



## **REVIEW REPORT 219-2021, 245-2021**

### **Northern Village of Buffalo Narrows**

**November 3, 2022**

#### **Summary:**

The Applicant made an access to information request to the Northern Village of Buffalo Narrows (Village). The Village partially denied access pursuant to subsection 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), and also claimed that records do not exist pursuant to subsection 7(2)(e) of LA FOIP. The Applicant was not satisfied with the response and requested a review by the Commissioner. The Commissioner found that the Village did not comply with subsection 7(2) of LA FOIP and it did not conduct a reasonable search. The Commissioner also found the Village properly applied subsection 28(1) of LA FOIP only to part of the record. The Commissioner recommended that the Village develop policies to be compliant with section 7 of LA FOIP, conduct a search and provide its search results to the Applicant and his office within 30 days of issuance of this Report. The Commissioner also recommended that the Village continue to withhold part of the record pursuant to subsection 28(1) of LA FOIP and release the remainder to the Applicant within 30 days of issuance of this Report.

#### **I BACKGROUND**

[1] On August 3, 2021, the Applicant hand-delivered their access to information request to the Northern Village of Buffalo Narrows (Village). This access to information request from the Applicant stated:

I would like to access information on the hiring procedure for the Chief Administrative Officer, [Chief Administrative Officer's name], for Buffalo Narrows. This should include documentation of meetings held, [Chief Administrative Officer's name] qualifications, information on other applicants and interview documents from the hiring process. December 2020 – August 2021.

- [2] On September 2, 2021, the Applicant contacted our office to request a review, because they had not received a response from the Village.
- [3] On September 8, 2021, my office contacted the Village to facilitate a response to the Applicant.
- [4] On September 17, 2021, the Village responded to the Applicant partially denying access to the records pursuant to subsection 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Village also claimed that records do not exist pursuant to subsection 7(2)(e) of LA FOIP.
- [5] On October 5, 2021, my office received a request for review from the Applicant regarding the exemptions cited by the Village, its response that records do not exist, and the Village's response time.
- [6] On October 7, 2021, my office provided notification to the Applicant and the Village of my office's intention to undertake a review.
- [7] On January 14, 2022, the Village provided its submission to my office. The Applicant did not provide a submission to my office.

## **II RECORDS AT ISSUE**

- [8] The record at issue includes resumes and interview notes for the position of Chief Administrative Officer (CAO), totaling 45 pages, withheld in full.

## **III DISCUSSION OF THE ISSUES**

### **1. Do I have jurisdiction?**

- [9] The Village qualifies as a "local authority" pursuant to subsection 2(f)(i) of LA FOIP. Therefore, I have jurisdiction to conduct this review.

**2. Did the Village comply with subsection 7(2) of LA FOIP?**

[10] Subsection 7(2) of LA FOIP provides that within 30 calendar days of receiving an access to information request, the head of the local authority must provide a response to the applicant. Subsection 7(2) of LA FOIP provides, in part:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

[11] My office's [Review Report 152-2020](#) provides the following at paragraph [11] regarding the calculation of time:

[11] ... in terms of calculating time, *The Legislation Act* establishes general rules that govern the interpretation of all statutory instruments in the province. Section 2-28 of *The Legislation Act* provides guidance on the computation of time and can be applied to the 30-day calculations as follows:

- The first day of the access request is excluded in the calculation of time;
- If the due date falls on a holiday, the time is extended to the next day that is not a holiday;
- If the due date falls on a weekend, the time is extended to the next day the office is open; and
- As LA FOIP expresses the time in a number of days, this is interpreted as 30 calendar days, not business days.

[12] In this matter, the Applicant submitted their access request to the Village on August 3, 2021. The Village did not provide its response pursuant to section 7 of LA FOIP to the Applicant until September 17, 2021. This was 45 days, which was beyond the time outlined at subsection 7(2) of LA FOIP. Therefore, I find that the Village did not comply with subsection 7(2) of LA FOIP.

[13] During this review, my office contacted the Village asking if it had any policies and procedures regarding access and privacy. The Village confirmed that it did not. Therefore,

I recommend that the Village develop policies and procedures to respond to all access to information requests pursuant to section 7 of LA FOIP.

**3. Did the Village conduct a reasonable search for records?**

[14] 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.

[15] Section 5 of LA FOIP is clear that access to records must be granted if the records are in the possession or under the control of the local authority subject to any exemptions that may apply pursuant to LA FOIP.

[16] In this matter, the Village indicated that the records relating to interview procedures for the COA position do not exist pursuant to subsection 7(2)(e) of LA FOIP. A statement by a local authority that a record does not exist does not imply that the record in question does not exist at all. It would not be possible for a local authority to make such a sweeping statement about the general existence of a record. The term “exist” in subsection 7(2)(e) of LA FOIP is a function of being possessed or controlled by the local authority to which the access request is being made. There are two circumstances where a response that records do not exist can occur: 1) the search did not produce records; and/or 2) the local authority does not have possession or control of the record (*IPC Guide to LA FOIP*, Chapter 3, “Access to Records”, updated June 29, 2021 [*Guide to LA FOIP*, Ch. 3], pp. 35-36).

[17] It is not reasonable for a local authority to rely on an employee’s opinion that no records exist when deciding not to search. A local authority should not rely on anyone’s memory as to whether records were created. It cannot know in advance of doing a search whether an individual will be right about whether records were created. All an individual can say, with any reasonable certainty, is whether he or she personally created any records. Otherwise, the individual is merely expressing an opinion as to the likelihood of whether anyone else created records. A local authority cannot absolve itself of its duty to search

based on an individual's opinion about whether records were created. If a local authority could forego its duty to search based on such an opinion, the Act would be frustrated (*Guide to LA FOIP*, Ch. 3, pp. 7-8).

[18] The focus of a search review, including when a local authority states no records exist, is whether the local authority conducted a reasonable search. 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 to support its search efforts that local authorities can provide to my office 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/committees/boards were included in the search.
- For general requests – tie the subject matter of the request to the departments/divisions/branches/committees/boards 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/committees/boards 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.

*(Guide to LA FOIP, Ch. 3, pp. 9-10).*

[19] The above list is meant to be a guide. Each case will require different search strategies and details depending on the records requested.

[20] In its submission to my office, the Village did not address its claim that records do not exist pursuant to subsection 7(2)(e) of LA FOIP or describe its search efforts. My office did inquire with the village if it had any policies or procedures regarding its hiring processes for the position of CAO, and the Village responded that it did not. I am mindful, however, that such information may also be contained in other documents, such as emails or instructions to councillors. To know this, a local authority needs to conduct a search.

[21] Regardless, the Village did not describe how it searched for the records to be able to conclude that such records do not exist. Based on this, I find that the Village did not conduct a reasonable search for records. Therefore, I recommend that within 30 days of issuance of this Report, the Village conduct a search for the record in question and provide the results of that search to the Applicant and to my office.

**4. Did the Village properly apply subsection 28(1) of LA FOIP?**

[22] 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.

[23] Subsection 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. Subsection 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 unless it has authority to disclose without consent pursuant to subsection 28(2) or section 29 of LA FOIP (*Guide to LA FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated April 29, 2021 [*Guide to LA FOIP*, Ch. 4], p. 240).

[24] When dealing with information in a record that appears to be personal information, the first step is to confirm that the information indeed qualifies as “personal information” as defined in subsection 23(1) of LA FOIP (*Guide to LA FOIP*, Ch. 4, p. 240).

[25] In its submission to my office, the Village stated:

[Name of CAO]’s qualifications, which would be comprised of [their] education and employment history, constitute “personal information” as per section 23(1)(b) of the Act and is therefore not disclosable in the absence [of name of CAO]’s consent in accordance with section 28(1) of the Act, which [name of CAO] has not provided...

In response to the request for documentation regarding the qualifications of the other applicants for the Chief Administrative Officer position, this request was denied for the same reasons as set out above...

[26] The Village provided an unredacted copy of the record, which it withheld from the Applicant in full. Upon review of these pages, it appears that all pages were divided in three documents:

1. Current CAO’s cover letter and resume – 4 pages.

2. Qualification of five other candidates, including their cover letters resumes – 31 pages.
3. Interview Questions - CAO, notes of interviewer for two candidates – 10 pages.

[27] Upon review of these 45 pages, my office noted that all 35 pages in the first two documents contain the names, qualifications and employment history of the current CAO and/or the other five candidates who submitted their resumes for the CAO's position. Document three, which contains interview questions and responses, where candidates discuss their qualifications, such as their employment or education history. This information would be "personal information" as defined by subsections 23(1)(b) and (k)(i) of LA FOIP as follows:

**23(1)** Subject to sections (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;

...

(k) the name of the individual where:

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

[28] I find, therefore, the Village properly applied subsection 28(1) of LA FOIP as I have described at paragraph [27] of this Report.

[29] I note that document three titled, "Interview Questions - CAO", contains questions that the interviewer asked in the two interviews conducted for the CAO position. While the responses from the candidates contain personal information, the questions themselves do not. As such, I find the Village did not properly apply subsection 28(1) of LA FOIP to the interview questions in document three.

[30] Section 8 of LA FOIP provides:



**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.

[31] In order to comply with section 8 of LA FOIP, a line-by-line review is essential to comply with the principle of severability set out in section 8 of LA FOIP. This provision grants an applicant a right of access to any record from which exempted material can be reasonably severed. Each severed item should have a notation indicating which exemption(s) applies in each instance (*Guide to LA FOIP*, Ch. 3, p. 48).

[32] I recommend that within 30 days of issuance of this Report, the Village conduct a line-by-line review of document three and release to the Applicant the portions containing the interview questions.

#### **IV FINDINGS**

[33] I find that I have jurisdiction to conduct this review.

[34] I find that the Village did not comply with subsection 7(2) of LA FOIP.

[35] I find that the Village did not conduct a reasonable search.

[36] I find that the Village properly applied subsection 28(1) of LA FOIP as I outlined at paragraph [28] of this Report, and that it did not properly apply subsection 28(1) of LA FOIP as I have outlined at paragraph [29] of this Report.

#### **V RECOMMENDATIONS**

[37] I recommend that the Village develop policies and procedures to respond to all access to information requests pursuant to section 7 of LA FOIP.

[38] I recommend that within 30 days of issuance of this Report, the Village conduct a search for the record in question and provide the results of that search to the Applicant and to my office.

[39] I recommend that the Village continue to withhold information in the record as I have outlined at paragraph [28] of this Report pursuant to subsection 28(1) of LA FOIP, and that it release the information where it applied subsection 28(1) of LA FOIP as I have outlined at paragraph [29] of this Report, to the Applicant within 30 days of issuance of this Report.

Dated at Regina, in the Province of Saskatchewan, this 3<sup>rd</sup> day of November, 2022.

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