 18(1) of LA FOIP, seek clarification on the types of records sought if it felt the Applicant’s request was not specific, or advise the Applicant how it searched for records it determined were non-existent. The RM also did not provide an index of records. Because of this, the RM did not respond to the Applicant openly, accurately or completely. Therefore, I find the RM did not meet its duty to assist.

[58] Regardless if the RM felt that the Applicant was being frivolous, vexatious, not acting in good faith or making a trivial request, it had obligations under LA FOIP that it did not meet. Those obligations included searching for responsive records and meeting its duty to assist. It also included providing my office with the necessary materials and information

to undertake and complete a review. As such, I strongly recommend the RM do all of the following within 30 days of issuance of this Report, Part I, in compliance with sections 5.1, 7, and 8 of LA FOIP:

1. Contact the Applicant to clarify their request, undertake and complete a search for responsive records, issue a new section 7 response to the Applicant and provide them with a severed copy of any records the Applicant may be entitled to receive pursuant to section 8 of LA FOIP; and
2. Provide my office with a copy of the non-severed and severed records as well as arguments for any exemptions upon which it is relying to deny access. If the RM is claiming solicitor-client privilege for any of the responsive records pursuant to subsection 21(a) of LA FOIP, then it has the option to either provide my office with a copy of the records stating the privilege is not waived, or to make a *prima facie* case that section 21(a) of LA FOIP applies, and provide an affidavit of records. If the RM does not comply with this recommendation, it can expect that I will exercise my powers under section 43 of LA FOIP, which provides as follows:

43(1) Notwithstanding any other Act or any privilege available at law, the commissioner may, in a review:

- (a) require to be produced and examine any record that is in the possession or under the control of a local authority; and
- (b) enter and inspect any premises occupied by a local authority.

(2) For the purposes of conducting a review, the commissioner may summon and enforce the appearance of persons before the commissioner and compel them:

- (a) to give oral or written evidence on oath or affirmation; and
- (b) to produce any documents or things;

that the commissioner considers necessary for a full review, in the same manner and to the same extent as the court.

(3) For the purposes of subsection (2), the commissioner may administer an oath or affirmation.

[59] In exercising this power, I will subpoena the reeve and the administrator of the RM.

IV FINDINGS

[60] I find the Applicant's request for review was not frivolous, vexatious, made in bad faith or does not contain a trivial matter.

[61] I find the RM did not conduct a reasonable search for records.

[62] I find the RM did not meet its duty to assist when it did not respond openly, accurately or completely to the Applicant.

V RECOMMENDATIONS

[63] I recommend the RM within 30 days of the issuance of this Review Report, Part I, do all of the following:

1. Contact the Applicant to clarify their request, undertake and complete a search for responsive records, issue a new section 7 response to the Applicant (with a copy to my office) and provide them with a severed copy of any records the Applicant may be entitled to receive pursuant to section 8 of LA FOIP; and
2. Provide my office with a copy of the non-severed and severed records as well as arguments for any exemptions upon which it is relying to deny access. If the RM is claiming solicitor-client and/or litigation privilege for any of the responsive records pursuant to subsection 21(a) of LA FOIP, then it has the option to either provide my office with a copy of the records stating the privilege is not waived, or to make a *prima facie* case that section 21(a) of LA FOIP applies, and provide an affidavit of records. If the RM does not comply with this recommendation, it can expect that I will exercise my powers under section 43 of LA FOIP, which provides as follows:

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- (a) to give oral or written evidence on oath or affirmation; and
- (b) to produce any documents or things;

that the commissioner considers necessary for a full review, in the same manner and to the same extent as the court.

(3) For the purposes of subsection (2), the commissioner may administer an oath or affirmation.

Dated at Regina, in the Province of Saskatchewan, this 9th day of September, 2021.

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy
Commissioner