



## **REVIEW REPORT 247-2017**

### **Town of Willow Bunch**

**March 26, 2018**

**Summary:**

An Applicant submitted an access to information request to the Town of Willow Bunch (the Town). The Town responded indicating that the requested records had been disposed of prior to receiving the Applicant's request, and as such the requested records did not exist. The Town Administrator alleged the requested records were her personal notes and therefore not subject to the Town's records retention and disposal schedule. The Information and Privacy Commissioner (IPC) found that the record related to Town business and as such would not be personal notes of the Administrator. However, it was found that the record requested by the Applicant appeared to be a transitory record. The IPC recommended the Town include a definition in its records retention and disposal schedule of what records are subject to the retention periods outlined.

### **I BACKGROUND**

[1] On June 9, 2017, the Applicant submitted two related access to information requests to the Town of Willow Bunch (the Town) for:

Request # 1

Administration Report Tracking [name of Applicant]'s visits to Town Office to request information, as referenced verbally by Mayor [name of Mayor] at Town of Willow Bunch Council Meeting, [date of meeting]. This item was introduced by Mayor [name of Mayor] as an Administration Report tracking [name of Applicant]'s visits to the Town Office, from October 2016 onwards, including dates, and minutes of each visit.

Request # 2

Administrator [name of Town Administrator]'s own personal record/document of visits of [name of Applicant] to the Municipal Office of the Town of Willow Bunch. I [name of Applicant] attended the [date of meeting] Council meeting, at which Mayor [last name of Mayor] made reference to an Administrative Report tracking my visits to the Town Office. After adjournment, I waited to speak to the Administrator, to request a copy of the report, referenced by Mayor [name of Mayor], because it was the Administrator's own personal document. I requested, and received a note to that effect. Therefore, I now request formally that Mayor [last name of Mayor], as the CEO of The Municipality of the Town of Willow Bunch, obtain a copy of the Administrator's own personal record/document, and make it available to myself, [name of Applicant].

[2] On July 27, 2017, the Town responded to the Applicant's requests advising the Applicant that her requests for information had been denied as records responsive to the request did not exist.

[3] On October 11, 2017, my office received a request for review from the Applicant. On October 13, 2017, my office sent notification to both the Town and the Applicant of my intentions to undertake a review.

## **II RECORDS AT ISSUE**

[4] The Town has responded to the Applicant's request indicating that records responsive to the request do not exist. As such, there are no records at issue in this review.

[5] However, along with its request for review, the Applicant provided a signed statement regarding the existence of the requested record dated April 3, 2017 from the Town Administrator stating:

I, [name of Town Administrator], administrator for the Town of Willow Bunch has made record of visits from [name of Applicant] to the municipal office for my personal record and as my own personal document.

[6] In initial discussions with the Town regarding the requested record, the Administrator advised the record had been destroyed prior to receiving the Applicant's access to information request, as she had considered the record to be her personal notes.

[7] Therefore, this review will examine whether or not the requested records would have been in the possession or under the control of the Town for the purpose of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) and how the Town reached the conclusion that records responsive to the Applicant's request do not exist.

### III DISCUSSION OF THE ISSUES

[8] The Town would qualify as a local authority for the purposes of LA FOIP pursuant to subsection 2(f)(i) of LA FOIP.

#### 1. **Would the Town have possession and/or control of the requested record pursuant to section 5 of LA FOIP?**

[9] Section 5 of LA FOIP provides:

**5** Subject to this Act and the regulations, every person has a right to and, on 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.

[10] First, I will consider if the requested records were in the possession and/or under the control of the Town to determine if LA FOIP applies to the records.

[11] The *IPC Guide to Exemptions* (the Guide) provides the following regarding possession and control:

**Possession** is physical possession plus a measure of control of the record.

**Control** connotes authority. A record is under the control of a public body when the public body has the authority to manage the record including restricting, regulating and administering its use, disclosure or disposition.

Possession and control are different things. It is conceivable that a public body might have possession but not control of a record or that it might have control but not possession.

To determine whether a public body has a measure of control over a record(s) both parts of the test must be met:

1. Do the contents of the document relate to a departmental matter? and
2. Can the public body reasonable expect to obtain a copy of the document upon request?

If both questions are answered in the affirmative, the document is under the control of the public body as found in *Canada (Information Commissioner) v. Canada (Minister of Defence), 2011*).

- [12] The Town has advised the responsive records had been disposed of prior to receiving the Applicant's access to information request. Therefore, this Report will consider whether or not the records would have been in the possession or control of the Town when the record was created, or if it was a "personal record," as the Administrator has alleged.
- [13] In its affidavit, the Town's Administrator stated that the information in the requested record included dates and times that the Applicant attended the office between approximately October 2016 and January 2017 and the reason for the Applicant's visit. The Administrator indicated she used this document as a reminder of the information requested so that she could respond to the Applicant's request. Initially, this was a handwritten document that was later converted by the Administrator to an electronic format to aid in legibility.
- [14] From the Town's submission, it is my understanding that the Administrator would often make notes for herself when individuals attended the office as a reminder and then dispose of the notes once the task had been completed. The Town's submission and the Administrator's affidavit takes the position that the requested record served as a reminder of the information the Applicant had requested.
- [15] I am concerned that the Administrator said she viewed this as her personal record. If she made these notes while she was being paid by the Town and the notes were related to Town business, there is no possibility of considering them personal records. They were prepared by an employee of the Town in the Town's premises while the Administrator was being paid by the Town.

[16] Based on the information provided, it would be reasonable to conclude that the record would have been related to business of the Town. I find that the requested record, would have been in the possession and control of the Town and as such subject to LA FOIP.

**2. Has the town provided a reasonable explanation for how it concluded the requested records do not exist?**

[17] In the notification email to the Town, my office requested details of the Town's search for the requested record, details about the record, a copy of the Town's records retention and disposal schedule, the reasons for disposal and whether a search had been conducted to determine if additional copies of the record existed. The Town's response was as follows:

The record was handwritten on legal paper. Prior to the request made by [name of Applicant] I had shredded the notes since I felt they were no longer required. I had made a typewritten copy to aid in legibility when I thought I would need to refer to the notes but disposed of them as well since I felt they were simply for my recollection of visits. I searched the computer to verify if I had saved the file but there wasn't a file of that nature.

[18] The Administrator stated that she recalls destroying both the handwritten and electronic version of the requested record, prior to the Applicant's request, as she felt the records were no longer needed and did not believe *Bylaw No. 214/06: A Bylaw for the Destruction of Documents* (the Bylaw) applied to these records.

[19] As noted earlier, the Administrator considered the requested records to simply serve as a reminder to herself to complete a task. While the Mayor had referenced the document in a council meeting when commenting on the frequency of the Applicant's visits to the office, the Administrator's affidavit provided that the information was not used to make any decisions regarding the Town's practices, activities, program, policies or procedures.

[20] In the Ministry of Government Relations' resource, *Records Retention and Disposal Guide*, (Records Guide) it quotes the definition of a record from LA FOIP and what would or would not qualify as an official record of a local authority:

Certain material has no evidential, fiscal, administrative or historical value and therefore, is not subject to this schedule. It can be destroyed when it is no longer needed without historical review by the Archives. This includes:

- extra copies created for convenience of reference
- publications i.e. books, magazines, catalogues, etc.
- blank forms
- transitory records, i.e. drafts that do not document significant steps in the development of a document or are summarized or produced in other form

The guide provides a schedule for official records which may be an original document, the only copy of a record retained by a municipality or any copy deemed to be the official record. The official record is retained to satisfy legal, fiscal and administrative retention requirements included in this schedule. Any additional copies of official records can be disposed of when they are no longer needed providing they contain identical information; an official record is identified; its completeness, authenticity and integrity is verified and it is retained for the period of time required by this schedule.

[21] While the Town's Bylaw contains the different categories and retention periods for its official records, it does not contain a definition of the types of records that the Bylaw would and would not apply to.

[22] LA FOIP only considers whether the record is in the public body's possession or control. A local authority has the ability to dispose of "official records" based on its records retention and disposal schedule or if the records do not fit the definition of an official record as outlined at paragraph [20].

[23] If a public body has disposed of a record responsive to an Applicant's access to information request before it is received, then the record would no longer be considered to be in the possession or control of the public body. In this case, based on the Town's submission and the Administrator's affidavit, the requested record appears to have been a transitory record that had been disposed of prior to receiving the access to information request.

[24] While I applaud the Town for developing and implementing a records retention and disposal schedule, I would recommend the Town amend the Bylaw to include a definition of the types of records that would and would not be subject to this Bylaw, such as transitory records.

[25] My office also requested the Town provide details of its search efforts to determine if another copy of the requested record existed. The Town responded stating its filing system is organized by subject matter and within those folders documents are saved under the title of the subject, person or item that it pertains to. The Administrator indicated any documents created or saved regarding citizens/ratepayers were saved using the individuals name and identifying the subject matter. The Town advised it had searched for the document in question in both its electronic and paper filing system, however it did not yield any results.

[26] I find that the Town has provided a reasonable explanation for how it concluded the requested records do not exist.

#### **IV FINDINGS**

[27] I find that the Town did have possession and control of the requested record, prior to it being disposed of.

[28] I find that the Town has provided a reasonable explanation for how it concluded the requested records do not exist.

#### **V RECOMMENDATION**

[29] I recommend the Town amend its Bylaw regarding records retention and disposal to include a definition of the type of records that would and would not be subject to this Bylaw.

Dated at Regina, in the Province of Saskatchewan, this 26th day of March, 2018.

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