



## INVESTIGATION REPORT 017-2019

### Rural Municipality of Rosthern No. 403

March 17, 2020

#### Summary:

A complaint was made against the Rural Municipality of Rosthern No. 403 (the R.M.). The Commissioner investigated the complaint and found that the R.M. did not have authority pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) to disclose the Complainant's personal information in this particular case. The Commissioner recommended that the R.M. ensure its councillors are aware of their obligations as councillors under both LA FOIP and *The Municipalities Act*, and that the councillor who breached the Complainant's personal information offer an apology to the Complainant.

#### I BACKGROUND

- [1] On November 30, 2018, my office received a complaint from an individual (the Complainant) that the Rural Municipality of Rosthern No. 403 (the R.M.) breached their privacy by submitting a confidential report and a letter prepared by the Ombudsman to the Court of Queen's Bench. The letter, addressed to the R.M. council member Tom Madden, in care of the R.M., stated that the report included Mr. Madden's remarks and also acknowledged that the R.M. had accepted the Ombudsman's recommendations. The Ombudsman's report contained information relating to a land use matter between the Complainant and the R.M.
- [2] On December 31, 2018, the Complainant emailed my office stating they had not received a response from the R.M. regarding a privacy complaint they submitted to it. On January 4, 2019, my office contacted the Complainant to clarify the nature of the complaint. The

Complainant alleged that the R.M. had provided the Ombudsman letter and report to the Court of Queen's Bench in a separate, private matter involving Tom Madden.

[3] On January 11, 2019, my office received a response from the R.M.'s legal counsel, which stated it did not believe a breach had occurred. The Complainant, who had also received this response, asked my office on January 15, 2019, to investigate the alleged breach.

[4] On January 17, 2019, my office provided notification to the R.M. of my office's decision to proceed with an investigation. My office requested that the R.M. provide a response to the following:

1. Details regarding the matter;
2. How the R.M. determined it did not have control over the records in question;
3. How the R.M. determined the records in question were sent to Mr. Madden as an individual and not as a Councillor of the R.M.;
4. Copies of relevant policies, procedures and agreements; and
5. A copy of the R.M.'s internal investigation report.

[5] On January 22, 2019, the R.M. provided my office with its submission.

## **II DISCUSSION OF THE ISSUES**

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

[6] The R.M. is a local authority pursuant to subsection 2(f)(i) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP); thus, I have jurisdiction in this matter.

### **2. Were the records, which were addressed to "Tom Madden", subject to LA FOIP?**

[7] LA FOIP applies to records that are in the possession or control of a local authority. The record in question, however, was in the physical possession of Tom Madden, although the R.M. had its own copy of the record; therefore, I need to determine if this meant the record was in the possession or control of the R.M.

[8] *Possession* means having physical possession over a record plus a measure of control over it. *Control* means having the authority to manage the record, including restricting, regulating and administering its use, disclosure or disposition.

[9] In a written response to the Complainant dated January 11, 2019, the R.M. stated the following:

...we note that LA FOIPP [sic] applies only to the personal information in the possession or under the control of the local authority. In this case, the documents that form the basis of your Complaint were not under the control of the R.M., but rather, under the control of Tom Madden.

[10] In its submission to my office, the R.M. repeated this by stating:

Although the R.M. is in possession of a copy of the Report, it did not release the Report, which was separately in the possession of Mr. Madden... If the Ombudsman had intended to deliver the package to Mr. Madden in his capacity as R.M. Councillor, there would have been no need to concurrently deliver a package to the R.M., or to mark the letter as personal and confidential.

[11] In Investigation Report LA-2014-001, my office adopted an approach taken by the Office of the Information and Privacy Commissioner of Ontario, who determined in Order M-813 that there are two circumstances in which a city councillor would be subject to the province's access and privacy laws: 1) if the councillor was acting in the position of an "officer" of the city; or 2) if the records were found to be in the custody and control of the city. If the councillor was acting on behalf of a constituent, then the record would not be subject to access and privacy laws. I will use the same approach to determine if the Ombudsman report and Ombudsman letter, addressed to Tom Madden, are subject to LA FOIP.

[12] Upon review of the Ombudsman's covering letter to Mr. Madden, dated February 7, 2018, I note the following statement:

On December 6, 2017, we gave you [Tom Madden] an opportunity to review our draft report on our investigation into [the Complainant's] complaint about the RM's ... We

understand the RM's January 29, 2018 response to us includes your remarks. We have reviewed the RM's comments and understand that the RM has accepted our recommendations.

[13] Upon review of the Ombudsman report itself, I note that it describes the matter the Ombudsman was reviewing, and describes that the report would consider the following two questions:

1. Were the R.M.'s decisions and actions regarding [XXXX], reasonable, and in accordance with its policies and bylaws?
2. Was the R.M.'s decision not to issue a formal apology to the complainant reasonable?

[14] I note that the Ombudsman's report further contained the following (which I have paraphrased below), which appears to describe Tom Madden's role in the Ombudsman's investigation:

- That Tom Madden was at the time the division council representative for the hamlet in which the Complainant resided;
- That Tom Madden, as the designated councillor, went to the Complainant's house to discuss the issues and also to discuss the council's decision on the issues;
- That the R.M. council had passed motions regarding the issue, and also that the R.M. had discussed the Complainant's grievances against the R.M. at council meetings;
- That the lawyer employed by the R.M. had written to the Complainant to advise them of the R.M.'s jurisdiction pursuant to *The Municipalities Act*; and
- That the findings and recommendations in the Ombudsman report are addressed to the R.M. of Rosthern No. 403, and not specifically to Tom Madden.

[15] Subsection 5(1) of *The Municipalities Act* sets out that a municipality is required to act through a council, while subsection 5(2) of *The Municipalities Act* sets out that council shall exercise its powers through the passing of bylaws. The purposes for which a municipality may pass bylaws are described in subsection 8(1) of *The Municipalities Act*, and includes in subsection 8(1)(g) the passing of bylaws respecting streets and roads.

Subsection 8(2)(i) of *The Municipalities Act* includes the provision that municipalities may inspect to determine if bylaws are being complied with.

[16] Subsection 24(4) of *The Ombudsman Act, 2012*, sets out that if there are sufficient grounds for making a report or recommendation about a matter that may adversely affect a council member (among others), the Ombudsman must give them an opportunity to make representations to the Ombudsman about it. In practice, the Ombudsman does this by providing a draft copy of a report or letter that lays out its tentative findings and recommendations.

[17] It appears to me that the Ombudsman's letter and report addressed to Tom Madden dealt with matters relating to R.M. business and that Tom Madden was acting in the role of officer of the R.M. as they pertained to those matters. Pursuant to *The Ombudsman Act, 2012*, it seems likely that this is the reason why a copy of the Ombudsman's report was sent to Tom Madden – so that they could make representations. Regardless, the Ombudsman report dealt with matters related to R.M. business and a response to the report was required by the R.M. Tom Madden participated in a professional, not personal capacity representing the R.M. Although I do not have evidence to suggest or support that the R.M. knew Tom Madden would submit the Ombudsman report to the Court of Queen's Bench as part of their own personal legal matter, I nonetheless find that the Ombudsman's letter and report were in the possession and control of the R.M. and subject to LA FOIP.

### **3. Is the Complainant's personal information involved?**

[18] In order for privacy provisions under LA FOIP to be engaged, the data elements at issue must constitute personal information in the possession or control of a local authority. The data elements are contained in two documents: 1) The letter from the Ombudsman to Tom Madden dated February 7, 2018; and 2) The Ombudsman report dated February 2018.

[19] Subsection 23(1) of LA FOIP defines what qualifies as personal information. Specifically, subsections 23(1)(d), (f), (g), (h) and (k) of LA FOIP provide:

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;

...

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

(g) correspondence sent to a local authority by the individual that is implicitly or explicitly of a private or confidential nature, and replies to the correspondence that would reveal the content of the original correspondence, except where the correspondence contains the views or opinions of the individual with respect to another individual;

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

...

(k) the name of the individual where:

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

...

[20] Upon review of the Ombudsman letter and the report, I note the following data elements which constitutes the Complainant’s personal information:

- The letter contained the name of the Complainant along with the Ombudsman file number for the Complainant, which is considered personal information pursuant to subsections 23(1)(d) and 23(1)(k)(i) of LA FOIP;
- On page 3 of the report, the Ombudsman included comments and opinions made by councillors regarding the Complainant, which is considered personal information pursuant to subsection 23(1)(h) of LA FOIP;
- On page 11 of the report, the Ombudsman included comments and opinions made by Tom Madden against the Complainant, which is considered personal information pursuant to subsection 23(1)(h) of LA FOIP; and
- On page 13 of the report, the Ombudsman includes a list of correspondence by the Complainant to the R.M., including some that contained the personal views or opinions of the Complainant as well as legal actions the complainant had contemplated against the R.M., which is considered personal information pursuant to subsections 23(1)(f) and 23(1)(g) of LA FOIP.

[21] I find, therefore, that personal information is involved.

**4. Did the R.M. have authority to disclose the Complainant's personal information?**

[22] The privacy matter at issue is Tom Madden, as councillor for the R.M., disclosing the personal information of the Complainant. This occurred when Tom Madden submitted the Ombudsman's letter and report, which contained the Complainant's personal information, to the Court of Queen's Bench for their own separate and personal matter (i.e. not related to R.M. business).

[23] With respect to disclosure of personal information, 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.

[24] In its submission to my office, the R.M. stated:

The R.M. did not prepare a formal investigation report. The R.M. accepted [the Complainant's] factual account of what occurred, and the Acting Administrator was able to recall the packages arriving from the Ombudsman's office. There is no dispute that Mr. Madden filed the Letter and the Report with the Court, and no indication that he obtained [the Complainant's] consent prior to doing so.

[25] It is clear that the Complainant did not provide their consent for their personal information to be disclosed by Tom Madden. Without such consent, one of the provisions of subsection 28(2) of LA FOIP to disclose the Complainant's personal information would have had to have been relied upon. As the R.M. did not treat the matter as a breach nor conduct an investigation, it did not state which authority it relied on to disclose the Complainant's personal information. It also does not appear that the R.M. knew of Tom Madden's actions to use the report for personal reasons. Even if Tom Madden was not aware that they did not have authority to disclose the Complainant's personal information, there was some onus on the R.M., once it became aware of what had occurred, to treat the matter as a breach of privacy and conduct an investigation. Regardless, I find there was no authority for the disclosure of the Complainant's personal information to the Court of Queen's Bench.

[26] I recommend that the R.M. ensure its councillors are aware of their obligations as councillors under both *The Municipalities Act* and LA FOIP through annual training provided by the R.M. I note that I made this same recommendation to this R.M. in Review Report 086-2017. I further recommend that Tom Madden offer an apology to the Applicant.

[27] I wish to add that the Ombudsman Report would be considered privileged, and therefore should not have been submitted by Tom Madden or Tom Madden's legal representative to the Court of Queen's Bench as evidence according to subsection 31(3) of *The Ombudsman Act, 2012*, which provides as follows:

**31(3)** Anything said or any information supplied or any document, paper or thing produced by any person in any court relating to an investigation by or proceedings before the Ombudsman pursuant to this Act is privileged in the same manner as if the investigation or proceedings were proceedings in a court.

### **III FINDINGS**

[28] I find that the Ombudsman's letter and report were in the possession and control of the R.M. and subject to LA FOIP.

[29] I find that personal information is involved.

[30] I find there was no authority for the disclosure of the Complainant's personal information to the Court of Queen's Bench.

### **IV RECOMMENDATIONS**

[31] I recommend that the R.M. ensure its councillors are aware of their obligations as councillors under both *The Municipalities Act* and LA FOIP through annual training provided by the R.M.

[32] I recommend that Tom Madden offer an apology to the Complainant.



Dated at Regina, in the Province of Saskatchewan, this 17th day of March, 2020.

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