



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 233-2020

Rural Municipality of Big River No. 555

August 11, 2021

Summary:

The Applicant submitted an access to information request to the Rural Municipality of Big River No. 555 (RM). The RM provided the Applicant with access to some, but not all records. The RM cited subsections 23(1) and 14(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) as its reasons for refusing access. The Commissioner found that the RM did not demonstrate that subsection 14(1)(c) of LA FOIP applied. Further, the Commissioner found that subsection 28(1) of LA FOIP did apply to some of the information but not all. The Commissioner recommended that after redacting personal information, the RM release the records to which it had applied subsection 14(1)(c) of LA FOIP. The Commissioner also recommended that the RM continue to withhold the information found to qualify as personal information, but release the information that he found to not qualify as personal information.

I BACKGROUND

[1] On August 26, 2020, the Rural Municipality of Big River No. 555 (RM) received the following access to information request from the Applicant:

1. Any and all information/correspondence, water security reports, to and from ombudsman [sic] and R.M [sic] Big River 555 in response to [name of Applicant]'s complaint to ombudsman [sic] regarding the flooding to landowners' properties caused by a beaver dam on [name of individual]'s land.
2. Any complaints/concerns to the R.M [sic] of Big River regarding the flooding caused by the beaver dam on [name of individual]'s land since the discovery of the dam.

- [2] For the first set of records they were seeking, the Applicant specified the time period of the records to be from July 1, 2020 to August 21, 2020. For the second set of records, the Applicant specified the time period to be April 2018 to August 21, 2020.
- [3] In a letter dated September 30, 2020, the RM responded to the Applicant's access request. It provided the Applicant access to some records, but it also indicated that it was withholding some records in part or in full pursuant to subsections 23(1) and 14(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).
- [4] On October 17, 2020, the Applicant requested a review by my office.
- [5] On November 3, 2020, my office notified the RM and the Applicant that it would be undertaking a review.

II RECORDS AT ISSUE

- [6] At issue are three sets of records. The first set of records is 42 pages that were released to the Applicant in-part or in-full. The RM indicated that it withheld portions of 7 pages because these portions contained the personal information of individuals. I will refer to this set of records as the "first set of records".
- [7] The second set of records is 35 pages. It consists of an email from the RM to a Complaints Analyst at Ombudsman Saskatchewan. Attached to the email is a five-page letter by the RM to Ombudsman Saskatchewan. Then, the letter enclosures make up the remaining pages of the 35-page set of records. The RM said its reason for withholding these 35 pages is subsection 14(1)(c) of LA FOIP. I will refer to this set of records as the "second set of records".
- [8] The third set of records is three pages. It consists of an email from the RM to the Complaints Analyst at Ombudsman Saskatchewan. Attached to the email is a two-page letter by the RM to Ombudsman Saskatchewan. The RM said its reason for withholding

these three pages is subsection 14(1)(c) of LA FOIP. I will refer to this set of records as the “third set of records”.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[9] The RM qualifies as a “local authority” as defined by subsection 2(f)(i) of LA FOIP. Therefore, I find that I have jurisdiction to review this matter.

2. Did the RM properly apply subsection 14(1)(c) of LA FOIP?

[10] The RM applied subsection 14(1)(c) of LA FOIP to the second and third sets of records as described in the Records at Issue section of this Report. That is, it applied subsection 14(1)(c) of LA FOIP to its correspondence addressed to Ombudsman Saskatchewan.

[11] Subsection 14(1)(c) of LA FOIP provides as follows:

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

...

(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;

[12] My office uses the following two-part test to determine if subsection 14(1)(c) of LA FOIP applies:

1. Does the local authority’s activity qualify as a “lawful investigation”?
2. Does one of the following exist?
 - a. Could the release of the information interfere with a lawful investigation?
 - b. Could the release disclose information with respect to a lawful investigation?

(IPC Guide to LA FOIP, Chapter 4: Exemptions from the Right of Access, Updated April 29, 2021, at pp. 52 to 53 (Guide to LA FOIP))

[13] Below is an analysis to determine if subsection 14(1)(c) of LA FOIP applies.

1. Does the local authority's activity qualify as a "lawful investigation"?

[14] Before I proceed with my analysis, I will provide a brief history of my office's interpretation of the term "lawful investigation".

[15] In Review Report 93/021, the public body had argued for a broad interpretation of the term "lawful investigation". However, former Information and Privacy Commissioner Derril McLeod interpreted the term "lawful investigation" to mean an investigation that is authorized or required and permitted by law". Commissioner McLeod said:

It was suggested to me by the Corporation that "lawful investigation" should mean any investigation that is not contrary to or prohibited by law. However, if this were so, it would encompass any and every investigation of any matter whatsoever not prohibited by some specific law. I am unable to conclude that such a broad interpretation is intended or warranted. **In my view, the expression "lawful investigation" means an investigation that is authorized or required and permitted by law.**

[Emphasis added]

[16] Former Commissioner Gary Dickson adopted this same definition of "lawful investigation" in his Review Report 2004-006 at paragraph [26] and F-2014-001 at paragraph [160].

[17] In *General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance*, 1993 CanLII 9128 (SK CA) at paragraph [11], the Court of Appeal for Saskatchewan provided that the dominant purpose of *The Freedom of Information and Protection of Privacy Act* (FOIP) is disclosure, not secrecy. As such, it described exemptions to be "limited":

[11] The Act's basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. That is not to say that the statutory exemptions are of little or no significance. We recognize that they are intended to have a meaningful reach and application. The Act provides for specific exemptions to take care of potential abuses. There are legitimate privacy interests that could be harmed by release of certain types of information.

Accordingly, specific exemptions have been delineated to achieve a workable balance between the competing interests. The Act's broad provisions for disclosure, coupled with specific exemptions, prescribe the "balance" struck between an individual's right to privacy and the basic policy of opening agency records and action to public scrutiny.

- [18] With regards to the federal *Access to Information Act* (ATIA) (which is similar to FOIP and LA FOIP), the Federal Court of Appeal in *Rubin v. President of Canada Mortgage & Housing Corp.*, 1988 CanLII 5656 (FCA), [1989] 1 FC 265 said that the exemptions under the federal *Access to Information Act* must be limited and specific at paragraph [18]:

[18] Accordingly, it is incumbent upon the institutional head (or his delegate) to have regard to the policy and object of the Access to Information Act when exercising the discretion conferred by Parliament pursuant to the provisions of s-s. 21(1). When it is remembered that s-s. 4(1) of the Act confers upon every Canadian citizen and permanent resident of Canada a general right to access and that the exemptions to that general rule must be limited and specific, I think it clear that Parliament intended the exemptions to be interpreted strictly.

- [19] Further, the Federal Court of Appeal in *Sherman v. Minister of National Revenue*. 2003 FCA 202 (CanLII), [2003] 4 FC 865 at paragraph [10] said that the court should choose the interpretation that infringes on the public's right to access the least. It said:

[10] The purpose of the Act, as expressed in subsection 2(1), is to provide a broad right of access to information in records under the control of a government institution. Consequently, all exemptions must be limited and specific and, in case of ambiguity, the court should choose the interpretation that infringes on the public's right to access the least.

- [20] Based on the above, I will continue to interpret "lawful investigation" as narrowly as possible. That is, a "lawful investigation" is an investigation that is authorized or required and permitted by law.

- [21] Also, in my determining if this particular part of the two-part test for subsection 14(1)(c) of LA FOIP applies, I look to the Information Commissioner of Canada's *Investigation Guidance* on the federal ATIA. Section 16 of ATIA says:

16 (1) The head of a government institution may refuse to disclose any record requested under this Part that contains

(a) information obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to

(i) the detection, prevention or suppression of crime,

(ii) the enforcement of any law of Canada or a province, or

(iii) activities suspected of constituting threats to the security of Canada within the meaning of the Canadian Security Intelligence Service Act,

if the record came into existence less than twenty years prior to the request;

(b) information relating to investigative techniques or plans for specific lawful investigations;

(c) information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

(i) relating to the existence or nature of a particular investigation,

(ii) that would reveal the identity of a confidential source of information, or

(iii) that was obtained or prepared in the course of an investigation; or

(d) information the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.

[22] The Information Commissioner of Canada's [*Investigation Guide*](#) lists 18 questions to determine if records were prepared or obtained in the course of "lawful investigations", including the question, "What statutory provision authorizes the investigation?" I must determine if there is a statutory provision that authorized the lawful investigation.

[23] In its submission, the RM asserted that Ombudsman Saskatchewan was undertaking a lawful investigation. The correspondence it provided to Ombudsman Saskatchewan is related to the lawful investigation.

[24] Individuals may submit complaints to Ombudsman Saskatchewan. However, making a complaint does not mean that the Ombudsman will undertake a formal investigation.

Section 21 of *The Ombudsman Act, 2012* provides the Ombudsman with the ability to refuse to investigate a complaint.

- [25] If the Ombudsman determines that they will investigate a complaint, then subsections 23(1) and (2) of *The Ombudsman Act, 2012* requires that the Ombudsman provide a written notice of their intention to investigate. Subsections 23(1)(c) and (2) of *The Ombudsman Act, 2012* provides:

23(1) Before investigating any matter pursuant to this Act, the Ombudsman shall notify the following of the Ombudsman's intention to make the investigation:

...

(c) in the case of a municipal entity:

(i) if the matter is related to a municipal entity mentioned in subclause 2(d.1) (i), (ii) or (iii), the administrative or executive head of the affected municipal entity;

(ii) if the matter is related to a municipal entity mentioned in subclause 2(d.1) (iv) or to a council member other than the chief officer, the chief officer of the affected municipal entity;

...

(2) The notice must:

(a) be in writing; and

(b) set out the nature of the complaint, if any, received by the Ombudsman.

- [26] On May 14, 2021 and May 21, 2021, my office contacted the RM to request that it provide my office with a copy of the written notice it would have received from the Ombudsman pursuant to subsections 23(1)(c) and (2) of *The Ombudsman Act, 2012*.

- [27] In a response dated May 27, 2021, the RM indicated that it did not receive a written notice from the Ombudsman. The RM indicated that it received telephone calls from a Complaints Analyst at Ombudsman Saskatchewan on July 7th, 2020 and July 23, 2020.

- [28] Without a written notice pursuant to subsections 23(1)(c) and (2) of *The Ombudsman Act, 2012*, I find that the first part of the two-part test is not met.

[29] Since all parts of the test must be met, I do not have to consider the second part. I find that the RM has not demonstrated that subsection 14(1)(c) of LA FOIP applies to the second and third sets of records. I recommend the RM redact the personal information of individuals who are not the Applicant from the second and third set of records pursuant to subsection 28(1) of LA FOIP, and then release the remainder to the Applicant.

3. Did the RM properly apply subsection 28(1) of LA FOIP?

[30] As summarized in the Background section of this Report, the RM cited subsection 23(1) of LA FOIP as a reason to withhold portions of the first set of records. Specifically, it withheld portions of the following pages in the first set of records under the following subsections of 23(1) of LA FOIP:

- Page 2 – subsections 23(1)(d), (f), (j)
- Page 4 – subsections 23(1)(d), (f)
- Page 5 – subsection 23(1)(f)
- Page 7 – subsection 23(1)(d)
- Page 10 – subsections 23(1)(d), (j)
- Page 20 – subsections 23(1)(f), (h)
- Page 29 – subsection 23(1)(d)

[31] Subsections 23(1)(d), (e), (f), (h), and (j) of LA FOIP provides the definition of “personal information” in part, which is:

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;

(f) the personal opinions or views of the individual except where they are about another individual;

...

(h) the views or opinions of another individual with respect to the individual;

...

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

[32] When a local authority identifies information to qualify as the personal information of an individual other than the Applicant, it must redact the information pursuant to subsection 28(1) of LA FOIP. Subsection 28(1) of LA FOIP provides:

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.

[33] Where the RM has redacted information in the first set of records, it asserted that the information qualified as "personal information" pursuant to subsections 23(1)(d), (f), (h), and (j) of LA FOIP. I will presume the RM meant to redact these portions of the record pursuant to subsection 28(1) of LA FOIP.

[34] In order for subsection 28(1) of LA FOIP to apply, the following two-part test must be met:

1. Is there an identifiable individual?
2. Is the information personal in nature?

[35] Below is an analysis of each page to which the RM applied subsection 28(1) of LA FOIP.

Page 2

Legal Land Description

[36] The RM redacted a legal land description. The RM asserted that such information qualified as "personal information" as defined by subsection 23(1)(d) of LA FOIP. In my Review Report 156-2015 at paragraph [6], I noted that information regarding land ownership is publicly available information. However, in that report, I considered the context of the information and how the disclosure of the legal land description in combination with other types of information including names on a petition could reveal the views and opinions of

such individuals. As such, I found that the information qualified as personal information pursuant to subsection 23(1)(f) of LA FOIP.

- [37] However, this case is distinct from the situation discussed in Review Report 156-2015. In this case, the legal land description appears in an email from the Water Security Agency to the RM. The RM disclosed the email in its entirety to the Applicant, but redacted a legal land description. When I consider the context, I find that the disclosure of the legal land description in this case does not reveal anything that is personal in nature about an identifiable individual. Further, when I consider subsection 3(1)(b) of LA FOIP, such information cannot be withheld because LA FOIP does not apply to material that is of a public record. Subsection 3(1)(b) of LA FOIP provides:

3(1) This Act does not apply to:

...

(b) material that is a matter of public record;

- [38] I find that subsection 28(1) of LA FOIP does not apply to the legal land description in this context. I recommend that the RM disclose the legal land description that appears on page 2.

Last sentence that appears on page 2

- [39] The RM withheld the last sentence that appears on page 2 pursuant to subsection 28(1) of LA FOIP. It asserted that the last sentence qualifies as “personal information” pursuant to subsections 23(1)(f) and (j) of LA FOIP. Based on a review of the sentence, it appears that the information contains an individual’s opinion or view and the financial information of an individual. I find that such information does qualify as personal information of a third party as defined by subsections 23(1)(f) and (j) of LA FOIP. I recommend that the RM continue to withhold the last sentence on page 2 pursuant to subsection 28(1) of LA FOIP.

Page 4

Email address of a private individual

[40] The RM withheld the first part of an email address on page 4. It asserted that such information qualifies as personal information as defined by subsection 23(1)(d) of LA FOIP. Based on a review, I note that the email address belongs to a private individual. I also note that the Applicant's name was included in the signature of the email message. However, based on a review of the email header, I note that the private individual sent the email only to the RM and sent a carbon copy to themselves. The email header does not display a blind carbon copy (BCC) line so I cannot confirm if the Applicant was a BCC recipient of the email.

[41] Based on the face of the record, I find that such information qualifies as personal information as defined by subsection 23(1)(d) of LA FOIP. I recommend that the RM continue to withhold such information pursuant to subsection 28(1) of LA FOIP.

Three portions of an email by a private individual to the RM

[42] The RM withheld three portions of an email by a private individual on page 4. It asserted such information qualifies as personal information as defined by subsection 23(1)(f) of LA FOIP. Based on a review, the information appears to be the opinions or views of an individual. I find that these three portions qualify as personal information of a third party as defined by subsection 23(1)(f) of LA FOIP. I recommend that the RM continue to withhold the three portions of the email by a private individual to the RM pursuant to subsection 28(1) of LA FOIP.

Page 5

Last sentence of an email

[43] Page 5 is a continuation of the email that began on page 4. The RM withheld the last sentence. It asserted that it qualifies as personal information pursuant to subsection 23(1)(f) of LA FOIP. Based on a review of the sentence, the information appears to be the position of an individual regarding an issue. I find that it qualifies as personal information

as defined by subsection 23(1)(f) of LA FOIP. I recommend that the RM continue to withhold the last sentence of the email that appears on page 5 pursuant to subsection 28(1) of LA FOIP.

Page 7

Telephone number of a private individual

- [44] Page 7 is a voice-to-text message from a private individual to the RM. The RM withheld the telephone number of a private individual. It asserted that such information qualifies as personal information as defined by subsection 23(1)(d) of LA FOIP. Based on a review, I find that such information qualifies as personal information as defined by subsection 23(1)(e) of LA FOIP, not subsection 23(1)(d) of LA FOIP. Nevertheless, I recommend that the RM continue to withhold the telephone number pursuant to subsection 28(1) of LA FOIP.

Page 10

Telephone number of a private individual

- [45] The RM withheld a telephone number that appears on page 10. It asserted that such information qualifies as personal information as defined by subsection 23(1)(d) of LA FOIP. Based on a review, I find that such information qualifies as personal information as defined by subsection 23(1)(e) of LA FOIP, not 23(1)(d) of LA FOIP. Nevertheless, I recommend that the RM continue to withhold the telephone number on page 10 pursuant to subsection 28(1) of LA FOIP.

Two portions of handwritten notes

- [46] The RM withheld two portions of the handwritten notes that appear on page 10. It asserted that such information qualifies as personal information as defined by subsection 23(1)(j) of LA FOIP. Based on a review, the information appears to be the financial information

of an individual. I find that such information qualifies as personal information as defined by subsection 23(1)(j) of LA FOIP. I recommend that the RM continue to withhold the two portions of handwritten notes on page 10 pursuant to subsection 28(1) of LA FOIP.

Page 20

- [47] Page 20 is a photo of a tablet displaying a Facebook post by a private individual. The RM asserted that portions of the Facebook post qualify as personal information as defined by subsections 23(1)(f) and (h) of LA FOIP. In the course of the review, the RM explained that the Facebook post was made on a public Facebook group page and was available for public viewing. However, when my office searched for the Facebook post on the public Facebook group page, my office could not locate it. Nevertheless, the RM redacted some of the information because its position was that the information qualified as personal information of third parties pursuant to subsections 23(1)(f) and (h) of LA FOIP. Based on a review of page 20, it appears that the redacted portions are the private individual's opinions or views about a particular matter, or the views or opinions of third party individuals. As such, I find that such information qualifies as personal information as defined by subsection 23(1)(f) and (h) of LA FOIP. I recommend that the RM continue to withhold these portions of the Facebook post pursuant to subsection 28(1) of LA FOIP.

Page 29

- [48] Two legal land descriptions were withheld by the RM on page 29. The RM asserted that the legal land descriptions qualify as personal information as defined by subsection 23(1)(d) of LA FOIP. Pursuant to my earlier analysis on legal land descriptions, I find that subsection 28(1) of LA FOIP does not apply to the legal land descriptions on page 29. I recommend that the RM disclose the two legal land descriptions on page 29.

IV FINDINGS

- [49] I find that the RM has not demonstrated that subsection 14(1)(c) of LA FOIP applies to the second and third sets of records.

[50] I find that subsection 28(1) of LA FOIP does not apply to some portions of the first set of records.

[51] I find that subsection 28(1) of LA FOIP applies to some portions of the first set of records.

V RECOMMENDATIONS

[52] I recommend the RM redact the personal information of individuals who are not the Applicant from the second and third sets of records pursuant to subsection 28(1) of LA FOIP, and then release the remainder to the Applicant.

[53] I recommend the RM continue to withhold the information found to qualify as personal information as outlined in this Report.

[54] I recommend the RM release the information found not to qualify as personal information as outlined in this Report.

Dated at Regina, in the Province of Saskatchewan, this 11th day of August, 2021.

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