



REVIEW REPORT 038-2019

Rural Municipality of Rosthern No. 403

March 17, 2020

Summary:

The Applicant submitted an access to information request to the Rural Municipality of Rosthern No. 403 (the R.M.). The Commissioner found that pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), that the R.M.: did not have records responsive to two requests, but that it did for one; and properly applied subsections 14(1)(c) and 21(a) of LA FOIP to the records. The Commissioner recommended that the R.M. continue to withhold the records accordingly.

I BACKGROUND

[1] The Applicant submitted an access to information request to the Rural Municipality of Rosthern No. 403 (the R.M.) on January 8, 2019, requesting access to the following (copied from the R.M.'s submission):

1. Any and all information which is identifiable [to yourself] and which contains the following provided from the RM of Rosthern to the RCMP on or about the 30th of October:
 - a) [Applicant name]
 - b) [Applicant] phone number [XXXXXX];
 - c) [Applicant] address [XXXXXX];
 - d) Any other information linked to [Applicant] in which no consent was provided by yourself to release;
 - e) Any other derivative of my name including initials [XX].
2. Any and all electronic “emails” and/or all other written correspondence provided to the RCMP which pertain to the RM’s Email from their Lawyer (Dated 2 November, 2018).

- a) This is to include all internal (RM Council) emails which may contain “evidence” reviewed or discussed.
3. All documents electronic or otherwise provided to the RCMP from the RM of Rosthern which pertains to this matter or otherwise involves [yourself].
4. All documents, recordings (audio or video), photos and/or any materials (electronic or otherwise).
5. All documents reviewed (as outlined in the Email from the RM Lawyer (Dated 2nd November, 2019 and 7th January 2019) by council.
6. A copy of the “Motion of Council” to proceed with this action or related actions and incur public expense on this matter.
7. A copy of all Legal Invoices pertaining to this matter;
 - a) This includes the invoice for the cost to email myself and [third party] on the 2nd of November, 2019 and 7th January, 2019.
8. All information reviewed on the 29th of October, 2018 identified as “evidence” in the email from the RM’s lawyer dated 2 November, 2018.
9. Any request for information from the RCMP.
10. Any other “person information” collected by the RM for this purpose. [sic]

[2] On January 23, 2019, the R.M. responded with the following to the Applicant:

1. The R.M. has determined that it is in possession of one or more records which is responsive to this request. However, access to these records is denied in accordance with sections 14(1)(a), 14(1)(c) and 14(1)(k) of LAFOIPP.
2. The R.M. has determined that it is in possession of one or more records which is responsive to this request. However, access to these records is denied in accordance with sections 14(1)(a), 14(1)(c) 14(1)(k) and 14(1)(k)(i) of LAFOIPP; in accordance with section 16(1)(a) and 16(1)(b) of LAFOIPP; as well as pursuant to sections 21(a), 21(b) and 21(c) of LAFOIPP.
3. The R.M. has determined that it is in possession of one or more records which is responsive to this request. However, access to these records is denied in accordance with sections 14(1)(a), 14(1)(c) 14(1)(k) and 14(1)(k)(i) of LAFOIPP.
4. It is the understanding of the R.M. that this request relates to the same matters addressed in the remainder of your request. The R.M. has no recordings (audio or

video) or photos which are responsive to this request. We are not able to identify any documents which are responsive to this request which have not been addressed elsewhere in your request. Should you wish to particularize this request further, we will conduct a further search of our records.

5. The R.M. has determined that it is in possession of one or more records which is responsive to this request. However, access to these records is denied in accordance with sections 14(1)(a), 14(1)(c) 14(1)(k) and 14(1)(k)(i) of LAFOIPP; in accordance with section 16(1)(a) and 16(1)(b) of LAFOIPP; and also pursuant to sections 21(a), 21(b) and 21(c) of LAFOIPP.
6. The R.M. has no records which are responsive to this portion of your request. However, for your reference, a copy of the Minutes of Council of December 11, 2019 appointing [name of law firm] as legal counsel to the R.M. is enclosed.
7. The R.M. has determined that it is in possession of one or more records which is responsive to this request. However, access to these records is denied in accordance with sections 21(a), 21(b) and 21(c) of LAFOIPP.
8. The R.M. has determined that it is in possession of one or more records which is responsive to this request. However, access to these records is denied in accordance with sections 21(a), 21(b) and 21(c) of LAFOIPP.
9. The R.M. has no records which are responsive to this portion of your request.
10. The R.M. has not collected any personal information from you with respect to the matters addressed in your request.

[3] On January 24, 2019, the Applicant requested a review by my office.

[4] On January 28, 2019, my office provided notification to the R.M and the Applicant; the R.M.'s response to my office was dated February 14, 2019.

II RECORDS AT ISSUE

[5] The R.M. provided my office with 86 pages of documents in response to the Applicant's request, and also provided an index of records, which I have modified below for ease of reference and for categorization as follows:

Pages	LA FOIP exemptions applied
1-72	14(1)(a), (c), (k) and (k.1)
73-76	14(1)(a), (c) and (k) 16(1)(a) and (b) 21(a), (b) and (c)
77-79; 81-84; 85-86	21(a), (b) and (c)
80	16(1)(a) and (b) 21(a), (b) and (c)

[6] The R.M. noted it was not able to identify records responsive to requests 4, 9 and 10, and that it provided the Applicant with records that were responsive to request 6. The R.M. withheld the remainder of the records, as noted in the preceding table, from the Applicant pursuant to exemptions it applied under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction to review this matter?

[7] The R.M. qualifies as a local authority pursuant to subsection 2(f)(i) of LA FOIP. I therefore, have jurisdiction to review this matter.

2. Are there records that are not responsive to the access request?

[8] Subsection 7(2)(e) of LA FOIP provides:

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

...

(e) stating that access is refused for the reason that the record does not exist;

[9] Part of a local authority’s ability to identify responsive records is to ensure it understands an applicant’s request. It is the applicant, in an access request, who sets out the boundaries of relevancy and informs the local authority’s search efforts.

[10] In the matter before me, the R.M. indicated that it did not have records responsive to requests 4, 9 and 10. The following outlines each of these specific requests from the Applicant and the R.M.’s response to each request:

Request Number	Applicant Request	R.M. Response to Access Request
4	All documents, recordings (audio or video), photos and/or any materials (electronic or otherwise).	It is the understanding of the R.M. that this request relates to the same matters addressed in the remainder of your request. The R.M. has no recordings (audio or video) or photos which are responsive to this request. We are not able to identify any documents which are responsive to this request which have not been addressed elsewhere in your request. Should you wish to particularize this request further, we will conduct a further search of our records.
9	Any request for information from the RCMP.	The R.M. has no records which are responsive to this portion of your request.
10	Any other “person information” collected by the RM for this purpose.[sic]	The R.M. has not collected any personal information from you with respect to the matters addressed in your request.

[11] Upon review of request 4, the R.M. stated it does not have recordings (audio or video) or photos responsive to this request, but I note that the R.M. did offer to continue its search

for records if the Applicant provided clarification on request 4; however, it does not appear that the Applicant provided such clarification to the R.M.

[12] With respect to request 9, upon review of the records, there does not appear to be any instance where the RCMP requested information on the Applicant from the R.M.

[13] With respect to request 10, I assume the Applicant's use of "for this purpose" to mean for the purposes of the investigation by the RCMP, but I cannot be certain that this is what the Applicant meant. According to LA FOIP, however, "collection" refers to what personal information a local authority collects from an individual or any other source for a purpose authorized by LA FOIP. In the matter before me, the R.M. appears to have provided the RCMP with information it collected directly from the individual as well as from other sources, which forms the basis of the records the R.M. has provided to the RCMP as part of its investigation.

[14] In conclusion, I find that for request 4, the R.M. did not have recordings (audio or visual) or photos that were responsive to this request, and acknowledge that the R.M. offered to continue working with the Applicant in further clarifying the request, but that the Applicant did not do so. I further find that the R.M. does not have records responsive to request 9, and that it does have records responsive to request 10 that I will subsequently review pursuant to the subsections of LA FOIP that the R.M. has applied to the records.

3. Did the R.M. appropriately apply subsection 14(1)(c) of LA FOIP to the record?

[15] The R.M. applied subsection 14(1)(c) of LA FOIP to pages 1 to 76 of the record, which I note is almost the entire record. Subsection 14(1)(c) of LA FOIP provides:

14(1) A head may refuse to give access to a record, the release of which could:

...

(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;

[16] To determine if subsection 14(1)(c) of LA FOIP applies, my office recommends applying the following test from my office's resource, *Guide to FOIP: The Freedom of Information and Protection of Privacy Act* (December, 2019) (the Guide to FOIP):

1. Does the local authority's activity qualify as a "lawful investigation"?
2. Does one of the following exist?
 - a. Could the release of the information interfere with a lawful investigation?
 - b. Could release disclose information with respect to a lawful investigation?

[17] To elaborate on the first part of the test, a "lawful investigation" is defined in the Guide to FOIP as an investigation that is authorized or required and permitted by law.

1. Does the local authority's activities qualify as a lawful investigation?

[18] In its submission, the R.M. did not state specifically under which legislation the investigation occurred, but upon review of the records, I note the following:

- It appears that the documents contained in pages 1 to 46 were provided to the RCMP by the R.M as part of investigating a matter that the RCMP can investigate under its legislative authority.
- It appears that pages 47-76 include communication exchanges between the R.M. and the RCMP, as part an investigation by the RCMP. The details of the exchange lead me to conclude that it was part of an active police investigation.

[19] I find that the first part of the test has been met and that the R.M.'s activities qualified as a "lawful investigation". I will now consider the second part of the test.

2. Does one of the following exist?

- a. *Could the release of the information interfere with a lawful investigation?*
- b. *Could release disclose information with respect to a lawful investigation?*

[20] In its submission, the R.M. stated that disclosure of the information in the record would disclose to the Applicant what information the R.M. provided to the RCMP. The R.M. stated the following:

As a result, the R.M. took the step of contacting the local detachment of the RCMP on or about October 30, 2018, and provided to the RCMP a package of information. The information was provided in the context of... and request for the RCMP to investigate.

[21] Pages 1 to 46 of the records include documentation the R.M. provided to the RCMP, while pages 47-76 relate to the investigation itself. All information in the record appears to indicate that the investigation pertained to a matter, brought forward by the R.M., against the Applicant, that can be investigated by the RCMP under its legislative authority.

[22] In Review Report 202-2018 at paragraph [14], my office stated that it is only necessary for the local authority to demonstrate that the information in the record is information with respect to a lawful investigation in order to meet the second part of the test. Based on my review of the records, and based on what I outlined at paragraph [18], it is evident that the records to which the R.M. applied subsection 14(1)(c) of LA FOIP contain information with respect to a lawful investigation, and so the second part of the test has been met.

[23] I find that subsection 14(1)(c) of LA FOIP has been properly applied to pages 1 to 76 of the record and that the R.M. has the discretion to continue to withhold them. Because I find that subsection 14(1)(c) of LA FOIP applies to pages 1 to 76 of the record, I do not need to consider the other LA FOIP exemptions the R.M. has applied to these pages. I will now consider the exemptions that the R.M. has applied to pages 77 to 86.

4. Did the R.M. appropriately apply subsection 21(a) of LA FOIP to the record?

[24] The R.M. withheld pages 77 to 86 of the record pursuant to subsection 21(a) of LA FOIP. I note that this is the remainder of the documents contained in the index of records.

[25] Subsection 21(a) of LA FOIP provides:

- 21** A head may refuse to give access to a record that:
- (a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege.
- [26] My office has established a process to consider a claim of solicitor-client privilege. When considering claiming solicitor-client privilege, public bodies have three options when preparing records for review with the Information and Privacy Commissioner (IPC):
1. Provide the documents to the IPC with a cover letter stating the public body is not waiving the privilege;
 2. Provide the documents to the IPC with the portions severed where solicitor-client privilege is claimed; or
 3. Provide the IPC with an affidavit with a schedule of records (see sample in the Rules of Procedure).
- [27] With respect to the matter before me, the R.M. has provided my office with a copy of the records with portions appropriately severed.
- [28] My office recommends the following test for subsection 21(a) of LA FOIP from the Guide to FOIP:
1. Is the record a communication between a solicitor and client?
 2. Does the communication entail the seeking or giving of legal advice?
 3. Did the parties intend for the communication to be treated confidentially?
- [29] Based on the non-redacted header and subject line information provided in the emails on pages 77 to 84, it seems apparent that the purpose was to discuss a letter the R.M.'s solicitor was helping draft and the R.M.'s feedback. The R.M.'s submission indicates that its legal counsel expects these to remain privileged, and therefore confidential. I find that all three parts of the test have been met for pages 77 to 84 of the record.

[30] Pages 85 and 86 contain a legal invoice from the solicitor's law firm to the R.M. In my Review Report 229-2017 concerning the same R.M., my office found at paragraph [23] that legal invoices are communications between a solicitor and a client and are part of legal advice. In that report, I further noted at paragraph [27] that if the applicant can provide persuasive arguments that the disclosure of the fees would not result in the applicant learning of information that is subject to solicitor-client privilege, then the presumption of solicitor-client privilege for legal invoices can be rebutted. The Applicant in the matter before me has not provided my office with such an argument. The R.M.'s submission confirms that the R.M. has included these pages for consideration pursuant to subsection 21(a) of LA FOIP. For these reasons, I find that all three parts of the test have also been met for pages 85 and 86 of the record.

[31] I find, therefore, that subsection 21(a) of LA FOIP has been properly applied to pages 77 to 86 of the record and that the R.M. has the discretion to continue to withhold them. Because I find that subsection 21(a) of LA FOIP applies to these pages, I do not need to consider the other exemptions the R.M. has applied to these pages.

5. Did the R.M. comply with section 8 of LA FOIP?

[32] 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.

[33] In order to comply with section 8 of LA FOIP, a local authority is required to undertake a line-by-line analysis of the records at issue to determine which exemptions apply to which portions of the records. The local authority is required to sever those portions that may qualify for a mandatory or discretionary exemption and release the balance to the applicant.

[34] Based on a review of the records at issue, I found that the R.M. appropriately applied subsections 14(1)(c) and 21(a) of LA FOIP to the records, which allows the R.M. to withhold the records accordingly.

[35] I find, therefore, that the R.M. has complied with section 8 of LA FOIP.

IV FINDINGS

[36] I find that the R.M. qualifies as a local authority pursuant to subsection 2(f)(i) of LA FOIP.

[37] I find the R.M. does not have records responsive for requests 4 and 9, and that it does for request 10.

[38] I find that subsection 14(1)(c) of LA FOIP has been properly applied to pages 1 to 76 of the record and that subsection 21(a) of LA FOIP has been properly applied to pages 77 to 86 of the record.

[39] I find that the R.M. has complied with section 8 of LA FOIP.

V RECOMMENDATION

[40] I recommend the R.M. continue to withhold pages 1 to 76 of the record pursuant to subsection 14(1)(c) of LA FOIP and pages 77 to 86 of the record pursuant to subsection 21(a) of LA FOIP.

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

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