



Office of the
Saskatchewan Information
and Privacy Commissioner

INVESTIGATION REPORT 200-2019

Village of Hyas

September 22, 2020

Summary:

The Village of Hyas (the Village) received a complaint from a constituent that a Village councillor had recorded them without their consent and then played the recording at a public Village meeting. The Commissioner found that, pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), the Village did not respond appropriately to the Complainant's privacy concerns, that personal information was involved in the matter, and that there was no authority to disclose the Complainant's personal information. The Commissioner did find that the recording could be made, but was done so without the Village/councillor understanding under what authority. The Commissioner recommended that the Village ensure its councillors understand their obligations with respect to collecting and disclosing personal information pursuant to LA FOIP. The Commissioner also recommended that the Village develop and implement policies, procedures and training regarding LA FOIP for its councillors that include when it is appropriate to make recordings regarding council business.

I BACKGROUND

- [1] In correspondence dated April 30, 2019, the Complainant wrote to the Village of Hyas (the Village) with concerns that a Village councillor had recorded a conversation without their consent on April 11, 2019. The recording took place at the Complainant's home. The councillor played a portion of the recorded conversation at a Village meeting on April 17, 2019.

- [2] In correspondence dated June 14, 2019, the Complainant contacted my office with concerns of the alleged breach. The Complainant was also not satisfied that the Village had not responded to their complaint.
- [3] On August 9, 2019, my office notified both the Village and the Complainant of my office's intent to undertake an investigation.
- [4] On November 15, 2019, the Village provided my office with its submission.
- [5] In a letter dated May 12, 2020, the Village provided a response to the Complainant. In its response to the Complainant, the Village stated that, "[i]t is the finding of the Village that your privacy has not been breached as there are no public recordings of the conversation held April 17, 2019".

II DISCUSSION OF THE ISSUES

1. Does my office have jurisdiction?

- [6] The Village is a local authority pursuant to subsection 2(f)(i) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Therefore, I have jurisdiction to investigate this matter.

2. Did the Village respond appropriately to the Complainant's privacy concerns?

- [7] The Complainant raised privacy concerns with the Village on April 30, 2019. The Village did not respond to those privacy concerns until May 12, 2020. This was a full year after the Complainant first raised their concerns.
- [8] Section 23.1 of LA FOIP outlines the obligations of a local authority to protect personal information. If an individual has concerns with a local authority's collection, use, disclosure or safeguarding of personal information, the individual can request the local authority address their concerns. Section 6-4, of *The Rules of Procedure* (June 10, 2019),

outlines that it is best practice for a local authority to provide its response within 30 days of receiving the complaint.

[9] Upon receiving a privacy complaint, the first step a local authority should take is to investigate and determine if a privacy breach occurred. If the local authority concludes a privacy breach was unfounded, then it should provide its reasons for its findings to the complainant, even if reasons lead to the conclusion that no breach occurred. The local authority should explain what happened, the findings of their investigation, and the steps taken to prevent further occurrences. If a record does not exist because it was destroyed, the local authority should explain why it did not keep a record, or explain its policies and procedures for the retention and destruction of records.

[10] In the matter before me, the Village took almost a year to respond to the Complainant's privacy concerns. The Village also did not provide the Complainant with its reasons for how it came to the conclusion that a privacy breach did not occur beyond that the Village did not make a public recording. As such, I find that the Village did not respond appropriately to the Complainant's privacy concerns.

3. Was personal information involved in this matter?

[11] The matter before me involves a recording that the councillor made of the Complainant at the Complainant's home. With respect to the recording itself, the councillor provided my office with an affidavit that stated, "I certify there is no record either in part or in full of a conversation held with [Complainant]". Both the Village and the Complainant, however, appear to agree on the following:

- That the councillor recorded the Complainant at the Complainant's home on April 11, 2019;
- That the councillor appears to have recorded the Complainant because they felt the Complainant was being verbally aggressive to them at the Complainant's home on April 11, 2019;

- That the Complainant asked to appear in front of the Village council meeting on April 17, 2019 to speak to their sewer issue; and
- That the councillor played a portion of the recording that contained the Complainant's voice and commentary at the Village council meeting on April 17, 2019.

[12] As the recording no longer exists, I am not able to review it. Further, the Village council does not appear to have taken notes at the April 17, 2019 meeting, which might have revealed the contents of the recording. The Village's minutes from its April 17, 2019 council meeting also do not detail the contents of the recording. However, based on what has been provided by both parties and the fact that both parties seem to agree on certain items, I am satisfied that the recording did exist and was played at the council meeting.

[13] With respect to the definition of "personal information", subsection 23(1) of LA FOIP provides a list of examples of what would qualify as "personal information", but the list is not exhaustive. This involves assessing if the information meets both of the following: 1) is there an identifiable individual; and 2) is the information personal in nature? The definitions for each are as follows:

- *Identifiable individual* means it must be reasonable to expect that an individual may be identified if the information were disclosed; and
- *Personal in nature* means that it reveals something about the individual.

[14] In Review Report 135-2018, I stated that a person's voice, tone and inflection, when paired with identifying information that is personal in nature, qualifies as personal information. In arriving at this conclusion, I considered what the Alberta Information and Privacy Commissioner stated in Order F2009-044 at paragraphs [12] and [18]:

[para 12] The Organization compares the recording of a telephone conversation to the taking of notes by hand or on computer. There is an important distinction, however. When an employee takes notes in order to record the personal information of an individual, the employee is collecting the substance of the information being provided, and possibly also the employee's opinions or observations of the way in which the substantive information is being conveyed. In this case, when the employee of the Organization collected the information from the Complainant by way of the electronic

recording, he collected additional personal information from her, within the meaning of section 1(k), in the form of her voice, tone, inflection, etc. This is the personal information at issue here, which I will refer to as the “Voice Recording”.

...

[para 18] The individuals who made the recorded calls are identifiable based on what they said in the recording, coupled with what was found in the subsequent investigation regarding the incident. Although, on the basis of voice alone, the general public would not be able to identify the individuals on the recording, this is not the test. I find that the voices paired with what the people in the recording said and the information in the file, would make these individuals identifiable to some other persons and therefore this information in the recordings is personal information.

[15] In this matter, the councillor appears to have played their recording of the Complainant at the Village council meeting, with the Complainant in attendance, to indicate the Complainant’s actions towards them. Anyone at the Village council meeting would have known, then, that the recording was of the Complainant. I am satisfied that the Complainant was identifiable on the recording. As the first condition is met, I will consider if the information is *personal in nature*.

[16] To determine if the information is personal in nature, I need to consider the purpose for which the councillor recorded the Complainant. The Village stated, “[the councillor] recorded [the Complainant] on the evening of April 11, 2019, because [the councillor] was concerned for [their] safety. [The Complainant] became abusive towards [the councillor and Village employee] while they were trying to free the blockage on a cold evening; shouting, acting aggressively and using profanity”. It appears, then, that the councillor was attempting to record the Complainant’s behaviour towards them, or convey elements such as their tone and inflection. This makes how the Complainant sounded on the recording personal in nature, which meets the second condition.

[17] As the Complainant’s identity would be known, when combined with factors including their voice, tone and inflection, the recording would qualify as personal information. I find, therefore, that personal information was involved in this matter.

4. Was there authority to collect, use and disclose personal information pursuant to LA FOIP?

[18] Before I consider if there was authority for collection of the Complainant's personal information, I will consider if the councillor was acting in an official capacity as Village councillor when the recording was made and subsequently shared at the Village council meeting.

[19] The Village provided my office with affidavits from the councillor and the Village's maintenance person regarding the events. With respect to the councillor's attendance at the Complainant's home, the Village stated the following:

[The Councillor] was not present in an "official capacity" [at the Complainant's home on April 11, 2019] as [the Complainant] suggests, clearing sewer lines is not part of our councillors [sic] duties.

...

It was outside office hours so the complainant called the Mayor of Hyas who then called [name of employee] to go and look at the complainants sewer. [The Councillor] was asked by [name of employee] to go with him should he require help. As I have stated in previous correspondence, [name of employee] is in his 70's and relies on [the councillor] to provide assistance.

[20] The Complainant, on the other hand, stated the following:

My concern is that a village councillor, [the councillor], recorded a conversation that we had as we surveyed the raw sewage done to my basement, due to his and the village maintenance man's negligence. [The Councillor] one week later, on Wednesday April 17, 2019, played the recorded conversation at a public village meeting... He [the councillor] showed no regard to the damage done to my home, which he and the maintenance man had caused.

[21] Regardless what each party states about why the councillor was in attendance at the Complainant's home that evening, I need to consider whether, as an elected official, the councillor will have certain functions or duties pursuant to *The Municipalities Act*. As such, they will also have obligations pursuant to LA FOIP with respect to collecting and disclosing the personal information of constituents within their jurisdiction. I need to continue my analysis with this in mind, as well as the fact that the councillor not only recorded their interaction with the Complainant, but later played it at a public council meeting.

[22] 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 as an "officer" of the city; or 2) if the records were found to be in the possession 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.

[23] Pursuant to subsections 92(b) and (c) of *The Municipalities Act*, general duties of councillors include:

92 Councillors have the following duties:

...

(b) to participate in developing and **evaluating the** policies, **services** and programs of the municipality;

(c) **to participate in council meetings** and council committee meetings and meetings of other bodies to which they are appointed by council;

[Emphasis added]

[24] From what the Complainant has described, it appears that the councillor attended their home on April 11, 2019, to review the work that had been completed on their sewer by the Village. Even if, as the Village contends, the councillor attended to assist the Village maintenance person, the councillor would have still been in the position of, as councillor, reviewing Village services in a constituent's home pursuant to *The Municipalities Act*. The act of reviewing the services at the Complainant's home, then, would come within the general duty of a councillor as outlined by subsection 92(b) of *The Municipalities Act*.

[25] The Village council meeting minutes from April 17, 2019, indicate that the councillor was in attendance at the Village council meeting. The councillor appears to have been acting in their official capacity as indicated by their participation, for example, in voting on various matters before the council. Participating in the Village council meeting and

discussing the Complainant's concerns with the sewer work would also qualify as a general duty of a councillor as outlined by subsection 92(c) of *The Municipalities Act*.

[26] Based on the aforementioned, I am satisfied that the councillor was acting in his official capacity as a Village councillor both when they attended the Complainant's home to review the sewer work and when they participated in the discussion of the sewer work at the Village council meeting. Having established this, I now move onto the question of *collection* or authority to collect personal information pursuant to LA FOIP.

[27] *Collection* is a term used to describe the action of having gathered, obtained access to, acquired, received or obtained personal information or personal health information. Local authorities must only collect personal information that relates to an existing or proposed program or activity of the local authority. Section 24 of LA FOIP provides:

24 No local authority shall collect personal information unless the information is collected for a purpose that relates to an existing or proposed program or activity of the local authority.

[28] *Purpose* means the purpose for which the information was collected. Typical purposes include the administration of a program, the delivery of a service or other directly related activities. When collecting personal information, local authorities must take into consideration the manner of collection, which is outlined at section 25 of LA FOIP as follows:

25(1) A local authority shall, where reasonably practicable, collect personal information directly from the individual to whom it relates.

(2) A local authority that collects personal information that is required by subsection (1) to be collected directly from an individual shall, where reasonably practicable, inform the individual of the purpose for which the information is collected.

(3) Subsections (1) and (2) do not apply where compliance with them might result in the collection of inaccurate information or defeat the purpose or prejudice the use for which the information is collected.

[29] The Village stated that the councillor, "recorded [the Complainant] on the evening of April 11, 2019, because [the councillor] was concerned for [their own] safety". The Village

added that the Complainant, “came into the meeting [on April 17, 2019] and at first discussed the agenda item [the Complainant was] scheduled for. [The Complainant] later became extremely agitated and made accusations to the councillor. In response, the councillor played a portion [of the recording] where [the Complainant] could be heard being verbally abusive”.

[30] As discussed earlier in this Report, I considered that one of the councillor’s duties as a councillor is to review services provided by the Village, which would be a program or activity of the Village. Based on the aforementioned, however, it does not appear that the councillor recorded the conversation with the Complainant on April 11, 2019, to capture a review of services provided by the Village, but rather to capture the Complainant’s behavior. I base this primarily on the Village’s statement, which I quoted in the preceding paragraph that the councillor played the recording when the Complainant became agitated at the Village meeting and appeared to go off topic. Although making the recording may have been justified based upon the councillor’s concerns while in the Complainant’s home, later playing that recording at a council meeting was not. Further, if the recording was collected because of a potential safety concern, it should not have been deleted. And, if legitimate concerns, those should have been subsequently investigated behind closed doors, not aired in public. I find, therefore, that the collection appears authorized, but the disclosure at the Village meeting was not.

[31] I recommend that the Village ensure its councillors understand their obligations with respect to collecting and disclosing personal information pursuant to LA FOIP. I further recommend that the Village develop and implement policies, procedures and training regarding LA FOIP for its councillors and staff that include when it is appropriate to make recordings regarding council business.

III FINDINGS

[32] I find that the Village did not respond appropriately to the Complainant’s privacy concerns.

[33] I find that the Complainant’s personal information was involved in this matter.

[34] I find that the collection appears authorized, but the disclosure at the Village meeting was not pursuant to LA FOIP.

IV RECOMMENDATION

[35] I recommend that the Village ensure its councillors understand their obligations with respect to collecting and disclosing personal information pursuant to LA FOIP. I further recommend that the Village develop and implement policies, procedures and training regarding LA FOIP for its councillors and staff that include when it is appropriate to make recordings regarding council business.

Dated at Regina, in the Province of Saskatchewan, this 22nd day of September, 2020.

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