



## **REVIEW REPORT 252-2018**

### **Resort Village of Candle Lake**

**June 18, 2019**

#### **Summary:**

The Applicant made an access to information request to the Resort Village of Candle Lake (the Village) which had 14 items. The Village provided the Applicant with two pages of responsive records. It severed a name of an individual from one page of the record. It also directed the Applicant to its website for additional records, but did not provide any links or describe or list the types of records available there. The Applicant requested my office to review the name withheld, the manner of access and the Village's search for records. The Commissioner found that the Village did not respond appropriately to the Applicant's access to information request, did not meet the duty to assist and did not perform a reasonable search for responsive records. The Commissioner also found that the information severed from the record is not responsive to the Applicant's request and that the Village did not make a valid application to disregard. Among other recommendations, the Commissioner recommended that the Village perform a new search for records and provide details of the search to my office, addressing all of the items in the Applicant's request.

#### **I BACKGROUND**

[1] On November 1, 2017, the Applicant made an access to information request to the Resort Village of Candle Lake (the Village) which contained 14 items. The requests relates to a janitorial contract that one of the councillors has entered in to with the Village. The request is as follows:

1. Copies of all motions, records and or disclosure statements in the records of the RVCL from and after Aug 1 2016 pertaining to [a specific councillor] and [an Assistant Administrator] and other parties wherein payment(s) under the contract

may have been issued or diverted to [the Assistant Administrator] and third parties and, in particular, third parties or persons who may have a contract of employment with the RVCL.

2. All records and documents by way of disclosure that would evidence that [the Councillor] complied with the provision the Code of Ethics Bylaw being Bylaw No 32 of 2016 Standards and Values and *The Municipalities Act*.
3. All records and documents by way of disclosure made that would evidence that the employee *Code of Conduct* in the instance of the Assistant Administrator or other third parties who maybe contractual bond or employed by the RVCL, was adhered to. There should be evidenced of such compliance documents in the records to the RVCL.
4. All public record and documents by way of disclosure that would evidence or establish that all Council members were made aware of the arrangement if any between [the specific Councillor] and [the [Assistant Administrator] captured in paragraph 1- 3 above.
5. All record and documents by way of disclosure that would evidence or verify that the money if any, diverted or assigned from the Contract or where payment was made directly or indirectly to a third party or Assistant Administrator, that Council was made aware of the same together with a copy of the a Resolution or Resolutions of Council authorizing that redirection to another payee.
6. If there were any payments to third party other than [the specific councillor], copies of all such documents evidencing such payment, including letters of direction, invoices, cheques, cancelled cheques with endorsement for payments otherwise made.
7. Any documents that were provided to Council setting out the names of all persons employed engaged or hired by [the Councillor] or who were subcontracted by [the Councillor] with respect to the performance of the Contract
8. The full legal name of the persons (third parties) identified in paragraph 6 and 7 above
9. Were any the persons identified in paragraph 6 - 8 above employees or under contract to the RVCL at the time they were engaged by [the Councillor] under that Contract.
10. If a person(s) is identified under paragraph 9 as being persons, employees or under contract with the RVCL, whether such employee filed disclosure statements setting out " ..... a detailed description of the conflict or potential conflict. " under the RVCL Employee Code of Conduct.

11. If a person(s) is identified under paragraph 9 or 10 above, did that employee
  - i. disclose the outside employment
  - ii. obtain permission under the employee code of conduct together with copies of the disclosure made and permission given.
12. Did [the Councillor] at any time disclose in writing the fact that she was engaging, hiring and or contracting RVCL employee(s) in relation to her Contract with the RVCL.
13. [The Councillor] at any time make any disclose in writing under the RVCL Code of Ethics Bylaw or The Municipalities Act with respect to the Contract and if so copies of the same
14. Did [the Councillor] on or after August 1, 2016 disclose at any meeting of Council, under Agenda item 2, Submission of Conflict of Interest, the arrangement with any third parties and or the employees and or the [Assistant Administrator] and if so, copies of the same.

- [2] On December 6, 2017, the Village responded to the Applicant. It provided the Applicant with two pages of responsive records. It severed a name of an individual from one page of the record. It also directed the Applicant to its website for additional records, but did not provide any links or describe or list the types of records available there.
- [3] On December 5, 2018, the Applicant requested a review by my office. My office was asked to review the name withheld, the manner of access and the Village's search for records.
- [4] On December 12, 2018, my office notified both the Village and the Applicant of my intention to undertake a review.
- [5] On December 28, 2018 and April 18, 2019, the Village requested that my office consider an application to disregard the Applicant's request pursuant to section 43.1 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

## **II RECORDS AT ISSUE**

[6] The Village has withheld one name from one page of the record. During early resolution efforts by my office, the Village indicated that the name was withheld pursuant to subsection 18(1)(b) of LA FOIP. This should have been raised when the Village sent its section 7 response to the Applicant. In its submission of December 28, 2018, the Village also indicated that the information was not responsive to the Applicant's access request.

## **III DISCUSSION OF THE ISSUES**

### **1. Does my office have jurisdiction in this matter?**

[7] The Village qualifies as a local authority pursuant to subsection 2(f)(i) of LA FOIP. Therefore, my office has jurisdiction.

### **2. Was a valid application to disregard made by the Village?**

[8] In its submission of December 28, 2018, the Village commented on the Applicant's view of the one redaction. The Village indicated, "We believe [the Applicant's] issue with this redaction is vexatious...". The Village did not make a request for any specific action by my office.

[9] Later in the review, after my office requested additional information, the Village provided a second submission dated April 18, 2019. In its second submission, it stated: "We would like to further request a ruling from the Commission providing information as it is our position this request is frivolous or vexatious... Pursuant to S 43.1.(D1)."

[10] Section 43.1 of LA FOIP provides:

43.1(1) The head may apply to the commissioner to disregard one or more applications pursuant to section 6 or requests pursuant to section 31.

(2) In determining whether to grant an application or request mentioned in subsection (1), the commissioner shall consider whether the application or request:

(a) would unreasonably interfere with the operations of the local authority because of the repetitious or systematic nature of the application or request;

(b) would amount to an abuse of the right of access or right of correction because of the repetitious or systematic nature of the application or request; or

(c) is frivolous or vexatious, not in good faith or concerns a trivial matter.

(3) The application pursuant to subsection 6(1) or the request pursuant to clause 31(1)(a) is suspended until the commissioner notifies the head of the commissioner's decision with respect to an application or request mentioned in subsection (1).

(4) If the commissioner grants an application or request mentioned in subsection (1), the application pursuant to subsection 6(1) or the request pursuant to clause 31(1)(a) is deemed to not have been made.

(5) If the commissioner refuses an application or request mentioned in subsection (1), the 30-day period mentioned in subsection 7(2) or 31(2) resumes.

[11] This provision is about the disregard of an applicant's access to information request. My office's resource *Application to Disregard an Access to Information Request or Request for Correction: A Guide for Public Bodies and Applicants* states:

A public body must make an application to disregard within the 30 day period set out by subsection 7(2) of FOIP/LA FOIP or subsection 32(2) of FOIP/31(2) of LA FOIP in which the public body must respond to the applicant's application or request. When a public body makes an application to disregard, this 30 day clock stops. (See subsection 45.1(3) of FOIP/43.1(3) of LA FOIP.) The [application to] disregard process will delay the applicant from potentially getting access to records for the duration of the process.

[12] As the 30 day period set out by subsection 7(2) of LA FOIP has long expired and the Village has already responded to the Applicant's request, it is too late for the Village to make an application to disregard.

[13] I find a valid application to disregard was not made. As such, I cannot consider an application to disregard the Applicant's access request.

**3. Is there information not responsive to the Applicant's access to information request?**

[14] When a local authority receives an access to information request, it must determine what information is responsive to the access to information request.

[15] Responsive means relevant. The term describes anything that is reasonably related to the request. It follows that any information or records that do not reasonably relate to an Applicant's request will be considered "not-responsive". The Applicant's access to information request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive.

[16] A local authority can sever information as non-responsive only if the Applicant has requested specific information, such as his or her own personal information. The local authority may treat portions of a record as non-responsive if they are clearly separate and distinct and not reasonably related to the access to information request.

[17] The purpose of LA FOIP is best served when a local authority adopts a liberal interpretation of a request. If a local authority has any doubts about its interpretation, it has a duty to assist the Applicant by clarifying or reformulating the request.

[18] In this case, the Village has made one redaction to one page of the record. The record is entitled "Resort Village of Candle Lake List of Accounts for Approval As of 03/02/2017". The records shows several payments made by the Village. It severed the "Vendor Name" of one of the payments. The Village indicated that it is a payment made to an individual for a personal matter. The Village also reported that this is a regular payment that has been made monthly for about two years.

[19] The Applicant's request relates to a janitorial contract between the Village and one of its councillors. The Village identified this record because one of the payments on the list was made to the Assistant Administrator who was fulfilling the Councillor's duties as described in the contract. The other payments are not relevant to the request. The Village severed this particular payment only because it believed it was third party information.

[20] I am satisfied that the information in question is not responsive to the Applicant's request. There is no need to consider whether subsection 18(1)(b) of LA FOIP applies to the record.

**4. Did the Village respond appropriately to the Applicant's access to information request?**

[21] The Applicant requested that my office review the manner in which the Village provided access to the record.

[22] In its section 7 response to the Applicant, the Village indicated:

The nature of your request is public information posted on the Resort Village of Candle Lake's website; accordingly, your \$20.00 application fee for the LAFOIPP will be forwarded to you directly by the Village Office.

I have inquired of the bookkeeper of the Resort Village of Candle Lake with respect to any payments regarding the janitorial contract and I am attaching the February 2017 receipt with the List of Accounts for Approval attached and have been told that there is no further documentation.

[23] The Applicant alleges that the information that has been requested is not available on the Village's website as suggested in the Village's section 7 response. Therefore, they indicated they was not satisfied in the manner in which the Village provided access.

[24] In my view, the Applicant's concerns touch on many portions of LA FOIP. First, I must consider whether this is a 'manner of access' issue. Then, I must determine if the Village responded appropriately to the Applicant's request as described in section 7 of LA FOIP. Finally, I will consider if the Village met its duty to assist the Applicant in this case.

[25] Section 10 of LA FOIP discusses the manner in which local authorities should provide access. It provides:

10(1) If an applicant is entitled to access pursuant to subsection 9(1), a head shall provide the applicant with access to the record in accordance with this section.

(2) Subject to subsection (3), if a record is in electronic form, a head shall give access to the record in electronic form if:

(a) it can be produced using the normal computer hardware and software and technical expertise of the local authority;

(b) producing it would not interfere unreasonably with the operations of the local authority; and

(c) it is reasonably practicable to do so.

(3) If a record is a microfilm, film, sound or video recording or machine-readable record, a head may give access to the record:

(a) by permitting the applicant to examine a transcript of the record;

(b) by providing the applicant with a copy of the transcript of the record; or

(c) in the case of a record produced for visual or aural reception, by permitting the applicant to view or hear the record or by providing the applicant with a copy of it.

(4) A head may give access to a record:

(a) by providing the applicant with a copy of the record; or

(b) if it is not reasonable to reproduce the record, by giving the applicant an opportunity to examine the record.

[26] In order to provide access to a record, the local authority must first identify the record. With its section 7 response, the Village provided the Applicant with two pages of records. There is no issue with how the manner of access of these two pages was provided. The Village also directed the Applicant to look up other information on its website. The Village, however, did not identify specific records for the Applicant to access on its website. In order for section 10 of LA FOIP to apply, specific records must be identified and the above options must be considered (i.e. provide a copy in print or electronic form, arrange to view, provide a transcript). Otherwise, how can a local authority decide what is the best way to provide access? As such, there is not a manner of access issue to resolve in this review.

[27] I must then consider if the Village was authorized by LA FOIP to direct the Applicant to its website in this manner. Section 7 of LA FOIP indicates how a local authority should respond to an access to information request. It provides in part:

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

...

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

...

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

...

(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.

...

[28] Although the Applicant has not specifically asked for a review of the Village's section 7 response, I will take this opportunity to note that the Village's section 7 response was missing some of the elements required by section 7 of LA FOIP, such as setting out the reason for severing the record as required by subsection 7(2)(d) of LA FOIP and informing the Applicant of the right to request a review from my office pursuant to subsection 7(3) of LA FOIP. Further, the Village did not indicate if responsive records did not exist for any of the 14 items in the Applicant's request.

[29] Subsection 7(2)(b) of LA FOIP allows a local authority to refer an applicant to a publication "if the record requested is published". However, the local authority must first identify records before it can ensure that they are published.

[30] This is supported by subsection 5.1(1) of LA FOIP which describes a local authority's duty to assist. It 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.

[31] My office's resource *Understanding the Duty to Assist: A Guide for Public Bodies* makes the following comments on the duty to respond to a request for access openly:

The response should fully answer the access request. If an access request has been clarified or the scope altered, this should be confirmed in writing to ensure no misunderstandings going forward.

In order to respond completely, a public body should provide a brief explanation as to how the records provided are records responsive to the access to information request. If there are no responsive records, reasons should be provided as to how this conclusion was reached. This could include a brief explanation as to how the search was conducted, why records would not have been created or how the record at issue was destroyed in keeping with the public body's record retention/disposition schedule. Also, if records have been deemed non-responsive, a brief justification as to how that conclusion was reached could be offered.

[32] In this case, the Village directed the Applicant to its website. However, it did not provide titles of records, types of records, specific links or explain how records on the website would tie back to one or more of the items in the Applicant's request.

[33] During the review, my office asked the Village twice to identify records on its website that were responsive to the Applicant's request. The Village did not do so.

[34] I find that the Village did not respond appropriately to the Applicant's access to information request. I also find that the Village did not meet the duty to assist.

[35] I recommend that the Village identify every record on its website that is responsive to the Applicant's request and provide the title of each document and the specific link to the Applicant within two weeks of the issuance of this report. If that cannot be provided, then I recommend that the Village provide copies of those records instead.

[36] I also recommend that, if it does not have one, the Village develop a written policy and procedure for responding to access to information requests.

**5. Did the Village perform a reasonable search for records?**

[37] Section 5 of LA FOIP provides:

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.

[38] 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.

[39] In the notification, my office requested that the Village describe its search efforts for the records in its possession or control that are responsive to the Applicant's request.

[40] The threshold that must be met is one of "reasonableness". In other words, it is not a standard of perfection, but rather what a fair and rational person would expect to be done or consider acceptable. LA FOIP does not require the local authority to prove with absolute certainty that records do not exist. However, it must demonstrate that it has conducted a reasonable search to locate them.

[41] 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.

[42] 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. Examples of the

type of information that can be provided can be found in my office's resource *IPC Guide to Exemptions for FOIP and LA FOIP*.

- [43] In its first submission, dated December 27, 2018, the Village provided some detail about its search for records. It indicated that it consulted with the Councillor in question about how many times the Village paid other individuals to fulfill the contract. The Village did not specifically note what the answer was. It also noted that it searched the accounts payable records and janitorial contracts and no further records were found. It indicated that no other documents relating to third parties were found, but it did not indicate how it reached that conclusion. The Village noted that it spent 4.5 hours searching for records.
- [44] The information provided to me in the Village's first submission did not fully explain its search. The Village did not explain how it searched for each item in the Applicant's request. The information provided only vaguely addressed a few of the items in the Applicant's request. For example, the explanation of the search did not address items that inquired about resolutions of Council authorizing that redirection to another payee, letters of direction, invoices, cheques, or records relating to the Code of Ethics Bylaw or the employee Code of Conduct.
- [45] On April 10, 2019, my office asked for more information about the Village's search. This included a request for a list of responsive records available on the Village's website. My office also tried to ask specific questions that would help in providing more information about the search.
- [46] The Village responded to my office on April 18, 2019. It did not provide a list of responsive records available on its website. The Village did provide some additional details about its search and the circumstances surrounding the topic of the Applicant's request, however it did not provide enough information.
- [47] Based on my office's questions, the Village indicated that the Councillor only asked the Village to pay someone other than the Councillor for janitorial services once and it indicated that records related to this would be the List of Accounts Payable and a payment

voucher. Both have been provided to the Applicant. The Village also noted that the contract does not require the Councillor to let the Village know if a third party will be performing services on the Councillor's behalf. My office asked the Village to list all areas where records would normally be filed and to confirm they were all searched. It noted that records of accounts payable are filed in accounts payable logs in the finance office and confirmed they were searched.

[48] Again, the information provided above only addresses some items of the Applicant's request. My office also asked if any electronic records or emails were searched. The Village simply responded that all possible account payable records were searched. My office asked if there were other areas that were not searched and if so, to explain why. The Village simply answered "no". My office asked if all council members were asked for related records. The Village indicated it only asked the Councillor in question. Finally, my office asked if council meeting minutes were searched. The Village simply said it had, but did not provide information about those results. Further, the Village did not provide a list of responsive records available on its website as requested, which may have given my office a better idea of what further details about searching may have been required.

[49] My office asked again on May 14, 2019, for more information. The Village was asked to indicate the following for each of the 14 items in the Applicant's request:

- 1) If records exist or if records do not exist. My office asked that if records do not exist, to indicate how the Village searched for records responsive to the item in the request.
- 2) If records have been physically provided.
- 3) If records are available on the Village's website. If they are available, my office asked the Village to identify the specific record and the specific link to that record.

[50] On May 17, 2019, the Village responded to my office. It did not provide the details requested of each item in the Applicant's request, including details about records that are available on the Village's website. The Village provided extra details about a search of its Munisoft program and the General Ledger Account.

[51] The Village has made it clear that it paid one person, other than the Councillor, for janitorial services. It provided two records related to that payment. However, I am not satisfied that the Village has fully searched for responsive records.

[52] The Village's section 7 response indicated that there were responsive records available on its website. However, it did not provide any information about these records. Therefore, I am not satisfied that it searched the records available on its website or otherwise.

[53] Further, the information that the Village provided to my office about its search did not address all of the items in the Applicant's request such as resolutions of Council authorizing that redirection to another payee, letters of direction, invoices, cheques, or records relating to the Code of Ethics Bylaw or the employee Code of Conduct.

[54] I find the Village has not performed a reasonable search for records.

[55] I recommend that the Village perform another search for records and provide a detailed record of the search to my office within two weeks of the issuance of this report. I recommend it also inform the Applicant of the results of its search. The search should provide the following details for each of the 14 items in the Applicant's request:

- 1) If records exist or if records do not exist. If records do not exist, indicate how the Village searched for records responsive to the item in the request.
- 2) If records have been physically provided.
- 3) If records are available on the Village's website. If they are available, identify the specific record and the specific link to that record.

[56] After providing the Village with a copy of my draft report, the Village provided my office with copies of the minutes of the February 10, 2017 council meeting and the following financial documents:

- Resort Village of Candle Lake Bank Reconciliation – Detailed – General Bank Account for Ending Date 31/01/2017;
- Resort Village of Candle Lake Bank Reconciled Items – General Bank Account 01/12/2016 to 31/01/2017;
- Resort Village of Candle Lake Bank Reconciliation – Outstanding Items – General Bank Account for Ending Date 31/01/2017;

- Resort Village of Candle Lake List of Accounts for Approval as of 03/02/2017; and
- Resort Village of Candle Lake Statement of Financial Activities – Condensed for the Period Ending January 31-17

[57] Although the Village has not specifically indicated as such, I assume these documents are responsive to the Applicant's access request. The Village indicated that these were provided to the Applicant in March 2017, six months before the Applicant made the access to information request. These documents are also available on the Village's website. The Village has not attempted to communicate to the Applicant that they are responsive to his access to information request.

[58] After reviewing the draft of this report, the Village has also provided my office with a copy of its *Code of Ethics Bylaw, Bylaw 15/2016* and *Bylaw 02-2017*. The Village did not address whether these documents were responsive to the Applicant's request in its response.

[59] It is positive that the Village provided my office with potential additional responsive records, but I am still not satisfied that the Village has addressed each item in the Applicant's request, and therefore, I am not persuaded it has performed an adequate search for records.

#### **IV FINDINGS**

[60] I find a valid application to disregard was not made.

[61] I find that the information severed from the record is not responsive to the Applicant's request.

[62] I find that the Village did not respond appropriately to the Applicant's access to information request.

[63] I find that the Village did not meet the duty to assist.

[64] I find the Village has not performed a reasonable search for responsive records.

## **V RECOMMENDATIONS**

[65] I recommend that the Village identify every record on its website that is responsive to the Applicant's request and provide the title of each document and the specific link to the Applicant within two weeks of the issuance of this report. If that cannot be provided, then I recommend that the Village provide copies of those records instead.

[66] I also recommend that the Village develop a written policy and procedure for responding to access to information requests.

[67] I recommend that the Village perform another search for records and provide a detailed record of the search to my office within two weeks of the issuance of this report. I recommend it also inform the Applicant of the results of its search.

Dated at Regina, in the Province of Saskatchewan, this 18th day of June, 2019.

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