



REVIEW REPORT 361-2021

Village of Neudorf

May 18, 2022

Summary:

The Applicant submitted an access to information request to the Village of Neudorf (Village) seeking copies of text messages. The Village responded indicating that no records existed. The Applicant appealed to the Commissioner asserting that text messages should exist. The Commissioner found that the text messages of the group chat between former council members and the previous Maintenance Foreman would be subject to access to information requests under *The Local Authority Freedom of Information and Protection of Privacy Act*. He recommended that the Village conduct a search for the records, inform the Applicant of the results of the search, and provide the Applicant screenshots of the text messages (subject to exemptions). He also recommended that the Village establish a written policy to reflect its current practice of using only Village email accounts to conduct Village business.

I BACKGROUND

[1] On October 12, 2021, the Village of Neudorf (Village) received the following access to information request:

Unprofessional communication of one [Council Member A], administrator [Name] and [Council Member B]!

[2] In a letter dated November 24, 2021 to the Applicant, the Village indicated it did not have enough details to identify the records the Applicant was seeking. Therefore, pursuant to section 6(3) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), the Village indicated that it required additional details from the Applicant in order to identify the records the Applicant was seeking.

- [3] On December 18, 2021, the Applicant sent an email to my office requesting a review asserting the following:

[Village's file number] needs clarification! Here is a text message from [Name of Administrator] saying she has them

- [4] Attached to the Applicant's email to my office, the Applicant attached a copy of a screenshot of text messages between the Applicant and the Village's Administrator to prove that records existed. The screenshot of the text messages stated the following:

Administrator: It's a group text with council. He texted everyone, not just me. Looks like you've gotten quite a response though. You'll have to look on Facebook and see what's happening there.

Applicant: Because he text you accusing me

Applicant: I don't have any of them on Facebook.

Administrator: No. That's town business. Need to be at the office.

Administrator: Password is at the office.

- [5] In an email dated December 28, 2021 to my office, the Applicant clarified which records they were seeking:

The text messages that council had aug [sic] 2020. The text from [Name of Administrator] saying I should see what they are saying about me [sic] come into the office and see.

- [6] The Applicant consented to my office sharing the above clarification of the records being sought with the Village. Therefore, on December 28, 2021, my office shared the above wording in an email to the Village.

- [7] With this clarification, the Village proceeded to process the access to information request. In a letter dated February 10, 2022, the Village responded to the Applicant indicating no records existed. The Village said:

This is to advise you that the record(s) you wish to access do not exist within the Village of Neudorf. The Village communicates with residents via e-mail, landlines and through

written correspondence. The Village does not supply or fund the use of cellular phones or devices with the ability to text. There were no indications of texts or unprofessional communications found, as per your Access Request.

[8] On February 12, 2022, the Applicant indicated to my office that he was not satisfied with the Village's response and requested a review of the matter by my office.

[9] On February 15, 2022, my office notified the Village and the Applicant that my office would be undertaking a review of the efforts the Village undertook to locate text messages responsive to the Applicant's access to information request.

II RECORDS AT ISSUE

[10] At issue in this review is the Village's efforts to search for text messages responsive to the access to information request. Therefore, there are no records at issue.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

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

2. Did the Village conduct a reasonable search for records?

[12] Where a local authority has indicated no records exist and an applicant requests my office review that response, my office will review the local authority's search efforts.

[13] A person's right of access to records in the possession or under the control of a local authority is established in section 5 of LA FOIP, which provides:

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.

[14] 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, "Access to Records", updated June 29, 2021 [*Guide to LA FOIP*, Ch. 3.], pp. 8 – 9)

[15] 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*, Ch. 3, p. 9).

[16] In its submission to my office, the Village explained that the "group text" (as referenced in the text message exchange described in the background of this Report) was a group chat set up by a previous Maintenance Foreman in 2020. The purpose of the group chat was to communicate transitory, day-to-day operations between the Maintenance Foreman and council members. The Village indicated that it did not maintain a record of these text messages as these text messages were 1) transitory in nature, and 2) the communications were sent-and-received through personal cellular phones. If there were any formal communications, the Village's practice was to send such communication through e-mail (not text) where records could be retained. Since the Village did not conduct a search for records, then I find that it did not make a reasonable effort to search for records.

- [17] The Village explained that the Applicant's access to information request, "continues to make little sense, as Councillor [Council Member A] does not own a cell phone, nor was he a Member of Council during the time that this group chat was utilized in 2020."
- [18] In my office's [Investigation Report 101-2017](#), I dealt with a matter involving the use of personal email accounts for government business. Using personal email accounts for government or local authority business results in the co-mingling of personal and government business, which makes it difficult for governments to meet their duties under freedom of information laws such as records management and access. Similarly, the use of personal cellular (or mobile) phones for activities related to the business of local authorities presents the same issues.
- [19] I note that employees and council members of local authorities must be accountable to the public in their official capacities. If they are using personal devices to conduct business in their official capacities, then such records could be subject to a search should the local authority receive an access to information request for such records. This is **not** to say that their personal matters should be made public; however, employees and council members should be cautioned that their personal devices may be searched for records should the local authority receive an access to information request.
- [20] In my office's [Review Report 219-2018](#), I dealt with a matter where a councillor for the City of Moose Jaw was using a personal email account to conduct City business. Then, an applicant sought responsive records from a City of Moose Jaw Councillor's personal email account. In that case, the City of Moose Jaw requested that the Councillor search their personal email account for responsive records and provide the relevant emails. The Councillor used reasonable keywords to search through their personal email accounts and provided the responsive records. I was satisfied that the City of Moose Jaw verified with the Councillor that the personal email account was searched for responsive records.
- [21] In this case, given that the group chat was for Village business, I find that such records would be subject to access to information requests under LA FOIP. I note that the Applicant sought text messages between the Administrator, Council Member A and Council Member

B. I also take note of the Village's assertion that Council Member A was not a part of Council when the group chat was utilized in 2020. If the Administrator or Council Member B were part of the group chat between Council and the previous Maintenance Foreman in August 2020, then I recommend that the Village request that the Administrator and Council Member B search through their personal cell phones to determine 1) if the group chat is still on their phones, and if so, then 2) search for text messages from August 2020 that may contain references to the Applicant. This may include a search for the Applicant's name. The Village should inform the Applicant the results of its search. If there are text messages, then screenshots should be made of the text messages and provided to the Applicant, subject to exemptions set out in Parts III and IV of LA FOIP.

[22] Given the passage of time (including the change in Council and the obsolescence of mobile phone technology) and the nature of text messages, there is a strong chance no responsive records exist. It would have been ideal if the Village had established a written policy regarding text messages that addressed the retention and destruction of text messages related to Village business prior to utilizing a group chat for communication.

[23] However, I note that the Village has since changed its practices. In its submission to my office, the Village explained that it set up Village email accounts for each council member for communication. This was done so there would be a clear distinction between personal records and Council records:

In November 2020, new Village e-mails were set up for the current Council. These are e-mail addresses that were specifically set up for the Mayor and each individual Councillor to ensure there is a definite distinction between personal and Council matters. NO communication, aside from emergency situations, are currently communicated via text message. All communication is now conducted through the use of these Village-issued e-mail addresses.

The Village does not pay for the use of cell phones, nor are there any future plans to do so.

[24] I commend the Village for addressing this issue by creating email accounts for council members and discouraging the use of personal email and personal cellular telephones for Village business. Such a step ensures that the Village will be able to meet its duties under

LA FOIP. I recommend that the Village establish a written policy to reflect its practice and to regularly remind its council members and employees to use only Village email accounts to conduct Village business.

IV FINDINGS

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

[26] I find that the Village did not make a reasonable effort to search for records.

[27] I find that text messages of the group chat between former council members and the previous Maintenance Foreman would be subject to access to information requests under LA FOIP.

V RECOMMENDATIONS

[28] I recommend that the Village request that the Administrator and Council Member B search through their personal cell phones to determine 1) if the group chat is still on their phones, and if so, then 2) search for text messages from August 2020 that may contain references to the Applicant. This may include a search for the Applicant's name. The Village should inform the Applicant the results of its search within 30 days of issuance of this Report. If there are text messages, then screenshots should be made of the text messages and provided to the Applicant, subject to exemptions set out in Parts III and IV of LA FOIP.

[29] I recommend that the Village establish a written policy to reflect its practice and to regularly remind its council members and employees to use only Village email accounts to conduct Village business.

Dated at Regina, in the Province of Saskatchewan, this 18th day of May, 2022.

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