



REVIEW REPORT 040-2019

Northern Village of Pinehouse

April 23, 2019

Summary:

The Applicant submitted an access to information request to the Northern Village of Pinehouse (Village). After receiving no response, the Applicant made a request for review to the Information and Privacy Commissioner (Commissioner). Upon the Commissioner's involvement, the Village sent a response to the Applicant. The Commissioner found that the response was not compliant with section 7 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). In addition, the Village did not meet its 30-day statutory deadline for responding. Further, during the review, the Commissioner found that the Village did not identify any exemptions in LA FOIP to justify withholding expense information from the Applicant. It was also found that the Village did not conduct a reasonable or adequate search for records responsive to the access to information request. Finally, the Commissioner found the Village did not meet its duty to assist. The Commissioner recommended the Village release the expense information to the Applicant. In addition, the Commissioner recommended the Village develop a policy and procedure for processing access to information requests and provide a copy to the Commissioner's office within 30 days. Further, the Commissioner recommended that the Village conduct a new search for Council minutes and Pinehouse Business North minutes and detail its search efforts in a response to the Applicant. Finally, any records located should be released to the Applicant. This is the 14th Report that the Commissioner has issued regarding the Village.

I BACKGROUND

- [1] On December 11, 2018, the Applicant sent an access to information request to the Northern Village of Pinehouse (the Village) via Canada Post. The request was sent by way of express post with an expected delivery date of December 14, 2018. Tracking information

indicated that the Village received the request on December 14, 2018. The Applicant requested access to:

As Pinehouse Business North is the wholly owned municipal corporation, and as the Village is its sole shareholder, the Village has the authority to dispense with audited financial statements in any fiscal year. This is the reason that the Village administration has indicated as to why PBN financial statements do not exist for 2009-2011. I am requesting copies of Village Council minutes and PBN board minutes in which motions were passed authorizing the PBN board to dispense with financial statements (audited or unaudited) for 2009, 2010 and 2011.

- [2] After receiving no response from the Village, the Applicant sent the Village Administrator an email on January 18, 2018, requesting an update on the status of the request. The Village responded indicating it had responded to her by email earlier that day. Further, it asserted it had received the request on December 18, 2018 and not December 14, 2018. The Applicant replied saying she had not received anything but the Village did not respond back to her. During the course of this review, my office requested and received from the Applicant a copy of that email chain. My office also requested a copy from the Village but the Village did not respond to my office's request.
- [3] On January 21, 2019, my office received a request for review from the Applicant. The Applicant indicated she had not received a response from the Village and she disputed the Village's claim that it received her access to information request on December 18, 2018.
- [4] After follow-up from my office, the Village sent its response to the Applicant again via email on January 23, 2019. Attached to the email was a section 7 letter and a single one-page record. The record appeared to have expense information removed or withheld.
- [5] On January 28, 2019, my office called the Village Administrator and left a message requesting contact. After receiving no response, my office called again on January 29, 2019, but was again unable to speak with the Village Administrator. My office followed this phone call up with an email requesting clarification as to whether a portion of the record had been redacted and if so, what exemption under *The Local Authority Freedom of*

Information and Protection of Privacy Act (LA FOIP) the Village was relying on to withhold it. At the time of issuing this report, the Village had still not provided an answer.

- [6] On January 31, 2019, my office notified the Village and the Applicant of my office's intent to undertake a review. In the notification email to the Village, my office requested a submission detailing the Village's search efforts and clarification on whether it withheld information on the one record released and what exemption in LA FOIP it was relying on. The submission was requested by February 15, 2019.
- [7] On February 19, 2019, my office emailed the Village indicating that it had not received what had been requested in its notification email. Further, as nothing had been received, my office would proceed to draft its report on the matter.
- [8] On February 20, 2019, the Village responded indicating, "the emails sent are blank. Also your previous one...please resend."
- [9] On February 27, 2019, my office resent its notification email. My office also indicated it was unfortunate that the Village Administrator had not returned my office's phone calls or responded to the initial email indicating it was blank. My office advised that the deadline to provide my office with its submission had passed, however, if it wished to request an extension it would need to do so immediately and a short extension could be considered.
- [10] On February 28, 2019, the Village Administrator requested an extension to March 8, 2019. The extension was granted.
- [11] On March 21, 2019, after hearing nothing from the Village, my office sent an email indicating that the matter would be proceeding forward to report. The Village did not respond.

II RECORDS AT ISSUE

- [12] The Village indicated that no records existed for 2009 and 2010 for:

- Council minutes in which motions were passed authorizing Pinehouse Business North (PBN) to dispense with financial statements; and
- PBN Board minutes in which motions were passed authorizing Pinehouse Business North (PBN) to dispense with financial statements.

[13] As such, the search efforts conducted by the Village will be addressed in this report.

[14] A one-page record for 2011 has been released to the Applicant. It is titled, *Pinehouse Business North Development Inc., Statement of Income and Retained Earnings for the Year Ended December 31, 2011*. However, it appears the expense amounts have been removed from the page. This will also be addressed in this report.

III DISCUSSION OF THE ISSUES

1. Does the Commissioner have jurisdiction?

[15] The Village is a local authority pursuant to subsection 2(f)(i) of LA FOIP. Thus, I have jurisdiction to conduct this review.

2. Did the Village comply with section 7 of LA FOIP?

[16] There are two issues to address in terms of compliance with section 7 of LA FOIP:

1. Was the response by the Village compliant with section 7? and
2. Did the Village meet its 30-day statutory deadline?

1. Was the response by the Village compliant with section 7?

[17] Subsection 7(1) of LA FOIP requires a local authority to provide a written response to an applicant when it receives an access to information request. Subsections 7(2) and 7(3)

instruct a local authority on what the response must include and within what timeframe it must be provided. Section 7 provides:

7(1) Where an application is made pursuant to this Act for access to a record, the head of the local authority to which the application is made shall:

(a) consider the application and give written notice to the applicant of the head's decision with respect to the application in accordance with subsection (2); or

(b) transfer the application to another local authority or to a government institution in accordance with section 11.

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

(a) stating that access to the record or part of it will be given on payment of the prescribed fee and setting out the place where, or manner in which, access will be available;

(b) if the record requested is published, referring the applicant to the publication;

(c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;

(d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;

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

(f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4); or

(g) stating that the request has been disregarded pursuant to section 45.1, and setting out the reason for which the request was disregarded.

(3) A notice given pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

(4) If an application is made with respect to a record that is exempt from access pursuant to section 15, 16, 21, or 22 or subsection 29(1), the head may refuse to confirm or deny that the record exists or ever did exist.

(5) A head who fails to give notice pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record.

[18] After intervention from my office, the Village emailed its section 7 response to the Applicant on January 23, 2019. In terms of its contents, the response had some of the elements required by subsection 7(2) and 7(3) of LA FOIP. For example, it contained reference to subsection 7(2)(e) of LA FOIP as reason for why records were not provided. In addition, it provided notice that the Applicant could request a review by my office as required by subsection 7(3) of LA FOIP. However, on the face of the record it is clear that information has been withheld from the Applicant yet there is no reference to this in the response as required by subsection 7(2)(d) of LA FOIP.

[19] To date, the Village has not clarified for the Applicant or my office if it has removed the expenses from the record. Although it is clear on the face of the record that it has, refusing to clarify this point for the Applicant and my office is contrary to the duty to assist at section 5.1 of LA FOIP. I will address this later in the report. In addition, the Village has not identified any exemptions in LA FOIP that it relies on to withhold this information. It is also important to note that section 51 of LA FOIP places the burden of demonstrating that access should be refused on the head of the local authority. Section 51 provides:

51 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[20] The Village has not responded to my office's questions and has not provided my office the benefit of a submission supporting its position. Clearly, the Village has not met the burden of proof in this case. Therefore, it should release the withheld expense information to the Applicant.

[21] In conclusion, as the Village's response did not contain all of the required elements, I find that the Village's response to the Applicant is not compliant with section 7. The fact that the Village provided a response is progress and I would encourage it to continue to work on providing responses that are fully compliant.

2. Did the Village meet its 30-day statutory deadline?

[22] Subsection 7(2) of LA FOIP requires local authorities to provide a written response to applicants within 30 days of receipt of an access to information request. The Village claims to have received the access to information request on Tuesday, December 18, 2018. However, the Village provided no evidence to support this assertion. On the other hand, the Applicant provided my office with a copy of the Canada Post registered mail tracking system receipt, which showed that the access request was delivered to the Village on Friday December 14, 2018. The following is an image from the Canada Post website:

CANADA POST / POSTES CANADA		Personal	Business	Our company	My Account	Tools
Date	Time	Progress				
Dec. 14, 2018	2:50 pm	Delivered Pinehouse Lake, SK				
	2:50 pm	Signature available through Customer Service Download delivery confirmation				
	1:33 pm	Notice card left indicating where and when to pick up item Pinehouse Lake, SK Additional information ▾				

[23] Based on the access request's arrival on Friday, December 14, 2018, the due date for a response was Sunday, January 13, 2019. However, consistent with section 24 of *The Interpretation Act, 1995*, where a due date falls on a weekend, the time is extended to the next day the office is open. In this case, the due date would have been Monday, January 14, 2019.

[24] As noted earlier in this report, the Village claimed to have emailed its response to the Applicant on January 18, 2019. The Applicant asserted she did not receive that email and told the Village as such. When asked by my office to provide a copy of this email, the

Village did not respond. Based on what has been provided to my office, there is only evidence that the Village provided its response via email on January 23, 2019, following intervention from my office. Regardless, a response on January 18, 2019, would still have been past the 30-day deadline.

[25] A similar dispute around which date the Village received an access to information request was also at issue in Review Report 204-2018. In that case, the Applicant was also able to demonstrate that the access to information request arrived at the Village earlier than the Village claimed. This appears to be an ongoing problem with the Village. To be clear, the 30 days does not begin when the Village decides to pick up the access to information requests from the post office. It begins when the request arrives at the Village. It is up to the Village to make sure that it has appropriate processes in place so it can meet its 30-day obligations under LA FOIP.

[26] As I indicated in Review Report 204-2018, if the Village had a clear process in place, it would not find itself trying to argue what date it received an access to information request in review after review. As a result of the systemic issues with the Village not meeting its 30-day statutory timeline, several applicants track their access to information requests to the Village via Canada Post and provide copies to my office. This is unfortunate and a sign that the Village has lost the trust of citizens and still does not take its obligations under LA FOIP seriously.

[27] In Review Report 204-2018, issued November 19, 2018, I made the following recommendation to the Village:

[51] I recommend the Village develop a policy and procedure for processing access to information requests that includes:

- how access to information requests are to be handled when they arrive at the Village post office (i.e. routing);
- that requests be date stamped by the Village on the date of arrival; and
- that processing begins immediately.

[28] The Village did not respond to that report as required by section 45 of LA FOIP, so it is not clear if the Village complied with this recommendation. Based on this review, it does not appear so. Therefore, this recommendation is made again to the Village, as it appears it is making its own rules when the 30-day clock starts and stops.

[29] In conclusion, I find that the Village did not meet its 30-day statutory deadline.

3. Did the Village conduct a reasonable search?

[30] Section 5 of LA FOIP provides every applicant the right of access to records in the possession or control of a local authority:

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.

[31] Section 5 is clear that access to records must be granted if they are in the possession or under the control of the local authority subject to any applicable exemptions under LA FOIP.

[32] LA FOIP does not require a local authority to prove with absolute certainty that records responsive to an access to information request, do not exist. However, it must demonstrate that it has conducted a reasonable search to locate them.

[33] A *reasonable search* is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the 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.

[34] When conducting a review of a local authority's search efforts, details are requested that help my office understand the level of effort made to locate the records. The submission to my office should outline the search strategy conducted which can include:

- 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 organizations 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 service provider.
- Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Which folders within the records management system were searched and explain how these folders link back to the subject matter requested?
 - For electronic folders – indicate what key terms were used to search if applicable.
- On what dates did each employee search?
- How long did the search take for each employee?
- What were the results of 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 the IPC resource, *Using Affidavits in a Review with the IPC* available on our website.

[35] The above list is meant to be a guide. Each case will require different search strategies and details depending on the records requested.

[36] Despite requesting a submission from the Village, nothing was received. As such, my office has no information about how the Village came to the conclusion that records did not exist.

[37] In terms of transparency and accountability to citizens, it is concerning that the Village is indicating that no minutes exist that are responsive to the Applicant's access to information request. Section 138 of *The Northern Municipalities Act* requires the Village Council and its committees to hold meetings in public (except for certain matters which can be discussed in private pursuant to subsection 138(2)). Section 137 requires that all decisions be made in public and section 132 requires that minutes be preserved permanently. Also of concern is that subsection 127(2) of *The Northern Municipalities Act* provides:

127(2) The Administrator shall ensure that:

- (a) all minutes of council meetings are recorded;

[38] Based on no submission being provided to my office, I find that the Village has not demonstrated that its search for records was reasonable and adequate for purposes of LA FOIP.

[39] I recommend the Village conduct a reasonable and adequate search for Council minutes and PBN Board minutes and detail its search efforts in a response to the Applicant. Any records located should be provided to the Applicant.

4. Did the Village meet its duty to assist?

[40] Subsection 5.1(1) of LA FOIP provides:

5.1(1) Subject to this Act and the regulations, a local authority shall respond to a written request for access openly, accurately and completely.

[41] This means that local authorities should make reasonable effort to not only identify and seek out records responsive to an applicant's access to information request, but to explain the steps in the process and seek any necessary clarification on the nature or scope of the request within the legislated timeframe.

[42] *Reasonable effort* is what a fair and rational person would expect to be done or would find acceptable and helpful in the circumstances (Office of the Nova Scotia Information and Privacy Commissioner (NS IPC), Resource, *What is the Duty to Assist*, at p. 1. Similar definition cited in SK Review Report F-2006-003 at paragraph [55]).

[43] *Open* means to be honest, forthcoming and transparent. Where a decision is made to not provide an applicant with all or part of a record, a local authority should provide reasons for the refusal in an upfront and informative manner. Being open would also include explaining to an applicant other things such as: how and why a decision was made, how responsive records were searched for, any additional information necessary to explain something found in the record that is believed to be confusing; how a fee is calculated; and creating a record when appropriate (NS IPC Resource, *What is the Duty to Assist*, at p. 1).

[44] *Accurate* means careful; precise; lacking errors (Review Report F-2006-003 at paragraph [49]). Further, it means the local authority must provide the applicant with sufficient and correct information about the access process and how decisions are made (NS IPC Resource, *What is the Duty to Assist*, at p. 1).

[45] *Complete* means having all its parts; entire; finished; including every item or element; without omissions or deficiencies; not lacking in any element or particular (Review Report F-2006-003 at paragraph [49]). Further, it means the information from a local authority must be comprehensive and not leave any gaps in its response to an applicant's access to information request. A local authority should provide all the necessary details to enable an applicant to understand how a decision was reached (NS IPC Resource, *What is the Duty*

to Assist, at p. 2). This would include explaining what, if any, exemptions have been applied to a record, the reason it was applied and what factors were relied upon in exercising discretion to withhold all or part of a record.

[46] In this case, the Village did not respond to the Applicant openly, accurately or completely by:

- Not responding to the Applicant as required by section 7 of LA FOIP;
- When it did respond, not making it clear what information had been withheld and why; and
- Not providing any information explaining why records did not exist and what efforts were taken to locate them.

[47] Therefore, I find that the Village has not met its duty to assist pursuant to subsection 5.1(1) of LA FOIP.

[48] This is now the 14th Review Report issued by my office involving the Village between 2013 and 2019.¹ 13 of these reports deal with section 7 responses not being provided, delays in providing it or responses being inadequate.² In addition, the Village did not cooperate with requests by my office in 11 of these cases.³ In one report, former Commissioner Gary Dickson Q.C. recommended that the Minister of Justice and Attorney General consider prosecution pursuant to subsection 56(3) of LA FOIP because the Village did not comply with a lawful requirement of the Commissioner (LA-2013-004). The prosecution did not proceed because the Village did what the former Commissioner requested after the issuing of the public report. In Review Report 204-2018, I recommended the Minister of Government Relations direct an inspection or inquiry under sections 396 and 397 of *The Municipalities Act* (sections 417 and 418 of *The Northern Municipalities Act*) due to the non-compliance with my office and LA FOIP. The Minister

¹ Saskatchewan OIPC Review Reports (SK OIPC) LA-2013-004, 141-2015, 036-2016, 037-2016, 039-2016, 040-2016, 056-2016, 098-2016, 106-2016, 110-2016, 171-2016, 104-2018, 204-2018 and 040-2019.

² SK OIPC Review Reports LA-2013-004, 036-2016, 037-2016, 039-2016, 040-2016, 056-2016, 098-2016, 106-2016, 110-2016, 171-2016, 104-2018, 204-2018 and 040-2019. Review Report 141-2015 dealt with search issues.

³ SK OIPC LA-2013-004, 036-2016, 037-2016, 040-2016, 056-2016, 098-2016, 106-2016, 110-2016, 104-2018, 204-2018 and 040-2019.

ordered an inspection of the Village on December 7, 2018 and expanded that to an inquiry by Mr. Neil Robertson Q.C. on April 2, 2019.

IV FINDINGS

[49] I find that the Village's response to the Applicant is not compliant with section 7 of LA FOIP.

[50] I find that the Village did not meet its 30-day statutory deadline pursuant to subsection 7(2) of LA FOIP.

[51] I find that the Village has not identified any exemptions in Part III of LA FOIP that it can rely on to withhold all or part of the records.

[52] I find that the Village has not demonstrated that its search for records was reasonable and adequate for purposes of LA FOIP.

[53] I find that the Village has not met its duty to assist pursuant to subsection 5.1(1) of LA FOIP.

V RECOMMENDATIONS

[54] I recommend that the Village release to the Applicant the withheld expense information that has been removed from the record titled, *Pinehouse Business North Development Inc., Statement of Income and Retained Earnings for the Year Ended December 31, 2011*.

[55] I recommend the Village develop a policy and procedure for processing access to information requests that includes:

- how access to information requests are to be handled when they arrive at the Village post office (i.e. routing);
- that requests be date stamped by the Village on the date of arrival; and

- that processing begins immediately.

[56] I recommend the Village provide a copy of this policy and procedure to the Ministry of Government Relations and my office within 30 days of receiving this Review Report.

[57] I recommend the Village conduct a reasonable and adequate search for Council minutes and PBN Board minutes and detail its search efforts in a response to the Applicant. Any records located should be released to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 23rd day of April 2019.

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