Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 179-2021

Resort Village of Kivimaa – Moonlight Bay

February 17, 2022

Summary: The Resort Village of Kivimaa – Moonlight Bay (Village) received an access to information request from the Applicant. The Village denied access to the records, in full, pursuant to section 16(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner found the Village properly applied section 16(1)(a) of LA FOIP to only certain portions of the records, and that section 28(1) of LA FOIP also applied in one part. The Commissioner recommended the Village continue to withhold or release information accordingly.

I BACKGROUND

[1] On June 22, 2021, the Resort Village of Kivimaa – Moonlight Bay (Village) received the following access to information request from the Applicant:

> All letters, attachments and enclosures from the Village's auditor(s) to the Village, Administration and/or Council upon completion of the audits for the fiscal years ended 2011 to 2020 inclusive.
>
> The letters received from PARCS – New Legislation for RV's with fewer than 100 permanent residents, which may have been received by the Village in August/September, 2020.

[2] On July 7, 2021, the Village responded to the Applicant as follows:

> In response to your request for the letters of recommendation from the auditors for the fiscal years *2011- 2020 inclusive*, Our lawyers have advised us that as per section 16(1)(a) of the LAFOIP Act, records which are comprised of "advice, proposals, recommendations, analyses or policy options developed by or for the local authority" are exempt from production.

> As such we will not be providing you with these documents: Letters to Mayor and Council From Holm, Raiche Oberg, dated: June 24, 2015, May 31, 2016, June 28, 2017, June 25, 2018, August 6, 2019 and August 18, 2020. There were no letters of recommendation sent out prior to these years.

[3] On July 19, 2021, the Applicant contacted my office to request a review of the Village's decision to deny access to the records, in full, pursuant to section 16(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Applicant noted the Village had provided them with records related to only one part of their access to information request, so was only concerned about the remainder.

[4] On July 20, 2021, my office notified the Village and the Applicant of my office's intent to undertake a review of the Village's decision.

II RECORDS AT ISSUE

[5] At issue are seven letters, 15 pages in total, to which the Village has denied access to, in full, pursuant to section 16(1)(a) of LA FOIP as follows:

Document	Description	Number of Pages
1	Auditor Letter 2013 (Dated August 19, 2014)	2
2	Auditor Letter 2014 (Dated June 24, 2015)	2
3	Auditor Letter 2015 (Dated May 31, 2016)	2
4	Auditor Letter 2016 (Dated June 28, 2017)	2
5	Auditor Letter 2017 (Dated June 25, 2018)	2
6	Auditor Letter 2018 (Dated August 6, 2019)	2
7	Auditor Letter 2019 (Dated August 18, 2020)	3

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[6] The Village is a "local authority" pursuant to section 2(f)(i) of LA FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did the Village properly apply section 16(1)(a) of LA FOIP?

[7] Section 16(1)(a) of LA FOIP provides as follows:

> **16**(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:
>
> (a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority;

[8] Before I consider if the Village properly applied section 16(1)(a) of LA FOIP, I will consider if the records in question would normally be available to the public pursuant to section 117(1) of *The Municipalities Act*, which provides as follows:

> **117**(1) Any person is entitled at any time during regular business hours to inspect and obtain copies of:
>
> (a) any contract approved by the council, any bylaw or resolution and any account paid by the council relating to the municipality;
>
> (b) the statements maintained by the administrator in accordance with section 142 and the debentures register;
>
> (b.1) the municipality's financial statements prepared in accordance with section 185 and auditor's report prepared in accordance with subsection 189(1);
>
> (c) any report of any consultant engaged by or of any employee of the municipality, or of any committee or other body established by a council pursuant to clause 81(a), after the report has been submitted to the council, except any opinion or report of a lawyer; and
>
> (d) the minutes of the council after they have been approved by the council.

[9] The Village described the records as follows:

> These documents qualify as observations and recommendations. In the opening paragraph of each letter, it stipulates that these are observations and recommendations developed for the Resort Village, which is the local authority in this case. Also, in the last paragraph of each letter, the Auditor states that this communication has been provided for the purposes of the board and it may not be suitable for other purposes.
>
> Finally, to be assured that this decision was correct in the case of [the Applicant's] request, we contacted our lawyer to provide any additional guidance or input that was necessary (Attached). He assured us that in fact, Subsection 16(1)a [sic] applied.

[10] The records in question are seven letters sent from the Village's accountant, Holm Raiche Oberg (HRO), to the Mayor and council. Each of the letters pertains to a year-end audit. The Village confirmed with my office that the accountant provides these letters to the Mayor and council separately from the annual audit report.

[11] In each letter, the accountant identifies that they conducted an audit for each year end and is reporting, to the Mayor and Village Council, on the matters or issues they observed as part of each respective audit. Issues appear to include, among others, council or employees not following proper accounting procedures or best practices. The accountant also includes what they refer to as "recommendations" to remedy the issues. As it is a review of accounting practices, observations and recommendations by the accountant appear to be financial in nature.

[12] I note that section 117(1)(b.1) of *The Municipalities Act* appears to contemplate auditor's reports completed in accordance with section 189(1) of *The Municipalities Act*, which provides as follows:

> **189**(1) The auditor for the municipality shall report to the council on the annual financial statements of the municipality in accordance with the form and the reporting standards recommended from time to time by the Canadian Institute of Chartered Accountants.

[13] The question is if the accountant letters, which the Village states are sent separately to the Mayor and council, are part of the audit report pursuant to section 189(1) of *The*

Municipalities Act. In considering this, I turn toward section 189(3) of *The Municipalities Act*, which provides as follows:

> **189** (3) An auditor mentioned in subsection (1) or (2) shall: (a) separately report to the council any improper or unauthorized transaction or non-compliance with this or another Act or a bylaw that is noted during the course of an audit; and (b) provide a copy of any report made pursuant to clause (a) to the minister.

[14] It appears that sections 189(1) and (3) of *The Municipalities Act* deliberately separate audit reports from other types of reports prepared by an auditor for a council. As I stated previously in this Report, the Village confirmed that the accountant sends the letters, which are the records in question, separately to the Mayor and council. The letters themselves do not appear to indicate that they are an addendum to the audit report.

[15] As such, in this matter I am of the view the letters can be reports that fall within the scope of section 189(3) of *The Municipalities Act*. Section 117(1)(b.1) of *The Municipalities Act* only makes audit reports completed pursuant to section 189(1) of *The Municipalities Act* available for inspection by the public, and not reports completed pursuant to section 189(3) of *The Municipalities Act*. I find, therefore, section 117(1) of *The Municipalities Act* would not have any application in this matter, and that the Village can rely on section 16(1)(a) of LA FOIP as it has applied it to the letters. I will then continue my analysis of section 16(1)(a) of LA FOIP.

[16] Section 16(1)(a) of LA FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose advice, proposals, recommendations, analyses or policy options developed by or for a local authority (IPC *Guide to LA FOIP*, Chapter 4, "Exemptions from the Right of Access", updated April 29, 2021 [*Guide to LA FOIP*, Ch. 4], p. 105).

[17] The following two-part test can be applied:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?

2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for the local authority?

(Guide to LA FOIP, Ch. 4, pp. 105-108)

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?

[18] As noted previously, the Village stated the letters contain "observations" and "recommendations". Observations are not contemplated by section 16(1)(a) of LA FOIP, but "recommendations" are.

[19] A "recommendation" is a specific piece of advice about what to do, especially when given officially; it is a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious. Recommendations relate to a suggested course of action more explicitly and pointedly than "advice". It can include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised. It includes suggestions for a course of action as well as the rationale or substance for a suggested course of action (*Guide to LA FOIP*, Ch. 4, pp. 105-106).

[20] Upon review of the letters, I note they all contain specific recommendations throughout that the auditor, or accountant, has for council regarding compliance with accounting practices. The accountant specifically uses the word "recommendation" to indicate a course of action that council should take. As such, recommendations are involved, which meets the first part of the test. I will now consider the second part of the test.

2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for the local authority?

[21] "Developed by or for" means the advice, proposals, recommendations, analyses and/or policy options must have been created either: 1) within the local authority, or 2) outside the local authority but for the local authority (for example, by a service provider or stakeholder) (*Guide to LA FOIP*, Ch. 4, p. 108).

[22] For information to be developed by or for a local authority, the person developing the information should be an official, officer or employee of the local authority, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the local authority (*Guide to LA FOIP*, Ch. 4, p. 108).

[23] As stated previously in this Report, the accountant was engaged by council to complete an audit. The Village's website includes links to audited financial statements, including statements that the Village has engaged accountants from HRO to undertake an independent financial audit. For the purposes of section 16(1)(a) of LA FOIP, HRO would be developing an audit, including recommendations, for the Village, which meets the second part of the test. As such, I find the Village properly applied section 16(1)(a) of LA FOIP to the letters.

[24] Having stated this, I am mindful that the Village has withheld the letters, in full, from the Applicant. Section 8 of LA FOIP places an obligation on a local authority to sever records as follows:

> **8** Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

[25] A local authority, then, should conduct a line-by-line review with an eye towards which portions of a record fall within the scope of a cited exemption. In this matter, while I have found that the Village has properly applied section 16(1)(a) of LA FOIP, I find section 16(1)(a) of LA FOIP only applies to the portions of the letters containing "recommendations", as per this exemption, as follows:

Auditor Letter	Portion Where Section 16(1)(a) of LA FOIP Applies
2013	Page 1 on the three paragraphs that begin with, "We recommend…" Page 2 on the four paragraphs that begin with "We recommend…"
2014	Page 1 on the three paragraphs that begin with, "We recommend…" Page 2 on the three paragraphs that begin with "We recommend…"

2015	Page 1 on the three paragraphs that begin with, "We recommend…" Page 2 on the two paragraphs that begins with "We recommend…"
2016	Page 1 on the three paragraphs that begin with, "We recommend…" Page 2 on the one paragraph that begins with "We recommend…"
2017	Page 1 on the two paragraphs that begin with, "We recommend…" Page 2 on the three paragraphs that begin with "We recommend…"
2018	Page 1 on the two paragraphs that begin with, "We recommend…"
2019	Page 1 on the two paragraphs that begin with, "We recommend…" Page 2 on the five paragraphs that begin with "We recommend…"

[26] I also need to add that I am mindful that section 28(1) of LA FOIP is a mandatory exemption that provides as follows:

> **28**(1) No local authority shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 29

[27] Section 28(1) of LA FOIP protects the privacy of individuals whose personal information may be contained within records responsive to an access to information request made by someone else. Section 28(1) of LA FOIP requires a local authority to have the consent of the individual whose personal information is in the record prior to disclosing it (*Guide to LA FOIP*, Ch. 4, p. 240).

[28] When dealing with information in a record that appears to be personal information, the first step is to confirm the information indeed qualifies as personal information pursuant to section 23 of LA FOIP (*Guide to LA FOIP*, Ch. 4, p. 240). The second page of the audit letter for the year 2014 appears to contain information pertaining to a financial transaction in which an employee has been involved as defined by section 23(1)(b) of LA FOIP as follows:

> **23**(1) Subject to subsections (1.1) and (2), "personal information" means personal information about an identifiable individual that is recorded in any form, and includes:
>
> …

> (b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

[29] I find, therefore, the letters contain "recommendations" pursuant to section 16(1)(a) of LA FOIP as I have outlined at paragraph [25] of this Report, and personal information pursuant to section 28(1) of LA FOIP as I have outlined at paragraph [28] of this Report. I recommend the Village to continue to withhold the information in the letters as I have outlined in these two paragraphs pursuant to sections 16(1)(a) and 28(1) of LA FOIP, and that it release the remainder of the information to the Applicant.

[30] I wish to add that section 16(1)(a) of LA FOIP is a discretionary exemption, and so the Village can exercise its discretion concerning which information it releases. The Applicant provided my office with copies of similar letters they received from other rural municipalities (RM) involving the same accountant, HRO. The Applicant explained they received these through other access to information requests they made to the other RMs. In this matter, the Village could exercise its discretion and release all the information to the Applicant. The exception to this would be the personal information as described in paragraph [28] of this Report, which the Village should continue to withhold as personal information pursuant to 28(1) of LA FOIP, which is a mandatory exemption.

IV FINDING

[31] I find the Village properly applied section 16(1)(a) of LA FOIP as I have outlined at paragraph [25] of this Report, and that there is personal information pursuant to section 28(1) of LA FOIP as I have outlined at paragraph [28] of this Report.

V RECOMMENDATION

[32] I recommend the Village continue to withhold or release information in the record as I have outlined at paragraph [29] of this Report.

Dated at Regina, in the Province of Saskatchewan, this 16th day of February, 2022.

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