



REVIEW REPORT 031-2017 PART I

Rural Municipality of Rosthern No. 403

September 13, 2017

Summary:

An Applicant made an access request to the Rural Municipality of Rosthern No. 403 (the RM) that included six different items. The RM provided the Applicant with records and withheld others pursuant to section 21 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Applicant requested a review of the fees charged, the RM's search for records and the application of section 21 of LA FOIP. The Commissioner found that the RM did not demonstrate that the fees were reasonable and that the RM did not perform a reasonable search for records. He recommended a refund of the fees and a new search. The application of section 21 of LA FOIP will be dealt with in Part II of this Report.

I BACKGROUND

- [1] On December 1, 2016, the Applicant made an access to information request to the Rural Municipality of Rosthern No. 403 (the RM) that included six different items.
- [2] On December 20, 2016, the RM wrote to the Applicant with a question to clarify, and possibly narrow, the scope of the request. The Applicant did not wish to do so. After the RM received a response from the Applicant, it sent the Applicant a fee estimate for the amount of \$220 on January 5, 2017. The Applicant paid a deposit of 50% on January 9, 2017.

- [3] On January 30, 2017, after the Applicant paid the remaining fee estimate amount, the RM responded to the Applicant's request.
- [4] With respect to the first two types of records requested by the Applicant, the RM provided the Applicant with some records. It also withheld parts of these records and other records in full pursuant to section 21 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).
- [5] In response to the Applicant's other four requests, it provided additional records.
- [6] On February 7, 2017, my office received a request for review from the Applicant. He requested that my office review the RM's application of fees, the RM's search for records and the RM's application of section 21 of LA FOIP.
- [7] On February 16, 2017 my office provided notification to both the RM and the Applicant of my intention to undertake a review.

II RECORDS AT ISSUE

- [8] This is Part I of a report which deals with the portion of the record which is not impacted by a claim of solicitor-client privilege. The portion of the record affected by solicitor-client privilege will be dealt with in Part II of this report.
- [9] Part I deals with the RM's search for records and the application of fees. As such there are no records at issue.

III DISCUSSION OF THE ISSUES

1. Did the RM conduct a reasonable search?

- [10] Section 5 of LA FOIP 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.

[11] Section 5 is clear that access can be granted provided the records are in the possession or under the control of the local authority. LA FOIP does not require a local authority to prove with absolute certainty that records do not exist. It must however, demonstrate that it has made a reasonable effort to identify and locate responsive records.

[12] A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request. The threshold that must be met is one of “reasonableness”. In other words, it is not a standard of perfection, but rather what a fair and rational person would expect to be done or consider acceptable.

[13] The level of detail that can be provided to my office is outlined in my office’s resource, *IPC Guide to Exemptions*. Each case requires different search strategies and details depending on the nature of the records and the way an organization manages them.

[14] The Applicant made a request that included six different items as follows:

1. Please provide all records of invoices (contracts) from Legal Counsel for “legal advice” pertaining to myself from the date of 1, June 2015 until the date of 1, December 2016.
2. Please provide all records shared, collected, produced or gathered which contain [variations of my name] and the RM of Rosthern’s typical misspelling or use of my surname from the date of 1, May 2015 until the date of 1, December 2016.
3. What rate (percentage) of the mill rate collected from the Hamlet is returned to the Hamlet Board operation expenses? (Ref; The Municipalities Act, Section 69(1)(b))
4. If the answer to question above is greater than the minimum required 40%, what is the agreement between the Hamlet Board and RM to achieve this amount?
5. Total itemized (cost with date incurred, location and description of work completed) of RM expenditures to the Hamlet of Neuanlage Board Funds for road repairs, road work or improvements, and or ditch repair within the Hamlet of Neuanlage for 2014, and 2015.
 - a. Please supply the minutes or written Hamlet Board approval for these expenditure’s. (Ref; The *Municipalities Act, Section 72(a)*)
6. Total itemized (cost with date incurred, location and description of work completed) expenditures from the Hamlet of Neuanlage Funds for all road repairs, road work including improvements, and or ditch repairs within the

Hamlet of Neuanlage for 2014, and 2015, which was arranged or approved by the Hamlet of Neuanlage Board.

- a. Please supply the minutes or written RM Council's approval for these expenditure's or authorization for work to be completed. (Ref; The *Municipalities Act, Section 12* and previous communication from RM Legal Advisor, dated 18 Jan, 2015).

[15] The Applicant is satisfied with the response provided for items #3 and 4.

Item #2

[16] With respect to item #2, the Applicant's concerns with the RM's search for these records include the fact that several councillors appeared to be using personal e-mail addresses for RM business. Also, he was concerned he was not getting responses to some of the e-mails.

[17] The RM stated that, as a search strategy, that it identified the Applicant as a ratepayer and as an individual who has had other correspondence with the RM with respect to LA FOIP. It identified that there would be documentation related to his inquires under LA FOIP and through usual ratepayer records.

[18] The RM also acknowledged that most records are stored in physical form. Electronic files are printed and kept on physical files. It reported when an issue arises, the RM keeps a physical file specific to that issue.

[19] The RM also noted that it has a small office. Its submission of June 29, 2017 stated: "All records of the R.M. over the time period in question were included in the search".

[20] Finally, the RM also described its electronic search for records. The RM used the Applicant's name and variations in spelling of his name as keywords. Additionally, it reported that it searched all RM issued e-mail accounts and iPads of councillors.

[21] My office asked the RM specifically about its councillors' use of personal and business e-mail for RM business. It noted that it recently implemented a policy requiring councillors to use RM issued e-mail for RM business. I have provided an analysis of the RM's e-mail policy in Investigation Report 086-2017. The RM acknowledged that this policy

was not in place during the time frame of the access request. It stated that personal and business e-mail accounts of the councillors were not searched. The RM would likely have a measure of control over e-mails relating to RM business in its councillor's personal accounts.

[22] I recommend that the RM require its councillors to search their personal e-mail accounts for responsive records.

[23] My office specifically advised the RM on May 2, 2017 to explain if some places or drawers were not searched. My office, again, directed the RM to these instructions on June 16, 2017. As noted above, the RM's submission of June 29, 2017 had indicated all RM records had been searched. The Applicant provided my office with a receipt with his name on it that should have been a responsive record. My office specifically asked the RM about this receipt. On August 4, 2017, it replied that it did have a copy of this receipt, but it had no reason to believe there would be responsive records in the accounts payable folders and did not search them. It indicated that a search of these folders would have led to an increase in fees charged.

[24] Typically, when developing a search strategy, local authorities should make a list of all record holdings and identify areas where records are most likely to exist. If the RM had indicated in its earlier submission that the accounts payable folders were not searched because it was determined that it would not likely contain responsive records, and explained why, I may have found that the search was reasonable. However, the RM first said that all records had been searched and then indicated that it did not search councillors' personal e-mail accounts or the accounts payable folders. It did not indicate if it omitted any other areas from its search. As a result, I am not persuaded that the RM has completed a thorough search.

[25] I recommend that the RM undertake a new search for responsive records that includes all RM records, including accounts payables and councillors' personal e-mail accounts. The RM should provide any additional responsive records to the Applicant. The RM should not apply additional fees at this point in the process.

Item #1

[26] With respect to the invoices for legal advice, the RM provided the Applicant with three invoices from legal counsel. The subject line of the invoice contains the name of an individual with a different first name of the Applicant and a different spelling of the last name. My office asked the RM how these records were responsive to the Applicant's request. In response, the legal counsel of the RM e-mailed my office and stated that "as a result of a misnomer at our office at the time the file was originally opened and uncorrected thereafter for a time, which resulted in the invoices being issued with the wrong reference". I am satisfied with the explanation of the RM's legal counsel. However, given the contradictory statements of the RM regarding its search, I recommend that the RM perform a second search for records.

Items #5 and #6

[27] Finally, with respect to items #5 and #6 in the Applicant's access request, the Applicant indicated that the RM did not demonstrate that the RM's expenditures were approved by the Hamlet's board.

[28] When asked about the Applicant's claims, the RM responded that the Applicant was provided with various council minutes approving certain expenditures which are responsive to that part of the request. The RM submitted that it is possible that the Applicant "misapprehends the extent of the work that is actually done by the R.M.'s internal staff, in which case no formal approvals are required or carried out." The RM also stated that it does not believe that it is obligated to provide the Applicant with any explanation as to why specific records do not exist.

[29] While the RM may not have an obligation to explain to the Applicant why records do not exist, it is best practice to do so. A conversation with the Applicant may have saved the time and effort of going through the exercise of a review by my office.

[30] Given the RM's previous contradictory statements about its search, I recommend that it perform another search for responsive records.

2. Were the fee estimate and the fees applied by the RM reasonable?

[31] Subsection 9(1) of LA FOIP states:

9(1) An applicant who is given notice pursuant to clause 7(2)(a) is entitled to obtain access to the record on payment of the prescribed fee.

[32] Subsections 5(2) and 5(3) of the *The Local Authority Freedom of Information and Protection of Privacy Regulations* (the Regulations) provide a local authority the ability to recover costs associated with searching for responsive records.

[33] Subsection 9(2) of FOIP requires that a local authority provide the Applicant with an estimate of the fees:

9(2) Where the amount of fees to be paid by an applicant for access to records is greater than a prescribed amount, the head shall give the applicant a reasonable estimate of the amount, and the applicant shall not be required to pay an amount greater than the estimated amount.

[34] A reasonable fee is one that is proportionate to the work required on the part of the public body to respond efficiently and effectively to an applicant's request. The public body should be able to detail how it arrived at its fee estimate amounts for each of the types of fees that can be charged. In past reports, my office has established that there are three kinds of fees that a public body can include in its fee estimate:

- fees for searching for a responsive record;
- fees for preparing the record for disclosure; and
- fees for the reproduction of records.

[35] In this case, the RM simply indicated in a letter to the Applicant dated January 5, 2017 that the estimate was \$220. It did not provide further details regarding how it came to this conclusion. Not wanting to delay the access request, the Applicant paid the required deposit. He paid the remaining fee estimate once the RM indicated that responsive records were ready for pick up.

- [36] Once my office received the request for review, the RM was asked to provide a submission explaining its application of the fees. As always, my office directed the RM to my office's resource *IPC Guide to Exemptions* which explains the type of detail required in a review regarding fees. In response, the RM simply indicated that the fee estimate was calculated to be \$220 and "The actual time spent on the search exceeded the estimate provided, however, as provided for in the Act, no additional time over the estimate was charged." This was not enough information to demonstrate that the fee was reasonable.
- [37] My office sent the RM an e-mail on May 2, 2017, detailing the kind of information needed to demonstrate that fees were reasonable. As with the *IPC Guide to Exemptions*, it described what search and preparation activities can be covered by fees and what activities cannot. It also gave general tests regarding how long it should take to search.
- [38] In response, on June 14, 2017, my office received a letter from the RM's legal counsel. It indicated that a breakdown of fees charged "is not only difficult to do, but is maybe unwarranted, in these relatively simple circumstances." It noted that preparation and search occurred at the same time. And it "propose[d] not to break that out". It also indicated that, with respect to the records it did provide, it charged the Applicant \$0.25 per photocopy. While this is in accordance with subsection 5(2)(a) of the Regulations, the RM did not indicate how many photocopies were provided to the Applicant.
- [39] I note the Applicant asked that the records be supplied electronically and provided a storage device for these purposes. In past reports such as Review Report 146-2015 & 147-2015, I have recommended that all public bodies accommodate Applicants and where practical provide the record electronically. In the future, I recommend that the RM provide records electronically to reduce costs, where practicable. I also note that Bill 31 was recently passed by the Legislative Assembly of Saskatchewan, but has not yet proclaimed. When it is in force, it will require local authorities to provide records electronically in some circumstances.

[40] Again, on June 16, 2017, my office referred to the material about fees already provided and asked that the RM's legal counsel provide more detail regarding the application of the fees.

[41] On July 13, 2017, the RM's legal counsel provided another submission about the RM's search and fees. It indicated that "in excess of the estimate provided" the search took "approximately 14 hours and 45 minutes" to search. However, the submission also stated that "the R.M. is a small office" and there is a "small number of employees" and "limited records". Finally, it stated:

In the R.M.'s respectful submission, as the value of the time actually spent searching for and preparing the record exceeded the estimate provided, such a breakdown on a retroactive basis is not helpful.

[42] My office has given the RM three opportunities to provide details to demonstrate that the fees charged were reasonable. The RM has not explained its fee estimate and what activities or photocopying it covered. Given the RM's description that the RM is a small office and has limited records, I am not persuaded that the search could have reasonably taken close to 15 hours on top of what the \$220 that the Applicant paid would have covered. Further, as noted above, the RM later admitted that it did not search all of the records it purported to have searched.

[43] In addition, subsection 5(3) of the Regulation provides:

5(3) Where time in excess of one hour is spent in searching for a record requested by an applicant or in preparing it for disclosure, a fee of \$15 for each half-hour or portion of a half-hour of that excess time is payable at the time when access is given.

[44] It is not clear whether the RM discounted this hour from the fees charged.

[45] Given the lack of information provided by the RM, I cannot conclude that the fee charged was reasonable. Further, the RM's fee estimate did not meet best practices. I recommend that the RM refund the Applicant \$220.

IV FINDINGS

[46] I find that the RM did not perform a reasonable search for records.

[47] I find that the RM has not demonstrated that the fees charged to the Applicant were reasonable.

V RECOMMENDATIONS

[48] I recommend that the RM request that its councillors search their e-mail accounts for records responsive to the Applicant's access to information request. I recommend it provide any responsive records to the Applicant in accordance with LA FOIP.

[49] I recommend that the RM make a new search strategy and perform a new search for records responsive to the Applicant's entire access to information request. I recommend that it take detailed notes of the search and provide them to the Applicant with any additional responsive records in accordance with LA FOIP. I recommend it do this within 10 days of the issuance of the final report.

[50] I recommend that the RM refund \$220 to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 13th day of September, 2017.

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