



## **REVIEW REPORT 075-2017 and 076-2017**

### **Rural Municipality of Blaine Lake #434**

**June 29, 2017**

#### **Summary:**

The Applicant, a councillor, submitted two access to information requests to the Rural Municipality of Blaine Lake (RM). The RM did not issue a fee estimate but reduced his monthly indemnity to pay for the processing of the access to information requests. The Commissioner found that the RM cannot charge fees if it had not issued a fee estimate pursuant to subsection 9(2) of LA FOIP. He also found that the councillor should be able to access to records related to RM business without being charged fees. The Commissioner made several recommendations including the RM refund the invoiced amounts to the Applicant, that the RM establish policies and procedures for processing access to information requests, and that the RM develop a policy setting out what a councillor is entitled to request and receive in terms of records in the possession of the RM.

#### **I BACKGROUND**

- [1] Approximately on April 5, 2016, the Applicant submitted an access to information request to the Rural Municipality of Blaine Lake (RM). Then, on May 4, 2016, the RM received another access to information request from the same Applicant under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).
- [2] Once the records were gathered and prepared, the RM contacted the Applicant to pick up the records. Once the records were picked up, the RM then issued two invoices dated May 30, 2016 to the Applicant. The first Invoice No. 128.2016 was for a total of \$126.50. The second Invoice No. 129.2016 was for a total of \$288.00. Both invoices were for fees charged for processing the Applicant's access to information request.

[3] Then, the RM sent a statement dated November 22, 2016 to the Applicant. The statement listed the two invoices, totaling \$414.50. A note on the statement indicated “Any amounts outstanding on December 31, 2016 will be added to your taxes.”

[4] Then, the RM issued Invoice No. 2017-00021 to the Applicant. As shown below, the RM collected payment for the two earlier invoices by reducing the Applicant’s monthly indemnity. This invoice showed the following:

<b>Description</b>	<b>Price</b>	<b>Amount</b>
February 2017 Indemnity		\$417.50
LAFOIP invoice 129.16		-\$288.00
LAFOIP invoice 128.16		-\$126.50
	<b>Subtotal</b>	\$3.00
	<b>Total Due</b>	\$3.00

[5] On April 5, 2017, the Applicant requested a review by my office.

[6] On April 24, 2017, my office notified the Applicant and the RM that it would be undertaking a review.

## **II DISCUSSION OF THE ISSUES**

[7] The RM qualifies as a local authority as defined by subsection 2(f)(i) of LA FOIP.

### **1. Did the RM issue a fee estimate pursuant to subsection 9(2) of LA FOIP?**

[8] In its submission, the RM asserts that it had given verbal fee estimates, in good faith, to the Applicant and the Applicant agreed to the costs. However, the Applicant asserts the RM did not provide an estimate nor was he asked to pay a deposit before the RM began processing the access to information request.

[9] Subsection 9(2) of LA FOIP requires that local authorities issue a fee estimate where the amount of fees to be paid by the applicant exceeds the prescribed amount. Subsection 9(2) of LA FOIP provides:

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.

[emphasis added]

[10] The prescribed amount is \$50 pursuant to subsection 6(1) of the LA FOIP Regulations. Subsection 6(1) of LA FOIP provides as follows:

6(1) For the purposes of subsection 9(2) of the Act, the amount of fees beyond which an estimate must be given by the head is \$50 in excess of the fee set out in subsection 5(1).

[11] Therefore, if the amount that the Applicant will ultimately pay is greater than the prescribed amount of \$50, then the local authority must issue a fee estimate to the Applicant pursuant to subsection 9(2) of LA FOIP.

[12] I note the RM's assertion that it issued fee estimates to the Applicant but I do not have evidence before me that supports that assertion. Therefore, I find that the RM did not issue fee estimates in accordance with subsection 9(2) of LA FOIP. Best practice would be that a public body issue a fee estimate in writing with an indication that the public body will begin the search and the reproduction of the records once a deposit is paid.

[13] My office's resource *IPC Guide to Exemptions* provides the following steps that should be taken when charging fees:

1. Contact the applicant:
  - a. advise that fees will be necessary;
  - b. attempt to clarify or offer ways to narrow the request to reduce or eliminate fees;
  - c. follow up in writing with applicant when narrowing occurs;
2. Make a search strategy;
3. Based on the search strategy, prepare a fee estimate (do not complete search);

4. Decide whether to charge a fee (refer to your public body's policy);
5. Send out fee estimate and suspend work;
6. If applicant initiates, clarify or narrow request with applicant;
7. When applicant pays 50% deposit; start search.

[14] I recommend that the RM undertake the above steps when it receives an access to information request under LA FOIP and believes that fees will be necessary. I also encourage that the RM issue a fee estimate within the first 10 days of receiving an access to information request. That way, there is time remaining in the legislated 30 day response period once an applicant provides the deposit.

## **2. Did the RM properly charge fees?**

[15] Subsection 9(2) of LA FOIP, which was quoted earlier, provides that an applicant shall not be required to pay an amount greater than the estimated amount. Since the RM did not issue a fee estimate pursuant to subsection 9(2) of LA FOIP, then I find that the RM cannot charge fees it is claiming for processing the Applicant's request.

[16] The RM issued Invoices 128.2016 and 129.2016, both dated May 30, 2016, for processing his access to information request. As described in the background section of this report, the RM reduced the Applicant's indemnity for February 2017 in order to pay these two invoices. I recommend that the RM refund this amount to the Applicant.

## **3. Did the RM issue a proper response in accordance with section 7 of LA FOIP?**

[17] Section 7 of LA FOIP provides that local authorities are to respond, in writing, to the Applicant within 30 calendar days. The written notice is to also notify the individual he or she may request a review by the Commissioner within one year after the notice is given. Section 7 provides in part:

7(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;

...

(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.

[18] The RM received the first access to information request in April of 2016 and the second one in May of 2016. Once the records were prepared, it contacted the Applicant to let him know the records were ready for pick-up.

[19] While I acknowledge that the RM provided the Applicant with records, it should have also provided written responses in accordance with section 7 of LA FOIP.

[20] I recommend that the RM develop policies and/or procedures that will ensure it will provide written responses to access to information requests in accordance with section 7 of LA FOIP.

**4. Does the RM have proper records management processes in place so it can respond to access to information requests effectively?**

[21] In his Request for Review form, the Applicant advised my office that whenever he seeks information, he is told it is “lost or missing.” In a telephone call with my office, he asserted that the RM’s disorganization impedes the RM’s ability to respond to access to information requests effectively, especially in the search for the records. He asserts that applicants should not have to be charged fees for the RM’s disorganization.

[22] LA FOIP allows local authorities to charge fees for searching for records. Fees promote the responsible use of the right of access by applicants. Fees, though, may be higher if a local authority’s records are disorganized. Higher fees resulting from the disorganization, then, may end up becoming an unreasonable barrier.

[23] In its submission to my office, the RM admitted that at the time the Applicant submitted his access to information requests, its office was in a “dysfunctional” and “unorganized state”. Therefore, it was unable to respond to the Applicant’s requests at the time. The

RM indicated to my office that it has since implemented an efficient filing system. The RM did not provide my office with any records management policies or procedures to support its assertion. Therefore, I find that the RM does not have proper records management processes in place to respond to access to information requests effectively.

[24] I note that subsection 116(1) of *The Municipalities Act* requires that municipalities establish a records retention and disposal schedule. Subsection 116(1) provides as follows:

116(1) A council shall establish a records retention and disposal schedule, and all documents of the municipality shall be dealt with in accordance with that schedule.

[25] If the RM has not already done so, then I recommend it establish a records retention and disposal schedule so that it is in compliance with *The Municipalities Act*. It should also establish records management policies and procedures that:

- establishes a records classification system that apply to both its paper and electronic records,
- that guides the management and disposition of records, and
- addresses how the RM is to manage transitory records.

## **5. Do councillors have a right to records without fees?**

[26] The Applicant is a councillor. This means he is entitled to sit at each and every council meeting. As a councillor, he is entitled to participate in the discussion and to vote on decision items. In order to be a good councillor, the councillor needs access to records in the possession or control of the RM. I would have expected a councillor could ask for almost any record in the possession or control of the RM that relate to RM business except possibly those containing personal information of others. In our democratic process, those elected to public office need information and I am completely surprised that the RM would charge the councillor fees. Best practice would suggest that a public body have a policy on what councillors are entitled to without a fee being charged.

[27] In support of this, section 92 of *The Municipalities Act* provides as follows:

92 Councillors have the following duties:

- (a) to represent the public and to consider the well-being and interests of the municipality;
- (b) to participate in developing and evaluating the policies, services and programs of the municipality;
- (c) to participate in council meetings and council committee meetings and meetings of other bodies to which they are appointed by the council;
- (d) to ensure that administrative practices and procedures are in place to implement the decisions of council;
- (e) subject to the bylaws made pursuant to section 81.1, to keep in confidence matters discussed in private or to be discussed in private at a council or council committee meeting until discussed at a meeting held in public;
- (f) to maintain the financial integrity of the municipality;
- (g) to perform any other duty or function imposed on councillors by this or any other Act or by the council.

[28] While I expect that a councillor should have access to records in the possession or control of the RM so he or she can fulfill their duties as a councillor, I note that subsection 92(e) of *The Municipalities Act* requires that councillors keep matters confidential until the matter is discussed in a public meeting.

[29] Further, section 117 of *The Municipalities Act* requires the RM to make certain documents available to the public. If the public can obtain the documents, then I would expect a councillor would be entitled to obtain those same documents. To the extent that any of the documents provided to the Applicant are covered by section 117, the Applicant should be able to receive those documents without fees. The section does allow for the charging of fees, but again a councillor carrying out his or her duties should be able to obtain documents without fees being taken out of his indemnity.

[30] Section 117 provides as follows:

117(1) Any person is entitled at any time during regular business hours to inspect and obtain copies of:

- (a) any contract approved by the council, any bylaw or resolution and any account paid by the council relating to the municipality;
- (b) the statements maintained by the administrator in accordance with section 142 and the debentures register;
- (b.01) the official oaths or affirmations taken by members of council pursuant to section 94;

(b.1) the municipality's financial statements prepared in accordance with section 185 and auditor's report prepared in accordance with subsection 189(1);

(c) any report of any consultant engaged by or of any employee of the municipality, or of any committee or other body established by a council, after the report has been submitted to the council, except any opinion or report of a lawyer; and

(d) the minutes of the council after they have been approved by the council.

(2) Within a reasonable time after receiving a request, the administrator shall furnish the copies requested on payment of any fee that the council may fix.

(3) For the purposes of subsection (2), the fee set by council must not exceed the reasonable costs incurred by the municipality in furnishing the copies.

[31] I find that since the Applicant is a councillor, he should have access to the records that relate to RM business without being charged fees. I recommend the RM develop a policy setting out what a councillor is entitled to request and receive in terms of records in the possession of the RM.

#### **6. Is the Reeve responsible for all decisions made under LA FOIP?**

[32] The "head" of a local authority is responsible for all decisions made under LA FOIP that relate to that local authority. Subsection 2(e)(i) of LA FOIP defines "head" as follows:

2(e) "head" means:

(i) in the case of a municipality, the mayor, reeve or chairperson of the local advisory committee, as the case may be;

[33] Based on subsection 2(e)(i) of LA FOIP, I find that the Reeve of the RM is the head and is responsible for all decisions made under LA FOIP related to the RM.

[34] As outlined in my office's resource *What to Expect During a Review with the IPC*, my office shares a copy of the draft report with the local authority before issuing its final report. This is so that the local authority has the opportunity to advise my office of any factual errors and advise us if it intends to comply with the recommendations.

[35] On June 19, 2017, my office sent a draft report to the RM to the Reeve. My office did not receive a response from the Reeve. However, my office noticed an error and made



changes to its draft report and re-sent it to the Reeve. The Reeve responded by indicating that the RM is unable to respond until it gets an administrator in place. He indicated that “the key to answering [my office’s] question of validity rested upon asking the Previous [sic] Administrator direct questions as to her response.”

[36] Regardless of whether the RM has an Administrator or not, the Reeve is responsible for all decisions made under LA FOIP.

[37] Thus the Reeve must respond to the recommendations in this report and give written notice of his decision to my office and to the Applicant pursuant to section 45 of LA FOIP.

### **III FINDINGS**

[38] I find that the RM did not issue fee estimates in accordance with subsection 9(2) of LA FOIP.

[39] I find that the RM cannot charge fees it is claiming for processing the Applicant’s request.

[40] I find that the RM did not issue proper written responses in accordance with section 7 of LA FOIP.

[41] I find that the RM does not have proper records management processes in place to respond to access to information requests effectively.

[42] I find that since the Applicant is a councillor, he should have access to the records related to RM business without being charged fees.

[43] I find that the Reeve of the RM is responsible for all decisions made under LA FOIP related to the RM.

#### IV RECOMMENDATIONS

- [44] I recommend that the RM adopt the steps in paragraph [13] when it receives an access to information request under LA FOIP.
- [45] I recommend that the RM refund the invoiced amounts to the Applicant.
- [46] I recommend that the RM develop policies and/or procedures that will ensure it will provide written responses to access to information requests in accordance with section 7 of LA FOIP.
- [47] I recommend the RM establish a records retention and disposal schedule so that it is in compliance with *The Municipalities Act*.
- [48] I recommend that the RM establish records management policies and procedures that:
- establishes a records classification system that apply to both its paper and electronic records,
  - that guides the management and disposition of records, and
  - addresses how the RM is to manage transitory records.
- [49] I recommend the RM develop a policy setting out what a councillor is entitled to request and receive in terms of records in the possession of the RM.
- [50] I recommend that the Reeve respond to the recommendations in this report and give written notice of his decision to my office and to the Applicant pursuant to section 45 of LA FOIP.

Dated at Regina, in the Province of Saskatchewan, this 29th day of June, 2017.

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