



REVIEW REPORT 063-2018

The Resort Village of the District of Katepwa

March 8, 2019

Summary:

The Applicant requested records from the Resort Village of the District of Katepwa (Katepwa). Katepwa provided a response to the Applicant providing access to some records. The Applicant requested a review by the Office of the Information and Privacy Commissioner (IPC) because the Applicant asserted that some records were not provided. Katepwa indicated to the IPC that the additional records did not exist. Upon review, the Commissioner found that the search conducted by Katepwa was reasonable or adequate for purposes of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Further, the Commissioner found that the response Katepwa provided to the Applicant was not compliant with section 7 of LA FOIP. The Commissioner recommended that Katepwa develop a template letter that contained the necessary elements as required by section 7 of LA FOIP to use going forward.

I BACKGROUND

[1] On March 1, 2018, the Resort Village of the District of Katepwa (Katepwa) received the following access to information request from the Applicant:

Completed nomination forms filed with regard to [candidate X] as a candidate in the District's 2016 general election.

[2] On March 2, 2018, the Applicant followed up with Katepwa by email clarifying the access to information request. The email stated in part that:

...You will see that I request "Nomination Forms". In order to ensure that there is no confusion, the request pertains to all forms related to the candidacy of [candidate X] in the 2016 general election.

The includes:

1. The Nomination and Candidate's Acceptance filed first re [candidate X] for the 2016 general election;
2. The Receipt of Nomination and Candidate's Acceptance issued by the returning officer or other designated election official;
3. [Candidate X]'s Withdrawal of that Nomination;
4. The second Nomination and Candidate's Acceptance filed re [candidate X] for the 2016 general election;
5. The Receipt of Nomination and Candidate's Acceptance issued by the returning officer or other designated election official.

I assume that the District, in addition to stating the date, uses a time stamp or specifies the time on election forms when they are received. If it does not, the District would have a record of the time of receipt. Please include the time that each document was received in relation to the candidate.

- [3] By letter dated March 16, 2018, Katepwa responded to the Applicant indicating that a copy of the nomination form for [candidate X] was enclosed.
- [4] On April 3, 2018, my office received a Request for Review from the Applicant. The Request for Review stated that the Applicant did not receive all of the records requested from Katepwa. In addition, the response from Katepwa did not speak to the redactions on the record that was provided.
- [5] During the review, it was determined that Katepwa's position was that the information withheld was withheld pursuant to subsection 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) and that any remaining records requested did not exist.
- [6] On April 19, 2018, my office notified Katepwa and the Applicant of my office's intent to undertake a review and invited both parties to provide submissions. For Katepwa, my office specifically requested a copy of the records that had been withheld and a submission

in support of its application of subsection 28(1) of LA FOIP. Further, my office requested details of Katepwa's search efforts to locate the records it claimed did not exist.

[7] On April 30, 2018, Katepwa provided my office with its submission and a copy of the records. On May 3, 2018, the Applicant provided a submission to my office.

[8] On November 6, 2018, Katepwa dropped its reliance on subsection 28(1) of LA FOIP and released the previously severed information to the Applicant. This information included the addresses of nominators on Form I. The issue of Katepwa's claim that the remaining records requested did not exist will be addressed in this review.

II RECORDS AT ISSUE

[9] The records remaining at issue are a number of forms prescribed in *The Local Government Election Regulations, 2015* (LGE Regulations) that were involved in the 2016 Katepwa election specific to one candidate. Katepwa claims that the following forms, portions of forms or documents do not exist for candidate, [candidate X]:

1. (Ward 1) Nomination and Candidate Acceptance (Form I);
2. (Ward 1) The Receipt of Nomination and Candidate's Acceptance (Form K);
3. (Ward 1) [Candidate X]'s Withdrawal of the Nomination for Ward 1;
4. (Ward 2) Page 36 of Form I (Candidate's acceptance); and
5. (Ward 2) Record of the time of receipt for the Ward 2 nomination.

III DISCUSSION OF THE ISSUES

1. Does the Commissioner have jurisdiction to conduct this review?

[10] According to Katepwa, a Minister's Order was issued indicating that the Resort Village of Sandy Beach, the Resort Village of Katepwa Beach and the Resort Village of Katepwa South were restructured under agreement to establish the District of Katepwa. Further, the

order states that the municipality is incorporated under *The Municipalities Act* as the Resort Village of the District of Katepwa.

[11] *The Municipalities Act* defines a municipality as “a town, village, resort village, rural municipality, municipal district or restructured municipality”. It further defines a restructured municipality as a “municipality incorporated as a result of a restructuring application described in section 53”.

[12] Subsections 53(1) and (2) of *The Municipalities Act* provide:

53(1) The council of a municipality or the council of a municipality or the councils of one or more other municipalities may apply to the minister, in accordance with the procedures set out in Division 2, to restructure...

(2) A municipality and any other municipality may enter into a voluntary restructuring agreement for the purposes of an application pursuant to subsection (1), whether or not their existing boundaries are coterminous.

[13] Therefore, under *The Municipalities Act*, Katepwa is considered a restructured municipality. Further, the definition of a municipality includes restructured municipalities.

[14] Subsection 2(f)(i) of LA FOIP defines a local authority as a municipality. Therefore, Katepwa is a local authority pursuant to subsection 2(f)(i) of LA FOIP. Thus, I have jurisdiction to conduct this review.

2. Did Katepwa’s response to the Applicant comply with section 7?

[15] During the review of materials provided to my office by the Applicant and Katepwa, it became apparent that there were issues with the response that Katepwa provided the Applicant. I address those issues below.

[16] Section 7 of LA FOIP instructs a local authority on what to do if it receives an access to information request:

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.

[17] Katepwa's section 7 response to the Applicant dated March 16, 2018, stated as follows:

Enclosed is a copy of the nomination form for [candidate X] as per your enclosed LAFOIP Access to Information Request dated March 1, 2018.

Also enclosed is your cheque in the amount of \$20.00. The district will not be requiring a fee for the request.

- [18] Katepwa's response appears to be deficient in several respects. First, it was not compliant with subsection 7(2)(d) of LA FOIP. Katepwa did not indicate that information was being withheld and why. Subsection 7(2)(d) of LA FOIP requires this detail be provided in responses to Applicants. Katepwa should have indicated that some information was being withheld pursuant to subsection 28(1) of LA FOIP.
- [19] Secondly, the response was not compliant with subsection 7(3) of LA FOIP. Katepwa did not state that the Applicant could request a review by the Commissioner within one year after Katepwa's response was given.
- [20] Finally, the response was not compliant with subsection 7(2)(e) of LA FOIP. Katepwa did not indicate that access was refused to some of the records for the reason that the records did not exist. Subsection 7(2)(e) of LA FOIP requires this detail also be provided to applicants when applicable.
- [21] I understand that according to Katepwa the Administrator was not aware of the full scope of the Applicant's request when she drafted the section 7 response. Further, that the Administrator did not realize until after the section 7 response went out that one of the responsive records was missing (i.e. page 36 of Form I (Candidate's acceptance)).
- [22] The Applicant clarified the access to information request for Katepwa in her email of March 2, 2018. The clarification email was sent to the Mayor. According to Katepwa, the Mayor did not forward the clarification email to the Administrator. However, lack of coordination by Katepwa does not mean section 7 responses can be deficient. I would encourage Katepwa to review its processes to make sure that these types of emails are funneled to the correct staff internally.
- [23] The duty to assist at section 5.1 of LA FOIP requires local authorities to make every 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 legislative timeframes. Section 5.1 of LA FOIP also requires local authorities to respond openly, accurately and completely.

[24] In conclusion, I find that Katepwa's response to the Applicant was not compliant with section 7 of LA FOIP.

[25] I note that this is the first Review Report my office has issued involving Katepwa. Therefore, I assume this lack of compliance is due to a lack of experience dealing with access to information requests and LA FOIP.

[26] I recommend that Katepwa develop a template letter that contains the necessary elements as required by section 7 of LA FOIP to use going forward for responses to access to information requests. For assistance, it can utilize the *Model Letters (LA FOIP)* developed by the Access and Privacy Branch at the Ministry of Justice. These model letters are there for local authorities to use. They can be accessed at www.publications.gov.sk.ca.

3. Did Katepwa conduct an adequate search?

[27] 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.

[28] 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.

[29] 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.

[30] 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.

[31] 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.

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

[33] Katepwa provided my office with three sworn affidavits. The affidavits were substantial. One affidavit was from the Administrator and two were from current Councilors.

[34] The Administrator’s sworn affidavit addressed each of the bulleted items in the list above. According to the Administrator’s affidavit, the Administrator conducted an initial search for records in April 2018. In terms of being experienced in the subject matter, the Administrator indicated that she commenced her position in April 2016. She was the Returning Officer for the District for the General Election in June 2016, so was familiar with the election records. The Administrator also indicated that prior to working for Katepwa she previously worked as an Administrator for another town. In order to assist with this review, the Administrator requested two other Councilors also conduct a search for [candidate X]’s nomination papers for the 2016 General Election. As noted, both of these Councilors provided my office with affidavits outlining their search efforts.

[35] According to the Administrator’s affidavit, the candidates were elected by acclamation. A copy of the Notice of Abandonment of Poll was provided to my office. The public notice indicated that no voting would take place for Ward 2 and that the list of candidates would be elected by acclamation. The Administrator indicated that because the candidates were

elected by acclamation, the only papers filed with Katepwa were the nomination papers of Form I and Form K. The paper file these are kept in is called “Receipt of Candidates Acceptance Form – 2016.” Katepwa’s paper file is filed by year in the file cabinet at the Katepwa office.

[36] There is also a computer file kept by Katepwa called “Election 2016”, but according to the Administrator’s affidavit, the computer file only contains blank forms, posters related to the election and ballot information. The computer file is filed alphabetically. The computer is located at the Katepwa office.

[37] The Administrator states that there are no other files relevant to the access to information request and she can confidently state this because she is the only Katepwa employee tasked with keeping track of the 2016 general election nomination forms. The Administrator indicates that there is no information stored off-site. Since she commenced her position in April 2016, information was either located within file cabinets in the Katepwa office or scanned into the office computer. No third party contractors or information service providers would have the information, as Katepwa does not use third parties for information storage. Further, there were no laptops, smart phones, cell phones or tablets used to store this information.

[38] In terms of the actual searches, the Administrator indicated that:

- The paper file, “Receipt of Candidates Acceptance Form – 2016”, was searched several times as a result of the review although the Administrator did not record the specific dates this occurred. However, the Administrator recalls one search occurring on April 18, 2018. This search lasted 30 minutes.
- No new records were ever found following any of the searches.
- Additional searches were conducted on February 6, 7 and 8, 2019. Details of these searches were also included in the affidavit. The searches took one to two hours.
- For any electronic folders, the Administrator searched under the key terms “Election 2016”, “Election” and “Nathan”.

[39] In addition, two Councilors also searched both the paper and electronic files and swore in affidavits that the records did not exist. The affidavits were provided to my office and included details of the searches conducted.

[40] I will now address specific records. The Applicant believes the following records for Ward 1 exist:

1. (Ward 1) Nomination and Candidate Acceptance (Form I) for [candidate X];
2. (Ward 1) The Receipt of Nomination and Candidate's Acceptance (Form K) for [candidate X]; and
3. (Ward 1) [Candidate X]'s Withdrawal of the Nomination for Ward 1.

[41] For the records related to Ward 1, Katepwa provided the following:

A Nomination paper and a Candidate's Acceptance paper were not filed with the Returning Officer for Ward 1...

A Receipt of Nomination and Candidate's Acceptance paper was not issued by the Returning Officer for Ward 1...

The withdrawal process was not required because a Nomination paper and a Candidate's Acceptance paper were not filed with the Returning Officer for Ward 1 and a Receipt of Nomination and Candidate's Acceptance paper was not issued by the Returning Officer for Ward 1. Section 67(7) of the Local Government Election, states "Nomination papers that are not complete or otherwise not accepted may be replaced or corrected if the new or corrected nomination papers are submitted before the nomination period ends."

[42] On April 17, 2018, Katepwa provided my office with more detail. According to Katepwa:

[Candidate X] came into the office and inquired if anyone was running for Ward 1 and was informed of the two candidates that were running and of the vacancy in Ward 2. The candidate never filed any papers for Ward 1. Instead, the candidate left the office and returned with a corrected nomination paper for Ward 2 and a corrected candidate's acceptance paper for Ward 2.

[43] The Applicant questions this account in her submission stating there was more than one person who was accepting and signing receipts the day of nomination. This included the Assistant Administrator who is no longer with Katepwa.

- [44] The Administrator pointed to the date on [candidate X]’s Form K, which confirms [candidate X] filed his papers on June 25, 2016. According to the affidavit of the Administrator, she was working on Saturday June 25, 2016, not the Assistant Administrator. A copy of timesheets were provided to my office supporting that it was the Administrator and not the Assistant Administrator that was working on June 25, 2016.
- [45] In a submission to my office, the Applicant disputed that the candidate came to the office as described by Katepwa. The Applicant pointed to the changes apparent on the Nomination and Candidate Acceptance (Form I) for [candidate X]. It appears that Ward “1” was changed to Ward “2” on both the Nomination and Candidate Acceptance. The Applicant asserted that the Administrator’s handwriting on the Nomination and on the Receipt appear to be similar to the handwriting that changed Ward “1” to Ward “2”. The Applicant suggested it was the Administrator, not [candidate X] that changed the form. Further, the Applicant asserted that candidates would not need to attend the office and inquire who was running in each ward, as municipalities are required to post nomination papers to the public as soon as they are filed.
- [46] According to the Administrator’s affidavit, when [candidate X] submitted Form I, he revised page 34 to reflect Ward 2. The Administrator indicated that she revised page 35 of his Form I to make it consistent.
- [47] The Applicant also asserted that based on *The Local Government Election Act, 2015* (LGEA), nominators must be qualified as “electors” in the Ward in which the candidate is being nominated for election. To be qualified, the nominator must reside in the Ward. Therefore, nominators in Ward 1 could not be nominators in Ward 2.
- [48] In the Administrator’s affidavit, it indicated that the candidate’s family have property in both Ward 1 and Ward 2.
- [49] The Applicant believes the following records for Ward 2 exist:

4. (Ward 2) Page 36 of Form I (Candidate Acceptance) for [candidate X]; and

5. (Ward 2) Record of the time of receipt for the Ward 2 nomination for [candidate X].

[50] For the records related to Ward 2, Katepwa provided the following:

...When I reviewed the forms on Publication's Saskatchewan, I realized I missed providing Page 36 to all the Candidates in the 2016 Election...

I am not aware of and am unable to locate in the Local Government Election Act of a requirement for a time stamp or having to specify the time on the election papers. A time was not indicated on the papers with either a time stamp or written. As per Section 74(b) sets out receiving nomination papers between 11:00a.m. to 2:00 p.m. on nomination day. When the papers were submitted I do recall it nearing the 2.00 p.m. deadline on nomination day. I think it was 1:57 p.m. but do not recall the exact time. As per Section 75 of the Local Government Election Act "If a nomination paper is submitted to the returning officer or nomination officer within the time specified in section 74, the returning officer shall, if satisfied that the form is complete, issue a receipt in the prescribed form to the candidate or the candidate's agent."

[51] In the Administrator's affidavit, it stated that on April 18, 2018, my office alerted the Administrator that page 36 was missing from what was provided to the Applicant. On that day, the Administrator searched the Queen's Printer for Form I and compared Form I to the nomination papers located within Katepwa's paper file (Receipt of Candidates Acceptance Form – 2016). That was when it was learned that page 36 was not provided to candidates in the 2016 General Election. My office asked Katepwa how many candidates were in the 2016 election and if any indicated they received page 36 of Form I. Katepwa responded to my office indicating that there were eight candidates and that in May 2018, one candidate told Katepwa via email that page 36 was received by the candidate during the election.

[52] Katepwa indicated it had previously gone through the file several times. In addition, it contacted Municipal Advisory to advise of the mistake, receive guidance and inquire whether the page could still be signed. Municipal Advisory told Katepwa the page could not be signed after the fact and that the legislation takes into consideration for an honest mistake.

[53] According to the affidavit of the Administrator, on June 15, 2016, the Administrator emailed Form I to the then Council members. A copy of this email was provided to my office. The email stated:

Good morning

Attached is a copy of the Nomination form and Acceptance form

I am positive you will all run again, so rather than having to pick up the forms I thought I would send...

[54] It is clear from this email that page 36 was missed in the attachment. The Administrator indicated in her affidavit that other than sending this email and providing a paper copy of Form I to one other candidate (also missing page 36), she did not provide any other nomination forms for the 2016 General Election. In support of it being an error, the Administrator indicated in her affidavit that one candidate signed and dated the bottom of his page 35 of Form I. The appropriate place for this signature and date is page 36. If there had been a page 36, she asserted, why would the candidate have signed and dated the bottom of page 35?

[55] The Applicant asserted that page 36 of the Candidate's Acceptance (Form I) is important because in order to qualify as a candidate in a municipal election, the prospective candidate must prove to the electorate that he/she is qualified to run. This page of the form verifies a candidate's qualifications. The Applicant asserted further that page 36 is also required by the LGEA. Further, the duty of the Returning Officer is to ensure that the forms submitted are complete. According to the Applicant, only fully completed forms can be accepted and filed and that the Returning Officer has no authority to accept an incomplete form. The Applicant asserted that after reviewing the forms for completeness, the Returning Officer is then required by the LGEA to provide a Receipt of Nomination and Candidate's Acceptance to the candidate. The Receipt is a prescribed form and states, in part:

I acknowledge that I have received a completed nomination paper and candidate's acceptance form from...

- [56] A Receipt of Nomination and Candidate's Acceptance was provided to [candidate X]. Further, the Applicant asserted that if no candidate filed the Candidate's Acceptance form that is mandatory by the LGEA, it raises a serious legal issue as to the validity of the election in 2016.
- [57] As noted earlier, the affidavit of the Administrator indicated that the Municipal Advisory has indicated that the LGEA takes into consideration for an honest mistake. Even though page 36 is required and the responsibilities of the Returning Officer are laid out in the LGEA, this line of argument does not prove that the records exist or that this was not just a matter of human error.
- [58] An affidavit is a written statement made under oath. An affidavit is sworn or affirmed before a Commissioner of Oaths or a Notary Public for Saskatchewan. Affidavits can strengthen a local authority's arguments. This is especially helpful when establishing that a proper search has been performed. In this case, the Administrator's affidavit was very detailed and included "I understand and verily believe that none of the candidates, including [candidate X], for the District of Katepwa's 2016 general election received from the District or returned Page 36 of Form I with their nomination papers. This was the consequence of an inadvertent mistake."
- [59] As noted earlier, a local authority does not have 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. The threshold that must be met is one of "reasonableness". Reasonableness does not mean perfection but rather an effort that is objectively diligent and prudent in all the circumstances.
- [60] Based on what has been provided to my office, I find that Katepwa has demonstrated that its search for records was reasonable or adequate for purposes of LA FOIP.

IV FINDINGS

[61] I find that Katepwa's response to the Applicant was not compliant with section 7 of LA FOIP.

[62] I find that Katepwa has demonstrated that its search for records was reasonable or adequate for purposes of LA FOIP.

V RECOMMENDATION

[63] I recommend that Katepwa develop a template letter that contains the necessary elements as required by section 7 of LA FOIP to use going forward for responses to access to information requests.

Dated at Regina, in the Province of Saskatchewan, this 8th day of March, 2019.

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