

SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT LA-2012-003

Village of Buena Vista

Summary:

Three access to information requests were made to the Village of Buena Vista (the Village) by the Village Mayor. The Village Administrator did not respond to the requests. The problem in this case was that the Mayor is designated as the “head” with responsibility under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). However, the elected Council and Village Administrator did not agree and did not recognize this designation. The Commissioner found that the Mayor was the designated head of the local authority. Further, he found that the Village was in contravention of section 7 of LA FOIP. The Commissioner recommended that the Village Council and the Village Administrator recognize the lawful authority of the Mayor as head. As well, he recommended that the Minister of Justice consider whether an offence has been committed pursuant to section 56(3)(a) of LA FOIP by reason of the unwillingness of the Village Administrator and Council to allow the Mayor to discharge her responsibilities as head.

Statutes Cited:

The Local Authority Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c. L-27.1, ss. 2(a), 2(e)(i), 2(f)(i), 5, 7, 22, 38(1), 50, and 56(3)(a); *The Local Authority Freedom of Information and Protection of Privacy Regulations*, S.S. 1993, c. L-27.1 Reg 1, s. 8.1; *The Municipalities Act*, S.S. 2005, s. 111(1).

Authorities Cited:

Saskatchewan OIPC Reports F-2012-001/LA-2012-001 and F-2010-002.

Other Sources

Cited:

Saskatchewan OIPC: *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review, FOIP FOLIO* (August 2007).

I BACKGROUND

[1] On July 3, 2012 my office received correspondence for which the source was unknown or unclear. The correspondence was copies of three access to information requests made to the Village of Buena Vista (the Village) on or about June 15, 2012.

[2] The Applicant requested the following information from the Village in the first access request:

Certificates & receipts for all training – even the ones that were not passed. As Mayor copies of the administrators certificates and receipts for all training programs paid for by the Village are important. I have been denied this information.

[3] The Applicant requested the following information from the Village in the second access request:

Addresses & Postal Codes. As Mayor I need access to the addresses and postal codes of property owners in the Village, Council distributes information to residents using the water bills. I am denied that opportunity.

[4] Finally, the Applicant requested the following information from the Village in her third access request:

Employee hours for 2010/2011/2012. As Mayor the information regarding the hours worked by employees is important. I have consistently been denied this info.

[5] My office sent a letter to the Applicant on July 11, 2012 advising her of our process and requested that she forward the requests to the Village as it is the Village's role to respond to such requests.

[6] On July 18, 2012 my office received a letter from the Applicant's legal counsel advising the following:

We are solicitors for [Applicant's name], Mayor of the Village of Buena Vista. For more than two years Mayor [Applicant's name] has been denied access to critical information regarding Village finances and operations and has been repeatedly frustrated in her many attempts to obtain that information.

...

It certainly seems unreasonable that a Mayor should have to seek the assistance of the Office of the Information and Privacy Commissioner in order to gain access to the materials needed to perform her duties as Mayor, yet that is the very situation in which our client now finds herself.

- [7] Further on July 18, 2012 the Applicant (the Mayor) contacted my office to advise that she had not been the person who sent the access to information requests to my office but rather it was likely the Village Administrator (the Administrator).
- [8] My office then contacted the Administrator who confirmed that she had sent to my office the three access to information requests on July 3, 2012. My office advised the Administrator that she needed to process the requests rather than simply forward them to the OIPC. My office also advised that a response was required to be issued to the Applicant within 30 days according to *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).¹
- [9] During this call to the Administrator on July 18, 2012 my office advised the Administrator that section 2(e) of LA FOIP defined the “head” of the local authority as the Mayor. The “head” is responsible under the Act for access and privacy as it relates to LA FOIP. The “head” can delegate that authority to another individual.²
- [10] My office asked if the Administrator had a written delegation of authority from the head. The Administrator indicated that she did not have such a delegation document. The Administrator was however confident she had authority over the Village records under *The Municipalities Act*.³ My office reminded the Administrator that the general requirement in LA FOIP is that the applicant is usually entitled to a response within 30 days of receipt of the access to information request by the local authority.⁴

¹*The Local Authority Freedom of Information and Protection of Privacy Act* (hereinafter LA FOIP), S.S. 1990-91, c. L-27.1 at section 7.

²See section 50 of LA FOIP.

³*The Municipalities Act*, S.S. 2005, c. M-36.1.

⁴There are circumstances where the time to respond can be extended a further 30 days pursuant to section 12 of LA FOIP. Those circumstances do not exist in these facts.

[11] On July 23, 2012 our office received a request for review from the Mayor after she alleged that there was no response to her three access requests noted at paragraphs [2], [3] and [4] of this Report. This lack of response from the Village was subsequently confirmed by the Village.

[12] Failing to provide a response to the Applicant is considered a procedural defect. Our office has outlined such defects in our resource, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review*:

A procedural defect occurs when a public body/trustee, in providing notice to an applicant, fails to meet one or more of the specific statutory requirements for this type of response. The OIPC has experienced a large volume of review files in which there are basic problems with compliance apart from any particular exemption. These procedural issues have historically been treated no differently than substantive issues related to the application of mandatory or discretionary exemptions. It is not uncommon that these files do not progress for a number of months because of delays in defining something as fundamental as which exemption the public body/trustee is relying on in denying access. There are then further delays of many months after the procedural defect has been cured but before the merits of the exemption have been resolved.

We have determined that these lengthy delays can be seen as rewarding public bodies/trustees that continue to deny access without having to meet the requirements in section 7 of FOIP and LA FOIP, and section 36 of HIPA. Applicants, on the other hand, can be seen as being penalized by excessive delays in addressing the merits of the exemption(s) claimed. All of this brings the legislation into disrepute and undermines public confidence in FOIP, LA FOIP and HIPA.⁵

[13] My office utilizes an expedited process to deal with requests for review that involve a failure of a local authority to meet the statutory requirement of providing a section 7 response to the Applicant.

[14] The expedited Review process includes the following steps:

1. The local authority's LA FOIP or HIPA Coordinator will be promptly notified by the OIPC of the procedural defect in the local authority's response to the access

⁵Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) resource, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* at p. 4, available at <http://www.oipc.sk.ca/resources.htm>.

request and that the Request for Review will be designated for expedited treatment.

2. If the defect is not remedied within 7 business days from the date that notice is provided to the LA FOIP/HIPA Coordinator, the Portfolio Officer will immediately refer the file to the Commissioner.
3. In that case, the Commissioner will promptly notify the head of the local authority of the procedural defect in the response to the access request.⁶

[15] Section 38(1) of LA FOIP states as follows:

38(1) Where:

- (a) an applicant is not satisfied with the decision of a head pursuant to section 7, 12 or 36;
- (b) a head fails to respond to an application for access to a record within the required time; or
- (c) an applicant requests a correction of personal information pursuant to clause 31(1)(a) and the correction is not made;

the applicant may apply in the prescribed form and manner to the commissioner for a review of the matter.⁷

[16] It is under section 38(1)(b) that I proceeded with a review of this matter.

[17] On July 26, 2012 my office advised both parties of its intention to undertake a review. In the letter to the Village my office advised that if the Village has not responded to the Applicant than the Village would be in contravention of section 7(2) of LA FOIP. We advised that the Village must provide a response by August 10, 2012 to the Applicant with a copy to my office. If this did not happen, my office would be requesting a meeting with the Village Administrator and Council to clarify roles and responsibilities pertaining to LA FOIP.

⁶This process is also highlighted in our resource, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* at p. 5, available at <http://www.oipc.sk.ca/resources.htm>. It is also highlighted in our August 2007 FOIP FOLIO Newsletter at p. 7, available at <http://www.oipc.sk.ca/newsletters.htm>.

⁷*Supra* note 1 at section 38(1).

[18] On August 17, 2012 my office received a letter from the Administrator addressed to my office. In the letter the Administrator stated as follows:

...I believe that I am required to treat Mayor [Applicant's name]'s requests for information just as I would do if they came from any resident. In other words, I do not believe that I am permitted to give the Mayor's (or any other councillor's) requests under this Act any different or preferential treatment.

[19] On August 21, 2012 the Mayor advised that she had still not received any response from the Village to her access to information requests contrary to our request that she receive a response by August 10, 2012.

[20] On August 30, 2012 I attended the Village and met with the Mayor, the Administrator, the Village's legal counsel and two Council members. Following discussion of what LA FOIP contemplates I provided the two parties the following options with regards to resolving this matter:

1. The head provides a section 7 response as required by LA FOIP within the next 7 days; or
2. The two parties come to a satisfactory resolution within the next 7 days and advise my office; or
3. Failing either of those actions, I would proceed to issue a formal Report.

[21] On September 12, 2012 my office was contacted by the Mayor who indicated that she had received no word from the Village and that nothing further had been discussed between herself and the Village following the meeting on August 30, 2012.

[22] Also on this date, my office proceeded to contact the Administrator and the Village's legal counsel to inquire what the status was of this matter. We were advised that the Administrator and the Village's legal counsel were working on a response and that it would arrive promptly.

[23] On September 13, 2012 the Village's legal counsel provided my office with a letter outlining its proposal regarding the access to information requests. The Mayor had not

been provided a copy of the proposal and following some assistance from my office she received a copy and advised shortly thereafter that she could not agree to what was proposed.

[24] I am proceeding to issue this Report as it became apparent that the parties are not able to resolve the matter informally.

II ISSUES

1. Is the Mayor the “head” of the “local authority”?
2. Is *The Municipalities Act* paramount to *The Local Authority Freedom of Information and Protection of Privacy Act*?
3. Is the ‘local authority’ in contravention of section 7 of *The Local Authority Freedom of Information and Protection of Privacy Act*?

III DISCUSSION OF THE ISSUES

1. Is the Mayor the “head” of the “local authority”?

[25] The Village is a “local authority” for purposes of LA FOIP by virtue of section 2(f)(i) which states:

2 In this Act:

...

(f) “local authority” means:

(i) a municipality;⁸

[26] Therefore, the Village is subject to LA FOIP.

⁸*Supra* note 1 at section 2(f)(i).

[27] Accountability to the public is a key component of LA FOIP. I highlighted this in my Report F-2012-001/LA-2012-001:

[47] It is my view that the two Acts must be considered together. Both Acts started out as consecutive Bills receiving first reading in the Legislative Assembly on April 19, 1991. On June 18, 1991 the Lieutenant Governor spoke to prorogation and stated as follows:

Widespread consultations also revealed a significant element of demand for a less partisan government, the protection of democratic rights, and the accountability of elected governments. This spring the rules of the Legislative Assembly were changed and the first Speaker elected, to respond to the first of these concerns. The government's comprehensive package of legislation, including *The Referendum and Plebiscite Act*, *The Freedom of Information and Protection of Privacy Act*, and *The Local Authority Freedom of Information and Protection of Privacy Act*, are reforms introduced to make government more open and allow people to play a more direct role in the government....Finally, the two freedom of information Acts provide the public with the right to know the activities of government as it touches their personal lives...⁹

[28] The local authority is accountable to the public for access to information and protection of personal information in its possession or under its control under LA FOIP. However, the Legislative Assembly must have anticipated that it would be difficult and perhaps ineffective to have an entire local authority accountable.

[29] As such, it narrowed accountability down to the "head" of the local authority. Section 2(e)(i) of LA FOIP defines the "head" of a local authority as follows:

2 In this Act:

...

(e) "**head**" means:

(i) in the case of a municipality, **the mayor**, reeve or chairman of the local advisory committee, as the case may be;¹⁰

[emphasis added]

⁹SK OIPC Report F-2012-001/LA-2012-001 at [47], available at <http://www.oipc.sk.ca/reviews.htm>.

¹⁰*Supra* note 1 at section 2(e)(i).

[30] Therefore, the head would be the Mayor of the municipality. However, he or she may delegate some or all of his or her authority under LA FOIP to another individual.

[31] Section 50 of LA FOIP outlines the provision of delegation as follows:

50(1) A head may delegate to one or more officers of the local authority a power granted to the head or a duty vested in the head.

(2) A delegation pursuant to subsection (1):

(a) is to be in writing; and

(b) may contain any limitations, restrictions, conditions or requirements that the head considers necessary.

[32] The Administrator has advised my office that she had no such delegation given to her by the head.

[33] What has complicated this case is that the Mayor is also the Applicant and the head of the local authority. LA FOIP does not contemplate such a situation. It is important to note here that any person can make an access to information request under LA FOIP.¹¹

[34] It is important to note that section 2(a) of LA FOIP defines the term “applicant” as follows:

2 In this Act:

(a) “**applicant**” means a person who makes an application for access to a record pursuant to section 6;¹²

[35] Therefore, I find that the Mayor for the Village of Buena Vista is the head for purposes of LA FOIP and the applicant for purpose of this Review. A mayor is not prohibited from being an applicant.

¹¹See section 5 of LA FOIP.

¹²*Supra* note 1 at section 2(a).

2. Is *The Municipalities Act* paramount to *The Local Authority Freedom of Information and Protection of Privacy Act*?

[36] During the course of this Review the Administrator has suggested that she and not the Mayor has responsibility for the Village records under *The Municipalities Act*.

[37] Section 111(1) of *The Municipalities Act* states as follows:

111(1) The **administrator shall take charge of and safely keep all** books, documents and **records of the municipality that are committed to his or her charge** and shall:

(a) produce, when called for by the council, auditor, minister or other competent authority, all books, vouchers, papers and moneys belonging to the municipality; and

(b) on ceasing to hold office, deliver all books, vouchers, papers and moneys belonging to the municipality to his or her successor in office or to any other person that the council may designate.¹³

[emphasis added]

[38] This requires that I consider the issue of paramountcy.

[39] Laws like LA FOIP have been described by the Supreme Court of Canada as quasi-constitutional in nature. I spoke to this quasi-constitutional status in my Report F-2010-002:

[46] A privileged status is afforded access and privacy legislation wherein it is typically paramount to other legislation. The importance of the rights protected by this legislation must always be borne in mind whenever considering any decisions which impact upon these rights. As the Privy Council Office has stated:

Whether the quasi-constitutional status of these Acts derives from one of their provisions or from court decisions, the justification for it is the same. These Acts express values that are very important in Canada. Any derogation from them must be explicit.

¹³*Supra* note 3 at section 111(1).

This requirement of explicit derogation protects the values expressed in those Acts to the maximum extent possible, short of entrenching those values in the Constitution. It also ensures accountability to the public for any decision to derogate.¹⁴

[40] Section 22 of LA FOIP addresses paramountcy. It reads as follows:

22(1) Where a provision of:

- (a) any other Act;
- (b) a regulation made pursuant to any other Act; or
- (c) a resolution or bylaw;

that restricts or prohibits access by any person to a record or information in the possession or under the control of a local authority conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant to it shall prevail.

(2) Subject to subsection (3), subsection (1) applies notwithstanding any provision in the other Act, regulation, resolution or bylaw that states that the provision is to apply notwithstanding any other Act or law.

(3) Subsection (1) does not apply to:

- (a) *The Health Information Protection Act*;
- (a.01) Part VIII of *The Vital Statistics Act, 2009*;
- (a.1) any prescribed Act or prescribed provisions of an Act; or
- (b) any prescribed regulation or prescribed provisions of a regulation;

and the provisions mentioned in clauses (a), (a.01), (a.1) and (b) shall prevail.¹⁵

[41] Section 8.1(c) of *The Local Authority Freedom of Information and Protection of Privacy Regulations* (Regulations) clarifies what is prescribed by section 22(3)(a.1) of LA FOIP as follows:

¹⁴SK OIPC Report F-2010-002 at [46], available at <http://www.oipc.sk.ca/reviews.htm>.

¹⁵*Supra* note 1 at section 22.

8.1 For the purposes of clause 22(3)(a.1) of the Act, the following are prescribed as provisions to which subsection 22(1) of the Act does not apply:

...

(c) subsections 201(5) and (6) and sections 231 and 232 of *The Municipalities Act*,¹⁶

[42] With regards to Regulation 8.1(c) above, section 201 of *The Municipalities Act* relates to confidentiality of information regarding property assessments. Sections 231 and 232 relate to confidentiality of information regarding appeals to the Board of Revision.

[43] Clearly, this matter does not relate to either the confidentiality of property assessments or the Board of Revision. This matter relates to the authority of the head over the Village's records as it pertains to LA FOIP.

[44] Further, neither Council nor the Administrator has any legal right to intervene or make representation under LA FOIP on behalf of the local authority without proper written delegation from the head.

[45] Therefore, I find that LA FOIP is paramount to *The Municipalities Act* with regards to this matter and therefore section 111(1) of *The Municipalities Act* does not displace the obligations of the head under LA FOIP.

3. Is the 'local authority' in contravention of section 7 of *The Local Authority Freedom of Information and Protection of Privacy Act*?

[46] Section 7 of LA FOIP states as follows:

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

¹⁶*The Local Authority Freedom of Information and Protection of Privacy Regulations* c. L-27.1 Reg 1 at section 8.1(c).

(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).

(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) Where an application is made with respect to a record that is exempt from access pursuant to this Act, 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

[47] The head of the local authority must provide a response to the Applicant indicating whether the records requested will be released or not. If the records are withheld the head should indicate under what sections of LA FOIP the records are being withheld.

[48] This has not occurred in this case.

[49] Therefore, I find that the local authority is in violation of section 7 of LA FOIP.

¹⁷*Supra* note 1 at section 7.

[50] This case highlights the potential problem that can arise when the Mayor and Council in a local authority cannot agree. What results is non-compliance by the local authority with LA FOIP.

[51] What we have in this case is an apparent obstruction or hindrance of the “head” by Council and the Administrator to do what the head is required to under sections 7 and 50 of LA FOIP.

[52] I note that this kind of situation could be covered by section 56(3)(a) of LA FOIP which provides as follows:

56(3) Any person who:

(a) without lawful justification or excuse wilfully obstructs, hinders or resists the commissioner **or any other person in the exercise of the powers, performance of the duties or the carrying out of the functions of** the commissioner or **other person pursuant to this Act;**

is guilty of an offence and liable on summary conviction to a fine of not more than \$1,000, to imprisonment for not more than three months or to both fine and imprisonment.¹⁸

[emphasis added]

[53] Although this circumstance may be rare, it would be appropriate for a local authority to develop a process to address any conflict of interest where the applicant is the head or has delegated responsibility to respond to access requests. This would involve the head issuing a contingent delegation. In other words, the delegation is contingent on the head finding herself in a conflict of interest.

[54] I should note that our expedited process has been frequently applied successfully with the public body promptly remedying the defect. In the unusual circumstances of this case there was no alternative to issuing this Report.

¹⁸*Supra* note 1 at section 56(3).

V FINDINGS

- [55] I find that the Mayor is the head of the Village of Buena Vista for purposes of *The Local Authority Freedom of Information and Protection of Privacy Act*.
- [56] I find that *The Local Authority Freedom of Information and Protection of Privacy Act* is paramount to *The Municipalities Act* in this case.
- [57] I find that the local authority, the Village of Buena Vista, is in violation of sections 7 and 50 of *The Local Authority Freedom of Information and Protection of Privacy Act* for failing to provide a response to the Applicant.

VI RECOMMENDATIONS

- [58] I recommend that the Village of Buena Vista Administrator and elected Council immediately comply with *The Local Authority Freedom of Information and Protection of Privacy Act* by recognizing the authority vested in the Mayor as head under the Act.
- [59] I recommend that the Minister of Justice consider whether an offence has been committed pursuant to section 56(3)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act*.

Dated at Regina, in the Province of Saskatchewan, this 2nd day of October, 2012.

R. GARY DICKSON, Q.C.
Saskatchewan Information and Privacy
Commissioner